

October 7, 2011

**VIA ECFS**

Marlene H. Dortch, Esq.  
Secretary  
Office of the Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: Written *Ex Parte* Presentation: *Applications of AT&T and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65

Dear Ms. Dortch:

In its reply comments<sup>1</sup> and several recent *ex parte* presentations,<sup>2</sup> Public Knowledge has argued that Section 314 of the Communications Act requires the Commission to deny the Applications of AT&T and Deutsche Telekom in this proceeding.<sup>3</sup> That is wrong, and Public Knowledge completely misconstrues the meaning of Section 314. By its plain terms, that provision applies only to the acquisition of certain telecommunications facilities that carry traffic across international borders. Indeed, that limit is clear not only from the text of the statute, but also from its legislative history and from directly applicable Commission precedent. In this transaction, however, AT&T is not acquiring any such facilities from Deutsche Telekom. Thus, Section 314 is completely irrelevant to this proceeding.

According to Public Knowledge, “Section 314 requires that the FCC deny the transfer of *any licenses* when the effect would be substantially lessened competition *in any market or line of*

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<sup>1</sup> See Public Knowledge, Reply Comments, WT Docket No. 11-65 (June 20, 2011) (“Reply Comments”).

<sup>2</sup> See Letter from Harold Feld, Legal Director, Public Knowledge to Marlene H. Dortch, Secretary, FCC (Sept. 15, 2011); Letter from Harold Feld, Legal Director, Public Knowledge to Marlene H. Dortch, Secretary, FCC (September 9, 2011); Letter from Harold Feld, Legal Director, Public Knowledge to Julius Genachowski, Chairman, FCC (September 1, 2011); Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge to Marlene H. Dortch, Secretary, FCC (July 27, 2011); Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge to Marlene H. Dortch, Secretary, FCC (July 18, 2011); Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge to Marlene H. Dortch, Secretary, FCC (July 12, 2011).

<sup>3</sup> 47 U.S.C. §314.

Ms. Marlene H. Dortch, Esq.  
October 7, 2011  
Page 2

*Commerce with international components or effects.*<sup>4</sup> Based on this overbroad characterization of Section 314, and the unsubstantiated assertion that T-Mobile USA (“TMUS”) “carr[ies] common carrier traffic internationally,” Public Knowledge alleges a Section 314 violation on the ground that the acquisition will lessen competition in the “provision of international common carrier traffic” and in the domestic GSM-roaming market and other lines of commerce with international effects.<sup>5</sup>

Public Knowledge’s interpretation of Section 314 is wrong. Section 314, which was carried forward in substance from the Radio Act of 1927 into the Communications Act of 1934, states in relevant part:

[N]o person engaged directly, or indirectly...in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall...directly or indirectly, acquire, own, control or operate *any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country...*if...the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or unlawfully create monopoly in any line of commerce.<sup>6</sup>

By its own terms, this provision applies solely to transactions involving *telecommunications facilities that carry traffic across international borders*. And consistent with the statutory language, the legislative history of Section 314 explains that the statute was enacted to prevent the elimination of competition in the international telecommunications market between what were then relatively new high-frequency radio companies providing international radiogram

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<sup>4</sup> Letter from Harold Feld, Legal Director, Public Knowledge to Julius Genachowski, Chairman, FCC (September 1, 2011), p.2 (“Feld Letter”) (emphasis added).

<sup>5</sup> Feld Letter, p.4; Reply Comments, pp.10-17.

<sup>6</sup> 47 U.S.C. §314 (emphasis added). Section 314 also addresses the reverse situation, where a person engaged in the provision of communications by wire seeks to acquire radio facilities that are used to carry traffic across international borders. *Id.* As noted above, AT&T is not acquiring any international telecommunications facilities from Deutsche Telekom.

services and incumbent submarine cable companies providing international cablegram services.<sup>7</sup> In this case, however, TMUS does not own or operate any international telecommunications facilities, and no such facilities are being conveyed to AT&T as part of this transaction.<sup>8</sup> Because the transaction will not result in any consolidation of international telecommunications facilities, Section 314 plainly does not apply.

Commission precedent further confirms that conclusion. Indeed, the Commission has previously considered and rejected the same theory Public Knowledge advances in its Reply and more recent *ex partes*. In *American Telephone & Telegraph Co. et al.*, a case concerning the lease and maintenance by AT&T of private mobile communications systems located in the U.S., the Commission concluded that the matter

does not involve the acquisition, ownership, control, or operation of any facility – wire or radio – for transmission or communication between the United States and any foreign country. Thus, we conclude that section 314 is not applicable to this proceeding.<sup>9</sup>

Similarly, in *Radiofone*, a case involving allegations of anti-competitive roaming conduct by a wireless carrier, the Wireless Telecommunications Bureau found that “[t]he language of Section 314 appears to relate only to anti-competitive combinations of international radio and cable

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<sup>7</sup> See S. Rep. No 781, 73<sup>rd</sup> Congress, 2<sup>nd</sup> Session 8 (April 17, 1934) reprinted in Com. Reg. (P&F) ¶ 10:1005; see also *Mackay Radio & Tel. Co., Inc. Applications for Radiotelegraph Circuits between the U.S. & Fin., Port., Surin., & the Neth.*, Decision, 15 FCC 690, 720 ¶ 70, ¶ 73 (1951) (discussing Congressional desire to promote competition between “radio, a relatively new medium of communication at the time these statutes were enacted” and “the older well entrenched cable medium”); *Radiofone Inc. v. BellSouth Mobility, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6088 (1999) (“*Radiofone*”) ¶35 (“Section 314 was included in the original 1934 Act in response to a Congressional concern that the then existing competition in the international telecommunications market between HF radio companies, providing radiogram services, and submarine cable companies, providing cablegram services, might be eliminated in the future as a result of consolidations or mergers among these competitors.”).

<sup>8</sup> TMUS customers are able to make international calls because TMUS hands off its international traffic to other companies in the U.S. for transmission across U.S. borders.

<sup>9</sup> *In the Matter of American Telephone & Telegraph Co. et al.*, Memorandum Opinion and Order, 22 F.C.C. 1220-1223 (1957).

Ms. Marlene H. Dortch, Esq.  
October 7, 2011  
Page 4

companies and the anti-competitive operation of international telecommunication facilities.”<sup>10</sup> And in its *Adelphia Order*, the Commission reaffirmed that Section 314 “prohibits the acquisition of *international facilities* when the transfer would substantially lessen the competition between radio facilities on the one hand and cable facilities on the other.”<sup>11</sup> In short, Commission precedent, like the text and legislative history of Section 314, confirms the inapplicability of that provision to cases, like this one, that do not involve international telecommunications facilities. The Commission should disregard Public Knowledge’s erroneous arguments to the contrary.

Sincerely,

/s/ Nancy J. Victory

Nancy J. Victory  
Counsel for Deutsche Telekom AG  
and T-Mobile USA, Inc.

/s/ Richard L. Rosen

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Counsel for AT&T Inc.

cc: Kathy Harris  
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<sup>10</sup> *Radiofone* ¶34. Moreover, the Order makes clear that “the Commission has not...been effectively granted omnibus antitrust jurisdiction over the communications industry by Section 314 of the Act.” *Id.* ¶33.

<sup>11</sup> Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. Assignors*, 21 FCC Rcd 8203, ¶ 30 (2006) (emphasis added) (quoting *Stockholders of RCA Corp. and General Electric Co.*, 60 Rad. Reg. 2d (P&F) 563, 568 ¶ 13 (1986)).