

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Applications of)
)
AT&T Inc. and)
Deutsche Telekom AG)
)
For Consent to Assign or Transfer)
Control of Licenses and Authorizations)

WT Docket No. 11-65

FILED/ACCEPTED

AUG - 4 2011

Federal Communications Commission
Office of the Secretary

To: The Secretary

MOTION FOR LIMITED DISCOVERY

The Diogenes Telecommunications Project (DTP), by its attorneys, files this Motion for Limited Discovery in the above referenced proceeding. On May 27, 2011, by separate letters, the FCC, pursuant to Section 310(d) of the Communications Act,¹ required AT&T Inc. (AT&T) and T-Mobile USA, Inc. (T-Mobile), a Deutsche Telekom AG (DT) subsidiary to provide additional information in support of the above captioned Applications.

On May 31, 2011, DTP filed a Petition to Deny (Petition) AT&T's proposed acquisition of T-Mobile. The Petition pointed out numerous material representations made in the Applications that are contradicted by statements made in SEC filings and in public statements made by AT&T and T-Mobile officials. These contrasting statements taken together indicate a deliberate attempt to misrepresent the facts said to justify the transaction, and to intentionally mislead the Commission into approving AT&T's acquisition of T-Mobile.

¹ 47 U.S.C. § 310(d).

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On June 10, 2011, AT&T and T-Mobile filed a Joint Opposition, which purports to address all the issues raised in all the Petitions to Deny filed in this proceeding. Despite its formidable size, the Joint Opposition is devoid of any explanation for the numerous inconsistent material statements that DTP and other parties documented in their Petitions to Deny. As DTP pointed out in its Reply, AT&T's and T-Mobile's failure to produce relevant and important evidence in their possession raises the presumption that, if produced, the evidence would be unfavorable to their cause. See, e.g. *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (“the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the . . . document, if brought, would have exposed facts unfavorable to the party.”)

The record in this proceeding is neatly divided between the statements AT&T and T-Mobile made prior to March 20, 2011, the day AT&T's acquisition of T-Mobile was publicly announced, and statements made after March 20, 2011. The statements pre and post March 20th are as contradictory as the opening paragraph of Charles Dickens' novel *A Tale of Two Cities*. Prior to March 20th, T-Mobile was the best of companies. T-Mobile had the “best 4G network in the US,” “sufficient spectrum,” the “fastest 4G network in the country with 200 million POP coverage, and with data speed of 21 megabits” with plans to increase speed to 42 megabits.² After March 20th, T-Mobile was the worst of companies. If the statements to the FCC are to be believed, the company is facing spectrum exhaust and financial ruin. Prior to March 20th, it was

² DTP Petition pp.21-22.

a spring of hope for T-Mobile. It had new and better smartphones and a solid plan for a “seamless” transition to LTE. After March 20th it was the winter of T-Mobile’s despair. Suddenly T-Mobile had “no clear path to LTE” (the meaningless slogan repeated incessantly throughout the filings) – although it does have a clear path to a 39 billion dollar payday. Prior to March 20th AT&T had everything before it. AT&T was lining up new smartphones and was busily planning its LTE buildout. It was seeking to acquire Qualcomm spectrum to round out its spectrum requirements. After March 20th AT&T had nothing before it. It was buckling under crushing demand and at best could offer its customers only limited LTE service, leaving large areas of the country unserved. AT&T claims that its ability to compete effectively now hinges on its acquisition of T-Mobile. This is not the *Tale of Two Cities*; rather it is the tall tale of two economically healthy mega companies with adequate spectrum to meet their business needs disingenuously fabricating a public interest justification to consummate a deal that would serve their corporate interests alone.

What happened to these scions of a hundred mergers, these giants of the telecom industry? How is it that, literally overnight, the solid prospects of these telecom giants evaporated? DTP contends that nothing happened, that the companies today are as healthy and vigorous as they were prior to March 20th. The overwhelming evidence points to a simple explanation, in order to convince the FCC to grant their pending Applications AT&T and T-Mobile have intentionally distorted facts, concealed evidence and repeatedly made material misrepresentations. Discovery is necessary to uncover the truth. What plans did T-Mobile have to build out LTE prior to March 20, 2011? How can T-Mobile claim on January 20, 2011 that its transition to LTE would be seamless, and just two months later, claim that it has “no clear path to

LTE?” What happened during those two months that drastically changed the fortunes of this company?

Prior to March 20, 2011, AT&T touted its acquisition of Qualcomm, as it did the acquisition of Centennial two years prior, as the solution to its spectrum needs.³ After March 20th the Qualcomm spectrum is only marginally useful in AT&T’s LTE agenda.⁴ No explanation is offered to explain why AT&T’s representations to the FCC in the Centennial and Qualcomm Applications are no longer true. Even more troubling, AT&T has not amended the pending Qualcomm application, and is in violation of Section 1.65 of the Commission’s rules.⁵ Thus, AT&T is simultaneously making two conflicting material representation to the FCC. Discovery is required to determine which, if any, of these two pending Applications AT&T correctly represents the true value of Qualcomm’s spectrum for LTE.

Prior to March 20th, AT&T was concerned that the wireless market was saturated and that there would be limited opportunity for AT&T to acquire additional customers. Specifically, AT&T was concerned that the availability of additional 700 MHz spectrum would continue to put pressure on pricing and AT&T’s profit margins.⁶ Thus, prior to March 20th, AT&T’s primary goal was not to acquire additional spectrum, but rather to acquire additional customers. The purchase of T-Mobile would satisfy this objective. After March 20th, AT&T claims that,

³ DTP Petition pp. 7-9.

⁴ Id.

⁵ 47 C.F.R. §1.65.

⁶ DTP Petition pp. 12.

unlike its competitors, it is facing an imminent spectrum crunch.⁷ This is inconsistent with AT&T's prior statements and its own internal documents and records.

In June 2011, the hacker group LulzSec leaked 200MB of AT&T internal documents. A significant portion of the leaked data files consisted of AT&T's internal plans for its buildout of LTE. The LulzSec documents begin at the early stages of planning in the fourth quarter of 2009 and continue until April 2011. They cover the full gamut of the LTE buildout from pre-LTE testing, through detailed plans for equipment and market rollout. The documents are not so much interesting in what they contain; they are the minutia of AT&T's internal technical, engineer, business and marketing discussions. Rather the documents are interesting in what they lack. This highly detailed and specific collection of hundreds of documents lacks any mention of a spectrum shortage, system wide or in any specific market. If there was an imminent spectrum shortage, this would have been reflected in AT&T's internal documents and would have been addressed during the LTE planning stages. The LulzSec documents show that AT&T estimates that it will have 6 million customers on its LTE network by the beginning of 2013.⁸ This is a modest number of customers for the amount of spectrum AT&T already has set aside for LTE. If AT&T has an imminent spectrum shortage, AT&T has not informed its technicians, engineers, marketing people or the staff working on the LTE build out. Apparently, AT&T's employees are operating in blissful ignorance to the pending disaster.

⁷ Clearly, in the future all wireless carriers will need additional spectrum. The question is whether AT&T has sufficient spectrum to build out and operate its LTE network in the short and middle term. Stated another way, are AT&T's spectrum holdings materially different from those of AT&T and Sprint? Here again there is a need to determine the facts.

⁸ LulzSec document release. Balance Manager/PCRF Design Review, Redmond Meeting, Day 1, 1/12/11.

What the LulzSec documents also lack is any demonstrable evidence that the LTE build out will be limited to 80 percent of the US population. By all indications, since about 2009, AT&T has been planning a full system LTE build out, which, when completed will cover AT&T's entire footprint. i.e. 97 percent of the US population. This contradicts AT&T's statements, in the pending Applications, that without T-Mobile it will only be able to provide LTE to 80 percent of the US population. The LulzSec documents unequivocally reference a "Nationwide Launch."⁹ Yet, AT&T continues to argue that without T-Mobile it cannot fully build out its LTE network.

Finally, the opponents contend that market forces would compel AT&T to deploy LTE to a level approaching 97 percent of the population even in the absence of this transaction. In fact, however, AT&T decided to build out LTE to only 80 percent of the population after considering the costs and benefits of increased LTE deployment, including (among other factors) competitive considerations, spectrum limitations, and the disproportionately higher infrastructure costs for rural deployment.¹⁰

AT&T further claims that it concluded "in January 2010, and again in January 2011" "that an LTE footprint covering more than 80 percent of the U.S. population could not be justified."¹¹ Yet none of the LulzSec documents which cover this period support AT&T's statements. In fact, DTP has not been able to find a single document, public comment, newspaper article or shred of evidence prior to March 20, 2011, that supports AT&T's claim that it was planning to limit its LTE build out to 80 percent of the population. Where then is the

⁹ LulzSec document release. LTE Services Issues Management.

¹⁰ Joint Opposition p. 9.

¹¹ Joint Opposition p. 80.

proof for this most important statement? Thus far AT&T has provided only *post hoc* insider statements to support its dubious claim.

The LulzSec documents show that AT&T has for the last two years, been intensely working on its LTE rollout. AT&T plans to accommodate new LTE devices, such as the iPad 3. Does it really plan to make these new and exciting devices available to only 80 percent of the population? There is no need to speculate. Clearly, AT&T possesses the evidence to prove or disprove its 80 percent coverage claim. In February 2010, AT&T announced that it had retained Alcatel-Lucent and Ericsson to build out its LTE network. No doubt, AT&T has executed contracts with these equipment vendors. Discovery would permit the parties to review these agreements. Is AT&T purchasing equipment to cover 80 percent of the US population or 97 percent? Also, AT&T has prepared detailed budgets. Do AT&T's budgets and its internal progress reports show that it is planning to build out only 80 percent of the US population or, more likely, is it planning a full build out covering its entire footprint?

In sum the AT&T and T-Mobile filings in this proceeding are littered with mistruths, half-truths, and direct contradictions with statements made by company executives in other government submissions and in the media. Substantial evidence of material misrepresentation by the applicants has already come to light. DTP in its Petition to Deny asked the FCC to conduct a hearing on the Applications, a request on which the FCC has not acted. Under the circumstances it is particularly important for the FCC to supplement the record by allowing parties in this proceeding to conduct discovery, both document production and depositions. While the FCC's comment cycle and information requests are important, they cannot take the place of discovery by interested parties where, as here, serious issues of misrepresentation are

present. Lacking a hearing, discovery is a critical and necessary step in the proper resolution of the AT&T/ T-Mobile application.

For these reasons, DTP requests that the Commission issue an order authorizing a 60-day discovery period wherein DTP and other requesting parties can obtain relevant documents from AT&T and T-Mobile and take depositions of key personnel.

Respectfully submitted

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