



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**FILED**

01-22-10

04:59 PM

Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc. and Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007.

I.09-01-018  
(Filed January 29, 2009)

**OPPOSITION OF JOINT RESPONDENTS TO  
MOTION FOR EXTENSION OF TIME BY  
THE CONSUMER PROTECTION AND SAFETY DIVISION**

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On Behalf of Joint Respondents

January 22, 2010

Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, AT&T Mobility LLC<sup>1</sup> and Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) on behalf of themselves and Southern California Edison Company ("SCE"), Cellco Partnership LLP d/b/a Verizon Wireless ("Verizon Wireless"), Sprint Nextel,<sup>2</sup> and NextG Networks of California, Inc. ("NextG"), (hereinafter collectively referred to as the "Joint Respondents" and/or "Respondents"), respectfully submit this Opposition to the Consumer Protection and Safety Division's ("CPSD") Motion for Extension of time ("Motion").<sup>3</sup>

## **I. Introduction and Summary of Position**

Based on the fact that its previous counsel has retired and been replaced by new counsel, CPSD seeks a three-month extension of time in which to file its testimony, currently due on February 1, 2010. It also seeks a three-month extension of the February 1, 2010 deadline on discovery, effectively extending a 12-month discovery period to 15 months. For the reasons set forth below, Respondents oppose the Motion.

### **A. Timeline**

The Commission issued its Order Instituting Investigation ("OII") on February 2, 2009. Respondents submitted detailed reports responding to questions set forth in the OII on April 20, 2009. On May 20, 2009, the parties jointly submitted a proposed schedule calling for the submission of CPSD's testimony on October 1, 2009. On August 8, 2009, with the concurrence of Respondents, CPSD proposed a revised schedule "that propose[d] a later date for CPSD's testimony"<sup>4</sup> in order to permit CPSD to "conduct a wind study which might not be completed until January of 2010."<sup>5</sup> The Scoping Memo, issued October 22, 2009, adopted that extended

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<sup>1</sup> New Cingular Wireless PCS, LLC (U 3060 C).

<sup>2</sup> Sprint Nextel Corporation, on behalf of the following wholly owned companies: Sprint Communications Company, L.P. (U 5112 C), Sprint Spectrum, L.P. as agent for WirelessCo, L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) (collectively, "Sprint Nextel").

<sup>3</sup> CPSD's Motion was filed on January 14, 2010. While the CPSD did not seek an order shortening time to respond to the Motion, Respondents advised Administrative Law Judge ("ALJ") Reed that even though parties were entitled to 15 days to respond to the Motion under the Commission's Rules of Practice and Procedure, Respondents intended to respond by January 22, 2010.

<sup>4</sup> Scoping Memo p. 3.

<sup>5</sup> *Id* at 7.

schedule and also provided that parties encountering “*unforeseen* events and difficulties” could seek a modification of the schedule if an “appropriate showing”<sup>6</sup> is made.

During discussions with CPSD which led to the hearing schedule adopted by the Scoping Memo, CPSD was very specific on what the February 1, 2010 “discovery cut-off” meant. CPSD asserted that the term “cut-off” means the date for which all aspects of discovery, both requests and responses are expected to be complete. In other words, the discovery requests must be propounded with adequate and reasonable time before the deadline to elicit a response by the discovery cut-off date.

Six weeks after the Scoping Memo was issued, the Commission, in light of the procedural schedule adopted by the Assigned Commissioner in the Scoping Memo, extended the 12-month statutory<sup>7</sup> deadline for completion of this matter by a *full year*.<sup>8</sup> If the Commission grants this Motion, the proceeding will not be completed within that timeframe.

## **B. CPSD’s Request**

### **1. Extension of Time to File Report**

In early January 2010, less than three months after the issuance of the Scoping Memo, CPSD advised Respondents’ counsel for the first time that it intended to request a three-month extension of the date CPSD must serve its opening testimony. This request was made on the single ground that CPSD’s counsel had recently retired, effective December 31, 2009, and new counsel simply needed to come “up to speed” on the file. Respondents were surprised at the request, since CPSD apparently was aware of the impending retirement in early August 2009 when it requested the current February 1, 2010 due date, and also certainly must have known about it by October 22, 2009, when the Commission issued the Scoping Memo granting CPSD’s request.

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<sup>6</sup> *Id.* (emphasis supplied).

<sup>7</sup> Public Utilities Code § 1701.2(d).

<sup>8</sup> D.09-12-009 (December 3, 2009.)

## **2. Extension of Discovery Period to 15 Months**

CPSD's Motion also requests that it be afforded additional time to complete discovery. Despite the fact that, as of the current discovery cut-off date, February 1, 2010, CPSD will have had over one year to conduct discovery, it seeks an additional three months. During the year CPSD has had to conduct discovery it has (a) had the benefit of Respondents' detailed responses to the OII, (b) submitted and received responses to detailed and voluminous data requests, and (c) in December of 2009 deposed three SCE employees. At no time during this process was any suggestion made by CPSD legal staff that its discovery was lacking or deficient in any way requiring an extension. Indeed, by early January of this year, when CPSD contacted Respondents, the discovery period effectively ended. Under the construction of the term "cut-off" insisted on by CPSD, it could not have propounded any discovery of consequence which Respondents could be reasonably required to answer by February 1, 2010, the cutoff date granted CPSD in the Scoping Memo. Yet, CPSD now seeks another three months.

### **C. The Moratorium on Discovery to CPSD**

As the Assigned Commissioner and the assigned ALJ considers whether CPSD has made an "appropriate showing" of "*unforeseen* events and difficulties," they should be cognizant of the fact that the parties agreed to establish a moratorium on discovery against CPSD until February 1, 2010. This unorthodox accommodation was put in place to ensure that CPSD was not burdened with having to respond to discovery while it was developing its case or conducting its own discovery. As a result, during the one year period that has elapsed between the issuance of the OII and February 1, 2010 CPSD has had both a right and an unfettered ability to conduct discovery.

### **D. Any Extension of Time for CPSD to Serve its Report/Opening Testimony Should be Minimal.**

CPSD has already had ample time in which to prepare its case and complete discovery against Respondents. As set forth below, neither of CPSD's requests is reasonable. Both should be denied. If CPSD's transition in counsel justifies any extension of time in which to produce its

opening testimony, which is difficult to accept given the timeline shown above, it should be limited to six weeks at most.

**II. Respondents Urge the Commission to Deny CPSD's Request for a Continuance of its Deadline for Serving its Opening Testimony and the Discovery Cut-Off Date.**

**A. CPSD Has Not Demonstrated why a Change in Counsel is an Unforeseen Event or Circumstance To Justify a Continuance.**

CPSD's Motion seeks an additional three months until May 3, 2010 to file its direct case.<sup>9</sup> The basis for CPSD's request is that new counsel has been assigned to this proceeding following the retirement of its former counsel. The Motion states that the complex nature of the matter and the voluminous record that has been developed necessitate an extension of time for CPSD to be given a fair opportunity to present its case.<sup>10</sup>

Respondents disagree with CPSD's statement that a three-month extension is necessary for it "to be given a fair opportunity to present its case."<sup>11</sup> Although CPSD's attorney of record may have recently changed, that change was hardly an "unforeseen" event. In fact, CPSD's counsel informed respondents of his retirement date in late summer/early fall of 2009. At that time, Respondents agreed to a hearing schedule that required CPSD to serve its testimony on October 1, 2009. During the summer of 2009, notwithstanding the impending retirement, CPSD requested a 4-month extension to serve its opening testimony (from October 1, 2009 to February 1, 2010) so that CPSD could conduct a wind study. In the spirit of cooperation, the Respondents agreed to join this request, which was adopted by the Assigned Commissioner on October 22, 2009. A change in counsel was certainly anticipated when the request was made, and undeniably "foreseen" by the time of the request was adopted by the Assigned Commissioner in the Scoping Memo.

Furthermore, even though CPSD's counsel has changed, its witnesses and expert consultants still remain on the case and presumably have been working on the required

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<sup>9</sup> Under the Assigned Commissioner's Ruling and Scoping Memo issued October 22, 2009, CPSD and Interveners must currently serve their direct cases on February 1, 2010.

<sup>10</sup> Motion at 2.

<sup>11</sup> *Id.*

testimony. As such, the subject matter experts who CPSD's prior counsel relied on to prepare CPSD's case will bring counsel up to speed on all relevant matters in an expedited fashion. CPSD's moving papers make no suggestion that, other than counsel, the staffing of this case has changed.

In light of the extensive notice of the anticipated staff transition and the resources available to new counsel to get him up to speed with this case, Respondents do not believe that CPSD has made the "appropriate showing" of "unforeseen events and difficulties" required by the Scoping Memo. If the Assigned Commissioner wishes to provide some minimal extra time to CPSD, the additional time should in no event exceed six weeks.

**B. CPSD's Request for a Continuance of the February 1, 2010 Moratorium on Discovery Should be Denied on the Basis That CPSD Has Had a Full Year To Complete Discovery In Preparation for Serving its Direct Case, and There is No Good Cause for a Continuance.**

The February 1, 2010 deadline in which to propound discovery to the Respondents should be maintained. CPSD's moving papers provide no guidance on what discovery, if any, remains outstanding and how CPSD would be unfairly prejudiced should the moratorium expire under the schedule approved by the Assigned Commissioner. As of December 28, 2009, when CPSD completed its last percipient witness deposition, CPSD made no indication that it intended to seek a continuation of the moratorium, or that CPSD would need to complete any further discovery before submitting its opening case. That is why Respondents were surprised when, about a week later, they learned from CPSD's new counsel that CPSD would seek a three-month continuance of the discovery deadline. With CPSD's report due in less than one month, Respondents presumed that CPSD's report had already been largely completed by CPSD personnel, consultants, and/or witnesses sponsoring the report.

The current schedule has provided CPSD with one year (February 2, 2009 to February 1, 2010) to evaluate claims and theories against Respondents, complete investigations, conduct discovery, and prepare its case. During that time, through extensive data requests propounded on all Respondents and reports filed in response to the OII, CPSD obtained the names of witnesses

and collected substantial information regarding Respondents' practices related to the placement and maintenance of facilities on the three subject poles. It also conducted wind studies with the cooperation of Respondents who assisted in the installation of wind measurement equipment on a pole in Malibu Canyon. Its Motion offers nothing to suggest why, only ten weeks after the issuance of the Scoping Memo, a year discovery period is suddenly inadequate.

Change of counsel cannot justify CPSD's request to extend the February 1, 2010 discovery cut-off date. As shown above, CPSD has had ample time to prepare its case, and has indeed completed extensive discovery. The moving papers do not suggest that the extension is warranted by an unforeseen event or circumstance, much less establish that any such circumstance exists.

**C. The Scoping Memo Did Not Intend to Synchronize the Discovery Calendar with the Date when CPSD is to Serve its Opening Testimony.**

CPSD argues that the Scoping Memo intended to synchronize the discovery calendar with the last day to serve opening testimony. However, nowhere in the parties' communications or the Commission's Scoping Memo is there any indication that the two deadlines must be synchronized. The quote CPSD relies on to support its request for a synchronized continuation of both deadlines is misguided because it suggests that a change in one part of the schedule that may meet the standard outlined in the Scoping Memo ("unforeseen events and difficulties") establishes a *per se* justification for modifying another date. The Scoping Memo, however, contains no requirement that a continuance of one deadline necessarily gives rise to an identical continuance of another deadline. The Scoping Memo intended to set dates in order to provide parties time to prepare their cases, free from discovery. Nothing in any of the decisions or rulings issued in this matter remotely suggests that a party could be afforded more than a full year to conduct discovery simply because they seek an extension to serve its opening testimony.

**D. CPSD Will Have the Opportunity to Conduct Additional Discovery Once Respondents Serve Their Opening Testimony.**

Denying CPSD's request to continue discovery beyond February 1, 2010 does not deny CPSD's right to discovery as erroneously suggested in the moving papers. Pursuant to the timeline set forth in the Scoping Memo, the moratorium on discovery against Respondents shall be lifted once Respondents submit their opening testimony. CPSD will have seven weeks to vet Respondents' cases, propound data requests, and take depositions, before serving its rebuttal testimony.

**E. If the Motion Is Granted, Respondents Should Be Granted an Identical Continuance For Serving Their Opening Testimony.**

As of February 1, 2010, CPSD will have had an entire year to investigate this matter and prepare its opening testimony. In contrast, Respondents have been precluded from propounding data requests or taking the depositions of CPSD witnesses since May 2009. Moreover, the Scoping Memo gives Respondents only four months to conduct discovery and prepare their opening testimony. There is a significant lack of parity between the time provided to CPSD versus that provided to Respondents for preparation of their cases. Should the Commission grant additional time to CPSD for serving its testimony, it is only fair that the same extension be granted to Respondents. In other words, if CPSD is given an additional six weeks to serve its testimony, Respondents should be given the same extension.

Therefore, should the Commission grant CPSD request to continue its deadline for serving opening testimony, Respondents respectfully request that they also be given an identical continuance beyond the current interval to submit their opening testimony. Respondents would be prohibited from conducting discovery until CPSD serves its testimony, as would CPSD until Respondents serve their cases.

**III. Respondents Request A Telephonic Hearing on The Motion Early Next Week.**

Respondents have conferred with CPSD to pursue an informal resolution of the issues raised by the Motion. Without disclosing the content of the discussion, Respondents will simply state that the parties were not able to reach agreement. It is possible that a telephonic hearing on





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