

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Applications of T-Mobile Licensee LLC,) WT Docket No. 12-21
AT&T Mobility Spectrum LLC, and New)
Cingular Wireless PCS, LLC)
)
For Consent to Assign AWS-1 Licenses)
)

**JOINT OPPOSITION OF AT&T INC. AND
T-MOBILE USA, INC. TO APPLICATION FOR REVIEW**

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SUMMARY

Diogenes seeks the Commission's review of the April 18, 2012 Order by the Wireless Telecommunications Bureau ("Bureau") dismissing Diogenes' Petition to Deny the assignment applications at issue in this proceeding. The Application for Review argues that the Bureau erred by dismissing the Petition to Deny for lack of standing and the Supplement to Petition to Deny ("Supplement") as untimely-filed.

As detailed herein, however, the Bureau correctly determined that Diogenes failed to establish party-in-interest standing because Diogenes made no showing that grant of the assignment applications would result in any direct harm to its members and no showing that its requested relief would redress any alleged injury. As such, Diogenes did not meet its burden to plead "specific allegations of fact" to show how it met the three-part standing test required to qualify as a "party in interest." Although Diogenes raised a new standing argument for the first time in its Application for Review, that argument both is untimely and suffers from the same flaws as Diogenes' other standing arguments.

The Bureau also correctly determined that Diogenes did not comply with the requirements for timely filing with regard to its Supplement. The Public Notice in this proceeding states clearly that a party seeking to raise a new issue after the conclusion of the pleading cycle must show good cause as to why it was not possible to raise the issue earlier and must submit such new facts within 15 days of their discovery. Yet, Diogenes not only failed to provide the required good cause demonstration, but also plainly submitted the new facts more than 15 days after they were widely reported.

Finally, Diogenes' substantive allegations against the Applicants are frivolous and utterly lacking in merit. Since they were first raised by Diogenes, the Commission has repeatedly

concluded that both AT&T and T-Mobile USA possess the requisite character qualifications to hold Commission licenses, including by consenting to the assignment applications in this proceeding. No further investigation is warranted or appropriate. Accordingly, Diogenes' Petition to Deny and Supplement were properly dismissed by the Bureau and the Application for Review must be denied.

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AT&T Inc. (“AT&T”) and T-Mobile USA, Inc. (“T-Mobile USA”) hereby oppose the Application for Review filed by The Diogenes Telecommunications Project (“Diogenes”) in the above-captioned proceeding¹ and request that it be promptly denied. Diogenes seeks the Commission’s review of the April 18, 2012 Order by the Wireless Telecommunications Bureau (“Bureau”) dismissing Diogenes’ Petition to Deny the assignment applications at issue in this docket.² The Application for Review argues that the Bureau erred by dismissing the Petition to Deny for lack of standing and the Supplement to Petition to Deny (“Supplement”) as untimely-filed.³ As detailed below, however, the Bureau correctly determined that Diogenes failed to establish party-in-interest standing because Diogenes made no showing of any direct injury to its members and no showing that its requested relief would redress any alleged injury. Although

¹ *In the Matter of Applications of T-Mobile Licensee LLC, AT&T Mobility Spectrum LLC, and New Cingular Wireless PCS, LLC, Application for Review of The Diogenes Telecommunications Project, WT Docket No. 12-21 (filed May 1, 2012) (“Application for Review”).*

² *In the Matter of Applications of T-Mobile Licensee LLC, AT&T Mobility Spectrum LLC, and New Cingular Wireless PCS, LLC, Order, WT Docket No. 12-21, DA 12-615 (WTB rel. Apr. 18, 2012) (“WTB Order”).*

³ Application for Review at 1.

Diogenes raised a new standing argument for the first time in its Application for Review, that argument both is untimely and suffers from the same flaws as Diogenes' other standing arguments. The Bureau also correctly determined that Diogenes did not comply with the requirements for timely filing with regard to its Supplement, as Diogenes failed to demonstrate that the new arguments contained in the Supplement were submitted within 15 days of discovering the alleged facts. Finally, Diogenes' substantive allegations against the Applicants are utterly lacking in merit. Accordingly, Diogenes' Petition to Deny and Supplement were properly dismissed by the Bureau and its Application for Review must be denied.

I. BACKGROUND

AT&T/T-Mobile USA Acquisition Proceeding. On April 21, 2011, AT&T and Deutsche Telekom AG ("DT"), T-Mobile USA's parent company, filed applications pursuant to Sections 214 and 310(d) of the Communications Act seeking consent to the transfer of control of licenses and authorizations held by T-Mobile USA to AT&T.⁴ On November 23, 2011, AT&T and DT withdrew those applications,⁵ and on November 29, 2011, the Wireless Telecommunications

⁴ *In re 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, Public Notice, 26 FCC Rcd 6424 (WTB 2011).

⁵ See Letter from Patrick J. Grant, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (Nov. 23, 2011). On that date, the applicants also filed notifications of withdrawal in the Universal Licensing System and International Bureau Filing System for the applications that had been filed electronically in those systems. See File Nos. 0004669383, 0004673673, 0004673727, 0004673730, 0004673732, 0004673735, 0004673737, 0004673739, 0004675960, 0004703157, 0004698766, ITC-T/C-20110421-00109, ITC-T/C-20110421-00110, ITC-T/C-20110421-00111, ITC-T/C-20110421-00112; see also Letter from Patrick J. Grant, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (Nov. 25, 2011) (relating to the applications in File Nos. 6013CWSL11, 6014CWSL11, 6015ALS11, and 6016CWSL11, which had been filed manually).

Bureau issued an order dismissing those applications without prejudice.⁶ On December 27, 2011, Diogenes filed an Application for Review of the Bureau’s November 29 order, seeking a decision on claims it previously made in the AT&T/T-Mobile USA proceeding about the applicants’ character qualifications.⁷ AT&T and DT filed oppositions to the Application for Review on January 11, 2012.⁸ The Commission subsequently dismissed Diogenes’ Application for Review for lack of standing and mootness.⁹

AT&T/T-Mobile License LLC AWS Spectrum Assignment Proceeding. After the withdrawal of the applications to transfer control, AT&T and T-Mobile License LLC, a subsidiary of T-Mobile USA, (collectively, “Applicants”) filed applications with the Commission seeking to assign AWS licenses from AT&T to T-Mobile License LLC.¹⁰ The proposed license assignments were part of the breakup provision in the Stock Purchase

⁶ *In re 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, Order, 26 FCC Rcd 16184, ¶ 10 (WTB rel. Nov. 29, 2011). The International Bureau subsequently dismissed the applications seeking to transfer international Section 214 authorizations. *See International Authorizations Granted*, Public Notice, Rpt. No. TEL-01531, DA 11-1960, at 6-7 (IB rel. Dec. 1, 2011).

⁷ Application for Review of The Diogenes Telecommunications Project, WT Docket No. 11-65 (filed Dec. 27, 2011).

⁸ AT&T Inc., Opposition to Application of Review of The Diogenes Telecommunications Project, WT Docket No. 11-65 (filed Jan. 11, 2012); Deutsche Telekom AG, Opposition to Application of Review of The Diogenes Telecommunications Project, WT Docket No. 11-65 (filed Jan. 11, 2012).

⁹ *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 11-65, FCC 12-40, at ¶ 17 (rel. Apr. 17, 2012) (“Memorandum Opinion and Order”).

¹⁰ The applications sought the Commission’s approval for the assignment of various AWS-1 licenses held by two subsidiaries of AT&T to T-Mobile License LLC, a wholly owned subsidiary of T-Mobile USA. *Applications of T-Mobile License LLC, AT&T Mobility Spectrum LLC, and New Cingular Wireless PCS, LLC*, WT Docket No. 12-21, Public Notice, DA 12-92 (rel. Jan. 26, 2012) (“Public Notice”) (noting filing of applications on January 20, 2012 and citing File Nos. 0005005685, 0005005682, 0005005687, 0005016840).

Agreement between AT&T and DT for the abandoned acquisition.¹¹ On January 26, 2012, the Commission released a Public Notice establishing a pleading cycle on the proposed license assignment, setting the close of the pleading cycle as March 19, 2012.¹² The Public Notice also emphasized that any party or interested person seeking to raise a new issue after the close of the pleading cycle “must show good cause” and file within 15 days of discovering the facts forming the basis of the new issue.¹³

Diogenes filed a Petition to Deny against the assignment applications on February 23, 2012, requesting an evidentiary hearing as to whether AT&T, DT and their respective affiliates had the requisite character qualifications to hold FCC licenses in light of alleged misrepresentations in the AT&T/T-Mobile USA acquisition proceeding.¹⁴ The Applicants filed a Joint Opposition on March 8, 2012, urging the Bureau to dismiss the Petition to Deny for lack of standing and refuting Diogenes’ allegations.¹⁵ Diogenes filed its Reply to the Joint Opposition on March 19, 2012.¹⁶ On April 16, 2012, Diogenes filed a Supplement to its Petition to Deny, asserting newly discovered information regarding alleged False Claims Act violations and related common law claims concerning AT&T’s Telecommunications Relay Service (“TRS”)

¹¹ WTB Order, ¶ 3 (internal citations omitted).

¹² *See* Public Notice.

¹³ *Id.* at 3.

¹⁴ The Diogenes Telecommunications Project, Petition to Deny, WT Docket No. 12-21 (filed Feb. 23, 2012) (“Petition to Deny”).

¹⁵ AT&T and T-Mobile USA, Joint Opposition to Petition to Deny, WT Docket No. 12-21 (filed Mar. 8, 2012) (“Joint Opposition”).

¹⁶ The Diogenes Telecommunications Project, Reply to Joint Opposition of AT&T and T-Mobile USA, WT Docket No. 12-21 (filed Mar. 8, 2012) (“Reply”).

payments and again calling upon the Bureau to conduct an evidentiary hearing on the Applicants' character qualifications.¹⁷

On April 17, 2012, the Bureau dismissed Diogenes' Petition to Deny for lack of standing and dismissed Diogenes' Supplement as untimely.¹⁸ On May 1, 2012, Diogenes submitted an Application for Review of the Bureau's Order. AT&T and T-Mobile USA hereby oppose Diogenes' Application for Review.

II. THE BUREAU PROPERLY DISMISSED THE PETITION TO DENY FOR LACK OF STANDING.

In its Order, the Bureau correctly determined that Diogenes failed to demonstrate the necessary elements for party-in-interest standing. The Bureau found that Diogenes did not plead specific allegations regarding a direct harm to its members or show how denying the applications and revoking the Applicants' licenses would cure such harm. Diogenes' Application for Review fails to show that these findings were incorrect. Instead, Diogenes impermissibly includes a new standing argument in its Application for Review, which is both untimely and substantively deficient. For these reasons, the standing arguments presented in the Application for Review must be rejected.

¹⁷ The Diogenes Telecommunications Project, Supplement to Petition to Deny, WT Docket No. 12-21 (filed Apr. 16, 2012) ("Supplement"). As discussed below, these claims have no merit.

¹⁸ WTB Order, ¶ 11. On April 25, 2012, the Bureau released a Public Notice consenting to the assignment applications underlying this proceeding. Public Notice, *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action*, Report No. 7718, at 3-4 (WTB rel. Apr. 25, 2012).

A. The Bureau Correctly Determined that Diogenes Lacks Standing to File a Petition to Deny.

Under Section 309(d)(1) of the Communications Act,¹⁹ and Section 1.939 of the Commission’s rules,²⁰ only a “party in interest” may file a petition to deny. To qualify as a “party in interest,” the petitioner must satisfy the familiar, three-part standing test used by federal courts.²¹ Specifically, the petitioner must: (1) establish that the “grant of the subject application would cause it to suffer a direct injury”; (2) “demonstrate a causal link ‘between the claimed injury and the challenged action’”; and (3) show that the injury “can be traced to the challenged action” and “would be prevented or redressed by the relief requested.”²² The petitioner must do more than make generalized statements in support of these elements; instead, the petition to deny must contain “specific allegations of fact.”²³ An organization may demonstrate standing by showing that it meets these standards in its own right or that one of more of its members meets them.²⁴

¹⁹ 47 U.S.C. § 309(d)(1).

²⁰ 47 C.F.R. § 1.939.

²¹ The FCC has concluded that in “determining whether a petitioner qualifies as a ‘party in interest,’ we must apply judicial standing principles.” *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, ¶¶ 19-20 (1989); *see also In the Matter of Rockne Educational TV*, Memorandum Opinion and Order, 26 FCC Rcd 14402, ¶ 7 (2011) (“We disagree with [the petitioner’s] claim that it need not demonstrate traditional Article III standing. In fact, in the context of wireless applications, the Bureau has used the Article III test to determine whether standing exists.”).

²² *Wireless Co., L.P., Order*, 10 FCC Rcd 13233, 13235 ¶ 7 (WTB 1995) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74, 81 (1978)).

²³ 47 U.S.C. § 309(d)(1); *see also* 47 C.F.R. § 1.939(d) (same).

²⁴ *See, e.g., In re Friends of the Earth, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23622, ¶¶ 2-3 (2003).

The Bureau correctly concluded that Diogenes failed to establish the necessary elements for standing. First, the Bureau found that Diogenes did not demonstrate that it or any of its members “would suffer a direct injury if the Applications [were] granted.”²⁵ As the Applicants pointed out in the Joint Opposition, Diogenes did not specify how the Commission’s grant of the assignment applications would directly harm any of Diogenes’ members.²⁶ Instead, Diogenes merely cited its members’ status as customers of the Applicants.

The Bureau further found that, even assuming the first two elements of party-in-interest standing (direct injury and causal link), Diogenes could not show that its requested relief would redress any of its members’ alleged injuries.²⁷ Diogenes sought an evidentiary hearing on the Applicants’ character qualifications and the potential revocation of all Commission licenses held by the Applicants.²⁸ As the Bureau pointed out, the relief sought could “potentially put both AT&T and T-Mobile out of the wireless business”—thus permanently harming Diogenes’ members.²⁹ Because Diogenes’ requested relief would harm, rather than redress, its members’ interest in remaining customers of the Applicants, Diogenes failed to show redressability.

²⁵ *Id.* at ¶ 7.

²⁶ Joint Opposition at 6-7.

²⁷ WTB Order, ¶ 10.

²⁸ Petition to Deny at 27. As the Bureau noted, Diogenes’ requested relief in this proceeding is not entirely clear. *See* WTB Order, ¶ 10 n.26. Diogenes’ Petition to Deny referred to an evidentiary hearing and potential license revocation, while its Reply briefly mentioned denial of the pending assignment applications as well as a hearing. *See* Petition to Deny at 27 (seeking an evidentiary hearing), Reply to Joint Opposition at 4, 6 (referring to a denial of the applications in the text of the pleading but to a designated hearing in the conclusion). Diogenes’ Application for Review does not attempt to clarify the issue either, as it refers to an evidentiary hearing, revocation of licenses and denial of the assignments. *See* Application for Review at 6, 10.

²⁹ WTB Order, ¶ 10; *see* Joint Opposition at 7 (making similar point).

In its Application for Review, Diogenes claims that the Bureau erred in its finding on redressability because, “[h]ad the Bureau set the matter for hearing, as it was required to do, a variety of outcomes was possible.”³⁰ Even assuming that is true, Diogenes failed to demonstrate, as was required, that its requested relief could have addressed its members’ alleged injuries.³¹ This failure was thus fatal to Diogenes’ standing claim.

B. Diogenes’ Application for Review Impermissibly Raises a New Purported Basis for Standing, Which Is Both Substantively and Procedurally Defective.

Perhaps recognizing the deficiencies in its Petition and Reply, Diogenes’ Application for Review asserts a new purported basis for standing based on alleged False Claims Act violations and related common law claims. This argument is substantively frivolous and untimely insofar as the Commission’s rules do not allow new arguments in applications for review.

First, like Diogenes’ other asserted means for establishing standing, this newly asserted basis is substantively deficient because, among other reasons, it fails to meet the redressability prong of the standing test. In that regard, none of the options for relief put forth by Diogenes—denial of the Applications, designation of an evidentiary hearing or revocation of the Applicants’ licenses—would in any way address the alleged overcharging for TRS contributions by AT&T. Accordingly, this new argument also fails to establish standing for Diogenes.

Second, the new argument is untimely and cannot be considered under the Commission’s rules for applications for review. Section 1.115(c) clearly states that “no application for review will be granted if it relies on questions of fact or law upon which the designated authority has

³⁰ Application for Review at 6.

³¹ The Commission’s rules place the burden to establish standing squarely on the petitioner. 47 C.F.R. § 1.939.

been afforded no opportunity to pass.”³² Diogenes did not assert standing based on AT&T’s alleged false claims in either its Petition to Deny or its Reply. Although Diogenes mentions the false claims allegations in its Supplement, that document was correctly rejected by the Bureau as untimely. Equally important, even if the Bureau had not rejected the Supplement, the Supplement contains no specific allegations of fact demonstrating direct injury, causation, or redressability based on these alleged false claims. Therefore, even if timely, the Supplement would not have provided the Bureau with an opportunity to pass on the new standing argument Diogenes makes in its Application for Review.

III. THE BUREAU PROPERLY DISMISSED DIOGENES’ SUPPLEMENT TO PETITION TO DENY AS NOT TIMELY FILED.

Because Diogenes failed to comply with the requirements for timely supplemental filings, the Bureau correctly declined to address Diogenes’ Supplement to Petition to Deny.³³ The Public Notice in this proceeding clearly states that a party seeking to raise new issues after the close of the pleading cycle must “show good cause why it was not possible for it to have raised the issue previously.”³⁴ The Public Notice further states—in bold type—that “[s]ubmissions after the pleading cycle has closed that seek to raise new issues based on new facts or newly discovered facts should be filed *within 15 days* after such facts are discovered.”³⁵ The Public Notice thus places the burden for demonstrating compliance on those who would seek to file after the close of the comment period.

³² 47 C.F.R. § 1.115(c).

³³ WTB Order, ¶ 5 n.15.

³⁴ Public Notice at 3.

³⁵ *Id.* (emphasis added).

Diogenes' Supplement does not adhere to these requirements. It states only that "[i]nformation has come to DTP's attention" regarding AT&T's alleged false claims without specifying the date Diogenes discovered this information and how the supplemental filing complies with the 15-day submission requirement.³⁶ Plainly, this does not meet the "good cause" demonstration and timely submission requirement set out in the Public Notice. Indeed, Diogenes waited 25 days after DOJ's complaint had been widely reported³⁷ before filing its Supplement. This is clearly beyond the 15-day period for timely submissions stipulated in the Public Notice. In its Application for Review, Diogenes does not even attempt to justify its failure to comport with these requirements; it provides no basis for reversing the Bureau's decision.³⁸

³⁶ Supplement at 1.

³⁷ See, e.g., Anton Troinovski & Brent Kendall, *AT&T Tied to Nigerian Scam*, Wall St. J., Mar. 22, 2012, available at <http://online.wsj.com/article/SB10001424052702304636404577297454154404874.html>; *AT&T Accused of Improperly Billing for Service for Deaf*, N.Y. Times, Mar. 22, 2012, available at <http://www.nytimes.com/2012/03/23/business/att-accused-of-improperly-billing-for-service-for-deaf.html>; see generally *Hughes v. Vanderbilt University*, 215 F.3d 543, 548 (6th Cir. 2000) (imputing knowledge based on press reports because, "[w]here events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence") (quoting *United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980); internal quotation marks omitted).

³⁸ See, e.g., *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 125 (D.C. Cir. 1989) ("When a party is on reasonable notice as to the dates and times for hearings and for filings in an administrative proceeding, we are hard pressed to hold that the administering agency acted arbitrarily or capriciously in denying admission of materials untimely filed."); *Llerandi v. FCC*, 863 F.2d 79, 87 (1988) (holding that the FCC did not need to consider evidence submitted after the close of the pleading cycle); *In the Matter of Global Cellular Communication, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 11366, 11369 ¶ 7 (1996) (dismissing an objection filed after the date set in the public notice because "the Commission must, in certain instances, make and enforce certain procedural requirements in order to keep pace with the rapidly growing and changing telecommunications industry and to perform the tasks delegated to [it] by Congress").

IV. DIOGENES' ALLEGATIONS OF MATERIAL MISREPRESENTATIONS BY AT&T AND T-MOBILE USA ARE WHOLLY WITHOUT MERIT.

The Commission should again reject Diogenes' attempt to resurrect its allegations of material misrepresentations by the Applicants. Diogenes has raised character allegations against AT&T and T-Mobile USA repeatedly in the past year, first in the AT&T/T-Mobile USA acquisition proceeding and then again in the instant assignment proceeding.³⁹ Given Diogenes' numerous filings in both proceedings, the Commission has had ample opportunity to consider these allegations. Nevertheless, the Commission has not only declined to initiate an investigation into the Applicants' character qualifications, but has repeatedly concluded that both AT&T and T-Mobile USA possess the requisite character qualifications to hold Commission licenses,⁴⁰ including by consenting to the assignment applications at issue in this proceeding.⁴¹ Diogenes' arguments to the contrary are frivolous.

A. Allegations Against AT&T Are Without Merit.

Diogenes' allegations in its Petition to Deny that AT&T lacked candor in the AT&T/T-Mobile USA proceeding are not only baseless, but irrelevant to the review of the license assignments. Diogenes claims that the FCC Staff Analysis conclusion that AT&T had not sufficiently supported certain arguments is tantamount to a finding that AT&T made

³⁹ See Section I, *supra*.

⁴⁰ Joint Opposition at 9 n.32 (citing the Commission's December 22, 2011 order approving the AT&T/Qualcomm transaction and the Bureau's consent to transfer call signs from Cricket License Company, LLC and Savary Island License B, LLC to T-Mobile License LLC on October 19, 2011).

⁴¹ Public Notice, *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action*, Report No. 7718, at 3-4 (WTB rel. Apr. 25, 2012).

misrepresentations.⁴² That is incorrect. AT&T's submissions and statements to the Commission in the AT&T/T-Mobile USA proceeding were made with complete candor and provide no basis for departing from the Commission's repeated conclusion that AT&T is qualified to control Commission licensees.⁴³

Moreover, Diogenes' request for the Commission to review AT&T's qualifications in this proceeding flies in the face of Commission precedent. It is the Commission's longstanding policy that the basic qualifications (including character qualifications) of the assignor (or transferor) are not re-evaluated in reviewing transactions, unless they have been designated for a hearing or have been sufficiently raised in petitions to warrant the designation of a hearing.⁴⁴

⁴² See, e.g., Petition to Deny at 9.

⁴³ See, e.g., *In re Application of Aloha Spectrum Holdings Co. LLC et al.*, Memorandum Opinion and Order, 23 FCC Rcd. 2234, 2236 ¶ 8 (2008); *In re AT&T Inc. & Centennial Communs. Corp.*, Memorandum Opinion and Order, 24 FCC Rcd. 13915, 13931 ¶ 33 (2009); *In re Applications of AT&T Inc. and Dobson Communs. Corp.*, Memorandum Opinion and Order, 22 FCC Rcd. 20295, 20303 ¶ 11 (2007); *In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5758 ¶ 194 (2007). As noted above, just a short time ago, the Commission once again reached this conclusion following a full public interest review. See *AT&T/Qualcomm Order* at 13 ¶ 28.

⁴⁴ See, e.g., *In re The Bankr. Estate of Innovative Commun. Corp. et al.*, 24 FCC Rcd. 14360, 14366 ¶ 14 (WCB/MB/WTB/IB 2009). See also *Applications of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer Control of Licenses, Leases and Authorizations*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17570, 17582-83 ¶ 23 (2008); *In re Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd. 11526, 11536-37 ¶ 17 (2006) ("*ALLTEL/Midwest Order*"). The exception when the assignor's qualifications are reviewed "is designed to prevent licensees from evading responsibility for misdeeds committed during the license period," *ALLTEL/Midwest Order*, 21 FCC Rcd. at 11536 ¶ 17 n.73, by selling the licenses and collecting on their value before the Commission can take enforcement action. See, e.g., *In re M&M Broadcasters, Ltd.*, Opinion, 25 FCC Rcd. 4942, 4945 (2010); *In re Applications of Otis L. Hale d/b/a Mobilfone Communications et al.*, Order to Show Cause and Memorandum Opinion and Order Designating Applications for Hearing, 50 Fed. Reg. 43779, 43784 ¶ 30 (rel. Oct. 23, 1985). Here, AT&T is not assigning the licenses for value or to escape an investigation; rather, the licenses are part of the breakup fee that AT&T owes T-Mobile USA

This exception does not apply here. The FCC has not designated AT&T's character qualifications for a hearing. Nor, as discussed above, have Diogenes' petitions raised any serious question as to AT&T's qualifications.

Further, Diogenes' references in its Supplement to a Department of Justice complaint alleging False Claims Act violations and related common law claims⁴⁵ similarly lack merit. As a matter of law, DOJ's complaint fails to state a claim under any of its theories, and AT&T has filed a Motion to Dismiss the complaint.⁴⁶ And, in all events, that complaint remains pending, and it is the FCC's longstanding policy to accord no weight in character determinations to claims, such as these, that have not been adjudicated.⁴⁷ Finally, as noted in the prior section, Diogenes' allegations also must fail for the additional reason that Diogenes failed to introduce this issue in a timely fashion. Accordingly, the Commission should deny Diogenes' request to review AT&T's character qualifications in this proceeding.

due to the abandonment of the AT&T/T-Mobile USA transaction. Thus, this transaction is not one where the public interest requires further review of the assignor's qualifications.

⁴⁵ See Application for Review at 3 (referring to Complaint in Intervention of the United States, *United States ex rel. Lyttle v. AT&T Corp.*, No. 2:10-cv-1376-NBF-RCM (W.D. Pa. Mar. 21, 2012)).

⁴⁶ Defendant AT&T Corp.'s Motion to Dismiss Complaint in Intervention of the United States, *Lyttle*, No. 2:10-cv-1376-NBF-RCM (Apr. 27, 2012); see also Brief in Support of Defendant AT&T Corp.'s Motion to Dismiss Complaint in Intervention of the United States, *id.* (Apr. 27, 2012).

⁴⁷ See, e.g., *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Order on Reconsideration, 25 FCC Rcd. 3492, 3495 ¶ 8 n.24 (2010) ("The Commission's longstanding policy is that '[w]e will not take cognizance of non FCC misconduct . . . unless it is adjudicated.'") (quoting *In re Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179, 1205 ¶ 48 (1986)); *In re Application of HHT/Estate of Robert D. Hanna*, 8 FCC Rcd. 6638, 6639 ¶ 5 (Domestic Facilities Branch, CCB 1993) (finding that an allegation of FCC-related misconduct in a licensing proceeding was "premature, as we have not yet found that NDW violated any Commission rules").

B. Diogenes' Allegations Against T-Mobile USA Are Without Merit.

As the Applicants explained in the Joint Opposition, Diogenes' character allegations against T-Mobile USA are baseless. Contrary to Diogenes' claims, T-Mobile USA did not make material misrepresentations to the Commission during the AT&T/T-Mobile USA acquisition proceeding. The statements highlighted by Diogenes in its numerous filings were the product of well-reasoned internal discussions within DT and T-Mobile USA's business and engineering groups and reflected the companies' best understanding at that time regarding their existing and future service capabilities. Under Commission precedent, such legitimate business and technical judgments have no place in the character qualifications inquiry.⁴⁸ Thus, while the Application for Review represents that T-Mobile USA has made "numerous misrepresentations" to the Commission,⁴⁹ these allegations do not warrant further consideration by the Commission for the same reasons asserted by the Applicants in the Joint Opposition.

⁴⁸ See Joint Opposition at 11 ("Indeed, the Commission has emphasized that 'it is not the objective of the character qualifications inquiry to evaluate applicants' business acumen, scrutinize their business plan for safety and soundness or judge their every business decision against other alternatives.'" (citing *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, ¶ 39 (2008))).

⁴⁹ Application for Review at 9-10.

V. **CONCLUSION**

For the reasons stated above, the Commission should promptly deny Diogenes' Application for Review in the instant proceeding.

Respectfully submitted,

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May 16, 2012

CERTIFICATE OF SERVICE

I, May K. Chiang, do hereby certify that on this 16th of May, 2012, I caused a true copy of the foregoing “Joint Opposition of AT&T Inc. and T-Mobile USA, Inc. to Application for Review” to be sent by electronic mail (*) or U.S. mail (^) on:

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