

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

In the Matter of
Application for Review of an
Order and Consent Decree of the
Enforcement Bureau by
Diogenes Telecommunications Project
File No.: EB-TCD-12-00000337
Acct. No.: 201332170011
FRN: 0005193701

ORDER

Adopted: June 3, 2014

Released: June 4, 2014

By the Commission:

I. INTRODUCTION

1. On May 7, 2013, the Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) adopted a Consent Decree resolving and terminating its investigation of AT&T, Inc. (AT&T or Company), for alleged misconduct in providing Telecommunications Relay Service (TRS) and in seeking compensation from the fund that supports TRS. By its terms, the Consent Decree constitutes a final settlement of the investigation, and in exchange for that finality, AT&T has adopted certain compliance measures designed to deter future misconduct and paid a combined total of \$18,250,000 to the U.S. Treasury and to reimburse the TRS Fund. On June 4, 2013, Diogenes Telecommunications Project (DTP)—which was not a party to, or in any way involved in or affected by, the investigation or its resolution—filed an Application for Review (AFR), asking the Commission to set aside the Consent Decree and investigate the matter anew. As explained below, DTP has no standing to challenge the Consent Decree, and we accordingly dismiss the AFR for the reasons discussed below.

II. BACKGROUND

2. TRS is a telephone transmission service that enables persons who are deaf, hard of hearing, or deaf-blind, as well as those with speech disabilities, to communicate by wire or radio with hearing individuals in a manner that is functionally equivalent to voice communication services utilized by those without such disabilities.1 The Commission has approved various forms of TRS, including traditional Text Telephone, Video Relay Service (VRS), and Internet Protocol Relay Service (IP Relay).2 Section 225 of the Communications Act of 1934, as amended (Act), directs the Commission to adopt implementing regulations,3 and to this end, the agency has, among other things, adopted a numbering system to assign ten-digit numbers to TRS users, allowing such users to more easily make and receive

1 See 47 U.S.C. § 225(a)(3). See also 47 C.F.R. § 64.601(a)(22).

2 See 47 U.S.C. § 64.601.

3 See 47 U.S.C. § 225.

calls, ensuring direct and automatic routing of emergency calls,<sup>4</sup> and reducing the misuse of IP Relay.<sup>5</sup> Related to this numbering system, the Commission has required TRS providers to register new users and assign them a ten-digit number before providing any service.<sup>6</sup> Further, the Commission requires that TRS providers verify information provided by users during registration, including the user's name and address, and to obtain a self-certification whereby the user verifies that he or she has a medically recognized hearing or speech disability necessitating his or her use of TRS.<sup>7</sup>

3. The Bureau issued a Letter of Inquiry (LOI) and Supplemental LOI to AT&T seeking detailed information concerning the Company's VRS and IP Relay service offerings, including the handling of emergency calls and the registration and verification of users, among other things.<sup>8</sup> Along with the Supplemental LOI, the Bureau simultaneously issued a subpoena to AT&T for certain records related to TRS reimbursement requests.<sup>9</sup> AT&T timely filed responses to these inquiries. AT&T approached the Bureau about the possibility of settlement and, after negotiating the terms, on May 7, 2013, the Bureau released the Order and Consent Decree (Consent Decree or *AT&T Order/CD*) settling the investigation.<sup>10</sup>

4. The *AT&T Order/CD* resolved the enforcement investigation. The financial terms of the Consent Decree required AT&T to reimburse the TRS Fund \$7,000,000 and to pay \$11,250,000 to the U.S. Treasury. The non-financial terms required the Company to develop a compliance plan, which obligated the Company, among other things, to establish and maintain certain operating procedures, install a compliance officer, and train personnel. At this time, AT&T no longer provides VRS and IP Relay services.

5. On June 4, 2013, DTP filed an AFR seeking Commission review of the *AT&T Order/CD*.<sup>11</sup> The AFR alleges, among other things, that the *AT&T Order/CD* "is in conflict with

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<sup>4</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591, 11592, para. 1 (2008).

<sup>5</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 809–810, para. 38 (2008) (*Second Internet-Based TRS Order*).

<sup>6</sup> See *id.* at 801–802, para. 21. With respect to existing users, the prohibition applied after November 12, 2009. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 24 FCC Rcd 8000 (2009) (extending the initial deadline from June 30, 2009 to November 12, 2009).

<sup>7</sup> *Second Internet-Based TRS Order*, 24 FCC Rcd at 809, para. 37. The Commission recently prohibited Internet-based TRS providers from handling calls made by new users prior to taking reasonable measures to verify users' registration information, i.e., eliminating the "guest-user" policy. See *Misuse of Internet Protocol (IP) Relay Service*, First Report and Order, 27 FCC Rcd 7866 (2012).

<sup>8</sup> See Letter from Richard A. Hindman, Chief, TCD, FCC Enforcement Bureau, to Celia Nogales, Assistant Vice President, AT&T Services, Inc. (Mar. 11, 2011) (on file in EB-TCD-12-00000337); Letter from Richard A. Hindman, Chief, TCD, FCC Enforcement Bureau, to Jackie Flemming, Assistant Vice President, External Affairs Regulatory, AT&T Services, Inc. (Jan. 23, 2012) (on file in EB-TCD-12-00000337).

<sup>9</sup> See Subpoena from Richard A. Hindman, Chief, TCD, FCC Enforcement Bureau, to Jackie Flemming, Assistant Vice President, External Affairs Regulatory, AT&T Services, Inc. (Jan. 23, 2012) (on file in EB-TCD-12-00000337).

<sup>10</sup> *AT&T Inc.*, Order and Consent Decree, 28 FCC Rcd 5994 (Enf. Bur. 2013).

<sup>11</sup> Diogenes Telecommunications Project, Application for Review (filed June 4, 2013) (AFR).

established Commission rule, policy and practice, commits prejudicial procedural error and exceeds the authority delegated to the Enforcement Bureau.”<sup>12</sup>

### III. DISCUSSION

6. Section 1.115(a) of the Commission’s rules (Rules) specifically provides that “[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.”<sup>13</sup> However, Section 1.115(a) makes plain that “[a]ny application for review which fails to make an adequate showing in this respect will be dismissed.”<sup>14</sup> In the present case, in order to establish standing, DTP “must allege facts sufficient to demonstrate” that allowing the *AT&T Order/CD* to stand “would cause it to suffer a direct injury.”<sup>15</sup> Moreover, DTP “must demonstrate a causal link between the claimed injury and the challenged action. To demonstrate a causal link, [DTP] must establish that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.”<sup>16</sup> As a threshold matter, DTP was not a party to the Bureau’s case against AT&T and fails to show that it is “aggrieved” by the Bureau’s action, as required by our Rules. Consequently, and as discussed more fully below, DTP lacks standing, and we therefore dismiss the AFR.

#### A. DTP Cannot Demonstrate a Direct or Personal Injury

7. The AFR does not allege any direct or personal injury to DTP as an organization or to any of its members. Instead, it offers only a generalized and purely hypothetical injury. Namely, DTP requests that the Commission review and set aside the *AT&T Order/CD*, and it speculates that there might possibly be some injury to one of its members (Ms. Laschuk, in her capacity as a subscriber to AT&T Mobility) from the Bureau’s resolution of the enforcement action.<sup>17</sup> However, the AFR does not allege that Ms. Laschuk—or anyone else—paid more or less to AT&T after the *AT&T Order/CD* was adopted. In fact, DTP fails to demonstrate *any* injury at all to itself or its members, let alone an actual or threatened injury directly resulting from the *AT&T Order/CD*.

8. DTP also asserts that there may have been an injury to the TRS Fund. However, that would not be a direct injury to itself or its members and, like the alleged harm to Ms. Laschuk, is wholly speculative.<sup>18</sup> In other words, even if DTP had a plausible claim that the TRS Fund had been injured, nothing in the AFR supports the suggestion that an injury to the TRS Fund is tantamount to an injury to DTP or its members.

9. In addition, DTP repeatedly complains about the amount of detail contained in the *AT&T Order/CD*, declaring that it “falls far short of the standard of openness required for actions of the Commission . . . .”<sup>19</sup> To the extent DTP is arguing that it suffered some sort of procedural injury because the negotiated Consent Decree does not contain more information, its allegations take the form of bald

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<sup>12</sup> AFR at 1.

<sup>13</sup> 47 C.F.R. § 1.115(a).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Applications of AT&T Inc. & Deutsche Telecom AG*, 27 FCC Rcd 4423, 4425, para. 8 (2012) (denying an Application for Review filed by Diogenes for lack of standing).

<sup>16</sup> See *id.* (DTP “may meet these standards in its own right or may demonstrate that one or more of its members meets these requirements.”).

<sup>17</sup> See AFR at 2 (“To the extent DTP members . . . are made to pay more than required to support the TRS fund, i.e. overcharged, they are harmed . . . .”) (emphasis added).

<sup>18</sup> *Id.* at 3 (“ . . . the extent to which the TRS Fund was harmed. . . .”) (emphasis added).

<sup>19</sup> *Id.* at 7.

statements unsupported by case law, regulations, statutes, or any other authority.<sup>20</sup> DTP does not and cannot point to any authority delineating the referenced “standard of openness” DTP asserts governs a consent decree, nor has it identified any source suggesting that DTP has a personal right to such information.<sup>21</sup>

10. More generally, DTP has no right to participate in the Bureau’s settlement with AT&T. Neither the Act nor the Rules give any third parties such as DTP a right to be notified of the Commission’s settlement efforts, let alone a right to participate in them.<sup>22</sup> In fact, confidentiality rules generally prevent the Commission from releasing to the public information provided to the Commission in a law enforcement investigation.<sup>23</sup>

#### **B. DTP Has Not Suffered an Injury Caused by the AT&T Order/CD**

11. DTP never alleges (let alone describes with particularity) any causal connection between the speculative, generalized harm it asserts in the AFR and the Consent Decree. In fact, DTP admits it cannot make any causal connection between the Consent Decree and one of the harms it alleges, conceding that “its members have no way of knowing whether the Consent Decree afforded adequate reimbursement to the TRS Fund . . . .”<sup>24</sup> In other words, the *AT&T Order/CD* may have resulted in a *greater* dollar amount for taxpayers than would have been recovered through litigation or other means.<sup>25</sup>

#### **C. Setting Aside the AT&T Order/CD Will Not Prevent or Redress any Alleged Injury**

12. DTP also makes no effort to show that the relief sought (Commission action setting aside the *AT&T Order/CD* and opening a new proceeding) would in any way ameliorate any hypothetical injury. AT&T has already paid the \$18.25 million required under the Consent Decree.<sup>26</sup> Nothing in the AFR suggests how its members would benefit (or how any alleged injury would be ameliorated) if we were to set aside the *AT&T Order/CD*, return the money to AT&T, and initiate an enforcement proceeding against AT&T.

13. Moreover, DTP does not provide any authority for the Commission to create the type of proceeding requested. The AFR outlines a new, unorthodox proceeding in requesting that “the

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<sup>20</sup> DTP also argues that the Bureau exceeded its delegated authority by entering into the Consent Decree. AFR at 11–12. This argument fails. The Bureau’s investigation, its findings, and its decision to settle the investigation via consent decree are all squarely within the authority delegated to the Bureau pursuant to Section 0.111 of the Rules. See 47 C.F.R. § 0.111(a). Indeed, the Bureau’s decision to enter into a consent decree is generally not even reviewable by the courts. Courts have found that “the FCC’s decisions about the initial scope of the enforcement action and its decision to enter into [a] Consent Decree are committed to the agency’s nonreviewable discretion . . . .” *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1211 (D.C. Cir. 1993). “[F]ederal agencies are presumed to have the discretion to settle or dismiss an enforcement action” and the *AT&T Order/CD* is “an appropriate exercise of the Commission’s broad discretion to settle enforcement actions.” *U.S. Cellular Corp. Constructed Tower Near Fries, Virginia*, Order, 24 FCC Rcd. 8729, 8737–38, paras. 25–26 (2009).

<sup>21</sup> See AFR at 7–9.

<sup>22</sup> See, e.g., 47 U.S.C. § 503; 47 C.F.R. § 1.80.

<sup>23</sup> See 47 C.F.R. §§ 0.459, 19.735–203.

<sup>24</sup> AFR at 2.

<sup>25</sup> DTP discusses another lawsuit involving the government and AT&T. See AFR 5–7. However, the Commission was not a party to that case and the *AT&T Order/CD* did not resolve it. Any circumstances or findings in that unrelated case create no connection between the *AT&T Order/CD* and DTP’s purported injury.

<sup>26</sup> AT&T has also paid an additional \$3.5 million to resolve any remaining liability related to TRS violations under the False Claims Act. See Press Release, Department of Justice, AT&T Agrees to Settle Allegations Involving IP Relay Servs. Provided to Hearing- and Speech-Impaired Persons (Nov. 7, 2013) (on file with author).

Commission *initiate a proceeding* on AT&T's apparent rule violations in which the public is given notice and the opportunity to participate."<sup>27</sup>

14. Accordingly, we find that DTP has failed to show, as required by our Rules, that it or its member Ms. Laschuk was "aggrieved" in any manner by the Bureau's action. And, pursuant to Section 1.115(a) of the Rules, "[a]ny application for review which fails to make an adequate showing in this respect will be dismissed."<sup>28</sup> Therefore we decline to review or set aside the *AT&T Order/CD* and dismiss the AFR for lack of standing.<sup>29</sup>

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i) and 5(c) of the Act,<sup>30</sup> and Section 1.115 of the Rules,<sup>31</sup> that the Application for Review filed by Diogenes Telecommunications Project on June 4, 2013, **IS DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>27</sup> AFR at 12 (emphasis added).

<sup>28</sup> 47 C.F.R. § 1.115(a).

<sup>29</sup> See *Friends of the Earth, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd. 23622, 23622-23, paras. 2-3 (2003).

<sup>30</sup> 47 U.S.C. §§ 154(i), 155(c).

<sup>31</sup> 47 C.F.R. § 1.115.