

March 11, 2013

By ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Ex Parte* Communication, Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign Licenses, WT Docket No. 12-301

Dear Ms. Dortch:

On March 8, 2013, over three months after the close of the FCC's established comment period, The Greenlining Institute ("Greenlining") filed an *ex parte* letter asserting, for the first time that the above-captioned "proposed transaction would harm the public interest and that the Commission should deny the application."¹ Greenlining provides no justification for its failure to comply with the Commission's established deadlines for opposing or commenting on the proposed transaction and utterly fails in its effort to blame the Applicants for its own tardiness. Greenlining provides no explanation whatsoever why its specific objections could not have been timely raised. Further, Greenlining does not even commit that its filing is its full comments. In a game of regulatory keep-away, all that Greenlining does provide is a threat to file yet another untimely explication of its concerns in the future.

Notwithstanding its opposition, despite having almost five months since the application went on public notice and over a month since it had access to the Applicants' confidential and highly confidential responses to the FCC's information request, Greenlining's *ex parte* does not identify a single public interest harm arising from the transaction. Rather, Greenlining endorses the Applicants' business goals of continuing the MetroPCS brand and business, but inexplicably goes on to assert that the Commission should undermine these laudable business plans by hamstringing the combined company into a five-year regulatory obligation to continue this plan on Greenlining-dictated terms irrespective of what real world consequences lay ahead. Putting aside the absence of any transaction harms, the lack of any cited authority for the radical conditions Greenlining seeks, and the absence of any nexus between the proposed conditions and

¹ Letter from Paul Goodman, Legal Counsel, the Greenlining Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301 at 1 (filed March 8, 2013) (emphasis omitted) ("*Greenlining Ex Parte*").

any articulated harms, the plain fact is that such regulatory conditions, if pursued, would ultimately disserve the very low income and value customers that Greenlining is purportedly trying to protect.

In asking the Commission to delay action, Greenlining claims that the Applicants cannot be trusted and that it needs more time to review the Applicants' confidential and highly confidential documents because the stated business plans to maintain both the T-Mobile USA and MetroPCS brands might not be the Applicants' real plans. This claim is preposterous on its face. The Applicants' confidential and highly confidential documents submitted pursuant to the FCC's information request have been in Greenlining's possession for over a month. These business plans, synergies models and board presentations detail and confirm the very thing Greenlining now seeks time to explore—the Applicants' intent to maintain both brands and retail stores. Further, T-Mobile USA and MetroPCS have made numerous presentations, press releases and public filings that substantiate these business plans.

Against this backdrop, the only reasonable conclusion is that Greenlining has never actually read the documents it aggressively sought and has had over a month to review.² If true, there can be little doubt that Greenlining's recent *ex parte* and its promised future filing are part of a calculated plan to delay regulatory action, rather than to illuminate real public interest issues. Accordingly, for the reasons summarized above and detailed below, the Greenlining *ex parte* and any ensuing untimely filings should be summarily dismissed, ignored or rejected.

Greenlining's Ex Parte Filing Is Untimely and Greenlining Promises More Untimely Filings

The above-captioned transfer applications were filed with the Commission on October 18, 2012 and placed on public notice by the Commission on October 26, 2012.³ Pursuant to the Public Notice, the deadline for filing petitions to deny and comments was November 26, 2012. The Public Notice in this proceeding makes clear that **“a party or interested person seeking to raise a new issue after the pleading cycle has closed must show good cause why it was not possible to have raised it previously.”**⁴

² The concern that Greenlining has not exercised the requisite diligence and conducted its review is evidenced by its assertion that “Greenlining does not expect its review of Applicant's materials *will uncover* any new information which might obviate those concerns.” Greenlining *Ex Parte* at 3 (emphasis added). Also, Greenlining does not cite any of the confidential documents it claimed it needed.

³ *Deutsche Telekom AG, T-Mobile USA, Inc. and MetroPCS Communications, Inc. Seek FCC Consent to the Transfer of Control of PCS Licenses and AWS-1 Licenses and Leases, One 700 MHz License, and International 214 Authorizations Held by MetroPCS Communications, Inc. and by T-Mobile USA to Deutsche Telekom AG*, Public Notice, WT Docket No. 12-301, DA 12-1730 (Oct. 26, 2012) (“Public Notice”).

⁴ Public Notice at 5 (emphasis in original).

Greenlining, for its part, was well aware of the established FCC deadline of November 26, 2012. Prior to that date, Greenlining not only had filed acknowledgments of confidentiality before the FCC,⁵ but also had received copies of the Applicants' Public Interest Statement in both redacted and unredacted form.⁶ Greenlining, as the record reflects, did not submit a timely petition or comments.

Indeed, Greenlining took no part in any aspect of the FCC proceeding until January 7, 2013, at which time it sought access to the confidential and highly confidential documents filed by Applicants in response to the FCC's information request. On February 5, 2013, Greenlining received access to all of these documents.⁷ Now, more than five months after the applications were filed, over three months after the comment deadline has passed, and over one month since having access to the Applicants' confidential and highly confidential documents filed in response to the FCC's information request, Greenlining surfaces for the first time to say that its "preliminary review" suggests some unspecified and completely speculative public interest harms, that it is going to continue to review the documents, that the documents probably won't show anything, but . . . it is going to file yet another untimely filing in the future.

Greenlining's request that the Commission "not render a decision on the Applications until the expiration of the 180-day "shot clock"⁸ reflects a complete misapprehension of the purpose of

⁵ Letter from Paul Goodman, Legal Counsel, the Greenlining Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301 (filed Nov. 15, 2012).

⁶ Contrary to Greenlining's assertion that the Applicants somehow impeded Greenlining's participation at the California Public Utilities Commission, Greenlining *Ex Parte* at 3, the Applicants provided to Greenlining under a nondisclosure agreement all merger-related documents supplied to the CPUC before the CPUC's notice period expired. Greenlining did not make any filing at the CPUC regarding the proposed transaction.

⁷ In connection with its request to inspect these documents, Greenlining engaged in a post-hoc rationalization for its failure to file timely comments by attempting to blame the Applicants for its own decisions to forego timely participation—a claim that T-Mobile USA documented under declaration to be patently false. Letter from Nancy J. Victory, Counsel for Deutsche Telekom AG and T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301 (filed Jan. 22, 2013). Further, what Greenlining refers to as "delaying tactics" in allowing it access to the Applicants' confidential and highly confidential documents, Greenlining *Ex Parte* at 2-3, were DT, T-Mobile USA and MetroPCS exercising their rights under the protective orders in this proceeding to object to entities accessing their confidential and highly confidential documents who have not been participating in the proceeding. See Protective Order, WT Docket No. 12-301, DA 12-1664, ¶ 5 (WTB rel. Oct. 17, 2012); Second Protective Order, WT Docket No. 12-301, DA 12-1665, ¶ 7, (WTB rel. Oct. 17, 2012).

⁸ Greenlining *Ex Parte* at 2 (initial caps removed).

the informal 180-day timeline for consideration of merger transactions. In adopting the 180-day target, the Commission expressly stated that “[it] is the Commission’s policy to decide all applications...as expeditiously as possible...”⁹ Significantly, one key purpose of the timeline was to set forth “the requirements and opportunities for participation by interested parties...in order for the review process to move forward efficiently...to contribute to a speedy and efficient consideration and resolution.”¹⁰ Here, Greenlining has blatantly disregarded the orderly process envisioned by the informal timeline with absolutely no showing of good cause. Under these circumstances, acceding to Greenlining’s request that the Commission “withhold ruling” would completely undermine the core objectives that the Commission sought to advance by articulating its proposed merger review timeline.

Under well-established Commission precedent, an entity who ignores the deadlines in transfer application proceedings cannot simply surface whenever it is convenient for it to offer its untimely views. Such filings, at most, are treated as informal comments that can be ignored at the Commission's discretion.¹¹ Where, as here, there is no reasonable explanation for the lack of timely participation, the result is dismissal or striking of the filing.¹² That is particularly the case where, as here, there is no substantive objection and the only apparent purpose of the filing is to seek to delay the proceeding. If the Commission were to accept such late-filed pleadings, the agency would have to constantly re-initiate pleading cycles at the whim of any entity seeking to delay a transaction. The Commission has established deadlines and procedures designed to

⁹ <http://www.fcc.gov/encyclopedia/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or-autho>.

¹⁰ *Id.*

¹¹ *See, e.g., In the Matter of Verizon Washington DC, Inc.*, 26 FCC Rcd 13511, ¶¶ 7-8 (WTB rel. 2011) (treating late-filed comments as informal requests for Commission action under Section 1.41 of the rules); *Armstrong Utilities, Inc., et al. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 11725, ¶ 7 n.28 (MB rel. 2007) (treating late-filed comments as *ex parte* presentation); *cf. Applications of Pacific Telesis Group, Transferor and SBC Communications, Transferee*, 12 FCC Rcd 2624, ¶ 10 (1997) (denying motion to accept late-filed comments but treating filing as “informal request for Commission action”).

¹² *See, e.g., Hughes Network Systems, Ltd., Assignor, and HNS Licensee Sub LLC, Consolidated Application for Consent for Assignment of Earth Station Licenses and Associated Special Temporary Authorizations*, 20 FCC Rcd 8080 ¶¶ 3-8 (IB rel. 2005) (dismissing late-filed comments as untimely filed); *National Science and Technology Network, Inc.*, 17 FCC Rcd 365, ¶ 6 (2001) (dismissing late-filed comments as untimely where filer “did not make any showing concerning its failure to file” within the designated period); *Application of Motorola SMR, Inc. 900 MHz Authorization New York MTA*, 12 FCC Rcd 5979, ¶ 11 (WTB rel. 1997) (striking late filed reply pleading where filer failed to present an emergency situation justifying the late filing); *Berlin, DeForest, Markesan, and Wautoma, Wisconsin*, 10 FCC Rcd 7733, n.3 (AB rel. 1995) (late-filed reply comments were unauthorized and not accepted).

review proposed transactions in a timely manner, and the Commission should summarily reject the Greenlining *ex parte* in order to protect the integrity of its application process.

Greenlining Does Not Identify a Single Public Interest Harm Arising from the Transaction.

Greenlining's claim that the transaction will disserve the public interest is devoid of a single public interest harm attributable to the proposed transaction. Indeed, the Applicants propose to do exactly what Greenlining says would be in the public interest—to maintain the MetroPCS brand and business. In fact, the Applicants intend to go further and expand the MetroPCS brand into new metropolitan areas across the country.

As is well-documented in this proceeding, the proposed transaction will result in a number of clear public interest benefits.¹³ The proposed transaction will bring together two companies that, on their own, face challenges to create a stronger carrier (“Newco”) better positioned to compete effectively against the other “nationwide” carriers. Post-transaction, the combined entity will continue and enhance the tradition of serving value-conscious customers. In addition, Newco plans to retain both the T-Mobile USA and MetroPCS brands as separate business units. This is not merely something the Applicants put in their Public Interest Statement; the Applicants have repeatedly and publicly made this statement. The combined company will be positioned—and indeed plans—to expand the MetroPCS brand to new cities where MetroPCS could not otherwise justify the capital requirements of building a new, stand-alone network. Even within MetroPCS’s existing service areas, the proposed transaction will strengthen competition by improving the speed, quality, and robustness of the company’s service offerings.

Despite these representations, Greenlining expresses concern that there is “no guarantee” that Newco will continue the MetroPCS brand.¹⁴ Based on its own self-generated “misgivings”, Greenlining asks the Commission to impose a number of draconian and unprecedented conditions.¹⁵ Ironically, the conditions Greenlining seeks to impose would disserve the very

¹³ See *Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 12-301, Lead File No. 0005446627, at Exhibit 1, Description of Public Interest Showing, and Related Demonstrations (filed Oct. 18, 2012) (“Public Interest Statement”).

¹⁴ Greenlining *Ex Parte* at 4.

¹⁵ Specifically, Greenlining recommends that the Commission “impose conditions to ensure that the new company maintains separate T-Mobile and MetroPCS brands for at least five years after the Applicants consummate the transaction.” Greenlining *Ex Parte* at 4. Greenlining also suggests that the Commission “require the new company to devote a minimum percentage of its marketing budget to the MetroPCS brand for the next five years” based on “the proportion of the new company’s T-Mobile and MetroPCS customers at the time the transaction is approved.” *Id.* at 4-5. Finally, “in accordance with net neutrality principles,” Greenlining urges the Commission to “prohibit the new company from prioritizing T-Mobile customers’ voice and data traffic over MetroPCS customers’ voice and data traffic.” *Id.* at 5.

consumers Greenlining purportedly seeks to protect. The conditions sought by Greenlining would be fatal to any company attempting to serve value customers. And imposing those conditions only on the merged entity would severely disadvantage it in competing in the intensely competitive wireless market. Post-consummation, the combined entity will require flexibility to administer its marketing budget and its staff and resources as needed to ensure the viability of both brands in a rapidly changing marketplace. The unprecedented and unwarranted conditions suggested by Greenlining, however, would threaten the sustainability of both brands and the ability to serve value customers.

Greenlining Does Not Appear to Have Actually Read the Documents in its Possession and, if True, It Is Engaged in a Calculated Effort to Delay Timely Commission Decision-Making

Based on Greenlining's assertion that its "preliminary" review of the documents raises concerns about the Applicants' commitment to continuing both the T-Mobile USA and MetroPCS brands, businesses and stores, the Applicants are left to wonder if Greenlining ever actually read any of the documents that it so aggressively sought and secured. The Applicants' confidential and highly confidential documents clearly confirm and detail business plans to maintain both brands and, furthermore, to expand the MetroPCS brand to new metropolitan areas. There are business planning documents, board briefing materials, board presentation materials and merger synergies models that all outline or flesh out the Applicants' intention to pursue the very business goals that Greenlining seeks to require by detailed and government-mandated conditions, which are all backstopped by MetroPCS and T-Mobile USA's public statements.

Simply stated, Greenlining is completely disregarding orderly procedure and wasting everyone's time. It does not even appear to have begun to review the materials in the record that refute the very concerns it belatedly raises. There is a point at which untimely filings need to be stopped and frivolous arguments need to be ended. Greenlining is well past that point.

CONCLUSION

For the reasons described above and in their earlier pleadings, the Applicants urge the Commission promptly to grant the license transfer applications and reject the unwarranted conditions proposed by Greenlining. Please direct any inquiries regarding this filing to the undersigned counsel for DT/T-Mobile USA and MetroPCS.

Respectfully submitted,

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