IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

NO. 18-5214

---

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLANT,

V.

AT&T INC.; DIRECTV GROUP HOLDINGS, LLC;
AND TIME WARNER INC.,

DEFENDANTS-APPELLEES.

---

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
NO. 1:17-CV-2511 (HON. RICHARD J. LEON)

---

# BRIEF OF FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

---

THOMAS M. JOHNSON, JR.
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

## TABLE OF CONTENTS

Table of Authorities ..... ii

Interest of the Federal Communications Commission ..... 1

Argument ..... 1

# TABLE OF AUTHORITIES

## CASES

*Mobilfone of Ne. Pa., Inc. v. FCC*, 682 F.2d 269 (D.C. Cir. 1982) ..... 4

*United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) ..... 5

## ADMINISTRATIVE MATERIALS

* *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016 (2003) ..... 3, 4

* *Applications of Comcast Corp.*, 26 FCC Rcd 4238 (2011) ..... 5, 6

## STATUTES

15 U.S.C. § 18 ..... 4

47 U.S.C. § 310(d) ..... 2

## REGULATIONS

* 47 C.F.R. § 1.17(a)(1) ..... 3

* 47 C.F.R. § 1.17(a)(2) ..... 3

** Cases and other authorities principally relied upon are marked with asterisks.*

## INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the Federal Communications Commission respectfully submits this brief as amicus curiae in support of neither party. In issuing its ruling in this case, the district court weighed the relevance of certain documents that had been submitted by AT&T and DirecTV in previous FCC proceedings in which the Commission reviewed license transfers associated with proposed mergers. While the Commission takes no position on the relevance of any specific document in this case or the ultimate outcome of this appeal, it is concerned that the district court's opinion could be read to misconstrue the nature of FCC adjudicatory proceedings in two key respects that diminish the evidentiary value of documents submitted to the Commission. The FCC therefore respectfully submits this brief to protect its institutional interest in a proper understanding of its rules and the integrity of its own proceedings.

## ARGUMENT

In seeking to block the merger of AT&T and Time Warner under the Clayton Act, the Department of Justice sought to introduce into evidence documents that AT&T and DirecTV previously submitted to the Commission in connection with prior proposed mergers—in which the Commission plays a role in evaluating license transfers between two companies to determine

whether such transfers are in the public interest. *See* 47 U.S.C. § 310(d).[1] The United States claims that such documents support its position in this litigation that "the economics of bargaining applies to affiliate fee negotiations and predicts that a vertical merger like AT&T-Time Warner results in higher fees." U.S. Br. 42. The district court, however, held that the documents were of limited evidentiary value. *See* JA __-__ (Op. 79-85).

While the Commission takes no position on the relevance of any document in this case, it is concerned that two of the rationales supplied by the district court for discounting the probative value of submissions made to the FCC could reflect a misunderstanding of Commission procedures. The Commission therefore respectfully submits this brief to aid the Court in understanding how Commission procedures could bear on the weight to accord to documents that the United States has introduced in this matter.

*First*, the district court acknowledged that in several filings with the FCC in previous proceedings, AT&T and DirecTV had made statements that could be "somewhat probative" of the increased-leverage bargaining theory that the United States urged the court to apply in this case. JA__-__ (Op. 80-81). The district court reasoned, however, that because AT&T and DirecTV

[1] The Commission did not review the Time Warner-AT&T transaction, and therefore takes no position on whether the proposed merger should proceed or the ultimate outcome of this appeal.

"acted as competitors to (or customers of) distributors whose competitive positions would be affected by FCC review," the court was, "[f]or that reason alone, . . . hesitant to assign any significant evidentiary value to [AT&T's and DirecTV's] prior regulatory filings." JA __-__ (Op. 81-82). The district court's apparent hesitancy on this point is misplaced. To the contrary, the Commission's rules require *all* regulated parties—whether applicants seeking to transfer licenses in connection with a proposed merger or competitors who oppose the merger—to abide by the same standard of truthfulness in adjudicatory proceedings.

The FCC's rules provide that, "[i]n any investigatory or adjudicatory matter within the Commission's jurisdiction, . . . no person subject to this rule shall," in any written submission, either intentionally or without reasonable basis "provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading." 47 C.F.R. § 1.17(a)(1), (2). This duty to be truthful and accurate "extend[s] to all regulatees and not just to applicants." *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016, 4017 ¶ 4 (2003). The Commission takes these obligations seriously, as evidenced by the fact that its rule prohibits not only intentional misrepresentations, but

also inaccurate statements submitted due to negligence. *See id.* at 4020-21 ¶ 10. AT&T and DirecTV were subject to this obligation when they submitted comments in earlier FCC merger proceedings. Thus, there was no reason for the district court to treat those comments as less credible simply because AT&T and DirecTV were "competitors" of the merger applicants in those proceedings (rather than the applicants themselves).

*Second*, the district court suggested, through citation to the Commission's prior review of license transfers connected to the Comcast-NBCU merger, that the prior FCC filings by AT&T and DirecTV were less probative here because of the "differences" between the "FCC's 'public interest' review" and the Government's "burden for 'block[ing] a transaction' under Section 7" of the Clayton Act, 15 U.S.C. § 18. JA__ (Op. 83). While it is correct that the Commission's "public interest" review is broader in certain respects than traditional antitrust analysis, the Commission has historically included competition analysis as one component of its public interest review and has looked to the Antitrust Division's merger guidelines for guidance when doing so. *See, e.g.*, *Mobilfone of Ne. Pa., Inc. v. FCC*, 682 F.2d 269, 272 (D.C. Cir. 1982) ("It has long been settled that antitrust considerations are material to the public interest as defined by section 309 [of the Communications Act]."); *United States v. FCC*, 652 F.2d 72, 88 (D.C.

Cir. 1980) (when the FCC evaluates a proposed transaction under the public interest standard, it "seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors"); *Applications of Comcast Corp.*, 26 FCC Rcd 4238, 4248 ¶ 24 (2011) (*Comcast-NBCU Order*) (the FCC's "competitive analysis" of proposed transactions "forms an important part of the public interest evaluation" and "is informed by … traditional antitrust principles"). Indeed, before it approved the license transfers connected to the merger of Comcast and NBCU, the Commission evaluated the competitive harms that would result from the transaction. *See Comcast-NBCU Order*, 26 FCC Rcd at 4382-4404 (App. B).

In doing so, the FCC found, among other things, that "vertical integration of NBCU's programming and Comcast distribution assets would improve the bargaining position of the integrated firm when negotiating the sale of programming to one of Comcast's video distribution rivals because some of the rival's subscribers will shift to Comcast." *Comcast-NBCU Order*, 26 FCC Rcd at 4391 (App. B ¶ 37). The integrated firm would thus be able "to extract higher prices" from rival video programming distributors "than pre-transaction NBCU was able to" negotiate. *Ibid.* To prevent such

anticompetitive conduct, the FCC imposed certain conditions on the Comcast-NBCU transaction. *Id.* at 4259-62 ¶¶ 49-59.

In determining that the Comcast-NBCU merger would increase the bargaining leverage of the merged firm in programming negotiations, the FCC applied the same "[s]tandard bargaining theory" that formed the basis for the government's suit to block the AT&T-Time Warner merger. *See Comcast-NBCU Order*, 26 FCC Rcd at 4391 (App. B ¶ 37). Applying "a Nash bargaining model," the Commission concluded that the proposed Comcast-NBCU merger would increase the merged firm's bargaining leverage "due to the expected gain in subscribers to Comcast cable if programming is withheld from a rival" video programming distributor. *Id.* at 4393 (App. B ¶ 39). DirecTV made the same point in a filing with the FCC concerning the Comcast-NBCU transaction, arguing that the merger "would enable Comcast to raise the prices paid by its [distributor] rivals for NBCU programming." JA__ (PX0441-005). AT&T made this point more broadly in another FCC proceeding, arguing that cable operators with affiliated programming "attempt to use their control over such programming to try to artificially limit competition in downstream video distribution markets." JA__ (PX-442-004).

In short, given that the Commission analyzes competition as one component of its public interest review of license transfers, the district court erred in suggesting that differences between these two standards made documents submitted to the Commission less probative of statements contained therein that relate to market analysis.

Respectfully submitted,

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

August 13, 2018

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1):

   ☒ this document contains 1325 words, *or*

   ☐ this document uses a monospaced typeface and contains _ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

*s/ James M. Carr*
James M. Carr
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

**CERTIFICATE OF FILING AND SERVICE**

I, James M. Carr, hereby certify that on August 13, 2018, I filed the foregoing Brief of Federal Communications Commission as Amicus Curiae in Support of Neither Party with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*s/ James M. Carr*
James M. Carr
Counsel