



## A P P E A R A N C E S

1  
2 For the USA: JOSEPH F. WAYLAND, ESQ.  
3 GLENN POMERANTZ, ESQ.  
4 JOSEPH J. MATELIS, ESQ.  
5 U.S. Department of Justice  
6 950 Pennsylvania Avenue, NW  
7 Suite 3121  
8 Washington, D.C. 20530  
9 (202) 514-1157

10  
11 For AT&T: MICHAEL K. KELLOGG, ESQ.  
12 MARK C. HANSEN, ESQ.  
13 Kellogg, Huber, Hansen, Todd,  
14 Evans & Figel, P.L.L.C.  
15 1615 M Street, NW, Suite 400  
16 Washington, D.C. 20036  
17 (202) 326-7900

18  
19 JAMES R. WADE, ESQ.  
20 Haynes and Boone, LLP  
21 1615 L Street, NW, Suite 800  
22 Washington, D.C. 20036  
23 (202) 654-4543

24  
25 A. MICHAEL WARNECKE, ESQ.  
Haynes and Boone, LLP  
2323 Victory Avenue, Suite 700  
Dallas, Texas 75219  
(214) 651-5659

For T-Mobile and  
Deutsche Telekom: GEORGE S. CARY, ESQ.  
MARK W. NELSON, ESQ.  
Cleary, Gottlieb, Steen &  
Hamilton, LLP  
2000 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 974-1500

HENRY C. THUMANN, ESQ.  
O'Melveny & Myers, LLP  
1625 I Street, NW  
Washington, D.C. 20006  
(202) 383-5300

M. EVAN CORCORAN, ESQ.  
Wiley Rein, LLP  
1776 K Street, NW  
Washington, D.C. 20006  
(202) 719-7113

## A P P E A R A N C E S (Cont'd.)

1  
2  
3 For Sprint Nextel: STEVEN C. SUNSHINE, ESQ.  
4 TARA L. REINHART, ESQ.  
5 Skadden, Arps, Slate, Meagher &  
6 Flom, LLP  
7 1440 New York Avenue, NW  
8 Washington, D.C. 20005  
9 (202) 371-7860

10  
11 For Cellular CHARLES L. MCBRIDE, JR., ESQ.  
12 South and Corr Bruni, Grantham, Grower & Hewes,  
13 Wireless: PLLC  
14 1900 East Capitol Street  
15 Suite 100  
16 Jackson, Mississippi 39201  
17 (601) 960-6891

18  
19 ALAN W. PERRY, ESQ.  
20 Forman Perry Watkins Krutz &  
21 Tardy, LLP  
22 200 South  
23 City Centre, Suite 100  
24 South Lamar Street  
25 Jackson, Mississippi 39201  
(601) 969-7833

15  
16 CHONG S. PARK, ESQ.  
17 Steptoe & Johnson, LLP  
18 Attorneys at Law  
19 1330 Connecticut Avenue, NW  
20 Washington D.C. 20036  
21 (202) 429-6275

22 For Commonwealth JAMES A. DONAHUE, III, ESQ.  
23 of Office of the Attorney General  
24 Pennsylvania: 14th Floor  
25 Strawberry Square  
Harrisburg, PA 17120  
(717) 705-2523

22 For the State of GERALYN J. TRUJILLO, ESQ.  
23 New York: Office of the Attorney General  
24 120 Broadway  
25 26th floor  
New York, New York 10271  
(212) 416-6677

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A P P E A R A N C E S (Cont'd.)

For the State of      BEN LABOW, ESQ.  
California:            Office of the Attorney General  
                          300 S. Spring Street  
                          Los Angeles, CA 90013  
                          (213) 897-2691

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1 P R O C E E D I N G S

2 (Whereupon, at 9:41 a.m. the proceedings  
3 commenced, and the following ensued:)

4 THE COURT: Good morning.

5 ALL: Good morning, Your Honor.

6 THE COURT: Gwen, will you call both cases  
7 simultaneously, please, so that all counsel for  
8 both -- the Sprint, Cellular South, and the DOJ cases.

9 THE DEPUTY CLERK: So you want Cellular  
10 South and DOJ case called first?

11 THE COURT: And Sprint.

12 THE COURTROOM DEPUTY: This is Civil Action  
13 11-1600, Sprint Nextel Corporation versus AT&T, et  
14 al., Civil Case 11-1690, Cellular South, Inc. et al.  
15 versus AT&T, et al., and Civil Case 11-1560, United  
16 States of America versus AT&T, et al.

17 I'm going to ask counsel to please come  
18 forward and identify yourself for the record and also  
19 state who you are representing.

20 MR. WAYLAND: Good morning, Your Honor.  
21 Joseph Wayland for the United States.

22 THE COURT: Good morning.

23 MR. WAYLAND: I have with me Mr. Glenn  
24 Pomerantz, my co-counsel, and Joe Matelis, my  
25 colleague.

1 THE COURT: Good morning.

2 MR. SUNSHINE: Good morning, Your Honor.  
3 Steve Sunshine for Sprint Nextel. I also have my  
4 colleague, Tara Reinhart with me.

5 MS. REINHART: Good morning.

6 THE COURT: Good morning.

7 MR. CARY: Good morning, Your Honor. George  
8 Cary for Deutsche Telekom and T-Mobile. At counsel  
9 table I have my colleague, Mark Nelson, Evan Corcoran,  
10 and Henry Thumann.

11 THE COURT: I'm sorry. You are not on this  
12 list here yet. The list is so long. Again?

13 MR. CARY: George Cary for Deutsche Telekom  
14 and T-Mobile with Mark Nelson, Evan Corcoran, and  
15 Henry Thumann.

16 THE COURT: All right.

17 I missed Cellular South.

18 MR. McBRIDE: Good morning. I'm Charles  
19 McBride on behalf of Cellular South, Inc. Along with  
20 me are my colleagues, Alan Perry and Chong Park.

21 THE COURT: Okay, thank you.

22 For ATT.

23 MR. HANSEN: Yes, Your Honor. Good morning.  
24 Mark Hansen for AT&T along with my partner, Michael  
25 Kellogg and Jim Wade present at counsel table.

1           THE COURT:   Okay.   Just for clarification,  
2   Mr. Hansen, is there any endearments between private  
3   suits in terms of representation for ATT?

4           I notice that Mr. Wade has joined at least  
5   the two suits brought by Cellular South and Sprint.

6           Is there some division that I should know  
7   about?

8           MR. HANSEN:   I don't believe so, Your Honor.  
9   Mr. Wade and his colleagues have joined as additional  
10   counsel.   We remain as counsel in the private suit as  
11   well as counsel in the government suit.

12          THE COURT:   Okay.   So you are ready to  
13   address both?

14          MR. HANSEN:   Yes, Your Honor.   I will  
15   address the government suit, and my partner,  
16   Mr. Kellogg will address the Sprint issue this  
17   morning.

18          THE COURT:   Okay.   Well I think where we  
19   need to start, I had originally thought we would be  
20   just taking up the initial scheduling involving the  
21   two private plaintiffs.   But given the events of the  
22   recent past, I think that we have to address you  
23   first, sir.

24          MR. HANSEN:   Sure.

25          THE COURT:   In fact, I read the newspapers

1 this morning. They have questions for you.

2 And I asked, through our special master, to  
3 find out if there's anything specific that the parties  
4 in the DOJ case wanted us to bring up, and I got  
5 precious little in response. But apparently the first  
6 order of business is the discussion of the FCC  
7 proceedings and, second, the discovery update.

8 So I'm happy to have you address those  
9 first, since you are more intimately involved in the  
10 FCC proceedings than I am.

11 MR. HANSEN: Yes, Your Honor, be happy to do  
12 that.

13 There's nothing before the Court. No one is  
14 seeking any relief or any change of any scheduling, so  
15 I'm not sure what the point of a discussion is. But  
16 that's something that the Justice Department wanted to  
17 put on the agenda.

18 Here is our perspective on it, Your Honor.  
19 While the Justice Department filed its suit with much  
20 fanfare and it sought to block our transaction, they  
21 have come to court before the special master  
22 on repeated occasions, said they --

23 THE COURT: You have to slow down, please.

24 MR. HANSEN: Thank you, Your Honor.

25 -- don't want to try the case, are not ready

1 to try the case, et cetera.

2 Recently, Your Honor, as you read in the  
3 newspapers, in the regulatory arena there's --  
4 something's happened, but we are continuing to proceed  
5 with this transaction. We have --

6 THE COURT: Which transaction? The one --

7 MR. HANSEN: Our merger with T-Mobile.

8 THE COURT: The one that's at issue before  
9 me now?

10 MR. HANSEN: Yes, Your Honor.

11 THE COURT: And you do not anticipate that  
12 being changed in any way in the foreseeable future?

13 MR. HANSEN: Your Honor, we are sitting here  
14 today with the committed transaction with a contract  
15 to proceed with the transaction as structured.  
16 Nothing has changed with that.

17 I do not have a crystal ball. I do not know  
18 what will happen in the future. I don't think anyone  
19 can promise what will happen in the future. But I can  
20 tell the Court that we have an obligation to proceed  
21 with the transaction exactly as it is structured,  
22 exactly as it was placed before Your Honor by the  
23 Justice Department, exactly --

24 THE COURT: You have an obligation. I'm  
25 sorry, where does that come from?

1           MR. HANSEN: We are contractually committed,  
2 Your Honor.

3           THE COURT: Now, let's review that for one  
4 second so I understand.

5           Somewhere I have read that there is a  
6 9/12/12 drop-dead date. Is that correct? What does  
7 that mean? What's that date?

8           MR. HANSEN: It's a date by which we have to  
9 achieve the closing of the merger or penalties are --  
10 not penalties, I guess is the wrong word, but  
11 financial consequences ensue.

12          THE COURT: So that if anyone were to walk  
13 away -- or if ATT were to walk away from the deal  
14 prior to the 12th, the 4 billion penalty, or however  
15 you want to call it, is or is not due? What triggers  
16 that and when?

17          MR. HANSEN: Well, Your Honor, I think the  
18 penalty -- it's not really a penalty. It's a  
19 contractual commitment. It's a breakup fee if the  
20 transaction is abandoned. I think there would be  
21 financial consequences. If the transaction is not  
22 closed in a timely way, there would be consequences.

23          So the contract is out there. It hasn't  
24 been changed at all. All the reasons why we asked to  
25 have the early trial date remain the reasons to have

1 the early trial date. The Court heard all those  
2 issues. From our perspective, Your Honor, nothing has  
3 changed.

4 THE COURT: Well, something has changed.  
5 You have withdrawn that application to the FCC, and we  
6 all know that's a condition precedent for this deal to  
7 go through. And it seems to be the given that they  
8 are not obligated to move particularly quickly, nor am  
9 I.

10 I have no -- without a PI, I have no  
11 particular obligation to move quickly. You agree,  
12 right?

13 MR. HANSEN: Your Honor, I'm not sure  
14 "obligation" is the right word. But we think the  
15 Court made the right decision last time when you  
16 decided, frankly, the government shouldn't be allowed  
17 to pocket veto our deal.

18 In other words, if we can't have a trial  
19 date in time to obtain the relief, to close the  
20 merger, the government, simply by its allegation, will  
21 have stopped the merger. And that's not fair or  
22 right. We need to have our day in court.

23 As to the FCC, Your Honor, I think it's a  
24 very simple story there and in terms of what people's  
25 obligations are to do. Obviously, we think the FCC

1 will act just as Your Honor has acted to do the right  
2 thing in the right time frame. We have not proceed --

3 THE COURT: But you withdrew your  
4 application, so they have nothing to do. You have  
5 given them nothing to do at this moment.

6 MR. HANSEN: Your Honor, what we're seeking  
7 to do is this: The issues in the antitrust case are  
8 framed and ready for trial in this court. The FCC had  
9 made an announcement that they were thinking about  
10 having a parallel administrative proceeding that will  
11 go over many of the same issues. We made what we  
12 think is a perfectly appropriate decision to say let's  
13 try the case in this court, develop a full record,  
14 have the decision of this Court on all of those  
15 issues.

16 When that's done, that will dispose of many,  
17 if not most, of the issues that would have been before  
18 the FCC.

19 THE COURT: Is it collateral estoppel as to  
20 the FCC?

21 MR. HANSEN: Yes, Your Honor. It's the same  
22 government, absolutely. The government couldn't redo  
23 those same issues. The government is litigating these  
24 issues against us here.

25 THE COURT: What is your authority for that?

1           First of all, they have a public interest  
2 factor that I do not have. You know that, as well as  
3 I.

4           MR. HANSEN: Yes. That's why I said many if  
5 not most. But we don't think the government could  
6 relitigate the competitive issues where they had  
7 already been decided in a full and fair proceeding in  
8 this court. I think that's standard collateral  
9 estoppel law.

10          THE COURT: Well, let's say this: Are any  
11 of the findings going to be collateral estoppel as to  
12 the private party, or you just say the FCC?

13          MR. HANSEN: Certainly as to us. I mean, in  
14 our proceeding, yes, Your Honor. We don't expect we  
15 would relitigate before the FCC the competitive  
16 findings of this court.

17          THE COURT: How about as to Sprint?

18          MR. HANSEN: They are not a party to our  
19 proceeding, Your Honor. Nonmutual offenses of  
20 collateral estoppel, I think, is a complicated  
21 doctrine. I'm not prepared to address all the  
22 different emanations of that.

23          But I think Mr. Sunshine effectively said in  
24 the prior proceeding that it expected this Court to  
25 have the final word on issues relating to the

1 government's case and it would not seek to be  
2 relitigating those.

3 THE COURT: What do you think is a realistic  
4 timetable in order to -- if you don't commit to  
5 resubmitting to the FCC until this Court rules?

6 MR. HANSEN: Here's our --

7 THE COURT: What is your plan?

8 MR. HANSEN: Here's the plan, Your Honor,  
9 and we think it's, frankly, not that much different  
10 from the plan we had before, and here's why: We are  
11 fully ready, and we will be fully ready to try this  
12 case before the Court beginning February 13th. And  
13 the Court will have time to decide the issues and make  
14 rulings that will be binding on us and on the  
15 government. We can go back to the FCC with a full  
16 judicial record --

17 THE COURT: If you win. If you win. You've  
18 already lost if you lose.

19 MR. HANSEN: Of course, Your Honor. We  
20 understand we're in this Court's hands, but we wish to  
21 have this Court decide those issues. We're ready to  
22 go.

23 When this Court decides those issues we  
24 can -- again, I'm not sure of the specific  
25 nomenclature, whether it's refiling, some other way to

1 be back at the FCC, but we can be back at the FCC with  
2 those issues. Really, we think the predominant issues  
3 having been decided, and the FCC will have time to  
4 act.

5 THE COURT: How do you get back to them, and  
6 when do I have to decide? I find it a little bit  
7 unsettling to think that I am being told when I have  
8 to decide because you have an agreement that you will  
9 lose X amount of money in the billions if I don't  
10 decide in a timely fashion. What if you want to  
11 appeal? The Court of Appeals is not here in the  
12 summer.

13 MR. HANSEN: Your Honor, we had --

14 THE COURT: It's true. I'm sorry.

15 MR. HANSEN: Of course, the Court has many  
16 commitments, but we had this discussion before the  
17 Court originally. And we gave the Court the  
18 timetable, and we tried to set out a timetable that  
19 would give the parties the time to try this case and  
20 the Court the time to write a decision and, Your  
21 Honor, time for any appellate process, obviously an  
22 expedited appellate process.

23 THE COURT: But you at that time had pending  
24 since, I think, April an FCC application. I'm now --  
25 I actually was the Judge who had Echostar. And I'm

1 starting to feel déjà vu that the private parties are  
2 saying we have a deadline, you, Judge, are bound by  
3 our deadline. You have to give us enough time to get  
4 back to the FCC. We would like to have your opinion  
5 to help us with the FCC. We've withdrawn our  
6 application.

7           That hadn't happened in Echostar. There  
8 they were asking me to do it in three and a half  
9 weeks. So you are asking us to do it in less. You  
10 are asking the taxpayer to support the Department of  
11 Justice, basically, in extraordinary expense because  
12 we're doubling up, tripling up discovery.

13           You're asking me to tell Sprint and Cellular  
14 South to go slow. Their time comes next, where  
15 they're not gonna necessarily -- we'll hear from  
16 Mr. Sunshine, but they are not going to go away if the  
17 government wins -- I mean, they'll go away if the  
18 government wins, but they don't necessarily go away if  
19 the government loses you just said.

20           So they will -- why don't I want them now to  
21 litigate? Why don't I want to slow this down, get it  
22 done once and for all?

23           Because when you were here before, you had a  
24 much different posture to convince me to move about as  
25 humanly fast as possible. But now you have third

1 parties spending enormous amounts of money, legal fees  
2 and document review. You have private parties. You  
3 have the taxpayer. And you've imposed your client  
4 upon the Court to get something done to meet the  
5 schedule which you've dramatically altered by removing  
6 that petition.

7           Because you have no assurance -- say I am as  
8 expeditious as humanly possible and get an opinion  
9 out. If it takes six weeks to have a trial, we have a  
10 month or two. So you are talking about fast  
11 approaching the summer. Do you resubmit your  
12 application?

13           What guarantee do you have that you'll get a  
14 ruling, one, favorable from me? You have none, we  
15 know that. And then what possible idea do you have  
16 that the FCC will sign off by the 20th of September  
17 and an appeal will be heard, if necessary?

18           MR. HANSEN: Your Honor, with all respect, I  
19 don't think anything is any different from when all  
20 those considerations were weighed by the Court before.  
21 Let me tell you why.

22           The FCC was always contemplated to be behind  
23 this Court. We never had a contemplation that the FCC  
24 will decide until after the Court decided. And,  
25 indeed, these arguments about the FCC were raised with

1 Your Honor and discussed at the time. The fortuity of  
2 how we deal with the regulatory process, application  
3 pending, not pending doesn't change that calculus.

4 THE COURT: I'm sorry, I have to interrupt.  
5 I don't understand that. What I understand, that  
6 everybody says the FCC, when you file, can take  
7 usually up to six months. That, apparently, is either  
8 an unwritten rule or a rule of the agency.

9 So by withdrawing, where are you, if that  
10 six months applies? You've now used that up. You  
11 can't make that.

12 MR. HANSEN: Your Honor, with all respect, I  
13 don't think there's an inflexible six-month rule. I  
14 don't think that's right.

15 The FCC has already had proceedings.  
16 According to them, Your Honor, they have an open  
17 docket respecting this matter. According to them,  
18 they have the flexibility to act. We believe -- Your  
19 Honor's absolutely --

20 THE COURT: I'm sorry. According to them.  
21 From whence are we getting this information? I  
22 thought that they had allowed you to withdraw your  
23 petition without prejudice?

24 MR. HANSEN: Without prejudice, exactly.  
25 They maintained an open docket, according to them.

1           And, Your Honor, we are not aware of any  
2 inflexible six-month period. We don't believe that's  
3 applicable. We don't believe there is such an  
4 inflexible period. We believe that substantively --  
5 again, I know the Justice Department wants to make a  
6 big deal out of this to keep us from having our trial.

7           THE COURT: No. It seems to me they might  
8 not like to have the trial on your timetable. That's  
9 what people are concerned about.

10          MR. HANSEN: It's either a trial on our  
11 timetable or not a trial at all, frankly. Because if  
12 we can't have a trial on an expedited basis, we can't  
13 have the merger. Effectively, a pocket veto.

14          Back to the FCC, Your Honor. The fact of  
15 the matter is --

16          THE COURT: You are leaving out in that  
17 analysis, sir, the FCC.

18          MR. HANSEN: No, Your Honor, I'm fully  
19 incorporating the FCC. When we were before you, Your  
20 Honor, before -- when we were here before, of course,  
21 we talked about the FCC as an independent regulatory  
22 actor. They have to make their own decision. The FCC  
23 has typically and traditionally been guided by what  
24 the court has done in these kinds of issues. We had  
25 no commitment as to when the FCC would act.

1           THE COURT:  Have you really had experience  
2   in that?  The only case that I'm aware of that has any  
3   similarities is the Echostar matter which clearly fell  
4   apart because there was no FCC approval ahead of time.

5           It's a condition precedent to this deal.  So  
6   to say that my trial in some fashion is the key here  
7   and should go first and should be oblivious to the  
8   question of whether the FCC will act in time or not --  
9   if I had the agreement of the FCC that we all could  
10  get done in time, it makes it a lot more productive.

11           The way I'm looking at this, I don't think  
12  there may be a case in controversy issue as suggested.  
13  But I certainly see that the landscape has changed,  
14  sir.  It has clearly changed.

15           I have no assurance that you're gonna  
16  proceed with the FCC in any way to get this resolved  
17  in a timely manner.  So to ask me to issue an opinion  
18  with enough time to allow for an appeal for the FCC,  
19  which we don't know what their timetable is -- you've  
20  had no discussion, I'm sure, or assurances from them,  
21  I suspect, unless you want to tell me otherwise.  If I  
22  had assurances, I might be willing.

23           I can get the work done, but you're not  
24  actually giving me much reason why.  I gave you the  
25  early trial date over their objection.  I now have

1 another lawsuit, which we didn't know about at the  
2 time, who would just as be happy as consolidating.  
3 And we slow it up slightly, and they'll be involved,  
4 and I'll have two trials -- I'll have one trial  
5 instead of two. Obviously preferable from everybody's  
6 point of view, and I can still get done before  
7 September 20.

8 But it's a bit presumptuous to say nothing  
9 has changed and you should just keep doing what we  
10 convinced you to do over the objection of certainly  
11 the Department of Justice without me knowing for sure  
12 that the deal will be the deal.

13 I mean, you could change the deal in a month  
14 and everybody's time will be wasted, including the  
15 third party. I mean, we have hundreds of nonparties  
16 out there looking for documents.

17 I didn't find the motion by LightSquared to  
18 be frivolous. I can understand why they said it. I'm  
19 saying the same thing they are and that the magistrate  
20 judge -- the special master indicated.

21 We don't have any confidence that we are  
22 spending the time and effort and the taxpayers' money  
23 as well as the money of these other parties, we have  
24 no confidence that we're not being spun.

25 So let me hear from the government for a

1 minute.

2 MR. HANSEN: Can I just address that, Your  
3 Honor?

4 THE COURT: Yeah.

5 MR. HANSEN: I really do want to stress one  
6 point. The only thing we're talking about different  
7 here is whether an application is pending or not  
8 pending. We are still committed to be at the FCC. We  
9 never had any commitment before as to when the FCC  
10 would act. The exact filing status is not  
11 determinative of what the FCC will do.

12 With all respect, Your Honor, I understand  
13 Your Honor's concerns, but from the perspective of  
14 having a committed transaction with contractually-set  
15 dates, we've all gated our expectations. We are  
16 moving forward with trial. We're making progress, and  
17 it will be of assistance to the FCC to have a decided  
18 case on the antitrust issues. It just will.

19 And it will put us in a position --

20 THE COURT: Nobody there said that to me.  
21 Have they said that to you?

22 MR. HANSEN: Pardon me, Your Honor?

23 THE COURT: I said has anyone said that to  
24 you? Honestly. I mean, you think it will if you win,  
25 but --

1           MR. HANSEN:  Many people have that said to  
2 me.

3           THE COURT:  From the FCC?

4           MR. HANSEN:  I have not spoken to the FCC,  
5 Your Honor.  But, truthfully, it only makes sense that  
6 if this Court has decided the antitrust issues, the  
7 same government will be bound by those decisions as to  
8 the antitrust issues.  There just doesn't seem to  
9 be -- I don't think that's a live issue.

10           THE COURT:  You said in a letter to counsel  
11 from LightSquared -- I don't remember whether it was  
12 you or Mr. Wade -- defendants intend to seek the  
13 necessary approval from the FCC as soon as practicable  
14 -- or practical, sorry -- and that my decision could  
15 constitute a materially changed circumstance.

16           So I read that to say that until you have a  
17 decision from this Court -- and I am certainly not  
18 bound to issue one on a day certain -- that you won't  
19 seek approval.  Is that what you mean by "as  
20 practical"?

21           MR. HANSEN:  I think all options are still  
22 available, Your Honor.  We are proceeding with the  
23 regulatory process and what we think is the  
24 appropriate way.

25           THE COURT:  What is that, sir?

1           MR. HANSEN: It means how we can most  
2 effectively get it done. Obviously, we think it would  
3 be of assistance to have that -- this Court's decision  
4 before the FCC. Exactly how and when you would do  
5 things at the FCC, I can't say. I'm not -- I just  
6 don't know.

7           THE COURT: Is that sentence, "Defendant's  
8 intend to seek the necessary approval as soon as  
9 practical" sensible? Does it mean anything?

10          MR. HANSEN: Yes, Your Honor. It means that  
11 we are committed to concluding this transaction.  
12 Whether we do that next week or six months from now is  
13 really a function of how we best get that done.

14                 We have always told this Court there were  
15 two independent things we had to get done to complete  
16 this transaction: Getting the Department of Justice's  
17 lawsuit resolved and getting the FCC approval.

18                 We decided, Your Honor, for what we think  
19 are sensible reasons, that rather than have an FCC  
20 hearing process in parallel to this Court's trial --  
21 which is what we were facing -- it made sense not to  
22 have that, but rather to have those issues decided in  
23 one place, and that was in this court where we already  
24 have a schedule to get them tried in February rather  
25 than have them tried here and in front of an

1 administrative law judge somewhere else. That's the  
2 only thing that has happened.

3           When we have this result, we don't think we  
4 will have that other process. That process will be  
5 effectively short circuited because this Court will  
6 decide many, if not most -- I didn't say all, but  
7 many, if not most, of the important issues. And then  
8 we'll have our fair chance before the FCC.

9           We understand the FCC isn't obligated to  
10 approve our transaction. We understand that the FCC  
11 has its right to take whatever time the law gives it.  
12 But we think the FCC, just like this Court, will be  
13 sensitive to the fact that we have a transaction.  
14 It's important for the future of a lot of people and a  
15 lot of companies, and we'd like to have a chance to  
16 have it resolved on the merits.

17           What the government is telling, Your  
18 Honor -- I understand Your Honor's skepticism, but  
19 what the government is telling you and the delay  
20 argument is effectively, well, just sit and wait and  
21 maybe this will all go away.

22           THE COURT: What happens if they withdraw  
23 their complaint?

24           MR. HANSEN: If they withdraw their  
25 complaint with prejudice, we don't have to have a

1 proceeding in this trial, Your Honor.

2 THE COURT: They won't.

3 MR. HANSEN: Of course, they won't do that.

4 THE COURT: But, sir, you know, we could be  
5 here on a PI and probably save everybody a lot of  
6 headaches.

7 MR. HANSEN: But, analytically, Your Honor,  
8 I think you've put your finger on exactly the right  
9 question. It's the fundamental fairness point that I  
10 really think is the counter way to the practical  
11 concerns.

12 If they were here saying yes, we'll drop it  
13 with prejudice --

14 THE COURT: No, not with prejudice, because  
15 they don't -- at this moment they don't see that  
16 you're a serious proponent of this deal without an  
17 application pending in the FCC.

18 MR. HANSEN: If they believe that, they  
19 could drop it with prejudice. They don't believe  
20 that. They want to preserve the -- and, Your Honor, I  
21 recognize the skepticism, but think of the practical  
22 effect here. By having their complaint out there and  
23 unresolved, they are having a pocket veto over our  
24 deal.

25 In other words, if this trial gets pushed

1 back, if all the things get pushed back, we don't make  
2 thresholds, deal has to blow up. We have no  
3 alternative. Yet the government has never proved a  
4 single thing in court.

5 THE COURT: Your problem is also self-made  
6 with the FCC.

7 MR. HANSEN: No, Your Honor, we don't think  
8 it's self-made because we have to get this trial done.

9 Forget about the FCC for a minute.

10 THE COURT: That's what you may have done.  
11 I'm not doing that. I'm sorry.

12 MR. HANSEN: Both things have to get done,  
13 and we have ways to deal with both of them. For this  
14 Court to essentially say we can't have our day in  
15 court here --

16 THE COURT: I didn't say that.

17 MR. HANSEN: If we don't have our day in  
18 court -- we had these discussions before with Your  
19 Honor, and the day in court that is meaningful to us,  
20 obviously, has to be an expedited day in court.

21 The FCC is, itself, a hurdle we have to get  
22 over, and we have a way to get over that hurdle.  
23 Simply for them to say, well, just because we now  
24 think you are doing it differently with the FCC, don't  
25 have the trial on the issues that we've framed and set

1 a block and gave reasons for the deal, we think that's  
2 unfair to us. We think all these issues are still  
3 live issues.

4           Until such time as they tell us they are not  
5 challenging our deal, we need to get those issues  
6 clear, and we need to move with the FCC as well. But  
7 the fact that we have chosen not to have parallel  
8 proceedings but rather have chosen as a matter of --  
9 pardon me. To essentially get those issues resolved  
10 here and use that --

11           THE COURT: Yeah, use it. I understand  
12 that.

13           MR. HANSEN: -- with the FCC, but to have  
14 this Court's guidance. And we think with this  
15 Court's --

16           THE COURT: You could have the FCC's  
17 guidance because they have a broader jurisdiction than  
18 this court. And they could go first, and it would  
19 certainly be very persuasive, if not, according to  
20 you, collateral estoppel because it's the government.

21           So if you wanted the FCC, you win the whole  
22 nine yards, whereas here you don't make nine yards no  
23 matter what. I'm just one person along the way that  
24 you would like to have a decision to use. I agree.

25           MR. HANSEN: Not to use, to have our day in

1 court.

2 And as to Your Honor's point about the FCC,  
3 we don't have that as an option, and I'll tell you  
4 why.

5 We already had a full expedited trial  
6 schedule to get these issues decided by Your Honor at  
7 the time the FCC staff indicated they wanted to have  
8 an administrative hearing. We have no guarantee in  
9 that process we would have an expedited administrative  
10 hearing. We have, on the other hand, an expedited  
11 trial in this court.

12 THE COURT: You have no guarantee of that.

13 MR. HANSEN: Well, we had an order from the  
14 court saying this is what was gonna happen.

15 THE COURT: Well, now I have two private  
16 litigants sitting here, too, that you would like to  
17 have them wait until after the deal goes through in  
18 September. You want -- you know, you want one chance  
19 at one judge, then to take it to the FCC. You don't  
20 want Sprint to be involved in this or Cellular South  
21 at this time because they'll slow us down. And then  
22 you say to them, well, we'll have a trial afterward.  
23 But they're not bound.

24 So you say to the judge, well,  
25 hypothetically, you could have two trials, Judge, but

1 that's okay for you because we will have a shot of  
2 having -- a fifty/fifty shot of taking your decision  
3 to the FCC.

4 It's a rather presumptuous position you find  
5 yourself in to say -- skeptical isn't the only word  
6 that might apply.

7 MR. HANSEN: Your Honor, we're trying to  
8 simply have an appropriate chance to have these issues  
9 litigated on the merits.

10 You are absolutely right. To inject private  
11 parties into this government lawsuit makes it  
12 difficult, if not impossible, for us to have our day  
13 in court on the merits.

14 And, Your Honor --

15 THE COURT: Why impossible? Wait. Wait.  
16 Let me hear what the impossibility is. It just means  
17 you have to fight more than one petition.

18 MR. HANSEN: Well, we had these very  
19 disputes before Your Honor, I think, the last two  
20 times we were before the Court when we laid out all  
21 those arguments. I believe we were persuasive at that  
22 time persuading the Court that injecting private  
23 parties with private competitors' concerns in the  
24 government's lawsuit made it an unadministrable  
25 lawsuit. And that was our basis for making those

1 arguments then, and we think they are every bit as  
2 valid now.

3 THE COURT: Can I interrupt for one thing so  
4 maybe I clarify it?

5 I believe that you are flatly wrong on the  
6 law that they have to show a Section 7 as well, and  
7 they will not be bound by the government, probably,  
8 under collateral estoppel basis and, therefore, at  
9 least up to the point of standing, there is one -- I  
10 am quite -- sort of shocked by your pleadings.  
11 There's never been a suggestion by this Court, and I  
12 don't know whether there's ever been one by the  
13 Department of Justice, but their burden is the same as  
14 the government's up to a point, plus some.

15 So it's that part that I don't want to try  
16 twice if you were to prevail. I mean, if the  
17 government prevails, we don't have to worry about  
18 Sprint.

19 But that -- so to the extent that you are  
20 proceeding on a premise that they need not show a  
21 Section 7 violation to even then get to the next step  
22 of standing, I cannot find a bit of support for that,  
23 and I find lots of support to the contrary. And if  
24 that's the case, now that we have two -- their  
25 discovery is not gonna be quite so limited. And I'm

1 not looking favorably upon the idea of looking at the  
2 issue twice.

3 MR. HANSEN: Your Honor, I believe  
4 Mr. Sunshine told the Court early on we weren't going  
5 to look at the issue twice. Whatever the government  
6 had will be decided in the government's case. They  
7 had other claims that will --

8 THE COURT: I think Mr. Sunshine probably  
9 wants to say something different today.

10 I'd like to go back to the issue of why we  
11 picked the trial date when we did.

12 My understanding was that you were proposing  
13 to close in March. You've now moved the goalpost,  
14 clearly. You were here telling us that your date --  
15 and then you had the petition pending. It had been  
16 out there more than six -- would be more than six  
17 months at the time, and that we were aiming to get  
18 done by March.

19 MR. HANSEN: Your Honor, I don't believe  
20 we've moved the goalpost at all. I believe we told  
21 the Court exactly accurately what the gating dates  
22 were in the contract, and they are still the gating  
23 dates. We have a March date. We have a September  
24 date. I think I specifically raised with the Court  
25 just those dates.

1           THE COURT:   March, September, and there's  
2 something in June.

3           MR. HANSEN:   Yes, exactly, Your Honor.   The  
4 dates are as we previously represented.   Nothing has  
5 changed.   We still have those dates.   But, obviously,  
6 it seems unlikely we are going to close in March.   We  
7 have the September date we're facing.

8           THE COURT:   What's the June date?   Somebody  
9 has to certify?

10          MR. HANSEN:   Certify the possibility that we  
11 will be able to proceed with the transaction.

12          THE COURT:   Is that the -- "possibility" is  
13 the language?

14          MR. HANSEN:   Reasonably, likely.   I don't  
15 have the exact -- someone has to certify they believe  
16 it's a reasonable chance that we can -- we can  
17 successfully conclude.   But those dates are exactly as  
18 previously represented, Your Honor.

19          THE COURT:   Well, I'm curious -- and I don't  
20 have this agreement.   I actually would like to see it  
21 because I think the difference, especially for  
22 purposes of a public company, is somewhat important.  
23 It's reasonable -- what is it, again, somebody from  
24 your company would have to certify?

25          MR. HANSEN:   I think --

1           THE COURT: Reasonable chance? No, that  
2 can't be.

3           MR. WAYLAND: Your Honor, reasonably  
4 possible.

5           THE COURT: Reasonably what --

6           MR. WAYLAND: Meaningfully possible to occur  
7 prior to such extended date.

8           MR. HANSEN: Meaningfully possible to occur.

9           THE COURT: And so without my decision, you  
10 as attorneys for ATT think that you can certify that  
11 without -- if I haven't complied with that date? You  
12 don't think that's an important date for your  
13 purposes?

14           MR. HANSEN: June is certainly an important  
15 date for our purposes. I think the dates are as I  
16 previously represented, Your Honor. Nothing has  
17 changed on that.

18           THE COURT: You keep on forgetting the FCC.

19           MR. HANSEN: Your Honor, all that's happened  
20 with the FCC --

21           THE COURT: I know. I know what's happened.

22           MR. HANSEN: -- is strategy for how to gain  
23 approval.

24           THE COURT: I know. But don't you  
25 understand from those of us who are not one of the

1 parties, that this "strategy" has a slight aura of  
2 using -- I think is the word that you used -- the  
3 Court to some extent, and the third parties and the  
4 Justice Department?

5 I understand they're in the driver's seat.  
6 So for them to not ask for any relief sort of  
7 surprises me, because they are working as hard as you  
8 are, if not more so. But I have some responsibility  
9 to the taxpayer to worry about whether we're entering  
10 into an exercise in which we are being used in a way  
11 that were not intended; "we," the courts.

12 MR. HANSEN: Your Honor, let me be very  
13 direct about that, Your Honor. We didn't seek resort  
14 to the court. We were sued.

15 THE COURT: Right.

16 MR. HANSEN: We were sued by a government  
17 that said we are going to block your \$39 billion  
18 transaction, which is a big thing for us, our  
19 shareholders, lots of other people. The Court's aware  
20 of that.

21 THE COURT: Sure.

22 MR. HANSEN: Our only recourse is to come to  
23 this Court to say we need to have the Court either  
24 decide, or we lose the transaction. There's a pocket  
25 veto aspect to this.

1           We don't believe that's using the Court. We  
2 simply believe that's an appropriate thing to bring to  
3 the Court's attention.

4           THE COURT: Why don't you renegotiate if  
5 it's such a good deal?

6           I mean, really, that's what happened in  
7 Echostar. They came and said we picked a date of  
8 January. By the way, Judge, you are just going to  
9 have to help us do this.

10           I find that difficult. You have a right to  
11 negotiate with private parties if it's such a great  
12 deal. Don't say everybody else has to comply with  
13 your timetable. To comply with your timetable is  
14 taking us a great deal of not -- I'm not speaking on  
15 my behalf. I'm talking about the larger group of  
16 people, far larger group. It's an enormous burden.

17           MR. HANSEN: Your Honor, the burden is  
18 imposed on us by the Justice Department, who got the  
19 transaction in March, decided to sue to us August 31  
20 and put us in the position we're in.

21           The fact is, Your Honor, we're not trying to  
22 impose a burden. We are simply trying to comply with  
23 our contractual obligation.

24           You say we can renegotiate the deal. That's  
25 absolutely -- we could make a deal. Who knows what

1 could happen. I don't have a crystal ball.

2 Here's what I have today, Your Honor. And I  
3 really apologize. I don't mean to be presumptuous,  
4 but I do mean to be as direct as I can. We are put in  
5 a position by people other than us. This is not a  
6 creation of ours. We were put in a position by the  
7 Justice Department of defending the lawsuit.

8 We then had the FCC say, you know what, why  
9 don't we have our own proceeding? We said to that,  
10 you know what, it makes no sense to have parallel  
11 proceedings. We think if we have a proceeding in this  
12 court -- which we have planned, which the parties are  
13 working to conclude before this court in February, so  
14 the court can decide the issues, that will be in the  
15 best interest of everyone.

16 THE COURT: Did they agree?

17 MR. HANSEN: Did who agree?

18 THE COURT: The FCC.

19 MR. HANSEN: They agreed to allow us to take  
20 the step we took.

21 THE COURT: But they agreed to let you  
22 withdraw your petition?

23 MR. HANSEN: Yes, Your Honor.

24 THE COURT: Was it without prejudice they  
25 agreed?

1           MR. HANSEN: They did agree to that.

2           THE COURT: They haven't agreed to anything  
3 else. I regret for everybody there's these two  
4 parallel tracks, but without one even being -- the  
5 train even being on the track at this moment gives one  
6 some insecurities.

7           MR. HANSEN: Let me just pause on that, Your  
8 Honor. In substantive terms -- and I recognize the  
9 Court's points, but in substantive terms we're still  
10 where we were.

11           Now we need to have the FCC approve this.  
12 We have already had significant proceedings at the  
13 FCC. They have lots of information.

14           THE COURT: They didn't like the  
15 information. No, I don't mean to be facetious. I  
16 mean, you're looking at the possibility that I agree  
17 that you have many arguments for the staff report, but  
18 I suspect without knowing that you have full access to  
19 a report that was fairly negative, sir.

20           So we are not in the same place. You have  
21 to look at the other regulatory process with a good  
22 deal of caution at this point, that their concerns are  
23 not limited to Section 7, and they are not favorable  
24 to you.

25           And even if you had a full fight and a full

1 opportunity to address that report -- and whether it  
2 ever comes in in this case, I have no idea. It's  
3 another big issue along with twenty-seven others, but  
4 your posture is just not the same as it was.

5 MR. HANSEN: Your Honor, with all respect,  
6 the staff report has no more significance than the  
7 DOJ's complaint. It is a government, essentially,  
8 prosecutorial document. It's entitled to no weight.  
9 And, indeed, much of it is about the antitrust issues  
10 that will be resolved in this court.

11 THE COURT: But not all.

12 MR. HANSEN: Not all, Your Honor. We think,  
13 we honestly think that when the government is forced  
14 to finally prove their case in this court and we can  
15 show that they're wrong, a lot of the staff report  
16 goes away, too. It's a deeply flawed document, deeply  
17 flawed analysis; entitled to no deference.

18 And the FCC has not acted. There hasn't  
19 been a single FCC action in terms of what will happen  
20 with this transaction. They have not --

21 THE COURT: Of course. You withdrew. They  
22 let you withdraw. I mean, you're sort of compressing  
23 the chronology. The report is starting to percolate.  
24 After you withdraw, they say it's okay and they make  
25 it public, and you respond.

1 MR. HANSEN: Right.

2 THE COURT: But those events that occurred  
3 over the Thanksgiving are not the same as where we  
4 were when we were here setting a trial date.

5 I guess I should hear from the government.  
6 They brought this complaint. They have concerns about  
7 it, they better let me know.

8 MR. HANSEN: Well, I'm sure, Your Honor.  
9 But if they want to drop the complaint, that's one  
10 thing, but we simply think they can't have it hanging  
11 over us. If they drop it, they drop it with  
12 prejudice.

13 We are committed contractually to going  
14 forward. And we do honestly believe that all the  
15 considerations the Court has identified are  
16 essentially the same considerations as when we went  
17 into setting the trial date in the first place. And  
18 we are where we were, and it would be unfair to us to  
19 let the government effectively exercise a pocket veto  
20 of our transaction by means of a lawsuit.

21 THE COURT: It's not a pocket veto. Don't  
22 forget, they have one other entity with a veto power  
23 and you have a private suit out there. It's hard not  
24 to think of these.

25 MR. HANSEN: The private parties, if they

1 really wish to come in, jump the queue of all the  
2 other private litigants at the doors of this  
3 courthouse, they can seek a TRO. They can seek a  
4 preliminary injunction. I don't see how private  
5 litigants get to essentially jump the line because  
6 they say we want to jump the line.

7 THE COURT: We just told them how.

8 MR. HANSEN: Well, they don't want to do  
9 that because it's unlikely they'll prevail. But the  
10 situation is, Your Honor, private parties, you know,  
11 obviously, you know, they have whatever rights they  
12 have.

13 But we have a pending lawsuit, a pending  
14 schedule, lots of water under the bridge. People are  
15 working very, very hard. I was -- U got back at 2 in  
16 the morning after having been at a deposition in  
17 Dallas yesterday.

18 Your Honor, we are committed to making this  
19 schedule and being in court in February so that we can  
20 have the transaction addressed on the merits and not  
21 on predictions about what an FCC will do when they  
22 haven't even gotten the transaction in front of them.

23 Nobody has done anything at the FCC yet.  
24 The staff report is no different than the DOJ decided,  
25 you know, the prosecutorial filing.

1           The merits of this transaction are positive.  
2 They are beneficial. If we can't convince the Court  
3 of this, then we don't win. We understand. If we  
4 can't -- think of that world. Think of a world where  
5 we can convince Your Honor in February or March this  
6 is a pro-competitive transaction and all their  
7 theories are at war with the facts --

8           THE COURT: Then they'll want to appeal.

9           MR. HANSEN: They'll have a right to appeal,  
10 and they can expedite the appeal.

11           Think of the world in which those are the  
12 facts. We then have a material chance --

13           THE COURT: How can they appeal if I don't  
14 decide before June? Really.

15           MR. HANSEN: They can expedite the appeal  
16 for whatever time Your Honor has decided.  
17 Obviously -- we will look at the world in June the way  
18 the world looks. If we have a decision from Your  
19 Honor saying we think you, AT&T, are right, much  
20 easier to certify on the standards that you adduce.

21           The government, on the other hand, if they  
22 have a decision by June adverse to them, they can say  
23 to the D.C. Circuit, we need some kind of ruling up or  
24 down in time to block the deal before this closes in  
25 September.

1           The FCC can act very quickly when it wishes  
2 it. It can act very slowly when it wishes to. But we  
3 are going to take the, hopefully not naive, assumption  
4 that the commission at the FCC wants to do what's in  
5 the public interest and take this case on the merits  
6 and not do some sort of cynical thing like a pocket  
7 veto.

8           We could only assume that everybody who has  
9 a role to play in this process is going to act in such  
10 a way as to decide this case on the merits and not on  
11 a pocket veto basis. And the only way we can avoid a  
12 pocket veto, Your Honor, it really is -- and we don't  
13 mean to be presumptuous. We are not using the Court,  
14 and we're not playing some strategic game. The only  
15 way we can have this case decided on the merits is to  
16 have a prompt trial in this court on what the DOJ has  
17 alleged --

18           THE COURT: And a prompt decision.

19           MR. HANSEN: Your Honor, we apologize. We  
20 know it puts a burden on the Court; puts a burden on  
21 everybody. We didn't sue to block the deal. They  
22 sued to block the deal.

23           We are going to meet every deadline. We're  
24 certainly working very hard, as everybody, on this.  
25 We understand it places a burden on the Court, and we

1 apologize for that.

2 THE COURT: Not just the Court.

3 MR. HANSEN: But it's essentially by virtue  
4 of the Justice Department coming in and seeking to  
5 block a very substantial private transaction. And if  
6 they're right, wonderful. That's the way it has to  
7 be. But if they are wrong, Your Honor, if they are  
8 wrong, it should be decided on the merits. It  
9 shouldn't be decided based on them never having to  
10 prove their case and scuttling this deal.

11 Echostar, Your Honor, you were involved in  
12 that. I wasn't. But the distinct flavor of that one  
13 was on the deal going away. People just had to go  
14 away. They never really got to resolve that on the  
15 merits.

16 THE COURT: I never did it based on smell.  
17 I mean, really. They came in and asked for something  
18 that was almost undoable. And I'm not sure whether  
19 this is or isn't.

20 Which brings me to the second issue on your  
21 agenda before I turn to the government and  
22 Mr. Sunshine.

23 You said discovery update was one of the  
24 issues. I just want to know what that refers to in  
25 the agenda.

1           MR. HANSEN: Your Honor, that's the  
2 Justice's agenda, not ours. We are, actually, quite  
3 pleased with the progress of discovery, thanks to the  
4 intercession on a timely basis of Special Master  
5 Levie. My understanding is there is no -- I want to  
6 underline this, there is no unresolved discovery.

7           THE COURT: Is there something coming up  
8 with the company in Texas that we need to know about?

9           MR. HANSEN: Yes, Your Honor. MetroCell,  
10 they sought to quash in Texas. I haven't read it, but  
11 I believe there's an order referring that to Master  
12 Levie by the court in Dallas, which we welcome. I  
13 think remarkably Special Master Levie has, within a  
14 day or so of virtually every dispute being brought to  
15 him, promptly resolved it.

16           So we sit in a situation where I think  
17 everybody contemplated going in that there could be a  
18 myriad of discovery disputes. We're moving forward  
19 quite efficiently from our perspective.

20           THE COURT: Have you reached all these  
21 deadlines that have been set up? We are up at seven  
22 rebuttal expert identifications due.

23           MR. HANSEN: We've made every deadline, Your  
24 Honor.

25           THE COURT: Twelve fact witnesses identified

1 by plaintiff. After the eighteen, eighteen by you.  
2 That's all moving along?

3 MR. HANSEN: All correct, Your Honor. Every  
4 deadline been met.

5 THE COURT: How many more third-party  
6 depositions are there to go?

7 MR. HANSEN: I think there are a number,  
8 Your Honor; five or ten. There's a substantial  
9 number.

10 THE COURT: Total five or ten?

11 MR. HANSEN: At least from us.

12 THE COURT: They haven't been set yet, you  
13 mean?

14 MR. HANSEN: I think most of them have been  
15 set or we are in negotiations to get them finally set.  
16 People are being cooperative, for the most part.

17 Again, the safety valve is to the extent  
18 somebody is not cooperative, we'll take the matter to  
19 Special Master Levie. And that's been very effective  
20 in getting it worked out, as you saw in LightSquared.

21 THE COURT: Do you know what the basis of  
22 this motion to quash is?

23 MR. HANSEN: Of MetroCell's? Your Honor, I  
24 don't specifically know the details of that. I  
25 suspect it's beyond confidential information...I can't

1 address the Court on the specifics.

2 THE COURT: We've now agreed, for the  
3 record, that we will have the tutorial on the industry  
4 the 18th and 19th. And I've set the contours through  
5 the special master. We will have more of a discussion  
6 than a cross-examination. And you will -- I think  
7 we've set a timetable where the parties will give me  
8 the agenda and what topics they want, who will take  
9 the burden for which topics so we cover the things  
10 that are essential for me to understand the industry.

11 I also appreciate the parties having -- I  
12 had to continue this matter because of family illness,  
13 but -- that was the reason. It had nothing to do with  
14 the contours of this deal.

15 All right. I think we need to hear from the  
16 government.

17 MR. HANSEN: Thank you, Your Honor.

18 MR. CARY: Your Honor, before you hear from  
19 the government, can T-Mobile be heard on this point  
20 briefly?

21 THE COURT: Sure. Sure.

22 MR. CARY: Your Honor, I'm not going to  
23 repeat what's already been said, but very briefly, it  
24 has always been our contemplation that the FCC  
25 decision would come after the decision in this court.

1 That's our understanding of what the FCC's plan is as  
2 well.

3 So the only thing that we're talking about  
4 here is whether they can decide that quickly.

5 We understand that there are --

6 THE COURT: Let me stop you. The FCC was  
7 willing to wait, by the way, for an ALJ to do their  
8 work. So that -- nothing about that has changed  
9 except now they don't have an ALJ getting ready to do  
10 anything because you withdrew.

11 MR. CARY: Yes. And that is exactly the  
12 point. That is exactly the point, Your Honor.

13 The FCC has never done a merger trial  
14 through an ALJ. That's a very long process. It's  
15 usually done at the staff level where things are  
16 worked out. When they announce that there was a  
17 possibility that they would put it into an ALJ  
18 proceeding, that's why the hearing -- the application  
19 was withdrawn.

20 THE COURT: Why?

21 MR. CARY: But the notion here is --

22 THE COURT: They've never done it before?

23 MR. CARY: Sorry?

24 THE COURT: It's because they've never done  
25 it before?

1           MR. CARY: Because the timeline of that kind  
2 of a proceeding would have been so long it would have  
3 pushed us beyond the drop-dead date of the deal.

4           THE COURT: How do you know that? I just  
5 don't know how you know that.

6           MR. CARY: That is the practice in terms of  
7 an ALJ proceeding. They said they wouldn't start it  
8 until after the trial, and the process takes a long  
9 time. So that was effectively the equivalent of  
10 pushing it past our drop-dead date.

11           When the government brought this case, they  
12 made a point of saying that it was important to  
13 expedite because T-Mobile's business was in limbo  
14 during this process. It remains in limbo.

15           The only way this deal can get done is for  
16 this Court to go ahead expeditiously, and then for the  
17 FCC process to get done.

18           It's --

19           THE COURT: How does that latter process get  
20 done? I just don't understand it.

21           MR. CARY: Because after this adjudication  
22 is finished, we go back to the FCC and we finish the  
23 process there outside the context of an ALJ  
24 proceeding, and that can be done.

25           THE COURT: But, again, you are being

1 presumptuous. You are saying the FCC will do what you  
2 want.

3           You're assuming you win here, that I do a  
4 very quick job in response to a long, complicated  
5 case, get you an opinion. If you then win, then you  
6 go to the FCC, and they'll no longer care about an  
7 ALJ, they'll no longer care about other issues, and  
8 they'll beat your deadline. And if the government  
9 wants to appeal, the Court of Appeals will beat your  
10 deadline, and fine and dandy you might get through by  
11 the 20th. The number of ifs in that scenario is  
12 mind-boggling to me.

13           MR. CARY: There are many ifs in that  
14 scenario.

15           THE COURT: It is a responsible thing for  
16 your parties to be doing this?

17           MR. CARY: Where there's no if, is that if  
18 this trial doesn't occur expeditiously, then the  
19 transaction's over.

20           THE COURT: Yeah. There's one last --  
21 there's one if instead of many, many ifs.

22           MR. CARY: Right. So the only way this  
23 transaction can get done is if this case proceeds  
24 expeditiously, and if the FCC then takes the record  
25 and deals with it expeditiously.

1           THE COURT:   And the Court of Appeals doesn't  
2 have anything to say before the 20th, or no one  
3 appeals.

4           MR. CARY:   That's right.

5           THE COURT:   And that -- those are three ifs.

6           MR. CARY:   That's right.   But a decision by  
7 this Court to put off the trial is a decision --

8           THE COURT:   I can put it off a month or two  
9 and get you a decision before the end of the summer,  
10 but you would not like that.

11           I can beat the 9/20 date in no time at all,  
12 but I can assure myself not having to look at the  
13 private parties again -- I would like to see  
14 collateral estoppel work both ways here; not just you  
15 going to the government, but me not having to deal  
16 with private parties.

17           MR. CARY:   But under that scenario there is  
18 no plan.   There is no way to get it through the FCC in  
19 time.

20           THE COURT:   I don't know what would -- how  
21 that will happen one way or the other no matter what I  
22 do.   You don't either, right?   I mean, frankly.

23           MR. CARY:   No, we do.   We do.   There is a  
24 prospect -- if this case is completed, if there's a  
25 record that deals with the competitive issues, there

1 is no need for a separate adjudication of the FCC.  
2 The FCC could very well recognize that and resolve the  
3 remaining issues. There's plenty of time for that to  
4 happen outside the context of an adjudication.

5 But if this case doesn't go ahead, then the  
6 deal's over. It's the equivalent of having  
7 permanently enjoined the transactions.

8 THE COURT: Well, this case can go forward,  
9 but it doesn't have to go forward in a month. I mean,  
10 there's a variety of issues.

11 MR. CARY: But all the reasons that  
12 militated in favor of an early trial date. In fact,  
13 the Department of Justice originally proposed a March  
14 trial date a couple of weeks later than what is  
15 scheduled. All of those reasons remain. T-Mobile  
16 remains in limbo. The transaction remains in limbo.  
17 The FCC process is held up because it was always going  
18 to come next, after this transaction -- after this  
19 hearing. All of that remains as it was.

20 THE COURT: Limbo at FCC is a result of  
21 their reaction to your deal. It has nothing to do  
22 with me.

23 MR. CARY: That's correct.

24 THE COURT: I mean, you would just like to  
25 be able to say that one court has considered the

1 arguments of Section 7, but they -- I don't know  
2 exactly what the collateral estoppel effect is. Maybe  
3 Mr. Wayland has a point of view, or Mr. Sunshine, on  
4 that. I've never thought about it, but still I'm sure  
5 some of their issues have nothing to do with Section  
6 7.

7 MR. CARY: The staff has indicated they have  
8 a lot of issues. Most of those issues are Section 7,  
9 and the commission would benefit from a full  
10 adjudicated record, and at that point there would be  
11 no necessity of doing another.

12 THE COURT: Whose opinion they would  
13 benefit?

14 MR. CARY: That's my opinion.

15 THE COURT: I would like to hear from the  
16 FCC, but they are not here.

17 Okay. Let us here from the other parties on  
18 this.

19 MR. CARY: Yes.

20 MR. WAYLAND: Good morning, Your Honor.  
21 There's a fundamental fallacy in what the Defendants  
22 are telling you, and that is that they believe that  
23 they can invoke the jurisdiction of Clayton Act  
24 Section 7 and get Your Honor to issue an opinion  
25 because they want to get going fast.

1           But the way Section 7 works, it's a blocking  
2 statute. We use it to block transactions when we  
3 think they're going to close. When we filed our  
4 complaint in August, there was an FCC proceeding in  
5 place already. There was a calendar at -- the 180-day  
6 clock was running.

7           THE COURT: Yeah. And they filed in April.

8           MR. WAYLAND: In April. So we filed in  
9 August thinking that we needed to do so because the  
10 FCC might complete its process, and we needed to be  
11 ready.

12           And that's what Section 7 does. It gives us  
13 a right to block. We don't have to approve. The  
14 court doesn't have to approve. It's simply a blocking  
15 statute. We invoke it when we think we need to stop a  
16 transaction.

17           Right now, Your Honor, there's absolutely no  
18 reason to invoke it because this transaction cannot  
19 close, and they cannot get it closed until they file  
20 with the FCC.

21           So we're next -- the reason for the delay,  
22 we raised this issue with the special master the other  
23 day, and we've been waiting to see what the response  
24 would be in front of Your Honor, which is why we put  
25 it on the agenda.

1           We thought maybe they would come in and say,  
2           okay, we're gonna file with the FCC next week and  
3           nothing's really changed. But hearing what we've  
4           heard today, which is that they may not file until  
5           after Your Honor rules or some other time, there's  
6           just no basis at all to understand when they are going  
7           to file, we next week will file a motion. The motion  
8           will be this: It will be either a motion to withdraw  
9           without prejudice, or a motion to stay the  
10          proceedings. We are to make that filing next week for  
11          all the reasons that Your Honor has already suggested.

12           THE COURT: Let's get specific here. It  
13          saves a lot of time and effort if we know what we are  
14          doing. I don't know why it takes so long to figure it  
15          out.

16           I just -- I think that they have to come to  
17          some grips with this in order for everybody to feel as  
18          though we're operating on --

19           MR. WAYLAND: Exactly right, Your Honor.

20           THE COURT: We are going to have to hear  
21          this quickly; quickly. You are going out doing  
22          discovery, and we are not putting a halt on that  
23          discovery at the moment.

24           MR. WAYLAND: We can file our motion on  
25          Tuesday, Your Honor.

1           THE COURT:   And they have till Thursday and  
2 we'll be back on Friday.  You are going to either move  
3 to stay or dismiss without prejudice under 42?

4           MR. WAYLAND:  Correct, Your Honor.

5           THE COURT:  You know, I've been in this  
6 situation.  It's not great, and no one loves it, but  
7 if we had to have a PI, we'd have to have a PI that  
8 exists out there.  It's not the ideal way to go.

9           But you must know a lot by now.  I mean, I  
10 don't know how much --

11          MR. WAYLAND:  Well, actually, there's a  
12 substantial amount of discovery to be done.  I can  
13 give it to Your Honor if Your Honor is interested in  
14 that before we have the motion or not.

15          THE COURT:  Yeah, I do.  But one other  
16 question, if you may.

17          What is the government's position -- I've  
18 never looked at this -- on whether there can be  
19 collateral estoppel used at the FCC?  In other words,  
20 it is -- if they were to prevail, that it is not  
21 anticompetitive?

22          MR. WAYLAND:  I'm not prepared to address  
23 it.  It's our view, but I don't have case authority,  
24 that it does not have that effect.

25          THE COURT:  I would like to know because,

1 it's really -- the number of hypotheticals that the  
2 two defendants are operating on are so enormous. I  
3 don't find that courts should have to operate in such  
4 a world of hypotheticals. But I also agree completely  
5 with Mr. Hansen that there's a suit here.

6 MR. WAYLAND: Well, there's a suit because  
7 there was a prospect of a real transaction. Once  
8 that's not gone -- a good hypothetical, Your Honor,  
9 suppose that they had filed their transaction in  
10 March, as they did, and that they had gone through the  
11 Hart-Scott-Rodino clearance process but they hadn't  
12 filed with the FCC, which is really what's their  
13 position.

14 We would have said this: We would have  
15 said, thank you very much, come back when you file  
16 with the FCC and we'll tell you what we're gonna do.  
17 We wouldn't have filed a complaint in August.

18 THE COURT: Because you knew you had six  
19 months?

20 MR. WAYLAND: Yeah. It was not a real  
21 transaction until they filed with the FCC.

22 THE COURT: Is that six-month rule, would  
23 that have any applicability here if they were to  
24 refile? They seem to think not.

25 MR. WAYLAND: Yes.

1           THE COURT: I think --

2           MR. WAYLAND: Here's what the general  
3 counsel of the FCC said when they announced that they  
4 were allowing them to withdraw: They said, they are  
5 back to "square one." That's the quote, "square one."  
6 The clock starts again.

7           THE COURT: But do you think you can invite  
8 the general counsel to appear?

9           MR. WAYLAND: I can invite, Your Honor. I  
10 can't force.

11          THE COURT: Well, I would like him to, so  
12 tell him. I think it's fair to say that some of  
13 these -- are they back to square one under the rules?  
14 I don't have the ability to know their practices  
15 without somebody appearing to say so.

16          I mean, there are a lot of people professing  
17 to say what they would do and not do. And whether or  
18 not we have a real controversy, it depends a whole lot  
19 on what's available to the parties, meaning ATT and  
20 T-Mobile.

21          And I need you, as part of your pleading, to  
22 address this issue. And it's one of the questions the  
23 general counsel may have something to say. I don't  
24 know the answer of whether or not they could go from  
25 here and convince them because I can hopefully write a

1 persuasive opinion in their favor, which that's a  
2 hypothetical, too, at this point.

3 MR. WAYLAND: Right.

4 THE COURT: And on discovery? I'm sorry.

5 MR. WAYLAND: Your Honor, I can give a quick  
6 summary where we are on discovery. There are about  
7 125 third parties were subpoenaed.

8 THE COURT: 135?

9 MR. WAYLAND: 125 were subpoenaed. There  
10 have been productions from 100 of those. There have  
11 been seventeen depositions taken, and the parties have  
12 identified twenty experts.

13 What's still to be done, supposedly by  
14 January 10th, Your Honor, there are potentially  
15 forty-six depositions left to complete of the thirty  
16 per side that were authorized.

17 THE COURT: So you have twenty or so, and  
18 they have twenty or so?

19 MR. WAYLAND: Plaintiffs have twenty-one,  
20 and defendants have twenty-five.

21 THE COURT: Have they noticed twenty-five?

22 MR. WAYLAND: Ten have been noticed by us  
23 and twelve have been noticed by the defendants. And  
24 at least thirty third parties haven't finished their  
25 production yet.

1           By January 25th, which is when all the  
2 expert depositions are complete, we're gonna have to  
3 have had as many as twenty-five expert reports and  
4 twenty-five expert depositions.

5           THE COURT: You think I'm gonna hear from  
6 twenty-five experts in my little trial?

7           MR. WAYLAND: I don't think so, Your Honor,  
8 but --

9           THE COURT: I mean, you've got to be  
10 serious. Twenty-five experts?

11          MR. WAYLAND: We identified five in our case  
12 in chief and the defendants identified nine. And we  
13 identified four rebuttal, and they identified two  
14 rebuttal.

15          THE COURT: That's twenty. So you've  
16 just -- it's not really twenty-five. You only have  
17 twenty experts.

18          I've never seen an expert get off the stand  
19 in less than a day or two. I mean, that's -- there's  
20 a trial. We have to move fast.

21          MR. WAYLAND: I agree, Your Honor. There  
22 would be seventy more depositions, supposedly, to be  
23 done before January 10th.

24          THE COURT: No. Seventy more with or  
25 without experts?

1 MR. WAYLAND: With experts.

2 THE COURT: But they are not due by the  
3 10th.

4 MR. WAYLAND: No. You are right, Your  
5 Honor. It could be as many as forty-six before  
6 January 10th. And then Your Honor's generally aware  
7 of the rest of the schedule.

8 THE COURT: By the 10th. And then the last  
9 day for depositions is the 25th. And then we are  
10 going to have briefing. And we are going to discuss  
11 that at some other time. We don't need to take page  
12 limits on exhibits and the briefs.

13 MR. WAYLAND: Right.

14 THE COURT: You are saying forty-six before  
15 the 10th and then the experts, which sound to me like  
16 twenty.

17 MR. WAYLAND: Well, yeah. I think maybe  
18 twenty.

19 THE COURT: Fifteen days with twenty  
20 experts.

21 MR. WAYLAND: I think that's right.

22 THE COURT: Quickly, Mr. Hansen, do you  
23 disagree with that? That's forty-six depositions  
24 between now and the 10th, and twenty depositions  
25 thereafter by the 25th; which will be about sixty-six

1 depositions, and you've taken seventeen?

2 MR. HANSEN: I agree that there are a  
3 number noticed. I'm not sure what the actual number  
4 will turn out to be, how many will actually get taken.  
5 The experts may or may not wind up staying through the  
6 process. This is designation stage. There's a  
7 winnowing process.

8 But what I agree with is we have a certain  
9 number of depositions we're going to take. So far  
10 we've made progress. I don't anticipate any issues.  
11 There are a lot of people working on it at DOJ, a lot  
12 of people working on it on our side. We are going to  
13 get it all done on schedule.

14 THE COURT: Okay. I don't think DOJ is  
15 quite so -- are there any other issues that I have to  
16 understand? I find that I'm learning more from the  
17 press than I learn from the parties sometimes.

18 MR. WAYLAND: We'll brief this fully, Your  
19 Honor, by Tuesday.

20 THE COURT: Tuesday, noon.

21 MR. WAYLAND: Yes.

22 THE COURT: As part of that, I would like to  
23 know what effect the ruling in this court would have.

24 Second of all, you probably have had  
25 experience with this. Say they lose, what's gonna

1 make the Court of Appeals come to grips with this in  
2 the summer? I mean, they generally leave in June. I  
3 don't quite understand that they could have -- they'll  
4 do something for a TRO or a PI, but I'm unaware that  
5 they'll bring in a special -- maybe they do. Maybe  
6 that's been your experience. I don't know.

7 MR. WAYLAND: My experience, Your Honor, the  
8 parties typically renegotiate the terms of their  
9 contract.

10 For example, this contract required the  
11 parties to make a filing with the FCC within thirty  
12 days of signing up the agreement. So in my view  
13 they've either had to renegotiate that or ignore the  
14 fact that they are, technically, in breach of that  
15 requirement.

16 THE COURT: You say "technically," because  
17 they made the filing and took it away. I don't know.  
18 That's their problems, not ours.

19 MR. WAYLAND: I agree.

20 THE COURT: I have not read it.

21 Mr. Sunshine, can I ask you a couple of  
22 questions here? There are a lot of things lingering.

23 Do you know any law on this, on whether or  
24 not a ruling from this court on title -- on section --  
25 I keep calling it Title VII, sorry -- Section 7, what

1 effect it would have on the FCC?

2 MR. SUNSHINE: Your Honor, I know generally.  
3 I don't have cases to cite you, but I can provide  
4 those to you in short order. But the general rule is  
5 as Your Honor correctly stated; the FCC has to approve  
6 a transaction that's in the public interest.

7 The public interest includes many things,  
8 including competition. And, importantly, one key  
9 difference between the FCC proceeding and your court,  
10 Your Honor, is in front of the FCC AT&T has the burden  
11 of proving that the application is, indeed, in the  
12 public interest.

13 THE COURT: What's that burden? Is it --

14 MR. SUNSHINE: I'm not sure, Your Honor. I  
15 don't know if it's a preponderance of evidence or  
16 convincing. I do know it is the FCC's -- it is the  
17 moving party's burden to show.

18 THE COURT: That may have an effect on res  
19 judicata and collateral estoppel, itself.

20 MR. SUNSHINE: And for all those reasons,  
21 Your Honor, I do not believe it's collateral estoppel.  
22 I believe the FCC will take note, just as they took  
23 note of the DOJ's opinion and considered it persuasive  
24 authority wherever you come out. But I do not believe  
25 it's collateral estoppel.

1           THE COURT:   And do you believe that their  
2 report is admissible in this court, or you don't want  
3 to express an opinion on that?

4           MR. SUNSHINE:   Right now, it's -- I think  
5 the report should be admissible in this court.   But  
6 it's just -- it's a staff report, so it's not a  
7 binding order of the commission.   But I would say, the  
8 much more important part -- because I think this just  
9 underscores the element of fantasy that you heard  
10 earlier this morning -- is that that report didn't  
11 come out of full cloth or come out of thin air.   That  
12 report was a result of an eight-month investigation.

13           According to the reports, AT&T met with the  
14 FCC staff and commissioners on at least thirty  
15 occasions -- if I'm getting that fact right --  
16 committed voluminous amounts of documents.   Party  
17 after party appeared in front of the FCC and put in  
18 their opinions.

19           THE COURT:   Okay.

20           MR. SUNSHINE:   So the reason why I raised  
21 that, Your Honor, is that this idea of just going back  
22 to the FCC and getting clearance, it's just fantasy,  
23 Your Honor.

24           THE COURT:   They don't view me as an expert  
25 in the federal communications, and I don't view them

1 as an expert, necessarily, in antitrust. But that  
2 doesn't mean that they're gonna be bound in some  
3 fashion by me unless it's legally required.

4 Well, I have to go back to you on something  
5 you did say earlier. And Mr. Hansen is absolutely  
6 right. You said if you lose here, that's the end of  
7 the case -- I mean, if the Justice Department loses.  
8 If they win, you win.

9 MR. SUNSHINE: Well, Your Honor, I think  
10 that that's right. Let me explain.

11 THE COURT: You said, "If we lose that day,  
12 I think we're going to be essentially done." I'm  
13 quoting.

14 MR. SUNSHINE: I'm nothing if not  
15 consistent, Your Honor. Let me explain exactly what I  
16 mean. Because I think Your Honor hit the nail on the  
17 head earlier.

18 We have a Section 7 case to prove that is  
19 the same Section 7 case that the DOJ approves. We  
20 have the additional burden of standing.

21 If Your Honor decides the Section 7 case on  
22 the basis of the DOJ case, when I said we're  
23 essentially done, that -- what I meant by that is you  
24 will have decided the issues as an all practical  
25 effect.

1           I don't think we're technically bound as a  
2 matter of collateral estoppel by those decisions  
3 because we are not present. But you would have  
4 examined the whole record, you would have made the  
5 decision. And that's why the right answer, from an  
6 efficiency perspective, is to do this once.

7           Now, I think AT&T is trying to get everybody  
8 to turn into pretzels to really satisfy the mess that  
9 they've made for themselves, for the -- of the  
10 contractual obligations they've put in. And they've  
11 really cynically manipulated the process with eight  
12 months of FCC, withdrawing the application, and now  
13 coming before you for an advisory opinion.

14           I certainly support the DOJ's approach of  
15 now this isn't ripe. What AT&T should do, if they are  
16 so convinced they are going to get this through the  
17 FCC, file a new application. Tell us what transaction  
18 you're doing. Tell us when you're going to do that.  
19 And then in that case Your Honor can set an  
20 appropriate schedule. It won't be an advisory  
21 opinion, and we can do this once.

22           We don't need to prove the Section 7 case  
23 once for DOJ, once for Sprint, once for Cellular South  
24 because it's the same record, same evidence.

25           THE COURT: Could you refresh my

1 recollection? On the Section 7 materials that we  
2 allowed DOJ to share, I believe, essentially, with you  
3 folks --

4 MR. SUNSHINE: That's right.

5 THE COURT: -- what are you missing now that  
6 that's happened?

7 MR. SUNSHINE: Well, those materials --

8 THE COURT: Let's just focus on Section 7.

9 MR. SUNSHINE: Right. Those materials, Your  
10 Honor, were the materials related to the economic  
11 models that AT&T has put in with respect to its  
12 affirmative defenses. And so those models go to what  
13 are the engineering models, how much are prices  
14 generally going to go up as a result of the merger.  
15 Those kinds of questions.

16 They don't deal with market definition.  
17 They don't deal with some of those other kinds of  
18 questions.

19 So it's an important part of the case, Your  
20 Honor, but there's certainly lots of other elements.

21 THE COURT: Well, relative to what?

22 MR. SUNSHINE: Relative to the Section 7  
23 analysis. We just briefly -- Section 7 analysis  
24 requires product market definition.

25 THE COURT: Yeah, but the Justice Department

1 is going to do that. You'll end up shadowing around  
2 with them anyways. I mean, I need to be practical.

3 Here's my thought, sir. At the moment, we  
4 have a lot of things in flux. What I would like to  
5 do -- I have made my ruling that they have to show in  
6 the private case. You've litigated this really more  
7 than once. And I agree with the position of Sprint  
8 and Cellular South that they have to show both the  
9 Section 7. And at least at the moment I believe that  
10 if it happens that they win, the government and you  
11 have to proceed, that you should be getting discovery  
12 on your other -- your standing issues. There is going  
13 to be precious little that won't be done by the  
14 Justice Department under the procedures that we have.

15 So that I would like you to come up with a  
16 discovery schedule that allows them -- they're going  
17 forward, but we're going to limit it to the two issues  
18 that establish standing. There are two for Cellular  
19 South and one for Sprint.

20 And that I will commit to make sure we don't  
21 have to unscramble the eggs. We'll have to go by a PI  
22 if necessary. But if the Justice Department wins, it  
23 may be over anyways -- well, if they win, it is over,  
24 and I suspect you are not going to do the Section 7.

25 So I would think that if -- there really

1 isn't much that we have to worry about. I mean, I  
2 can't -- I'm having trouble with the practicalities  
3 here other than you would like to be a full  
4 participant in the Section 7.

5 We would have to slow things down. And  
6 until I rule on the government's motion, I can't  
7 decide that.

8 MR. SUNSHINE: Well, Your Honor, with one  
9 amendment to that, I think we're on the same -- you  
10 know, we're clearly on the same time frame.

11 We do have a private right of action under  
12 Section 16. Now, worst case scenario -- and I think  
13 the chances of this may be the same as comet hitting  
14 the earth, but suppose DOJ were to settle the case  
15 with AT&T; we would still have our case.

16 And so the proposal that we had made to you  
17 in the CMO would be to get, you know, basically  
18 discovery of the record without any interference.

19 So basically all we're asking is to burn  
20 copies of the hard drives. And that way, Your Honor,  
21 if we have to put on a case, if we have to go to a PI,  
22 we're ready. And there's no burden, so there's really  
23 no reason not to do that.

24 THE COURT: How big is that burn?

25 MR. SUNSHINE: I believe, Your Honor, since

1 it's materials that have already been produced in the  
2 litigation, they've already been harvested, processed,  
3 priv logged, reviewed.

4 THE COURT: Produced by AT&T, not third  
5 parties.

6 MR. SUNSHINE: Our proposal, Your Honor,  
7 leaves third parties out of the equation. It just  
8 says defendants will produce all of their materials.  
9 And that leaves us on a position to move quickly on a  
10 PI if we need to.

11 THE COURT: Have you produced everything  
12 that they want?

13 MR. SUNSHINE: Yes, we have, Your Honor.

14 THE COURT: It is done?

15 MR. SUNSHINE: It is done.

16 THE COURT: So the notion would be that they  
17 produce what they produced to the Department of  
18 Justice that you don't already have? I mean, you have  
19 certain things coming to you from the Department Of  
20 justice, and there's no point getting it twice.

21 MR. SUNSHINE: That's a small portion of the  
22 total record, Your Honor. But, yes, we have that  
23 piece of it.

24 THE COURT: I'm sorry, just to make sure I  
25 understand. If you got what they have given to the

1 Department of Justice both during the investigatory  
2 stage -- and I don't know if there's anything been  
3 given since.

4 MR. SUNSHINE: There has been quite a bit,  
5 as I understand it.

6 THE COURT: You are looking for AT&T,  
7 T-Mobile's production to the government. And then  
8 you're willing to, for lack of a better word, be quiet  
9 for a while?

10 MR. SUNSHINE: Correct. As quiet as I can  
11 be.

12 THE COURT: And you can work out -- I've  
13 made the key ruling, I think, for the protective  
14 order. But you can work out the details of the  
15 protective order and the referral.

16 It appears that everyone seems to agree to a  
17 referral to the special master who's been unbelievably  
18 critical to this case moving. I can't thank him  
19 enough. We would be wallowing if we didn't have him  
20 to make decisions sometimes in the middle of the  
21 night.

22 Okay. Well, I'll hear from Mr. Hansen on  
23 that.

24 But those two things, the remainder of the  
25 protective order, if you could just get a referral.

1           And he would ask the parties, the special  
2 master, and I will ask on his behalf whether the  
3 declaration needs to be completed?

4           Is that fair, Richard, whether you would  
5 expect his prior declarations so that we can get a  
6 referral done?

7           MR. SUNSHINE: I haven't looked at it, Your  
8 Honor, but I can't imagine that we would not be  
9 willing to accept it.

10          THE COURT: So we can get the thing moving.

11          So your hypothetical, which is like some of  
12 the other hypotheticals that would cause us the  
13 heartburn is if there's a settlement, which you can't  
14 stop for some reason, then you'd want to go through  
15 with your suit. And you have to go quickly because we  
16 are still dealing with the September 20 deadline.  
17 And, of course, AT&T wants, to be fair, to get that  
18 done sooner than later.

19          But if the government files and the case  
20 gets withdrawn, where do you stand on that?

21          MR. SUNSHINE: We believe that we're in the  
22 same position. We don't know what transaction is  
23 going to -- is to eventually be proposed. We don't  
24 need to prosecute our case if their case is in limbo.

25          THE COURT: So yours get stayed or withdrawn

1 without prejudice according to you as well?

2 MR. SUNSHINE: I'd have to discuss that with  
3 my client, but that's a sensible position.

4 THE COURT: You go up and down with them.

5 Okay. I think we are down to one issue now,  
6 Mr. Hansen.

7 We have a briefing schedule. Tuesday they  
8 come -- let's see, by noon the government is filing  
9 whatever they're gonna file regarding the schedule of  
10 this matter.

11 In the meantime, the Court is not stopping  
12 anything. I haven't ruled, so therefore you  
13 proceed -- I'm sorry, Mr. Wayland, could you stand  
14 that way so I can see him?

15 MR. WAYLAND: Yes, I understand we are  
16 proceeding along until you rule.

17 THE COURT: Right, until I rule.

18 MR. WAYLAND: Exactly.

19 THE COURT: Tuesday puts you at the 13th by  
20 noon. ATT is going to have to file by Wednesday, the  
21 close of the day.

22 We can have a hearing on Thursday or Friday.  
23 It looks to me like it has to be in the afternoon in  
24 both instances. Is there any strong opposition?

25 MR. WAYLAND: Thursday works better for my

1 schedule, Your Honor.

2 MR. HANSEN: Whatever is most convenient  
3 form the Court, Your Honor. We can do any day.

4 THE COURT: 2:30?

5 MR. WAYLAND: On Thursday, Your Honor?

6 THE COURT: 15th.

7 MR. HANSEN: Thank you.

8 THE COURT: We'll have a hearing on whatever  
9 motion we have. I don't think at this point in time I  
10 need anything further from Sprint. Other than if  
11 anybody wants to give me any law on this collateral  
12 estoppel, I'd like to know.

13 We're moving rather quickly, so Mr. Sunshine  
14 wants to do a memorandum of law on the issue. Because  
15 your premise has been that there's some collateral  
16 estoppel effect from my ruling as to certain issues, I  
17 understand that. But -- okay.

18 On his issue. He's concerned --  
19 Mr. Sunshine is concerned that nobody knows what the  
20 deal is. You say it is as it is. Well, he objects to  
21 it as is, and he wants his day in court for his client  
22 in the event another hypothetical happens. Everybody  
23 wants our time and attention in the event there are a  
24 bunch of hypotheticals.

25 What's your response? If it's hypothetical,

1 I would be careful.

2 MR. HANSEN: Your Honor, I'm not going to go  
3 back and plow old ground. As to his hypothetical, we  
4 don't think that this is an occasion to unleash the  
5 eight million pages that's been released to the  
6 government. In the event something comes to pass, his  
7 hypothetical, certainly there could be an adjustment  
8 to that. We don't honestly think we ought to redo  
9 that issue and suddenly open the floodgates to --

10 THE COURT: It's not a redo. We are here  
11 now. I've got to rule. There's still standing on  
12 their case. It's not a redo at all.

13 I said they weren't going to be part of your  
14 government case, but they want to be in the position  
15 to litigate and then move for a PI if the government,  
16 in some fashion, goes away and you still proceed. And  
17 unless the deal changes, of course, then they would  
18 have to change the complaint.

19 I don't see -- other than you need a  
20 confidentiality order, and, again, our special master  
21 can help with that. They are not looking for third  
22 parties. They are not imposing upon anybody who isn't  
23 a party. And it's their position that they have a  
24 suit that's alive and well.

25 I don't -- what's the next thing, other than

1 you have to burn some CDs?

2 MR. HANSEN: Eight million pages,  
3 obviously -- we're talking about a serious competitor,  
4 turning over all kinds of AT&T documents. We don't  
5 think they need all of them. They haven't even framed  
6 a discovery request.

7 THE COURT: They want what you gave to the  
8 Department of Justice because they say Section 7 -- if  
9 I say that their claims include Section 7, they'll  
10 have to prove what the government does, and in  
11 addition they have the standing issues as to roaming  
12 and handsets. You think that you really want to take  
13 up the time of the special master going through eight  
14 million documents to say, well, this really isn't  
15 relevant to the government's case?

16 That's really what they are saying. They  
17 are saying, we stand in the shoes of government plus  
18 some.

19 MR. HANSEN: Your Honor, you said it best.  
20 They can count on the government to deal with those  
21 issues. We don't think they need to back step the  
22 government on all those points.

23 THE COURT: Well, they only do if the  
24 government, for some reason, drops out of the picture.

25 MR. HANSEN: Then the issue can be addressed

1 at that time. There are all kinds of issues turning  
2 over eight million pages of our corporate documents to  
3 Sprint on that hypothetical.

4 If that comes to pass, then that could be  
5 adjusted at that time. We don't think now is the time  
6 to take that step.

7 THE COURT: Would you agree they would be  
8 entitled to have a PI hearing immediately if, in fact,  
9 they get -- are in the position -- they don't -- I  
10 don't see why we should say to them, well, you wait  
11 until after the 20th of September. I mean, why should  
12 they have to wait? If I have to move fast for you, I  
13 can move fast for them, too.

14 MR. HANSEN: On the hypotheticals, Your  
15 Honor, they obviously have tools available to them to  
16 try and advance the issue. I think it's -- obviously,  
17 it's obviously a step by step. At the appropriate  
18 time they do that, they would be entitled to certain  
19 things. They are not entitled where they are sitting  
20 now as a private litigant to essentially get  
21 everything that the Department of Justice has gotten  
22 from us.

23 We think based on a hypothetical, that's not  
24 appropriate. That is a big burden. It is --  
25 confidentiality issues are important. Sprint is a

1 large competitor. This is sensitive stuff. We  
2 honestly think that's not an appropriate step here.

3 If the time comes when it is appropriate,  
4 the Court and special master will make sure they get  
5 their rights protected. But giving them all that  
6 stuff right now on a hypothetical, we think --

7 THE COURT: Well, some of the stuff they  
8 already have. But we don't know what proportion of  
9 that you have.

10 MR. HANSEN: Some they have. They can frame  
11 more limited responses in the litigation to things not  
12 relevant to the government's case.

13 THE COURT: Well, I think the easiest thing,  
14 sir, before we get back here, I would like you to  
15 list, generic, what isn't relevant to their case so we  
16 know. You know what the stuff is. They want all that  
17 you have given to the Justice Department. If there  
18 are significant things, let's find out what they are,  
19 and then we'll know what the special master has to do  
20 instead of putting the burden on them.

21 MR. HANSEN: Yes, Your Honor.

22 MR. SUNSHINE: Your Honor, if I may make two  
23 quick points?

24 First of all, this idea that --

25 THE COURT: Could you come to the mic. I'm



1 that -- there may be a category of things that they  
2 think are protected in some fashion, so we know what  
3 we have because that will move us along.

4 I don't expect you to come up with, you  
5 know -- let's assume the government asks them for  
6 materials that are related to their Section 7 case. I  
7 don't know what else they were doing, but if they have  
8 something else up their sleeves, let's find out. Then  
9 we'll know what the fights are about.

10 I don't find the burden argument  
11 particularly persuasive. And if you'll stay out of  
12 everybody's hair in the meantime, then, frankly,  
13 that's a small price to pay.

14 MR. SUNSHINE: Thank you, Your Honor.

15 THE COURT: I would ask that the Sprint and  
16 Cellular South -- is there anything that Cellular  
17 South wants to add or subtract here?

18 One minute, please.

19 (Pause.)

20 THE COURT: I have a special request from  
21 the special master. Anything he wants, goes. He  
22 wants the parties to remain so he can discuss  
23 scheduling issues, if you don't mind.

24 You are including private parties as well as  
25 government?

1           SPECIAL MASTER LEVIE:  Yes.  ATT and  
2 Cellular South also -- Sprint.  I'm sorry.

3           THE COURT:  I'll make the jury room  
4 available for you?

5           SPECIAL MASTER LEVIE:  I can do it right  
6 here.

7           THE COURT:  I don't know about that.

8           MR. McBRIDE:  Answering the Court's inquiry,  
9 Your Honor.  Charles McBride on behalf of Cellular  
10 South.  Your Honor, we agree with everything  
11 Mr. Sunshine has said and adopt the same positions as  
12 Sprint on all these matters today.

13           THE COURT:  All right.  You have one other  
14 legal issue than folks out here.  But to the extent  
15 that it makes anything easier, I have ruled on the  
16 legal dispute between the ATT and Cellular South,  
17 Sprint about the scope of discovery.

18           That doesn't mean that what they are trying  
19 to protect won't be protected to some extent on  
20 relevance grounds or confidentiality.  But I do not  
21 believe that the plaintiffs here are precluded from  
22 looking into the question of -- or having to prove  
23 they have a burden of showing a Section 7 violation.

24           And, if, once again, on a hypothetical, if  
25 we lose the government in the middle of this for some

1 unknown and unpredictable reason, they will be stuck  
2 proving both the Section 7 -- the private parties will  
3 be stuck proving the Section 7 violation as well as  
4 standing.

5           So I'm not foreclosing the idea of agreeing  
6 to the discovery that Sprint has asked for, but I'm  
7 giving them -- the defendants here, ATT and  
8 T-Mobile -- an opportunity to explain what's either  
9 not relevant -- listing by generics. I'm not  
10 expecting you to go document by document, what's not  
11 relevant or what shouldn't be provided to the other  
12 side for some specific reason, but the legal reason is  
13 now off the table.

14           MR. KELLOGG: Your Honor, may we be  
15 permitted to brief the issue of just what Section 7  
16 violation they have to prove? Because I think it is  
17 common ground that they have to prove a Section 7  
18 violation. But the Court has ruled that the DOJ  
19 argument that the consolidation of these two companies  
20 will impede competition in mobile wireless services,  
21 thereby hurting consumers of those services, that they  
22 do not have standing to raise that claim.

23           THE COURT: They can't recover for that  
24 claim. I don't think I have ruled.

25           Yeah, you can brief it, and they can respond

1 by Tuesday. But I also want the list because I think  
2 it's quite clear -- and I don't want to cut you off,  
3 but there was a lot of briefing that went on  
4 previously as part of this pretrial about this.

5 And I certainly -- as part of my opinion, I  
6 assumed that that wasn't before me, that issue. I  
7 just went on from there. I think the law is pretty  
8 clear on the Supreme Court precedent.

9 But you are welcome to address it, and  
10 Mr. Sunshine can respond. We are on a schedule that  
11 now you have to tell us what shouldn't be produced  
12 based on my ruling, tentative ruling. You can tell me  
13 why the ruling is wrong first, and then tell me what  
14 shouldn't be produced either because of relevance or  
15 because -- you have to assume I'll rule as I've ruled.

16 MR. KELLOGG: Thank you, Your Honor.

17 THE COURT: That would be Tuesday by noon,  
18 and you'll have until Wednesday by the end of business  
19 to respond to that.

20 The government will file their motion by  
21 Tuesday, noon, and ATT has until the end of business  
22 on Wednesday. We will be back Thursday at 2:30 for a  
23 hearing.

24 I don't know that there's any other issues  
25 that need to be resolved. We have our days for our

1 tutorial at the moment.

2 MR. McBRIDE: Your Honor, may I?

3 THE COURT: Mm-hmm.

4 MR. McBRIDE: Just for clarification. I  
5 think the Court's referred to Sprint's discovery  
6 request. Throughout this discussion, obviously, we  
7 would ask that Cellular South be included in that, and  
8 then add to that that Sprint's lawyers also should be  
9 given -- or we would request that they be given access  
10 to the roaming materials as well as the devices, even  
11 though roaming is not an issue for Cellular South.

12 THE COURT: I'm not sure where your access  
13 to materials -- sitting where? I thought we were just  
14 talking about what ATT produced to the government  
15 either as part of the investigation or recently.

16 MR. McBRIDE: That's correct, Your Honor.

17 THE COURT: Nothing would be excluded.

18 MR. McBRIDE: I'm anticipating what AT&T  
19 might or might not say. That, number one, that  
20 Cellular South would have the same access to those  
21 materials as does Sprint.

22 THE COURT: Yeah. I mean, I understood that  
23 they were on your behalf.

24 And if the parties would kindly -- we will  
25 close the courtroom now.

1           Do you want to talk in the jury room? I  
2 think that makes the most sense.

3           Is there anything further? We have our next  
4 hearing. But in the meantime, all discovery will go  
5 forward. We will not stay anything until the Court  
6 rules next Thursday. So I ask you to proceed.

7           Thank you very much.

8           MR. HANSEN: Thank you, Your Honor.

9           MR. WAYLAND: Thank you, Your Honor.

10          MR. SUNSHINE: Thank you, Your Honor.

11          (Whereupon, at 11:03 a.m. the proceedings  
12 concluded.)

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REPORTER'S CERTIFICATE

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2  
3 I, Chantal M. Geneus, a Certified Realtime  
4 Reporter and Registered Professional Reporter of the  
5 United States District Court for the District of  
6 Columbia, do hereby certify that I stenographically  
7 reported the proceedings in the matter of CA 11-1560,  
8 USA versus AT&T, et al., CA 11-1600, Sprint Nextel  
9 versus AT&T, et al., and CA 11-1690, Cellular South,  
10 et al. versus AT&T, et al, on Friday, December 9,  
11 2011, in the United States District Court for the  
12 District of Columbia, before the Honorable Ellen S.  
13 Huvelle, United States District Judge.

14 I further certify that the page numbers 1 through  
15 87 constitute the official transcript of the  
16 proceedings as transcribed by me from my stenographic  
17 notes to the within typewritten matter.

18 In witness whereof, I have affixed my signature  
19 this 10th of December, 2011.

20  
21  
22  
23  
24 /s/ Chantal M. Geneus  
Chantal M. Geneus, RPR, CRR

25 Official Court Reporter