BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

DEC 27 2011

Federal Communications Commission
Office of the Secretary

In the Matter of	)	
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Applications of AT&T Inc.	)	
	)	
And	)	WT Docket No. 11-65
	)	
	)	
Deutsche Telekom AG,	)	
	)	
For Consent to Assign or Transfer Control of Licenses and Authorizations	)	
	)	

To: The Secretary

APPLICATION FOR REVIEW

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Summary

The Diogenes Telecommunications Project seeks review by the Commission of an Order of the Wireless Telecommunications Bureau dismissing without prejudice the applications of AT&T and T-Mobile for authorization to transfer licenses to effectuate their planned merger. The WT Bureau Order also dismissed petitions to deny the applications subject to possible reinstatement should the applicants refile. Appended to the WT Bureau Order was a Staff Analysis and Findings, which concluded that the Applicants had not made their case under the public interest standard the Commission uses to evaluate such applications, and which confirmed the bankruptcy of the Applicants' purported justifications for the merger, as alleged in the petitions to deny filed by DTP and other parties.

The WT Bureau Order erred in not taking the next logical step in these lengthy proceedings; namely to resolve the serious character and qualification issues that have been raised concerning the Applicants conduct herein. As alleged by the parties, and validated by the Staff Analysis, the Applicants have made numerous material misrepresentations to the Commission throughout these proceedings, including false and misleading statements and material omissions. Irrespective of whether the Applicants continue to pursue a merger or other business arrangement that requires Commission authorization, the Applicants must be held accountable for their misconduct in clear violation of Commission rules and the Communications Act. The Commission has a long track record of refusing to tolerate untruthfulness by its licensees and those seeking authorizations and imposing sanctions up to and including revocation of licenses.

The Applicants have steadfastly maintained that the merger is necessary to: alleviate AT&T's spectrum shortage; enable AT&T to provide LTE to the entire country; save a failing T-Mobile (which was not a significant competitor anyway); and create many domestic jobs. The applicants continued to press these claims, despite a paucity of justification and overwhelming evidence to the contrary. And, the Applicants spoke out of both sides of the mouth, giving investors and the SEC one version of a transaction that would yield cost-cutting synergies and reduce investment, while telling the FCC a tale of economic stimulation and universal broadband deployment. The contradictions in the record are legion, as referenced in this application for review.

On review the Commission can correct the error below by acknowledging the serious questions of candor, character and qualification that have been raised and commence proceedings to resolve these critically important issues.

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APPLICATION FOR REVIEW

The Diogenes Telecommunications Project, (DTP) by its attorneys, and pursuant to Section 1.115 of the Commission's Rules[1] files this Application for Review of the November 29, 2011, Order, DA 11-1955 (Order) of the Chief, Wireless Telecommunications Bureau (WT Bureau) dismissing without prejudice the above captioned applications (Applications) of AT&T Inc. and T-Mobile USA, Inc. (collectively, Applicants).

I. Question Presented for Review

Did the WT Bureau err in dismissing the Applications without making findings on the serious character qualification and misrepresentation questions raised by DTP and other parties to the proceeding?

[1] 47 C.F.R. §1.115.

II. Introduction

On April 21, 2011, the Applicants, pursuant to Sections 214 and 310(d) of the Communications Act, as amended,[2] filed Applications seeking Commission consent to the transfer of control of licenses and authorizations held by T-Mobile USA, Inc. (T-Mobile), a Deutsche Telekom AG (Deutsche Telekom) subsidiary to AT&T Inc. (AT&T). On May 31, 2011, DTP filed a Petition to Deny, raising character and misrepresentation issues against the Applicants. On June 20, 2011, DTP filed a Reply to Applicant's June 20, 2011 Joint Opposition. On August 4, 2011, DTP filed a Motion for Limited Discovery, seeking documentation, among other things, relevant to Applicants' claim that AT&T was planning to limit its LTE build out to only 80 percent of the U.S. population if the merger was not approved. DTP also filed a Motion For An Order To Cease And Desist From Violations Of The Commission's Ex Parte Rules And To Dismiss The Applications on October 24, 2011, in which DTP requested dismissal of the Applications with prejudice. Finally, on November 29, 2011, DTP filed an Application for Review of the letter decision of the Office of General Counsel denying DTP's complaint that AT&T had violated the ex parte rules.

On November 22, 2011, the WT Bureau publically announced that it had circulated for consideration by the Commission a draft order designating the Applications for an administrative hearing. Thereafter, the Applicants promptly filed a letter purporting to withdraw the Applications. The WT Bureau Order not only dismissed the Applications without prejudice, it dismissed all Petitions to Deny the Applications subject to possible reinstatement, "if they remain relevant," should the Applicants file revised Applications. The WT Bureau also released a document entitled Staff Analysis and Findings (Staff Analysis). The Staff Analysis concluded

[2] 47 U.S.C. § § 214(a), 310(d).

that the record does not support a finding that the proposed merger would serve the public interest, convenience, and necessity.

However, neither the WT Bureau Order nor the Staff Analysis addressed the pending character and misrepresentation issues. It was arbitrary and capricious for the Commission to dismiss the Applications and petitions to deny without first making findings on the allegations of material misrepresentation in this proceeding, making findings on the Applicants' qualifications to be licensees, and imposing sanctions on the Applicants for their misconduct. Whether or not the Applicants may at some later time seek authorization to effectuate the same or similar transaction, the issues raised in this proceeding bear directly on their current status as holders of Commission licenses numbering in the thousands. The Applicants routinely file applications to renew existing licenses. It would be extremely difficult for parties to address and for the Commission to resolve these threshold issues of qualification in the context of applications not related to this transaction. Lest these critical matters be swept under the rug and forgotten, it is incumbent upon the Commission to deal with them at the time they occur in all of their implications. In other words, even if the Applicants do not continue to pursue this transfer, their conduct during the course of this proceeding is so egregious as to warrant administrative sanctions, up to and including revocation of their licenses.

The WT Bureau Order erred in dismissing the Applications and the petitions to deny without first making findings on the Applicants' numerous material misrepresentations throughout these proceedings, as shown by DTP in its Petition to Deny and subsequent filings herein, as well as by other parties. Indeed, the Staff Analysis issued along with the Bureau Order is replete with examples of AT&T's false and misleading statements as well as its withholding of information. AT&T's conduct in this proceeding violates the Communications Act and the

Commission's rules, and calls into serious question its qualifications as a Commission licensee. The implications go well beyond the transfer of licenses at issue in this proceeding. While the Commission could initiate separate proceedings on AT&T's qualifications, it has given no signal that it plans to do so.

The Commission insists on truthful and accurate statements by its applicants and licensees. [3] In filings before the FCC, DTP documented numerous inconsistencies between statements made by the Applicants in the Applications before the FCC and statements made by the Applicants in official filings and in the media. Taken together these inconsistent statements evidence a deliberate attempt to misrepresent the facts said to justify the transaction and to intentionally mislead the Commission into approving the acquisition. The Applicants' false statements and misrepresentations have raised unresolved issues concerning their qualifications to remain FCC licensees. Specifically, the outstanding issues include:

- Whether the Applicants intentionally made material misrepresentations to the Commission when they submitted material information to support AT&T's claim that it was facing an imminent spectrum shortage and needed T-Mobile's spectrum to meet customer demand.
- Whether the Applicants intentionally provided factual information that is incorrect or intentionally omitted material information in an effort to mislead the Commission concerning the Applicants' claim that without T-Mobile's spectrum, AT&T could not rollout LTE service to more than 80 percent of the U.S. population.

[3] 47 C.F.R. §1.17.

- Whether the Applicants, intentionally provided factual information that is incorrect or intentionally omitted material information in an effort to mislead the Commission concerning the Applicants' claim that the merger was required for AT&T to rollout LTE service to 97 percent of the U.S.
- Whether the Applicants intentionally misled the Commission and made material misrepresentations when they claimed that T-Mobile had "no clear path to LTE"?
- Whether AT&T made intentional, material misrepresentations to the Commission when it claimed the merger would create 96,000 American jobs.
- Whether the Applicants violated the FCC's ex parte rules when they targeted FCC decision making personnel with issue specific advertising.

III. AT&T Knowingly Made False Statements to the FCC Claiming that It was Facing Severe Network Spectrum and Capacity Constraints.

AT&T claimed that the merger was necessary because "AT&T faces network spectrum and capacity constraints more severe than those of any other wireless provider, and this merger provides by far the surest, fastest, and most efficient solution to that challenge."[4] The FCC Staff Analysis found that AT&T has sufficient spectrum for LTE deployment.[5] As discussed herein, AT&T does not lack spectrum. Its purpose in attempting to acquire T-Mobile was to kill competition and acquire wireless subscribers. AT&T was not candid with the FCC when in its filings it repeatedly claimed that it was facing spectrum shortages.

[4] AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2.

[5] Staff Analysis, ¶ 215.

A. AT&T, the Communications Company that Cried Wolf

The dismissed Applications were not the first time AT&T claimed that it is facing severe capacity constraints and that the grant of the application would alleviate the spectrum crunch. On November 21, 2008, AT&T filed an application with the FCC requesting permission to acquire Centennial Communications Corp. ("Centennial"). In the Centennial proceeding AT&T argued that the acquisition would enable AT&T to provide 4G services to more of Centennial's customers than Centennial could do on its own.[6] In words remarkably similar to those used in the Applications, AT&T states:

> The combined company will have enough spectrum to migrate to 4G technology (LTE) without interfering with the quality of service provided to its customers. The combined company would be in a position to dedicate a portion of its spectrum holdings to the LTE conversion while continuing to provide high quality service to its existing customer base. The transition to LTE requires each company to set aside part of its spectrum for conversion while supporting its existing customer base on the remaining spectrum. In some areas served by Centennial, AT&T lacks spectrum to support existing customers while converting to LTE. . . . Centennial would also face difficulties converting its network to LTE with its current spectrum.
>
> In addition, Centennial holds spectrum in certain areas where AT&T does not have or has not yet applied for either AWS or 700 MHz spectrum. In certain of these areas, the merger may give AT&T sufficient spectrum to roll out 4G technology. . .
>
> The merger will also enable AT&T to roll out 4G technology faster in the Centennial service areas where AT&T may have or has applied for AWS or 700 MHz spectrum, but does not yet have the towers or infrastructure in place to use the spectrum. In those areas, AT&T will not be delayed by the necessity of obtaining permits and constructing towers.[7]

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[6] *AT&T and Centennial, WT Docket No. 08-246* , Decl. Moore pp. 7-8. http://transition.fcc.gov/transaction/att-centennial.html.

[7] Id. (footnote omitted).

Two years later, AT&T made similar claims in its bid to acquire Qualcomm. In December 2010, AT&T agreed to purchase spectrum licenses in the Lower 700 MHz frequency band from Qualcomm Incorporated (Qualcomm). The spectrum covers more than 300 million people nationwide, including 12 MHz of 700 MHz D and E block spectrum covering more than 70 million people in 5 of the top 15 metropolitan areas and 6 MHz of 700 MHz D block spectrum covering more than 230 million people across the rest of the U.S.[8] In its application to acquire Qualcomm, AT&T claims it will move aggressively to integrate this spectrum into its LTE network.[9] AT&T again argues that this transaction will be the spectrum fix it needs to rollout LTE.

> The Qualcomm Spectrum will enable AT&T to expand capacity on its LTE network and provide a more robust and competitive service. The 6 MHz of Lower 700 MHz D block spectrum nationwide complements AT&T's existing holdings and will provide additional capacity everywhere. In addition, Qualcomm's Lower 700 MHz E block licenses in the New York, Los Angeles, San Francisco, Boston, and Philadelphia Economic Areas will give AT&T a total of 12 more MHz of capacity in these areas of particularly high demand.
>
> As noted above, AT&T plans to deploy the Qualcomm Spectrum as supplemental downlink, using the carrier aggregation technology, which will be enabled after the LTE Advanced standards are released. Supplemental downlink technology will allow AT&T to add substantial capacity on its LTE network by combining Qualcomm's unpaired 700 MHz spectrum with AT&T's paired spectrum. Supplemental downlink technology permits the bonding of noncontiguous spectrum, including unpaired spectrum, into a single wider channel. In addition, supplemental downlink can be used to provide additional downlink capacity to address the asymmetry of data flow that results from

[8] AT&T 2010 SEC FORM 10-K, p.21.

[9] AT&T and Qualcomm WT Docket No. 11-18 , p.7. http://transition.fcc.gov/transaction/att-qualcomm.html

> wireless broadband users currently consuming more downlink than uplink capacity. Such asymmetry is caused by, for example, the consumption of video and other data-heavy media content with one-sided data flows.
>
> AT&T and likely other carriers will make significant use of supplemental downlink technology as they strive to meet consumers' seemingly ever-growing appetite for wireless broadband services.[10]

To read AT&T's Qualcomm application is to come to the conclusion that its spectrum woes (real or imagined) will be behind it, if only the FCC grants its application to acquire Qualcomm. AT&T states that its customers will be able to utilize handsets and other equipment incorporating the Qualcomm spectrum by early 2014.[11] Yet, the Applicants make almost no mention of the Qualcomm spectrum other than to claim that it will not solve the severe spectrum crunch AT&T is facing. "Nor can AT&T address its short-term capacity challenges with the spectrum it is purchasing from Qualcomm. That spectrum is only "unpaired" (one-way)..." [12] If this is true, why did AT&T not disclose this material fact to the FCC in the Qualcomm application? AT&T offers no explanation for its two conflicting statements made in pending applications filed just months apart, nor did AT&T seek to amend the Qualcomm application. AT&T's failure to do so is in violation of Section 1.65 of the FCC's rules.[13]

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[10] AT&T and Qualcomm WT Docket No. 11-18 , pp.14-15, footnotes omitted. http://transition.fcc.gov/transaction/att-qualcomm.html.

[11] Id. at p. 16.

[12] Moore Decl. ¶ 25.

[13] *See* 47 C.F.R. § 1.65. That rule states in pertinent part: "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days..."

B. AT&T Is Not Experiencing Spectrum Crunch; It Is Attempting To Eliminate Competition.

The Applicants claimed in the Applications that AT&T is facing a "spectrum crunch" so severe that its spectrum holdings are insufficient to permit deployment of LTE services. In making these representations, AT&T has not been candid with the FCC. By almost any metric, AT&T has ample spectrum to launch LTE and maintain its existing services. The Staff Analysis concluded that AT&T had sufficient spectrum.[14] Of course, the issue was never the falsely alleged lack of spectrum, the real issue was competition. AT&T was not seeking to acquire additional spectrum *per se*, rather it is seeking to eliminate T-Mobile, a leading competitor and acquire its 34 million customers. The Staff Analysis concluded that the proposed transaction would result in the elimination of a nationwide rival, the elimination of T-Mobile product offerings and would give post-merger AT&T a unilateral incentive to raise prices or, to similar effect, to reduce service quality or otherwise exercise market power.[15]

The wireless market is saturated. As AT&T admits, in a wireless market place in which wireless subscription penetration surpassed 95 percent in 2010, there are a limited number of potential new subscribers. "As a result, wireless providers compete not only to retain their existing customer base, but also to attract new customers from each other—consumers we call "switchers."[16] While AT&T was representing to the FCC that it lacks spectrum, it was representing to the Securities and Exchange Commission (SEC) that a key risk factor for investors is the availability of additional 700 MHz spectrum which will increase competition.

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[14] Staff Analysis, ¶ 215.

[15] Staff Analysis, ¶ 17, 48-49.

[16] Christopher Decl. at ¶ 5.

> We expect market saturation to continue to cause the wireless industry's customer growth rate to moderate in comparison with historical growth rates, leading to increased competition for customers. We expect that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition. This competition will continue to put pressure on pricing and margins as companies compete for potential customers.[17]

Despite its statements to the SEC, AT&T claimed before the FCC that "[s]ignificant qualities of spectrum . . . are not available for acquisition."[18]

Based on its statements to the SEC, AT&T's primary agenda was not to gain additional spectrum, but rather to limit the effectiveness of its competitors and to acquire additional subscribers. In a saturated market, it would be difficult, if not impossible, to acquire 34 million new customers simply by improving network quality and customer service. As AT&T reported to the SEC, to acquire additional customers, it will be forced to lower prices and cut its profit margins. By acquiring T-Mobile, AT&T would accomplish two key goals: first it would gain 34 million new customers and second it would take away available spectrum from competitors and future would-be competitors. The Applicants did not candidly and in a forthright manner explain the proposed transactions. Rather they misrepresented the facts in a way that was designed to mislead the Commission and dupe the public.

[17] AT&T 2010 SEC FORM 10-K, p.29. (Emphasis added).

[18] Moore Decl. at ¶ 22.

C. AT&T'S Statements That, Absent The Merger, It Will Expand LTE Coverage To 80 Percent Of The U.S. Population And Then It Will Cease Further LTE Expansion, Lack Candor And Contain Numerous Misrepresentations.

The Applicants claim that AT&T's LTE deployment plan, without T-Mobile, would reach approximately 250 million people, or only 80 percent of the U.S. population, by the end of 2013.[19] This statement was made despite the fact that AT&T's mobile footprint already covers 97 percent of the U.S. population and that it recently announced plans for extending HSPA+ mobile broadband to its full wireless footprint by the end of 2012.[20] The Applicants further asserted that T-Mobile has no plans to deploy LTE.[21] The Applicants claimed that if the FCC permits AT&T to acquire T-Mobile, only then could AT&T expand LTE coverage to 97 percent of America.[22]

According to John Donovan, AT&T's Chief Technology Officer, "AT&T is committed to extending LTE coverage to over 97 percent of the nation's population, far more than was planned or possible without the transaction."[23] The Staff Analysis found that AT&T had sufficient spectrum to deploy LTE.[24] The Staff Analysis did not find as credible the Applicants' claim that, without the merger, LTE penetration would be lower than 97 percent of the U.S. population.[25] The Staff Analysis further concluded that absent the proposed merger, AT&T

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[19] Hogg Decl. at ¶ 27; Moore Decl. at ¶ 5.

[20] Joint Opposition at p. 81.

[21] Larsen Decl. ¶ 9.

[22] See, e.g. Moore Decl. at ¶ 5.

[23] Donovan Decl. ¶ 11. (emphasis added).

[24] Staff Analysis at ¶ 215.

[25] Id.

would upgrade its full footprint to LTE in response to competition from Verizon Wireless and other mobile wireless providers.[26] "Nothing in the record suggests that AT&T is likely to depart from its historical practice of footprint-wide technological upgrades with respect to LTE even absent this transaction."[27]

In June 2011, the hacker group LulzSec released 200MB of AT&T internal documents. A significant portion of the leaked data files consisted of AT&T's internal plans for its build out 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 build out 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. For example, the LulzSec documents show that AT&T estimates that it will have 6 million customers on its LTE network by the beginning of 2013.[28] 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.

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[26] Id. ¶ 250-251.

[27] Id. ¶ 252.

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