

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

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

WT Docket No. 12-21

To: The Secretary

APPLICATION FOR REVIEW

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May 1, 2012

The Diogenes Telecommunications Project, (Diogenes) by its attorneys, and pursuant to Section 1.115 of the Commission's Rules¹ files this Application for Review of the April 18, 2012, Order, in WT Docket No. 12-21, DA 12-615 (Order) of the Chief, Wireless Telecommunications Bureau (WT Bureau) dismissing Diogenes' Petition to Deny in the above captioned proceeding.

I. Question Presented for Review

Did the WT Bureau err when it dismissed Diogenes' Petition to Deny for lack of standing? Did the WT Bureau err when it concluded that Diogenes' Supplement to Petition to Deny failed to comply with the requirement for timely supplemental filing? Did the WT Bureau err when it dismissed Diogenes' Supplement to Petition to Deny?

II. Introduction

On April 21, 2011, T-Mobile USA, Inc., a Deutsche Telekom AG subsidiary and AT&T Inc. (collectively 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, Diogenes filed a Petition to Deny, raising character and misrepresentation issues against the Applicants. On June 10, 2011, Diogenes filed a Reply to Applicant's June 20, 2011 Joint Opposition. On August 4, 2011, Diogenes 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. Diogenes also filed a Motion

¹ 47 C.F.R. §1.115.

² 47 U.S.C. § § 214(a), 310(d).

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 Diogenes requested dismissal of the Applications with prejudice. Finally, on November 29, 2011, Diogenes filed an Application for Review of the letter decision of the Office of General Counsel denying Diogenes' 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 seeking to withdraw the Applications. On November 29, 2011, the Chief, WT Bureau released an Order, DA 11-1955, dismissing the Applications along with all pending petitions to deny. The WT 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.

However, the WT Bureau Order did not address the unresolved character and misrepresentation issues. On December 27, 2011, Diogenes filed an Application for Review. In the Application for Review, Diogenes argued that 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 and, as necessary, imposing sanctions on the Applicants for their misconduct. Diogenes argued that it would be extremely difficult for the parties to address and for the Commission to resolve these threshold issues of qualification in the context of applications not related to this transaction. On April 17, 2012, the FCC issued a Memorandum Opinion and Order, in WT Docket No. 11-65, FCC 12-40 dismissing Diogenes' Application for Review without considering the underlying misrepresentation and character

issues. However, the Commission did specifically state that, “our decision not to address the character issues in this proceeding does not prejudice how those issues would be address if raised in another context.”

While the Application for Review was pending, the Applicants on January 20, 2012 sought approval to assign spectrum licenses from AT&T to T-Mobile. The Applicants explained that the proposed license assignments are part of the break-up provision of a Stock Purchase Agreement, dated as of March 20, 2011 between AT&T and DT. The license assignments stem directly from the break-up of the proposed transfer of control applications, which were the subject of WT Docket 11-65. Seeking to have the unresolved character issues addressed in this new proceeding, Diogenes on February 23, 2012 filed a Petition to Deny. Diogenes raised the same unresolved issues it had raised in the WT Docket 11-65 proceeding. In addition, Diogenes on April 16, 2012, filed a Supplement to Petition to Deny. The Supplement reported that on March 22, 2012, the Department of Justice filed a complaint against AT&T under the False Claims Act for conduct related to its provision of Internet Protocol (IP) Relay services. The suit alleges that AT&T fraudulently submitted ineligible IP Relay calls to the interstate TRS Fund for payment and has, in fact, collect tens of millions of dollars in illegal payments. In the process, AT&T caused significant financial injury to U.S. individuals and merchants. It also deteriorated the ability of disabled persons from using relay services to communicate with individuals and businesses. AT&T’s fraudulent conduct caused it customers, including Irene Laschuk, a member of Diogenes, to incur additional monthly charges. Further, the lawsuit alleges that to better perpetrate this fraud, AT&T became the partner of the Nigerian Mafia. Diogenes submitted this evidence to show a pattern of conduct demonstrating that AT&T is not qualified to be an FCC

licensee. The WT Bureau, in dismissing Diogenes Petition to Deny also dismissed the Supplement without addressing the issues raised therein.

The Commission insists on truthful and accurate statements by its applicants and licensees.³ In filings before the FCC, Diogenes 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. 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 evidence 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.

³ 47 C.F.R. §1.17.

- 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.
- Whether AT&T knowingly accepted and sought compensation for international TRS IP Relay calls.
- Whether AT&T made knowing false certifications or submitted knowingly false claims for reimbursement from the TRS Fund for such international calls.
- Whether AT&T assisted or provided the Nigerian Mafia with the technology to transparently relay international funds through proxy servers, for the purpose of defrauding the TRS Fund.

III. The Bureau Erred When It Determined that Diogenes Lacked Standing.

The Bureau acknowledges that Irene Laschuk is a member of Diogenes and a customer of AT&T. AT&T claimed in WT Docket 11-65 that it is suffering from a severe spectrum crunch. In fact, AT&T has stated, under penalty of perjury, that its spectrum crunch is so severe that should the FCC not grant the AT&T/T-Mobile merger AT&T could not fully build out its LTE network. 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 Taking AT&T at its own word, to permit AT&T to divest its spectrum at this critical juncture would be

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

disastrous for the company and highly prejudicial to its customers, including Irene Laschuk. In the Supplement, Diogenes demonstrated that AT&T was making false claims in order to receive unearned reimbursements from the TRS Fund. AT&T's customer's, including Irene Laschuk, are required to reimburse AT&T for its contributions to this fund. This represents a separate and independent basis for standing.

The Bureau concludes that Diogenes lacks standing because setting the Applications for hearing potentially might not provide Diogenes with the relief it is requesting.

The requested hearing and potential revocation of all licenses held by AT&T and T-Mobile USA would potentially put both AT&T and T-Mobile out of the wireless business in the United States, a result that would not provide any relief for the alleged injuries to Diogenes' members. Indeed, the relief Diogenes seeks would prevent Mr. Karren from remaining a T-Mobile customer as he desires to do, and deny Ms. Laschuk any benefits from AT&T's deployment of LTE. Accordingly, we dismiss the Diogenes Petition to Deny for lack of standing. Order at ¶ 10.

This is false logic. In the process of deciding whether to grant the proposed assignment of licenses from AT&T, the FCC could reach any number of conclusions. Thus, the Bureau could have potentially decided that AT&T should not be permitted to transfer valuable spectrum to T-Mobile without revoking the licenses of these wireless providers. Had the Bureau set the matter for hearing, as it was required to do, a variety of outcomes was possible. A different result, once standing is established, is not inconsistent with the requirements of Constitutional standing. It is sufficient for the purposes of standing that the FCC could deny the assignment. The Commission has a range of administrative sanctions at its disposal when it finds that its licensees have made false statements to the agency.

The undisputed evidence in this proceeding raises concerns about the Applicants' honesty and integrity with respect to the Commission's rules and the likelihood that the Applicants will

abide by the FCC rules in the future. In the case of AT&T, its misrepresentations concerning the TRS Fund are directly linked to the injury suffered, i.e. Ms. Laschuk must pay more in regulatory fees. In the interests of "preserv[ing] the integrity" of its operations, the Commission may consider a would-be licensee's deceptive behavior as grounds for rejecting an application.⁵ The Court has stated that the Commission "would be derelict if it did not hold broadcasters to high standards of punctilio, given the special status of licensees as trustees of a scarce public resource,"⁶ even to make denial of a license virtually automatic on evidence of intentional misrepresentations in license applications.⁷ In this case, the Bureau did not consider the Applicants behavior, nor did it consider AT&T's conduct as it relates to filing certifications and receiving money from the TRS Fund. The Bureau erroneously concluded that Diogenes lacked standing.

The irreducible constitutional minimum of standing contains three elements: (1) injury-in-fact, (2) causation and (3) redressability.⁸ That is, "to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) 'fairly traceable' to the defendant's conduct and (3) redressable by the relief requested."⁹ 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

⁵ *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946).

⁶ *Leflore Broad. Co. v. FCC*, 204 U.S. App. D.C. 182, 636 F.2d 454, 461 (1980).

⁷ See, e.g., *In re Opal Chadwell*, 2 FCC Rcd. 5502 (1987).

⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁹ *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340, 145 F.3d 1410, 1412 (D.C. Cir. 1998) (quoting *SunCom Mobile & Data, Inc. v. FCC*, 318 U.S. App. D.C. 377, 87 F.3d 1386, 1387-88 (D.C. Cir. 1996) (quoting *Branton v. FCC*, 301 U.S. App. D.C. 244, 993 F.2d 906, 908 (D.C. Cir. 1993) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984))), cert. denied, 511 U.S. 1052, 128 L. Ed. 2d 338, 114 S. Ct. 1610 (1994)).

valuable spectrum), and likely to be redressed by the requested relief (a denial of the pending assignment application).

In addition, an applicant's past behavior is germane as it predicts future behavior. Thus, AT&T's material misrepresentations in the AT&T/Mobile merger proceeding and its false claims to the TRS Fund over a number of years for tens of millions of dollars predict that it will not be truthful with the FCC in the future. Improperly receiving payments for IP Relay calls results in a direct injury to Irene Laschuk and Mr. Karren, since they have been assessed higher fees by their wireless providers as a direct result of AT&T's fraud on the TRS Fund. Inasmuch as AT&T's past behavior is a reasonable predictor of its future behavior, the prospect of future injury to both Ms. Laschuk and Mr. Karren results in a "material impairment of [a customer's] hopes or expectations".¹⁰ Such a material impairment is sufficient to support standing. Simply stated, having made material misrepresentations on multiple occasions and proceedings and gotten away with it, there is every reason to believe that the Applicants will continue to make misrepresentations and that those misrepresentations, as in the case of the TRS Fund, will materially injure Ms. Laschuk's expectations for a fair and reasonable mobile wireless service. This represents a separate and independent basis for standing in this proceeding.

IV. The Bureau Erred When It Concluded That Diogenes' Supplement to Petition to Deny Was not Timely Filed.

On April 16, 2012, Diogenes filed a Supplement to Petition to Deny. The Bureau dismissed the Supplement, claiming that it did not comply with the requirements for a timely supplemental filing as set forth in the *Comment Public Notice*, at 3.¹¹ The *Comment Public*

¹⁰ *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998).

¹¹ T-Mobile License LLC, AT&T Mobility Spectrum LLC, and New Cingular Wireless PCS, LLC Seek FCC Consent to the Assignment of AWS-1 Licenses, WT Docket No. 12-21, Public Notice, DA 12-92 (rel. Jan. 26, 2012)

Notice limits parties seeking to raise a new issue after the pleading cycle has closed to new facts or newly discovered facts. Such new issues should be filed within 15 days after such facts are discovered. The Supplement reported that on March 22, 2012, the Department of Justice filed a complaint against AT&T under the False Claims Act for conduct related to AT&T's provision of Internet Protocol (IP) Relay services. The suit alleges that AT&T has fraudulently submitted ineligible IP Relay calls to the interstate TRS Fund for payment and has, in fact, collected tens of millions of dollars in illegal payments. In the process, AT&T caused significant financial injury to U.S. individuals and merchants. It also deteriorated the ability of disabled persons from using relay services to communicate with individuals and businesses. The issues raised were new and newly discovered by Diogenes. Further, as discussed herein, they addressed the integrity of AT&T, an applicant in this proceeding. The Bureau erred when it concluded that Diogenes' Supplement did not meet the requirements for filing supplemental pleadings as set forth in the Comment *Public Notice*.

V. Conclusion

There is a growing perception that federal agencies are quick to enforce their regulations against small companies, but too often look the other way when large regulated companies break the rules. While the Commission regularly enforces its truthfulness provisions as to other, mostly small, applicants and licensees; it has not held AT&T and T-Mobile accountable for their dissembling in this proceeding, nor in WT Docket 11-65. As matters stand, the substantial questions that have been raised concerning Applicants' truthfulness and their qualifications will not be resolved herein or by a separate proceeding.

Where an applicant has knowingly attempted to mislead the Commission on an underlying matter of decisional import, complete disqualification of such an untrustworthy

licensee or applicant has consistently resulted.¹² AT&T and T-Mobile have made numerous misrepresentations, yet the Commission has taken no action.

On review the Commission must find that the Bureau Order erred in dismissing the Petition to Deny and Supplement and ignoring the serious character and qualifications issues raised by Diogenes. This omission can be rectified by designating a hearing to determine whether AT&T and T-Mobile still retain the basic character qualifications to remain FCC licensees. If they are found to lack the basic qualifications to remain licensees, their licenses should be revoked and auctioned to parties who will take seriously their responsibility to be honest and forthcoming. As an absolute minimum the FCC should make findings based on AT&T's own statements that it lacks spectrum and deny the proposed assignment of licenses from AT&T to T-Mobile.

Respectfully submitted

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¹² See, e.g., *Contemporary Media, Inc.*, 13 FCC Rcd 14,437 (1998); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2136-38 (Rev. Bd. 1987); *TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987); *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986); *Bellingham Television Associates, Ltd.*, 103 FCC 2d 222 (Rev. Bd. 1986); *Pendleton C. Waugh* 22 FCC Rcd 13363 (2007).

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 "Application for Review" was served, as specified, this 1st day of May, 2012, to the following:

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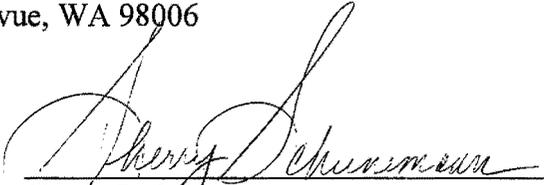
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