

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

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In the Matter of))
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Applications of))
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T-Mobile License LLC))
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AT&T Mobility Spectrum LLC and))
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New Cingular Wireless PCS LLC))
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For Consent to the Assignment of AWS-1))
Licenses))
_____))

WT Docket No. 12-21
File Nos. 0005005682, 0005005682
0005005687, 0005016840

To: The Secretary

REPLY TO JOINT OPPOSITION OF AT&T AND T-MOBILE

Rather than addressing the unresolved character issues against them, AT&T, Inc. (AT&T) and T-Mobile USA, Inc. (T-Mobile and collectively the Applicants) seek to hide beneath the FCC's procedural skirts. This time, the Applicants, in their Joint Opposition claim that The Diogenes Telecommunications Project, (DTP) lacks standing. Yet again, AT&T and T-Mobile have chosen not to reply to the serious charges of misrepresentation and lack of candor, preferring instead to argue petty procedural points.

In the AT&T – T-Mobile Acquisition Proceeding, WT Docket 11-65, DTP provided evidence showing that AT&T and T-Mobile lacked candor or made material misrepresentations to the Commission. Before the Commission could address these issues AT&T and T-Mobile requested that their applications be dismissed. In dismissing the applications, the Bureau

simultaneously dismissed all pending petitions to deny subject to reinstatement, “if they remain relevant.” The Bureau also released a document entitled Staff Analysis and Findings (Staff Analysis). The Staff Analysis concluded that the record does not support a finding that the proposed merger would serve the public interest, convenience, and necessity.

DTP sought review of the Bureau order dismissing its Petition to Deny. In their Oppositions to the Application for Review, AT&T and T-Mobile failed to provide a substantive response; instead they argued that the dismissal of their applications made the lack of candor and misrepresentation issues “moot.” DTP believes that AT&T’s and T-Mobile’s past conduct raises serious character issues, which have yet to be resolved.

In the Joint Opposition, the Applicants fail to address the misrepresentation and lack of candor issues, other than to provide banal statements and self-serving denials. They continue to argue that the dismissal of their applications makes DTP’s evidence of misrepresentation moot. This invites the Commission to set a very dangerous precedent. If AT&T and T-Mobile’s reasoning is accepted as valid, Commission licensees can file applications before the FCC that contain material misrepresentations. When an applicant is caught making false statements, it can simply dismiss its application and clear its slate. Such an outcome is counter to all previously established Court and FCC precedents on misrepresentation. As the Court said, “The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.” *WOKO v. FCC*, 329 U.S. 223, 226-227 (1946). A licensee’s duty of candor to the FCC is absolute. “The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants

have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.” *RKO General, Inc. v FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) See also, *SBC Communications*, 16 FCC Rcd 19091 (2001) “We consider misrepresentation to be a serious violation, as our entire regulatory scheme rests upon the assumption that applicants will supply [the Commission] with accurate information.” In the past, the FCC has not hesitated to revoke the licenses of those caught making material misrepresentations to the agency.

Standing

AT&T and T-Mobile argue that DTP lacks standing to file a petition to deny. This is a straw man, as standing is easily established in this proceeding. For the purpose of demonstrating standing DTP will accept the Applicants’ statements as true. In the Joint Opposition AT&T states “AT&T’s submissions and statements to the Commission in the AT&T/T-Mobile USA proceeding were made with complete candor. . .” Joint Opposition at p. 9. 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. . . .”¹ AT&T further claimed that its LTE deployment plan, without T-Mobile, would cover only a percentage of its existing U.S. footprint.² AT&T nonetheless seeks to give away valuable spectrum to T-Mobile. Irene Laschuk is a member of DTP and an AT&T customer; as such she can establish standing for DTP.³ If as AT&T claims, it is facing a spectrum crunch, and that it needs every megahertz of

¹ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2.

² Hogg Decl. at ¶ 27; Moore Decl. at ¶ 5.

³ An association has standing to pursue litigation “on behalf of its members when its members would have standing to sue in their own right.” *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). It is enough if just one member of the group has standing. *City of Waukesha v. EPA*, 320 F.3d 228, 235-37 (D.C. Cir. 2003).

available spectrum to rollout LTE (at least partially) then Ms. Laschuk will be harmed by AT&T's action of giving away its valuable spectrum.

The irreducible constitutional minimum of standing contains three elements: (1) injury-in-fact, (2) causation and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Ms. Laschuk has established the prerequisites for Article III standing: a personal injury (deterioration or nonexistence of AT&T's LTE service), fairly traceable to the challenged action (AT&T proposed give away of valuable spectrum), and likely to be redressed by the requested relief (a denial of the pending assignment application).

AT&T and T-Mobile have yet to Address the Issues

The Commission insists on truthful and accurate statements by its applicants and licensees.⁴ AT&T and T-Mobile have made numerous, inconsistent and untruthful statements. Clearly, if AT&T is to be believed, that it is facing a severe spectrum crunch, why would it execute an agreement that requires it to give away spectrum. There is only one possible conclusion, AT&T was not facing a spectrum crunch; it was making a grab at T-Mobile customer base. In an attempt to get regulatory approval it repeatedly misrepresented its true purpose in attempting to acquire T-Mobile. The undisputed record shows that AT&T had more than enough spectrum. The Staff Analysis also concluded that AT&T had enough spectrum. In fact, it had so much spectrum that it could afford to give away a large part of it if the acquisition did not go through.

Nothing would be gained by DTP repeating the numerous misrepresentations made to the FCC. They remain on the record and the Applicants have made no effort rebutted the evidence.

⁴ 47 C.F.R. §1.17.

No doubt, to do so would be to add more misrepresentations to a dismal list of lies. Taken together these statements evidence a deliberate attempt to misrepresent the facts said to justify the proposed purchase of T-Mobile and subsequently this transaction. AT&T's and T-Mobile's 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.
- 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 AT&T violated the FCC's ex parte rules when it targeted FCC decision making personnel with issue specific advertising.

Conclusion

Accordingly, the FCC should designate for hearing the above captioned applications to determine whether AT&T and T-Mobile possess the requisite character qualifications to remain FCC licensees.

Respectfully submitted

By:



Arthur V. Belendiuk

Counsel to The Diogenes Telecommunications Project

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., # 301
Washington, D.C. 20016
(202) 363-4050
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CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary with the law firm of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing “Reply to Joint Opposition of AT&T and T-Mobile” was served, as specified, this 19th day of March, 2012, to the following:

Best Copy and Printing, Inc.
FCC Duplicating Contractor
445 12th Street, S.W.
Washington, D.C. 20554
FCC@BCPIWEB.COM
(Via Electronic Mail)

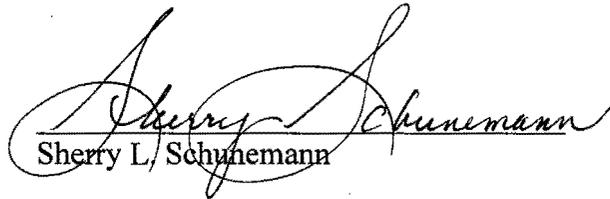
David Hu
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
david.hu@fcc.gov
(Via Electronic Mail)

Joel Taubenblatt
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
joel.taubenblatt@fcc.gov
(Via Electronic Mail)

Jim Bird
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
TransactionTeam@fcc.gov and jim.bird@fcc.gov
(Via Electronic Mail)

M.E. Garber
Gary L. Phillips
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(Via First Class U.S. Mail)

Nancy J. Victory
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(Via First Class U.S. Mail)


Sherry L. Schunemann