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

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

REPLY OF DIOGENES TELECOMMUNICATIONS PROJECT TO JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS

On May 31, 2011 the Diogenes Telecommunications Project (DTP), by its attorneys, filed its Petition to Deny the proposed acquisition by AT&T Inc. (AT&T) of the licenses and authorizations of T-Mobile USA, Inc. (T-Mobile), a Deutsche Telekom AG (DT) subsidiary. On June 10, 2011 AT&T, T-Mobile and DT filed a single Joint Opposition to all Petitions to Deny their applications. DTP files this Reply to the Joint Opposition.

In its Petition to Deny DTP documented numerous inconsistencies between statements made by AT&T in its April 21, 2011 filing with the Commission, and statements made by AT&T, T-Mobile and DT in other 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. The

applicants' lack of candor calls into serious question their qualifications to remain Commission licensees. The Joint Opposition is devoid of any explanation whatsoever for the numerous inconsistent material statements that DTP documented in its Petition to Deny. Given this utter failure to explain or rebut DTP's showing, the Commission is obligated under well-established legal standards to designate the applications for evidentiary hearing to determine if AT&T and T-Mobile have the necessary qualifications to remain Commission licensees. Only after the FCC has addressed the threshold qualification issues can it consider whether or not to grant AT&T's application to absorb T-Mobile.

The sole reference to DTPs' claims in the Joint Opposition appears on page 228 at footnote 480:

> The Diogenes Telecommunications Project alleges that, "in the application, T-Mobile and AT&T have demonstrated a lack of candor and have made material misrepresentations to the FCC, thereby raising the issue of whether they lack the necessary qualifications to remain FCC licensees." Diogenes Petition at 1. Specifically, Diogenes questions whether AT&T "is facing an imminent spectrum crunch" and whether T-Mobile USA "is facing spectrum exhaust, and has no clear path to LTE." *Id.* at 26. It also claims that "AT&T's promised 97 percent LTE rollout is a sham designed to curry favor with the FCC." *Id.* at 16 (capitalization altered). These allegations are baseless for the reasons detailed above. *See* Sections I.A.1 and I.B.1.

The Joint Opposition, therefore, summarily dismisses DTP's Petition to Deny as "baseless," without rebutting the proffered evidence or even offering any explanation of the applicants' many inconsistent material statements documented by DTP. Sections 1.A.1 and 1.B.1in the Joint Opposition, moreover, contain nary a general reference to any of the allegations of prior inconsistent statements. In one place the Joint Opposition brushes aside past projections because of the dynamism of market conditions:

> Opponents cite previous statements in which T-Mobile USA had suggested that it had enough spectrum in the short to medium term. But, as Larsen explains, "the incredible growth in demand for data services on the T-Mobile USA HSPA+ network has required a near constant adjustment to determine projected spectrum capacity constraints," and such projections have consistently "surpass[ed]" T-Mobile USA's "previous estimates of capacity constraints and spectrum exhaustion." Larsen Reply Decl. ¶¶ 18, 20.[1]

Of course, this excuse ignores the fact that some of the cited inconsistent statements were dated approximately two months before the acquisition was publicly announced. If projections are indeed so uncertain, how is it that AT&T can confidently represent that it will suffer from spectrum exhaust if the transaction is not approved or that it will achieve the LTE coverage it promises if the transaction is approved?

In another place AT&T splits hairs to dispute claims by several petitioners that in 2009 its executives promised 87% LTE coverage not counting the Qualcomm or T-Mobile transactions. According to AT&T,

> ... the actual statement indicated that AT&T "would be using our 700 megahertz and AWS spectrum exclusively for LTE. *This spectrum will cover* 100% of the top 200 markets and *87% of the US population.*" (Citation omitted) Thus, the statement in question concerns AT&T's spectrum holdings, not its LTE deployment plans. Indeed, as noted in the same statement, because LTE technology was still in its development stage, AT&T had not yet even begun testing LTE in its labs. *Id.* Thus, it was hardly in a position to make definitive LTE deployment plans at that time.[2]

What AT&T is saying here defies logic. If the first statement "AT&T would be using our 700 megahertz and AWS spectrum exclusively for LTE" is coupled with the second statement "This spectrum will cover...87% of the US population," the logical inference is that AT&T is able to provide LTE to 87% of the US population. AT&T's oddly pathetic distancing

[1] Joint Opposition P. 39 (footnote omitted).

[2] Joint Opposition P. 82, n. 92.

of itself from the proud declarations of its top executives in 2009 is indicative of the jerry rigged public interest justification it has had such a difficult time putting together and has had to wordsmith so carefully. Its statements in the Joint Opposition further show a continuing lack of candor, both to the public AT&T is licensed to serve and to the FCC whose regulatory mission is frustrated and undermined by such disingenuous wordplay.

DTP's Petition to Deny, Pages 7-9 described how AT&T contradicted itself in the Qualcomm and T-Mobile applications, providing grossly disparate views of the value of the Qualcomm spectrum to its LTE agenda. It is worth reproducing again what AT&T said in the Qualcomm filing:

> 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.
>
> 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.[3]

In the Joint Opposition, however, AT&T continues in the T-Mobile context to downplay the importance of the Qualcomm spectrum and refuses to reconcile its two conflicting descriptions:

> Nor, contrary to opponents' claims, does the spectrum AT&T is seeking to acquire from Qualcomm provide a feasible way for AT&T to address spectrum-exhaust issues. Again, opponents ignore the fact that the Qualcomm spectrum could not be used to address congestion in the UMTS or GSM networks, both because it is unpaired and because the handsets of AT&T customers using those services are not compatible with 700 MHz spectrum. Hogg Reply Decl. ¶¶ 62-63. As for LTE, even if the Qualcomm spectrum is available by late 2014 (at the earliest), as currently estimated, it will not solve all of AT&T's capacity challenges for that service either. The Qualcomm spectrum is unpaired (*i.e.*, one-way) and, even after the technology, standards, and equipment are available to integrate it with two-way spectrum, it will provide only a supplement to downlink capacity. Moore Decl. ¶ 25; Hogg Reply Decl. ¶ 63. Thus, although this spectrum will be valuable to help bridge the gap until the Commission makes additional spectrum available for auction, it is not in any way comparable to, or a substitute for, the spectrum that AT&T will obtain from this transaction.[4]

A comparison of the two passages reveals AT&T's selective and deceptive characterizations of its spectrum needs and LTE deployment plans. Such distortions and misrepresentations run through the entire case presented by the applicants, infecting every aspect of their public interest arguments. Clearly, a hearing is needed to determine where the public interest lies, as well as whether T-Mobile and AT&T are qualified to hold FCC licenses.

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

[4] Joint Opposition at pp. 30-31.

The Joint Opposition perpetuates the fiction that T-Mobile is floundering, citing recent subscriber losses while ignoring Smartphone gains; placing absolute reliance on a statement by DT's chairman that T-Mobile USA will have to fund itself, as if it were a commandment written in stone; and continuing to brand T-Mobile incessantly with the accusation "no clear path to LTE," as if anything in the wireless industry future proceeded along a clear path. The applicants stick to their story and never deviate from those five carefully chosen words, "no clear path to LTE." AT&T brazenly goes on to say that the acquisition will enable *it* to have "a clear path to LTE." This glib sloganeering is far too slick for a major FCC review process that may well determine the future of wireless competition in the United States.

AT&T and T-Moblie have an absolute duty to be honest and forthcoming with the FCC. Instead, they have made numerous inconsistent statements. Worse still in the Joint Opposition they make to effort or explain their previous inconsistencies. For example, AT&T is simultaneously claiming before the FCC that the Qualcomm spectrum will provide the needed spectrum to enable AT&T to rollout its LTE network and in the above referenced application, that the Qualcomm spectrum will not address AT&T's problem of spectrum exhaust. AT&T says in its application that it needs to acquire T-Mobile because it is in imminent danger of spectrum exhaust, yet it is telling another federal agency, the SEC and its investors that the real problem is the surplus of 700 Mhz spectrum, which will fuel additional competition and, most importantly, reduced profit margins for AT&T.[5] AT&T repeatedly claims that T-Mobile "has no clear path to LTE." T-Mobile, however, is telling its investors and customers that it has the fastest information superhighway in the business today and can move to LTE at the right time.

[5] AT&T 2010 SEC FORM 10-K, p.29.

Significantly, T-Mobile has said that the transition to LTE will be "seamless."[6] AT&T would have the FCC believe that T-Mobile is in serious financial trouble. T-Mobile, on the other hand, is telling its investors that it can raise the money it needs and that it can convert its network to LTE for a fraction of what it will cost its competitors. These are significant inconsistencies going to the very heart of the issues before the FCC. Yet neither AT&T, nor T-Mobile has chosen to address these issues in any meaningful way.

Only one conclusion can be drawn from AT&T and T-Mobile's failure to produce consistent material evidence: AT&T and T-Mobile have intentionally made material misrepresentations to the FCC. *Tendler v. Jaffe,* 203 F.2d 14, 19 (D.C. Cir. 1953) ("The omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."); *International Union, UAW v. National Labor Relations Board,* 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the . . . document, if brought, would have exposed facts unfavorable to the party.") (quoting J. Wigmore, Evidence §284, 3rd ed. 1940); *United States v. Robinson,* 233 F.2d 517, 519 (D.C. Cir. 1956) ("[u]nquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered a circumstance against him and may raise presumption that the evidence would not be favorable to his position"); *Washoe Shoshone Broadcasting,* 3 FCC Rcd 3948, 3952-53 (Rev. Bd. 1988);

[6] Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts, (Jan. 20, 2011.) P.14. http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf

Thornell Barnes v. Illinois Bell Telephone Co., 1 FCC 2d 1247, 1274 (Rev. Bd. 1965).

AT&T and T-Mobile's failure to produce evidence creates a presumption that they intentionally made false and misleading statements to the Commission for the purpose of obtaining approval of their applications.. In so doing AT&T and T-Mobile have violated the public trust and cannot be relied upon to be truthful in their dealings with the government or to faithfully execute their duties to serve the public.

CONCLUSION

The few examples discussed above are typical of the applicants' failure to reckon with the glaring contradictions found in their public statements. The Joint Opposition neither explains nor rebuts the material inconsistent statements that DTP documented in its Petition to Deny. This abundance of contradictory statements strongly suggests a concerted attempt on the part of applicants to mislead the Commission and win approval of the proposed transaction by distorting the conditions and circumstances of the companies and of the market for wireless services. When a petitioner raises substantial issues regarding an applicant's qualifications as an FCC licensee, the Commission has a legal obligation to conduct a hearing to get to the bottom of the matter. If, after hearing, it is determined that AT&T and T-Mobile have attempted to win approval of their applications through misrepresentation and deceit their licenses must be revoked and they be forever barred from being FCC licensees.

Respectfully submitted

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