BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

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

REPLY TO OPPOSITION TO MOTION FOR LIMITED DISCOVERY BY DIOGENES TELECOMMUNICATIONS PROJECT

The Diogenes Telecommunications Project (DPT) files this Reply to the August 15, 2011 Opposition of AT&T Inc. and Deutsche Telekom AG (Applicants) to the Motion for Limited Discovery filed by DPT on August 4, 2011.

Limited discovery will allow the parties to this proceeding and the Commission to establish whether the so-called "public interest" justifications, which are at the heart of AT&T's proposed acquisition of T-Mobile, contain numerous material misrepresentations. Substantial evidence of the Applicants' dissembling has already come to light. Granting the Applications would be *prima facie* inconsistent with the public interest.[1] The Opposition makes only weak procedural objections to the Motion, summarily dismissing DPT's specific showings of material misrepresentation. Once again, the Applicants refuse to address the glaring inconsistencies between the Applications and statements made in their other official filings and by their officers in the media. Material misrepresentation before the Commission is a serious breach of the

[1] *47 U.S.C. § 309*(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC, 857 F.2d 1556 (D.C. Cir. 1988)* ("*Astroline*").

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Applicants' obligations as Commission licensees and could disqualify them from holding licenses in the future.[2]

The Opposition gives three reasons for denying the Motion for Limited Discovery. First it says there is no precedent for allowing discovery unless an application has been designated for hearing. DPT did ask for a hearing in its Petition to Deny, a request on which the Commission has not acted.[3] Citing many conflicting statements by the Applicants' senior executives, DPT raised substantial questions of qualification which clearly warrant a hearing under Commission and Court precedent. Since nearly three months have passed and the Commission has yet to rule on the request for hearing, the information produced through limited discovery could convince the Commission that a hearing is necessary. The Commission has unquestioned authority to order its procedures in this fashion.

Second the Opposition maintains that the limited discovery DPT seeks would cause undue delay in this proceeding. This claim is greatly exaggerated, since the Commission can devise efficient procedures setting the parameters of permissible discovery and coordinating the activities of the parties wishing to participate. Provided that the Applicants cooperate in producing documents and making witnesses available, DPT could conclude discovery in 60 days.

Third the Opposition downplays the need for discovery inasmuch as the Applicants have already produced voluminous documents and other information in response to Commission requests. The gathering of information to complete a paper record, however, is not a substitute for putting the Applicants' case to the test of discovery and a hearing where substantial questions of material misrepresentation have been raised. Further, the Commission has already initiated discovery procedures by requesting information and documents from the Applicants.[4] In addition, the Applicants have had numerous ex parte meetings with the Commission staff. During these meetings the Commission has asked for and received additional information. If the Applications are designated for hearing, the FCC would be a party to the hearing. It is fundamentally unfair for one party to have discovery rights that are not afforded to all parties.

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[2] *See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1210-11 (1986) (Charater Policy Statement), Memorandum Opinion and Order, 1 FCC Rcd 421 (1986); Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252 (1990), Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991), Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992).*

[3] Petition to Deny, filed May 31, 2011, pages 24-28

[4] See May 27, 2011, Letters from FCC to Applicants.

Any decision based on such a one sided exchange of information would be arbitrary and capricious.

Even in the days since DTP filed its Motion, information has surfaced casting further doubt on the Applicants' credibility. T-Mobile released its 2nd Quarter financials showing markedly improved performance.[5] T-Mobile has nearly 10 million customers using smartphones as of the second quarter of 2011, an increase of 50% from the second quarter of 2010. These results, which were achieved despite AT&T's proposed takeover, are directly at odds with the Applicants' picture of T-Mobile as a carrier on life support with "no clear path to LTE." The Applicants have failed to explain T-Mobile's significantly improved prospects. Tellingly, they have not amended the Applications as required by Section 1.65 of the Commission's rules. Additionally, the now famous "leaked" AT&T ex parte letter destroys AT&T's chief claimed benefit that the acquisition of T-Mobile will enable it to expand its planned LTE coverage from 80 to 97 percent of the population.[6] AT&T is not paying $39 billion to increase LTE coverage; it is paying $39 billion to reduce competition.[7] For it to repeatedly claim otherwise is an open and continuing misrepresentation to the FCC and the American people it is licensed to serve.

The evidence of material misrepresentation in these Applications continues to mount. Unless the Commission allows discovery by the parties and commences a hearing in whatever sequence, it will not have fulfilled its statutory responsibility to test the validity of the public interest claims on which these Applications are based. Further, it will enable AT&T and T-Mobile to carry on their charade with impunity, thereby compromising the high standard for truthfulness that the FCC has heretofore required of its licensees.

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[5] http://www.t-mobile.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/5657114502E70FF301319AE29D9B02EB/file/TMUS%20Q2%202011%20Press%20Release-FINAL.pdf

[6] http://www.dslreports.com/shownews/Leaked-ATT-Letter-Demolishes-Case-For-TMobile-Merger-115652
In an effort to minimize this stunning disclosure AT&T now is claiming that the $3.8B price tag for expanding LTE coverage from 80 to 97% is a post-merger number. The "leaked" letter unequivocally shows this contention to be false. Discovery and a hearing are the only effective means of probing the Applicants' shifting stories on matters critical to the proceeding.
http://www.dslreports.com/shownews/ATT-Blows-Smoke-to-Cover-Leaked-Document-Snafu-115735

[7] http://www.infoworld.com/d/networking/yankee-group-att-t-mobile-merger-will-hurt-wireless-market-170101?page=0,0

Respectfully submitted,

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