

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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

To: The Secretary

**REPLY OF DIOGENES TELECOMMUNICATIONS PROJECT
TO OPPOSITIONS TO APPLICATION FOR REVIEW**

The Diogenes Telecommunications Project (DTP) files this Reply to the January 11, 2012 Oppositions of AT&T, Inc. (AT&T) and Deutsche Telekom AG (DT) to DTP's Application for Review filed on December 27, 2011 . DTP seeks review by the Commission 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) and dismissing petitions to deny. The Oppositions are without merit.

The Opposition filed by AT&T (AT&T Opposition) collectively with DT requests dismissal of the Application for Review on procedural grounds. It offers no substantive response to DTP's showing that Applicants made multiple intentionally false and misleading material statements and material omissions throughout these proceedings, simply asserting that Applicants were candid and that the Commission's recent order approving AT&T's acquisition

of Qualcomm spectrum somehow negates the claims made in this proceeding by DTP and others as well as the findings of the Staff Analysis and Findings. The AT&T Opposition's procedural argument consists of citing one Commission decision, *In re Delta Radio, Inc.*¹, in which the Commission dismissed an application for review as moot because it had already granted the identical relief requested on other grounds, and another decision, *In re Applications of La Star Tel. Co.*², in which the Commission declined to reach candor issues, having dismissed the cellular license application on other grounds.

The Opposition filed by DT (DT Opposition) also requests dismissal of the Application for Review largely on procedural grounds. First, DT argues that approval of the withdrawal of the Applications was a purely ministerial act and consequently the Commission somehow was precluded from addressing character issues in the *Order*. Next, the DT Opposition maintains that the Application for Review was faulty because it did not allege any of the five grounds specified in Section 1.115(b)(2) of the Commission's rules. Finally, the DT Opposition disputes DTP's claim that DT and T-Mobile themselves made any material misrepresentations to the Commission, and argues that two of DTP's examples are not in fact misrepresentations.

The Oppositions' procedural arguments for dismissing the Application for Review are weak and may not be credited. The AT&T Opposition's reliance on the *Delta Radio* and *La Star* decisions is misplaced. In *Delta Radio*, the application for review sought the very same relief that the Commission had already granted, namely the dismissal of Delta Radio's application for a new FM broadcast station. The application for review truly was moot even though the dismissal was based on Delta Radio's default on its payment obligations instead of the reasons that had

¹ 18 FCC Rcd 16889 (2003).

² 7 FCC 3762 (1992).

been put forth by the competing bidder. Here, however, the Order did not grant or even address the relief that DTP seeks, namely the imposition of sanctions on the Applicants for their material misrepresentations or at least a hearing on the Applicants' conduct. Character issues have important implications for the Commission's processes and the qualifications of multiple license holders apart from the particular application in which such claims are raised. Therefore the fact that AT&T may no longer pursue its acquisition of T-Mobile in no way moots the character issues that are so prominent in this proceeding.

The *La Star* case is telling on this point. While the AT&T Opposition is correct that the Commission found it did not need to reach the character issue to find La Star ineligible for the proposed authorization, the Commission did not drop the character issue as AT&T implies. AT&T conveniently neglects to mention the well known Footnote 3 in the *La Star* decision in which the Commission stated:

[q]uestions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. 7 FCC Rcd at 3767, n.3

The Commission in *La Star* therefore expressly acknowledged and preserved for a later time the substantial questions of qualification raised therein. And the Commission did indeed revisit the matter, designating the character issue for hearing.³ In contrast the WT Bureau Order in this proceeding made no reference whatsoever to the allegations of material misrepresentation herein and to boot it dismissed the petitions to deny, making it extremely difficult for parties to convince the Commission to entertain these issues in any future proceeding.

³ *In re Application of Telephone and Data Systems, Inc. Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd 938 (1994) (TDS).

Significantly, the Qualcomm authorization order, cited by AT&T as an affirmation of its qualifications as a Commission licensee, makes no mention of the misrepresentation issues raised in this proceeding. Since the Qualcomm order was adopted after this Order, the Commission could well have taken notice of the evidence of misrepresentation in the record herein and addressed them in Qualcomm. The Order's summary dismissal of the Applications and petitions to deny is prejudicial to parties who may seek to have these character issues taken up in other proceedings. Absent recognition by the Commission that these issues are significant and will be resolved either in this proceeding or in a hearing, the prospects for DTP ever to get a ruling on its claims is slim to none. Sweeping the allegations and substantial evidence of material misrepresentation under the rug would amount to a dereliction of duty by the Commission and a major departure from established policy. As the Commission said in *TDS*, *supra*, at para.16:

The Commission has consistently required its applicants and licensees to be fully forthright and candid in their dealings with the Commission. As the Commission's Review Board stated in *Silver Star Communications-Albany, Inc.*, there is a "special duty imposed upon FCC licensees and applicants to go beyond merely avoiding an affirmative misrepresentation, but to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited." The United States Court of Appeals has recognized this special duty imposed upon applicants to be fully candid. As the Court stated in *RKO General, Inc. v. FCC*:

the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. (Citations omitted.)

The procedural arguments in the DT Opposition are overly technical insofar as they treat the Order as a simple ministerial act to effectuate the Applicants' withdrawal of their Applications. Whether or not it was a matter of right to withdraw the Applications, it surely was

not a matter of right to have the character issues in this proceeding brushed aside. By terminating the proceeding without addressing the misrepresentation issues the Order ignores an important Commission policy of insisting upon and enforcing truthfulness on the part of its licensees. Thus the Order was in clear conflict with established Commission policy and, contrary to the DT Opposition, the Application for Review satisfies the requirements of Section 1.115(b)(2) of the Commission's rules.

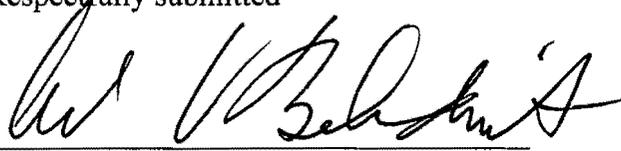
Finally, DT cannot evade responsibility by disassociating itself from the material misrepresentations made jointly by the Applicants throughout the proceedings. While some of the so-called public interest benefits of the transaction were largely touted by AT&T, and while some of these claims may have stuck in T-Mobile's craw, it was a willing participant in the filings and statements herein that contained the material misrepresentations.

Reportedly, AT&T has agreed to transfer spectrum to T-Mobile because the acquisition failed. The Applicants presumably will be filing new applications for authorization of this transaction. The Commission will of course have to make qualification findings on these applications, as well as the numerous other applications the Applicants are certain to file going forward. It makes little sense and is prejudicial to DTP for the Commission to duck the misrepresentation issues in this proceeding, knowing that they will be raised again in other proceedings which are less suitable forums for resolution.

The Oppositions having been shown to be without merit, DTP asks the Commission to grant its Application for Review and to take meaningful steps to resolve the character issues in this proceeding.

Respectfully submitted

By:



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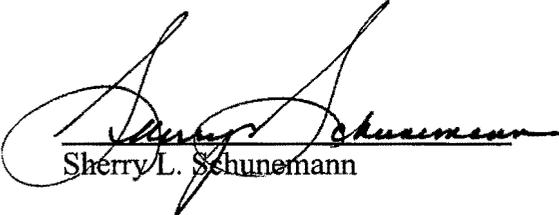
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Certificate of Service

I, Sherry L. Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Reply of Diogenes Telecommunications Project to Oppositions to Application for Review" was mailed by First Class U.S. Mail, postage prepaid, this 23rd day of January, 2012, to the following:

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