

**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

PETITION TO DENY

**Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., #301
Washington, D.C. 20016**

**Counsel for:
The Diogenes Telecommunications Project**

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Summary

The Diogenes Telecommunications Project (DTP) files this Petition to Deny the applications filed by affiliates of AT&T, Inc. (AT&T) and Deutsche Telekom AG (DT) to transfer wireless spectrum licenses as part of the break-up arrangement following termination of the planned acquisition of T-Mobile USA by AT&T. In WT Docket No. 11-65 DTP and other parties raised serious questions of material misrepresentation by AT&T and DT throughout those proceedings. These allegations were born out by the Staff Analysis and Findings made public by the Commission. The Communications Act, the Commission's rules, and Commission precedent all require truthfulness on the part of FCC licensees and applicants. The Commission therefore is obligated to inquire into these serious and supported claims of misconduct and take its findings into account when ruling on the qualifications of the applicants herein.

At AT&T and DT's request the WT Bureau dismissed without prejudice their merger applications and also dismissed petitions to deny those applications subject to possible reinstatement should the applicants refile. Appended to the WT Bureau Order was the Staff Analysis and Findings, which concluded that the Applicants had not made their case under the public interest standard the Commission uses to evaluate such applications, and which confirmed the bankruptcy of the Applicants' purported justifications for the merger, as alleged in the petitions to deny filed by DTP and other parties.

DTP filed an Application for Review of the WT Bureau Order, faulting it for not taking the next logical step in these lengthy proceedings, which is to resolve the serious issues that DTP and other parties raised concerning the qualifications of AT&T and DT and their affiliates to

hold FCC licenses. Ignoring these claims and the substantial evidence of their validity in the record in WT Docket No. 11-65 is a stunning departure from established Commission policy to insist on truthfulness by its licensees and applicants.

As alleged by the parties, and validated by the Staff Analysis, AT&T and DT made numerous material misrepresentations to the Commission throughout those proceedings, including false and misleading statements and material omissions. Irrespective of whether the Applicants chose to renew their merger efforts or pursue other business arrangements that require Commission authorization, the AT&T and DT and their affiliates must be held accountable for their misconduct in clear violation of Commission rules and the Communications Act. The Commission has a long track record of refusing to tolerate untruthfulness by its licensees and those seeking authorizations and imposing sanctions up to and including revocation of licenses.

AT&T and DT steadfastly maintained that the merger was necessary to: alleviate AT&T's spectrum shortage; enable AT&T to provide LTE to the entire country; save a failing T-Mobile (which was not a significant competitor anyway); and create many domestic jobs. AT&T and DT continued to press these claims, despite a paucity of justification and overwhelming evidence to the contrary. And, they spoke out of both sides of the mouth, giving investors and the SEC one version of a transaction that would yield cost-cutting synergies and reduce investment, while telling the FCC a tale of economic stimulation and universal broadband deployment. The contradictions in the record are legion, as referenced in DTP's filings in WT Docket No. 11-65 and in this Petition to Deny.

It is the Commission's clear responsibility to thoroughly air these serious issues by commencing an evidentiary hearing on whether AT&T and DT have the requisite character and qualifications to hold FCC licenses.

On review the Commission can correct the error in WT Docket No. 11-65 by acknowledging the serious questions of candor, character and qualification that have been raised and designating them for evidentiary hearing to resolve these critically important issues.

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PETITION TO DENY

The Diogenes Telecommunications Project, (DTP) by its attorneys, files this Petition to Deny the referenced applications of T-Mobile License LLC, AT&T Mobility Spectrum LLC and New Cingular Wireless PCS LLC (Break-up Applications.) The applicants are subsidiaries of AT&T, Inc. (AT&T) and T-Mobile USA (T-Mobile), which itself is a subsidiary of Deutsche Telekom AG (DT). AT&T, T-Mobile and DT, and their subsidiaries, have abused their trust as FCC licensees by making willful and repeated material misrepresentations to the Commission in WT Docket No. 11-65, AT&T's failed initiative to acquire T-Mobile.

I. Standing.

DTP's standing was established in WT Docket No. 11-65 and is incorporated herein by reference. Briefly, Scott Karren is a long standing customer of T-Mobile. Additionally, Irene Laschuk is also a member of DTP and a customer of AT&T Mobility.

II. Background.

On April 21, 2011, the AT&T and DT, pursuant to Sections 214 and 310(d) of the Communications Act, as amended,¹ filed applications seeking Commission consent to the transfer of control of licenses and authorizations held by T-Mobile to AT&T (Merger Applications). On May 31, 2011, DTP filed a Petition to Deny, raising character and misrepresentation issues against AT&T and DT. On June 20, 2011, DTP filed a Reply to the June 20, 2011 Joint Opposition of AT&T and DT. On August 4, 2011, DTP filed a Motion for Limited Discovery, seeking documentation, among other things, relevant to the AT&T and DT claim that AT&T was planning to limit its LTE build out to only 80 percent of the United States population if the merger was not approved. DTP also filed a Motion 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. On November 29, 2011, DTP filed an Application for Review of the letter decision of the Office of General Counsel denying DTP's complaint that AT&T had violated the ex parte rules.

On November 22, 2011, the Wireless Telecommunications (WT) Bureau publically announced that it had circulated for consideration by the Commission a draft order designating the Applications for an administrative hearing. Thereafter, AT&T and DT promptly filed a letter purporting to withdraw the Merger Applications. The WT Bureau Order not only dismissed the

¹ 47 U.S.C. § § 214(a), 310(d)

Merger Applications without prejudice, it dismissed all Petitions to Deny the Merger Applications subject to possible reinstatement, "if they remain relevant," should the Applicants file revised applications. 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, neither the WT Bureau Order nor the Staff Analysis addressed the pending character and misrepresentation issues. On December 27, 2011 DTP filed an Application for Review of the WT Bureau Order on the grounds that it was arbitrary and capricious and a departure from established Commission policy for the WT Bureau to dismiss the Merger Applications and petitions to deny without first making findings on the allegations of material misrepresentation in this proceeding, making findings on the Applicants' qualifications to be licensees, and imposing sanctions on the Applicants for their misconduct.

The issues raised in that proceeding bear directly on the qualifications of AT&T and DT and their affiliates as holders of Commission licenses numbering in the thousands. These companies routinely file applications to renew existing licenses and to transfer licenses within the industry. In its Application for Review DTP asserted that it would be extremely difficult for parties to address and for the Commission to resolve these threshold issues of qualification in the context of applications not related to the merger transaction. Lest these critical matters be swept under the rug and forgotten, DTP believes it is incumbent upon the Commission to deal with them at the time they occur in all of their implications. In other words, even though AT&T and DT decided no longer to pursue this transfer, their conduct during the course of the proceeding was so egregious as to warrant administrative sanctions, up to and including revocation of their licenses.

The WT Bureau Order erred in dismissing the Applications and the petitions to deny without first making findings on the Applicants' numerous material misrepresentations throughout the proceedings, as shown by DTP in its Petition to Deny and subsequent filings therein, as well as by other parties. Indeed, the Staff Analysis issued along with the WT Bureau Order is replete with examples of AT&T and DT's false and misleading statements as well as their withholding of information. AT&T and DT's conduct in this proceeding violates the Communications Act and the Commission's rules, and calls into serious question their qualifications as Commission licensees. The implications go well beyond the transfer of licenses at issue in this proceeding. While the Commission could initiate separate proceedings on AT&T and DT's qualifications, it has given no signal that it plans to do so.

The Commission insists on truthful and accurate statements by its applicants and licensees.² In filings before the FCC, DTP documented numerous inconsistencies between statements made by the AT&T and DT in the Merger Applications before the FCC and statements made by them in official filings and in the media. Taken together these inconsistent statements evidence a deliberate attempt to misrepresent the facts said to justify the transaction and to intentionally mislead the Commission into approving the acquisition. AT&T and DT's false statements and misrepresentations have raised unresolved issues concerning their qualifications to remain FCC licensees. Specifically, the outstanding issues include:

- Whether the AT&T and DT intentionally made material misrepresentations to the Commission when they submitted material information to support AT&T's claim that it

² 47 C.F.R. §1.17

was facing an imminent spectrum shortage and needed T-Mobile's spectrum to meet customer demand.

- Whether AT&T and T-Mobile intentionally provided factual information that is incorrect or intentionally omitted material information in an effort to mislead the Commission concerning their 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 AT&T and T-Mobile intentionally provided factual information that is incorrect or intentionally omitted material information in an effort to mislead the Commission concerning their claim that the merger was required for AT&T to rollout LTE service to 97 percent of the U.S.
- Whether AT&T and T-Mobile intentionally misled the Commission and made material misrepresentations when they claimed that T-Mobile had "no clear path to LTE."
- Whether AT&T and T-Mobile made intentional, material misrepresentations to the Commission when they claimed the merger would create 96,000 American jobs.
- Whether AT&T violated the FCC's ex parte rules when it targeted FCC decision making personnel with issue specific advertising.

III. AT&T Knowingly Made False Statements to the FCC Claiming that it was Facing Severe Network Spectrum and Capacity Constraints.

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."³ The FCC Staff

³ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2

Analysis found that AT&T has sufficient spectrum for LTE deployment.⁴ As discussed herein, AT&T does not lack spectrum. Its purpose in attempting to acquire T-Mobile was to kill competition and acquire wireless subscribers. AT&T was not candid with the FCC when in its filings it repeatedly claimed that it was facing spectrum shortages. It is ironic that despite its claims of spectrum shortages it is giving T-Mobile a portion of its valuable spectrum. Why would a spectrum starved company ever make such an agreement?

A. AT&T, the Telecommunications Company that Cried Wolf

The dismissed Merger Applications were not the first time AT&T claimed that it is facing severe capacity constraints and that the grant of the application would alleviate the spectrum crunch. On November 21, 2008, AT&T filed an application with the FCC requesting permission to acquire Centennial Communications Corp. (“Centennial”). In the Centennial proceeding AT&T argued that the acquisition would enable AT&T to provide 4G services to more of Centennial’s customers than Centennial could do on its own.⁵ In words remarkably similar to those used in the Merger Applications, AT&T stated:

The combined company will have enough spectrum to migrate to 4G technology (LTE) without interfering with the quality of service provided to its customers. The combined company would be in a position to dedicate a portion of its spectrum holdings to the LTE conversion while continuing to provide high quality service to its existing customer base. The transition to LTE requires each company to set aside part of its spectrum for conversion while supporting its existing customer base on the remaining spectrum. In some areas served by Centennial, AT&T lacks spectrum to support existing customers while converting to LTE. . . . Centennial would also face difficulties converting its network to LTE with its current spectrum.

⁴ Staff Analysis, at ¶ 215

⁵ *AT&T and Centennial*, WT Docket No. 08-246, Decl. Moore pp. 7-8 <http://transition.fcc.gov/transaction/att-centennial.html>.

In addition, Centennial holds spectrum in certain areas where AT&T does not have or has not yet applied for either AWS or 700 MHz spectrum. In certain of these areas, the merger may give AT&T sufficient spectrum to roll out 4G technology. . .

The merger will also enable AT&T to roll out 4G technology faster in the Centennial service areas where AT&T may have or has applied for AWS or 700 MHz spectrum, but does not yet have the towers or infrastructure in place to use the spectrum. In those areas, AT&T will not be delayed by the necessity of obtaining permits and constructing towers.⁶

Two years later, AT&T made similar claims in its bid to acquire Qualcomm. In December 2010, AT&T agreed to purchase spectrum licenses in the Lower 700 MHz frequency band from Qualcomm Incorporated (Qualcomm). The spectrum covers more than 300 million people nationwide, including 12 MHz of 700 MHz D and E block spectrum covering more than 70 million people in 5 of the top 15 metropolitan areas and 6 MHz of 700 MHz D block spectrum covering more than 230 million people across the rest of the U.S.⁷ In its application to acquire Qualcomm, AT&T claimed it will move aggressively to integrate this spectrum into its LTE network.⁸ AT&T again argued that this transaction will be the spectrum fix it needs to rollout LTE.

The Qualcomm Spectrum will enable AT&T to expand capacity on its LTE network and provide a more robust and competitive service. The 6 MHz of Lower 700 MHz D block spectrum nationwide complements AT&T's existing holdings and will provide additional capacity everywhere. In addition, Qualcomm's Lower 700 MHz E block licenses in the New York, Los Angeles, San Francisco, Boston, and Philadelphia Economic Areas will give AT&T a total of 12 more MHz of capacity in these areas of particularly high demand.

⁶ Id. (footnote omitted)

⁷ AT&T 2010 SEC FORM 10-K, p.21

⁸ AT&T and Qualcomm WT Docket No. 11-18, p.7 <http://transition.fcc.gov/transaction/att-qualcomm.html>

As noted above, AT&T plans to deploy the Qualcomm Spectrum as supplemental downlink, using the carrier aggregation technology, which will be enabled after the LTE Advanced standards are released. Supplemental downlink technology will allow AT&T to add substantial capacity on its LTE network by combining Qualcomm's unpaired 700 MHz spectrum with AT&T's paired spectrum. Supplemental downlink technology permits the bonding of noncontiguous spectrum, including unpaired spectrum, into a single wider channel. In addition, supplemental downlink can be used to provide additional downlink capacity to address the asymmetry of data flow that results from wireless broadband users currently consuming more downlink than uplink capacity. Such asymmetry is caused by, for example, the consumption of video and other data-heavy media content with one-sided data flows.

AT&T and likely other carriers will make significant use of supplemental downlink technology as they strive to meet consumers' seemingly ever-growing appetite for wireless broadband services.⁹

To read AT&T's Qualcomm application is to come to the conclusion that its spectrum woes (real or imagined) will be behind it, if only the FCC grants its application to acquire Qualcomm.

AT&T states that its customers will be able to utilize handsets and other equipment incorporating the Qualcomm spectrum by early 2014.¹⁰ Yet, the Merger Applicants made almost no mention of the Qualcomm spectrum other than to claim that it will not solve the severe spectrum crunch AT&T is facing. "Nor can AT&T address its short-term capacity challenges with the spectrum it is purchasing from Qualcomm. That spectrum is only "unpaired" (one-way)..."¹¹ If this is true, why did AT&T not disclose this material fact to the FCC in the Qualcomm application? AT&T

⁹ AT&T and Qualcomm WT Docket No. 11-18, pp.14-15, footnotes omitted. <http://transition.fcc.gov/transaction/att-qualcomm.html>

¹⁰ Id. at p. 16

¹¹ Moore Decl., at ¶ 25

offers no explanation for its two conflicting statements made in applications filed just months apart, nor did AT&T seek to amend the Qualcomm application. AT&T's failure to do so is in violation of Section 1.65 of the FCC's rules.¹²

B. AT&T Was Not Experiencing Spectrum Crunch; It Was Attempting To Eliminate Competition.

The Merger Applicants claimed in their Applications that AT&T is facing a "spectrum crunch" so severe that its spectrum holdings are insufficient to permit deployment of LTE services. In making these representations, AT&T has not been candid with the FCC. By almost any metric, AT&T has ample spectrum to launch LTE and maintain its existing services. The Staff Analysis concluded that AT&T had sufficient spectrum.¹³ Of course, the issue was never the falsely alleged lack of spectrum, the real issue was competition. AT&T was not seeking to acquire additional spectrum *per se*, rather it was seeking to eliminate T-Mobile, a leading competitor and acquire its 34 million customers. The Staff Analysis concluded that the proposed transaction would result in the elimination of a nationwide rival, the elimination of T-Mobile product offerings and would give post-merger AT&T a unilateral incentive to raise prices or, to similar effect, to reduce service quality or otherwise exercise market power.¹⁴

The wireless market is saturated. As AT&T admits, in a wireless market place in which wireless subscription penetration surpassed 95 percent in 2010, there are a limited number of potential new subscribers. "As a result, wireless providers compete not only to retain their

¹² See 47 C.F.R. § 1.65. That rule states in pertinent part: "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days..."

¹³ Staff Analysis, at ¶ 215

¹⁴ Staff Analysis, at ¶ 17, 48-49.

existing customer base, but also to attract new customers from each other—consumers we call “switchers.”¹⁵ While AT&T was representing to the FCC that it lacks spectrum, it was representing to the Securities and Exchange Commission (SEC) that a key risk factor for investors is the availability of additional 700 MHz spectrum which will increase competition.

We expect market saturation to continue to cause the wireless industry’s customer growth rate to moderate in comparison with historical growth rates, leading to increased competition for customers. We expect that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition. This competition will continue to put pressure on pricing and margins as companies compete for potential customers.¹⁶

Despite its statements to the SEC, AT&T claimed before the FCC that “[s]ignificant qualities of spectrum . . . are not available for acquisition.”¹⁷

Based on its statements to the SEC, AT&T’s primary agenda was not to gain additional spectrum, but rather to limit the effectiveness of its competitors and to acquire additional subscribers. In a saturated market, it would be difficult, if not impossible, to acquire 34 million new customers simply by improving network quality and customer service. As AT&T reported to the SEC, to acquire additional customers, it would be forced to lower prices and cut its profit margins. By acquiring T-Mobile, AT&T would accomplish two key goals: first it would gain 34 million new customers and second it would take away available spectrum from competitors and future would-be competitors. The Merger Applicants did not candidly and in a forthright manner explain the proposed transactions. Rather they misrepresented the facts in a way that was designed to mislead the Commission and dupe the public.

¹⁵ Christopher Decl., at ¶ 5

¹⁶ AT&T 2010 SEC FORM 10-K, p.29 (Emphasis added)

¹⁷ Moore Decl. at ¶ 22

C. AT&T'S Statements That, Absent The Merger, It Will Expand LTE Coverage To 80 Percent Of The U.S. Population And Then It Will Cease Further LTE Expansion, Lack Candor And Contain Numerous Misrepresentations.

The Merger Applicants claimed that AT&T's LTE deployment plan, without T-Mobile, would reach approximately 250 million people, or only 80 percent of the U.S. population, by the end of 2013.¹⁸ This statement was made despite the fact that AT&T's mobile footprint already covers 97 percent of the U.S. population and that it recently announced plans for extending HSPA+ mobile broadband to its full wireless footprint by the end of 2012.¹⁹ The Applicants further asserted that T-Mobile has no plans to deploy LTE.²⁰ The Applicants claimed that if the FCC permits AT&T to acquire T-Mobile, only then could AT&T expand LTE coverage to 97 percent of America.²¹

According to John Donovan, AT&T's Chief Technology Officer, "AT&T is committed to extending LTE coverage to over 97 percent of the nation's population, far more than was planned or possible without the transaction."²² The Staff Analysis found that AT&T had

¹⁸ Hogg Decl. at ¶ 27; Moore Decl. at ¶ 5

¹⁹ Joint Opposition at p. 81

²⁰ Larsen Decl. ¶ 9

²¹ See, e.g. Moore Decl. at ¶ 5

²² Donovan Decl. ¶ 11 (emphasis added)

sufficient spectrum to deploy LTE.²³ The Staff Analysis did not find as credible the Merger Applicants' claim that, without the acquisition of T-Mobile, AT&T's LTE penetration would be lower than 97 percent of the U.S. population.²⁴ The Staff Analysis further concluded that absent the proposed merger, AT&T would upgrade its full footprint to LTE in response to competition from Verizon Wireless and other mobile wireless providers.²⁵ "Nothing in the record suggests that AT&T is likely to depart from its historical practice of footprint-wide technological upgrades with respect to LTE even absent this transaction."²⁶

In June 2011, the hacker group LulzSec released 200MB of AT&T internal documents. A significant portion of the leaked data files consisted of AT&T's internal plans for its build out of LTE. The LulzSec documents begin at the early stages of planning in the fourth quarter of 2009 and continue until April 2011. They cover the full gamut of the LTE build out from pre-LTE testing, through detailed plans for equipment and market rollout. The documents are not so much interesting in what they contain; they are the minutia of AT&T's internal technical, engineer, business and marketing discussions. Rather the documents are interesting in what they lack. This highly detailed and specific collection of hundreds of documents lacks any mention of a spectrum shortage, system wide or in any specific market. If there was an imminent spectrum shortage, this would have been reflected in AT&T's internal documents and would have been addressed during the LTE planning stages. For example, the LulzSec documents show that AT&T estimates that it will have 6 million customers on its LTE network by the beginning of

²³ Staff Analysis at ¶ 215

²⁴ Id.

²⁵ Id. ¶ 250-251

²⁶ Id. ¶ 252

2013.²⁷ This is a modest number of customers for the amount of spectrum AT&T already has set aside for LTE. If AT&T has an imminent spectrum shortage, AT&T has not informed its technicians, engineers, marketing people or the staff working on the LTE build out.

What the LulzSec documents also lack is any demonstrable evidence that the LTE build out will be limited to 80 percent of the U.S. population. By all indications, since about 2009, AT&T has been planning a full system LTE build out which, when completed will cover AT&T's entire footprint. This contradicts AT&T's statements in the Merger Applications that without T-Mobile it will only be able to provide LTE to 80 percent of the U.S. population. The LulzSec documents unequivocally reference a "Nationwide Launch."²⁸ Yet AT&T knowingly continued to argue that without T-Mobile it could not fully build out its LTE network.

Finally, the opponents contend that market forces would compel AT&T to deploy LTE to a level approaching 97 percent of the population even in the absence of this transaction. In fact, however, AT&T decided to build out LTE to only 80 percent of the population after considering the costs and benefits of increased LTE deployment, including (among other factors) competitive considerations, spectrum limitations, and the disproportionately higher infrastructure costs for rural deployment.²⁹

AT&T further claims that it concluded "in January 2010, and again in January 2011" "that an LTE footprint covering more than 80 percent of the U.S. population could not be justified."³⁰

Yet none of the LulzSec documents, which cover this period, support AT&T's statements.

Likewise the Staff Analysis, relying on internal confidential documents AT&T produced, did not

²⁷ LulzSec document release. Balance Manager/PCRF Design Review, Redmond Meeting, Day 1, 1/12/11

²⁸ LulzSec document release. LTE Services Issues Management

²⁹ Joint Opposition p. 9

³⁰ Joint Opposition p. 80

credit AT&T's claim on this point.³¹ DTP has not been able to find a single document, public comment, newspaper article or shred of evidence prior to March 20, 2011, that supports AT&T's claim that it was planning to limit its LTE build out to 80 percent of the population. On the rollout of LTE coverage, AT&T has made so many contradictory statements that it is impossible to determine what to believe.

The LulzSec documents show that AT&T has for the last two years, been intensely working on its LTE rollout. AT&T plans to accommodate new LTE devices, such as the iPad 3. It is unlikely that AT&T was planning to make such new devices available to only a portion of its existing footprint. Does it really plan to make these new and exciting devices available to only 80 percent of the population? AT&T possesses the evidence to prove or disprove its 80 percent coverage claim. In February 2010, AT&T announced that it had retained Alcatel-Lucent and Ericsson to build out its LTE network. No doubt, AT&T has executed contracts with these equipment vendors. Designating this matter for hearing would permit the parties to review these agreements as part of the discovery process. Has AT&T agreed to purchase equipment sufficient to cover 80 percent of the U.S. population or 97 percent? Also, AT&T has prepared detailed budgets. Do AT&T's budgets show that it is planning to build out only 80 percent of the U.S. population or, more likely, is it planning a full build out covering its entire footprint? The evidence clearly shows that the Applicants have lacked candor and made material misrepresentations to the FCC concerning AT&T's proposed LTE rollout.

³¹ Staff Analysis ¶¶ 253-256

IV. The Merger Applicants' Claims That T-Mobile Lacks A Clear Path To LTE Are Unsubstantiated And False.

The Merger Applicants' argued that T-Mobile is an ailing company, with declining market share and no clear path to LTE.³² T-Mobile, they said, lacks a "compelling portfolio of smartphone offerings."³³ Conversely, they claim that T-Mobile is facing imminent spectrum exhaust.³⁴ Thus, they simultaneously argue that T-Mobile lacks smartphone offerings and is facing spectrum exhaust from its dramatic growth in smartphone usage. As of the end of 2010, T-Mobile's smartphone customers accounted for 24 percent of T-Mobile's customers, about double the 12 percent figure it had by the fourth quarter of 2009.³⁵ As a result of this "explosive growth in demand," according to AT&T, T-Mobile "faces spectrum exhaust in a number of markets."³⁶ AT&T contends, T-Mobile "does not have the spectrum needed to deploy LTE in an economically and technically sustainable fashion."³⁷ However, if the FCC permits AT&T to acquire T-Mobile and combine its spectrum with that of T-Mobile's, these problems will evaporate. According to AT&T, "the combined network will far exceed the sum of its parts (i.e. 1+1=3)."³⁸

T-Mobile USA's network and spectrum resources will add substantial value to this highly competitive marketplace when they

³² AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2; Larsen Decl. ¶ 9

³³ Christopher Decl. at ¶36

³⁴ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.30

³⁵ Id. Citing, *T-Mobile USA Reports Fourth Quarter 2010 Results*, at 5 (Feb. 25, 2011), http://www.tmobile.com/company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations&ViewArchive=Yes.

³⁶ Larsen Decl. ¶ 12

³⁷ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.31

³⁸ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.34

are combined with AT&T's network and spectrum resources to produce the output-enhancing synergies discussed in this submission.³⁹

The Staff Analysis found that “the record does not support the bleak short-term outlook for T-Mobile that AT&T has portrayed in its submissions.”⁴⁰ AT&T's statements concerning T-Mobile's imminent spectrum exhaust contradict the statements it made in the Qualcomm application. In that application AT&T unequivocally stated, “Existing Carriers Have Sufficient Spectrum to Roll Out 4G Service.”⁴¹ In fact, AT&T claims that T-Mobile holds proportionally more spectrum than AT&T given T-Mobile's customer base.⁴²

The Staff Analysis found that “MetroPCS, Leap, U.S. Cellular, and the other regional and small firms all have substantially less spectrum than T-Mobile.”⁴³ AT&T, in the Merger Applications, claims that its competitors all have sufficient spectrum, except now (three months after filing the Qualcomm application) T-Mobile is facing spectrum exhaust. AT&T offers no explanation for its two divergent statements made in applications filed just months apart. Nor did AT&T amend the Qualcomm application to reflect the change in T-Mobile's status from an aggressive competitor with ample spectrum to a failed entity facing spectrum exhaust. AT&T's failure to do so is in violation of Section 1.65 of the FCC's rules.⁴⁴

³⁹ AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.13

⁴⁰ Staff Analysis ¶ 22

⁴¹ AT&T and Qualcomm WT Docket No. 11-18, pp. 30-31. <http://transition.fcc.gov/transaction/att-qualcomm.html>

⁴² Id.

⁴³ Staff Analysis ¶ 64

⁴⁴ 47 C.F.R. § 1.65

Without explaining what it means, AT&T obsessively claims that T-Mobile has no clear path to LTE.⁴⁵ AT&T makes much of Deutsche Telekom's CEO, Rene Obermann's statement that T-Mobile suffered from its late transition to 3G.⁴⁶ Likewise, AT&T stresses Obermann's statement that "[w]e also lack[ed] competitive smart phones."⁴⁷ Based on these statements, David Christopher, AT&T's Chief Marketing Officer, in his declaration concludes. "Accordingly, T-Mobile is not an important factor in AT&T's competitive decision-making."⁴⁸

The Christopher declaration relies on out-of-context references to the Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts of January 20, 2011.⁴⁹ A complete reading of the transcript reveals that AT&T was not candid in its representations and quotations from the Deutsche Telekom transcript. Obermann admits that T-Mobile came late to the 3G spectrum and that it lacked smart phone. However, Obermann made those statements in the past tense. In the next paragraph, Obermann switches to the present tense:

We now have the fastest nationwide 4G network in the U.S. and the handset portfolio has vastly improved, as demonstrated by the rising number of smart phones in our base and as we show here. And we have also seen improving revenue trends.⁵⁰

In fact, Obermann goes so far as to say, "Independent field surveys show that real life data transmission speeds on our network are superior to most competitors and they are at least

⁴⁵ Larsen Decl. ¶¶ 23-26; Langheim Decl. ¶ 11

⁴⁶ Christopher Decl. at p. 22, citing Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts, (Jan. 20, 2011), p.3 http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf

⁴⁷ Id.

⁴⁸ Christopher Decl. at p. 30

⁴⁹ Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts, (Jan. 20, 2011 P.3 http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf

⁵⁰ Id.

equivalent to LTE.”⁵¹ Obermann is absolutely euphoric about T-Mobile’s prospects, placing heavy emphasis on T-Mobile’s superior 4G network.

We have the best 4G network in the US. And we have a sufficient spectrum position medium-term. And we have a variety of attractive smart phones on our shelves, including the largest lineup of Android smart phones.

....

At the same time we will continue to improve our 3G, 4G network coverage and increase the transmission speed of our network which will increase from peak rates of 21 megabits today to 42 megabits in 2011, a significant improvement of the performance. And we expect to have this speed of 42 megabits available to 140 million POPs.⁵²

Philipp Humm, T-Mobile’s CEO, in the same transcript has this to say about T-Mobile’s smartphone lineup:

T-Mobile built the largest and fastest 4G network in the country with 200 million POP coverage and with data speed of 21 megabits and we’re currently rolling out 42 megabits in the country. Second, T-Mobile has a superior 4G handset lineup, smart phone lineup with 25 4G devices planned for the year 2011 and 50% of our sales today are already smart phones and 39% of our base is in smart phones. That’s quite a lot of potential on the smart phone side.⁵³

T-Mobile’s Chief Technology Officer Neville Ray at the same analysts’ meeting had this to say about the prospects of T-Mobile and its all too clear path to LTE:

We are on the GSM 3G path and we migrate from that to HSPA+ to LTE. It’s seamless. That’s how this technology path was built.

....

⁵¹ Id. at p. 2

⁵² Id. at p. 3

⁵³ Id at p. 5. Accord, Staff Analysis ¶ 23

We'll deliver 4G services with a broad HSPA+ footprint. At the right point in time when it's needed for us we can roll out LTE more as a capacity overlay because there are awesome benefits and the capacity delivery of LTE in the right spectrum configurations that will drive better economics and better performance for our customers. But when we do that, we don't have to go and touch the lion's share of our cell sites at all. So, you can see our expectation on investment levels around the LTE rollout for T-Mobile USA are more in the \$1 billion to \$2 billion range for that radio infrastructure upgrade depending on how far we go and how deep we go.⁵⁴

The statements of Obermann, Humm and Ray were made on January 20, 2011, just two months before T-Mobile announced it was selling its assets and licenses to AT&T. Neither AT&T nor T-Mobile explains how such divergent statements could be made only two months apart. DTP can only draw one conclusion, the Applicants have lacked candor and made material misrepresentations to the FCC, their investors and the SEC.

V. AT&T Violated The FCC Ex Parte Rules And Misrepresented The Number Of Jobs The Merger Would Create.

In a failed attempt to place pressure on FCC decision makers, AT&T engaged in an all out media campaign aimed primarily toward the Washington, D.C. area for the purpose of influencing FCC decision making personnel to grant the Merger Applications. Its issue oriented radio, television, and newspaper advertisements constitute oral and written presentations to the FCC in a permit-but-disclose proceeding.⁵⁵ In failing to file memoranda documenting these ex parte presentations, AT&T violated the FCC's ex parte rules.⁵⁶

On November 29, 2011, DTP filed its Application for Review of the letter decision of the Office of General Counsel (OGC Letter Decision) denying DTP's "complaint...that AT&T, Inc.

⁵⁴ Id. at p. 14 (Emphasis added)

⁵⁵ DA-11-722, April 21, 2011

⁵⁶ 47 C.F.R. §§1.1200-1.1216

(AT&T) violated the ex parte rules.”⁵⁷ DTP’s Application for Review is pending, and the issues DTP raised are incorporated herein by reference.

AT&T’s issue-oriented advertising focused on the spurious claim that the proposed merger will create 96,000 new “American jobs.” The Staff Analysis concluded that “the proposed transaction would in fact be expected to result in a significant reduction of indirect jobs because of the lower total network investment by the combined entity compared to AT&T and T-Mobile operating as separate competitors.”⁵⁸ While AT&T was quick to make public claims of job creation it provided the FCC with little in the way of supporting documentation.⁵⁹

Rather than build a record before the FCC, AT&T sought to influence decision makers with information it knew or had reason to know was false. Instead of providing the FCC with documentation, AT&T purchased issue-oriented newspaper, radio and television advertising primarily in the Washington, D.C. media market.⁶⁰ These issue-specific commercials were not intended to sell any of AT&T’s products or services; they were 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 create jobs. The television and radio commercials hammer home to key decision makers AT&T’s 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

⁵⁷ Letter of Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, to Arthur V. Belendiuk, dated November 10, 2011, styled “Re: Ex parte complaint in WT Docket No. 11-65.”

⁵⁸ Staff Analysis ¶ 265

⁵⁹ Id. at ¶ 260

⁶⁰ <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.

many as 96,000 American jobs.”⁶¹ These are unsubstantiated statements that directly addressed issues pending before the FCC. These commercials were 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. For example, an independent study commissioned by Sprint estimates that the AT&T acquisition of T-Mobile would eliminate between 34,000 and 60,000 jobs. AT&T’s numbers are based on an analysis from the Economic Policy Institute (EPI) that the Communications Workers of America filed in comments on May 31, 2011. The EPI paper states that for every 1 billion dollars invested in wireless infrastructure, some 12,000 "job-years" are created -- meaning, that a billion dollars would keep 12,000 people employed for one year.⁶² The EPI study then cites an AT&T press release promising to invest 8 billion dollars 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 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.⁶³

⁶¹ <http://www.youtube.com/watch?v=UAKYkizAUKc>

⁶² <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

⁶³ Id.

Nonetheless, knowing its statements were not true, AT&T heavily lobbied its claim that the AT&T merger will create 96,000 new American jobs. Knowing that time was running out and that the true facts would be soon be exposed, AT&T purchased advertising in the hope that it could directly reach FCC decision makers and influence politicians, who in turn would put pressure on the FCC to grant the pending applications. Its fraudulent campaign met with no small amount of success. AT&T was able to get 100 House Republicans, on September 20, 2011 to write to President Obama, urging the administration to use its influence 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, apparently, 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 do 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."

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. Rather than address the issues before the FCC, AT&T did everything in its power, both fair and foul, to influence the FCC's decision. For the purposes of this pleading, what is relevant is that AT&T misrepresented material facts both before the FCC and the public it is licensed to serve.

VI. Standard Of Review

The Commission insists on truthful and accurate statements by its applicants.⁶⁴ Section 1.17 of the Commission's Rules makes a blanket admonition to all parties participating in proceedings before the Commission that they shall not make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.⁶⁵ This duty of candor requires applicants to be fully forthcoming as to all facts and information that may be of decisional significance to their applications.⁶⁶ Any false or misleading submissions can have serious implications. Penalties for such conduct may include license revocation,⁶⁷ forfeitures, and referral to the Department of Justice for violation of 18 U.S.C. § 1001.

The FCC has consistently found that certain actions by a licensee are so egregious and outside the realm of acceptable conduct that they disqualify it from remaining a FCC licensee. FCC-related misconduct raises the question of “whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the

⁶⁴ 47 C.F.R. § 1.17

⁶⁵ Id.

⁶⁶ *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994)

⁶⁷ 47 U.S.C. § 312 (a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title; ...

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

requirements of the Communications Act and the Commission's Rules and policies."⁶⁸ Where the FCC has found that a licensee has intentionally deceived the FCC or recklessly disregarded the truth, it has disqualified the licensee and revoked its licenses.⁶⁹

In determining whether applicants have the requisite character to be Commission licensees, the FCC looks to the Commission's character policy, initially developed in the broadcast area, as guidance in resolving similar questions in common carrier proceedings.⁷⁰ Under this policy, the Commission has stated that it will review allegations of misconduct directly before it, as well as conduct that takes place outside of the Commission.

AT&T has certainly demonstrated its willingness to intentionally deceive. In its application it claimed it was facing an imminent spectrum crunch while at virtually the same time it told another federal agency, the SEC, "that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition." AT&T claims T-Mobile lacks smartphones, is facing spectrum exhaust and has no clear path to LTE. T-Mobile's officers, in a report to analysts cited by AT&T in its application, have told investors just the opposite. AT&T has not been forthcoming or candid with its needs for spectrum, or its plans to rollout LTE. AT&T and DT have both dissembled and lacked candor with the FCC in

⁶⁸ *Character Policy Statement* 102 F.C.C. 2d 1179, para. 55

⁶⁹ See, e.g. *WOKO v. FCC*, 329 U.S. 223, 226-227 (1946) "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones."

⁷⁰ See, e.g., *WorldCom, Inc.*, 18 FCC Rcd. 26484, 26493 P 13 (2003) ("*WorldCom Order*") See also *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1210-11 (1986) (*Character 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). The Commission applies its broadcast character standards to applicants and licensees in the other radio services. See, e.g., *1990 Character Policy Statement*, 5 FCC Rcd at 3253 P 10 (adopting 47 C.F.R. § 1.17 to apply prohibition against misrepresentations and material omissions to applicants, licensees, and permittees in all radio services).

their representations concerning T-Mobile's LTE rollout, the availability of smartphones and generally about T-Mobile's ability to continue serving its customer base. AT&T has made material misrepresentations and has withheld material information concerning its claim that the merger will create 96,000 American jobs. These are serious, material misrepresentations made by the highest officers of both companies. Such statements call into question the qualifications of AT&T and DT and their affiliates to remain FCC licensees.

A licensee's duty of candor to the FCC is absolute. As the United States Court of Appeals has said: "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *RKO General, Inc. v FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). Since the adoption of *RKO General*, the FCC has issued thousands of mobile wireless licenses. See also, *SBC Communications*, 16 FCC Rcd 19091 (2001) "We consider misrepresentation to be a serious violation, as our entire regulatory scheme rests upon the assumption that applicants will supply [the Commission] with accurate information." In the past, the FCC has not hesitated to revoke the licenses of those caught making material misrepresentations to the agency.

VII. 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 DT and their affiliated license holders accountable for their dissembling in this proceeding. Neither the WT Bureau Order nor

the Staff Analysis took the next logical step of making findings on the substantial evidence in the record that AT&T's repeated misstatements violated the Communications Act and Commission rules. Although the Bureau Order kept the docket open, its dismissal of the petitions to deny implies that the proceeding will be inactive unless and until AT&T files another application to effectuate the transaction. Therefore, as matters stand, the substantial questions that have been raised concerning AT&T's truthfulness and its 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.⁷¹ As demonstrated herein, AT&T and DT have made numerous misrepresentations concerning the state of their respective companies, their alleged spectrum shortages, the jobs that allegedly would be created and AT&T's supposed need to acquire T-Mobile. They have made one set of representations to the FCC and another set of representations to the companies' investors and the SEC. Based on the evidence provided by DTP, the other parties to this proceeding and the FCC's Staff Analysis, there is little doubt that the Merger Applicants made numerous misrepresentations to the Commission. No doubt they believe that they are just too big to have their wireless licenses revoked. Commission case precedent says otherwise.

These issues are live and pressing, despite the WT Bureau Order dismissing the Merger Applications and the petitions to deny in that proceeding. The Commission has now initiated

⁷¹ 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).

this new proceeding on the Break-up Applications. In order to grant these applications the Commission must first find the Applicants qualified to hold FCC licenses. DTP expressly incorporates in this Petition to Deny, all of its filings in WT Docket No. 11-65, as well as all pertinent material filed in that proceeding by AT&T and DT. DTP unquestionably has at least made a threshold showing that the conduct of AT&T and DT in WT Docket No. 11-65 raises serious questions of material misrepresentation, hence of character and qualifications, warranting an evidentiary hearing. If 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 with the FCC.

Respectfully submitted

By: 
Arthur V. Belendiuk
Counsel to The Diogenes Telecommunications Project

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., # 301
Washington, D.C. 20016
(202) 363-4050
February 23, 2012

DECLARATION

I, Irene Laschuk, declare under penalty of perjury, as follows:

I reside in Colts Neck, New Jersey. I am a member of The Diogenes Telecommunications Project. I am a wireless telephone customer of AT&T Mobility.

2/21/12
Date

Irene Laschuk
Irene Laschuk
The Diogenes Telecommunications Project

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 "Petition to Deny" was served, as specified, this 23rd day of February, 2012, to the following:

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FCC Duplicating Contractor
445 12th Street, S.W.
Washington, D.C. 20554
FCC@BCPIWEB.COM
(Via Electronic Mail)

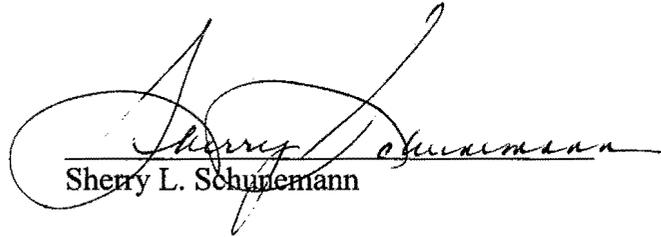
David Hu
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
david.hu@fcc.gov
(Via Electronic Mail)

Joel Taubenblatt
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
joel.taubenblatt@fcc.gov
(Via Electronic Mail)

Jim Bird
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
TransactionTeam@fcc.gov and jim.bird@fcc.gov
(Via Electronic Mail)

Mr. Michael P. Goggin
AT&T Mobility, LLC
1120 20th Street, NW.,
Suite 1000
Washington, D.C. 20036
MG7268@att.com
(Via Electronic Mail)

Mr. Dan Menser
T-Mobile License LLC
12920 SE 38th Street
Bellevue, WA 98006
fccregulatorycompliancecontract@t-mobile.com
(Via Electronic Mail)


Sherry L. Schunemann