

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

In the Matter of	)	
Applications of AT&T Inc.	)	
and	)	
Deutsche Telekom AG,	)	WT Docket No. 11-65
For Consent to Assign or Transfer Control of	)	
Licenses and Authorizations	)	

**SUPPLEMENT TO PETITION TO DENY OF  
DIOGENES TELECOMMUNICATIONS PROJECT**

The Diogenes Telecommunications Project (DTP), by its attorneys, files this Supplement to its Petition to Deny of May 31, 2011, in response to the applications of AT&T Inc. and Deutsche Telekom AG (Applicants). In its Petition to Deny DTP exposed AT&T's purported public interest justification for the acquisition of T-Mobile as a sham intended to obscure its true motivation, the elimination of a lower-priced competitor. The Petition to Deny went on to say:

What is truly shocking about the AT&T/T-Mobile application is the extent to which it misrepresents the conditions and capabilities of both companies and their prospects for the future were they to remain independent. Many of the statements and characterizations in the application are contradicted by SEC filings and in public statements made by AT&T and T-Mobile officials that have been widely reported in the media. These mischaracterizations and discrepancies have largely to do with AT&T's linchpin public interest claim, namely that AT&T's acquisition of T-Mobile's spectrum holdings is key to the availability of LTE throughout the country and that T-Mobile, having "no clear path to LTE" is on life support.

Holders of FCC licenses are held to a high standard of qualification. The Petition to Deny documents the companies' mischaracterizations, half-truths and selective omissions of critical facts. The evidence presented here is more than sufficient to warrant a hearing into the applicants' qualifications under well-established FCC precedent. Even without a hearing, the application for transfer of licenses must be denied for the applicants have not shown that the transaction would serve the public interest.

The Commission has not responded to DTP's request for a hearing or to its August 4, 2011, Motion for Limited Discovery. In the almost four months since petitions to deny were filed the case for a hearing and denial of the applications has only gotten stronger. AT&T has been scurrying to validate its claims of public benefit, yet has been unable to produce any substantial evidence. To the contrary, there is a growing body of evidence that shows that AT&T and T-Mobile have deliberately misled the FCC. Clearly AT&T expected this process to be a cakewalk, the FCC and DOJ buckling under the enormous political pressure it brought to bear. Doubtless even before filing the applications AT&T had in its back pocket a list of concessions it planned to make to enable the regulators to declare victory as they approved the transaction. What AT&T apparently did not bargain for was the high level of scrutiny and push back by government, industry, consumer groups and the media to its obviously false assertions. The result is that AT&T has gotten itself in the awkward position of having to stick to its story, no matter how bankrupt and indefensible. As it continually recites its hollow mistruths, AT&T compounds the material misrepresentations it has made to the FCC.

Some of this might be acceptable behavior, say in the context of a car dealer advertising a used vehicle as a "cream puff." However, for the car dealer to claim that a car has never been in

an accident, when the car dealer knows it has been damaged, is fraud. In most commercial settings the line between puffery and outright fraud is reasonably clear.<sup>1</sup>

It is true that in formal filings with the government such as these applications a certain amount of “hype” is to be expected and is commonly tolerated. What we have here, however, is a degree of misrepresentation and fabrication that amounts to an egregious violation of the public trust. These are official documents signed by attorneys and executives who themselves have professional ethical responsibilities in addition to the duty of truthfulness imposed on the Commission licensees they represent. The discomfort these individuals must experience is made apparent by the limits drawn in the Applicants’ statements, as where T-Mobile’s LTE capabilities are repeatedly described by the mantra “no clear path to LTE.” Never is it said “not at all” or even “not likely,” only “no clear path.” In particularly egregious cases, the record may indicate that an applicant's proposal is not only unreliable, but contains false statements amounting to disqualifying misrepresentations. *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940, affirmed, 5 FCC Rcd 4596 (1990). The Commission demands candor from those who come before it and will not tolerate deliberate misrepresentations. E.g., *WOKO, Inc.*, 329 U.S. 223 (1946).

The Applicants’ asserted public benefits are counterintuitive, contradicted by their own statements and filings, and are inconsistent with the facts. The Applicants’ say that the acquisition will solve AT&T’s spectrum shortage. Suddenly, the Qualcomm spectrum AT&T wanted so badly is not very useful after all, and AT&T is facing a spectrum crunch, even though

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<sup>1</sup> In commercial law, there is a distinction drawn between misrepresentations of fact and mere puffery. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350, 366 (N.J. 1997). In order for a misrepresentation or other unlawful act to occur "in connection with" the sale of services, it must be "one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase."

AT&T is flush with unused spectrum holdings.<sup>2</sup> The acquisition will rescue T-Mobile from a slow demise now that its parent has cut the umbilical cord and LTE is beyond its grasp, even though T-Mobile's network is faster than AT&T's and its second quarter financials are better than last year's.<sup>3</sup> Yet T-Mobile is showing remarkable resilience.<sup>4</sup> The acquisition will enable AT&T to deploy LTE to 97% of the population rather than 80%, even though T-Mobile has little presence in these rural areas and AT&T has admitted that the cost of the build out is less than one-tenth that of the buyout. The acquisition will spur infrastructure investment, even though the promised amounts are far less than the Applicants historically invested as independent companies.<sup>5</sup> The acquisition will not impair competition because T-Mobile is not a serious competitor yet smaller providers whom AT&T is not seeking to acquire at this time are

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<sup>2</sup> <http://www.dslreports.com/shownews/ATT-Sticking-to-TMobile-Claims-Nobody-Believed-Last-Time-116091> "Except again, AT&T has shown absolutely no interest in lowering prices under any circumstance and their own documents have shown they have more than enough resources to fully deploy LTE already without the largely redundant T-Mobile assets. Stockpiling spectrum in AT&T's lock box also doesn't magically build networks, something AT&T has a long and clear track record on skimping on."

<sup>3</sup> <http://blogs.wsj.com/deals/2011/09/09/att-t-mobile-is-awful-please-let-us-buy-them/> "T-Mobile is losing customers and subscriber shares in a growing market, is not a unique or material competitive constraint on AT&T, and will not be one going forward in the absence of this transaction," the telecom giant says in its legal filing. Repeatedly!

<sup>4</sup> <http://www.tmonews.com/wp-content/uploads/2011/09/Untitledwtmkwtmk0000.jpg>. There has been a lot of negative news lately surrounding T-Mobile's financial performance given AT&T's efforts to portray them as a carrier steps away from financial ruin. While that may be the way AT&T is attempting to portray T-Mobile, there is some good news considering T-Mobile's recent internal report regarding the number of customer renewals in the last three months. A total of 5 million customers have renewed their service with T-Mobile in the last three months alone.

During the month of June T-Mobile renewed 1.7 million customers, 1.6 million customers in July and 1.7 million customers were renewed on contract in August.

"Our 4G network, strong handset lineup, and the introduction of the classic and value plans are giving customers are reason to stay and our RSRs/CSRs are executing flawlessly," says Greg Hoffman, VP of Churn and Retention. "The renewals programs we implemented are showing big results. We've had three terrific months in a row."

<sup>5</sup> <http://www.dslreports.com/shownews/Unions-Are-Selling-You-Out-on-ATT-TMobile-115135> "AT&T has told investors they expect the new, combined AT&T T-Mobile to reduce investment by \$10 billion over 6 years as part of deal "synergies." While AT&T insists they'll spend \$8 billion over 6 years following the merger (something they would have done anyway as they belatedly deployed LTE) -- more network upgrade aggressive T-Mobile -- based on historical averages -- would have spent around \$18 billion in capital investment over that period."

providing vigorous competition, even though AT&T will be the only GSM carrier left standing.<sup>6</sup>

The acquisition will lower prices and spur innovation, even though every consumer and anyone who has ever taken an economics course knows that prices rise and innovation is stifled when a large competitor gobbles up one of its chief rivals for a premium price. The acquisition will create jobs, which is exactly the opposite message that AT&T is giving Wall Street, even though

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<sup>6</sup> [http://money.cnn.com/2011/09/12/technology/att\\_tmobile\\_antitrust\\_response/index.htm](http://money.cnn.com/2011/09/12/technology/att_tmobile_antitrust_response/index.htm) NEW YORK (CNNMoney) -- "In a response to the government's antitrust suit against its proposed merger with T-Mobile, AT&T issued a glowing report on the wireless industry's health -- with the sole exception of the carrier it is trying to buy." T-Mobile [is] the only major carrier to have actually lost subscribers in a robustly growing market," AT&T (T, Fortune 500) said in a court filing late Friday. How accurate is that claim? As always in this merger deal, the reality is complicated. The sentence is technically true, but only with a very narrow reading of "major," "subscriber," and "actually." AT&T is correct in saying that among the four national carriers -- a group that also includes Verizon Wireless, AT&T and Sprint -- T-Mobile is the only carrier last quarter to have suffered a net loss in subscribers. But not all customers are created equal. National carriers care most about customers under contract, because they provide a source of guaranteed revenue and tend to pay a lot more than prepaid customers. In terms of customers under contract, Sprint (S, Fortune 500) has also been losing subscribers like crazy, shedding a net 101,000 last quarter. In fact, Sprint has lost net subscribers under contract in all but one quarter since the second quarter of 2007. AT&T's statement also depends on its definition of "major," which the company seems to vacillate on. In another part of its response to the DOJ, AT&T says it faces a fierce competitive environment on all fronts, from the biggest providers to the tiny regional carriers. "The complaint largely ignores the significant competition from established providers such as Verizon Wireless and Sprint, innovative upstarts such as MetroPCS (PCS) and Leap/Cricket, and strong regional providers like US Cellular and Cellular South, among others," AT&T says of the DOJ's protest. If those companies are real rivals, as AT&T claims, it's important to note that on a net basis, U.S. Cellular has lost customers for five straight quarters and Leap Wireless (LEAP) also shed more customers than it gained last quarter. A spokesman for AT&T declined to comment for this story, saying he would let the filing "speak for itself." But in that filing, AT&T appears to talk out of both sides of its mouth on multiple occasions. In one part of its response, the carrier argued that the DOJ's "characterization of AT&T, T-Mobile, Verizon (VZ, Fortune 500), and Sprint as the 'Big Four' is misleading," because an FCC report recently showed that "more than 90% of U.S. consumers have at least five wireless providers to choose from." AT&T is claiming that it sees every rival as a genuine threat. Yet AT&T also went out of its way to illustrate how T-Mobile is not a "material competitive constraint" on AT&T. So how can AT&T claim that the regional and lower-cost carriers represent significant rivals if T-Mobile, the nation's fourth-largest wireless company, can't compete? AT&T's rationalization relies on bifurcating the mobile market. It sees two viable playing fields -- big national player or low-cost regional carrier -- and no middle ground. T-Mobile's business model is unsustainably "stuck in the middle," AT&T says in its response to the DOJ. But in its complaint, the DOJ said that it had reviewed several AT&T internal documents that seemed to show AT&T treating T-Mobile as a more significant challenger than regional players. For example, the DOJ cited a 2010 analysis -- identified only as an "AT&T internal document" -- describing T-Mobile's broadband network upgrades as a "more immediate threat" than other rivals', and one that "should be taken seriously." In response, AT&T admonished the Justice Department, saying its use of "unidentified written material, without context, is misleading and inappropriate." AT&T said it continues to fight for its merger with T-Mobile, both by pursuing an expedited court hearing and -- its preference -- a settlement with the DOJ that would let the deal go forward. "If and when these discussions occur they will be confidential and as such we won't be commenting publicly," AT&T said."

it is a given that elimination of duplicative resources is always a major outcome of this type of industry consolidation.<sup>7</sup>

None of these claims is credible. More to the point, AT&T and T-Mobile have made these claims knowing full well that they are materially false representations of the two companies' present positions. AT&T's feeble attempts to bolster its case, as by announcing that it will bring back 5,000 jobs from Europe are mere contrivances to appease, and are already dwarfed by the news of wholesale layoffs in T-Mobile's domestic work force, which the company defends as normal churn.<sup>8</sup> Caught with its pants down by the famous *ex parte* letter that made public the \$3.8 billion price tag for LTE deployment to 97% of the country, AT&T did a fast shuffle, saying that this startling revelation was not new information, that the figure represented a post-merger cost, and that it could only justify spending the money for 97% LTE if it was to be spread over the larger customer base it would achieve by acquiring T-Mobile. These claims represent a lack of candor and material misrepresentations to the FCC. The 97% LTE promise was designed as an inducement to win approval from the FCC and did not represent a legitimate business plan.

Petitioners have raised substantial questions on both the public interest merits of the applications and the Applicants' qualifications to hold FCC licenses. Under established legal standards, the Commission is required to designate the applications for hearing on both issues. Instead the Applicants have been inundated with information requests by the Commission and are holding numerous *ex parte* meetings with Commission personnel. If all of this activity is

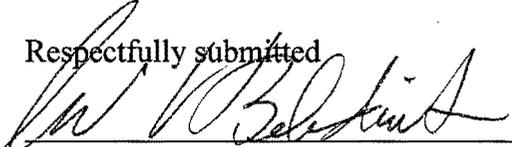
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<sup>7</sup> <http://www.washingtontimes.com/news/2011/sep/13/when-to-regulate-and-when-not-to-356796749/> "T-Mobile had been preparing severance packages for 20,000 employees when the decision to block the deal was announced. AT&T tried to tell Congress the deal would add jobs. But it promised Wall Street investors "efficiency" gains through job cuts."

<sup>8</sup> <http://www.onlinesentinel.com/Workers-claim-recent-mass-firings.html> "Whether the call center has fewer than 400 employees or 520, both totals would represent the lowest number of workers there since 2006, the facility's second year of operation. Earlier this year, company officials said the center had about 700 employees."

being undertaken to enable the Commission to decide whether or not to designate the applications for hearing, it surely is overkill, because the necessity for a hearing has long been established. At hearing the parties to this proceeding will be full participants, rather than onlookers, and will be on equal footing with the Commission, which will itself be a party in the hearing. The point is that much of the information the Commission is taking pains to gather in its unilateral dealings with the Applicants will be superseded by the hearing record that is developed through the advocacy of the parties according to formal procedures and under the supervision of a administrative law judge.

DTP urges the Commission to get on with it and designate these applications for hearing. No other course will suffice.

Respectfully submitted  
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