

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
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Ratesetting

TO PARTIES OF RECORD IN INVESTIGATION 11-06-009

This is the proposed decision of Administrative Law Judge (ALJ) Jessica T. Hecht. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Jessica T. Hecht at jhe@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:rs6

Attachment

Decision **PROPOSED DECISION OF ALJ HECHT** (Mailed 5/7/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 Effect on California Ratepayers and the California Economy.

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

DECISION DISMISSING PROCEEDING WITH CONDITIONS

1. Summary

This decision grants with conditions the motion to dismiss as moot this investigation into the proposed purchase and acquisition of T-Mobile USA, Inc. by Pacific Bell d/b/a AT&T California and New Cingular Wireless PCS, LLC. Given that the respondents have abandoned their planned merger and withdrawn their related application at the Federal Communications Commission, it is no longer necessary for the Commission to make findings on the effect of the merger on California consumers. Still, because of the time and effort that parties expended on developing a record in this proceeding, this decision takes steps to preserve this record for other proceedings, to allow for future use of confidential documents produced in this case (while preserving, as appropriate, their confidentiality), and to ensure that this record is available to be made part of any future merger application or investigation involving either respondent.

This proceeding is closed.

2. Background

On April 21, 2011, AT&T Inc. (AT&T) and Deutsche Telekom AG (T-Mobile USA, Inc.'s parent company) filed applications with the Federal Communications Commission (FCC) pursuant to Sections 214 and 310(d) of the Communications Act of 1934 (47 U.S.C. §§ 214, 310(d)), seeking FCC consent to transfer control of the licenses and authorizations held by T-Mobile USA, Inc. (T-Mobile) and its subsidiaries to AT&T. (WT Docket No. 11-65.) Also on April 21, 2011, AT&T provided to the California Public Utilities Commission (Commission) an initial notice of the proposed transfer, commonly referred to as the merger of the two companies. On May 3, 2011, AT&T vacated this initial notice and provided a revised 30-day notice pursuant to Rule 6.1 (information-only filings) of Commission General Order (GO) 96-B. At the May 26, 2011, Commission meeting, the Commission directed Communications Division (CD) staff to draft and present to the Commission an Order Instituting Investigation (OII) into the merger, in which the Commission would gather facts and analyze data relevant to whether the proposal complies with applicable California law. In addition, the Commission directed staff to prepare comments to file at the FCC regarding the Commission's preliminary investigation of this merger in California and the expected OII process. On May 27, 2011, the Director of CD sent AT&T a letter informing the company that its 30-day informational notice was suspended pending the receipt of additional information.

The Commission opened this OII, Investigation (I.) 11-06-009, on June 9, 2011, to investigate, gather, and analyze information relevant to the proposed purchase and acquisition of T-Mobile by AT&T. The purpose of this

investigation was “to determine the specific impact of the merger on California.”¹

2.1. Parallel Reviews by Other Agencies

Because FCC approval would be required for completion of the proposed merger, the FCC analyzed the proposal’s impact at the national level through its WT Docket No. 11-65. Throughout the summer and fall of 2011, AT&T and T-Mobile provided the FCC and parties to the FCC proceeding with a great deal of information in support of the transaction; other entities, including market participants and consumer advocacy organizations, also contributed their analyses to the FCC record.

Also during 2011, other state and federal agencies, including the United States Department of Justice (DOJ), undertook their own analyses of the potential effects of the proposed merger. On August 31, 2011, DOJ filed an antitrust lawsuit in U.S. District Court for the District of Columbia, to prevent AT&T from acquiring T-Mobile from its parent company, Deutsche Telekom AG.² In this lawsuit, DOJ alleged that the merger “would substantially lessen competition for mobile wireless telecommunications services across the United States, resulting in higher prices, poorer quality services, fewer choices and fewer innovative products for ... American consumers who rely on mobile wireless

¹ I.11-06-009 at 2.

² U.S. Department of Justice Press Release, “Justice Department Files Antitrust Lawsuit To Block AT&T’s Acquisition Of T-Mobile,” August 31, 2012 at 1.
http://www.justice.gov/atr/public/press_releases/2011/274615.htm.

services.”³ AT&T and T-Mobile contested these claims, and the resulting lawsuit went forward throughout the fall and early winter of 2011.

In late November 2011, an FCC internal draft order that would have designated the proposed merger transaction for an administrative hearing circulated within the FCC and was announced to the public.⁴ The merger proponents subsequently filed a letter withdrawing the FCC applications related to the merger proposal without prejudice, while also stating an intention to continue pursuing the merger and eventual FCC approval.⁵ On November 29, 2011, the FCC approved the merger proponents’ request to withdraw their applications without prejudice, and released a staff report critical of the proposed transaction.

2.2. Structure of the Proceeding

When this OII was issued in June 2011, the Commission expected the FCC to complete its analysis of the merger before the end of 2011. In order to ensure that the Commission would have sufficient information to make timely and informed decisions and recommendations to the FCC related to the transaction, I.11-06-009 established an aggressive schedule for the completion of this investigation.⁶ Due to this expedited schedule, the OII provided that no prehearing conference would be held. The assigned Administrative

³ Civil Action No. 11-01560-ESH; see press release also at http://www.justice.gov/atr/public/press_releases/2011/274615.htm.

⁴ FCC Decision, at 1. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A1.pdf.

⁵ FCC Decision at 2. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A1.pdf.

⁶ I.11-06-009 at 16-17.

Law Judge (ALJ) held a telephonic scheduling conference with parties on June 22, 2011, during which parties discussed, among other things, the proceeding schedule, the treatment by parties of confidential information, and procedures for filing and service of discovery and other documents. In lieu of a formal scoping memo, a ruling issued on June 26, 2011, provided guidance on these and other procedural issues.

As required in the OII and consistent with subsequent rulings, the respondents filed with the Commission, on an ongoing basis, all information provided to the FCC in support of their merger application with that agency. Other parties had the option of filing relevant portions of their FCC filings with the Commission, and all parties were provided with several opportunities to provide information and analysis on the proposed merger in response to various questions contained in the OII and subsequent rulings.

Parties' filings in this proceeding were voluminous and, in many cases, highly technical, and many of the filings were considered in whole or in part to be confidential. Anticipating this, the OII adopted an expedited process for the filing of confidential information, under which parties could designate information as confidential, subject to challenge, without the need for a separate motion to file under seal.⁷ The OII also established that parties to the proceeding could access materials designated as confidential by signing a non-disclosure agreement and following its requirements for review and use of the confidential information. Parties generally abided by these procedures throughout the conduct of the proceeding.

⁷ I.11-06-009 at 19.

2.2.1. Workshops and Public Participation Hearings

Consistent with the direction set forth in the OII, the assigned Commissioner and ALJ held workshops and public participation hearings throughout California during the month of July, to gather information on specific issues related to the proposed merger and to hear public comment. Each workshop was facilitated by the assigned ALJ, with the assigned Commissioner and other Commissioners in attendance. Participants at each workshop included independent experts, representatives of the respondents and other market participants, and representatives of other interested groups, including unions, consumer advocates, and others. Each workshop consisted of panel presentations, and provided opportunities for parties to ask questions of panel members. Each workshop also included time during which members of the public could comment.

Each of the three workshops was dedicated to a different set of issues. The first workshop, which took place on July 8, 2011, in San Francisco, focused on facilities-based competition issues. The second workshop took place on July 15, 2011, in Santa Clara, and examined the potential effects of the merger on innovation in the wireless industry. The third workshop took place on July 22, 2011, in Los Angeles, and focused mainly on consumer issues, such as the potential effects of the merger on service quality. The workshops were recorded on video and transcribed, and the transcripts and videos were made available to the public on the Commission's Web site.⁸

⁸ See http://www.cpuc.ca.gov/PUC/hottopics/2Telco/110628_att.htm.

The four public participation hearings in this proceeding were held in San Francisco, Los Angeles, San Diego, and Fresno. Each hearing was led by an ALJ and attended by one or more Commissioners. All public hearings in this case were well attended by members of the public, with attendance in some cases surpassing 200 people. Speakers at these hearings expressed their thoughts in support of or against the merger proposal.

2.2.2. Comments, Data Responses, and Other Filed Documents

I.11-06-009 required the respondents and other named market participant parties⁹ to file responses to various data requests included as appendices to the OII. In addition, parties filed opening comments on the issues described in the OII on July 6, 2011.¹⁰ Most parties also provided factual showings through declarations attached to their opening comments, as authorized in OII. The reply comments and accompanying factual declarations required in the OII were filed on August 29, 2011, consistent with an extension granted on August 11, 2011. Parties filed additional information, comments, and briefs consistent with ALJ rulings issued on July 19, 2011, August 11, 2011, and November 16, 2011.

In mid-December, the Commission received two requests, from AT&T and T-Mobile (jointly) and from the Commission's DRA, to stay this investigation in

⁹ See I.06-009 at 11-12.

¹⁰ Parties filing opening comments were: National Asian American Coalition, Latino Business Chamber of Greater Los Angeles, and the Black Economic Council (jointly); Cricket Communications; Division of Ratepayer Advocates (DRA); The Greenling Institute (Greenlining); Verizon; The Utility Reform Network (TURN); Free Press; AT&T; T-Mobile; PacWest; Utility Consumers Action Network (UCAN); Communications Workers of America District 9; Sprint Nextel; and California Association of Competitive Telecommunications Carriers (CalTel).

recognition of a stay of the DOJ lawsuit related to the proposed transaction and the withdrawal of the merger-related applications at the FCC.¹¹ All filing dates after December 15, 2011, were taken off the schedule for this proceeding through an electronic mail ruling issued that day by the assigned ALJ.

On December 21, 2011, the respondents filed a motion to dismiss this proceeding as moot, citing their announcement on December 19, 2011, that AT&T had agreed with Deutsche Telekom AG to cease its efforts to acquire T-Mobile. This motion stated that because “AT&T has withdrawn its bid to acquire T-Mobile USA, and the stipulation of dismissal has been filed in the federal court litigation, there is no longer any reason for the investigation to remain open. Accordingly, the investigation should be dismissed as moot.”¹² No parties filed responses to the motion to dismiss. This Decision addresses that motion and related issues.

3. Investigation Should be Dismissed, with Conditions

The purpose of this investigation was to determine the specific impact of the proposed merger of AT&T and T-Mobile within California. As stated by AT&T and T-Mobile in their joint motion to dismiss this proceeding, with the announcement on December 19, 2011, that AT&T “has agreed with Deutsche Telekom AG to end its bid to acquire T-Mobile USA,”¹³ there is no longer a potential transaction on which this investigation must make findings. Not only have the respondents withdrawn their applications associated with this

¹¹ DRA Motion to Hold Proceedings in Abeyance and AT&T/T-Mobile joint Motion for a Stay of Investigation I.11-06-009, both filed December 12, 2011.

¹² Motion to Dismiss, December 21, 2011, at 1.

¹³ Motion to Dismiss, December 21, 2011, at 1.

transaction from the FCC, but “on December 20, 2011, the parties in the DOJ antitrust litigation filed with the District Court for the District of Columbia a joint stipulation regarding dismissal of the federal court action without prejudice.”¹⁴

Given these changes in circumstance, it is reasonable to grant the motion to dismiss this proceeding. There is no need for this Commission, or the parties to this proceeding, to use additional resources to analyze a transaction that is no longer being pursued.

Still, the record developed through this proceeding contains, among other things, information about the applicants’ past business practices, along with factual information on several issues that may be relevant to existing and future Commission proceedings.¹⁵ We do not wish to squander that record or lose the insights gained. It is therefore reasonable for the Commission to place conditions on the respondents before dismissing this proceeding. The reasonable conditions of dismissal are discussed below.

4. Appropriate Conditions

The Commission’s authority to make decisions even after a particular issue – such as the proposed merger that this proceeding was opened to examine – becomes moot is based on our independent obligation to enforce the

¹⁴ Motion to Dismiss, December 21, 2011, at 1.

¹⁵ For example, the record contains information on subscriber enrollment and churn data from 2010 and 2011, and information on the type and placement of wireless telecommunications facilities and infrastructure during that time period.

law regardless of whether an outside complainant brings forward a claim.¹⁶ In this sense, we are not simply a court, which only adjudicates controversies that outside parties bring to it, with no law enforcement obligations.

In this case, the Commission initiated the examination of the proposed merger as part of our responsibility to protect California customers. The former merger proponents moved to dismiss this proceeding after approximately six months of concentrated effort to evaluate the proposed transaction, undertaken in good faith by Commission staff and parties participating in this proceeding. Given the advanced stage of the proceeding at the time the respondents abandoned the proposed transaction and requested dismissal, it is reasonable for the Commission to take action to preserve the record developed by parties participating in this proceeding and to ensure that intervenors have the opportunity to request compensation for their activities that built that record. The conditions of our dismissal of this merger are discussed in Sections 4.1 through 4.3 below.

4.1. Preservation of Record for Future Use

In the approximately six months between the initiation of this proceeding on June 9, 2011, and the respondents' request to dismiss this proceeding on December 21, 2012, parties made more than 250 separate filings as part of the record of this proceeding. Many of these filings were voluminous, containing

¹⁶ *See, e.g.*, Cal. Pub. Util. Code §§ 451 (Commission has power to ensure that telephone service is "adequate, efficient, just and reasonable . . . [so as to promote public] safety, health, comfort and convenience") and 701 (Commission authorized to do all things which are necessary and convenient in the exercise of the Commission's power and jurisdiction); California Constitution Article XII (establishing Public Utilities Commission and providing the constitutional basis for regulation of public utilities).

hundreds of documents, and in some cases hundreds of thousands of separate pages of data and analysis related to the merger proponents' operations, facilities, and other issues. According to Section 6252 of the California Government Code, "[p]ublic records include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Under Commission GO 66-C, this definition includes documents received in evidence in Commission proceedings. Even evidence that includes confidential information, including filings made under seal, are considered to be public records "not open to inspection."¹⁷

In this proceeding, parties provided large amounts of specific information on the respondents and other market participants relating to the issues examined in this proceeding that may also be relevant to future Commission proceedings. Those issues include, but are not limited to, service quality, consumer protection, and competition in the telecommunications market. Given that the documents received in this proceeding are public records (even if some are not open to public inspection), it is reasonable for the Commission to order that the entire record of this proceeding – including documents under seal – be available for use in future proceedings to which they may be relevant.

Those documents marked Confidential shall bear the same designation in other proceedings, and shall be kept under seal unless and until the presiding officer in a later proceeding rules that they are no longer deserving of protection.

¹⁷ GO 66-C, Section 2.

Thus, none of parties' confidential documents will be made available for public inspection without action to remove the confidentiality designation.

4.2. Disclosure of Record in Future Merger-Related Proceedings

To ensure that parties in future proceedings are aware that the record of this case is available for use in proceedings to which the information may be relevant, we order AT&T and T-Mobile (jointly, the Respondents) to disclose the existence of the record here, and of this decision, in future proceedings initiated within two years of the effective date of this decision. Specifically, the Respondents shall make such disclosure in any future proceeding in which they seek Commission approval of a transaction under § 854. When in doubt, Applicants should err on the side of disclosure.¹⁸

If a party desires to introduce confidential documents from this proceeding into the record of a different case, that party may bring this decision to the attention of the presiding officer in that proceeding. It will then be within the presiding officer's discretion to determine whether such documents are appropriately identified and received as evidence.

4.3. Requests for Intervenor Compensation are Appropriate

There is no evidence that Applicants' decision to terminate the merger was based on anything revealed in proceedings before this Commission.

Nonetheless, the parties spent considerable time developing a record related to respondents' products, services, pricing, outreach, facilities and other issues. As

¹⁸ We made a similar order in D.99-04-048, 1999 Cal. PUC Lexis 185 (Pacific Bell to identify prior action in future proceedings).

noted above, parties made more than 250 filings in this proceeding, including detailed analysis of data provided by the merger proponents and others, in order to inform their responses to the merger proposal and respond to Commission requests. In order to participate effectively in this proceeding, parties would need to spend time reviewing the vast amount of data and documents filed by the merger proponents throughout the summer and fall. Several parties, including The Utility Reform Network (TURN), Greenlining, DRA, and others provided panel members in the Commission's workshops in July 2011, and these and many other parties attended and participated in those workshops, for example by submitting questions for panel members.

In addition, TURN and Greenlining spent time analyzing complex computer models submitted by the merger proponents in support of their transaction. The analysis of these economic and engineering models required a great deal of time and effort to understand and evaluate the models.¹⁹

In recognition of these and the other activities undertaken by the parties to this proceeding, it is reasonable for parties otherwise eligible to request intervenor compensation to do so in this case, despite the fact that the Commission will not be making any final determination on the merits of the merger because it has been abandoned. Nothing in this decision shall preclude any party deemed eligible for intervenor compensation from seeking such compensation in this proceeding, or, to the extent this proceeding's record is used in other proceedings, in those other proceedings, provided there is no duplicate compensation.

¹⁹ December 12, 2011, comments filed by TURN and Greenlining.

5. Affirmation of All Rulings

All Rulings by the assigned ALJ and assigned Commissioner, including rulings made by electronic mail, and the July 5, 2011, ruling requiring that AT&T provide and pay for support services for the workshops, are affirmed.

6. Comments on Proposed Decision

The proposed decision of ALJ Jessica T. Hecht in this matter was mailed to the parties in accordance with § 311 of the Public Utilities Code and comments are allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Opening comments were filed by _____ on _____, and reply comments were filed by _____ on _____.

7. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Jessica T. Hecht is the assigned ALJ in this proceeding.

Findings of Fact

1. April 21, 2011, AT&T and Deutsche Telekom AG (T-Mobile's parent company) filed applications seeking FCC consent to transfer control of the licenses and authorizations held by T-Mobile and its subsidiaries to AT&T.
2. The Commission opened I.11-06-009 on June 9, 2011, to investigate, gather, and analyze information relevant to the proposed purchase and acquisition of T-Mobile by AT&T. The purpose of this investigation was "to determine the specific impact of the merger on California."
3. On August 31, 2011, DOJ filed an antitrust lawsuit in U.S. District Court for the District of Columbia, to prevent AT&T from acquiring T-Mobile.
4. On November 29, 2011, the FCC approved the request of AT&T and T-Mobile to withdraw their merger applications without prejudice.

5. On December 21, 2011, the respondents filed a motion to dismiss this proceeding as moot, citing their announcement that AT&T had agreed to cease its efforts to acquire T-Mobile.

6. The documents received in this proceeding, including documents filed under seal, are public records.

7. Parties made more than 250 filings in this proceeding, including detailed analysis of data provided by the merger proponents and others, in order to inform their responses to the merger proposal and respond to Commission requests.

8. In order to participate effectively in this proceeding, parties spent a great deal of time reviewing the vast amount of data and documents filed by the merger proponents throughout the summer and fall. Several parties provided panel members in the Commission's workshops in July 2011, or attended and participated in those workshops, by submitting questions for panel members.

Conclusions of Law

1. There is no need for this Commission, or the parties to this proceeding, to use additional resources to analyze a transaction that is no longer being pursued.

2. It is reasonable for the Commission to take action to preserve the record developed by parties participating in this proceeding, and to ensure that the entire record of this proceeding be available for use in future proceedings to which they may be relevant.

3. It is reasonable for the Commission to ensure that intervenors have the opportunity to request compensation for their activities that built the record in this proceeding.

4. According to Section 6252 of the California Government Code, "[p]ublic records include any writing containing information relating to the conduct of the

public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Under Commission GO 66-C, this definition includes documents received in evidence in Commission proceedings. Even evidence that includes confidential information, including filings made under seal, are considered to be public records "not open to inspection."

5. In recognition of the other activities undertaken by the parties to this proceeding, it is reasonable for parties otherwise eligible to request intervenor compensation to do so in this case.

O R D E R

IT IS ORDERED that:

1. The motion of Pacific Bell d/b/a AT&T California and T-Mobile USA, Inc. to dismiss this proceeding as moot is granted.

2. The entire record of this proceeding – including documents under seal – shall be available for potential use in future Commission proceedings to which it may be relevant.

3. Pacific Bell d/b/a AT&T California and T-Mobile USA, Inc. shall disclose the existence of the record developed in this proceeding, and of this decision, in future proceedings initiated within two years of the effective date of this decision. Specifically, Applicants shall make such disclosure in any future proceeding in which they seek Commission approval of a transaction under § 854. If uncertain, Applicants should err on the side of disclosure.

4. If a party desires to introduce confidential documents from this proceeding into the record of a different case, that party may bring this decision to the attention of the presiding officer in that proceeding. It will then be within the

presiding officer's discretion to determine whether such documents are appropriately identified and received as evidence.

5. Nothing in this decision shall preclude any party deemed eligible for intervenor compensation from seeking such compensation in this proceeding, or, to the extent this proceeding's record is used in other proceedings, in those other proceedings, provided there is no duplicate compensation.

6. All rulings by the assigned Administrative Law Judge and assigned Commissioner, including the July 5, 2011, ruling requiring that Pacific Bell d/b/a AT&T California provide and pay for support services for the workshops and Public Participation Hearings, are affirmed.

7. Subject to the conditions imposed above, Investigation 11-06-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.