

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of) MB Docket No. 14-90
)
Applications of)
)
AT&T, Inc. and)
DIRECTV)
)
For Consent To Assign or Transfer Control of)
Licenses and Authorizations)

PETITION TO DENY OF THE GREENLINING INSTITUTE

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PETITION TO DENY

The Greenlining Institute (“Greenlining”) hereby files this Petition to Deny the applications, as proposed, in the above-captioned matter pursuant to Section 309(d)(I) of the Communications Act of 1934,¹ and the FCC's Public Notice of July 10, 2014.² The proposed transaction would seriously harm consumers from communities of color and low-income consumers; these public interest harms outweigh any potential public interest benefits. The public interest therefore requires that the Commission reject the applications in their entirety, as proposed, or, at a minimum, impose significant conditions to ameliorate the threatened harms to low-income consumers and protect the public interest.

SUMMARY

Greenlining files this petition to deny on the information that is currently available. However, Greenlining is currently investigating this transaction, and Greenlining’s current position in this proceeding may not be its ultimate position. In an effort to learn more about this transaction, Greenlining is undertaking a review of the Confidential and Highly Confidential documents that Applicants have submitted to the Commission.

Applicants must prove by a preponderance of the evidence that the proposed transaction is in the public interest. Applicants have failed to meet that burden. The proposed transaction will harm the public interest by reducing the availability of standalone broadband and video services to low-income communities and communities of color. Given Applicants’ claims about bundled services and questionable assertions about the competitive effects of the proposed transaction, it is unlikely that the new company will continue to offer standalone video or

¹ 47 U.S.C. § 309(d)(1) (2011).

² FCC Public Notice, MB Docket No. 14-57 (July 10, 2014) (Establishing Pleading Cycle).

broadband service. Additionally, Applicants' claims that the proposed transaction will increase deployment of communication services are questionable. Finally, Applicants' proposed commitments are insufficient to protect the public interest. Accordingly, the Commission should deny the proposed transaction or, if it does approve the transaction, the Commission should impose conditions to protect the public interest.

ARGUMENT

I. GREENLINING HAS STANDING TO FILE THIS PETITION

Any "party in interest" may petition the Commission to deny the assignment or transfer of a license.³ A party in interest is any party whose interests are likely to be adversely affected.⁴ Greenlining is a non-profit organization dedicated to empowering communities of color, low-income communities, and other disadvantaged groups. Started in 1993 by the Greenlining Coalition, Greenlining seeks to protect consumer interests while partnering with some of the largest companies in America to better serve this country's multi-ethnic and underserved communities. Beyond ethnic diversity, the coalition represents diverse constituents that include faith-based organizations, minority business associations, community development corporations, health advocates, traditional civil rights organizations, and minority media outlets.

Members of the Greenlining Coalition subscribe to services provided by the Applicants. Moreover, members of the communities served by Greenlining Institute and employees of the Greenlining Institute are subscribers to phone, video, and broadband services and will be impacted by the proposed merger. As this petition will demonstrate, the proposed merger would

³ 47 U.S.C. §309(d) (2011).

⁴ Camden Radio, Inc., v. Federal Communications Commission, 220 F.2d 191, 194 (D.C. 1954).

directly and adversely impact the communities the Greenlining Institute represents. Accordingly, Greenlining has standing to oppose the applications.

II. THE PROPOSED TRANSACTION IS NOT IN THE PUBLIC INTEREST

Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction is in the public interest. The proposed transaction would harm the public interest. The proposed transaction will harm the public interest by reducing the availability of standalone broadband and video services to low-income communities and communities of color. Applicants' past use of econometric models casts doubt on claims that the proposed transaction will increase competition for standalone services. Applicants' claims that the proposed transaction will increase deployment of services are questionable, and Applicants' proposed commitments are insufficient to protect the public interest.

A. Applicants Must Prove by a Preponderance Of the Evidence that the Proposed Transaction Is In the Public Interest.

A party seeking the acquisition or transfer of a license bears the burden of proving to the Commission, by a preponderance of the evidence, that the proposed transaction will serve the public interest, convenience, and necessity.⁵ In making this determination, the Commission first assesses "whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules."⁶ When reviewing a transaction, the Commission considers the competitive effects of that transaction on the public interest.⁷ However, the Commission's public interest inquiry extends far beyond potential

⁵ Order In the Matter of Applications of AT&T Inc. and Cellco Partnership, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd 8704, 8716 (June 22, 2010) (hereafter, AT&T/Cellco Order).

⁶ *Id.*

⁷ *Id.*

competitive effects.⁸ The Commission also considers “whether the proposed assignment and transfer of control...is likely to generate verifiable, transaction-specific public interest benefits.”⁹

The Commission’s public interest inquiry includes a consideration of, “among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.”¹⁰

The Commission then considers whether the acquisition “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.”¹¹ If there is a risk of harm, the Commission employs “a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”¹² If the potential public interest harms outweigh the potential public interest benefits, the transaction is not in the public interest.¹³

B. The Proposed Transaction Will Harm the Public Interest by Reducing the Availability of Standalone Broadband and Video Services to Low-Income Communities and Communities of Color.

Greenlining finds a number of Applicant’s claims questionable, and expects that other parties will address many of those claims in their filings. Greenlining wishes to focus on the effects of the proposed transaction on the availability of standalone services. Low-income consumers, many of whom are from communities of color, often are not able to afford bundled services, and are therefore especially reliant on standalone services.¹⁴ Accordingly, any

⁸ *Id.* at 8717.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See John Horrigan, Pew Internet, Home Broadband Adoption 2009, available at <http://www.pewinternet.org/files/old-media/Files/Reports/2009/Home-Broadband-Adoption-2009.pdf>.

reduction in the availability of those standalone services promises to disproportionately harm those communities.

AT&T's overwhelming focus on selling bundled services indicates that the new company will most likely not promote standalone services, if it offers those services at all. Applicants' proposed commitments cast doubt on the veracity of Applicants' claims that the proposed transaction will benefit consumers of standalone service. Additionally, the Commission should be skeptical of the models and analyses that Applicants provide in support of the proposed transaction.

1. Applicants' Claims that New Company Will Maintain Standalone Service are Dubious Given Applicants' claims about Bundled Services.

Applicants claim that the proposed transaction will benefit consumers of standalone services. For example, Applicants state that the new company will have a strong incentive to compete aggressively for standalone video customers.¹⁵ Applicants further claim that post-transaction, the new company "will have both the ability and the incentive to promote standalone video not only within our current service territory, but outside it as well."¹⁶

However, these claims stand in sharp contrast to Applicants' statements about the state of standalone service and AT&T's efforts to provide standalone service. Applicants note that "[i]n contrast to the increasing demand for bundles, standalone video service is of decreasing significance,"¹⁷ and that "bundled offerings of broadband and video services increasingly have become the focus of consumer demand and competitive energy for cable incumbents, telephone

¹⁵ Public Interest Statement at p. 53.

¹⁶ Public Interest Statement, Exhibit A, Declaration of Lori M. Lee at p.12.

¹⁷ Public Interest Statement at p. 52.

companies...and [broadband service providers].”¹⁸ AT&T “focuses its U-verse video marketing efforts almost exclusively on bundles rather than on standalone video.”¹⁹ This focus extends to AT&T’s “strategic planning and competitive positioning, which are “focused overwhelmingly on the bundled offerings of its cable competitors.”²⁰

Despite Applicants’ tepid claims about intentions to provide standalone service, Applicants’ clear purpose for entering into the proposed transaction is to increase the two companies’ ability to sell bundled services. This purpose, taken in context with Applicants’ claims about the “decreasing significance” of standalone service, indicate that the new company does not have a serious commitment to providing standalone service. Given low-income consumers’ (many of whom are from communities of color) dependence on standalone service, eliminating the availability of that service would harm those consumers and the public interest.

2. The Commission Should Be Skeptical of Claims that Competitive Forces will Increase Availability of Standalone Services.

Applicants cite an economic assessment in support of the proposed transaction by Dr. Michael Katz.²¹ Applicants state that “Dr. Katz has performed an econometric analysis and associated merger simulation and concludes that this downward pricing pressure also stimulates a reduction in the prices of standalone broadband, standalone video, and bundles of video and broadband offered by cable operators.”²² However, there are reasons to doubt the extent to which Applicants rely on the economic analysis, as well as the accuracy of the economic analysis itself.

¹⁸ Public Interest Statement at p. 51-52.

¹⁹ *Id.* at p. 69.

²⁰ *Id.* at p. 57.

²¹ Public Interest Statement, Exhibit A, Declaration of Michael J. Katz (hereafter, Katz Declaration).

²² Public Interest Statement at p. 65 (no citation in original).

a. Applicants' Proposed Commitments Cast Doubt on Claims that the Proposed Transaction Will Increase Competition for Standalone Services.

As discussed above, Applicants claim that the proposed transaction will create incentives for the new company to offer standalone service.²³ However, despite these claimed incentives, Applicants state that they are willing to enter into commitments to preserve standalone service. These commitments include offering standalone wireline broadband service for three years after the deal closes,²⁴ as well as a similar commitment to offer DirecTV's satellite video services for three years after deal closes.²⁵ Applicants make no such commitment regarding standalone U-Verse video services.

These commitments cast doubt on Applicant's claims that competitive effects are sufficient to incentivize the new company to continue offering standalone services post-transaction. If, as Applicants claim, there was sufficient competition to ensure that Applicants offered standalone services after the deal closed, Applicants would not have to those make commitments. Accordingly, the Commission should view Applicants claims about competitive effects on standalone service with skepticism.

²³ Katz Declaration at pp. 80-81.

²⁴ Public Interest Statement at p. 50.

²⁵ *Id.* at p. 51.

b. Applicants' Past Use of Econometric Models Casts Doubt on Claims that the Proposed Transaction Will Increase Competition for Standalone Services.

Applicants' statements regarding economic modeling and analysis sound suspiciously similar to AT&T's claims of public interest benefits in the AT&T/T-Mobile proceeding.²⁶ In that proceeding, Commission staff determined that AT&T's analysis and models were so flawed that they could not be used to support AT&T's claims.²⁷ Despite numerous Commission requests, AT&T was unable to alleviate Commission concerns about the models and did not establish the probative value of the models.²⁸ Accordingly, the models were "abstract, not robust to reasonable changes in their assumptions, [and] not consistent with each other or, in many cases, the Applicants' internal documents."²⁹ Greenlining believes that the Commission should evaluate each proposed transaction on its own specific merits, and that each claim should be evaluated independently. However, given AT&T's past behavior, the Commission should be extremely skeptical of AT&T's claims of competitive benefits in this transaction.

C. Applicants' Claims that the Proposed Transaction will Increase Deployment of Communication Services are Questionable.

In the current proceeding, Applicants claim that the transaction is driven by AT&T's desire to deploy fiber connections "to at least 2 million more customer locations than what could be economically justified absent the merger synergies."³⁰ One of AT&T's primary justifications for the proposed AT&T/T-Mobile transaction was that the acquisition of T-Mobile (at a price of

²⁶ FCC, Staff Report and Findings at ¶ 62, In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc., DA 11-799, WT Docket No. 11-65 (June 10, 2011) (hereafter, Staff Report).

²⁷ Staff Report at ¶ 131.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Public Interest Statement at p. 41; see also, Public Interest Statement, Exhibit A, Declaration of John T. Stankey at p. 18.

\$39 billion) was necessary for AT&T to be able to deploy LTE coverage to 97 percent of the American population. However, AT&T filed an improperly redacted document indicating that the actual cost to increase coverage to 97 percent of the population was \$3.8 billion.³¹ The Commission's redacted Staff Analysis concluded that internal AT&T documents contradicted AT&T's claims that it was not planning to increase LTE deployment in the absence of its purchase of T-Mobile.³² It is possible that Applicants' claims that the proposed transaction is necessary to permit AT&T to expand its fiber deployment is similarly exaggerated. The Commission should be extremely skeptical of Applicant's claims that the transaction is necessary to increase deployment of services.

D. Applicants' Proposed Commitments Are Insufficient to Protect the Public Interest.

As discussed above, Applicants promise a number of commitments despite Applicant's argument that competitive forces will be sufficient to ensure that the proposed transaction is in the public interest. These commitments are insufficient to protect the public interest. Applicants' standalone service commitments are subject to so many qualifiers and exceptions that the commitments are essentially meaningless. Additionally, Applicants net neutrality commitments would be insufficient to protect consumers.

1. Applicants' Standalone Service Commitments are Insufficient.

Applicants state that "in areas where AT&T currently offers wireline IP broadband service, the combined company will, for three years after closing, continue to offer standalone

³¹ Broadband DSLReports.com, Leaked AT&T Letter Demolishes Case For T-Mobile Merger, *available at* <http://www.dslreports.com/shownews/Leaked-ATT-Letter-Demolishes-Case-For-TMobile-Merger-115652>

³² Staff Report at ¶ 252 et. seq.

wireline broadband service”³³ However, that proposed commitment is riddled with exceptions. AT&T is willing to offer that service “at reasonable market-based prices,”³⁴ a term so nebulous as to be meaningless. AT&T commits to offering a so-called “low-cost” option “with speeds of at least 6 Mbps down” for a one-year term of no more that \$34.95 a month.³⁵ However, AT&T will only provide those speed “where feasible,” and AT&T reserves the right to increase the cost consistent with increases in the Consumer Price Index.³⁶ This commitment is nothing more than a promise that AT&T will provide standalone broadband service at whatever speed and price AT&T deigns to offer. Applicants’ offer to provide DirecTV video services “at nationwide package prices that do not differ between customers in AT&T’s wireline footprint and customers outside the footprint”³⁷ for three years after the merger closes is similarly troubling, as it makes no commitment to maintain current prices or provide a low-cost option. Applicants’ commitments to provide standalone service are insufficient to protect low-income consumers and consumers from communities of color from the harms of the proposed transaction.

Additionally, even if the combined company does commit to providing low-cost, standalone services, the Commission should keep in mind the fact that AT&T has a history of eliminating low-cost services when no longer required to do so. As a condition in the AT&T/Leap transaction, AT&T agreed to continue offering Lifeline service through Leap for a period of 18 months after the transaction closed.³⁸ In June of 2014, AT&T announced its

³³ Public Interest Statement at p. 50.

³⁴ *Id.*

³⁵ Public Interest Statement at p. 50.

³⁶ *Id.*

³⁷ *Id.* at p. 51.

³⁸ Memorandum Opinion and Order, In the Matter of Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization, WT Docket No. 13-193 (March 13, 2014) https://apps.fcc.gov/edocs_public/attachmatch/DA-14-349A1.pdf ¶ 169; see also, Letter from The Greenlining Institute to Marlene H. Dortch (Nov. 4, 2013).

intentions to stop offering Lifeline service through Leap within 18 months.³⁹ It is safe to assume that once any commitment period ends, the new company will cease offering standalone services under the terms of the above-discussed commitments. This fact creates a very real risk that in a few years, many low-income consumers may find themselves unable to afford, or even obtain, communications services. Accordingly, a commitment period of three short years would be insufficient to protect low-income consumers, communities of color, and the public interest.

2. Applicants' Net Neutrality Commitments are Inappropriate.

Applicants further commit that “for three years after closing, AT&T will continue its commitment to the FCC’s Open Internet protections established in 2010, regardless of whether the FCC re-establishes such protections for other industry participants in the wake of the D.C. Circuit’s vacatur of the 2010 rules.” While any commitment to the FCC’s Open Internet protections is admirable, it would be inappropriate for the Commission to address industry-wide issues of net neutrality in a transaction-specific proceeding. In AT&T’s own words:

In short, merger reviews are not the proper forum for resolution of industry-wide policy issues. That is particularly true of “matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.” As the Commission has recognized, adopting non-transaction-specific conditions “could distort competitive market conditions, resulting in favoring some providers over others unjustly and unreasonably.”⁴⁰

If the Commission approves the transaction subject to AT&T’s compliance with the 2010 net neutrality rules, AT&T will no doubt argue use that fact to argue in the Commission’s net

³⁹ Mike Dano, FierceWireless.com, AT&T's Cricket to discontinue Lifeline support (June 4, 2014), *available at* http://www.fiercewireless.com/story/atts-cricket-discontinue-lifeline-support/2014-06-04?utm_medium=nl&utm_source=internal.

⁴⁰ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments 210-211, (June 10, 2011) In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc., DA 11-799, WT Docket No. 11-65.

neutrality proceeding that industry-wide rules are unnecessary. The Commission should reject Applicants' attempts to use a commitment in this proceeding to obtain leverage in another.

E. The Commission Should Deny the Application.

The proposed transaction will harm the public interest by reducing the availability of standalone broadband and video services to low-income communities and communities of color. Given Applicants' claims about bundled services and questionable assertions about the competitive effects of the proposed transaction, it is unlikely that the new company will continue to offer standalone video or broadband service. Additionally, Applicants' claims that the proposed transaction will increase deployment of communication services are questionable. Finally, Applicants' proposed commitments are insufficient to protect the public interest. Accordingly, Applicants have failed to prove by a preponderance of the evidence that the proposed transaction is in the public interest. Accordingly, the Commission should deny the Application.

III. IF THE COMMISSION DOES APPROVE THE PROPOSED TRANSACTION, IT SHOULD IMPOSE CONDITIONS TO PROTECT THE PUBLIC INTEREST.

The Commission can prescribe restrictions or conditions that may be necessary to carry out the provisions of the Communications Act.⁴¹ The Commission can use its "...extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."⁴² Accordingly, should the Commission approve the Application, the Commission should impose conditions that will preserve competition, protect low-income consumers and communities of color, and ensure that the new company passes through the economic benefits of the transaction.

⁴¹ 47 U.S.C. § 303, subdivision (f); AT&T/Cellco Order at 8717-8718.

⁴² AT&T/Cellco Order at 8718.

CONCLUSION

Greenlining supports well-designed industry measures that increase the availability of affordable communications services to communities of color and low-income consumers. While the proposed transaction has the potential to achieve this goal, Applicants have not yet provided sufficient proof that the alleged benefits of the proposed transaction are likely to occur. Accordingly the Commission should either deny the applications or impose conditions to ensure that communities of color and low-income consumers can take advantage of the benefits of telephone, video and broadband services that should be available to everyone.

For the above-stated reasons, Greenlining respectfully requests that the Commission deny the proposed transaction or impose conditions to protect the public interest.

Respectfully submitted,

Dated: September 16, 2014

/s/ _____
Paul Goodman
Legal Counsel

Declaration of Paul Goodman

My name is Paul Goodman. I am Legal Counsel-Telecommunications of the Greenlining Institute.

The Greenlining Institute is a national policy, organizing and leadership institute working for racial and economic justice. The Greenlining Institute's mission is to empower communities of color and other disadvantaged groups through multi-ethnic economic and leadership development, civil rights, and anti-redlining activities. We also advocate before regulatory agencies to advance these goals.

Members of the communities served by the Greenlining Institute reside in areas served by AT&T and/or DirecTV services, and many are subscribers to those services. Moreover, members of the communities served by Greenlining Institute and employees of the Greenlining Institute are subscribers to other service providers who will be impacted by the proposed merger.

I am familiar with the contents of the foregoing Petition to Deny. The factual assertions made in the petition are true to the best of my knowledge and belief.

I declare that the foregoing is true and correct.

Executed on September 16, 2014.

/s/ Paul Goodman
Paul Goodman

Certificate of Service

I hereby certify that on this 16th day of September, 2014, I caused true and correct copies of the foregoing Petition to Deny to be served as follows:

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