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)

PLAINTIFFS' STATEMENT RESPECTING TRIAL WITNESSES

This Court's 9/23/11 Scheduling and Case Management Order required the parties, "on or before October 14, 2011 [to] negotiate the timing, method, manner and content of the exchange of witness lists." Scheduling Order (9/23/11) at 7. The parties have reached agreement on some matters, but not others. Plaintiffs now seek Court guidance so that they may conduct their discovery and pretrial work in a focused manner. Specifically, Plaintiffs ask the following:

- The Court should order a **staggered schedule for disclosure of potential trial witnesses**.
- The Court should impose a **trial fact witness limit of 20 per side**. A witness should "count" against the 20 witness limit regardless of whether a party calls the witness live, submits the testimony in writing, or presents the witness by deposition.
- The parties should make **simultaneous disclosures of their final trial witness lists** on January 22, 2011.
- The Court should confirm that both sides must submit **written direct testimony of all trial witnesses whose written testimony they reasonably can obtain,** regardless of whether the particular witness is to be called by the other side.

Plaintiffs have attempted to reach resolution on each of these issues in a manner consistent with the Court's prior rulings. Defendants' positions, by contrast, reflect fundamental disagreements with the manner in which this Court has decided the case should be tried.

I. MATTERS ON WHICH THE PARTIES DISAGREE

A. The Court Should Enter A Staggered Schedule For Disclosure Of *Potential* Witnesses

Plaintiffs propose a staggered schedule for disclosing potential trial witnesses as set forth in their [Proposed] Order as follows:

November 15: Plaintiffs disclose 15 potential witnesses.

November 29: Defendants disclose 15 potential witnesses.

December 9: Plaintiffs disclose 15 additional potential witnesses.

December 16: Defendants disclose 15 additional potential witnesses.

Defendants, by contrast, propose that Plaintiffs should disclose *all* their potential witnesses on November 15, while holding back their own list until December 6. This proposal makes no sense: substantial document production and most depositions will not be completed until well after November 15. For example, AT&T recently sought an extension of time to complete its document production; most nonparty document production is in the earliest stages; and depositions for many witnesses cannot reasonably be conducted until after the document productions are completed. There simply is no logical or legal basis to require Plaintiffs to identify all of their trial witnesses long before the completion of discovery and well before Defendants must do so. Even the staggered schedule that Plaintiffs propose is problematic for this very reason. But given the

compressed schedule, the staggered schedule is a reasonable compromise.

Nor is there a basis to think that Defendants need to know Plaintiffs' potential witnesses before disclosing their own. Defendants may once again repeat their refrain that Plaintiffs already completed their discovery before they filed the Complaint and that Defendants are at some substantial disadvantage because of the Plaintiffs' alleged head start. These claims are false. Long before they made their HSR filings, Defendants had completed substantial analysis of the antitrust issues. They had retained experts, identified fact witnesses, and begun preparing thousands of pages of submissions to the FCC and the DOJ shortly after the transaction was announced.[1] Indeed, when Defendants responded to Plaintiffs' interrogatories regarding the basis for the narrative responses set forth in their Answer, Defendants simply pointed to the literally dozens of submissions, including the statements of experts and fact witnesses, that they had made *before* the Complaint was filed.[2] Defendants reasonably can be expected to identify an initial set of witnesses at the same time as Plaintiffs; they certainly do not need to have all Plaintiffs' witnesses identified by November 15 in order to provide a partial list.

Nor is it correct, as Defendants imply, that the filing of a complaint signals the end of Plaintiffs' factual investigation. The Complaint sets forth allegations sufficient to state

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[1] *See* AT&T Inc., Notification & Report Form for Certain Mergers & Acquisitions, No. HSR-2011-0714 (DOJ & FTC filed 3/31/2011) (attaching 12 documents analyzing the transaction); Deutsche Telekom AG, Notification & Report Form for Certain Mergers & Acquisitions, No. HSR-2011-0713 (DOJ & FTC filed 3/31/2011) (attaching 22 documents).

[2] *See* Defendants' Joint Responses to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 1, at 6-8 (10/17/2011) (citing 20 submissions to the FCC and DOJ).

a claim for relief; having done so, Plaintiffs are entitled to take discovery to gather the admissible evidence necessary to prove facts at trial, including document discovery and depositions. It is only then that Plaintiffs can make reasonable decisions about trial witnesses. November 15 is certainly too early for identification of all of Plaintiffs' potential witnesses.

B. The Court Should Impose A Limit On The Total Number Of *Trial* Witnesses

This Court repeatedly has told the parties to limit the number of depositions *and trial witnesses*. Tr. 9/21/11 at 10:14-15, 22-23 ("[I]f the parties are interested in having a speedy disposition of this matter, it's not in anybody's interest to overwhelm me. . . . You may want to depose sixty witnesses, but *I don't want to hear from sixty*.") (emphasis added). Plaintiffs suggest a limit of 20 trial witnesses per side (plus experts). Defendants reject the notion of any numeric limit at all, favoring a time clock allotting total trial time to each side.

Courts frequently impose numeric witness limits. *See, e.g.*, *United States v. H&R Block, Inc*., No. 11-948 (BAH), slip op. ¶ 3 (D.D.C. July 6, 2011). The power to do so is unquestioned. Rule 403, for example, permits courts to limit witnesses to avoid "undue delay, waste of time, and needless presentation of cumulative evidence." *See* Fed. R. Evid. 403. And it makes sense to do so here. Both sides should decide which witnesses are crucial, and put them on. Advance notice of the number of witnesses will discipline the parties in their discovery, and focus the written direct and other testimony to be presented to the Court.

Defendants' proposal for a time clock but no numeric limit creates numerous opportunities for mischief. The absence of a numeric limit undermines the Court's stated desire not to hear from sixty witnesses. Without a numeric limit, Defendants may submit unlimited amounts of written testimony knowing that their submissions may not "count" against the time clock.[3] Moreover, the time clock suggestion is premature. The parties do not now know which witnesses they will call, and whose testimony will come in live rather than in writing. Until they do, it is difficult to determine how much live court time to allow, and how to allocate it fairly. The Court should impose a numerical limit now, and revisit the possibility of a time clock later.

C. The Court Should Require Simultaneous Exchange Of Trial Witness Lists

The Court also should set a deadline for a simultaneous exchange of final trial witness lists. Plaintiffs propose January 22. Defendants claim they need to see Plaintiffs' witness list before confirming their own. But that is not the way trials work. The Local Rules, for example, provide that parties must simultaneously file Pretrial Statements no less than two weeks before trial that contains "a schedule of witnesses to be called by the party." *See* LCvR 16.5(b)(1)(iv). Defendants can provide no reason to abandon this default practice here.

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[3] For this reason, the Plaintiffs also recommend that the Court, at an appropriate time, consider a page limit governing testimony submitted in writing.

D. The Court Should Confirm That All Direct Testimony From Witnesses Controlled By A Party Must Be In Writing

Defendants also do not want to submit written testimony for AT&T and T-Mobile witnesses that Plaintiffs call in their case. But this Court already has determined that all direct testimony that *can* be submitted in writing *must* be. The Court made this ruling explicitly at the September 21, 2011 Status Conference:

> In terms of the trial of this matter, I would like to see us do direct testimony by declaration/affidavit; that includes experts and fact witnesses.

Tr. 9/21/11 at 7:5-8. Defendants apparently do not want to follow the ruling.

This is the nub of the dispute: Plaintiffs currently intend to call at least some AT&T and T-Mobile employees as adverse witnesses in our direct case. Defendants now assert that they do not need to submit written statements for such witnesses, even if they appear on Defendants' witness list. Instead, Defendants seek a rule that would allow them to elicit unlimited live testimony from their own witnesses on cross-examination following an adverse direct. They claim, in short, that they are relieved of the responsibility to submit witness statements for anyone called as an adverse witness and they seek to elicit what is essentially live, direct testimony under this guise.

But the Court has already ruled that "the case will be tried as a matter of cross-examination" Tr. 9/21/11 at 7:8-9. There is no basis under this ruling for Defendants to avoid filing a written statement of direct testimony, or to examine their own witnesses beyond the scope of any of adverse questioning by Plaintiffs. Tr. 9/21/11 at 16:6-9 (reiterating that a party cannot put on live direct simply because it wants to). The fact that this ruling may require Defendants to submit a greater *number* of witnesses through written direct does not render the ruling "unfair" – as the Court already has concluded. At the

September 21, 2011 status conference, counsel for Plaintiffs reminded the Court that the Plaintiffs likely would call adverse witnesses live, as well as "third parties . . . that are not in our control." Tr. 9/21/11 at 8:9-16. In response, counsel for AT&T argued that it is unfair for the Plaintiffs "to call a whole bunch of live witnesses and put in a live case and limit us to a paper case." Tr. 9/21/11 at 14:2-3. AT&T specifically suggested that, rather than the rule the Court actually adopted, the Court should instead adopt a rule providing "equal opportunities on both sides to present live evidence." Tr. 9/21/11 at 15:21-22.

The Court rejected the suggestion outright, and adopted the rule requiring written direct examinations: "I can assure you it will be fair and balanced. But I can assure you we're going with declarations wherever possible." Tr. 9/21/11 at 16:4-5. Defendants offer no basis – no new facts, no new law – for revisiting the ruling. The Court therefore should confirm that *both* sides must, in advance of trial, submit direct testimony in writing "wherever possible" – regardless of whether the witness shows up on the other side's witness list. If either side calls as an adverse witness a person who has submitted written testimony, the calling party will "cross" the witness, and any "redirect" must be limited to the subjects of the "cross.

Finally, Defendants' proposed order also requires that *all* nonparty testimony be submitted by the proponent in writing, unless the witness is unavailable. Such a requirement is unworkable. The Court's prior ruling recognized that written direct testimony is required "*wherever possible*." Tr. 9/21/11 at 10:6 (emphasis added). That means that if Plaintiffs are cooperating with a nonparty – a regional carrier, or a cable company, or an AT&T competitor, for example – and the Plaintiffs reasonably can submit

that nonparty's direct testimony in writing, Plaintiffs will do so. But Plaintiffs expect there are nonparties that one side or the other may want to call, but who may choose not to cooperate with *either* side in preparing written testimony. Defendants' proposal requiring written testimony from nonparties in *all* cases does not account for this likelihood, and therefore has the effect of categorically preventing the introduction of testimony from truly "neutral" nonparties.

II. CONCLUSION

For all the foregoing reasons, Plaintiffs requests that the Court enter the [Proposed] Order, submitted herewith.

Dated: November 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine A. Hill, hereby certify that on November 4, 2011, I caused a true and correct copy of the foregoing Plaintiffs' Statement Respecting Trial Witnesses to be served via electronic mail on:

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