

JHE/cla 8/11/2011



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08-11-11
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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)

ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING ADDITIONAL INFORMATION AND ADDRESSING VARIOUS PROCEDURAL ISSUES

This ruling requests additional analysis from parties on several substantive issues and addresses various procedural matters related to this investigation. Among other things, this ruling acknowledges the granting of requests for extensions of time that parties sought and received from the Executive Director for the submission of information previously requested. In addition, this ruling sets dates for filings left open in the Executive Director's letter, dated August 1, 2011, and establishes a modified schedule for upcoming activities in California Public Utilities Commission (Commission) Investigation (I.) 11-06-009. The modified schedule for this proceeding is as set forth below. Finally, this ruling grants several requests for extensions of time to meet deadlines for submission of responses to staff data requests.

1. Background

The Commission opened this Order Instituting Investigation (OII) on June 9, 2011, to investigate, gather, and analyze information relevant to the

proposed purchase and acquisition of T-Mobile USA, Inc., by AT&T, Inc., “to determine the specific impact of the merger on California.”¹ Consistent with the direction set forth in the OII, I held a telephonic scheduling conference with parties on June 22, 2011, to discuss, among other things, the schedule, treatment of confidential information, and procedures for filing and service of discovery. Parties filed opening comments on the issues described in the OII on July 6, 2011, and consistent with the OII, the assigned Commissioner and I held workshops and public participation hearings throughout the State of California during the month of July to gather information on specific issues related to the proposed merger and to hear public comment.

On July 19, 2011, I requested briefing on definitions of the relevant product and geographic markets for studying the effects of the proposed merger. I extended the deadline for those briefs to August 5, 2011, for opening briefs and August 12, 2011, for reply briefs via an electronic mail (e-mail) sent on July 29, 2011. On July 26, 2011, The Utility Reform Network (TURN) requested an extension to the schedule adopted in the OII, based on an extension to the schedule of the Federal Communications Commission (FCC) due to the availability of new information (<http://transition.fcc.gov/transaction/att-tmobile.html>). The Commission’s Executive Director granted this extension through a letter issued on August 1, 2011. This ruling modifies the proceeding schedule accordingly and describes additional activities in this proceeding.

¹ I.11-06-009 at 2.

2. Ongoing Responsibility to File Information Provided to the FCC

The OII requires the respondents to this Investigation to file the application submitted to the FCC in WT Docket No. 11-65, and requires the respondents and market participant parties to file in this proceeding full responses to all data requests regarding the proposed merger propounded by the Commission or its staff. Consistent with the intention of the OII, this ruling confirms that the respondents are required to file and serve in this proceeding on an ongoing basis all information provided to the FCC in WT Docket No. 11-65. This includes any materials or analyses supporting that application before the FCC that have been filed or will be filed in the future, from the date Commission staff propounded the data requests until the record of this proceeding is submitted for decision. Other market participant parties may file their FCC submissions, or portions of them, in this docket to the extent they believe them relevant to the issues outlined in the OII and developed in subsequent rulings.

Materials submitted to the FCC, including all materials from the respondents and relevant portions submitted by other market participant parties, shall be filed in this docket within two business days of their submission to the FCC. Filing and service shall conform to the requirements specified in the OII and earlier rulings in this proceeding. Files and folders submitted in electronic form to staff should not be password protected at the individual folder or file level, nor should any material be submitted in compressed, encrypted, or zipped formats. Materials that meet the requirements for confidential, highly confidential, or additional copying prohibited treatment as specified in the OII should be marked accordingly, with accessible copies (that include any necessary passwords or other supporting information) served on all party representatives

that have signed the non-disclosure agreement adopted in the OII. As previously requested, at least one courtesy hard-copy of every document filed should be delivered to staff (to the attention of Bill Johnston in the Communications Division), and any attached documents (beyond narrative comments, briefs, and data responses) should be Bates-stamped.

3. Additional Issues for Party Comment

Parties are asked to provide additional comments and analysis on the following questions, which focus on several issues raised in this proceeding through previous workshops, filings, and other activities. If parties wish to incorporate parts of their previous submissions into such comments and analyses, they should do so by specific reference to document name and page number, along with a discussion of how those materials respond to the questions below. Parties are expected to respond as completely as possible to these and all other Commission requests.

Spectrum

The FCC has adopted a spectrum screen whereby additional examination is given to any market in which the merging party would control one-third of the critical spectrum input post-merger.² As explained in the FCC's 15th Annual Report and Analysis of Competitive Market Conditions With Respect to Wireless, including Commercial Mobile [Radio] Service (CMRS), "In those markets, the [Federal Communications] Commission conducted further analysis

² Fifteenth CMRS Competition Report (2011), paragraph 281.

to determine whether sufficient spectrum capacity would be available to other providers to compete effectively.”³

In Appendix A of AT&T’s application to the FCC petitioning for approval of the merger with T-Mobile, AT&T listed the spectrum screen for each Cellular Market Area (CMA) where it would operate post-merger.⁴ AT&T identified a spectrum screen of 115 Mhz in San Diego, Fresno, Ventura, Riverside, Santa Barbara, Butte, Shasta, Yuba, Lassen, Mariposa, Plumas, Tuolumne, Madera, Imperial, Colusa, Glenn Tohama and Sierra counties in California. This equates to approximately 345 Mhz of spectrum used to establish a spectrum screen of 115 (33% of 345). In all other California markets measured by CMA, AT&T identified a spectrum screen of 145.⁵ This equates to approximately 435 Mhz of spectrum used to establish a spectrum screen of 145 (33% of 435).⁶

At the Commission’s July 8 workshop on the effect of the proposed merger on competition, in answer to a question about how much spectrum is available for competition and service in the relevant market, AT&T’s witness Mr. Hogg

³ *Id.*

⁴ AT&T Merger Application, Appendix A, available at: <http://transition.fcc.gov/transaction/att-tmobile.html#appdocs> (click on Appendix A).

⁵ *Id.*

⁶ The lower number in some counties is due to current unavailability of the spectrum designated by the FCC as “AWS” for commercial mobile radio service operation; see AT&T Merger Application, Appendix A, available at: <http://transition.fcc.gov/transaction/att-tmobile.html#appdocs> (click on Appendix A).

suggested that 650 Mhz of spectrum is available for mobile broadband services.⁷

The following questions are intended to gather additional information on spectrum availability and use in different geographic and product markets within California.

- 1) Please identify the total spectrum, by spectrum band broken down by spectrum blocks and Megahertz holdings in those blocks, and by CMA, currently in use in each of the relevant product and geographic markets in California. By “currently in use,” we mean spectrum currently used by handsets and other commercial mobile devices in California.
- 2) Please identify any further spectrum you expect to be in service for handsets and other commercial mobile devices in California within the next six months.
- 3) As part of the analysis of spectrum available to competition in the relevant product and geographic markets in California, parties should discuss the extent, if any, to which consideration should be given to spectrum that is not currently used by carriers in California, or is expected to become available and accessible to mass market handsets and other commercial mobile devices in California in the next six months.
- 4) Please provide information on whether different spectrum bands e.g., PCS, cellular, 700 Mhz, AWS, BRS, 800 Mhz, etc., are used to provide different types of CMRS services in California, including, but not necessarily limited to: pre-paid wireless voice, text or data services; post-paid wireless voice, text or data services to individuals or families, and; post-paid wireless voice, text or data services to enterprise or business customers. Please discuss any differences in spectrum used

⁷ July 8 Merger Workshop transcript, at 167:2-3 (“If you said that there’s, you know, roughly 650 megahertz of spectrum that’s suitable to mobile broadband ... about 22 percent would be in control of AT&T”).

for CMRS services in California targeted at different types of customers such as value-conscious customers as compared to data only or data-heavy users who may be less price-sensitive. This information should include the amount and percent of spectrum used in California for pre-paid and post-paid wireless services, including: voice only; voice and text only; data only, and; bundled voice-text-data plans. If possible, analyze the potential effects of the proposed merger on the available spectrum for these different types of services and customers.

Roaming

- 5) Each respondent and other market participant party shall provide detailed information on any limits the company imposes on its customers' roaming, including customers using LTE-capable devices. Examples of limitations on roaming include, but are not necessarily limited to, reserving the right to impose surcharges, suspend, or terminate customer service for roaming deemed "excessive." Any respondent or other market participant party that reserves the right to limit roaming shall describe the specific terms and conditions governing those limitations, including any penalties that may be imposed, and the factors or activities that may trigger those penalties (such as distance from home location, amount of time spent roaming, or other factors).

Backhaul

As used herein, "backhaul" means call and data transport from: (a) a cell site to serving wire center; or, in the cases of Ethernet and microwave backhaul, (b) from a cell site to the first mobile telephone switching office, central office, or other aggregation point used by the responding carrier for that cell site.

- 6) To the extent that its previous response to data request 9 in the June 28, 2011 data request (the corrected version of which is appended to this ruling as Appendix A) did not include Ethernet and/or microwave backhaul, each respondent and each market participant party is asked to provide a supplemental response indicating which of its cell sites is

served by either of those technologies (Appendix B, revised sheet 1).⁸ These supplemental responses shall also provide summary information about the length of the contractual or tariff arrangements under which such Ethernet and/or microwave is purchased (Appendix B, new sheet 3). A revised data template to be used in providing these supplemental responses, with the additions described here, is attached to this ruling as Appendix B.

- 7) Please analyze the effect of long-term contracts or contracts that necessitate purchase of a certain amount of wireless backhaul requirements in order to get a better price or terms on backhaul special access, on competition in the backhaul for wireless services market and on wireless market participants who purchase backhaul services. To the extent related information has been provided in response to previous data requests,⁹ please reference such information specifically.

In this context, we ask the parties to comment on CalTel's discussion of what it calls "demand lock-up" contracts (July 6, 2011 Comments, at 7-17), and provide any additional information or response relevant to the assertions made in those comments. Please provide (under seal if necessary) any contracts that you believe exemplify or undercut this description.

Respondents AT&T and T-Mobile are further requested to provide:

- a. any "Section 33 contracts" between them, as identified at 13 of the CalTel Comments; and

⁸ Revised sheet 1 is substantially similar to the original sheet 1, except for the addition of the two columns needed to capture information on Ethernet and microwave transport.

⁹ See, for example, the Respondents and/or market participant parties' filings on Data Request questions 3, 15, and 16 in OII Appendix A, and Data Request question 8 in OII Appendix B.

- b. The October 13 and December 1, 2009, and June 17, 2010 amendments to its “Amended and Restated” Master Carrier Agreement and/or Broadband Services Agreement, identified at 13 of the CalTel Comments.
- 8) Please provide any further analysis and discussion of the potential effect of the merger on competition, focusing on whether or not the merger is likely to lead to any increase in rivals’ costs. Within this analysis please specifically address any potential effects of the proposed merger on: 1) the backhaul market for wireless communication in California, including whether it would affect seller power or reduce the power of non-AT&T or non-ILEC affiliated buyers; 2) handset innovation and/or handset exclusivity; 3) spectrum access; 4) roaming, and; 5) other relevant subjects.

Competition

- 9) Please analyze and discuss the implications, if any, for California of the economic and engineering analysis that the respondents filed at the FCC in WT Docket No. 11-65 on July 25-26, 2011.
- 10) Each respondent and other market participant party shall provide its complete port-out data for the last six months for customers based on California – i.e., to what company did the customer ask that the number be ported. Please analyze the port-out data and other sources of data on California customer movement between carriers, and discuss the implications of that data for defining the relevant product markets, identifying the market participants’ key competitors, and assessing the likely impact of the merger on competition in California, including price competition.

Potential Mitigation Measures

- 11) California Public Utilities Code Section 854 requires that the Commission analyze whether any mitigation measures would ameliorate any concerns about whether a proposed merger serves the public interest. Please discuss whether any merger-specific potential mitigation measures are warranted and can or should be imposed, and if so, propose specific mitigation measures tailored to do the following:

- a. Promote competitiveness in the backhaul market for wireless communications services in California;
- b. Promote CMRS competition in serving different types of California customers including (but not necessarily limited to) value-conscious customers, customers who want more or improved data and broadband access, and other market segments in California;
- c. Maintain incentives for CMRS innovation in California;
- d. Maintain or encourage choice and innovation in the handset market in California;
- e. Maintain competitive access to roaming services in California;
- f. Maintain incentives for price competition and competitive terms available to California subscribers including early termination fees ;
- g. Ensure that merger-specific benefits in California suggested by the respondents, including any benefits to California communities, California's economies, and the respondents' employees, are realized in the post-merger period;
- h. Improve wireless service quality in California;
- i. Institute data reporting requirements to assist with monitoring any changes to service quality, terms, or competition in the post-merger period; and
- j. Address other relevant subjects.

Parties should provide an analysis of any potential mitigation measures proposed, including a discussion of whether the measures are sufficient or necessary to protect the public interest in California in the event the merger is approved. Parties should specify whether the adoption or enforcement of each potential measure is within the jurisdiction of this Commission or should be recommended to the FCC or other agencies. Parties should also note whether any proposed mitigation measures are enforceable, and if so, whether they

would require FCC or other agency monitoring or enforcement. Arguments about the need (or lack of need) for potential mitigation measures and the form of potential measures should be specific and detailed.

Proposed mitigation measures that lack specificity, as well as general statements that policies, prices, or terms will be determined after the proposed merger is approved, are too speculative to constitute mitigation measures or arguments against mitigation measures, and will be accorded little or no weight. Arguments in favor of or against mitigation measures should be specific and detailed.

In addition to providing the information and analysis requested in this ruling, the respondents and market participant parties are reminded to file and serve their responses to any data requests propounded by the Commission or its staff during this investigation by the due date specified in each request, and to update such responses to keep them as accurate as the available data permits. As noted above, information provided to staff in an electronic format should not be compressed, encrypted, or password protected. Materials that meet the requirements for confidential, highly confidential, or additional copying prohibited treatment as specified in the OII should be marked accordingly.

4. Motions for Extensions of Time to Respond to Commission Data Requests

The original OII and earlier rulings in this proceeding included data requests directing the respondents and market participant parties to file various types of information within the record of this proceeding. As parties assembled this information, some parties asserted that the required information could not be assembled by the relevant due dates, and requested extensions of time to

comply with portions of these data requests. Specifically, the following parties filed motions requesting additional time to provide certain data:

1. MetroPCS filed a motion on June 23, 2011, requesting an extension of time until July 1, 2011 to respond to Questions 6-14 and 17 of Appendix A to the OII, and an extension until July 8, 2011, to respond to Question 16.
2. Verizon Wireless and related companies filed a motion on June 23, 2011, requesting an extension of time until June 29, 2011, to respond to Data Request Question 15 from Appendix A to the OII.
3. Cricket Communications filed a motion on July 6, 2011, requesting a two-week extension of time to respond to Data Request Question 9 of the June 28, 2011 Joint Assigned Commissioner's and Administrative Law Judge's Ruling.
4. Verizon Wireless and related companies filed a motion on July 6, 2011, requesting an extension of time until July 20, 2011, to respond to Data Request Question 9 of the June 28, 2011, Joint Assigned Commissioner's and Administrative Law Judge's Ruling.

These motions for extensions of time are granted. I note that parties have filed some information responsive to the data request questions for which extensions were sought; any additional information not included in these supplemental filings shall be filed as soon as possible, but no later August 25, 2011.

5. Schedule

As noted in the OII, the schedule originally adopted for this proceeding was intended to ensure that the Commission substantially completes its inquiry in time to provide comment to the FCC as part of that agency's examination of the proposed merger. Given that the FCC "stopped the clock" for its related docket on July 20, 2011 (essentially suspending its timeframe for review of this

transaction), it is reasonable to modify the timeline for this investigation to allow for a more thorough review of the potential merger, including any new material submitted to the FCC. For this reason, the Commission’s Executive Director granted an extension to the reply comment date specified in an OII in a letter dated August 1, 2011 (attached to this ruling as Appendix C). That letter provides that a future ruling would confirm a modified schedule for the reply comments and provide other schedule modifications, as necessary. Consistent with the extension letter, this ruling establishes the new due date for reply comments in this proceeding, along with new dates for the filing of analysis and supporting documentation and information in this proceeding related to the questions set forth in Section 3, above.

The modified schedule for this proceeding is as follows:

Activity	OII Date	Actual Date
Opening briefs served and filed on the definitions of the relevant product and geographic markets for studying the effects of the proposed merger. Briefs are limited to 25 pages; verified declarations may be attached and are not subject to the page limit.	N/A	August 5, 2011
Responses to the requests for information and analysis in Section 3 of this Ruling filed and served. Responses are limited to 25 pages; verified declarations may be attached and are not subject to the page limit.	N/A	August 22, 2011

Activity	OII Date	Actual Date
Combined reply comments and briefing filed and served. The following items shall be included in these filings: (1) reply comments limited in scope to matters raised in the Opening Comments filed July 6, 2011 and the workshops that took place in July; (2) comments on or replies to the information and analysis filed on August 22, 2011 in response to this Ruling; and (3) replies to the briefs filed on August 5, 2011, regarding definition of relevant product and geographical markets. These combined comments and briefs may not exceed 35 pages. Verified declarations containing supporting information may be attached and are not subject to the page limit.	August 5, 2011	August 29, 2011
Staff may submit the Investigation's record to the FCC.	August 10-30, 2011	On or after August 10, 2011
Target date for mailing a Proposed Decision.	September 2, 2011	October 11, 2011
First possible date for a Commission vote on a Proposed Decision.	October 6, 2011	November 10, 2011

The assigned Commissioner or assigned Administrative Law Judge may modify the schedule adopted herein as necessary for the reasonable and efficient conduct of this proceeding.

Therefore, **IT IS RULED** that:

1. The respondents are required to file and serve in this proceeding on an ongoing basis all information provided to the Federal Communications Commission (FCC) in WT Docket No. 11-65. This information shall be provided within 2 business days of filing with the FCC.

2. Market participant parties may file such information from their FCC filings as they deem relevant to the issues developed herein. All parties are required to provide their unredacted FCC filings to CPUC staff upon request, to the extent that the provision of such documents is consistent with the FCC protective orders in the AT&T/Deutsche Telekom AG merger proceeding (WT Docket No. 11-65).

3. Appendix A to this ruling replaces the Appendix distributed with the Joint Assigned Commissioner's and Administrative Law Judge's Ruling issued on June 28, 2011.

4. Parties shall file and serve their responses to the questions set forth in Section 3 of this ruling according to the schedule provided above.

5. Attached as Appendix B to this ruling is the revised data template referred to in Question 6 (regarding backhaul) in Section 3, above. After service of this ruling, staff will provide the parties with a "live" Excel version of this template. Respondents and market participant parties are requested to populate this template, and provide it to staff in its native Excel format (a Bates-numbered courtesy hardcopy should also be provided).

6. The modified schedule for this proceeding is as set forth in Section 5 of this ruling.

7. The assigned Commissioner or assigned Administrative Law Judge may modify the schedule set forth herein as necessary for the reasonable and efficient conduct of this proceeding.

8. The motions filed by Verizon Wireless, Cricket Communications, and MetroPCS requesting extensions of time for responding to the staff data requests included in the Order Instituting Rulemaking and previous rulings are granted as described in Section 4, above.

9. The assigned Commissioner or assigned Administrative Law Judge may provide further direction regarding filing or other procedural matters as necessary for the reasonable and efficient conduct of this proceeding.

Dated August 11, 2011, at San Francisco, California.

 /s/ JESSICA T. HECHT
 Jessica T. Hecht
 Administrative Law Judge