

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CV No. 17-2511
)	
vs.)	Washington, D.C.
)	February 2, 2018
AT&T, INC. ET AL.,)	3:10 p.m.
)	
Defendants.)	
)	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript
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P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Good afternoon, Your Honor. This afternoon we have Civil Action 17-2511, the United States of America versus AT&T, Inc., et al.

Counsel, please approach the lectern and identify yourself for the record.

MR. CONRATH: Good afternoon, Your Honor. Craig Conrath for the United States.

THE COURT: Welcome.

MR. WELSH: Good afternoon, Your Honor. Eric Welsh for the United States.

THE COURT: Welcome.

MR. KEMPH: Good afternoon, Your Honor. Don Kempf for the United States.

THE COURT: Welcome.

MR. SCHWINGLER: Good afternoon, Your Honor. Peter Schwingler for the United States.

THE COURT: Welcome.

MS. SCANLON: Good afternoon, Your Honor. Lisa Scanlon for the United States.

1 MR. PETROCELLI: Good afternoon, Your Honor.
2 Daniel Petrocelli for defendants, AT&T, DirectTV, and Time
3 Warner.

4 THE COURT: Welcome.

5 MR. ROBSON: Good afternoon, Your Honor.
6 Katrina Robson for Defendants AT&T, DirecTV, and Time
7 Warner.

8 THE COURT: Welcome.

9 MR. OPPENHEIMER: Good afternoon, Your Honor.
10 Randy Oppenheimer for defendants AT&T, DirectTV, and
11 Time Warner.

12 THE COURT: Welcome.

13 MR. WALTERS: Good afternoon, Your Honor.
14 Rob Walters here for Defendants AT&T and DirectTV.

15 THE COURT: Welcome.

16 MR RAIFF: Your Honor, Mike Raiff for AT&T and
17 DirectTV.

18 THE COURT: Welcome.

19 All right, Counsel. Welcome to our most recent
20 status hearing. I'm happy to say there's no big issue
21 that's on my table at the moment, so that makes me very
22 pleased, and I thought I'd get a little update. I mean,
23 I know today's the day where you're doing your final fact
24 witness list and your expert reports are being exchanged, so
25 maybe you could give me a little idea how those are shaping

1 up, and any other issues that you might have.

2 I did have a thought about -- our next status
3 hearing is the 16th, as you know, and I thought it might be
4 helpful if I could get your proposed trial procedures order
5 the day before, say noon the day, the 15th, so that way
6 I have that afternoon and the morning of the 16th to review
7 it, and so that when we get together again on the 16th,
8 I could ask you questions that I'm sure I'll have some
9 questions. So if that would work, I certainly would
10 appreciate if you could get them in by noon the 15th.

11 But other than that, I'd love to hear whatever
12 progress reports you want to announce and if you think you
13 see issues or problems on the horizon, feel free to raise
14 them.

15 MR. CONRATH: Thank you, Your Honor.

16 And, actually, with what you just told us, you
17 took one of the questions I was going to raise off the
18 table, because the thought that we needed a way to get a
19 resolution on the trial procedures issue was one thing we
20 had talked about amongst ourselves as well.

21 So brief status report. Depositions are
22 continuing. We've had, I think, ten since the last status
23 conference. There's one more today. Obviously, given the
24 impending end of the main part of our fact discovery, the
25 next two weeks is a very busy deposition time.

1 THE COURT: Right.

2 MR. CONRATH: All the data that was the subject of
3 our discussion at the last status conference was produced,
4 I think, last week, or almost all of it last week, and all
5 of it has been produced.

6 Expert reports are being exchanged today. I think
7 close of business time.

8 THE COURT: Roughly, how many for each side can
9 you --

10 MR. CONRATH: Well, our side -- so we expect -- so
11 for our case-in-chief, there will be one principal economic
12 expert, which is Carl Shapiro, who's a noted economist,
13 who's been a Chief Economist in the Antitrust Division,
14 testified in the *Staples* trial here, in the *Bizarrevoice*
15 trial in California, is a Professor of Economics at the
16 business school at the University of California.

17 There will be two in our case-in-chief probably,
18 other experts who would be testifying information -- about
19 information that is essentially an input into Professor
20 Shapiro's analysis, that's Professor John Hauser of MIT,
21 who's a survey expert; and a Professor Simon Wilkie, who's a
22 former Chief Economist at the Federal Communications
23 Commission, testifying about, candidly, a relatively small
24 regulatory issue that is an input as well. We also have,
25 for -- that would be it for our case-in-chief.

1 We don't know exactly what arguments are going to
2 come that we would need to respond to in rebuttal, but we
3 are submitting expert reports for four experts so that we
4 are ready and have made full disclosure of what they would
5 testify about in rebuttal, if the defendants pursue these
6 various arguments.

7 THE COURT: Sure.

8 MR. CONRATH: So that's approximately where we are
9 on experts.

10 THE COURT: That sounds like around seven on your
11 side.

12 MR. CONRATH: That's correct.

13 And the reasons that four of them are rebuttal,
14 who knows how many of them would testify at trial.

15 THE COURT: Right. Exactly.

16 How about fact witnesses?

17 MR. CONRATH: So we exchanged, obviously, initial
18 fact witnesses a couple weeks ago. Today's the final fact
19 witness list. The limitation of people on the fact witness
20 list is 30. So we'll be exchanging those lists again this
21 evening.

22 I suspect we'll find that by the time trial comes,
23 there isn't going to be a way to have 30 live witnesses,
24 some of these may be people we propose to submit by
25 designation and, of course, just in the nature of these

1 things, there's some trimming as you get to trial to try to
2 make an efficient presentation for the Court, but those are
3 also going to be exchanged today.

4 THE COURT: So 30 is the --

5 MR. CONRATH: That's the max.

6 THE COURT: You might get close to it, huh?

7 MR. CONRATH: Yeah.

8 No. I think we will list 30 on our list. Yeah.

9 THE COURT: Okay.

10 Any other issues you see out on the horizon in the
11 next few weeks, that is?

12 MR. CONRATH: I don't think so.

13 The one that we wanted to raise was the trial
14 procedures question.

15 I mean, one, a question, if you recall, last time,
16 Mr. Petrocelli raised the question of whether the Court
17 would entertain some discussion about the trial in an
18 informal way before we submit procedures memo.

19 And if you were -- we talked about this earlier,
20 if the Court were amenable to having us stop by for an
21 informal discussion about how you see the trial going and we
22 can talk about some of the things we're thinking about, that
23 might help us shape the trial, the formal trial procedures
24 memo that we would submit. So if there were an option and
25 available to the Court, we think that could be beneficial.

1 THE COURT: All right. Well, that certainly,
2 probably would be done. I mean --

3 MR. CONRATH: Right.

4 THE COURT: -- get a subgroup together in kind of
5 a less formal setting --

6 MR. CONRATH: Yeah. That's the thought.

7 THE COURT: -- and kick it around.

8 My guess is you'll know better a week from now or
9 more as to how many witnesses you really think you'll need
10 to use of a fact kind and how many you will really need to
11 use of an expert kind and to what extent you're going to
12 need to use deposition excerpts or not use them.

13 MR. CONRATH: Right.

14 THE COURT: Of course, the big concern, I'll,
15 I'm sure, have, all judges would have, is fights over
16 evidentiary issues for admissibility purposes, and not
17 knowing where those fights are likely to be yet.

18 It's hard for me to anticipate, other than some
19 maybe obvious ones, but my guess is that that's where you
20 could really be of assistance to the Court in trying to
21 project what kind of procedures will make the most sense by
22 giving me a clearer sense of where you anticipate the fights
23 will be from an evidentiary point of view, because there's
24 nothing more frustrating than to be constantly stopping and
25 starting with your witness' testimony over the evidentiary

1 objections that are just -- especially if they're novel or
2 thorny, particularly thorny.

3 So to the extent those can be anticipated and
4 ironed out in advance so that things go in smoothly, I mean,
5 I think it would be a nice objective to have that, certainly
6 any documentary evidence, any issues are resolved before the
7 trial even starts.

8 MR. CONRATH: Yeah. I think -- so our thinking is
9 very much along those lines, Your Honor.

10 We're going to kind of start from our experience
11 before Judge Bates about a year ago, where we had an
12 exchange of witness lists in advance. To the extent the
13 parties could either agree or negotiate an agreement about
14 admissibility, there was no need to individually move them
15 in if they were resolved, they were, I forget exactly the
16 procedure, but deemed admitted, admitted in group.

17 THE COURT: Sure.

18 MR. CONRATH: And that process also identified any
19 as to which there would be disputes for the case-in-chief
20 exhibits, that maybe we could find a way to resolve them
21 beforehand, just to make the trial efficient absolutely.

22 THE COURT: It really does. It really increases
23 efficiency, and it streamlines the process.

24 MR. CONRATH: Right.

25 THE COURT: It, frankly, also, I think --

1 I haven't really quite had a trial like this before, because
2 so much of the -- so much of what's happening in the trial
3 is basically a learning process for the Court, every time
4 you kind of stop and start, it disjoints the learning
5 process.

6 MR. CONRATH: Right. Yes.

7 THE COURT: It makes it harder to learn new
8 things --

9 MR. CONRATH: Right.

10 THE COURT: -- because you're always picking up
11 where you left off, and you might, in the process, miss a
12 step or two.

13 So I really think it's great if we can resolve a
14 lot of these issues in advance, it would be really
15 preferable.

16 MR. CONRATH: All right.

17 Yeah, we pledge to work hard to make that
18 possible, and based on prior experience, it ought to be
19 possible.

20 You know, look, we're talking in terms of exhibits
21 substantially on documents from the files of the defendants
22 and, in some cases, third parties, which normally have
23 several reasons for their admissibility and their weight
24 normally goes for the Court, we all understand that.

25 THE COURT: Well, that's right.

1 And then, of course, with the things that are
2 covered be protective orders, we've got to, in some
3 instances, we're going to have to close the doors.

4 MR. CONRATH: Right.

5 THE COURT: Which is always -- again, can be
6 frustrating for others. So we want to keep that to the
7 minimum if possible.

8 MR. CONRATH: Right.

9 That's one of the things if we have a chance to
10 discuss, because I certainly think, from our perspective,
11 there's two conflicting interests that we represent and we
12 know apply to the Court as well, very strong institutional
13 interest in open procedures, open courtrooms.

14 THE COURT: Very.

15 MR. CONRATH: And at the same time, we are the
16 Antitrust Division and we care a lot about competition and
17 the last thing we would want is either for a defendant or a
18 third party company to have their competitiveness
19 compromised by disclosing their negotiations strategy or
20 what. And we have to find a way to accommodate those two
21 interests.

22 THE COURT: That's right. Exactly.

23 MR. CONRATH: And we have some experience trying
24 to do that and we'll suggest, but, obviously, all options
25 have to be on the table.

1 THE COURT: Makes sense.

2 MR. CONRATH: Okay. I think that's all I have,
3 Your Honor.

4 THE COURT: Thank you, Mr. Conrath.
5 Mr. Petrocelli.

6 MR. PETROCELLI: Thank you, Your Honor.

7 THE COURT: Yeah.

8 MR. PETROCELLI: We wholeheartedly endorse any and
9 all efforts to streamline and simplify this trial.

10 Judge, 25 million pages of documents were produced
11 during the investigative process, just since this case was
12 filed, another 7 and a half million pages of documents have
13 been produced.

14 The reality is, as Your Honor well knows, in the
15 course of a two or three-week trial, we're lucky if we see
16 100 to 200 documents. So the lawyers have a lot of work to
17 do.

18 THE COURT: Synthesis. It's all about synthesis.

19 MR. PETROCELLI: Exactly right, to compress this
20 extraordinary mass of information down to something that's
21 sensible and manageable within a two- or three-week trial.

22 So we're 45 days from trial now, and so today's a
23 big day for both sides, with the exchange of expert reports
24 later today and the witness list, and we still have 25 fact
25 depositions out of a total of 50, so we're about halfway

1 through with that process, and then we're going to turn to
2 expert witnesses.

3 We'll have four experts that we will be
4 identifying initially. Dr. Dennis Carlton will be our
5 economist. And then we have an expert in the advertising
6 area, one in the media and entertainment industry, and one
7 to talk about the costs savings and efficiencies.

8 And there may be a rebuttal expert or two as well
9 so we'll just have to wait and see.

10 But a week from now, Your Honor, is correct,
11 we will know much more about this case, and we can start
12 that process of winnowing down this massive information to
13 something that makes sense.

14 THE COURT: Well, of course, the -- as Mr. Conrath
15 was, I think, quite accurately describing, the tension
16 between the public interest and the interest of
17 confidentiality that conflict with one another here. The
18 other thing that's in conflict here is the creation of an
19 opinion that's comprehensive and accurate and fair to both
20 sides, and doing it quickly.

21 This is -- I mean, the parties, with good reason,
22 want a quick decision after the trial's over. But coming up
23 with a quick decision, as I'm sure you're both well aware,
24 our Court of Appeals likes things with ribbons and bows, and
25 to come up with a quick opinion with all the ribbons and

1 bows, is really hard to do from a judicial point of view.

2 So the spade work we do now to make this run more
3 efficiently and more smoothly will pay benefits, yield
4 dividends later when I'm trying, with my law clerk's more
5 than able assistance, to concoct the opinion that will be
6 the basis of my decision. So I think this is time
7 well-spent on the front end, I really do.

8 What would be the -- if our next hearing is the
9 16th, if we did like maybe in a less formal, like a
10 conference hearing on the -- say the 12th, that Monday, that
11 would be still a number of days in advance of the deadline
12 of the 15th and of the hearing on the 16th, but you also
13 would have had the benefit of whatever you've learned
14 between now and the 12th, which is a Monday, and you'd have
15 a weekend to be digesting it and talking among your own team
16 and maybe clarifying your own thoughts. Does that sound
17 like something that might make sense?

18 MR. PETROCELLI: I think that's a terrific idea,
19 Your Honor.

20 We're going to get together as soon as we digest
21 this material over the weekend and start hashing out issues
22 related to the trial procedures order, and then, if we could
23 visit with Your Honor on Monday, the 12th, we can have some
24 specific questions for you and you for us, and then we can
25 get this thing finalized by the 15th.

1 THE COURT: All right. Why don't we put it down
2 for -- does that work for you, Mr. Conrath?

3 MR. CONRATH: Yes, it does, Your Honor.

4 THE COURT: Why don't we put it down for -- we'll
5 have a meeting, just a small group of lawyers from each
6 side, in the conference room, say, three at the most for
7 each side, that's the most, on Monday, the 12th, 3:00.
8 That'll give you the morning to talk among yourselves and
9 maybe narrow things or clarify things between the two of
10 you, and we'll just do, just have a conference meeting and
11 sort of think out loud, so to speak.

12 MR. PETROCELLI: Yeah.

13 THE COURT: I think spitball is the way they say
14 it in this new generation, spitball a little bit.

15 MR. PETROCELLI: So, Your Honor, I think that's
16 it.

17 I think Mr. Conrath gave you an accurate
18 accounting of where things are, with respect to the pricing
19 data, they have provided most of it. There's another set of
20 it that we're still waiting for, but we expect it any day
21 now.

22 THE COURT: What's your sense on the fact
23 witnesses, from your point of view? Do you have clarity in
24 your own mind as to where you're going to come out as to how
25 many?

1 MR. PETROCELLI: Well, like any trial list,
2 there's always a tendency to hedge your bet a bit and put
3 more down there.

4 THE COURT: That's true.

5 MR. PETROCELLI: So it's good we have the cap of
6 30. So I think both sides are going to end up listing 30,
7 but I'd be surprised if half that number actually were
8 called by the parties. So we know what the time constraints
9 are, and in many ways, this is not a complicated trial,
10 Your Honor. I think the issues --

11 THE COURT: Well, that's nice to hear.

12 MR. PETROCELLI: Well, we intend to present it in
13 a very clear and straightforward manner, and I don't think
14 the issues are as complicated as maybe meets the eye right
15 now.

16 THE COURT: Good. I'll hold you to that.

17 MR. PETROCELLI: Please do.

18 THE COURT: All right.

19 Well, then, sounds like we have a game plan for
20 the 12th to the 15th and the 16th, and again, I compliment
21 the parties for their hard work.

22 I know that having this kind of excellent working
23 arrangement is not an everyday occurrence, certainly not is
24 this courthouse, so that's a credit to everyone, and I
25 appreciate your hard work there. And so I'll let you get

1 back to it.

2 MR. PETROCELLI: Thank you, Your Honor.

3 THE COURT: All right. Have a nice weekend,
4 Counsel.

5 DEPUTY CLERK: All rise.

6 This Honorable Court will stand in recess until
7 the return of court.

8 (Proceedings concluded at 3:31 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: February 2, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR