

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

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In the Matter of )  
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Applications of AT&T Inc. )  
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And )  
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Deutsche Telekom AG, )  
 )  
For Consent to Assign or Transfer Control )  
of Licenses and Authorizations )  
\_\_\_\_\_ )

WT Docket No. 11-65

To: The Secretary  
Office of General Counsel  
Attention: Ex parte complaints

**MOTION FOR AN ORDER TO CEASE AND DESIST FROM VIOLATIONS OF THE  
COMMISSION'S EX PARTE RULES AND TO DISMISS THE APPLICATIONS**

The Diogenes Telecommunications Project (DTP), by its attorneys, hereby files this Motion For an Order to Cease and Desist from Violations of the Commission's Ex Parte Rules and to Dismiss the Applications of AT&T Inc. (AT&T) and T-Mobile USA, Inc. (T-Mobile), a Deutsche Telekom AG (DT) subsidiary. AT&T has engaged in an all out media campaign in the Washington, D.C. area for the purpose of influencing Federal Communication Commission (FCC) decision making personnel to grant the above-captioned applications. Its issue oriented radio, television and newspaper advertisements constitute oral and written presentations to the FCC in a permit-but-disclose proceeding.<sup>1</sup> In failing to file memoranda documenting these ex

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<sup>1</sup> DA-11-722, April 21, 2011

parte presentations, AT&T has violated the FCC's ex parte rules and must be made to cease and desist from this unlawful practice.<sup>2</sup> Furthermore, since the improper oral and written presentations were made to all Commission decision making personnel, there can be no recusal of tainted personnel. Therefore, the only solution consistent with the FCC's rules is to dismiss the applications with prejudice.<sup>3</sup>

The merits of AT&T and T-Mobile proposed merger are deeply disputed, with many parties filing comments in favor of and against the proposed acquisition. AT&T originally argued that the merger was necessary because it was suffering from a spectrum shortage and that granting the merger would permit it to build out its 4G LTE network to 97 percent of the US population. AT&T also argued that T-Mobile was a failed company "with no clear path to LTE". These arguments have largely been discredited in the record of this proceeding. AT&T has now changed tactics. Focusing on the troubled US economy, AT&T now relies on the spurious and roundly contradicted claim that the proposed merger will create 96,000 new "American jobs." As a means of promoting its position, AT&T has purchased issue oriented newspaper, radio and television advertising in the Washington, D.C. media market.<sup>4</sup> These issue specific commercials are not intended to sell any of AT&T's products or services; they are designed to sell decision makers at the FCC, the Justice Department and Congress on the false claim that the AT&T-T-Mobile merger will help solve the unemployment problem in the country. The television and radio commercials hammer home to key decision makers AT&T's

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<sup>2</sup> 47 C.F.R. §§1.1200-1.1216.

<sup>3</sup> If the FCC decides to designate the applications for evidentiary hearing, as DTP and other parties have urged, the appointment of a separate trial staff that has not been part of the decision making deliberations would be problematic.

<sup>4</sup> <http://www.adweek.com/adfreak/att-ads-cast-merger-t-mobile-jobs-creator-135128>. AT&T Ads Cast Merger With T-Mobile as Jobs Creator TV, print work targets D.C. By Katy Bachman September 23 2011.

message, “with the planned merger with T-Mobile, AT&T will begin bringing 5,000 jobs to America from overseas. We will invest 8 billion dollars more and deploy the next generation of wireless broadband to nearly everyone in America. This investment will create as many as 96,000 American jobs.”<sup>5</sup> These are unsubstantiated statements that directly address issues pending before the FCC in this proceeding. These commercials are designed to put pressure on the FCC to decide the matter in AT&T’s favor.

Mergers between big companies tend to result in layoffs rather than new positions overall. For example, an independent study commissioned by Sprint estimates that the AT&T acquisition of T-Mobile will eliminate between 34,000 and 60,000 jobs. How is it that AT&T can claim that its merger with T-Mobile will create 96,000 new American jobs? AT&T’s numbers are based on an analysis from the Economic Policy Institute that the Communications Workers of America filed in comments on May 31, 2011. The EPI paper states that for every \$1 billion invested in wireless infrastructure, some 12,000 "job-years" are created -- meaning, that billion dollars would keep 12,000 people employed for one year.<sup>6</sup> The EPI study then cites an AT&T press release promising to invest \$8 billion over a seven-year period in improving the joined infrastructure of AT&T and T-Mobile.

Sprint commissioned an independent study by University of California Irvine Professor David Neumark, who wrote:

The EPI analysis claiming that the AT&T/T-Mobile merger will create jobs because of increased capital investment is completely unfounded. It is based solely on a claim by AT&T that it will increase its capital expenditures. But it appears to ignore

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<sup>5</sup> <http://www.youtube.com/watch?v=UAKYkizAUKc>

<sup>6</sup> <http://www.readwriteweb.com/enterprise/2011/10/did-anyone-prove-att-t-mobile.php>. Did Anyone Prove AT&T + T-Mobile Would Create Jobs? By Scott M. Fulton, III / October 17, 2011

reductions in capital expenditures that T-Mobile would have undertaken, and the strong likelihood that net capital expenditures would decline as a result of the merger. Indeed AT&T has told the federal government and its investors that the merger would lead to reduced capital expenditures. By EPI's own logic, the net reduction in capital expenditures would lead to fewer jobs.<sup>7</sup>

AT&T's "job years," calculation has not stopped it from heavily lobbying its unsubstantiated assertion that the AT&T merger will create 96,000 new American jobs. Rather than waiting for the FCC to decide the merits of this assertion according to its own procedures, AT&T has purchased advertising in the hope that it can directly reach FCC decision makers and influence politicians, who in turn will put pressure on the FCC to grant the pending applications. AT&T is forging ahead with this campaign at the expense of the other parties to this proceeding. The Communications Workers of America continues to trumpet the 96,000 new "quality jobs."<sup>8</sup> Recently, 100 House Republicans, on September 20, 2011 wrote to President Obama, urging the administration to use its considerable power to sway government agencies to grant the AT&T - T-Mobile merger. The letter has all of AT&T's key talking points incorporated in the text and, no doubt, was influenced by AT&T's lobbying. The letter claims that failure to approve the merger will "thwart job creation and growth." The letter further states that AT&T is "committed to deploy ultra-fast mobile broadband networks to 97 percent of the U.S. population", "repatriate 5000 T-Mobile call center jobs," and spend \$8 billion in building out a 4G network to 55 million Americans who currently don not have access to this network." The letter then goes so far as to chastise the president. "The Obama Administration should not be turning away offers by the private sector to bring jobs to the United States." This letter ignores

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<sup>7</sup> Id.

<sup>8</sup> [http://cwa.3cdn.net/909aa2adb4873bd07f\\_jlm6269jy.pdf](http://cwa.3cdn.net/909aa2adb4873bd07f_jlm6269jy.pdf)

the countervailing evidence that strongly suggests that AT&T's takeover of T-Mobile will result in a net loss of American jobs.

On October 13, 2011, the FCC wrote to AT&T attorneys asking for a fuller response to its questionnaire about the benefits of its proposed merger -- specifically for more information on whether the merger will result in a net increase in jobs in the United States. The letter states that AT&T "has produced almost nothing" in response to the FCC's previous question about jobs data. The FCC is seeking more information and has clearly stated that on this issue the record is incomplete, yet AT&T is running commercials as if its claim that the merger will create 96,000 new American jobs is an established fact.

While the FCC is in the process of reviewing the pending applications, AT&T is doing everything in its power, both fair and foul to influence the FCC's decision. AT&T's Washington-based advertising campaign and its unrestrained lobbying of decision makers raises serious issues

First, this campaign is another case of AT&T materially misrepresenting the facts before the FCC. AT&T's and T-Mobile's predilection for making material misrepresentations to the FCC has been documented by several parties to this proceeding and has been addressed in DTP's Petition to Deny, Supplement to Petition to Deny and Motion for Limited Discovery. In the current media blitz AT&T apparently is making knowingly false representations to key Washington personnel in an attempt to influence the Commission's decision making process.

Second, if these ads are found to be oral and written ex parte statements in this proceeding, AT&T's failure to file the required memoranda with the FCC Secretary violate the Commission's ex parte rules and unfairly advantage the applicants vis a vis the other parties to the proceeding. The Commission's ex parte rules play an important role in protecting the

fairness of the FCC's proceedings by assuring that FCC decisions are not influenced by impermissible off-the-record communications between decision makers and others. An ex parte presentation is a communication, written or oral, directed to the merits or outcome of a proceeding that, if written, is not served on all the parties to a proceeding, and if oral, is made without giving all the parties to the proceeding advance notice and an opportunity for them to be present.<sup>9</sup> Clearly, AT&T's issue advertising is intended to influence the FCC, as is its fierce lobbying before Congress. DTP has not been notified of these presentations and has certainly not been offered an opportunity to reply on the record. Based on information and belief, AT&T's "jobs" advertising campaign is limited to the Washington D.C. area. Other parties to this proceeding may not even be aware that AT&T is making presentations to the FCC in violation of the ex parte rules.

In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) ("HBO"), the court criticized the Commission's practice of engaging in oral ex parte contacts throughout the course of the proceeding. The court declared that "[e]ven the possibility that there is . . . one administrative record for the public and this court and another for the Commission and 'those in the know' is intolerable," and stated that undocumented discussions are "inconsisten[t] . . . with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."

In cases where politics and ex parte contacts have intruded on an agency's decision making process, courts have held that so long as the agency successfully insulated its final decision maker from the effects of political pressure, the agency's final decision is permitted to

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<sup>9</sup> 47 C.F.R. §§1.1200 (b)

stand. "Judicial evaluation of the pressure must focus on the nexus between the pressure and the actual decision maker." *ATX, Inc. v. United States Dep't of Transp.*, 309 U.S. App. D.C. 367, 41 F.3d 1522, 1527 (D.C. Cir. 1994). For example, in *Press Broadcasting Co. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) the Court upheld a Commission decision notwithstanding that the Mass Media Bureau, the office that first decided the issue, was exposed to ex parte contacts from a congressional staffer. As the Court explained, because the Mass Media Bureau had recused itself and because the full Commission, which had not been subjected to any improper influence, then rendered a fresh decision, that decision was free of taint. *Id.* at 1369-70.

In this case, AT&T has launched a lobbying effort unprecedented in the history of the FCC. No doubt, what has been presented in this Motion is just the tip of the iceberg. AT&T has taken the unusual step of purchasing issue advertising to address issues in an FCC proceeding governed by the ex parte rules. These advertisements put pressure on the FCC staff and on politicians that are looking for ways to put Americans back to work. The advertisements are presentations within the meaning of the FCC's ex parte rules and AT&T has filed no memoranda with the Secretary documenting these presentations. Therefore, the FCC must promptly order AT&T to cease and desist from its unlawful conduct.

Unfortunately, there is no unscrambling this egg. The issue as the Court has put it is "whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." *PATCO v. Federal Labor Relations Auth.*, 222 U.S. App. D.C. 97, 685 F.2d 547, 564 (D.C. Cir. 1982) (footnote omitted). The FCC should conclude that in light of the issue advertising, extensive Congressional contacts and an open letter to President Obama urging that the merger be granted,

that AT&T has so tainted the proceeding that no decision of the FCC can be viewed as fair and beyond the corrupting hand of AT&T.

Accordingly, DTP requests that the FCC dismiss the above captioned applications, with prejudice.

Respectfully submitted

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