

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Applications of AT&T Inc. and)
Deutsche Telekom AG for Consent)
to Transfer Control of the Licenses)
and Authorizations Held by T-Mobile)
USA, Inc. and Its Subsidiaries)

WT Docket No. 11-65

**OPPOSITION TO MOTION TO WITHDRAW OF
PUBLIC KNOWLEDGE AND MEDIA ACCESS PROJECT**

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INTRODUCTION

Public Knowledge and the Media Access Project hereby oppose AT&T, Inc.'s ("AT&T") motion to withdraw its application to acquire licenses from T-Mobile USA ("T-Mobile").¹ The Federal Communications Commission ("Commission") is under no obligation to stand idly by while AT&T attempts to game the system and circumvent Commission review of its application. The Commission's rules explicitly give the Commission flexibility to act when parties attempt to abuse agency process in order to protect the integrity of the Commission's procedures. AT&T and Deutsche Telekom AG have explicitly and publicly stated that they are not requesting a withdrawal because they are re-thinking their proposed license transaction, but rather because they intend to seek a favorable decision in federal court, which the companies can then use to pressure the Commission to approve the merger.² AT&T and Deutsche Telekom fear that the Commission's opinion as the relevant expert agency will hurt their arguments at trial, but the Commission has ample authority to continue to investigate the parties' application despite the consequences that investigation may have on AT&T's trial strategy.

AT&T's claims that the proposed merger will serve the public interest have been repeatedly called into question by industry competitors and public interest advocates alike, and a formal administrative hearing will allow the Commission to thoroughly scrutinize AT&T's claims and any evidence purported to support those claims. The Commission should therefore deny AT&T's recent request to dismiss its application without prejudice and issue a Hearing Designation Order.³ Allowing AT&T to withdraw its application only after learning that it had

¹ See Withdrawal of Application Form 603 of AT&T, Inc. and Deutsche Telekom AG (Nov. 23, 2011).

² *AT&T & Deutsche Telekom Continue to Pursue Sale of DT's U.S. Wireless Assets*, DEUTSCHE TELEKOM (Nov. 24, 2011), <http://www.telekom.com/dtag/cms/content/dt/en/1106028>.

³ See Letter from Patrick J. Grant, Counsel for AT&T, Inc., and Nancy J. Victory, Counsel for Deutsche Telekom AG, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 23, 2011).

lost its battle to avoid an evidentiary hearing—and after merger opponents have spent months and millions of dollars urging the Commission to initiate such a hearing—would thwart the fair and efficient operation of the Commission’s procedural regulations. The Commission has authority to deny the AT&T’s withdrawal request, and should do so quickly to avoid delaying the issuance of the Commission’s forthcoming Hearing Designation Order.

ARGUMENT

I. THE COMMISSION HAS DISCRETION TO DENY THE WITHDRAWAL REQUEST.

The Commission has discretion to deny a request to withdraw when, as here, circumstances demonstrate that permitting withdrawal would harm the public interest and undercut the integrity of the Commission’s procedures. In its letter, AT&T purported to withdraw as of right, but cited no particular regulation that gives it such a right.⁴ As Deutsche Telekom and AT&T admitted, this withdrawal request was intended to give AT&T a tactical advantage in the parties’ case against the Department of Justice in federal district court.⁵ If AT&T is able to leverage this advantage favorably in the federal court system, it could then return to the Commission and seek approval again, without worrying that the Commission’s informed expert opinion or factual investigation would harm AT&T’s trial strategy in court, while using any favorable court decision against the Commission in their future license transfer application. This type of litigation gamesmanship wastes the resources of both the Commission and the federal court system. The Commission’s application dismissal rules are not designed to indulge this kind of behavior, and the Commission is well within its authority to protect the integrity of its procedures, deny the request, and move forward with its evidentiary investigation.

⁴ *Id.*

⁵ *AT&T & Deutsche Telekom Continue to Pursue Sale of DT’s U.S. Wireless Assets*, DEUTSCHE TELEKOM (Nov. 24, 2011), <http://www.telekom.com/dtag/cms/content/dt/en/1106028>.

The Commission has discretion to deny AT&T's withdrawal request. The Commission's rules give the Commission discretion to dismiss applications involving wireless radio services.⁶ If the Commission decides to dismiss an application at the request of an applicant, the rules instruct the Commission to dismiss the application with or without prejudice according to the preference of the applicant, with some exceptions.⁷ The application dismissal rule was created by the Commission to govern "the filing of incomplete or otherwise defective applications in all wireless services,"⁸ not to permit applicants to use the Commission as a pawn in its battle with another law enforcement agency. The Commission's decision of whether to dismiss an application is given substantial deference by courts, which will affirm the Commission's decision to deny AT&T's request unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁹ Here, the docket is replete with evidence not only supporting the need for a formal administrative hearing, but demonstrating how parties have expended considerable time and resources in making the issues ripe for the Commission's decision. The Commission must take this information into account as it evaluates AT&T's request, and the Commission should conclude that the Hearing Designation Order must go forward.

A. EVEN IF THE COMMISSION GRANTS DISMISSAL FOR THE TRANSFER OF TITLE III LICENSES, IT SHOULD CONSIDER SEPARATELY WHETHER TO DISMISSAL THE APPLICATION TO TRANSFER TITLE II LICENSES.

⁶ 47 C.F.R. § 1.934(a) ("The Commission *may* dismiss any application in the Wireless Radio Services at the request of the applicant . . .") (emphasis added). Similarly, the Commission has discretion to permit amendments to applications if good cause is shown. 47 C.F.R. § 1.927(e).

⁷ 47 C.F.R. § 1.934(a)(1).

⁸ Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, 63 Fed. Reg. 68,904, 68,907 (Dec. 14, 1998).

⁹ *Environmentel, LLC v. FCC*, No. 10-1344, 2011 U.S. App. LEXIS 23080 at *10 (D.C. Cir., Nov. 18, 2011) (citing 5 U.S.C. § 706(2)(A)).

Additionally, since AT&T and T-Mobile are both common carriers, and T-Mobile has applied to transfer its certificates of public convenience and necessity obtained under Section 214 in addition to the transfer of Title III licenses. These Title II licenses are governed by a wholly different statute and set of regulations than licenses under Title III.¹⁰ The relevant language under Title II further emphasizes the discretionary nature of a request to dismiss. As Rule 1.748(a) states, “an application not designated for hearing *may* be dismissed without prejudice without prejudice at any time at the request of the parties” (emphasis added). It cannot be argued that the use of the word “may” denotes discretion – which the Commission should chose to exercise here.

After the Commission designates an application for hearing, the applicants must show good cause for the Commission to dismiss the application.¹¹ Courts have held that the Commission has broad expertise to provide supervisory functions at the policy level to ensure the functioning of the nation’s communications network,¹² pursuant to Congress’s intent to vest the Commission with abundant powers to coordinate and enforce a uniform national communications policy.¹³

B. THE COMMISSION HAS THE AUTHORITY TO PROTECT THE INTEGRITY OF ITS PROCESSES BY DENYING THE REQUEST TO WITHDRAW.

The Communications Act vests the Commission with authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as

¹⁰ 47 C.F.R. § 1.748(a). *See also* *Petition for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations*, CC Docket No. 96-159, at ¶ 22 (rel. July 15, 1997).

¹¹ 47 C.F.R. § 1.728(b).

¹² *U.S. v. Western Elec. Co., Inc.*, 531 F. Supp. 894 (D.N.J. 1981).

¹³ *Chastain v. American Tel. & Tel. Co.*, 351 F. Supp. 1320 (D.D.C. 1972).

may be necessary in the execution of its functions,”¹⁴ and even specifically authorizes the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”¹⁵ The Commission has further authority in the wireless services context to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of” Title III of the Communications Act.¹⁶ Title III authorizes and requires the Commission to determine “whether the public interest, convenience, and necessity will be served” by the granting of license applications.¹⁷ These laws give the Commission broad statutory authority to govern its own procedures and to ensure that those procedures operate justly and efficiently.

Pursuant to these laws, the Commission’s regulations permit the Commission to “waive specific requirements of the [wireless application procedure] rules on its own motion or upon request.”¹⁸ More broadly, the Commission may suspend, revoke, amend, or waive its general rules of practice and procedures on its own motion or upon a petition showing good cause.¹⁹ The Court of Appeals for the D.C. Circuit has specifically held that “[t]he FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”²⁰ The Commission has on multiple occasions exercised this authority to

¹⁴ 47 U.S.C. § 154(i).

¹⁵ 47 U.S.C. § 154(j).

¹⁶ 47 U.S.C. § 303(r).

¹⁷ 47 U.S.C. § 309.

¹⁸ 47 C.F.R. § 1.925(a).

¹⁹ 47 C.F.R. § 1.3.

²⁰ *Northeast Cellular Tel. Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

waive its own rules pursuant to Rule 1.3 to safeguard the public interest.²¹ The Commission is not powerless to prevent an applicant from capitalizing upon a procedural loophole or from playing the procedures of two branches of government against each other to maximize its own profit at the expense of the public interest. If a party to a proceeding attempts to appeal to a Commission procedural rule as an excuse to game the system, the Commission has the power to waive the rule at issue and ensure that its regulations encourage the fair and efficient administration of the laws.

II. EVEN IF THE COMMISSION ALLOWS AT&T TO WITHDRAW THE APPLICATION, IT SHOULD PUBLISH THE HEARING DESIGNATION ORDER IN SOME FORM.

Regardless of AT&T's withdrawal request, the Commission should issue the proposed Hearing Designation Order. The Commission, as the expert agency in this proceeding, has spent seven months collecting evidence and carefully evaluating whether the proposed transaction will further the public interest. Applicants have made no secret of their desire to short-circuit a true review on the basis of facts via a procedural loophole. But the public deserves for the Commission's determinations to see the light of day. As AT&T is well aware, issuance of the HDO will prove invaluable to the determination of the anti-trust complaint. Indeed, for this very reason AT&T has sought to forestall the request.

Finally, the equity interests of the public and other merger opponents, who have invested millions of dollars and thousands of hours in developing the record, weigh heavily here. AT&T must not be allowed to triumph through use of its bottomless war chest when the facts are so

²¹ See *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Al-Ishan Academy South Ozone Park, New York, et al.*, Order, CC Docket No. 02-6 (rel. Dec. 29, 2010); *Review of the Emergency Alert System*, Order, EB Docket No. 04-296 (rel. Nov. 23, 2010); *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order (rel. Aug. 13, 2010).

clearly against it. To allow AT&T to exhaust the far more limited resources of public interest opponents by withdrawing the application at the end of the process, only so that it can refile under more favorable conditions after its opponents have spent their resources, is clearly contrary to the public interest. Accordingly, even if the Commission determines that AT&T may withdraw its Application, the Commission should issue the Hearing Designation Order in some form.

The Commission may vote on the Hearing Designation Order as a declaratory ruling; establishing an automatic formal evidentiary hearing if AT&T and Deutsche Telekom file their application again in the future. The Communications Act gives the Commission “full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter.”²² Section 403 gives the Commission “the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had”²³ With this authority, the Commission may issue a declaratory ruling that lays out how AT&T and Deutsche Telekom’s transfer application will automatically be handled if the parties

²² 47 U.S.C. § 403. The Commission’s rules permit the Commission to “on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations.” 47 C.F.R. § 1.1. The procedure used in such an investigation shall “be such as in the opinion of the Commission will best serve the purposes of such proceedings.” *Id.*

²³ 47 U.S.C. § 403.

re-file the application in the future.²⁴ The declaratory ruling should automatically designate the application for a formal administrative hearing and incorporate all documents filed in Docket No. 11-65 in the new application proceeding. Otherwise, AT&T and Deutsche Telekom would benefit from draining the time and resources of the application's opponents, resulting in an incomplete record for the Commission or an adjudicatory officer to consider.

²⁴ 47 C.F.R. § 1.2(a) (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

CONCLUSION

The Commission can and should deny AT&T's request to withdraw its transfer application at the eleventh hour, after commenters have expended so much time and resources creating a full record that establishes the material questions of fact raised by AT&T's application. Delay will not serve the swift and just administration of the laws, and the Commission need not indulge the applicants' attempts to twist neutral agency procedures into a contest of gamesmanship. In fact, the Commission's failure to act now would have the effect of delaying the process and would benefit AT&T at the expense of T-Mobile by freezing T-Mobile in place. The undersigned urge the Commission to forge ahead with a Hearing Designation Order so the agency can develop a complete record for the Commission to evaluate the consequences this merger will have on the public interest.

Respectfully submitted,

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