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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 REGARDING INFORMATION
FILED UNDER FCC PROTECTIVE ORDERS**

Over the last several weeks, some parties have filed redacted versions of various documents originally developed for or provided to the Federal Communications Commission (FCC), asserting that the redactions were required pursuant to the protective orders in the FCC proceeding, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations* (WT Docket No. 11-65). This ruling orders the parties in this proceeding to submit un-redacted versions of any documents previously submitted to the California Public Utilities Commission (Commission or CPUC) in redacted form. This ruling further order parties to submit un-redacted versions of any future documents that are filed or requested in this proceeding, and orders AT&T to provide a copy of the transcript of the Economists Workshop held at the FCC on July 13, 2011.

This ruling also addresses issues related to the responses of parties to recent data requests (DRs), the submission by the parties of electronic materials,

and the processing of such responses and materials by the Commission's Docket office.

1. Background

The Commission opened this Order Instituting Investigation (OII) on June 9, 2011, to investigate, gather, and analyze information relevant to AT&T, Inc.'s (AT&T) proposed purchase and acquisition of T-Mobile USA, Inc., in order "to determine the specific impact of the merger on California."¹ We have previously ordered Respondents to file and serve in this proceeding on an ongoing basis all information they have provided to the FCC in WT Docket No. 11-65. (*See, e.g.,* Administrative Law Judge (ALJ) Ruling issued on August 11, 2011). We have given the non-Respondent parties the option to file with the Commission any FCC materials they think are relevant. In an attempt to comply with this order, parties have submitted to the Commission documents in which certain information has been redacted pursuant to the FCC protective orders in WT Docket No. 11-65.²

In addition, parties (particularly AT&T) have submitted recent FCC filings and other materials to the Commission's Docket office for filing on compact disks (CDs) or other electronic media. Many of these materials have been effectively inaccessible to staff for a variety of reasons, including password requirements, encryption, and lack of availability of software applications necessary to read the data or open the included files. These submissions do not comply with the

¹ I.11-06-009 at 2.

² *See, e.g.,* Sprint's August 5, 2011 Brief, with confidential Attachment A containing a heavily redacted version of the Joint Reply Declaration of [Messrs.] Salopo, Besen, Kletter, Moresi and Woodbury.)

Commission's filing requirements, and cannot be accepted into the record in the form in which they were submitted.

In still other instances, parties have submitted data that, while readable and formatted appropriately for filing, appear problematic for a variety of reasons, and/or have failed to respond to DRs on the grounds that the outstanding requests were not directed at them, or that they were not required to respond for other reasons.

This ruling once again clarifies the filing requirements and parties' responsibilities for meeting them, in order to resolve the many problems encountered with data submission. The requirements and due dates contained in this ruling are not affected by the suspension of the due dates for the comments and reply comments on the AT&T economic model announced via electronic mail on August 31, 2011. This ruling sets forth rules and expectations for information already provided to the Commission; the purpose of these procedures is to ensure a clear and complete record in this case. This need is unaffected by the United States Department of Justice complaint to block the proposed acquisition of T-Mobile by AT&T Wireless that motivated that delay.

2. Filing of Information Covered by the FCC Protective Orders

2.1. Background

In WT Docket No. 11-65, the FCC has adopted three protective orders to date. The First Protective Order, adopted April 14, 2011, deals with "Confidential Information." The NRUF/LNP Protective Order, adopted April 18, 2011, covers information contained in the Numbering Resource Utilization and Forecast (NRUF) reports filed by carriers providing wireless

telecommunications services, as well as disaggregated, carrier-specific local number portability (LNP) data related to wireless providers.³ The Second Protective Order (REVISED), originally adopted on June 22, 2011, covers especially competitively sensitive information designated as “Highly Confidential Information.”

Some of the parties in this proceeding have taken the position that the terms of the FCC Protective Orders prohibit the parties from submitting to the CPUC information that is subject to the FCC protective orders. This is typically information that parties to the FCC proceeding (WT Docket No.11-65) obtained by virtue of signing one of the FCC protective orders. Such information is labeled “confidential,” “highly confidential,” or “NRUF/LNP” consistent with the category of the information in the relevant FCC protective order. Parties filing documents previously filed in the FCC proceeding have in many cases also used these designations to mark redactions in those materials when submitting them to the CPUC.

2.2. Commission’s Authority to Request Information Covered by the FCC Protective Orders

This Commission has the authority to issue subpoenas and to order the production of documents. (*See, e.g.*, Cal. Const., art. XII, § 6; *see also, e.g.*, Pub. Util. Code §§ 311, 313, 314, 581-82, 584, and 1794.) Public utilities have a duty to furnish information as prescribed by the Commission. (Public Utilities Code Section 581). To the extent such information is considered to be “confidential,”

³ These protective orders can be found on the FCC website at <http://transition.fcc.gov/transaction/att-tmobile.html> under “Orders and Public Notices.”

such information must still be provided to the Commission upon request, but can be filed under seal, with confidential information redacted from public versions of those filings. The Commission cannot release the confidential information provided under these circumstances except by order of the Commission. (Public Utilities Code Section 583.)

Each of the FCC protective orders contain a provision governing responses to subpoenas or orders for confidential information (information obtained pursuant to the protective orders) that are issued by courts, departments, and agencies. According to these provisions, the procedure for releasing information obtained under the protective order requires the party that has obtained the information in question to promptly notify the party who submitted the information, or the FCC and affected Wireless Telecommunications Carriers in the case of the NRUF/LNP Protective Order, of the pendency of such subpoena or order. "Consistent with the independent authority of any court, department or agency," such notification must be accomplished so that the submitting party and/or the FCC and affected wireless carriers have a full opportunity to oppose such production prior to production or disclosure. (First Protective Order, ¶ 15; NRUF/LNP Protective Order, ¶ 15; Second Protective Order, ¶ 17.)

2.3. Requirement to Provide Unredacted Documents Containing Information Covered by the FCC Protective Orders

The parties in this proceeding are ordered to file un-redacted versions of documents that were previously submitted to the CPUC with portions redacted according to the terms of the FCC protective orders.

Consistent with the procedures required by the FCC protective orders, this ruling constitutes notice that information provided under such protective orders is being sought by this Commission. The parties to this proceeding shall

promptly notify the submitting parties, and/or the FCC and affected wireless carriers,⁴ that the CPUC has ordered the production of confidential information covered by the FCC protective orders. Submitting parties and affected parties will have until close of business (5:00 p.m.) on Tuesday, September 6, 2011, to object to production of information under this order. Such objections shall be filed in the form of a motion, and served on all parties consistent with the service requirements in this proceeding. The ALJ or the Assigned Commissioner will rule on such objections promptly. In the absence of such objections or if the objections are overruled, the redacted FCC filings previously filed in this docket shall be supplemented by the filings in an un-redacted form not later than September 7, 2011.

In addition, AT&T is ordered to provide a copy of the un-redacted transcript of the Economists Workshop held at the FCC on July 13, 2011, as soon as possible, but no later than September 7, 2011.

Consistent with this process, parties shall submit on a going-forward basis un-redacted versions of any documents that are requested or filed in this proceeding, as set forth below. In the future, any party to this proceeding required to or wishing to submit to this Commission information covered by the FCC protective orders shall promptly give notice to the submitting and/or affected parties whose confidential data is included in such filing. The submitting and/or affected parties receiving such notice will have two business days from the date that notice is given to file any objections with this Commission, using the motion process outlined above. If there is no objection, or

⁴ Hereinafter referred to as “affected parties.”

if an objection is overruled, the party to this proceeding shall promptly file or submit the information to this Commission.⁵

2.4. Treatment of Information Labeled Confidential or Highly Confidential Based on the Terms of the FCC Protective Orders

This Commission may use confidential⁶ information covered by the FCC protective orders in its review of the AT&T/T-Mobile merger. This information will be held in confidence pursuant to Public Utilities Code Section 583 and consistent with the applicable FCC protective orders. The Commission and its staff shall treat any confidential information that is subject to the FCC protective orders in a manner consistent with the terms of applicable protective orders.

3. Issues Regarding Electronic Media

3.1. Filing of Data on Electronic Media Generally

Parties (including AT&T) have filed or attempted to file within this proceeding confidential and public data contained in various electronic media, including CD-ROMs and Portable External Hard Drives (PEHDs). (See below for discussion of confidentiality and electronic media.) These submissions do not comply with Rule 1.13(b)(1) of the Commission's Rules of Practice and Procedure. Rule 13.1 requires filings to be made either in hard (paper) copy or electronically, and specifies the rules governing each type of submission. Filings

⁵ As to such unredacted FCC materials, we modify the service requirements in Rules 1.9 and 1.10 of our Rules of Practice and Procedure. We ask that the parties provide an email notice of such filing or submission to the service list, and respond to requests for copies of the filings to the extent appropriate under the protective orders.

⁶ As used here, "Confidential" also refers to "Highly Confidential" and "NRUF/LNP" confidential.

containing documents that are not provided in hard copy must be filed in accordance with Rule 13.1(b). Rule 13.1(b)(1) requires that electronically filed “[d]ocuments must be transmitted to the Docket Office using the Electronic Filing System on the Commission's website at <http://www.cpuc.ca.gov/PUC/efiling>.” Rule 13.1(b)(1) further requires that these “(i) Documents must be transmitted in PDF Archive format (PDF/A).”

The documents provided by parties to this proceeding on electronic media do not comply with either of these provisions. In addition to the fact that these submissions are not PDF/A compliant (i.e., they do not have a 30-year archivable life), they also appear to violate Public Utilities Code Section 1822(b) and (c), which provide as follows:

- (b) Any testimony presented in a hearing or proceeding before the commission that is based in whole, or in part, on a computer model shall include a listing of all the equations and assumptions built into the model.
- (c) Any data base that is used for any testimony or exhibit in a hearing or proceeding before the commission shall be reasonably accessible to the commission staff and parties to the hearing or proceeding to the extent necessary for cross-examination or rebuttal, subject to applicable rules of evidence, as applied in commission proceedings.

Most of the documents submitted to the docket office on electronic media in this proceeding do not meet either of these requirements, and specifically are not reasonably accessible to Commission staff or parties for one or more of the following reasons:

- Passwords and Encryption: Some media tendered to the docket office require a password (or in certain cases, multiple passwords) to access their contents, or have been encrypted. Documents submitted to the Commission for filing subject to

Section 583 and the Commission's confidentiality rules will be kept confidential as required by law. Additional protection such as passwords and encryption are unnecessary and serve only to ensure that the documents are not reasonably accessible to Commission staff or parties.

- Third-Party Software: Data files or programs that require third-party software are also not compliant with the accessibility requirement of Public Utilities Code Section 1822(c) or with of the requirement of Rule 1.13(b)(1)(i) electronic files be submitted in PDF/A format.
- Digital Rights Protection: Documents that are so digitally protected that one cannot print even one copy from the electronic file are also not compliant with the accessibility requirements of state law or with the spirit of Rule 1.13.⁷

As provided in Rule 1.14(a), "[t]endered documents are not filed until they have been reviewed and accepted for filing by the Docket Office in San Francisco." Even after such filing, defects may make the filing retroactively invalid. Rule 1.14(e) provides:

- (e) Acceptance of a document for filing is not a final determination that the document complies with all requirements of the Commission and is not a waiver of such requirements. The Commission, the Executive Director, or the Administrative Law Judge may require amendments to a document, and the Commission or the Administrative Law Judge may entertain appropriate motions concerning the document's deficiencies.

In this case, then, electronic media tendered for filing must not be password protected on the file level (as previously ordered), must not be

⁷ The Protective Order in OII Appendix C allows for "additional copying prohibited" designations, but not for "no copies." At least one hard copy of every such document must be provided.

digitally rights protected so as to prevent any copying or printing,⁸ and must not require third-party software to be opened or understood. Files in Excel and other “native” formats that are commonly available may be submitted, but one PDF of each such file should be included to meet the PDF-A requirement.⁹ Finally, when submitting files on electronic media, parties must provide to the full extent possible a usable hard-copy index to the files provided on such electronic media.

3.2. Filing of Certain Confidential and Other Materials in Electronic Form

Rule 1.13 of the Commission’s Rules of Practice and Procedure requires that all utilities of the size of the Respondent and other carriers herein “shall electronically file all documents unless otherwise prohibited or excused by these rules.”

Rule 1.13(b) clearly provides that “Electronically tendered documents will not be filed under seal. Documents that a person seeks leave to file under seal (Rule 11.4) must be tendered in hard copy. However, redacted versions of such documents may be electronically tendered for filing.”

⁸ To the extent that a party wants to avail itself of the “Additional Copying Prohibited” possibility referenced in OII Appendix C, p. 4, ¶ 4, such documents shall be presented in hard-copy only, along with a log explaining why such treatment is justified.

⁹ For files supplied in native formats, the “native files” designation should be defined, and each file should be accessible by ordinary means (e.g., not password protected, encrypted, or compressed) and should not require special applications (e.g. beyond Windows XP and Excel or Adobe Reader for PDF). If the material requires special applications to open, those applications should be provided with the file or files. AT&T and other parties should check that the “native files” can indeed be opened by ordinary means prior to delivery to the Commission.

In this proceeding, AT&T has not filed its responses to the commission's DRs, even those submitted in a public version only, in electronic form. At the same time, AT&T has tendered confidential and non-confidential materials on electronic media (CDs, thumb drives, PEHDs), in some instances appending such media to paper-only DR responses. AT&T also has not filed public, redacted versions, electronically or in hard copy, of its confidential data responses. As a result, there is no documentation of AT&T's responses on the Commission's online docket sheet. This does not comply with the spirit of Rule 1.13, or (in some cases) the requirements discussed above that model-related filings be reasonably accessible, and is not in the public interest.¹⁰ As set forth further below, an unredacted, public version of all such responses, specifying the Bates-range and nature of the confidential filings, shall be filed in electronic form.

Additionally, my August 11, 2011 Ruling contained the following direction:

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

¹⁰ The current version of Rule 1.13 was adopted by Resolution ALJ-224, which sets out the Commission's intent to "reduc[e] administrative burden and the use of natural resources, and [to] provid[e] timely notice of filed documents on the Commission's website."

documents (beyond narrative comments, briefs, and data responses) should be Bates-stamped.

As staff have clarified to Respondents informally, FCC materials, including those filed in response to Ordering Paragraph 5 of the Order Instituting Rulemaking establishing this proceeding (OII) and to the Communications Division's May 9, 2011 data request, need not be provided in hard-copy except on specific request of staff. Staff made this exception based on the utility's representation that AT&T filings at the FCC number over a million pages of documents. In addition, the OII dispenses with the additional step of filing for specific permission to file under seal. To further tailor procedures herein to the specific nature of this expedited proceeding, parties shall comply with the following rules for electronic filing of documents in this proceeding:

- An electronic version of all redacted, public responses of DRs herein shall be provided to Docket Office for inclusion in the online Docket Sheet for this proceeding. As set forth below, each a public response shall specify the Bates-numbers of the public and/or confidential documents submitted.¹¹
- Except for the standing request for FCC filings and submissions, one courtesy Bates-stamped hard-copy of all documents submitted as "public," "confidential," "highly confidential," or "under seal" in response to California-specific DRs must be provided, as well as in an electronic version. Any questions can be directed to Bill Johnston (wej@cpuc.ca.gov) and Chris Witteman (wit@cpuc.ca.gov) of staff.
- Submissions of FCC filings may continue to be provided on electronic media only (except in cases in which staff specifically

¹¹ Thus, Docket is directed not to accept any filings marked "no public version."

asks for a hard copy), but all contents must be accessible in the spirit of Rule 1.13, as discussed in Section 3.1, above; and

- Any electronic media that are filed or submitted shall be Bates-numbered (one number per storage device).

4. Issues in Recent Responses to DRs

4.1. Duty to Respond

Metro PCS' August 22, 2011 Data Responses contained the following objection: "MetroPCS has only responded to the DRs issued by the Commission and directed to Interested Parties as designated by the OII, and has not otherwise participated in any way in the proceeding. Accordingly, MetroPCS does not interpret Additional Request No[s. 1-4, 5, and 6] as applicable to it." Similarly, Verizon Wireless objects broadly: "Verizon objects to each and every request to the extent it seeks documents or information on services or business activities not subject to the jurisdiction of the California PUC."¹²

We clarify that Requests 1-6 in the August 11, 2011, ALJ Ruling are DRs directed to both Respondents and the market participant parties. The requests are thus directed to California utilities, and are clearly related to those utilities' provision of telephone service to California consumers. The Commission's authority to request information from these entities does not depend on their participation in a specific proceeding, and indeed the Commission has the authority to request information from these utilities outside of a specific proceeding. Failure to respond to such DRs may be a sanctionable violation of

¹² At the same time, Verizon responses acknowledge that it is a party to this proceeding "for purposes of discovery by the Commission and its Staff" (Order Correcting Error), and that it is subject to those sections of the Public Utility Code "including §§ 309, 581, and 582," which give the Commission plenary authority to obtain documents and data from licensed public utility corporations in this State.

California Public Utilities Code Sections 309, 311, 314, 581-82 and 584. All respondents and market participant parties, including Verizon and MetroPCS, must fully respond to Requests 1-6 not later than September 7, 2011.

**4.2. Practice With Regard to DR Responses,
Bates-numbering and Other Tracking Systems.**

Some data responses submitted by parties fail to identify the Bates-numbered documents related to or incorporated into those responses. Parties have also filed or submitted DR responses that are undated, and/or do not adequately identify the responding party. (AT&T's responses to the workshop DRs, for instance, suffer from this problem.) Finally, data responses have been submitted with attached documents that are not Bates-numbered.¹³

Due to the large amount of data submitted in this proceeding, parties are required to be as clear and consistent as possible in their data responses. Each response to a Commission DR should contain a narrative response, along with a listing of the Bates-numbered documents associated with that response. Any graphs, charts, company documents, or other documents or materials (including electronic media) appended to the narrative response should be Bates-stamped, and the Bates numbers corresponding to such documents or materials shall be included in the narrative response. Each response, or set of responses, shall be dated, signed by counsel or other party representative, and shall clearly indicate the party submitting the response and the DR(s) to which it responds. To the extent feasible, the title of each such filing or submission shall be descriptive of

¹³ The party in this case professed confusion over the phrase from my previous Ruling which required that "any attached documents (beyond narrative comments, briefs, and data responses) should be Bates-stamped."

its content. Parties shall resubmit past DR response filings in the form specified herein by close of business Wednesday, September 7, 2011.

Therefore, **IT IS RULED** that:

1. The parties to this proceeding shall promptly notify the submitting parties, and/or the Federal Communications Commission and affected wireless carriers that the California Public Utilities Commission has ordered the production of confidential information covered by the Federal Communications Commission protective orders. Submitting parties and affected parties will have until close of business (5:00 p.m.) on Tuesday, September 6, 2011, to object to production of information under this order. Such objections shall be filed in the form of a motion, and served on all parties consistent with the service requirements in this proceeding.

2. In the absence of objections or if the objections are overruled, the redacted Federal Communications Commission filings previously filed in this docket shall be refiled in un-redacted form not later than September 7, 2011, as described in this ruling.

3. AT&T Inc. shall provide a copy of the un-redacted transcript of the Economists Workshop held at the Federal Communications Commission on July 13, 2011, as soon as possible, but no later than September 7, 2011.

4. The procedures set forth in Section 2.3, above, for the handling of information subject to the Federal Communications Commission's protective orders filed in this proceeding in the future shall be followed in this case.

5. Filings shall comply with the requirements discussed in Sections 3.1 and 3.2 of this ruling.

6. Each response to a Commission data request shall contain a narrative response, along with a listing of the Bates-numbered documents associated with

that response. Any graphs, charts, company documents, or other documents or materials appended to the narrative response should be Bates-stamped with the numbers corresponding to the listing included with the narrative response. All responses shall be dated, and shall clearly indicate the party submitting the response and the data request to which it responds.

7. To the extent necessary to comply with this ruling, parties shall resubmit past filings in the form specified herein, and do so by close of business Wednesday, September 7, 2011.

Dated August 31, 2011, at San Francisco, California.

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