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

PLAINTIFFS' SECOND MOTION SEEKING RELIEF
TO FACILITATE EFFICIENT TRIAL PREPARATION

Plaintiffs respectfully move for entry of the attached proposed Order, which addresses four issues: (1) deposition protocol; (2) the exchange of exhibit lists and a schedule for resolving admissibility and confidentiality objections; (3) the technology tutorial; and (4) pretrial legal briefs. Pursuant to LCvR 7(m), counsel for the parties have conferred and cannot reach agreement on these issues.

Dated: November 23, 2011

Respectfully submitted,

/s/ Joseph F. Wayland

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Deputy Assistant Attorney General

/s/ Matthew C. Hammond

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CERTIFICATE OF SERVICE

I, Matthew C. Hammond, hereby certify that on November 23, 2011, I caused a true and correct copy of the foregoing Plaintiffs' Second Motion Seeking Relief to Facilitate Efficient Trial Preparation, Memorandum in Support, and Proposed Order to be served via electronic mail on:

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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' SECOND MOTION SEEKING RELIEF TO FACILITATE EFFICIENT TRIAL PREPARATION

Plaintiffs seek the Court's guidance on the following issues to facilitate efficient, practical pretrial proceedings that will result in a focused trial and avoid unnecessary and unreasonable burdens on the Court, the Special Master, nonparties, and the parties before February 13.

Sharing time at depositions: If Defendants notice a nonparty deposition, Defendants contend that they get to use all 7 hours allotted under the Case Management Order ("CMO") for nonparty depositions. This would mean that Plaintiffs can be assured of asking a nonparty deponent questions only by separately noticing a deposition of the same deponent. That is not the way the Federal Rules work generally, and it is not the way they should work in this case. The parties should fairly split questioning time. The split does not need to be 50-50. Plaintiffs propose that the non-noticing party be permitted up to two hours of questioning.

Streamlining trial exhibits. Everyone recognizes that this case requires an approach to trial exhibits that will (1) allow the parties to identify the limited number of exhibits that will really matter in this case and (2) avoid the need for the Court, the Special Master, nonparties, and

the parties to deal with thousands of unnecessary confidentiality and admissibility objections. Plaintiffs propose a simple solution: cap the number of exhibits that each side can place on its exhibit list. Defendants instead insist on unlimited exhibit lists exchanged shortly before trial, which will invariably lead to bloated exhibit lists and unnecessary last-minute burdens on the Court, the Special Master, nonparties, and the parties.

Procedure for Court technology tutorial. The tutorial should be designed to explain to the Court neutral facts about the relevant technology without spilling over into advocacy about those facts. Plaintiffs propose that the tutors for both sides sit side-by-side and jointly educate the Court about the neutral facts, thereby helping to avoid unnecessary repetition. Under our proposal, the tutors would take turns explaining different aspects of the technology, and they would both be available to answer the Court's questions. Defendants propose that one side go first and then the other side respond, on two separate days—the classic adversarial structure that is not conducive to a neutral presentation of the facts and will burden the Court with unnecessarily duplicative discussion.

Trial briefs. Plaintiffs propose that initial trial briefs be limited to 25 pages and responsive briefs to 10 pages, with no exhibits. Defendants reject limits on either pages or exhibits. Thirty-five pages of briefing from both sides, plus the technology tutorial and the written direct testimony from the 14 potential case-in-chief experts,[1] is sufficient to educate the Court in advance of the four to six week trial.

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[1] Defendants identified 9 experts for their affirmative case. Plaintiffs identified 5.

I. Depositions

Federal Rule of Civil Procedure 30(c)(1) provides that "examination and cross-examination of a deponent shall proceed as they would at trial," where both sides are permitted to question witnesses. Although the Federal Rules do not provide a specific division of time between the noticing and non-noticing side, parties routinely allocate questioning time without the need for judicial intervention. This process typically occurs in light of the default rule that each side be permitted only up to 10 depositions. *See* Fed. R. Civ. P. 30(a)(2)(A)(i). Here, the Court has permitted each side up to 30 depositions, with additional exceptions for trial witnesses and experts. That should have made the parties' conversation about how to share deposition time easier, but it did not.

Plaintiffs propose that the non-noticing party be permitted up to two hours of deposition time—well short of the 50-50 split that some courts have required. *E.g., United States v. First Data & Concord EFS, Inc.*, 287 F. Supp. 2d 69, 70-71 (D.D.C. 2003).

Defendants maintain that they can extinguish Plaintiffs' right to examine a nonparty deponent, claiming they need the full 7 hours for their own examination. This is contrary to the Federal Rules and ignores the fact that the CMO provides that depositions of fact witnesses shall extend no more than 7 hours (or 14 hours for up to five deponents employed by or otherwise affiliated with a party). CMO ¶ 7. In other words, Defendants are seeking to end-run the duration limits that were already agreed upon by the parties and ordered by the Court, even though the CMO expressly provides that "the length of depositions provided for in [the CMO] may be modified only by order of this Court for good cause shown." CMO ¶ 7.

Nor should Plaintiffs be required, as Defendants insist, to separately notice a deposition to ensure the right to examine a witness. This is pure gamesmanship. Again, the parties agreed

to a cap on the number of depositions and jointly submitted that cap to the Court, which then entered the proposed CMO. Plaintiffs should not be forced to use up a deposition slot to examine a witness noticed by Defendants, particularly since many of Plaintiffs' slots must be used to examine Defendants' employees.

The fact that Defendants may notice more nonparty witnesses than Plaintiffs is immaterial. That is the natural result where Plaintiffs have no employees whose testimony can be prepared for and offered at trial, and Defendants' employees have extensive knowledge of the relevant facts. Of course, Defendants have the advantage that comes from the ability to prepare their own employees to testify for Defendants.

Finally, Defendants assert that the duration of depositions noticed under Federal Rule of Civil Procedure 30(b)(6) should depend on the number of witnesses that the entity designates to testify on its behalf. For example, if three witnesses are designated in response to a single notice, Defendants assert that they get 21 hours, 7 for each witness.[2] Although the Advisory Committee Notes suggest this may be appropriate in some circumstances, the Court already has ruled on this issue, fixing the duration of "[d]epositions of fact witnesses" at 7 hours (and 14 hours for up to 5 party witnesses). CMO ¶ 7. Depositions noticed under Rule 30(b)(6) involve fact, as opposed to expert, witnesses, and the CMO limits their length to 7 or 14 hours. No good cause exists for revisiting agreed-upon, and significant, case management decisions that have guided the parties for more than half of the scheduled pretrial period.

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[2] The majority of Defendants' depositions noticed under Rule 30(b)(6) list between 10 and 22 separate matters for examination.

II. Exhibits

After the close of discovery, the Court should set an upper limit on the number of potential trial exhibits. A limit will help ensure that any motion practice is not wasted on issues that will not ultimately matter at trail. Even though parties are presumed to act in good faith, a natural tendency to over-designate will prevail without a cap, especially given expedited pretrial proceedings. The size of that outer bound should be set closer to the time established for identifying potential trial exhibits, after document discovery is complete.

In addition, to avoid an unmanageable rush of litigation regarding admissibility and confidentiality, our proposed Order sets forth a schedule that would provide some smoothing of the timing of any such disputes. Confidentiality issues pertaining to nonparty documents would be resolved first, with any admissibility objections and confidentiality issues pertaining to party documents to follow. Plaintiffs' proposal also provides for the simultaneous disclosure (at staged intervals) of potential trial exhibits. That is consistent with Local Civil Rule 16.5(b)(1)(v), which provides for simultaneous disclosure of "a list of exhibits to be offered in evidence by the party."

Defendants fail to propose a workable alternative. Defendants' suggestion that the parties exchange an unlimited number of exhibits two weeks before trial poses the very real risk of burdening the Court with voluminous confidentiality and admissibility issues without providing any way for the Court to focus on the exhibits that will truly matter at trial.

III. Teaching Experts

The parties agree that either side should be permitted to offer as a tutor an expert who may also testify at trial. The parties disagree, however, on how the issues to be discussed at the tutorial should be set, as well as its form. Plaintiffs believe the joint conversation suggested as a

possibility in Special Master Order No. 3 (with the tutors alternating lead roles on specific topics to ensure equitable time) is most likely to result in a neutral, non-adversarial, and non-repetitive discussion of how firms provide wireless services. A tutor would be less likely to characterize a contested issue as a fact, for instance, if another tutor were part of the conversation. In addition, it is essential that both sides have advance notice of the topics that the other would like to address, thereby avoiding unnecessary surprises and setting the stage for a balanced discussion.

Most of the facts discussed at the tutorial should be undisputed. It is hard to imagine that the technology tutors for each side will have any significant disagreement about how wireless technology works. Thus, an explanation of wireless basics, such as the nature of spectrum, how signals are transmitted across spectrum, how cell phones connect with networks and similar issues, should be provided in a single, joint session with both tutors present. Separate sessions would invariably involve substantial repetition and burden the parties with unnecessary distraction shortly before trial.

Obviously, the parties ultimately are likely to disagree about many technical issues. For example, the parties are likely to disagree about what alternatives are available to deal with spectrum shortages and whether the proposed merger would result in specific technological efficiencies. But those disagreements should await trial; the tutorial should be limited to the basic, largely undisputed technological facts that will allow the Court to have an informed basis to consider the parties' arguments about the technology. Defendants' proposal for separate, full day presentations suggests the classic adversarial trial proceeding, with each side going separately. The tutorial is designed to be something different—a non-adversarial presentation of relevant technical information to prepare the Court for the adversarial proceedings to follow.

Accordingly, Plaintiffs propose that, on January 6, the parties should identify their tutors and submit either an agreed list of topics to be addressed or competing proposals for the Court to consider. That will enable both sides to have a clear understanding of the likely process and hopefully to reach agreement on many of the basic facts. We also propose that the tutorial should take no more than a day, and propose January 23 subject to the Court's availability.

IV. Pretrial Legal Briefs

The Court should establish a schedule for the submission of the pretrial briefs and responses that the Court has requested. Plaintiffs agree that slightly longer submissions than the ten pages the Court originally suggested (10/24/11 Tr. at 113) may be appropriate to address the underlying legal issues and provide an overview of the factual issues. But Plaintiffs do not agree that it is appropriate or necessary to expand the scope of those submissions to cover all the anticipated evidence. Our proposal is pretrial briefs of up to 10,000 words (about 25 double-spaced pages) and responses of up to 4,000 words (about 10 double spaced pages) submitted simultaneously on January 20 and February 3, respectively.

Defendants reject any limitations on the length of those submissions, and seek to expand those submissions to include an unlimited number of exhibits potentially addressing anticipated evidence as well. Again, their proposal amounts to an abdication of the concept of effective case management. Clear rules should be set now to ensure a fair, orderly, and efficient road to trial.

Dated: November 23, 2011

Respectfully submitted,

/s/ Joseph F. Wayland

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