

J811nysa

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

19 Civ. 5434 (VM) (RWL)

6 DEUTSCHE TELEKOM AG, et al.,

7 Defendants.

Oral Argument

8 -----x
9 New York, N.Y.
August 1, 2019
3:36 p.m.

10 Before:

11 HON. ROBERT W. LEHRBURGER,

12 Magistrate Judge

13 APPEARANCES

14 STATE OF NEW YORK
15 OFFICE OF THE ATTORNEY GENERAL
For Plaintiffs

16 BY: BEAU W. BUFFIER (Bureau Chief - Antitrust Bureau)
17 AMBER WESSELS-YEN, Assistant Attorney General
18 JEREMY R. KASHA, Assistant Attorney General
ELINOR R. HOFFMANN, Deputy Chief - Antitrust Bureau

19 MUNGER, TOLLES & OLSON
Attorneys for Plaintiffs

20 BY: GLENN D. POMERANTZ, ESQ.
KURUVILLA J. OLASA, ESQ.

21 STATE OF CALIFORNIA
22 OFFICE OF THE ATTORNEY GENERAL
For Plaintiffs

23 BY: PAULA L. BLIZZARD, Deputy Attorney General
24
25

J811nysa

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES CONTINUED

GIBSON, DUNN & CRUTCHER

Attorneys for Defendant Deutsche Telekom AG

BY: RICHARD G. PARKER, ESQ.

WILSON SONSINI GOODRICH & ROSATI

Attorneys for Defendant Deutsche Telekom AG

BY: JOSHUA H. SOVEN, ESQ.

CLEARY GOTTlieb STEEN & HAMILTON LLP

Attorneys for Defendants T-Mobile US, Deutsche Telekom

BY: DAVID I. GELFAND, ESQ.

GEORGE S. CARY, ESQ.

WILMER CUTLER PICKERING HALE & DORR LLP

Attorneys for Defendants T-Mobile US, Deutsche Telekom

BY: HALLIE B. LEVIN, ESQ.

MORRISON & FOERSTER LLP

Attorneys for Defendants Sprint, Softbank Group Corp.

BY: DAVID L. MEYER, ESQ.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Attorneys for Defendant Sprint Corporation

BY: KAREN HOFFMAN LENT, ESQ.

ALSO PRESENT: ARTHUR J. BURKE, ESQ., Davis Polk & Wardwell LLP

J811nysa

1 (Case called)

2 THE DEPUTY CLERK: Attorneys, please state your name
3 for the record.

4 MR. BUFFIER: Beau Buffier for the State of New York.

5 MR. POMERANTZ: Good afternoon, your Honor. Glenn
6 Pomerantz of Munger, Tolles & Olson, and I will be taking the
7 lead today on behalf of plaintiff states. I'm sure, obviously,
8 others will be speaking also.

9 THE COURT: Okay. Good afternoon.

10 MS. BLIZZARD: Good afternoon. Paula Blizzard for
11 State of California.

12 MS. WESSELS-YEN: Good afternoon, your Honor. Amber
13 Wessels-Yen for the State of New York.

14 THE COURT: Good afternoon.

15 MR. KASHA: Jeremy Kasha for the State of New York.
16 Good afternoon, your Honor.

17 MR. OLASA: Good afternoon. Kuruvilla Olasa, Munger,
18 Tolles & Olson, for California AG.

19 MS. HOFFMANN: Elinor Hoffmann for the State of New
20 York.

21 MR. GELFAND: Good afternoon, your Honor. My name is
22 David Gelfand from Cleary Gottlieb, and I represent T-Mobile
23 and Deutsche Telekom.

24 MS. LEVIN: Good afternoon. Hallie Levin from Wilmer
25 Cutler Pickering Hale & Dorr for Deutsche Telekom and T-Mobile.

J811nysa

1 MR. CARY: Good afternoon, your Honor. George Cary
2 from Cleary Gottlieb for Deutsche Telekom and T-Mobile.

3 MR. PARKER: Good afternoon, your Honor. Richard
4 Parker for Gibson Dunn for Deutsche Telekom.

5 MR. MEYER: Your Honor, David Meyer, Morrison &
6 Foerster, for defendants Sprint and Softbank.

7 MS. HOFFMAN LENT: Good afternoon, your Honor. Karen
8 Lent from Skadden on behalf of Sprint.

9 THE COURT: Are we good? Okay. That ends the
10 conference.

11 I have an appearance sheet in front of me that lists
12 four attorneys but somehow we ended up with far more, but I
13 knew that was going to happen. And counsel, please do not be
14 offended if I just say "counsel," because I am not very good
15 with names and I will not remember yours, at least for today.

16 I have read every letter that counsel has sent.

17 I'm being looked at by my deputy. Am I okay?

18 Okay. I have read every letter that the parties have
19 sent recently, including the ones that were bestowed upon me
20 last evening, and I'm prepared to address really all the issues
21 in there, but we have two hours, essentially, so I want to use
22 our time efficiently and wisely, and I have an agenda of how
23 I'd like to proceed based on the issues before me, and at the
24 end, of course, if I've omitted anything, then we'll certainly
25 be able to raise what you would like to.

J811nysa

1 So although this conference was precipitated in part
2 by a motion to modify a protective order, one of the concerns
3 that the parties have and I think are most interested in is the
4 issue of a trial date, which is currently set for October 7,
5 2019. That trial date was premised on an agreement between the
6 parties that there would be receipt of material terms of an
7 agreement with the DOJ by June 28th and that all definitive
8 documents would be produced by July 12th. It turns out that
9 the DOJ and the parties were not quite as timely as would have
10 been liked for that so basically things ran a little late, so
11 material terms were distributed July 2nd and definitive
12 agreements were produced on July 26th, two weeks after the time
13 they were scheduled to be received if there was going to be a
14 trial on October 7th. And now we have the plaintiff states
15 asking for a later trial date. In light of that delay -- not
16 necessarily fair to call it a delay, but in light of that
17 extended period and in light of various discovery agreements,
18 some of which we'll talk about today -- and I'm not going to
19 answer that at the beginning of this so I'm going to leave you
20 with a cliffhanger, but it needs to be set up because it may
21 well be influenced by things we discuss today, and I don't want
22 to have a ruling on that at the outset without having taken
23 other things possibly into account. And you could be rest
24 assured I have communicated with Judge Marrero, who is the
25 scheduled district judge for trial of the case.

J811nysa

1 Currently we have a discovery deadline I believe, at
2 least pursuant to the case management order that the parties
3 have worked on, of August 23rd. There is no doubt this is a
4 tight schedule. It's basically a freight train running as fast
5 as it can with its windows open so papers are flying outside,
6 etc. It's not going to be pleasant for anyone who is on that
7 freight train. Nonetheless, we are dealing with a public
8 matter that has enormous consequences for most all the public
9 in the United States. And it's a very important issue, and we
10 don't want to take it lightly, and we don't want to take it
11 faster than it deserves. And obviously the concern here is how
12 fast need it be, given that there has already been an agreement
13 reached with the DOJ. So we will address that later on.

14 And I'd like to proceed to the protective order
15 dispute, and I don't think we need to waste time on oral
16 argument on it. And I know there was an objection to the
17 filing of the joinder yesterday by Samsung, and my decision on
18 this would be the same whether Samsung had filed joinder or
19 not. So the parties that objected to the late joinder and
20 asked for an opportunity to respond need not be concerned with
21 that. And the protective order, again, to set the stage for
22 people, the question is the extent to which in-house counsel of
23 the parties should be allowed to have access to information
24 produced by nonparties, essentially what are referred to as
25 MVNOs, virtual network operators, which include Comcast,

J811nysa

1 Charter, and Altice. So they have moved. So has AT&T and, as
2 I said recently, Samsung Electronics. And they object to
3 having access of their information by in-house counsel, by the
4 parties who, yes, happen to be direct competitors and/or people
5 who do business together involving highly sensitive pricing,
6 marketing, and competitive information. And as a general rule,
7 there can be, and often are, restrictions on in-house counsel's
8 access to competitively sensitive information, particularly if
9 those in-house counsel are involved in competitive
10 decision-making. As the parties recognize, the agreement as
11 written doesn't even have that restriction. It was worded
12 differently. But at least the parties are in agreement that at
13 least that needs to be a modification that's made. Bottom
14 line, though, is I am ordering that there be a modification,
15 that there be two tiers for the nonparty movants that allow for
16 confidentiality and highly confidential material; highly
17 confidentials for outside counsel only. If a party feels that
18 in-house counsel has to see particular information that has
19 been marked highly confidential, the parties must meet and
20 confer, and if they cannot agree, then they can bring it to my
21 attention. If in-house counsel is allowed access, there is
22 going to be a presumptive rule that only two are allowed per
23 defendant, but you can make a request for more if there is good
24 cause for that.

25 Any questions on that issue?

J811nysa

1 MR. GELFAND: Your Honor, David Gelfand on behalf of
2 T-Mobile and Deutsche Telekom. May I address that.

3 THE COURT: Of course.

4 MR. GELFAND: I understand the Court's ruling on this.
5 There are a couple of issues that I think would remain open.

6 Your Honor, first of all, I think there is a category
7 of materials that are particularly critical in this case for
8 our in-house lawyers to have access to, and that would be
9 materials that enter the record of the case, materials that are
10 attached as exhibits to pleadings or filings, materials that
11 are marked as trial exhibits. As your Honor saw from our
12 submissions, our in-house lawyers -- and two of them are here
13 today, Laura Buckland and Melissa Scanlan, if I can introduce
14 them. Laura Buckland is the senior vice president of
15 litigation and IP, and Melissa Scanlan is the vice president of
16 IP and antitrust.

17 MS. BUCKLAND: Good afternoon.

18 MS. SCANLAN: Good afternoon.

19 THE COURT: Good afternoon.

20 MR. GELFAND: They are extremely active in this case.
21 I conservatively estimate I've been in 15 hours of meetings and
22 calls with them this week. They're involved in every decision
23 we make, and this is as important a litigation as the company
24 has been through perhaps in its history.

25 THE COURT: Right. But how do you explain that in

J811nysa

1 many other antitrust proceedings of this type that there have
2 been agreements that do keep in-house counsel off limits and in
3 various shape or form, through multitiered protective orders or
4 allied restrictions or various other iterations? Why is this
5 different?

6 MR. GELFAND: Well, there are cases that have gone
7 both ways.

8 THE COURT: That is true.

9 MR. GELFAND: There have been at least four merger
10 challenges that I can think of in the modern era in which
11 in-house counsel were allowed access to materials.

12 THE COURT: What was the case with the DOJ, in terms
13 of, was there any agreement there on the investigation, for
14 instance?

15 MR. GELFAND: Well, *Justice Department v. Sunguard* was
16 one case.

17 THE COURT: I'm talking about here, though. In terms
18 of the investigation, was in-house counsel allowed access for
19 similar materials?

20 MR. GELFAND: So during the investigation phase, there
21 is a different set of rules and regulations. We don't get any
22 access to third-party documents during the investigation stage.

23 THE COURT: Okay.

24 MR. GELFAND: They're covered by a set of regulations
25 that govern those kinds of investigations.

J811nysa

1 THE COURT: Okay. Now I appreciate the concern. You
2 know, I was in litigation for 27 years before I did this so I
3 dealt with protective orders on behalf of clients with
4 competitively sensitive information quite a lot. Sometimes I
5 was fighting for access for in-house counsel; sometimes I was
6 opposing it. Another situation, right? That's why I said, if
7 there's really -- well, in-house counsel of course is going to
8 be actively involved in the situation. And I wouldn't expect
9 any less. But you're talking about information that really
10 goes to the heart of competition and business dealings between
11 nonparties and the parties, and the nonparties are due at least
12 that protection, if it's not a competitor-on-competitor
13 situation who are both the parties to the case.

14 Secondly, you mentioned trial exhibits. Trial is a
15 whole new ballgame, and, you know, what comes in at trial, that
16 can be all public, unless there's a really good reason that you
17 can convince Judge Marrero that some piece of information
18 shouldn't be. So that's not even an issue at this time.

19 And as for record materials, look, people file stuff
20 all the time, and it's too broad a stroke to say anything filed
21 on the record. Like I said, if there's something that's
22 particularly important to where you feel in-house counsel needs
23 that particular information or document access, talk about it,
24 try to get a quick yes or no, and as I said, if there's a
25 dispute, you can bring it to my attention.

J811nysa

1 MR. GELFAND: Very well, your Honor.

2 The other issue -- and I don't know what your Honor
3 has in mind, but there's a tendency, in my experience, in these
4 cases for people to designate way too much.

5 THE COURT: That is surely true.

6 MR. GELFAND: And I think it would be helpful if we
7 had a very clear and enforceable standard for what materials --

8 THE COURT: What do you propose?

9 MR. GELFAND: I'd like to have an opportunity perhaps
10 to submit a suggestion on that. I don't know that I --

11 THE COURT: How are we going to avoid another sort of
12 lengthy dispute on that so we don't hold up production? Of
13 course, is everything being produced so that outside counsel at
14 least see it so we're not delaying things?

15 MR. GELFAND: Correct, yes.

16 THE COURT: Okay. If you want to make a submission on
17 that, I'm fine. I don't need a full brief. I'm perfectly fine
18 with letters that are three pages or less, as you know,
19 according to my rules. You can attach exhibits. And of course
20 I always believe in meeting and conferring first. And of
21 course others get the opportunity to respond.

22 When would you get that submission in?

23 MR. GELFAND: We'll get that submission in on Monday,
24 if we could.

25 THE COURT: Okay. How much time is needed for

J811nysa

1 response to that?

2 MR. GELFAND: I think probably as third parties,
3 because the states don't have a dog in this race --

4 THE COURT: I know. Where are the third parties?

5 MR. BURKE: Hello, your Honor. I'm Arthur Burke. I'm
6 representing Comcast. I think we can probably meet and confer
7 tomorrow and we'll reach resolution and we can respond by
8 Wednesday.

9 THE COURT: That's great.

10 And if you want to reply, you can reply, you know, two
11 days later, okay?

12 MR. GELFAND: Thank you, your Honor.

13 THE COURT: You're welcome. All right.

14 Moving on. Or was there anyone else who wanted to
15 speak to the protective order?

16 Okay. Good. So the next thing I had on the agenda
17 were a couple of items that were raised in the letters that
18 raised the trial date issue and looked like they were along for
19 the ride because they've been arranged in the case management
20 order that's been submitted, and those issues that I have in
21 front of me include the time of depositions, total time, and
22 time for deposition that the parties will have with respect to
23 depositions of party employees, and the location of those
24 depositions.

25 So let's start with time. The plaintiff states are

J811nysa

1 asking for 150 hours total, with seven hours max per
2 deposition, and the defendants are suggesting 60 hours, with a
3 max of three hours of deposition. And I'd actually like to
4 hear from the defendant first on this, just to understand where
5 the shortened time comes from, the three hours. Are these
6 people who have been deposed before so you think there's not as
7 much time needed, or is it a narrow category of information
8 that hasn't already been exchanged that can be limited because
9 of efforts with the DOJ or whatever? Help me understand that.

10 MS. LEVIN: Sure. Good afternoon, your Honor. Hallie
11 Levin for T-Mobile and Deutsche Telekom.

12 So the rationale behind the three hours actually
13 arises from Judge Marrero's individual practices. In his
14 individual practices, Rule IV(A)(2), he provides that if the
15 discovery plan contemplates that any party conduct more than
16 five depositions or any particular deposition requires more
17 than three hours to complete, that circumstances shall be
18 stated in the CMO and leave, of course, therefore shall be
19 sought at the initial conference.

20 So we start with the judge's three-hour presumption.
21 But we go further than that.

22 THE COURT: I hope so, because that is not designed
23 for a case of this nature.

24 MS. LEVIN: This is not a slip and fall. Absolutely.

25 So we go farther than that, because to start, over 180

J811nysa

1 hours of depositions were taken by plaintiff states and DOJ
2 from 23 witnesses before the complaint was filed. Over 18
3 hours of on-the-record testimony from T-Mobile and Sprint
4 witnesses were taken before the California Public Utilities
5 Commission, which plaintiff states attended. There are also
6 nine hours of Congressional testimony from Sprint's former CEO
7 and T-Mobile's CEO.

8 So that's sort of the general background of the sort
9 of sprawling deposition and testimonial record that we come to
10 this proceeding with. If you have questions about the
11 particular witnesses whose depositions have been noticed, I can
12 also give you some metrics around those.

13 THE COURT: Well, yes, my question generally on that
14 is, there's a degree of overlap with witnesses who have fully
15 given testimony in some other context.

16 MS. LEVIN: Sure. So thus far in the proceeding
17 plaintiffs have noticed 11 depositions of employees or former
18 employees of the defendants. Five of those are already
19 identified on our fact witness list. And to level that, we
20 acknowledge that plaintiffs should be permitted to depose the
21 witnesses on our fact witness list, and that that would not
22 count towards the 60. If you're speaking directly about the
23 three-hour limits that we are suggesting, there I can go
24 through the specific depositions and the prior depositions that
25 have already been taken.

J811nysa

1 So they've requested the deposition of John Legere,
2 T-Mobile's CEO. He was already deposed for -- I'm going to
3 give you a specific number -- six hours and 42 minutes at DOJ
4 and gave over nine hours of Congressional testimony, along with
5 Marcelo Claure from Sprint. Mike Sievert, whose deposition
6 they've noticed in this proceeding, already gave about six and
7 a half hours of testimony. He also gave testimony before the
8 California Public Utilities Commission, and also attended a
9 number of interviews with DOJ and the states in addition to
10 those sort of public recorded testimony experiences. Tom Keys,
11 whose deposition has been noticed, already gave a
12 seven-hour-and-two-minute deposition. Marcelo Claure has
13 already given ten hours and 23 minutes of deposition.

14 THE COURT: All right. You don't need to keep going.
15 Very illustrative.

16 I wasn't clear on the 11. Was that 11 that overlap or
17 don't overlap?

18 MS. LEVIN: There are 11. Eight of them overlap;
19 three have not had prior testimony taken.

20 THE COURT: All right. Let me hear from the plaintiff
21 states on why they think they need 150 hours and a max of seven
22 with no restrictions.

23 MR. POMERANTZ: Thank you, your Honor. Glenn
24 Pomerantz. Do you want me to speak here or do you want me to
25 go back there?

J811nysa

1 THE COURT: Wherever you're most comfortable.

2 MR. POMERANTZ: All right. I will try here. Can you
3 hear me?

4 THE COURT: Yes.

5 MR. POMERANTZ: Okay. So with respect to the prior
6 investigation and testimony that was taken during the
7 investigation, we cited law on this -- the *Saul* and *Sargent*
8 cases. And what those cases stand for is that government
9 agencies often investigate to make an enforcement decision, and
10 if they make the decision to then pursue a lawsuit based on
11 that investigation, the courts do not restrict them to
12 testimony or evidence that they haven't had a chance to get, so
13 of course there's always going to be some factual overlap. And
14 there's zero law that they have cited and that we have found
15 that would say that a government agency is restricted when they
16 get into civil discovery by the fact that they took pre, you
17 know, investigation testimony or documents.

18 THE COURT: I'm looking at it from a little more
19 factual perspective. Do you mean new testimony? I understand
20 certainly there needs to be inquiry regarding the actual
21 divestiture and modifications that came about in the DOJ's
22 final arrangement or the deal with Dish, etc. But what beyond
23 that? Is that the only thing that really needs to be
24 investigated by the states that hasn't been fully vetted
25 elsewhere, or is there something else?

J811nysa

1 MR. POMERANTZ: There are two things. Obviously there
2 have been a bunch of developments that have occurred since that
3 investigation, and basically the document production ended in
4 mid-2018, and so part of the document production, most of which
5 has now been agreed upon, is giving us updates on that for the
6 last year. And of course competition continues. Evidence
7 continues. So one of the things that we were going to want
8 to --

9 THE COURT: Well, a reason to cut things off at some
10 point.

11 MR. POMERANTZ: And we have cut it off. I think we're
12 on agreement that much of the discovery is cut off the
13 beginning of June or the end of June. Most of that has been
14 agreed upon by this point. But there's going to be a year of
15 competition that we need to examine. Within that, there's
16 been -- auctions for Spectrum, for example. There are
17 important inputs that affect the competition analysis. Then,
18 of course -- and I don't want to minimize this -- we have all
19 of these developments in the last two months that have to do
20 with the now disclosed agreements with the DOJ, with Dish, and
21 with commitments to the FCC, none of which have had any
22 discovery at all. And then there's the practical consideration
23 that we now try to put together a case for trial, and the kind
24 of questions you would ask at a deposition, particularly a
25 deposition in which that witness is not going to show up live

J811nysa

1 at trial, is very different than what the DOJ may have asked at
2 the outset of an investigation. And so we need a fair
3 opportunity to question these witnesses.

4 And there's an important thing about the prior history
5 that your Honor should be aware of. All but one of those
6 depositions was taken by the DOJ. Under the DOJ manual, the
7 DOJ can invite the states, their lawyers to come and
8 participate, in the sense that they can sit and listen. But
9 they are not permitted to ask questions. So all of the states
10 who are now here before your Honor did not ask any questions in
11 any of those depositions, save one, in which New York was the
12 one who actually noticed and took that deposition and the DOJ
13 was an interested party. That's the way it worked back then.

14 So we definitely need to have the kind of discovery --
15 and we're only taking seven hours, your Honor, so, I mean,
16 that's the presumptive number in the rules. And the idea that,
17 as your Honor says, a case of this importance, with these kinds
18 of recent developments, really, really cries out for a fair
19 opportunity to get these facts. We're going to be constrained
20 by the number of hours, whatever those are. We're going to
21 have to have some constraint there because there are a lot of
22 witnesses in this case, so we're going to have to kind of make
23 some choices.

24 Why the 150 hours instead of the 60 hours that they
25 have proposed? Well, again, your Honor, when you look at the

J811nysa

1 other cases that could be comparable -- for example, the
2 AT&T/T-Mobile case may be the most comparable because it's the
3 same industry. In that case, they had way more than 150 hours
4 that was allowed. In fact, virtually every case -- a lot of
5 these are cited in footnotes that your Honor has read, so I'm
6 not going to go through it.

7 THE COURT: You're assuming I read the footnotes.

8 MR. POMERANTZ: I don't think there's any case, any
9 merger case where there was anything close to 60 hours, that
10 kind of a limit, and I'm not sure that there's any that are as
11 low as 150. But frankly, we're not the DOJ; we're the states.
12 We have to use our resources wisely, and as we sort of looked
13 at what we had to do to properly gather the facts and present
14 them to Judge Marrero so he can make an important decision
15 correctly, we felt that 150 hours was about the max that we
16 could probably do, and we felt that, give us seven hours for
17 these witnesses, give us 150 hours, plus whatever the trial
18 witnesses are. Right now they disclosed, I don't know, five or
19 six witnesses, I'm not sure how many, but -- so those were sort
20 of on a separate track.

21 THE COURT: And the experts.

22 MR. POMERANTZ: And the experts are separate as well.

23 That seems not only fair with respect to this case but
24 fair with respect to any other merger case that the parties
25 have identified in their letters to you.

J811nysa

1 THE COURT: Do you want to respond at all to that?

2 MS. LEVIN: I do, briefly.

3 First, with respect to the ability of the states to
4 consult with DOJ during those DOJ depositions, I am told, by
5 those who were there, that the states were able to and did
6 confer with DOJ during the depositions, so were able to, if not
7 actively ask questions themselves, were able to otherwise
8 confer during the course of those depositions.

9 Second, with respect to the AT&T/T-Mobile deposition
10 discovery to which Mr. Pomerantz referred, I am also told by
11 the legions of very esteemed antitrust colleagues sitting with
12 me at counsel table that in their collective recollection,
13 there had been no more robust, comprehensive investigative
14 record than in this case, so while there may have been more
15 civil litigation-related depositions in AT&T/T-Mobile, in this
16 case the precomplaint investigation was more comprehensive and
17 robust than any colleagues of mine can recall.

18 I take Mr. Pomerantz's point that he believes that
19 there are topics that need to be incrementally covered for
20 witnesses who have already testified, but I would submit that
21 having been subjected to so much testimony already, there
22 should at least be some subject matter limitation and attendant
23 hours limitation for those witnesses.

24 THE COURT: This is what I'm going to do. I'm going
25 to grant 140 hours, and I'm not going to put a limit. Set the

J811nysa

1 presumptive seven hours. The fact is, 140 hours, again, for a
2 case of this magnitude notwithstanding, all the prior
3 investigatory work and other proceedings involving it, is
4 actually a very low number. And I don't presume to be in a
5 position to dictate how many hours counsel should spend with
6 particular witnesses so I don't want to put on an official cap.
7 And more importantly, because it is such a low number,
8 actually, I believe counsel will use their time wisely and will
9 not be simply asking questions to badger somebody in a case
10 like this.

11 All right. Location of party depositions. The
12 plaintiff states have requested that all depositions of party
13 witnesses take place in California and New York, with the
14 exception of four that may be somewhere else at I guess the
15 parties' choosing. And the defendants take the position that
16 it should be on a sort of case-by-case basis, and at least I
17 think in one of the most recent submissions there was a
18 representation that many of the depositions have or are being
19 scheduled for New York and California. But help me on this
20 one.

21 MR. POMERANTZ: Your Honor, so I think, generally
22 speaking, there is a presumption that you take the deposition
23 where the witness resides. I think also there is discretion
24 with your Honor, with the Court, to change that location
25 presumption. Our recommendation is that you reverse that

J811nysa

1 presumption -- that is, that it's going to presumptively be in
2 New York or California -- and if they think that a certain
3 witness can't travel for a certain reason, we'll work with
4 them. In fact, that's why, in our proposal, we suggested that
5 they can choose any four witnesses and we'll go someplace.
6 We're obviously trying to do this in order to keep the case
7 moving forward on an expeditious pace and so that we don't --
8 because clearly, if we have to travel to Kansas, where Sprint
9 is located, or to the state of Washington, where T-Mobile is
10 headquartered, or if we have some regional witnesses who,
11 wherever they're located, or for Deutsche Telekom, who is now
12 telling us that we have to go either -- that we might have to
13 go to London for those depositions, we would ask your Honor to
14 reverse the presumption. I have a feeling that with the
15 lawyers I know well on the other side, that if there really is
16 a good reason to move it from someplace other than California
17 or New York, that we'll work it out. Frankly, I do not expect
18 to see your Honor again on this issue, but I would ask that
19 you, you know, formally reverse that presumption -- that is,
20 that it's not presumed to be where they reside. All of these
21 witnesses, at least the ones that were deposed, they all
22 traveled to Washington, DC for the depositions during the
23 investigative phase. This is obviously the highest priority
24 for these companies. This obviously doesn't affect third
25 parties at all. We're going to have to go wherever they tell

J811nysa

1 us to go. But for the parties who are here trying to get this
2 merger to not be enjoined by Judge Marrero, it's not too much
3 to ask them to go to New York or California for these
4 depositions.

5 THE COURT: Okay. Thank you.

6 Yes.

7 MS. LEVIN: Yes. Thank you, your Honor.

8 So a couple of responses to that. First of all, I
9 would say that on a case-by-case basis, which is what
10 defendants had proposed the parties try to sort of do to work
11 out this issue, on a case-by-case basis, this has been going
12 quite smoothly so far. But with respect to why plaintiffs
13 think that they're entitled to entirely reverse the
14 presumption, I don't think Mr. Pomerantz's argument is
15 particularly well founded. There are legions of lawyers for
16 plaintiff, and for defendants as well, who have entered
17 appearances in this case and who can presumably travel to where
18 the witnesses need to go beyond New York and California, should
19 that need arise, in particular when it comes to the witnesses
20 who are located outside of the United States. I think that
21 there are, you know, certainly reasons having to do with the
22 witnesses', you know, business and the extraordinarily, you
23 know, active business responsibilities that they each have that
24 would make it difficult for them to fly in some cases halfway
25 across the country.

J811nysa

1 THE COURT: There is definitely consideration to that.
2 Of course they're trying to conduct a lot of their business
3 through this transaction in the US, so I think they would have
4 an interest in coming here as well.

5 MS. LEVIN: I appreciate that. And I should
6 definitely permit counsel for the witnesses who do reside
7 outside of the US an opportunity to speak to that issue.

8 THE COURT: It depends on who is sought to be deposed,
9 but in terms of foreign witnesses, what number are we talking
10 about as compared to say, well, in the US?

11 MS. LEVIN: Presently there are two deponents who have
12 been noticed outside of the US, who reside outside of the US.

13 THE COURT: Okay. And taking that deposition here
14 would probably require that person to come over with maybe one
15 other person -- I don't know, maybe in-house counsel, maybe a
16 couple -- but if we do it there, how many lawyers are going for
17 everyone concerned? I don't know how many states. I'm just
18 thinking, in terms of real practicality and efficiency, there
19 may be a reason to do otherwise. But I understand the
20 concerns.

21 Go on. I'm sorry.

22 MS. LEVIN: And I don't know that I had --

23 THE COURT: Help me with the -- you said everything is
24 going okay so far. Meaning what?

25 MS. LEVIN: Meaning that -- and I'm looking at my

J811nysa

1 colleagues. As I understand it, with the exception of those
2 two foreign deponents, who I think they're still meeting and
3 conferring about the location, I believe that every other
4 employee witness of the parties has been agreed to be deposed
5 in either California or New York.

6 THE COURT: Okay. And let me ask, have you talked to
7 others? Is there a sense of how many might not want to be
8 deposed in New York or California? I'm not asking for a number
9 on the spot, but if it's been going well so far, it doesn't
10 seem like the largest concern.

11 MS. LEVIN: And to be fair, the plaintiffs have
12 already acknowledged that there are four on each side that they
13 would sort of I think presumptively suggest to take place
14 outside of California or New York. I'm not necessarily sure
15 that we're going to bump up against that, but I do --
16 Mr. Parker, would you like to speak to that.

17 MR. PARKER: Your Honor, Richard Parker. I represent
18 Deutsche Telekom.

19 We have two witnesses who reside and work every day in
20 Germany, not in the United States. We're most certainly
21 willing to bring them to London, where the rules are such that
22 you can take a deposition. In Germany, apparently, it's very
23 difficult. We will attempt to bring them to New York, if
24 that's possible, depending on the schedule. If we agree on a
25 schedule that works where we can get them to New York, we will,

J811nysa

1 but I'd like to reserve the right to agree to have the
2 deposition in London as a compromise position. That's all I'm
3 saying. A lot of it has to do with scheduling, your Honor.

4 THE COURT: Sure, of course.

5 MR. POMERANTZ: Your Honor, so a couple things.

6 First, I do believe these two gentlemen from Deutsche
7 Telekom do, with some frequency, come to the United States.
8 That's our understanding.

9 Second, an example of one that I forgot; I think that
10 Ms. Levin may have forgotten too. So there's a former T-Mobile
11 employee, and we were told by counsel for T-Mobile that they
12 don't represent him, at least for purposes of serving a
13 subpoena. So they gave us a name of this former employee's
14 lawyer, who we reached out to. Now T-Mobile's counsel has not
15 said they're not going to represent him at the deposition, so I
16 don't know what's actually going to happen. But this former
17 employee, who still resides I believe in the Seattle area, has
18 asked to have his deposition taken in Seattle. And I think as
19 a former employee who at least doesn't appear to be represented
20 by T-Mobile's counsel, we have to accommodate him. So we are
21 doing that. So there's going to be examples like that where
22 we're going to have to, unfortunately, incur the delay and cost
23 to go someplace else. We're just asking that where they are
24 current employees of these parties, that the presumption is,
25 they come to California or New York. And as they said, so far,

J811nysa

1 with the exception of these two German residents, they've
2 agreed to do that.

3 And so I think that if your Honor would give guidance
4 that at least presumptively it should be in California or New
5 York, we're probably going to continue on exactly the course
6 we've been on so far.

7 Now I do believe that so far the reason why they've
8 agreed to California and New York is because we haven't been in
9 front of your Honor, but I was hoping that if you would just
10 reverse the presumption, again, it's my prediction that I won't
11 see you again on this issue. I may see you on other issues,
12 but not this one. That's our hope.

13 THE COURT: Okay. You know, this is the type of thing
14 that I think is important in some ways to leave it to a
15 case-by-case basis, but you're asking about a presumption, and
16 that means in every case it will be on a case-by-case basis.
17 It's not a rule that says this must be. It's rather just,
18 let's try to do it in New York and California and, if that's
19 not convenient to the witness and there's some good reason for
20 doing it somewhere else, you'll do it somewhere else. And the
21 foreign deponents get to be deposed in London. I think that's
22 great that counsel has agreed to bring his folks over to London
23 from Germany. And I'm okay with reversing the presumption, but
24 it's a very weak presumption. You guys, I'm sure, are capable
25 of working this out. Again, I hate to bring work upon myself

J811nysa

1 in connection with this to invite disputes, but again, if
2 there's something that comes up that's a real problem, you can
3 bring it to my attention.

4 So I will reverse the presumption, lightly. And
5 foreign defendants get to be deposed abroad.

6 All right. That brings me to party employee
7 attendance at trial. And, you know, in some ways I feel that's
8 premature. On the other hand, there does sort of have to be an
9 understanding of what's going to happen in this regard because
10 taking depositions, you have to know if you're preserving
11 testimony for trial or not. It's helpful to have that
12 understanding. So help me there just a little bit.

13 MR. POMERANTZ: Yes. Your Honor, I wish I could ask
14 you to order them to show up for trial, but I can't find any
15 law that gives you that power. If you found it, let me know.
16 But the best I can hope for is that you, number one, order them
17 to tell us early who they are and who they're not bringing to
18 trial, because -- now again, if somebody regularly transacts
19 business, we can all look at the rules and try our best, but
20 I'd like to know at least from them who they say they're not
21 bringing, because that affects our deposition taking and
22 strategy. If they're telling us that some employee, Employee
23 X, they don't intend to bring to trial, he lives in Kansas, and
24 I can't show that he regularly transacts business in this
25 district, then I may decide to take his deposition late in the

J811nysa

1 deposition period, because if it's going to be trial testimony,
2 I better know what I need for trial. And I think that's a
3 common, you know, tactic for any trial lawyer is that for ones
4 that you know where you're preserving the testimony for trial,
5 you may move them to later. And we may need to know before we
6 take the deposition what their position is as to whether
7 they're bringing him or her to trial or not. So I would ask
8 that at least they give us some notice -- the sooner the
9 better -- of who they are going to bring and who they're not
10 going to bring. We will look at the ones that they're not
11 going to bring and decide whether we have an argument that they
12 should be compelled, and if we can't reach an agreement, we
13 might be back here. But I at least would like to have notice
14 of that so that we can both discuss it with them and prepare
15 for our deposition strategy accordingly.

16 THE COURT: Okay. Thank you.

17 Defendants?

18 MS. LEVIN: Thank you, your Honor.

19 I think that that is actually an acceptable resolution
20 for defendants. I do think that having a certainty around when
21 the trial is going to be makes that in some ways a little bit
22 easier, but hopefully we'll get more clarity on that, but I
23 think the notion of giving them advance notice of our
24 intentions to bring these witnesses to trial is reasonable
25 under the circumstances.

J811nysa

1 THE COURT: I appreciate the cooperation, and I think
2 that is a good ruling. We'll get that out of the way.

3 Okay. So that brings me to Docket 138, which is a
4 motion to compel or request for conference to discuss a motion
5 to compel by plaintiffs regarding responses to the second set
6 of requests issued to Deutsche Telekom. Do I have that right?

7 MS. WESSELS-YEN: That's right, your Honor.

8 THE COURT: All right. And let me ask a question of
9 defendants on this one. Actually, no. I'll stick with you.
10 I'm sorry.

11 Based on my reading of the correspondence, I'm going
12 to ask if this might be the case. I'm probably wrong, but it
13 would be good if I'm right. Is the only issue at this point
14 from this letter really Mr. Wittig?

15 MS. WESSELS-YEN: Unfortunately that's incorrect, your
16 Honor.

17 THE COURT: Okay. All right. I tried.

18 MS. WESSELS-YEN: We have three issues. The first is
19 Mr. Wittig and whether all documents for Mr. Wittig need to be
20 gathered and searched. Our position is that, as your Honor can
21 see in Exhibits D and E to the letter, that Mr. Wittig does
22 have considerable information that is very relevant to the
23 comparisons between US and other markets.

24 THE COURT: And I understand that various Wittig
25 documents came from others or the information that he has was

J811nysa

1 produced by others. Why isn't that sufficient?

2 MS. WESSELS-YEN: Your Honor, we have only files from
3 only three Deutsche Telekom custodians to date. We believe
4 that Mr. Wittig will have additional analyses and
5 communications in his documents, and we believe the incremental
6 burden to producing a single custodian's documents in a case
7 with a \$26.5 billion merger is very small, is proportional
8 under Rule 26.

9 THE COURT: Of course these all add up when you do one
10 at a time, right? So we have to decide which are the more
11 important ones. What is his position? What was he doing?

12 MS. WESSELS-YEN: Mr. Wittig's job title is I believe
13 vice president regarding investor relations, if I'm not
14 mistaken. He is acknowledged in internal company documents as
15 their MVNO expert. And as your Honor can see from those
16 exhibits, he is very adept in discussing the events of other
17 mergers in the US in determining what kinds of merger mechanics
18 would be best to use.

19 THE COURT: Okay. Let's knock these off one at a
20 time. How about a response on Mr. Wittig?

21 MR. SOVEN: Your Honor, Josh Soven from Wilson Sonsini
22 for Deutsche Telekom.

23 Respectfully, I think the only issue is Mr. Wittig.
24 But we'll go on.

25 So I think the most productive way to do this is to

J811nysa

1 bifurcate the time periods at issue here. One is the period,
2 the three-year-and-a-half period covered by the DOJ
3 investigation; the second is the year post that.

4 As your Honor noted, we produced thousands of
5 documents plus from Mr. Wittig's files in response to DOJ's
6 subpoena. We haven't heard any indication as to why they think
7 there's any other material out there. Ms. Wessels-Yen is
8 exactly right, it's a big case, but I think you're right as
9 well --

10 THE COURT: Are you saying that you think all
11 documents that would be within Mr. Wittig's custody as the
12 custodian have been produced? It didn't sound like that's what
13 the issue is about.

14 MR. SOVEN: I think it is highly likely that all
15 responsive documents in Mr. Wittig's files have been produced,
16 because when he writes about the subjects that the plaintiffs
17 are interested in, he sends those documents to the three other
18 custodians.

19 I mean, to cut to the chase, we can spend, you know,
20 another hundred thousand dollars pulling his documents for the
21 investigation period, but we respectfully suggest, look, even
22 in a matter of this size, there is some value to thrift, and
23 while we're willing to engage with Ms. Wessels-Yen on
24 Mr. Wittig's documents post the investigation cutoff, we think
25 it is an undue burden to go back and redo the three and a half

J811nysa

1 years.

2 THE COURT: Right. And I assume, in referring to the
3 post period -- I think in your correspondence you made a
4 representation that of course you're producing documents for
5 that period. Are you saying you're willing to add Mr. Wittig
6 into that?

7 MR. SOVEN: Yes, we are.

8 THE COURT: Of course that is, well, like we said,
9 post DOJ. It may be that he had more interesting and valuable
10 things to say before that.

11 And did your counterpart over here describe correctly
12 what he does and that he has written on the effects of mergers?

13 MR. SOVEN: In part. He's the director of investor
14 relations. The bulk of his responsibilities are dealing with
15 analysts. That's really what he does. And so he goes out and
16 speaks to analysts and talks about market structure and the
17 like. He occasionally delves into some subjects that the
18 plaintiffs are interested in, again, and if you look at the
19 documents that they're citing, all of those documents mention,
20 you know, have the three custodians who we already searched and
21 produced 100,000 plus pages from in the investigation period.

22 THE COURT: What is the length of the pre-DOJ period
23 for which documents have been produced?

24 MR. SOVEN: So for the DOJ period it was three and a
25 half years. It was 2015 to summer 2018. The post period is 12

J811nysa

1 months. So again, we think an equitable approach is, you know,
2 we'll go look at his documents post, but to go back and redo
3 that a specific --

4 THE COURT: Well, like I said, I think the more
5 valuable information, if it's there, would be prior to DOJ,
6 prior to the post-DOJ period.

7 But nonetheless, let me hear back from the plaintiffs
8 on this.

9 MS. WESSELS-YEN: Your Honor, it's of course necessary
10 that if we're shown documents, they only come from those three
11 custodian files. It's a little bit difficult to prove a
12 negative that there are additional documents out there;
13 nevertheless, we do believe that based on Mr. Wittig's
14 expertise and based on the documents we've seen so far, that
15 there are further documents out there. The ones that we have
16 at issue are from 2017, and additional documents that we have
17 shown to your Honor are from considerably earlier, and we
18 believe that those documents are also important on this issue.

19 THE COURT: I think given Mr. Wittig's subject matter
20 areas of interest or expertise, it's a good idea to make sure
21 we get his documents, so yes, I'm going to ask you to go back
22 and get them, for both periods.

23 MR. SOVEN: Okay.

24 THE COURT: All right. And then the next issue in
25 here --

J811nysa

1 MS. WESSELS-YEN: Your Honor? I'm sorry.

2 THE COURT: No. Go ahead.

3 MS. WESSELS-YEN: The second area where there's
4 daylight between us and plaintiffs with regard to these
5 Deutsche Telekom documents is whether Deutsche Telekom has
6 already agreed that it will collect -- apply search terms for
7 and provide files for the three custodians.

8 THE COURT: Right.

9 MS. WESSELS-YEN: Where there's daylight is that we
10 would like them to apply those same exact search terms to the
11 documents that are already in their reviewed database for these
12 custodians, to exclude from those search results documents that
13 have already been produced, and if there are incremental
14 documents, and we believe there will be, with these narrow
15 search terms, to add those to the production.

16 THE COURT: I didn't fully understand exactly what you
17 were saying there. To go back to which custodians and do that?

18 MS. WESSELS-YEN: The three custodians who DOJ has
19 already reviewed documents from.

20 THE COURT: Right. Okay. And they've said they'll do
21 it for the later period but they don't want to go back and do
22 it for the earlier period.

23 MS. WESSELS-YEN: Yes. And we think instead of
24 artificially reducing the review set, that counsel can just as
25 easily apply those search terms to the new review sets and the

J811nysa

1 old review sets, excluding all documents already produced, and
2 to provide incremental documents.

3 THE COURT: And you said the documents already in the
4 database.

5 MS. WESSELS-YEN: That's our understanding.

6 THE COURT: Let me hear from the defendant.

7 MR. SOVEN: So that I will respectfully push back on a
8 little bit more.

9 So the premise for this audit, if you will, or redo of
10 what's already been done I think is not well founded. The
11 subpoena is substantively identical to the second request that
12 the Justice Department issued, which is their large merger
13 investigation subpoena. Those documents were searched through
14 a rigorously vetted technical assistance review program the DOJ
15 monitored every step of the way. I have not heard any
16 deficiencies whatsoever in how that search was conducted. And
17 the premises on which we're being asked to do this all turned
18 out to be wrong. The basis of the motion for the redo was
19 first that we didn't produce texts. That's not true; we did
20 produce the texts. The second basis for the motion was that we
21 didn't produce documents related to an analyst workshop; we
22 produced all of those. We were supposed to have not produced
23 documents for Mr. Wittig; we produced a thousand documents from
24 Mr. Wittig. We were supposed to have not produced documents
25 from Mr. Stern; we produced those documents too. So what's

J811nysa

1 being proposed here is sort of this forensic analysis where
2 we're meant to guess where we fell short, and I think that's
3 unreasonable.

4 THE COURT: Thank you, because I hadn't quite put
5 together what you were addressing was the issue about the texts
6 and the study, because it did seem to me these were limited
7 areas where you were concerned about going back to get
8 documents as opposed to just everything. But that was helpful.

9 MS. WESSELS-YEN: Your Honor, with regard to the
10 study, that actually relates to Document Request No. 2. We
11 thank DT's counsel for pointing us to those two documents,
12 comprising 360 pages. We were able to discover that some of
13 those documents had been misfolded in our system, and we do
14 apologize for not realizing that. DT's counsel has confirmed
15 that those two documents are the only documents that they have
16 produced regarding a series of workshops. We have dozens of
17 documents in T-Mobile's production regarding these series of
18 workshops which do not appear in DT's production. Nor would
19 they be expected to because Mr. Stern has departed DT and his
20 documents were not searched. However, Mr. Langheim was a
21 participant in the series of workshops that resulted in this
22 one document that has now been produced in two different forms,
23 and we believe it is to be expected that there would be
24 considerable documents about his retention of the firm to begin
25 with, about the premises for the workshops, about the progress

J811nysa

1 of the workshops, about the presentations made during those
2 workshops, and, most importantly, about the extent to which
3 Mr. Langheim and Mr. Höttges and other custodians agreed with,
4 adopted, or carried out any actions in the document at issue,
5 which New York will just characterize as being extraordinarily
6 probative to the allegations in paragraphs 4 and 6 of its
7 complaint.

8 THE COURT: Again, you're proposing doing this and
9 going back and doing it for three custodians?

10 MS. WESSELS-YEN: Those three custodians in
11 particular, your Honor. The study at issue, those workshops
12 that resulted in that one summary document, and we think many,
13 many others, was in the end of 2015.

14 THE COURT: Okay. So we can narrow it to those three
15 custodians. In other words, they're not going back and
16 searching --

17 MS. WESSELS-YEN: We are only asking for the files of
18 those three custodians to be searched, your Honor.

19 THE COURT: All right. Help me there. It sounds like
20 there's more information on it, subject to seeing them.

21 MR. SOVEN: Well, I don't think that's true. I mean,
22 the implication of that is we failed to produce documents which
23 we were supposed to produce to the Justice Department subpoena,
24 which we took quite seriously. I worked there 11 years.
25 That's a big thing.

J811nysa

1 THE COURT: I have no doubt.

2 MR. SOVEN: And as I asked Ms. Wessels-Yen yesterday,
3 we could benefit from some guidance as to where the search
4 methodology was somehow deficient for the DOJ period, and we
5 haven't received that information.

6 But our bottom line, your Honor, is, we did all that
7 work. I don't have any reason to believe that a search that
8 would produce the end product of a consultant's work somehow
9 would not capture other documents related to that, and we think
10 the appropriate thing for the parties to do is to agree on a
11 reasonable set of search terms for those three custodians going
12 forward and that's sufficient.

13 Again, all of this adds up, and we understand that
14 it's a big case, but we do know, you know, if we do this again,
15 we're going back to the client and telling them they will get a
16 six-figure bill.

17 THE COURT: I know. It's not like everything they
18 think is deficient they get, and I absolutely agree with you on
19 additional work and cost. But can't you just go into the
20 database and look for some documents on these workshops and
21 say, oh, here are some documents that weren't produced, and if
22 they were produced, tell them, and then it turns out those are
23 misfiled? And you don't have to do it for every document, but
24 sort of test the waters of perhaps whether these materials are
25 there.

J811nysa

1 MR. SOVEN: I think we could do that if we get some
2 guidance from the states on what they want us to look for. As
3 drafted, the subpoena requires us to produce all documents
4 related to competition in US market. That's 1(a) of the second
5 set of requests.

6 THE COURT: Okay. So we have a disconnect. Because
7 on the one hand I'm hearing narrowly focused on particular
8 workshops; here I'm hearing about a request that could be every
9 document under the sun.

10 MR. SOVEN: That's what it sounds like.

11 THE COURT: So what is it that you really need?

12 MS. WESSELS-YEN: Your Honor, the request for
13 documents regarding competition is of course relevant to the
14 additional custodians and to the new refreshed time period.
15 The request that we're now discussing is No. 2, and for that,
16 we believe that search terms regarding, for example, the name
17 of the firm that provided the -- facilitated the workshops and
18 provided the work product would be a very simple, easy search
19 term to run, a reference to workshops within the few months
20 period.

21 THE COURT: Okay. That's what I thought.

22 So you're going to meet and confer, you're going to
23 tell him some terms, you're going to go look, test the waters.
24 Not like a full-scale search. See what there is, okay, we'll
25 search broadly, more broadly, specifically with those terms,

J811nysa

1 and we'll give them to you. So let's do that.

2 MR. SOVEN: Okay. I just ask that we get some
3 guidance on that, because the broad spec covers 2015 through
4 the present.

5 THE COURT: Okay.

6 MS. WESSELS-YEN: Your Honor, with regard to the
7 narrower specs, we believe that there could also be a number of
8 easy search terms crafted similarly regarding consolidation,
9 regarding commoditization.

10 THE COURT: Wait. I'm sorry. I missed what you said
11 at the very beginning. You're now addressing what beyond the
12 workshops?

13 MS. WESSELS-YEN: I'm now returning to Document
14 Request No. 1 for the three custodians for the earlier time
15 period. And we believe that similar other narrowly crafted
16 search terms could be applied.

17 THE COURT: But is your concern again that you have
18 some really good reason to believe that there was certain
19 documentation there that wasn't produced, or are you just sort
20 of speculating about it?

21 MS. WESSELS-YEN: We believe that there may be
22 briefer, shorter text conversations that would not have been
23 located or email references that would not have been located in
24 a TAR review.

25 THE COURT: But have the parties agreed that they're

J811nysa

1 going to go back and look for things that TAR did not pick up?

2 MS. WESSELS-YEN: That is what we're asking, your
3 Honor.

4 THE COURT: I know you're asking. I asked if the
5 parties agreed. In other words, you know, there are systems of
6 searching, and it doesn't mean every time that the methodology
7 doesn't pick up something you go back and do over things,
8 because then again, they're caught in an endless loop.

9 But here's what I'm going to order on this. I just
10 want you to meet and confer. If there are particular terms
11 isolated to particular things, like workshops, that seems fine
12 for them to go test the waters. To test a concept I think is
13 too broad to go back and ask. They produced what needs to be
14 produced based on their methodology or whatever methodology was
15 used. But meet and confer. I mean, if there's, again,
16 something specific, talk about it.

17 MS. WESSELS-YEN: We do have just one final point,
18 your Honor.

19 THE COURT: Sure.

20 MS. WESSELS-YEN: There was a specific DOJ request for
21 documents regarding competition in countries outside of the
22 United States, and DT declined to provide documents relevant to
23 that. We believe that, especially based on Mr. Wittig's
24 documents, that the discussions regarding the comparisons
25 between markets, the remedies in other mergers and the extent

J811nysa

1 to which the outcomes of those mergers are relevant to DT's
2 goals, that those are very probative and important in this
3 case.

4 THE COURT: I'm sorry. You're saying that with
5 respect to this transaction, analysis of competition outside
6 the US is what you're concerned with?

7 MS. WESSELS-YEN: Your Honor, where DT's own documents
8 show that Mr. Wittig is using other merger results as
9 comparators, paradigms, benchmarks, etc., that these documents
10 that make those comparisons should be produced.

11 MR. SOVEN: Your Honor, I think I can cut through
12 this.

13 THE COURT: Yes, help me there.

14 MR. SOVEN: Our issue is not with documents that make
15 comparisons. There are many of those in the second request for
16 production. What we pushed back on was, if there's a document
17 that is solely focused on the telecommunications sector in
18 Lithuania, for example, that doesn't mention the US --

19 THE COURT: That's not a local market here?

20 MR. SOVEN: I don't think so. Right. That's going
21 too far. So I think we're on the same place, but hunting for
22 documents that talk about competition in any country under the
23 sun without a reference to the US we think is excessive.

24 THE COURT: Yes, I agree on that. We're not going to
25 go there.

J811nysa

1 Okay. Does that take care of 138?

2 MR. SOVEN: Yes, your Honor. Thank you very much.

3 THE COURT: All right. Bear with me. I go next --
4 since even though it's not number order, it is party order, so
5 I go next to 140, which is plaintiff's motion to compel
6 regarding first sets of requests for production. Let me just
7 pull that up.

8 Okay. Yes. So Docket 140, there's a responding
9 document, Docket 148. This has five areas, one of which is
10 incredibly expansive.

11 Okay. Who am I going to hear from on this?

12 MR. OLASA: For plaintiff's case, Kuruvilla Olasa.

13 THE COURT: And for defense?

14 MR. GELFAND: David Gelfand, your Honor.

15 THE COURT: All right. I just want to know where to
16 direct my voice.

17 Okay. So the first issue is communications regarding
18 potential remedies or agreements involving the Dish part of
19 this, and my understanding is that defendants say they produced
20 the agreements and the plaintiffs say they want more than just
21 the agreements. Do I have that right or is it something else?

22 MR. OLASA: Not quite, your Honor.

23 THE COURT: Okay.

24 MR. OLASA: The dispute here really is about internal
25 versus external communications. So we agree, the parties have

J811nysa

1 agreed that we get the agreements, we get the negotiating
2 history. The issue really is, what are the parties talking
3 about? When they agree on a term, why did they agree to that
4 term? Is it intended to hobble Dish's competitor or is it
5 intended to allow competition in a particular way? So our
6 understanding is defendants haven't taken the position that all
7 these documents are privileged. We'd be surprised if they
8 were. So we want to see: How did this deal come together?
9 What were defendants thinking? What were the people at
10 defendants saying about the various terms and how they would
11 affect competition in the market? And our understanding is
12 that defendants have refused to give us those internal
13 communications.

14 THE COURT: Because?

15 MR. OLASA: They believe it is not proportional to the
16 needs of the case.

17 THE COURT: All right.

18 MR. GELFAND: Your Honor, that's not quite accurate.
19 There are three categories of things that we did agree to
20 provide in connection with this collection of agreements with
21 Dish and the Justice Department and the FCC that relate to this
22 topic that the plaintiffs are interested in. One was all of
23 the communications with those entities about negotiating
24 agreements, the drafting history, correspondence back and
25 forth, anything substantive. We tried to exclude things like

J811nysa

1 scheduling emails, things like that.

2 I think the confusion here is that we drew a
3 distinction between internal and external, but we didn't say we
4 weren't going to provide any internal documents.

5 So there are two categories of internal documents that
6 we are agreeing and have already produced on a rolling basis.
7 One is board material. So if something went to the board of
8 directors and was a decision document or an analysis of the
9 agreement, that's going to be included. That's one category of
10 internal.

11 We also agreed to provide documents about Dish as a
12 competitor. So this is a topic on which one of our guiding
13 principles, your Honor, has been, let's try to focus on issues
14 that you consider to be important. And in fact, the example
15 that the plaintiffs had given -- and I agree, it's relevant --
16 if we have a document -- I don't think there will be one, but
17 if we have a document that says, let's do this with the
18 agreement so we can "hobble" Dish as a competitor, we're not
19 withholding that. We did a search for Dish, for the word
20 "Dish," among the two senior executives who were responsible
21 for negotiating these agreements, and we are producing anything
22 that relates to Dish as a competitor, or its competitiveness.
23 And that would capture "hobble" documents, which there won't be
24 any, but it would capture them if there were. And that's
25 whether they're internal or external.

J811nysa

1 The thing that we didn't want to have to produce are a
2 lot of internal documents about the negotiation with the
3 parties which are almost entirely going to involve legal
4 matters: Should we agree to this provision in the agreement or
5 that provision. If it relates to Dish as a competitor, that
6 would be produced. We're searching for the word "Dish." If
7 it's about what kind of limitation of liability do we have, how
8 do we view this consent decree with the Justice Department,
9 what are we exposed to in terms of liability, how does it work,
10 most of that is going to be privileged. What isn't privileged,
11 I can't think of how it's going to be relevant. But we asked
12 the plaintiffs, tell us, if there are topics like hobbling
13 Dish, which we are giving them, then give us specific topics
14 and we will go search for those.

15 What we don't want to have to do is collect up
16 thousands of documents, maybe tens of thousands of documents,
17 most of them are going to involve lawyers, and they're going to
18 be about negotiating agreements and almost entirely irrelevant
19 to the issues in the case, and also would also involve the
20 burden of privilege logs.

21 THE COURT: Yes. And I'm not sure I agree with your
22 first statement, that they wouldn't necessarily be relevant,
23 but they may well be privileged. And I understand your
24 adversary's position on correspondence, that there's a tacit
25 admission that there must be some documents that aren't

J811nysa

1 privileged, which is undoubtedly the case, but hard to say that
2 they're going to be the magic document.

3 But I'll allow the states to respond why that's not
4 sufficient, what's just been described.

5 MR. OLASA: Your Honor, our understanding is
6 defendants have taken the position that while they have
7 searched for the word "Dish," that they are not in fact going
8 to be giving us these type of internal communications where
9 they discuss specific parts of the remedy and determine whether
10 Dish had agreed to that proposal or that part of the remedy.

11 THE COURT: I didn't hear that as quite what they've
12 said. I think they've said they're certainly not going to
13 produce privileged documents, documents they claim are
14 privileged, but they're producing everything related to Dish
15 that's internal communications. Do I have that right?

16 MR. GELFAND: Not --

17 THE COURT: Not right?

18 MR. GELFAND: If it relates to Dish as a competitor.

19 THE COURT: Okay.

20 MR. GELFAND: So if the subject matter of the document
21 is, are they going to be a formidable competitor, are they
22 going to be a weak competitor, that was the one subject that
23 the plaintiffs identified to us, and we agreed. And we're
24 perfectly happy to meet and confer and talk about other
25 possible subjects. But as your Honor can imagine, when you go

J811nysa

1 through a month-long process and negotiate a series of
2 complicated agreements, many of which involve things that have
3 nothing to do with competition, how do we deal with monitor
4 trustee under the DOJ consent decree, how do we deal with --

5 THE COURT: In a case with any document collection,
6 you're going to get stuff that's not necessarily relevant.

7 Let me hear again from the state. He hadn't finished.

8 MR. OLASA: Your Honor, I heard Mr. Gelfand make a
9 really important limitation on what he said. He said they
10 produced documents about Dish as a competitor. But that's not
11 really what we're after. We're after the documents in which
12 they discuss this particular deal. We agree documents about
13 Dish as a competitor are relevant, and as part of the separate
14 document request, they did agree to produce those documents.
15 But this is something very different. This is about this
16 specific transaction with Dish. Is that a pro-competitive
17 transaction, is that transaction one designed to actually
18 create a forced competitor or hobble Dish in some way? So for
19 the general topic of Dish just out there as a competitor, in
20 our view, it doesn't quite capture what we're looking for,
21 which is an evaluation of this transaction.

22 MR. GELFAND: Your Honor, if I could, it will capture
23 those documents. We are not going to --

24 THE COURT: You don't need to go further. It does.
25 Absolutely, it does, Dish as a competitor. So I don't see a

J811nysa

1 need to do more there.

2 Let's go on to the competition in the local market
3 issue. Help me there, plaintiffs.

4 MR. OLASA: Your Honor, I think this is primarily a
5 dispute about where the relevant documents are. And we have
6 alleged local markets in this case, and at the initial
7 conference, Judge Marrero did ask some questions about local
8 markets. We cited Exhibit 8 in our transcript of his
9 questions, and we think it's an important part of the case.
10 And we understand and we appreciate that defendants have
11 offered to produce documents from senior executives sitting
12 high up in the company, but what we really need to get an
13 understanding of and a picture of is competition as it plays
14 out in the field. And we think regional vice presidents and
15 people of that level are more likely to have the type of
16 documents that show exactly how a strategy for a particular
17 region or particular geographic area actually plays out --
18 communications to people on the line, explanations of which
19 competitors are targeted, where stores should be opened because
20 they're targeting specific types of competitors. Those are
21 documents we're looking for. We don't believe decisions on
22 whether or not to target any specific geographic area would
23 bubble up to Mr. Legere or other senior executives.

24 THE COURT: Well, depends what the issue is.

25 MR. OLASA: Well, sometimes they might, I agree,

J811nysa

1 but --

2 THE COURT: Well, first of all, in terms of the number
3 of local markets, you had reduced it down to ten, your demand?

4 MR. OLASA: That's right, your Honor.

5 THE COURT: And how many custodians in each market
6 would that be?

7 MR. OLASA: So we haven't asked for custodians that
8 are within these markets; we've asked for custodians that are
9 above them. So that way we don't have to go into each market.

10 THE COURT: I'm just trying to understand the number
11 of custodians that are involved.

12 MR. OLASA: Between the two defendants, we understand
13 from defendant's letter it's about a dozen custodians.

14 THE COURT: Okay. And with the same search terms that
15 have been used for everything else or something more specific?

16 MR. OLASA: We generally have agreement on the search
17 terms for the existing custodians. We anticipate that if we
18 add these custodians, we may have to change the name of the
19 geographic area or something similar.

20 THE COURT: But it would be just as expansive?

21 MR. OLASA: It would be essentially the same type of
22 search terms.

23 THE COURT: All right. Mr. Gelfand.

24 MR. GELFAND: So here's the issue here, your Honor.

25 We have provided a couple of custodians of T-Mobile. I might

J811nysa

1 need to let Sprint speak for Sprint's situation. I can speak
2 to T-Mobile.

3 THE COURT: I remember the reference to that. People
4 at the national level, there were two from one and one from the
5 other.

6 MR. GELFAND: Yeah. And our two people, you can say
7 they're national in responsibilities, but the national
8 responsibilities include overseeing what happens in regions in
9 local areas.

10 THE COURT: Yeah, but how far do they get to drill
11 down versus the sort of getting sort of general top-level
12 information?

13 MR. GELFAND: I think they get a lot of material that
14 talks about individual locations. Obviously they're not
15 involved in a ribbon cutting at a new store on Main Avenue.
16 But they are definitely getting reports that talk about what's
17 going on in this city, what's going on in that city.

18 And one of the things -- I know your Honor is aware of
19 it, and we've put it in some of our letters, and you've heard
20 it discussed today. There's an enormous volume of materials
21 that were produced in the investigative record. Fine. The
22 Justice Department looked at these local area issues. The
23 Justice Department concluded there were not local markets, but
24 they examined it. There are a lot of documents in the
25 investigative file of the Justice Department, which the states

J811nysa

1 have, that deal with these particular topics. So when we
2 talked to them about, at least at T-Mobile, who our custodians
3 are going to be, we took one of the people whose
4 responsibilities include marketing throughout the country and
5 who does get a lot of these reports, and we also took a new
6 person who was never involved in the second request for
7 production, whose specific responsibilities are local marketing
8 activities, even though she has that responsibility across the
9 entire country, and we said we will apply these search terms.

10 By the way, for the various correspondence back and
11 forth and what sounds like some contentious issues, the
12 cooperation here has been quite good.

13 THE COURT: Oh, I have no doubt.

14 MR. GELFAND: We worked through search terms and we've
15 really accomplished an awful lot, and I'm very proud of the
16 team. We're moving this along, and it's really quite a
17 remarkable effort by both sides.

18 So we've agreed on search terms. We said we'll have
19 this additional person, but please, look at the million
20 documents you already have, and you've got to have documents in
21 there that are examples about local cities, regions, etc., and
22 tell us, what are the kinds of things you're looking for? We
23 can help you think about whether there are specific people who
24 would give you this additional drill-down that you need. Are
25 you looking for pricing issues? Because, honestly, that's

J811nysa

1 always going to be on a national basis. There's very little
2 pricing that's done locally. Or are you looking for store
3 openings?

4 THE COURT: Okay. You have the two. There was
5 somebody responsible for the local markets but nationally.
6 They're going to be breaking out things per local market, and
7 it's hard to know exactly how much volume would be involved in
8 what you're looking for. It could be enormous. And I sort of
9 have the same idea. Why can't you look at what's coming from
10 those custodians and say, okay, maybe this does give us what we
11 need. If there's not, then you go back to the well.

12 MR. GELFAND: And also what they already have from the
13 investigative file. It covered three and a half years. And
14 opening stores and ribbon cuttings has not changed in the last
15 year. That is fairly constant.

16 THE COURT: Okay.

17 MR. OLASA: A few responses, your Honor.

18 First, so we have looked at the production. We
19 appreciate they've added one custodian. But we have looked at
20 the production from the past, from the other custodians, and it
21 doesn't have the sort of local drilled-down information. It is
22 true there are occasionally a few examples of things happening
23 in the local market that bubble up to a senior executive, but
24 based on our review, we don't see sort of, day to day, the line
25 level work that's happening in competition.

J811nysa

1 I'll point out, I understand that in this case,
2 T-Mobile is taking the position that everything is done
3 nationally and there's no competition at the local level. But
4 in 2011, during the AT&T case, T-Mobile submitted a declaration
5 saying competition, it happens at the local level and T-Mobile
6 planned its competition that way. So we're entitled to look
7 into that. We've alleged local markets.

8 THE COURT: Well, you have. I know, going through the
9 complaint, that that's fully in there.

10 MR. OLASA: And at trial they're going to put us to
11 our proof. They're going to say, what is your proof in this
12 local market and this local market and this local market, and
13 they're not going to be okay with anecdotes at that point.
14 That's why we need this evidence.

15 THE COURT: And I'm sorry. You said it would be 12
16 overall custodians?

17 MR. OLASA: Yes, your Honor.

18 THE COURT: What's the volume of documents that have
19 been produced by Deutsche Telekom just using the search terms
20 you're talking about but with respect to what's been produced
21 so far?

22 MR. OLASA: For T-Mobile, your Honor?

23 THE COURT: Yes. I'm sorry.

24 MR. OLASA: We don't know. We just received a
25 production last night.

J811nysa

1 THE COURT: Let me ask Mr. Gelfand.

2 MR. GELFAND: I actually don't know the T-Mobile
3 specific. We're in the tens of thousands of pages of
4 documents.

5 THE COURT: That is very small. Wow.

6 MR. GELFAND: But your Honor, your Honor, I appreciate
7 that, your Honor, but as I said, we have been working really
8 cooperatively --

9 THE COURT: I understand that.

10 MR. GELFAND: -- to hone these search terms. These
11 are high-value documents that are going right to the topics.

12 THE COURT: Not only that. It is a fast-moving issue
13 and we don't want to overburden the case. It's a case that
14 lasts for years, and we're doing one that lasts for months.
15 But they do have the local market allegation, and there are
16 definitely issues about what's happening in this local market,
17 and there may be a market that's just fine, but there may be
18 one over here where it's a very different story.

19 So I'm prepared to order that there be some local
20 market discovery. You've reduced it to 10. Again, I'm just
21 concerned about what volume of documents we're talking about.
22 But you said 12 custodians overall?

23 MR. OLASA: That's right, your Honor.

24 THE COURT: These are persons at the local level?

25 MR. OLASA: They're regional vice presidents so they

J811nysa

1 oversee the local markets. And it's 12 between the two
2 defendants, so about six of one, six of the other.

3 THE COURT: And are all of them necessary in order to
4 cover those 10 markets, or is there some duplication?

5 MR. OLASA: There are some who cover multiple markets.
6 We'd have to go back and look at exactly what the configuration
7 is. But they do cover multiple markets.

8 THE COURT: But my question is, are there multiple --
9 can you reduce a custodian because another custodian can speak
10 to that local market?

11 MR. OLASA: We don't believe so, your Honor.

12 THE COURT: All right. Someone else has joined the
13 podium and is about to tell me why this should not be granted.

14 MS. HOFFMAN LENT: Your Honor, it's Karen Lent --
15 thank you -- on behalf of Sprint.

16 I want to correct the record a bit in that it's not
17 six and six for the defendant; it's actually nine for Sprint
18 and I think it's four for T-Mobile. So it's a pretty big
19 burden on Sprint to do this. And frankly, the reduction in the
20 number of local markets that the plaintiffs are looking for
21 hasn't eased the burden on Sprint at all. Some local markets
22 that plaintiffs have asked about are geographically dispersed
23 and line up with virtually every single one of the people at
24 the local level that plaintiffs are looking for.

25 THE COURT: Right. There are 50 local markets. I

J811nysa

1 understand I think they went down to 10?

2 MS. HOFFMAN LENT: Right, but it doesn't reduce the
3 number of custodians for Sprint.

4 THE COURT: I see. The number of custodians --

5 MS. HOFFMAN LENT: So it's a really big burden. And
6 for Sprint, the decisions on how to spend the marketing dollars
7 and decisions on how to price are made on the national level.
8 Whats going on in the local level is implementation of those
9 decisions. And those local people are reporting up about how
10 to determine how to spend the money. So the decisions are
11 really made at the national level. I'm not sure what the
12 plaintiffs are looking for at the local level that wouldn't be
13 covered by the custodians we've already agreed to.

14 MR. OLASA: Your Honor, my colleague Mr. Buffier would
15 like to speak to this.

16 THE COURT: Okay.

17 MR. BUFFIER: Your Honor, Beau Buffier from the State
18 of New York.

19 I was deeply involved together with the DOJ in looking
20 at some of these local market issues. And the DOJ delegated
21 some of that to the states because they figured the states had
22 more expertise in these local markets, and these local markets
23 that we're talking about are incredibly important to the
24 plaintiff's case here. Of course we're concerned about the
25 national effects. We're very concerned about the effects here

J811nysa

1 in New York City, in LA, and in other markets. And so we need
2 this information. And I can tell you, having gone through the
3 investigation and seeing the documents that have been produced
4 from the national retail account level, from the vice
5 presidents at the national level, we see smatterings of very
6 probative documents about what's going on at the local level.
7 But they're smatterings. They're things that bubble up, that
8 bubble up for all sorts of reasons, not just because they're
9 the most interesting from a competition perspective but just
10 because they have to bubble up to get someone's say-so on
11 something.

12 THE COURT: You don't need to go any further. You've
13 got to look at the local markets. I'm ordering that.

14 All right. For the third one, we have Spectrum and
15 MVNO agreements, June 2018. But hold on just one second. I
16 just need to ask the court reporter if she's doing okay.

17 (Discussion off the record)

18 THE COURT: So Item No. 3. Help me on that.

19 MR. OLASA: Your Honor, this one has two pieces.
20 Agreements, MVNO agreements and documents about those MVNO
21 agreements, I think as the Court noted earlier, MVNOs are our
22 resellers of wireless services, and we appreciate that in their
23 letter defendants noted that they produced the agreements, but
24 it's not just the agreements we need; it's actually their
25 evaluation of the agreements, their consideration of the key

J811nysa

1 terms, their economic analysis, but that's really what tells us
2 what's unfolding in terms of competition with these agreements.
3 So while we do appreciate the agreements, we do need to look
4 behind them to see defendants' own analysis of the agreements.
5 And I have a sample document I'd be happy to hand up to the
6 Court that shows you the type of documents we're looking for
7 and the type of analysis we're looking for.

8 THE COURT: No, I understand it, and I certainly agree
9 there are going to be documents about those agreements that
10 will be relevant potentially one way or the other. Again, I
11 sort of want an understanding of how expansive we're getting,
12 because is your request for all documents concerning those
13 agreements? Is it narrower? Is it --

14 MR. OLASA: Well, we'd be happy to negotiate search
15 terms. We were informed that we wouldn't get any of these
16 documents. We'd be happy to negotiate search terms and narrow
17 the production. What we're really looking for are the decs
18 that are usually presented and the email correspondence that
19 talks about negotiating the deal. Those two pieces.

20 THE COURT: How many such agreements do you think
21 there are?

22 MR. OLASA: We don't know. We don't have -- they're
23 just MVNO agreements.

24 THE COURT: I'm just trying to understand. Is it
25 three or four? Is it 20?

J811nysa

1 MR. OLASA: Our understanding is it would be a
2 handful, because we're looking for a production of MVNO
3 agreements that have been entered into since their last
4 production.

5 THE COURT: Ah, this is only since their last
6 production.

7 MR. OLASA: That's right, your Honor.

8 THE COURT: So it's for the last --

9 MR. OLASA: About the last year.

10 THE COURT: Okay. All right. Mr. Gelfand.

11 MR. GELFAND: Your Honor, on this one, I have not been
12 in every meet-and-confer call and conversation, but I've been
13 in most of them and I'm talking to the team about it. I just
14 think it's gotten precious little air time on our discussions.
15 And we are giving the MVNO agreements. Until we saw their
16 letter, or the day before, they had alerted us to the fact they
17 were going to move to compel on this. I don't think we spent a
18 lot of time thinking about it.

19 What happened here, your Honor, is we got a very broad
20 set of requests at the outset of this case, and the plaintiffs
21 told us, it's going to be very broad, we don't yet have a
22 handle on all of the materials that we have in the
23 investigative file, we need to think about this, but we're
24 going to be moving quickly so we're going to send you a broad
25 request. And fine. We got a hundred requests, or however many

J811nysa

1 it was, and it would have captured millions of documents. And
2 we started talking, we started working the issues and working
3 through the issues. There has been a tension, I would say,
4 between the two sides, almost a little bit of a stalemate,
5 where from time to time the plaintiffs say, well, you've got 30
6 or 40 requests; tell us which ones you're willing to comply
7 with. And we say, well, we got 30 or 40 requests; tell us the
8 ones you really care about. So that's been a little bit of a
9 back-and-forth. We have preserved our objections. But there
10 have been some very productive back-and-forths at the same time
11 when the plaintiff has said -- and there have been a couple of
12 letters to this effect -- okay, today, here are the six things
13 we really want: We want the Dish agreements, we want things
14 about this, we want things about that.

15 THE COURT: You're describing cooperation,
16 meet-and-confers, all good.

17 MR. GELFAND: We've responded to those. This, I don't
18 recall having that kind of advance discussion. We did have
19 that discussion about the two Spectrum auctions that they were
20 interested in, two microwave Spectrum options that I believe
21 have been in the last year, or relatively recently, and we
22 said, fine, we'll give you documents about those. That's
23 specific.

24 THE COURT: All right. Just complete the
25 meet-and-confer on this, and it sounds like you're going to get

J811nysa

1 there.

2 MR. OLASA: Your Honor, just briefly, the issue we're
3 facing is one where the parties have an agreement, once we
4 serve document requests, the defendants are supposed to tell us
5 what they agree to produce. Once they make that agreement,
6 they're required to produce those documents within 30 days. We
7 do appreciate the meet-and-confers, but from time to time we
8 get on the phone, we're told that a lot of the documents have
9 been produced, what do we really need, we try and explain it,
10 and then the entire agreement is held hostage on, well, agree
11 to all our conditions and you'll get these five documents.

12 THE COURT: Right. I don't like that.

13 MR. OLASA: Because of that, we're worried that unless
14 we bring these issues to the Court's attention swiftly, we're
15 going to get --

16 THE COURT: I understand. I have no problems with you
17 bringing things to my attention, particularly if there's been
18 sufficient meet-and-confer. But it already sounds like, just
19 through the little back-and-forth, we're drilling down to where
20 there's more specificity, and you might be able to find a way
21 that makes sense for both of you. I think this was a little
22 premature, because I'm not going to order that they have to
23 produce everything. It's too broad.

24 But Mr. Gelfand, how many agreements are we talking
25 about?

J811nysa

1 MR. GELFAND: I don't know, but it's a small number,
2 your Honor.

3 THE COURT: Yes, so it shouldn't be that hard to
4 collect documents regarding them and producing them. I just
5 think you've got to draw the line.

6 Ah, someone's coming back.

7 MS. HOFFMAN LENT: Your Honor, Karen Lent again.

8 For Sprint, I understand from our client that it's in
9 the hundreds.

10 THE COURT: Really.

11 MS. HOFFMAN LENT: Yes. Not all have very, very large
12 agreements, but they all are MVNO agreements.

13 THE COURT: All right. Well --

14 MR. GELFAND: Your Honor, clarification. I meant the
15 number of new agreements for T-Mobile. I wasn't attempting to
16 speak for Sprint, or speak about the total number.

17 THE COURT: I'm sorry, because I did take it for both,
18 so I'm glad you added that in there.

19 MR. GELFAND: I apologize.

20 THE COURT: Okay. I don't think I can make a ruling.
21 I just don't think it's gelled enough, and I think you need to
22 meet and confer on it. A couple days from now, come back, I'll
23 be familiar with the issue, but I think it's something you
24 should work on, because frankly, what I had written down for
25 myself was that "probably, but gets narrowed." It's got to be

J811nysa

1 narrowed.

2 Okay. What about the communications with Nielsen for
3 which all the data sounds like it's been produced but there are
4 other issues regarding it?

5 MR. OLASA: So the Nielsen data is important to our
6 expert analysis, your Honor. During the investigation phase,
7 defendants produced a number of models, economic models and
8 reports based on data they obtained from Nielsen. And we would
9 like to understand quality of that data, whether there were any
10 issues with that data.

11 THE COURT: Well, they produced the data, right?

12 MR. OLASA: Well, they produced data up to a certain
13 period. We don't have the latest data.

14 THE COURT: They agreed to produce that.

15 MR. OLASA: But beyond the data we want to see their
16 communications with Nielsen. For example, if they emailed
17 Nielsen and said, well, we're seeing some issues here with this
18 data, what's going on with that, and Nielsen says, we're not
19 sure, well, that's important to our experts, and, you know,
20 their reports are due pretty soon, so we would really like to
21 understand what's behind the Nielsen data, what quality, is it
22 quality data, what are the problems with the data, how did
23 defendants obtain this data.

24 THE COURT: So I want to see how you're parsing this.
25 Are you saying you want all the communications with Nielsen

J811nysa

1 about the data?

2 MR. OLASA: So two things, your Honor. Yes, we want
3 all the communications with Nielsen. That's the first. And
4 secondly, we do want their internal documents discussing the
5 Nielsen data.

6 THE COURT: So any document that mentions Nielsen.

7 MR. OLASA: Well, the specific data set at issue, yes.
8 The Nielsen --

9 THE COURT: So any document that mentions one of the
10 data sets that has been provided already, you want to be
11 provided.

12 MR. OLASA: That's right.

13 THE COURT: Let me hear from Mr. Gelfand.

14 MR. GELFAND: Yes, your Honor. I think there might be
15 less than meets the eye here as well. I'm not quite certain
16 what counsel is referring to about the model. There is one
17 thread of work that has been done that I'm aware of -- and I've
18 checked around -- that relies on Nielsen data. There are lots
19 of types of Nielsen data. And this particular type of Nielsen
20 data is very specialized type of data that was used to analyze
21 how wireless subscribers behave, and not necessarily data
22 that's obtained on a regular basis. But that data I believe
23 was already produced back at the time of the --

24 THE COURT: It's not asking about the data; it's
25 asking for communications about the data.

J811nysa

1 MR. GELFAND: So communications about the data, what
2 we proposed is we at T-Mobile have an individual who has
3 overall responsibility for analysis that relies on data. He's
4 actually going to be deposed next week. And we did a search
5 and did a search for the word "Nielsen" to find out any
6 documents he has that referred to Nielsen. We've produced
7 those documents. I don't want to give the plaintiff any great
8 encouragement here. There is nothing to it. A couple hundred
9 documents that refer to Nielsen. We didn't find any great
10 smoking gun.

11 THE COURT: He's the guy? He's the one responsible?

12 MR. GELFAND: Yes. He's going to be deposed next
13 week. What I propose is that plaintiff take his deposition,
14 see what he says about Nielsen data, because they're not
15 particularly specific about it, and at that point we can meet
16 and confer and see if there are other avenues they want to go
17 down with documents about Nielsen. But I'm sure there's a lot
18 of regular course documentation where people are dealing with
19 subscriptions to data. Some Nielsen data involves television
20 markets, etc.

21 THE COURT: All right. Let me hear from states on
22 that.

23 MR. OLASA: Your Honor, we understand -- this is the
24 first we saw of this proposal in defendant's letter. We hadn't
25 heard that they were willing to produce documents from their

J811nysa

1 custodians on the Nielsen data. There is one important
2 limitation that they have placed on this production. They've
3 stated that it would be ordinary course documents. And we
4 appreciate that and we do want that. But what's missing are
5 the documents regarding this specific data that they obtained
6 for the models that they presented during the investigation.
7 So while I understand in the ordinary course they may --

8 THE COURT: No, I understand that.

9 Mr. Gelfand?

10 MR. GELFAND: I might need to let my colleague from
11 Sprint respond to that. Or perhaps --

12 THE COURT: In other words, they may not be ordinary
13 course, some may be specialized.

14 MR. OLASA: Extraordinarily specialized.

15 THE COURT: All right.

16 MS. HOFFMAN LENT: Your Honor, I don't think that
17 there was anything special about that language. We weren't
18 intending to be excluding something about data.

19 THE COURT: The data that was used in that analysis,
20 you're going to provide the communications from that custodian
21 regarding, if they exist.

22 MS. HOFFMAN LENT: If they exist, correct. And Sprint
23 has proposed two custodians whose files we would search. We
24 hadn't met and conferred about this, frankly, before we got
25 plaintiff's request, and so the meet-and-confer happened in

J811nysa

1 these letters.

2 THE COURT: Yes, I think we're good, from my end.

3 And the last item we're not doing anything on because
4 it says documents responsive to 27 to 44 for Sprint and
5 document requests 28 to 45 to T-Mobile. So I'm not prepared to
6 go through that. We don't have the time to go through that.
7 You're going to have to meet and confer on that more.

8 MR. OLASA: Just one clarification on the previous, on
9 the Nielsen communications.

10 THE COURT: Sure.

11 MR. OLASA: We don't know whether these particular
12 custodians would be the ones who have these types of
13 communications. This is the first we've heard of them for this
14 data. So we'd like to be able to meet and confer with
15 defendants on whether these are the right --

16 THE COURT: Yes. It sounds like you're going to be
17 deposing somebody who's actually going to be able to give you
18 some good information on that as well.

19 MR. OLASA: Thank you, your Honor.

20 THE COURT: All right. That brings us to Docket 139.
21 I have a response at 149. There are three discovery issues
22 brought by defendants. First one is market share and
23 concentration calculation and, as you have argued, there are
24 references in the complaint to certain analyses that have been
25 done and you want the work behind that. Do I have that right?

J811nysa

1 MS. LEVIN: Yes, you do, your Honor. Hallie Levin.
2 I'll address this motion.

3 So that is correct. Let's start with talking about
4 the calculations. Plaintiff's amended complaint alleges that
5 the merger will be anticompetitive because it's going to
6 increase market concentration and HHI indices across the
7 country.

8 THE COURT: Thus they will rise.

9 MS. LEVIN: Thus they will rise.

10 These redacted numbers are set forth in the amended
11 complaint in paragraphs 45 through 52 in a heading called The
12 Merger Would Increase Concentration --

13 THE COURT: I see that. So just tell me. I know
14 those calculations are there. They're in the complaint. They
15 want the work behind it. That information may have been
16 provided in work with the consultants, may have been done in
17 connection with an expert, or it may have been done based on
18 internal work. So which is it?

19 MS. LEVIN: So our understanding is that those
20 calculations were conducted by their expert. They can correct
21 me if I'm wrong on that. They seem to be taking the position
22 that they're not going to rely on a work product protection for
23 that. They seem to be asserting in their correspondence that:
24 (1) either those calculations don't exist in a document; or (2)
25 that we should wait until expert discovery to get access to

J811nysa

1 those calculations.

2 So with respect to the first, we cannot believe,
3 respectfully, that there is no document that sets forth the
4 calculations.

5 THE COURT: Right. Okay.

6 MS. LEVIN: So we don't believe that they could have
7 gotten this by smoke signals or semaphores from the experts.
8 There must be some calculation, some spreadsheets.

9 THE COURT: If there are calculations, you want them.

10 MS. LEVIN: Correct.

11 And then the second argument is that we should wait
12 till expert discovery to get those. Respectfully, we don't
13 think we should have to wait. They put them at issue, they're
14 in their complaint, they've been sitting out there.

15 THE COURT: I know that issue. It's very near and
16 dear to my heart. There was a case in my practicing life where
17 that was a tussle, but the parties came to an agreement on it.

18 All right. Who wants to address that?

19 MR. KASHA: I'm Jeremy Kasha from the State of New
20 York. I'd like to address this issue.

21 Your Honor, to be clear, we are not refusing to
22 produce the calculations.

23 THE COURT: I know that. I got that. It's a question
24 of when.

25 MR. KASHA: Thank you very much. We want to make sure

J811nysa

1 that the process is done correctly but with respect to which
2 phase of discovery. If we have to respond to that question, it
3 will not be me or one of the attorneys doing it. We do not
4 have any document which would just answer that question. If we
5 did, we would have given it to them, and we told them that. We
6 would have to contact the experts, who are now working on their
7 expert reports, and essentially they would make a pre report.

8 THE COURT: Well, you did rely on a preliminary
9 analysis. That's the way it was referred to, I believe,
10 preliminary something. Something like preliminary. Because it
11 was qualifying basically that at a later point there's going to
12 be refined numbers, is the way I understood it. But the
13 question is, if that work was provided by the expert in
14 connection with issuing or putting together the complaint,
15 should it be produced now or with the expert?

16 MR. KASHA: Well, I think there are some assumptions
17 in there that are not correct, your Honor, if I may.

18 First of all, it's not that they gave us an analysis
19 that we then had and used those numbers. If there's a number
20 that's in the complaint that we got from the expert, they gave
21 us a number, not the way it was calculated, which is a big
22 difference.

23 THE COURT: Yes, but there's information in a
24 spreadsheet somewhere that makes those calculations, I have no
25 doubt.

J811nysa

1 MR. KASHA: Not ones that we have, though.

2 THE COURT: When I say "you," I mean your experts.

3 MR. KASHA: Fair enough.

4 Your Honor, the second thing is, in the sense of
5 preliminary, we didn't mean we're expecting any changes. I
6 don't know for a fact -- I'm not working day to day with the
7 experts myself, but I would say there's no way for me or any of
8 the other attorneys in New York or any of the other states to
9 answer the question without making the experts stop what
10 they're doing and answer it.

11 And another thing which I think is another important
12 point, if I may, is, they haven't even waited for the expert
13 report, which is coming soon. It might be there.

14 THE COURT: That's the point, though. They want it
15 sooner rather than later. They don't want to wait for the
16 expert report. And the question is: When should they be
17 produced?

18 MR. KASHA: And given the body of law, which seems to
19 favor that when it is an expert calculation, to wait for the
20 expert phase, we don't understand why we should have to provide
21 something like that so early.

22 THE COURT: Let me ask something over here. Don't you
23 have enough other things to do?

24 MS. LEVIN: But the answer is, we have so very much to
25 do, your Honor, but we are decidedly interested, and I think

J811nysa

1 absolutely entitled at this stage, given that these are
2 calculations that have been published to the world and form the
3 gravamen of their complaint against our clients, I think that
4 we're entitled to them now.

5 THE COURT: No, I understand. It's part of the expert
6 work. Just do them with the expert reports. That's the way
7 really it should be done. I understand the point.

8 MR. KASHA: Your Honor, may we suggest that it should
9 be something that they should serve an interrogatory for.

10 THE COURT: No. Anything in connection with an expert
11 report, you have to produce the information behind it, and the
12 data behind it. And if you don't, that's not good. You don't
13 wait and then wait for them to ask for it. That's just a
14 given. All right?

15 Okay. And it includes any preliminary work as well,
16 not just final work, if there is calculation.

17 MR. KASHA: Yes, we understand.

18 THE COURT: All right. Okay. Now to one that I
19 thought had the most sense. Help me with communications
20 between attorneys general.

21 MS. LEVIN: Correct, your Honor.

22 THE COURT: Are the attorneys general -- are you
23 counsel? Are you lawyers? Are you counsel? Or are you
24 officers? Or are you both?

25 MR. BUFFIER: I'm the bureau chief of the State of New

J811nysa

1 York.

2 THE COURT: So the head attorney general, are they
3 officers, are they lawyers, or counsel, or both?

4 MR. KASHA: Under New York law, they are counsel.

5 THE COURT: I know they are.

6 Why are you asking for that?

7 MS. LEVIN: Your Honor, look, we view the attorneys
8 general themselves as like the CEOs.

9 THE COURT: Nice try, but you're not getting that.
10 Okay.

11 MS. LEVIN: I'm going to skip ahead then.

12 THE COURT: This one's like a divorce case. The
13 financial agreements, that if there are agreements between the
14 states that one is helping finance the other and therefore
15 their credibility is in question. No. Come on. I was looking
16 for justification. So no, you're not getting that.

17 All right. I've gone through my agenda. I hope I
18 haven't skipped anything.

19 Oh, there is one thing. Trial date. That's easy.
20 Trial date is in December. Trial date is December 9th. And
21 the reason it's easy is because there is going to be some
22 additional discovery that comes out of this, the schedule that
23 you were headed on is insane, and there will not be quality
24 material necessarily. And I know that the defendants want to
25 push it as quick as they can, but again, given the gravitas of

J811nysa

1 the situation, we're not going to just short-circuit it. I was
2 more concerned, depending on Judge Marrero's calendar, if he
3 wasn't able to do December, it looked like it was going to be
4 in February. That might have presented a different issue. I
5 don't know. But right now he has confirmed that he has
6 December 9th. And he may be able to get December 2nd. He is
7 looking. But it will be in December.

8 Okay. Anything else?

9 MR. POMERANTZ: Yes, your Honor. If I could just ask
10 Mr. Buffier to just alert your Honor to one additional
11 development in the case.

12 THE COURT: Sure.

13 MR. BUFFIER: Thank you. There has been one recent
14 development and we will be --

15 THE COURT: More recent than yesterday?

16 MR. BUFFIER: It was late in the day yesterday, your
17 Honor. And I think you described this case as a freight train,
18 and it undoubtedly is, and it appears that there will be some
19 more carriages being added to the freight train.

20 So the State of Texas wishes to join the lawsuit and
21 to take a leadership role along with the attorneys general of
22 New York and California. So Attorney General Paxton has asked
23 to join the complaint, and we will be seeking leave with the
24 Court early next week to add Texas as a plaintiff. And we do
25 expect, we anticipate, that there may be other states that wish

J811nysa

1 to join also early next week. So we will be filing those
2 papers and seeking leave to amend. As for any --

3 THE COURT: Before you file those papers, are you
4 going to just consult with your counterparts to discuss any
5 issues there may be? I can't imagine there would be, but I
6 don't know.

7 MR. BUFFIER: Yes, we obviously will.

8 And your Honor, as for any substantive amendments, we
9 may make some amendments to deal with the proposed final
10 judgment that was publicly released by the Justice Department
11 only last Friday, so we may make some amendments to the
12 complaint that are necessary to deal with that issue.

13 THE COURT: Okay. Well, again, meet and confer. If
14 they agree, I have no problem. If you need to bring it up with
15 me in terms of some other dispute, that's fine, but hopefully
16 not.

17 MR. BUFFIER: Thank you.

18 MR. GELFAND: Your Honor, may I be heard on the trial
19 date issue.

20 THE COURT: Yes.

21 MR. GELFAND: I'd like to take a couple of minutes and
22 talk about the background of the trial date and --

23 THE COURT: Fair enough. Go ahead.

24 MR. GELFAND: Thank you very much.

25 This has been about the longest merger investigation

J811nysa

1 in history; certainly in modern times.

2 THE COURT: 4-to-3. It's up there.

3 MR. GELFAND: Your Honor, there have been plenty of
4 4-to-3 mergers that have been cleared in much shorter periods
5 of time than this. Many have not been challenged. There is
6 nothing magical about 4-to-3.

7 THE COURT: I agree with that. I apologize.

8 MR. GELFAND: Thank you, your Honor.

9 This deal is now on the verge of being cleared by the
10 Federal Communications Commission --

11 THE COURT: Yes.

12 MR. GELFAND: -- because it is going to lead to
13 benefits from combining two complementary networks that can
14 only be achieved by combining these complementary networks.
15 Consumers are going to benefit from that. There is a race
16 going on to take this technology to the next generation, 5G
17 technology. This is extremely important. It's extremely
18 important to our client, it's extremely important to consumers.
19 The Justice Department has now cleared this merger, with
20 additional remedies. We're not sure they were necessary, but
21 they cleared it with additional remedies. They have filed a
22 document in federal court in Washington, DC, saying that this
23 merger is in the public interest and that the competition
24 issues have been fully resolved.

25 Plaintiffs here have been investigating this merger

J811nysa

1 for over a year and a half. I appreciate the freight train
2 analogy, your Honor. This has been an exhausting few weeks.
3 But we are making tremendous progress. We've got depositions
4 scheduled, we've got the document production largely done.
5 This can be done. And it's actually unfair to our client, your
6 Honor.

7 THE COURT: What harms will befall your clients and/or
8 the public if trial occurs two months later?

9 MR. GELFAND: Well, first of all, the closing of the
10 merger is going to occur two months later as a result of that.
11 There is obviously growing uncertainty in these companies.
12 This is very disruptive to the lives of employees. People have
13 to plan their lives. The companies themselves are chomping at
14 the bit to start to integrate these assets. They have larger
15 competitors, competitors, who are making their own plans for
16 migrating to a 5G world. And every day that passes when we
17 can't integrate those assets is a day that we start falling
18 behind in that competitive race.

19 THE COURT: That's a good point, particularly with 5G
20 coming around, and I understand the synergy on the 5G point. I
21 totally get that.

22 MR. GELFAND: It's critically important, your Honor.
23 And we talked about this to the plaintiffs. And we gave up an
24 awful lot when we agreed to that October 7th trial date. We
25 had asked for a September trial date. And I appreciate that

J811nysa

1 would have even been a faster freight train, but there have
2 been merger cases tried on extremely expedited schedules.
3 That's the nature of the beast. That's why the government gets
4 a year and a half to collect all their documents and subpoena
5 third parties and collect a million documents. They hire
6 economists. They get all the data. They do it for as long a
7 period of time as many cases have in pretrial discovery, and
8 that's what they did here. And they're coming into court and
9 saying, well, we need all this additional time, when we agreed
10 with them over a month ago that it was going to be October 7th.
11 They could figure out for themselves what they were going to be
12 able to accomplish in discovery. And there are no surprises
13 here. We haven't missed a single deadline, your Honor. And --

14 THE COURT: Were the definitive agreements produced on
15 July 2nd?

16 MR. GELFAND: Definitive agreements, near final
17 versions of those agreements were produced, but that was only a
18 two-week delay over the due date, your Honor.

19 THE COURT: I know. But there's disagreement between
20 the parties as to whether things that were in there were
21 material or not material, etc. And look, I understand, of
22 course, there are serious and extremely legitimate interests in
23 getting it done sooner rather than later. I totally get that.
24 But I'm not going to assume that just because the DOJ and the
25 FCC are okay with it, that it means it's necessarily okay when

J811nysa

1 someone else is examining it, perhaps with a different angle or
2 intensity; not intensity, but different tools, maybe. And it's
3 just two months. I realize it's a big deal, could be a lot of
4 money, but it also creates problems if you've got to unwind for
5 some bad reason that you have to. So we don't want to get
6 there. And as I said, if it had looked like it was going to be
7 February, it might very well be a different outcome here, but
8 it's December.

9 So I appreciate your thoughts. Thank you.

10 Anything else? Anything else from the plaintiffs?

11 MR. POMERANTZ: No, your Honor.

12 THE COURT: Anything else from defendants?

13 Anything from anybody else?

14 All right. I thank everybody, and we're adjourned.

15 o0o

16
17
18
19
20
21
22
23
24
25