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

In the Matter of	)	
	)	
APPLICATIONS OF AT&T, INC. AND DEUTSCHE TELEKOM AG	)	WT Docket No. 11-65
	)	
	)	
For Consent to Assign or Transfer Control of Licenses and Authorizations	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 2012 **Released: May 14, 2012**

By the Commission: Commissioner Rosenworcel not participating.

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review by the Diogenes Telecommunications Project (DTP), seeking review of a decision by the Office of General Counsel (OGC) denying DTP's complaint against AT&T, Inc. (AT&T) for violation of the ex parte rules.

II. BACKGROUND

2. DTP's complaint is related to the now withdrawn, proposed AT&T/T-Mobile transaction, which was the subject of WT Docket No. 11-65.[1] This matter was designated "permit-but-disclose" for purposes of the Commission's ex parte rules.[2] Thus, under 47 C.F.R. § 1.1206, written ex parte presentations and a summary of oral ex parte presentations had to be filed in the record of the proceeding.[3] DTP's complaint[4] alleged that AT&T failed to make the filings required by the rule.

[1] Because ex parte violations are subject to sanctions, the withdrawal of the applications does not moot the complaint.

[2] *See* Commission Announces That The Applications Proposing The Transfer Of Control Of The Licenses And Authorizations Held By T-Mobile USA, Inc. And Its Subsidiaries From Deutsche Telekom AG To AT&T, Inc. Have Been Filed And Permit-But-Disclose *Ex Parte* Procedures Now Apply, Public Notice, DA 11-722 (Apr. 21, 2011).

[3] A presentation is defined as a communication directed to the merits or outcome of the proceeding. *See* 47 C.F.R. § 1.1202(a). An ex parte presentation is a presentation that, if written, is not served on all the parties to the proceeding and if oral, is made without giving the parties advance notice and an opportunity to be present. *See* 47 C.F.R. § 1.1202(b).

[4] *See* Motion For An Order To Cease And Desist From Violations Of The Commission's Ex Parte Rules And To Dismiss The Applications, filed October 24, 2011, by DTP.

3. DTP's complaint stated:

> AT&T has engaged in an all out media campaign in the Washington, D.C. area for the purpose of influencing Federal Communications Commission (FCC) decision making personnel to grant the [applications related to the proposed AT&T/T-Mobile transaction]. Its issue oriented radio, television, and newspaper advertisements constitute oral and written presentations to the FCC in a permit-but-disclose proceeding. In failing to file memoranda documenting these ex parte presentations, AT&T has violated the FCC's ex parte rules and must be made to cease and desist this unlawful practice. Furthermore, since the improper oral and written presentations were made to all Commission decision making personnel, there can be no recusal of the tainted personnel. Therefore, the only solution consistent with the FCC's rules is to dismiss the applications with prejudice.[5]

4. OGC held that AT&T's mass media advertisements did not constitute presentations to decision-makers and, therefore, did not have to be reported under the ex parte rules.[6] OGC found that the advertisements were directed to the public at large and not specifically to decision-making personnel. OGC also found that the advertisements were not the type of undisclosed communications that the ex parte rules are primarily concerned with, because their public character gave interested parties an opportunity to respond. Further, OGC found that imposing sanctions based on such public speech would raise First Amendment concerns.[7]

III. APPLICATION FOR REVIEW

5. In its application for review,[8] DTP contends that AT&T's advertisements should be deemed presentations to decision-makers within the scope of the ex parte rules, and thus be subject to the filing requirements of section 1.1206. DTP asserts that AT&T's advertisements were directed to Commission decision-makers and not to the public at large.[9] In DTP's view, because AT&T's advertisements were distributed only in the Washington, D.C. area rather than nationally, their intent was to "pressure the FCC directly or indirectly, to grant [AT&T's] applications."[10] DTP contrasts these ads to ads in national or major markets intended to bolster AT&T's image or sell its products.

6. DTP proposes that the ex parte rules should be interpreted consistent with the definition of the term "lobbying contact" in the Lobbying Disclosure Act of 1995.[11] DTP observes that the term "lobbying contact" would include mass media advertising but for an express exception in that statute.[12]

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[5] *See id.* at 1-2 (footnotes omitted).

[6] *See* Letter from Joel Kaufman, Associate General Counsel to Arthur V. Belendiuk (Nov. 10, 2011).

[7] *See id.* at 2.

[8] *See* Application for Review, filed November 29, 2011, by DTP (AFR).

[9] *See* AFR at 2.

[10] *See id.* DTP analogizes AT&T's advertising campaign to picketing FCC headquarters. *See id.* at 3.

[11] *See id.* at 2-3; 2 U.S.C. §§ 1601 *et seq.*

[12] *See* 2 U.S.C. §§ 1602(8)(A) (defining lobbying contact as "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative official that is made on behalf of a client [with regard to specified topics]"); 1602(8)(B)(iii) (excluding from the term "lobbying contact" material distributed and made available to the public through the mass media).

DTP urges that the ex parte rules contain no similar exception that excludes mass media advertising from the scope of presentations to decision-makers.

7. DTP also disputes OGC's observation that the public nature of AT&T's advertising campaign gave the public notice of AT&T's communications.[13] DTP points out that only people in the Washington area would have known about AT&T's advertisements, whereas, if AT&T had complied with the filing requirements of the ex parte rules, people interested in the AT&T/T-Mobile proceeding could have accessed AT&T's filings in the Commission's Electronic Comment Filing System (ECFS) from anywhere in the country.

8. Finally, DTP asserts that OGC did not explain the nature of the "significant First Amendment concerns" that it raised.

III. DISCUSSION

9. We agree with OGC that mass media advertisements do not constitute presentations to decision-makers within the scope of section 1.1206. As OGC found, this interpretation is consistent with the primary purpose of the ex parte rules, which is preventing undisclosed communications that taint the fairness of the administrative process because they convey information to decision-makers that interested parties do not have an opportunity to rebut.[14] Mass media advertising is public communication of a character different from the type of private communication with decision-makers that the ex parte rules are designed to address.

10. We do not find any of DTP's arguments to the contrary persuasive. We disagree with DTP's contention that the fact the ads ran only in the Washington area and not all interested persons were necessarily aware of the ad campaign is pertinent to the analysis. As noted above, the ads were public in character, not private communications directed to decision-making personnel; the fact that the ads did not run nationwide does not change this analysis.

11. We also disagree with DTP's contention that because "mass media advertising" is not specifically excluded from the definition of "presentation to decision-making personnel" in our ex parte rules, we must read these rules to cover "mass media advertising." We do not find the statutory scheme of the Lobbying Disclosure Act to be controlling when interpreting our own ex parte rules, which are not statutorily required. DTP misapplies the tenet of statutory construction that where Congress includes language in one section of a statute but not in another, it is generally presumed that the disparity was intentional. This tenet has no applicability to different statutes,[15] let alone to a statute and an unrelated administrative regulation.

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[13] *See id.* at 3.

[14] *See Ex Parte Complaint of Marcus Spectrum Solutions, LLC,* 26 FCC Rcd 2351, 2355-56 ¶ 15 (2011) (because the purpose of the ex parte rules is to ensure the fairness and integrity of Commission decision-making, the Commission is principally concerned with ex parte violations that deprive interested persons of notice and an opportunity to respond to the violator's presentations); 47 C.F.R. § 1.1200(a) (the purpose of the ex parte rules is to ensure the fairness and integrity of Commission decision-making); *see also Power Auth. of the State of N.Y. v. FERC,* 743 F.2d 93, 110 (2d Cir. 1984) (finding the communication of undisclosed information to be a factor of particular significance in resolving the issue of whether ex parte contacts require the recusal of a decision-maker).

[15] *See Gomez-Perez v. Potter,* 553 U.S. 474, 486 (2008) (negative implication not applied to two provisions that were not considered or enacted together).

12. Nothing in our ex parte rules suggests that the rules are meant to apply to mass media presentations. Indeed, in some cases, the rules would be impossible to apply in the context of mass media advertisements. Our rules require, for example, that a filing summarizing an oral presentation include "the Commission employees who attended or otherwise participated in the presentation,"[16] a requirement which could not be applied to mass media advertisements.

13. Finally, we agree with OGC that applying our ex parte rules to mass media advertisements[17] could raise First Amendment concerns. Restrictions on even potentially misleading commercial advertising are permissible under the First Amendment *only* when they directly advance a substantial government interest and are not more extensive than is necessary to serve that interest.[18] We do not believe that imposing ex parte restrictions on mass media advertising is necessary to advance the governmental interest behind the ex parte rules. Further, section 1.1203 of the rules[19] bars all presentations, whether ex parte or not, during the sunshine period, which begins when an item is listed in a public notice for consideration at an agenda meeting. DTP's interpretation would have the effect of banning media advertising about such items entirely during that period, a result that is not contemplated by our rules. In sum, we believe that we should interpret our ex parte rules to avoid unnecessarily implicating the First Amendment, particularly when such an interpretation is not supported by the overall purpose and structure of the rules.

IV. ORDERING CLAUSE

14. ACCORDINGLY, IT IS ORDERED, that the application for review by Diogenes Telecommunications Project IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[16] *See* 47 C.F.R. § 1.1206(b)(2).

[17] We do not assume, as DTP suggests (AFR at 3), that picketing FCC headquarters is subject to the ex parte rules.

[18] *See, e.g., Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board,* 632 F.3d 212, 218, 228-29 (5th Cir. 2011) (finding that Louisiana law regulating the font size and speech rate of required disclaimers in advertising was not justified and therefore unconstitutional).

[19] 47 C.F.R. § 1.1203.