July 31, 2019

VIA ECF

Hon. Robert W. Lehrburger
United States Magistrate Judge
500 Pearl Street
New York, NY 10007-1312

Re: *State of New York, et al. v. Deutsche Telekom AG, et al.*, No. 1:19-cv-05434-VM-RWL (S.D.N.Y.)

Dear Magistrate Judge Lehrburger:

I write on behalf of Defendants in response to the letter submitted by Plaintiffs earlier today, which asks that the Court delay trial by at least nine weeks. None of Plaintiffs' purported rationales for seeking this delay have merit.

To begin with, the minor modifications that were made to the final terms of the DISH divestiture do not have a material impact on the issues in this case and should be easy for Plaintiffs' experienced counsel and experts to assimilate. Even if Plaintiffs were genuinely confused about how to incorporate this new information into their analysis, they acknowledge that final agreements were provided to them on July 26—two weeks after the July 12 date originally contemplated for production of final agreements. This cannot possibly justify Plaintiffs' request for a *nine week* delay.[1]

As for the discovery issues Plaintiffs raise in their letter, Plaintiffs mischaracterize the record, but in all events those purported disputes do not justify adding yet more time to the schedule on top of their requested DISH delay. Defendants are fully complying with their discovery obligations and have been making rolling productions of documents since late June. The incongruity of Plaintiffs' requested two-month delay is demonstrated by the fact that they are asking for a longer period from now until trial than they originally agreed would pass from the time of the submission of the agreed Case Management Order until trial, even though the parties are now well along in the discovery process.

Defendants made significant compromises when they agreed to the October 7 trial date. This included an agreement not to close their merger pending a decision at trial and pushing the trial date back a month from Defendants' originally requested date. The merger at issue in this case has undergone one of the longest and most exhaustive premerger investigations in history. It is on the verge of being approved by the Federal Communications Commission because it will accelerate the development of a nationwide 5G network and bring enormous benefits to consumers throughout the country. The Department of Justice, joined by several state Attorneys General, has now allowed it to go forward as well. Plaintiffs' transparent attempt to renege on their prior

[1] At most, the two-week period between July 12 and July 26 is the operative delay, but even that is not warranted in light of the voluminous material Plaintiffs already had in hand by July 12, as set forth in more detail in this letter.

agreement and hold up this procompetitive merger for two more months is without merit and should be denied.

I. DISH Agreements

In accordance with Section 10 of the Case Management Order, Defendants provided to Plaintiffs on June 28 a summary of the key terms of the DISH agreements. Plaintiffs immediately complained and requested more information. On July 2, Defendants provided near-final versions of those DISH agreements. Defendants' July 2 letter is attached as Exhibit 1, as Plaintiffs failed to include this letter in their submission to the Court. In the July 2 letter, Defendants also explained which provisions of the agreements were likely to change and what those changes would be.

Although Plaintiffs suggest that there are many material changes between the near-final versions they received on July 2 and the final agreements they received on July 26, there are only four categories of changes that we believe are conceivably in issue. None of those changes materially affects Plaintiffs' competitive analysis or ability to prepare for trial, and none requires any new or incremental discovery. Indeed, two of those categories were already described to Plaintiffs in Defendants' July 2 letter.

First, there was a change to the limitation on DISH's use of New T-Mobile's network. The end result is that this limitation will be 2.5% higher in years 4 and 5 than what was disclosed to Plaintiffs on July 2. Given that the prior limits provided room for very significant growth by DISH, it should be a trivial matter for Plaintiffs to adapt their analysis to this change.

Second, Defendants anticipated and explained in their July 2 letter to Plaintiffs that the final agreement would have branding restrictions on DISH's use of New T-Mobile's network. Defendants disclosed to Plaintiffs the language that Defendants anticipated would be added to the agreement. The language that Defendants sent to Plaintiffs on July 2 is nearly identical to what appears in the final agreement.

Third, there were changes to the "change of control" provisions that apply during the term of the agreement. Since July 2, changes have been made to (1) which acquisitions of DISH would trigger a change of control and (2) what would happen as a result of a change of control of DISH. These differences plainly are not material to Plaintiffs' analysis because the ownership of DISH is neither relevant to the antitrust issues nor something that either side would likely argue was going to change during the term of the agreement in any event.

Fourth, the final DISH agreements changed by a small amount the charge for DISH to utilize certain ancillary features on New T-Mobile's network. This too is a trivial matter for Plaintiffs to incorporate in their analysis.

Tellingly, Plaintiffs never explain how any one of these changes, or the changes in the aggregate, are prejudicial or otherwise necessitate *any* delay in the trial date, let alone the nine week delay sought. Plaintiffs attach Exhibit 13, a DISH document that lists a "summary of material changes." However, what is material for business purposes is not necessarily material for the purposes of an antitrust analysis. In any case, the majority of the "changes" listed in this document

are not in fact changes to the DISH agreements, but provisions of the Proposed Final Judgment ("PFJ").

Plaintiffs also complain that they only received the PFJ on July 26, though Defendants' letter on July 2 referred Plaintiffs to another DOJ final judgment that had many of the anticipated provisions here and included a description of several anticipated additions. In addition to what was described on July 2, the PFJ includes a provision that the Defendants and DISH will negotiate in good faith for the Defendants to lease some or all of DISH's 600 MHz spectrum. As this provision contemplates a potential future agreement between the Defendants and DISH, it should not materially affect Plaintiffs' competitive analysis. The PFJ also requires DISH to offer nationwide postpaid service within one year, which will benefit consumers and was always something DISH was capable of doing anyway.

If the Court would find it useful, Defendants could provide further briefing about these changes or submit the agreements themselves with a roadmap to assist the Court in its review. Plaintiffs' strategic decision to submit their letter one day before our August 1 conference was not ideal.

II. Discovery

Plaintiffs' complaints about the timing of Defendants' document productions are without merit. Defendants served written responses to Plaintiffs' initial set of document requests on July 1 offering certain materials, and contrary to Plaintiff's baseless assertion that Defendants only recently agreed to produce documents, both T-Mobile and Sprint have been making rolling productions of documents since late June. T-Mobile made rolling productions in response to Plaintiffs' requests on June 27, July 3, July 9, July 12, July 23, and July 31. Sprint made rolling productions of documents and data on June 27, July 12, July 22, and July 29.

Defendants' letters of July 10, July 19, and July 30 all offered additional materials and Defendants are working diligently to make materials available for prompt production, including reviewing tens of thousands of documents and producing them on a rolling basis.

Also contrary to Plaintiffs' assertion, Defendants are producing the data requested by Plaintiffs in a timely manner. Plaintiffs' complaint about data is particularly unwarranted in view of the fact that Plaintiffs initially failed to review and confirm the data already in their investigative record and then made repeated, unjustified demands that Defendants re-produce data that had already been provided to them.

Finally, Defendants are working with Plaintiffs to schedule the depositions that they have requested and several dates have already been agreed. Defendants were prepared to move forward with two depositions that Plaintiffs themselves noticed for August 1 or earlier, but Plaintiffs insisted on rescheduling those depositions for a later date. Defendants have also accommodated Plaintiffs' request that most of these depositions be held in New York or California, even though the employees are located elsewhere.

Defendants look forward to discussing this issue and other case management issues at the requested status conference.

Respectfully yours,

David I. Gelfand

cc: All counsel of record (via ECF)