

**FILED**11-16-10
04:59 PM**Witteman, Chris**

From: McTarnaghan, James W. [JWMcTarnaghan@duanemorris.com]
Sent: Monday, November 15, 2010 9:07 PM
To: Witteman, Chris
Cc: Christiansen, Charles H.; Tan-Walsh, Llela; brecherm; Ansley, Jolie-Anne S.
Subject: RE: Written Objections to CPSD Notice of Depositions -- further meet and confer

Chris,

Thanks for your note. Unfortunately, if you intend to file a reply and/or seek discovery from TracFone beyond the established cut-off date, including depositions of witnesses who will present live testimony, I don't think that you can avoid filing a motion with the ALJ to amend the procedural schedule set forth in the September 30, 2010 Assigned Commissioner's Amended Scoping Memo and Ruling. Even if we were willing to stipulate, which we are not, the parties cannot change the procedural schedule in the Scoping Memo without a ruling by the ALJ or Assigned Commissioner.

On the specific topics you've referenced, I note that:

1. Reply to Response to Motion for Summary Adjudication – The existing schedule does not provide CPSD with an opportunity to file a Reply to the Response. To the extent you base your asserted right to file a reply on the CCP, I note that you filed CPSD's Motion under Rule 11.1 of the CPUC's Rules of Practice and Procedure. Rule 11 does not provide for a reply to a motion without leave of the ALJ.
2. Discovery. The September 30th Schedule establishes a Discovery cut-off date of November 18th for all parties. I do not see how you can possibly read that as applying only to TracFone. As you know, the discovery provided by CPSD has been extremely limited. CPSD has requested discovery from TracFone and we have provided timely responses. In fact, if the discovery cut-off date is extended, it necessarily would need to be for both sides. We will be serving notices of depositions later this week to preserve our right to continue discovery after that date. In any event, we have objected to depositions of our witnesses as unnecessary and burdensome and will not stipulate that you are entitled to depose these witnesses.
3. In reference to your comments on the MSA and the fact that we have not yet responded, CPSD is the party that has claimed that there are no material issues of fact. This argument was made in your Motion for Summary Adjudication. The date for Response to that Motion was set in the Procedural Schedule for TracFone as November 18th and we will file our response then. After we file that, the ALJ will have both sides of the issue before her.

It is very unclear to me whether there will ever action taken on the MSA and our reply thereto. Indeed, the procedural schedule set forth in the Scoping Memo does not contemplate a decision of any sort on the MSA.

4. I do appreciate your thoughts regarding a telephone deposition and your understanding on the inability to take the depositions while I am in South America over Thanksgiving week. Of course, before we even to trying to schedule depositions, the ALJ will need to take a number of actions. I suggest we cross the scheduling bridge sometime after you see the testimony filed later this week and after the ALJ rules on whatever motions you decide to file.

Jim McTarnaghanDuane Morris
415-957-3088

From: Witteman, Chris [mailto:chris.witteman@cpuc.ca.gov]
Sent: Monday, November 15, 2010 1:52 PM
To: McTarnaghan, James W.
Cc: Christiansen, Charles H.; Tan-Walsh, Llela; brecherm
Subject: RE: Written Objections to CPSD Notice of Depositions -- further meet and confer

Jim,

Exhibit A

11/16/2010

I'm hoping we can avoid a motion here. I'd like to get a stipulation to the following:

1. That CPSD can file a reply to your motion - CCP 437c unambiguously provides for replies, and the CPUC looks to the CCP in this regard.
2. That CPSD can take the depositions of anyone offering testimony for TracFone. This also seems self-evident. We have yet, November 15, 2010, to see any substantive response to the allegations of the OII, nor have we seen any clear specification of issues of fact that you claim will defeat summary adjudication. In either event, it's simply unreasonable to say that TracFone is going to file testimony/opposing declarations on November 18, 2010, presumably setting out the purported material issues at that time, and then tell CPSD that discovery is closed as of that date. I do not think this is what the Assigned ALJ and Commissioner meant by their last scoping memo – only TracFone's discovery is discussed; CPSD's need for discovery is not considered at all.

It is true that CPSD does not believe that there are any *genuine* issues of material fact here. You disagree, and you have indicated that you will proffer purported issues of material fact. It's on these purported issues that we need discovery. Moreover, if the judge decides that there are material issues of fact which are not eliminated by the motion for summary adjudication, we need discovery on those.

In order to meet you half-way, I am prepared to abide by the following:

1. To take depositions by phone, as to TracFone's declarations in opposition to summary adjudication - if any. (This is contingent on our court reporters going along with a telephone deposition.)
2. To take those depositions after you get back from Peru.
3. Find a time for depositions of Llela Tan-Walsh, and possibly Charles Christiansen, on issues set out in Ms. Tan-Walsh's testimony, if you still want to take those per your letter of next week. (We would oppose any attempt to take Mr. Leutza's deposition as any knowledge he has about this case is derived from Ms. Tan-Walsh and Mr. Christiansen.)

Please let me know as soon as possible if we can find common ground here. I plan to file something tomorrow.

Thanks,

Chris

From: McTarnaghan, James W. [mailto:JWMcTarnaghan@duanemorris.com]
Sent: Friday, November 12, 2010 5:57 PM
To: Witteman, Chris
Cc: Christiansen, Charles H.; Tan-Walsh, Llela; brecherm
Subject: RE: Written Objections to CPSD Notice of Depositions – meet and confer

Chris,

As I'm sure you can understand, I am working on the testimony in this case, the Response to the Motion and numerous other matters. I was unable to get to the objections to the depositions sent Tuesday afternoon until this afternoon and intentionally made an effort to get that done this week. In any event, I did respond to your first communication (received on October 26) on October 28th and your subsequent communication (received on November 5th) on the date of receipt. In those communications, I encouraged you to wait and see what the testimony and Response to the Motion actually states before making any decisions on whether you would attempt to seek discovery and indicated that we would oppose depositions.

For clarification sake on my reference to "response" rather than "opposition", the procedural schedule in this

11/16/2010

proceeding sets a date for a Response to the CPSD Motion so we will be filing a document entitled Response. This is also consistent with Rule 11.1(e). As indicated, that same schedule (presumably intentionally) does not include a Reply to TracFone's Response and contains a cut-off for discovery on November 18, 2010. To me, the Procedural Schedule reflects an intent by the Assigned Commissioner to not provide CPSD with another round of pleadings and to continue discovery.

With regard to this being a "meet and confer," I am unaware of any requirement that we meet and confer prior to a CPSD Motion to Modify the Procedural Schedule although I would be willing to do so by telephone sometime next week.

In terms of a discovery "meet and confer", I believe that will be premature unless and until the ALJ rules that further discovery will be allowed following November 18, 2010. If the ALJ modifies the procedural schedule to permit discovery after the cut-off date, I would be happy to meet and confer with you on remaining discovery issues at that time. As I mentioned in the letter, however, I will be out of the country from 11/19 to 11/29 on a long-awaited trip to Peru and request that you contact Mr. Brecher in my absence that week.

Jim McTarnaghan

Duane Morris
415-957-3088

From: Witteman, Chris [mailto:chris.witteman@cpuc.ca.gov]
Sent: Friday, November 12, 2010 4:59 PM
To: McTarnaghan, James W.
Cc: Christiansen, Charles H.; Tan-Walsh, Llela; brechern
Subject: RE: Written Objections to CPSD Notice of Depositions -- meet and confer

Jim,

Thank you for your late Friday afternoon (4:39 pm) objection to depositions that I gave you informal notice of several weeks ago, then again last Thursday/Friday, and formal notice on this Tuesday.

I do find it amusing that you describe depositions as "very rare" in CPUC proceedings. Perhaps you forget the 20-25 depositions we both sat through in the *Cingular* case?

In any event, please consider this email a first attempt to meet and confer with you, prior to a CPSD motion – if necessary – for permission to reply to your opposition to summary adjudication, and to compel the depositions if proven necessary by your opposition to motion for summary adjudication (I assume that's what you were referring to ("its response, of course").

Have a good weekend,

Chris

Chris Witteman
Legal Division/Telecommunications
California Public Utilities Commission
505 Van Ness Ave., Room 5129
San Francisco, CA 94102
Tel: 415.355.5524
Fax: 415.703.2262

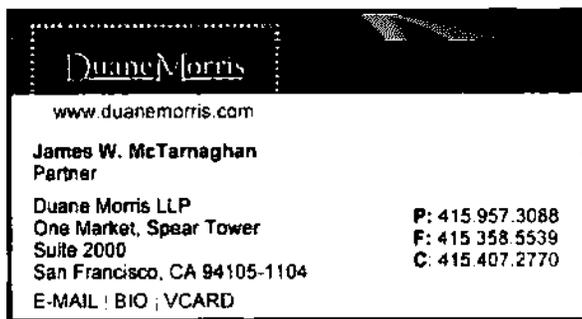
11/16/2010

From: McTarnaghan, James W. [mailto:JWMcTarnaghan@duanemorris.com]
Sent: Friday, November 12, 2010 4:39 PM
To: Witteman, Chris
Cc: Christiansen, Charles H.; Tan-Walsh, Liela; brecherm
Subject: Written Objections to CPSD Notice of Depositions

Chris,

Attached please find a letter dated today contained TracFone's response and written objections to the Notices of Deposition received late Tuesday afternoon.

Jim



For more information about Duane Morris, please visit <http://www.DuaneMorris.com>

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PRINCETON
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November 12, 2010

VIA E-MAIL AND U.S. MAIL

Christopher Witteman
Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: 1.09-12-016: Investigation of TracFone Wireless, Inc. (U-4231)

Dear Chris:

I am in receipt of your Notice of Depositions submitted to me by fax and e-mail late Tuesday afternoon. As I understand this, CPSD is requesting discovery through depositions of Mr. Pollak and Mr. Salzman based only on a statement that was made regarding a potential scheduling difficulty. In your email, you indicate that you are doing so to "reserve your right" to take these depositions.

On November 18, 2010, TracFone will be presenting its opening testimony and its response and, of course, we will be identifying material issues of disputed fact in both documents. In due course, these witnesses will be available for cross-examination. As such, there is no need for depositions. Our testimony will contain the documents upon which the testimony is based.

In addition, TracFone formally objects to the depositions for the following reasons:

1. Depositions are used very rarely in proceedings at the CPUC, and there is no showing here of any special need. All TracFone witnesses will be available for cross-examination. Accordingly, if any discovery is allowed, it should be done through normal data requests.
2. In earlier correspondence, you have mentioned your intent to file a Reply to our Response to the Motion for Summary Adjudication. In the procedural schedule established in the Amended Scoping Memo and Ruling issued September 30,

DUANE MORRIS LLP

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PHONE: 415.957.3000 FAX: 415.957.3001

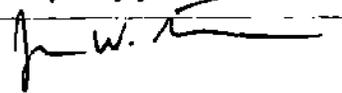
Christopher Witteman
November 12, 2010
Page 2

2010, there is no provision for CPSD to file a Reply to the Motion thus negating the need for discovery for such reply.

3. In that same schedule, a discovery cut-off date was set for November 18, 2010, the same date that TracFone's testimony and Response are due. Accordingly, without a change in the procedural schedule, any discovery related to TracFone's testimony is precluded.
4. Messrs. Pollak and Salzman are physically located in Miami, Florida and any deposition of them would need to be taken in Florida.
5. The dates selected, the Monday and Tuesday before Thanksgiving and the Monday and Tuesday after Thanksgiving are extremely burdensome days to travel even if depositions were otherwise warranted.
6. In addition, I will be out of the country from November 19, 2010 to November 29, 2010 and the dates that you have suggested will not work for depositions under any circumstance.
7. To the extent that there is any additional discovery, TracFone will shortly notice depositions to preserve its right to depose Jack Leutza, Llela Tan-Walsh, and Charles Christiansen and further reserves the right to depose witnesses CPSD puts forward in reply.

For all these reasons, I suggest that you withdraw these notices and make any decisions you need to make on seeking modifications to the procedural schedule until after you see what TracFone actually submits to the Commission on November 18, 2010.

Very truly yours,



James W. McTarnaghan

JWM:cwc

Christopher Witteman
November 12, 2010
Page 2

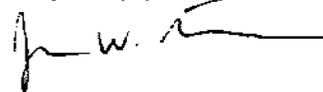
Duane Morris

2010, there is no provision for CPSD to file a Reply to the Motion thus negating the need for discovery for such reply.

3. In that same schedule, a discovery cut-off date was set for November 18, 2010, the same date that TracFone's testimony and Response are due. Accordingly, without a change in the procedural schedule, any discovery related to TracFone's testimony is precluded.
4. Messrs. Pollak and Salzman are physically located in Miami, Florida and any deposition of them would need to be taken in Florida.
5. The dates selected, the Monday and Tuesday before Thanksgiving and the Monday and Tuesday after Thanksgiving are extremely burdensome days to travel even if depositions were otherwise warranted.
6. In addition, I will be out of the country from November 19, 2010 to November 29, 2010 and the dates that you have suggested will not work for depositions under any circumstance.
7. To the extent that there is any additional discovery, TracFone will shortly notice depositions to preserve its right to depose Jack Leutza, Lela Tan-Walsh, and Charles Christiansen and further reserves the right to depose witnesses CPSD puts forward in reply.

For all these reasons, I suggest that you withdraw these notices and make any decisions you need to make on seeking modifications to the procedural schedule until after you see what TracFone actually submits to the Commission on November 18, 2010.

Very truly yours,



James W. McTamaghan

JWM:cwc

Witteman, Chris

From: McTarnaghan, James W. [JWMcTarnaghan@duanemorris.com]
Sent: Friday, November 05, 2010 5:13 PM
To: Witteman, Chris
Cc: BRECHERM@gtlaw.com; Christiansen, Charles H.; Tan-Walsh, Llela
Subject: RE: I.09-12-016
Attachments: RE: Witness unavailability issues in I.09-12-016

Chris,

In terms of Item 1, if that is in fact the attachment, we are willing to admit that the document appears to be a true and correct copy of the document. To be clear, however, we dispute that Attachment B supports the statement of undisputed facts listed in your Motion.

On your second point, given that we have not even submitted our response or testimony in the case, it is inappropriate to discuss depositions at this point. We also believe that depositions are completely unnecessary given that all of TracFone's witnesses will be available for cross-examination during the hearing in this proceeding. And, by the way, I did respond to your email of a week or two ago (attached).

Jim McTarnaghan

Duane Morris
 415-957-3088

From: Witteman, Chris [mailto:chris.witteman@cpuc.ca.gov]
Sent: Friday, November 05, 2010 8:44 AM
To: McTarnaghan, James W.
Cc: BRECHERM@gtlaw.com; Christiansen, Charles H.; Tan-Walsh, Llela
Subject: FW: I.09-12-016

Jim,

Two things:

1. Your RFA responses about Attachment B being an incomplete document sent us back to the file. We found the attached, which we will file with any reply to TracFone opposition re summary judgment. We wanted you to have it now, however. It does not change our analysis of the case. If you think that Attachment B is still incomplete, please let us know.

2. I sent you an email a week or two ago, stating that CPSD wanted to take the depositions of TracFone witnesses after you file TracFone's testimony, and I didn't hear back from you. I wanted to get you deposition notices this week, but the week got away from me, and I'm in L.A. today. I will get those notices to you on Tuesday. Let me clarify, however, that we will not take the depositions if: (a) the TracFone testimony/declarations do not even attempt to raise a material issue of fact; or (b) we believe that purported issues of fact are clearly not material given the law in this area. We would also not need immediate discovery if TracFone raises an issue that clearly is genuine and material. I simply want to protect the Commission's rights to prompt discovery if TracFone raises for the first time in its papers something it claims to be material but we believe is not genuine and can clearly be negated.

Thank you,

11/15/2010

Exhibit B

Chris Witteman

From: Tan-Walsh, Llela
Sent: Mon 11/1/2010 4:15 PM
To: Witteman, Chris; Christiansen, Charles H.
Cc: Amato, Michael C.
Subject: RE: I.09-12-016

There is an "additional " 2 page document. I have never seen this document before.

I attach a copy of the document.

Llela Tan-Walsh
Regulatory Analyst
California Public Utilities Commission
llela.tan-walsh@cpuc.ca.gov
(415) 703-5213

From: Witteman, Chris
Sent: Monday, November 01, 2010 3:57 PM
To: Christiansen, Charles H.; Tan-Walsh, Llela
Cc: Amato, Michael C.
Subject: FW: I.09-12-016

Llela, can you do some research about the attachments TracFone claims are missing from Attachment B?

CW

From: McTarnaghan, James W. [mailto:JWMcTarnaghan@duanemorris.com]
Sent: Friday, October 29, 2010 5:02 PM
To: Witteman, Chris
Cc: 'BRECHERM@gtlaw.com'
Subject: I.09-12-016

Chris,

Attached please find TracFone's Responses to CPSD's 10/18 Requests for Admission/Document Request.

 Right-click here to download pictures. To help protect your privacy, Outlook prevented automatic

www.duanemorris.com

James W. McTarnaghan
Partner

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11/15/2010

Witteman, Chris

From: McTarnaghan, James W. [JWMcTarnaghan@duanemorris.com]
Sent: Thursday, October 28, 2010 9:53 AM
To: Witteman, Chris
Cc: 'BRECHERM@gtlaw.com'
Subject: RE: Witness unavailability issues in I.09-12-016
Importance: High

Chris,

It seems that my email on Monday, which was intended as a courtesy notification of a potential scheduling problem, has blown up into a much larger issue than necessary. Given that TracFone has repeatedly indicated that we wanted to file testimony and that we will oppose your motion for summary adjudication, I don't understand why the Monday email again stating that we will file testimony and an opposition came as such a surprise to you. As I see it, the only new information listed was the names of potential witnesses.

In any event, we are busy preparing that testimony and the opposition in order to be prepared to file on schedule. I suggest at this time that we await whatever ruling ALJ DeAngelis will be preparing on our motion to compel and motion to modify the procedural schedule.

By the way, will we be receiving requests to Discovery Request TF1.3 and the Requests for Admissions from CPSD on Friday, October 29, 2010 as requested?

Jim McTarnaghan

Duane Morris

415-957-3088

From: Witteman, Chris [mailto:chris.witteman@cpuc.ca.gov]
Sent: Tuesday, October 26, 2010 10:32 AM
To: McTarnaghan, James W.
Subject: RE: Witness unavailability issues in I.09-12-016

Jim,

Your emails below raise issues that I would like to sort out between us, if we can. I glean from your emails that TracFone will be serving testimony from Messrs Pollak, Salzman and two other witnesses on November 18 – assuming the current schedule remains in place – in conjunction with TracFone's opposition to CPSD's summary adjudication motion. It seems highly probable that we will ask the ALJ for permission to file a reply brief, in addition to any reply testimony.

You state below for the first time that TracFone will identify "disputed issues of fact in its testimony and response" in its November 18, 2010 testimony. As you've heard me state many times, CPSD does not believe that there are genuine disputed issues of material fact, and TracFone has not identified any such issues to date. So we will be most keen to test the assertions of Messrs Pollak, Salzman et al to see if there are indeed genuine issues of material fact. To that end, I would like to schedule the depositions of Messrs Pollak, Salzman et al in the week or two after the November 18 testimony is served. Given the Thanksgiving holiday, I would suggest Nov 22, 23, 30, or December 1-3, 6, or 7. Please let me know if you are agreeable to producing these witnesses for depositions on those dates in SF, and to producing prior to the deposition any workpapers or other documents which they reviewed in developing their testimony and which are not attached to the testimony itself.

Please let me know.

Exhibit C

11/15/2010

Chris

From: McTarnaghan, James W. [mailto:JWMcTarnaghan@duanemorris.com]
Sent: Mon 10/25/2010 6:04 PM
To: Witteman, Chris; DeAngelis, Regina
Subject: RE: Witness unavailability issues in I.09-12-016

Dear ALJ DeAngelis and Mr. Witteman,

I certainly appreciate Mr. Witteman's understanding that conflicts happen and his openness to consider other hearing dates. After receiving the response, I contacted Mr. Pollak and Mr. Salzman to determine their availability during the week of January 24th. Mr. Pollak is unavailable on the 25th and 26th but would be available on the 27th. With that in mind and working around Mr. Witteman's planned trip, we'd suggest that starting either Tuesday, January 25th or Wednesday, January 26th and schedule Mr. Pollak as a date certain witness on Thursday, the 27th.

TracFone respectfully disagrees with CPSP's comment on the hearings and believe that the Amended Scoping Memo was clear in setting Phase 1 hearings, followed by briefing, notwithstanding CPSP's Motion for Adjudication. In any event, TracFone will demonstrate disputed issues of fact in its testimony and response.

I apologize for the inconvenience associated with our request and appreciate the efforts to find dates that work for the hearing in this proceeding.

Jim McTarnaghan
 Duane Morris
 415-957-3088

From: Witteman, Chris [mailto:chris.witteman@cpuc.ca.gov]
Sent: Monday, October 25, 2010 3:59 PM
To: McTarnaghan, James W.; DeAngelis, Regina
Subject: RE: Witness unavailability issues in I.09-12-016

Dear Mr. McTarnaghan and ALJ DeAngelis:

Conflicts happen, and we understand that.

CPSP continues to believe, however, that *no hearings* will be necessary on liability issues. It is our understanding that the ACR scheduled phase 1 liability hearings in an abundance of caution, i.e., for the eventuality that the adversary summary adjudication process does reveal a genuine, material issue of disputed fact – as opposed to disputed issues of law. (Even in that event, however, the scope of the factual issues would presumably be more focused, and hopefully require less than three days testimony.)

I do note that I am scheduled to be out of the office January 10-17, so I would ask that if we set aside time for eventual phase 1 hearings, they not start until January 24.

Sincerely,

Chris Witteman
 Legal Division/Telecommunications
 California Public Utilities Commission
 505 Van Ness Ave., Room 5129

11/15/2010

San Francisco, CA 94102
Tel: 415.355.5524
Fax:415.703.2262

From: McTarnaghan, James W. [mailto:JWMcTarnaghan@duanemorris.com]
Sent: Monday, October 25, 2010 3:15 PM
To: DeAngelis, Regina; Witteman, Chris
Subject: Witness unavailability issues in I.09-12-016
Importance: High

Dear ALJ DeAngelis and Mr. Witteman,

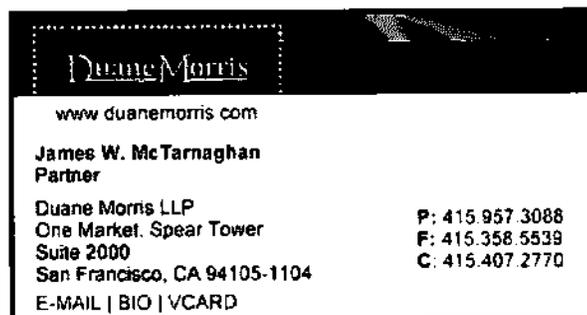
I was at TracFone's offices on Thursday and Friday as we prepare for the remainder of the case. Based on our discussions, F.J. Pollak, the CEO and President, will be TracFone's primary witness and present a significant amount of the testimony for TracFone. In addition, Rick Salzman, TracFone's Executive Vice President and General Counsel, will present testimony. In addition, I expect that we will have one or perhaps two additional witnesses.

While in Florida, I learned that Mr. Pollak is unavailable during the first week of January when the hearings are scheduled due to a prior business commitment and that Mr. Salzman had a similar conflict the second week in January. As a result, we need to ask if it could be possible to hold hearings on January 18-20, 2010 instead of the currently scheduled January 4, 5 and 7, 2011.

I am very willing to discuss this further and left Mr. Witteman a voicemail earlier today. As necessary, I can also file a formal motion but hoped that we might be able to reach an informal solution to this problem. I can assure you both personally that these are very legitimate conflicts.

Thank you for your consideration of this request.

Jim McTarnaghan



For more information about Duane Morris, please visit <http://www.DuaneMorris.com>

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11/15/2010