

MUNGER, TOLLES & OLSON LLP

Hon. Robert W. Lehrburger
500 Pearl St.
United States Courthouse
New York, NY 10007-1312

July 31, 2019

Re: *State of New York et al. v. Deutsche Telekom et al.*, No. 1:19-cv-05434-VM-RWL

Dear Magistrate Judge Lehrburger:

I write on behalf of Plaintiff States to request a new trial-ready date of December 9, 2019. Recent developments, combined with the events previously described in my July 15, 2019 letter to the Court,¹ render an October 7, 2019 trial unworkable.

I. DISH Deal and Settlement with USDOJ

Plaintiff States agreed to an October 7 trial date based on an express agreement with Defendants that was memorialized in the parties' proposed Case Management Plan ("CMP"):

Trial Date: The parties request a trial date of October 7, 2019, *provided* that (i) by June 28, 2019, Plaintiffs receive all material terms relating to any settlement agreement(s) reached between the Defendants and the USDOJ, including but not limited to all material terms of any related agreements involving third parties; and (ii) by July 12, 2019, Plaintiffs receive all definitive documents that will be used to implement such agreements.

CMP § 10, ECF No. 73 at pp. 7-8. These disclosure deadlines were critical to Plaintiff States because any "material[] change[s to] the terms or structure of the merger being litigated" would require changes to the nature and scope of our discovery.² Plaintiffs and the Court also had good reason to believe the June 28 and July 12 deadlines would be met: Counsel for Sprint represented that settlement with USDOJ was "likely to be imminent" and "likely to be along very consistent terms as the deal already reached with the FCC."³ Ex. 4 (Hr'g Tr. 15:10–16:2 (June 21, 2019)).

Defendants' predictions were wholly inaccurate—settlement was neither imminent nor was it along the same terms "as the deal . . . reached with the FCC," which does not attempt to establish DISH as a fourth nationwide wireless carrier. Instead:

1. On June 28, Defendants informed Plaintiff States that they had *not* reached a settlement with USDOJ and instead attached a 3-page Summary of Key Terms that were still under discussion with the USDOJ and DISH. Ex. 5 (June 28 Letter to Pomerantz).
2. On July 2, after written objection by Plaintiff States, Ex. 6 (July 1 Letter to Gelfand), Defendants provided drafts of six agreements between Defendants and DISH, but no drafts of any agreement with the USDOJ or FCC.

¹ Ex. 1 (Letter to Hon. Lehrburger (July 15, 2019)).

² Ex. 2 (Endorsed Letter to Hon. Marrero (June 20, 2019)); *see also* Ex. 3 (Endorsed Letter to Hon. Marrero (June 28, 2019)); Ex. 1 (Letter to Hon. Lehrburger (July 15, 2019)).

³ Defendants purportedly made commitments to the FCC around May 20, 2019, though the conditions have not yet been incorporated in an FCC order. Those commitments are distinct from DISH's recent commitments to the FCC.

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3. On July 12, Defendants did not provide Plaintiff States with any “definitive documents,” but instead confirmed in writing that Defendants still had not reached a settlement with USDOJ or finalized any agreements with DISH. Ex. 7 (July 12 Letter to Pomerantz).
4. On July 26, Plaintiff States finally received (a) revised agreements between Defendants and DISH, Ex. 8 (excerpts);⁴ (b) a Proposed Final Judgment (“PFJ”) with USDOJ, Ex. 9; and (c) a DISH commitment letter to the FCC, Ex. 10. See Ex. 11 (Letter to Pomerantz).

Plaintiff States clearly did not receive “all material terms” on June 28 (or July 2), or “all definitive documents” on July 12. They never saw *any* version of the PFJ before July 26. And all three sets of the July 26 documents include new material terms. For example, the DISH agreements contain revised provisions regarding [REDACTED], and the PFJ now requires DISH to offer nationwide postpaid wireless service in one year and DISH and T-Mobile to negotiate in good faith about leasing DISH’s 600 MHz Spectrum Licenses.⁵ Plaintiff States will be prepared to discuss these material changes, and the many others like them, in greater detail at tomorrow’s hearing.

Plaintiff States’ communications with DISH over the last month confirm that it, too, believes that Defendants’ various agreements have changed significantly since June 28 and July 12. On July 19, Plaintiff States received a letter from DISH [REDACTED]

Ex. 12. [REDACTED]

*Id.*⁶ [REDACTED]

[REDACTED]. Ex 13 ([REDACTED]).

Defendants now unfairly seek to sandbag Plaintiff States by forcing them to go to trial in just two months on a new transaction they have not had an opportunity to fully examine. But Plaintiff States expressly bargained for adequate time to consider whether and how Defendants’ remedial efforts affect the competitive analysis—time Judge Marrero suggested they would need if Defendants settled with the USDOJ.⁷ Defendants cannot have it both ways: They should either be required to defend their anti-competitive merger without relying on the recently finalized remedies, or they must “allow [Plaintiff States] time for litigation on both the merits of the merger as well as any additional issues that might be raised by the proposed divestiture.”⁸

⁴ Plaintiff States will have complete copies of these documents at the hearing.

⁵ This provision makes clear that even the PFJ does not set forth the final agreement between the parties. More broadly, under the Tunney Act, 15 U.S.C. § 16, Defendants’ settlement with USDOJ still requires judicial approval.

⁶ Rather than provide the terms of the DISH agreements with the USDOJ and the FCC, Defendants requested that Plaintiff States speak to DISH directly, and DISH promptly refused to provide documents absent a subpoena.

⁷ Ex. 4 (Hr’g Tr. 9:6-12 (June 21, 2019)) (Judge Marrero: “[T]he elephant not in the room is the justice department....I understand that it is still under consideration and they may or may not take a position. Either way, it is likely to affect what is on the table and potentially how long it would take to resolve the issues.”).

⁸ D. Gelfand & L. Brannon, *A Primer on Litigating the Fix*, Antitrust (Fall 2016), <https://www.clearygotlieb.com/-/media/organize-archiv/cgsh/files/litigating-the-fix.pdf>. Indeed, Defendants “bear the burden of showing that any

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II. Recent Discovery Developments Also Affect Scheduling

Defendants also have impeded Plaintiff States' ability to conduct discovery, further requiring a change in the trial date.

Document Production: Plaintiff States served First Requests for Production on June 24. Over the last two weeks, Defendants finally agreed to produce some of the requested documents, but Plaintiff States still have not received many of those documents, and Defendants have stated that they might take up to thirty days to produce them. Defendants have flatly refused to produce other indisputably relevant materials, necessitating the pending letter motions to compel.

Expert Analysis: For weeks, Plaintiff States have been asking Defendants to produce the basic subscriber, cost, and revenue data that Plaintiff States' experts need for their reports. Defendants did not agree to produce this data until last Thursday, July 25, and as of today, they still have not produced it. Yet Defendants continue to insist that Plaintiff States file their initial expert reports in one week, on August 7. That deadline is now impracticable, given Defendants' delay in producing data and documents needed for Plaintiffs' experts' analysis.

Depositions: Under the current schedule, with limited exceptions, all fact discovery, including depositions of fact witnesses, must be completed by August 23. Plaintiff States served Defendants with nine deposition notices on July 12. Defendants did not raise issues with any of these notices until July 22—10 days later. On July 22, Defendants stated that they would make just *two* of the nine deponents available on the requested dates, and then refused to agree that Plaintiff States could hold these depositions open for questions related to the DISH deal after it was finalized. Defendants still have not provided Plaintiff States with availability for many of the deponents whom Plaintiff States have noticed, and all but two of the few dates that Defendants have provided are in mid-August. Relatedly, Defendants have not disclosed which, if any, of the fact witnesses identified by Plaintiff States they will bring to trial, and have refused to commit to bringing two Germany-based Deutsche Telekom witnesses to either deposition or trial in the U.S. Defendants' stonewalling has undermined Plaintiff States' ability to conduct the necessary depositions in accordance with the CMP.

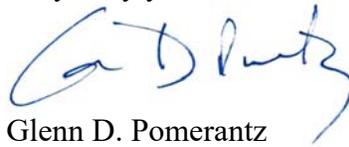
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Given these developments, Plaintiff States propose that trial be re-scheduled for December 9, 2019, or as soon thereafter as the Court is available, and that the parties negotiate a modified case management schedule consistent with the new trial date. Deferral of the trial is necessary to permit a fair evaluation of the transaction, as amended by the very recent USDOJ, FCC, and DISH commitments, and to allow meaningful discovery to be completed. Plaintiff States look forward to discussing these issues with Your Honor at the conference this Thursday.

proposed remedy would negate any anticompetitive effects of the merger.” *FTC v. Staples*, No. CV 15-2115, 2016 WL 2899222, at *25 n.15 (D.D.C. May 17, 2016). And Defendants must offer such a remedy in a timely manner for it to be considered as part of the case. Transcript of Pre-Hearing Conference at 22–29, *FTC v. Ardagh Grp.*, No. 13-1021 (D.D.C. Sept. 24, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf>.

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Very truly yours,

A handwritten signature in blue ink, appearing to read "Glenn D. Pomerantz".

Glenn D. Pomerantz
Munger Tolles & Olson
350 S. Grand Ave, 50th Floor
Los Angeles, CA 90071
Tel: (213) 683-9132
Glenn.Pomerantz@mto.com

cc (via ECF): All Counsel of Record