

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**OPPOSITION TO APPLICATION FOR REVIEW**

Deutsche Telekom AG (“DT”) hereby opposes the Application for Review filed by the Diogenes Telecommunications Project (“Diogenes”)<sup>1</sup> and requests that it be promptly dismissed. Diogenes asks the FCC to review the Order of the Wireless Telecommunications Bureau (“Bureau”) that dismissed without prejudice the applications of AT&T Inc. and DT (“Applicants”) for authorization to transfer licenses to effectuate the proposed merger of AT&T and T-Mobile USA, Inc. (“T-Mobile USA”) (“*Withdrawal Order*”).<sup>2</sup> Diogenes states that the Bureau erred in failing to address Diogenes’ assertions regarding the character and qualifications of the Applicants.<sup>3</sup> As detailed below, Diogenes’ request is procedurally defective. Moreover,

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<sup>1</sup> See Application for Review, Diogenes Telecommunications Project, WT Docket No. 11-65 (filed Dec. 27, 2011) (“Diogenes Application for Review”).

<sup>2</sup> *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG*, Order (Wireless Bur. Nov. 29, 2011) (“*Withdrawal Order*”).

<sup>3</sup> Diogenes Application for Review at 26.

Diogenes has failed to identify any specific misrepresentations to the Commission by DT or T-Mobile USA. Accordingly, the Commission should promptly dismiss the Application for Review.

**I. THE BUREAU WAS NOT REQUIRED TO ADDRESS DIOGENES' MISREPRESENTATION ALLEGATIONS.**

Diogenes' Application for Review is based on the faulty premise that the Bureau "err[ed] in dismissing the Applications" without simultaneously "making findings on the serious character qualification and misrepresentation questions raised by DTP[.]"<sup>4</sup> As detailed below, the Bureau was not obligated to address Diogenes' lack of candor or misrepresentation claims in the *Withdrawal Order*. Dismissal of the applications was a purely ministerial act executed by the Bureau in accordance with the Commission's rules.

The FCC's rules make clear the Applicants' ability to withdraw their applications as a matter of right. Section 1.934(a) of the Commission's rules states that, if "the applicant requests dismissal of its application without prejudice, the Commission *will* dismiss that application without prejudice."<sup>5</sup> As the word "will" emphasizes, dismissal is mandatory and the Bureau is bereft of discretion. This construction of 1.934(a) is bolstered by the D.C. Circuit's recent decision in *Environmentel LLC v. Federal Communications Commission*, which makes clear that withdrawal is a matter of right rather than agency discretion.<sup>6</sup> The Bureau's order accepting AT&T's and DT's request to withdraw their applications was ministerial.<sup>7</sup>

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> 47 C.F.R. § 1.934(a) (emphasis added). Section 1.934(a) requires acceptance of a request for withdrawal unless one of two conditions exists. The two exceptions are for applications that have "been designated for comparative hearing" and applications "for which the applicant submitted the winning bid in a competitive bidding process." 47 C.F.R. § 1.934(a)(1)(ii)(A), (B). Neither of those conditions are present here.

<sup>6</sup> In *Environmentel LLC v. Federal Communications Commission*, an applicant withdrew a license transfer application *after* the Commission had granted the application but *before* filing of a notice of consummation. The FCC dismissed the notice of consummation on the ground that

Because the *Withdrawal Order* was ministerial, Diogenes' assertion that the FCC erred in not addressing Diogenes' ancillary allegations about the applicants' lack of candor proceeds from a faulty premise. As a procedural event, withdrawal does not involve substantive review of matters at issue in the terminated proceeding. Indeed, conducting a substantive review when the vehicle for doing so has been withdrawn and the issues mooted would be a waste of administrative resources. Thus, contrary to Diogenes' assertion, it would have been in error for the Bureau to conduct the character and qualifications review Diogenes requested in the context of a withdrawal request. For this reason, the Application for Review should be dismissed.

## **II.      DIOGENES' APPLICATION FOR REVIEW FAILS TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.**

The Commission should also reject the Application for Review because it fails to identify a Bureau action for which relief under Section 1.115 would be appropriate. Section 1.115(b)(2) lists the five specific types of allegations that are sufficient to sustain an application for review.<sup>8</sup>

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the application had already been withdrawn. In denying a Motion for Reconsideration, the Commission noted that “the processing of [the] withdrawal request was a routine matter” and that “[w]hat the Division did in this case was to act according to its standard procedures in processing the withdrawal request.” *In re Thomas K. Kurian*, Opinion and Order, 25 FCC Rcd 13863, ¶ 6 (2010). On appeal, the FCC noted that “FCC staff processed [the] withdrawal request as a routine matter and granted the withdrawal.” Brief for Appellee at 2, *Environmental LLC v. Federal Communications Commission*, 661 F.3d 80 (D.C. Cir. 2011) (No. 10-1344). The D.C. Circuit Court agreed, making clear that the FCC must abide by its rules and that, under Section 1.934(a)(1), an applicant has a right to the dismissal of an application if the applicant withdraws it. *Environmental LLC*, 661 F.3d 80.

<sup>7</sup> Even if the FCC were to conclude that it does have discretion over whether to approve or deny a withdrawal request, this difference in interpretation is irrelevant in this matter because the FCC approved the Applicants' decision to withdraw their applications.

<sup>8</sup> Specifically, Section 1.115(b)(2) provides that an “application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy. (ii) The action involves a question of law or policy which has not previously been resolved by the Commission. (iii) The action involves application of a precedent or policy which should be

In practice, the Commission has been clear that it will reject an Application for Review if the pleading does not “specify with particularity” one of the five types of allegations.<sup>9</sup> In this case, none of Diogenes’ allegations about the *Withdrawal Order* fits any of the five categories listed in Section 1.115(b)(2).

- Issuance of the *Withdrawal Order* was not “in conflict with statute, regulation, case precedent, or established Commission policy.”<sup>10</sup> As detailed above, the mandatory language of Section 1.934(a), along with D.C. Circuit precedent and the Commission’s own statements, make clear that AT&T and DT possessed as a matter of right the ability to withdraw their applications, and that the Bureau was required to effectuate the withdrawal requested by the Applicants.<sup>11</sup>
- Issuance of the *Withdrawal Order* did not “involve[] a question of law or policy which has not previously been resolved by the Commission.”<sup>12</sup> The law is clear that withdrawal is a matter of right and that the Bureau was obligated to issue the *Withdrawal Order*.
- The *Withdrawal Order* does not “involve[] application of a precedent or policy which should be overturned or revised.”<sup>13</sup> Again, the law is clear that withdrawal is a matter of right. Diogenes’ pleading does not assert that Section 1.934(a) should be overturned or revised. Diogenes simply ignores the rule.
- The Bureau did not make “[a]n erroneous finding as to an important or material question of fact.”<sup>14</sup> Given the limited nature of the review, the only fact at issue is whether AT&T

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overturned or revised. (iv) An erroneous finding as to an important or material question of fact. (v) Prejudicial procedural error.” 47 C.F.R. § 1.115(b)(2).

<sup>9</sup> *In re Skybridge Spectrum Found. on Request for Inspection of Records*, 26 FCC Rcd 13800, ¶ 11 (2011) (rejecting a party’s Application for Review because the party “did not even identify one of the factors, much less attempt to ‘specify with particularity’ why the Commission should revisit” an Office of General Counsel determination); *see also In re Paging Sys.*, 25 FCC Rcd 450, ¶ 5 (2010); *In re Washoe County, NV and Sprint Nextel et al.*, 23 FCC Rcd 11695 (2008).

<sup>10</sup> 47 C.F.R. § 1.115(b)(2)(i).

<sup>11</sup> *See supra* Section 1.

<sup>12</sup> 47 C.F.R. § 1.115(b)(2)(ii).

<sup>13</sup> 47 C.F.R. § 1.115(b)(2)(iii).

<sup>14</sup> 47 C.F.R. § 1.115(b)(2)(iv).

and DT requested withdrawal. Diogenes does not dispute that the Applicants requested withdrawal.

- The Bureau’s conduct did not constitute a “[p]rejudicial procedural error.”<sup>15</sup> As the Commission has explained, a party that submits an Application for Review on this ground must make two separate showings: first, that a procedural error occurred; and second, that the error prejudiced a party to the proceeding.<sup>16</sup> Here, the Bureau did not commit a procedural error. AT&T and DT requested withdrawal of their merger application, and the *Withdrawal Order* granted the request as required by Section 1.934(a). Neither Diogenes nor any other party was prejudiced by the withdrawal.

Because Diogenes failed to identify a Bureau action for which relief under Section 1.115 would be appropriate, its Application for Review must be rejected.

### **III. DIOGENES HAS FAILED TO IDENTIFY ANY MISREPRESENTATIONS THAT DT OR T-MOBILE USA MADE TO THE COMMISSION.**

Diogenes has failed to demonstrate how any statements that DT or T-Mobile USA made to the Commission regarding T-Mobile USA’s lack of a clear path to LTE were misleading. Nor can it. Diogenes points to statements by T-Mobile USA Chief Technology Officer Neville Ray at an investor conference.<sup>17</sup> But those statements pertain to T-Mobile USA’s chosen technology path and the need to evolve to LTE. Nothing in Mr. Ray’s statements addresses the issue of whether T-Mobile USA had sufficient spectrum or resources needed for a competitive nationwide deployment of LTE.

Diogenes’ other claim—that DT and T-Mobile USA made misrepresentations regarding T-Mobile USA’s smartphone portfolio—also lacks merit. Whether T-Mobile USA’s smartphone portfolio is “compelling” is a matter of subjective judgment and, in any event, the fact that T-

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<sup>15</sup> 47 C.F.R. § 1.115(b)(2)(v).

<sup>16</sup> Specifically, the Commission has explained that “[u]nder 47 C.F.R. § 1.115(b)(2)(v), an application for review that rests on alleged procedural error must show prejudice.” *In re Skybridge Spectrum Found. on Request for Inspection of Records*, 26 FCC Rcd 13800, n. 28 (2011).

<sup>17</sup> Diogenes Application for Review at 18.

Mobile USA's lack of access to certain smartphones, such as the iPhone, was a marketplace challenge is a matter of public record. All told, Diogenes' misrepresentation claims lack merit and should be rejected by the Commission.

**IV. CONCLUSION.**

For the foregoing reasons, DT urges the Commission to reject the procedurally defective and factually inaccurate Diogenes Application for Review and promptly dismiss it.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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