

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Order Instituting Investigation on the  
Commission's Own Motion Into the Planned  
Purchase and Acquisition by AT&T Inc. of T-  
Mobile USA, Inc. and its Effects on California  
Ratepayers and the California Economy

Investigation 11-06-009  
(Filed June 9, 2011)

**Reply Comments of Latino Business Chamber of Greater LA, Black Economic  
Council and National Asian American Coalition on Decision Dismissing AT&T/T-  
Mobile Proceeding with Conditions**

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**Reply Comments of Latino Business Chamber of Greater LA, Black Economic Council  
and National Asian American Coalition on Decision Dismissing AT&T/T-Mobile  
Proceeding with Conditions**

**I. Introduction**

The Minority Joint Parties were the only intervenors to file opening comments on the proposed decision (PD). This response is therefore limited to the two main points raised by AT&T, relating to a) retention of confidential documents and b) the inapplicability of intervenor compensation.

**II. Retention of Confidential Data**

AT&T's contentions that the PD's use of documents in future proceedings violates the Protective Order are incorrect. The Protective Order written by AT&T is attached.

The essence of the AT&T confidentiality document signed by the Minority Joint Parties, and presumably the other parties, is that a violation of the Protective Order is a violation of an order by the CPUC. We concur. Therefore, the PD issued by ALJ Hecht determines the scope of the Protective Order.

To simplify matters as to the Minority Joint Parties,<sup>1</sup> they have not used any of the confidential documents, have treated them as fully confidential, and the documents have not been examined by any of the parties, only by their counsel.

To avoid an unnecessary dispute about future proceedings, the Joint Parties are prepared to destroy all documents labeled confidential subject to the Protective Order, at the request of AT&T, should the CPUC request such. In fact, subject to discussion with the other intervenors, **the Minority Joint Parties suggest only this Commission, DRA, and AT&T should maintain the confidential documents as set forth in the PD.** Should there be any future proceedings where such documents are necessary, parties will then seek, upon signing a confidentiality

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<sup>1</sup> The Minority Joint Parties do not speak for other intervening parties who did not file opening comments.

document written by this Commission and AT&T, to adhere to the confidentiality requirements in all future proceedings. This should avoid any unnecessary and protracted litigation on this issue.

The Minority Joint Parties disagree that the reason the record in this case is so voluminous is primarily this Commission's fault regarding the scope of its OII.

The Minority Joint Parties are also prepared to document that the Department of Justice (DOJ) specifically stated that they were guided in significant part by the filings of the parties herein. This is based upon their February 14, 2012 Washington DC meeting with the leadership of the antitrust division of the DOJ.

Had AT&T decided to continue with its initial course of demonstrating strong public benefits in support of this merger, and done so at an appropriately early stage in the proceedings, it is possible that the FCC would have declined to oppose the acquisition and that the CPUC would have had good reason to support the proposed acquisition.

Should AT&T and T-Mobile wish to meet with the parties and Commission staff to develop reasonable boundaries regarding future use of confidential documents, including the use by non-parties herein, the Minority Joint Parties are prepared to participate in a workshop or any other action this Commission deems necessary to simplify the order, protect present confidentiality and avoid the PD being viewed as either arbitrary, capricious or unnecessarily complicating Protective Orders.<sup>2</sup> However, the Minority Joint Parties are prepared to demonstrate that AT&T/T-Mobile's contention is incorrect that the present PD requirement on confidentiality denies AT&T/T-Mobile "the right to due process of law guaranteed by the U.S. and California constitutions."<sup>3</sup>

### **III. Intervenor Compensation and Fee Enhancement**

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<sup>2</sup> This workshop could also serve to minimize any of the concerns expressed by AT&T that the process "will likely lead to more litigation, more disputes...and more work..." AT&T Opening Comments at 5.

<sup>3</sup> AT&T Opening Comments at 4. Neither of the US Supreme Court cases cited supports AT&T's contentions (Duquesne Light Co. v. Barasch or West Ohio Gas Co. v. Comm'n). They merely state what has never been in contention in any cases in the recent history of this Commission. Specifically, corporations are entitled to due process.

AT&T takes a very strained and limited approach to intervenor compensation. This approach is at odds with both the stated intent of the statute and the long history of this Commission in broadly interpreting its intervenor compensation authority.

AT&T improperly contends that intervenor compensation is essentially only available when a decision on the merits is made. This narrow definition, of course, allows utilities whose actions trigger intervenor intervention to minimize, if not fully discourage, effective intervenor compensation. That is, if a party seeks to intervene and attempt to interfere with a key corporate action, the party runs the risk of no compensation at all, no matter how important its contribution has been since the utility can unilaterally withdraw its action at any time.

#### **A. CPUC Precedent**

The Public Utility Code statute that addresses intervenor compensation explicitly supports the Minority Joint Parties' position. Section 1801.3(b) of the Public Utilities Code sets forth the legislative intent, stating that it is to: "encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process" and should be "administered in a manner that affects this goal." *See*, for example, D.07-10-027, discussing support for intervenor compensation even in the absence of a decision on disputed issues.<sup>4</sup>

D.04-03-031 states that one of the goals of the statute was to decrease intervenor's "financial risk of participation" to reasonable levels.<sup>5</sup> Most significantly, the Public Utilities Commission has held for at least the last decade, as set forth in the Edison case, that when proceedings are "prematurely terminated for reasons that are not reasonably foreseen and are beyond its control" intervenors should not be denied compensation.<sup>6</sup>

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<sup>4</sup> The CPUC held, "we have previously recognized the appropriateness of awarding intervenor compensation under circumstance where the absence of a decision on the disputed issues makes it impossible for intervenors to demonstrate a substantial contribution." D.07-10-027 at 9.

<sup>5</sup> D.04-03-031 at 11.

<sup>6</sup> D.02-08-061 at 8.

Due to the rules limiting the length of this brief, we would urge this Commission, if there are any doubts on this issue, to require the parties to more fully brief this issue with a 15-page limit.

### **B. Fee Enhancement**

The Minority Joint Parties' Opening Comments urging a fee enhancement or multiplier is implicitly raised by AT&T's arguments in its Opening Comments. That is, AT&T contends that despite the thousands of hours of legal and expert work by intervenors, some of which may have caused AT&T to withdraw its application, intervenors should bear the full risk as to intervenor compensation. It is this very argument by AT&T that supports the Minority Joint Parties' opening comments urging this Commission to allow fee enhancement requests or multipliers up to two. Due to the limitations on the length of this reply brief, we limit ourselves to the following.

There are many California court cases supporting fee enhancement in cases such as this where the risk of not being compensated was greater than otherwise would have been predictable. *Serrano v. Priest*, 20 Cal. 3d 25 (1977) first established the risky and "contingent nature of the fee award,"<sup>7</sup> as a factor potentially weighing in favor of fee enhancement, and in the intervening years, this proposition has been echoed by numerous California cases. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004); *Northwest Energetic Services, L.L.C. v. California Franchise Tax Bd.*, 159 Cal. App. 4th 841 (2008). As explained in *Ketchum v. Moses*, 24 Cal. 4th 122 (2001), the purpose of fee enhancement is to compensate lawyers who have taken cases on a contingent fee basis for bearing the risk of not being paid.<sup>8</sup> This is necessary because if lawyers are forced to "both bear the risk of not being paid and provide[] legal services... [they] will be reluctant to accept fee award cases" without additional compensation.<sup>9</sup> These cases demonstrate that intervention in especially risky cases such as this one are deserving

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<sup>7</sup> *Id.* at 49.

<sup>8</sup> *Id.* at 1132.

<sup>9</sup> *Id.* at 1132-33.

of fee enhancement where the corporation may have within its own hands the ability to affect, through withdrawal of its actions, any compensation at all.

The Minority Joint Parties urge this Commission, if it has question as to the applicability of fee enhancements herein, to request a separate briefing limited to 15 pages on this subject by all the intervenors participating in this case, as well as of AT&T and DRA.

Date: June 4, 2012

Most respectfully submitted,

/s/ Len Canty

Len Canty, Chairman  
Black Economic Council

/s/ Faith Bautista

Faith Bautista, President and CEO  
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