

September 1, 2011

Julius Genachowski
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WT 11-65, Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations

Dear Chairman Genachowski:

In light of yesterday's action by the Department of Justice to block the merger of AT&T and T-Mobile,¹ Public Knowledge (PK) asks the Commission to immediately deny the companies' application to transfer control of licenses and authorizations as violative of Section 314 of the Communications Act,² which prohibits the FCC from granting any license transfers that would have the effect of substantially reducing competition in any market with international components.

The Department of Justice has concluded that the merger would significantly lessen competition in two nationwide³ product markets: consumer mobile wireless telecommunications services⁴ and enterprise/government mobile wireless telecommunications services.⁵ Even if it restricts its analysis to these two markets (which involve carriage of international traffic),⁶ the FCC should follow the DoJ's reasoning and disallow the merger under Section 314. At a minimum, the DoJ's analysis demonstrates that there are substantial questions of material fact as to whether the transfer of licenses would violate 314, which requires that the Commission refer the matter to a hearing.

Additionally, a reduction in competition in the mobile wireless telecommunications markets directly translates to a reduction in other markets that are relevant to a Section 314 analysis: namely, the international roaming market and the global handset market. Under the DoJ's Clayton Act analysis, many of what PK has identified as discrete markets

¹ Complaint of the United States in *United States v. AT&T*, Case 1:11-cv-01560 (Dist. Ct. D.C. 2011), available at <http://www.justice.gov/atr/cases/f274600/274613.pdf>.

² 47 U.S.C. § 314.

³ Complaint ¶ 21.

⁴ Complaint ¶ 12.

⁵ Complaint ¶ 13.

⁶ In its filings before the Commission, PK has argued for a more expansive market analysis that analyzes such products and services as special access, handsets and applications, and roaming as discrete markets. PK notes that the broader markets examined by the DoJ do not preclude the Commission or DoJ from undertaking a more detailed market analysis later.

for Section 314 purposes, the DoJ views as *components of or inputs to* mobile wireless telecommunications services. These are relevant “lines of commerce” for both Clayton Act and Section 314 purposes,⁷ and substantially reduced competition “in any line of commerce” provides grounds to block the license transfer under 314. Thus, whether or not the Commission separately identifies all of the markets that are relevant for its various statutory duties, the evidence in the record already requires that the Commission deny the transfer of licenses under 314.

* * *

Section 314 requires that the FCC deny the transfer of any licenses when the effect would be substantially lessened competition in any market or line of commerce with international components or effects. In its Complaint, the DoJ has presented a *prima facie* case that the merger would substantially lessen competition in mobile telecommunications services markets. Public Knowledge,⁸ foreign carriers,⁹ foreign governments,¹⁰ and others¹¹ have recognized these markets and associated lines of commerce as having international components. Therefore, pursuant to Section 314, the FCC must deny the application immediately.

According to the DoJ, mobile telecommunications services allow their users “to engage in telephone conversations and obtain data services,”¹² using a variety of devices including mobile phones, computers, and data cards.¹³ Using these devices, consumers can make calls and exchange data with users and services located anywhere on earth. Mobile telecommunications services require a number of inputs. For example, both AT&T and T-Mobile must interconnect their networks with those of domestic and international carriers,

⁷ See *United States v. Aluminum Co. of America*, 377 US 271, 276-77 (1964) (a “line of commerce” can be a component of a larger market).

⁸ Reply Comments of Public Knowledge, WT Docket No. 11-65 (filed June 20, 2011), at 11, available at <http://www.publicknowledge.org/files/docs/PKATTTMOreplycomments.pdf>.

⁹ See, e.g., Comments of Japan Communications, Inc., and Communications Security & Compliance Technologies, Inc., WT 11-65 (filed May 31, 2011) (“Japan Communications”); Comments of Vodafone Group, WT 11-65 (filed May 31, 2011) (“Vodafone”).

¹⁰ See Comments of New Zealand Ministry of Economic Development, WT 11-65 (filed May 31, 2011) (“NZ Ministry”).

¹¹ See, e.g., Petition to Deny of Rural Telephone Group, WT 11-65 (filed May 31, 2011) at 34-35 (“RTG”); Petition of MetroPCS and NTelos, Inc. to Condition Consent, or Deny Application, WT 11-65 (filed May 31, 2011) at 48 (“MetroPCS/NTelos”) (“for those customers that require a GSM handset or international roaming, particularly travelling business executives, AT&T an T-Mobile may be the only game in town.”); Comments of Cablevision Systems Corp., WT 11-65 (filed May 31, 2011) at 15 (“Cablevision”) (both domestic and international GSM users “would have no alternative” post-transaction).

¹² Complaint ¶ 11.

¹³ Complaint ¶ 12.

obtain FCC licenses for spectrum use, build towers, and obtain backhaul.¹⁴ Mobile telecommunications services, in turn, have a number of components, including differentiated “price[s], network coverage, service quality, customer support, and device options.”¹⁵ As the DoJ also discusses, carriers such as AT&T and T-Mobile also provide roaming services to other carriers.¹⁶

Section 314 is an absolute prohibition on mergers with certain anti-competitive effects. Once its provisions are triggered, the Commission has no choice but to block the merger. It may not, for example, “balance” the harms the merger would cause with promises from the applicants to relocate outsourced jobs to the United States.¹⁷ As PK has argued before,¹⁸ the record before the FCC demonstrates that the merger would reduce competition in what the DoJ now recognizes as relevant product markets or as essential inputs to those markets. It prohibits any entity:

in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.¹⁹

The Commission has chosen to interpret this statute narrowly, holding that the absolute prohibition on the grant or transfer of a license occurs only in very narrow circumstances.

¹⁴ Complaint ¶ 11.

¹⁵ Complaint ¶ 37.

¹⁶ Complaint ¶ 35.

¹⁷ *E.g.*, Press Release of AT&T, AT&T to Bring 5,000 Call Center Jobs Back to U.S. Following T-Mobile Merger Closing, August 31 2011.

¹⁸ Petition to Deny of Public Knowledge and Future of Music Coalition, WT Docket No 11-65) (filed May 31, 2011), at 20-33, *available at* http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf.

¹⁹ 47 U.S.C. § 314.

Specifically, the Commission has held that the transaction must involve common carriers engaged in international communication,²⁰ and that the transaction must impact international communication, or have some other international impact.²¹ At times, the Commission has also suggested that a transfer of international assets must also be involved.²² Even so construed, this merger triggers Section 314. Both AT&T and T-Mobile are common carriers that carry common carrier traffic internationally. The merger would involve the transfer of assets internationally (AT&T would pay billions to Deutsche Telecom in Germany for T-Mobile) and would, as the DoJ demonstrates, substantially reduce competition in the consumer, enterprise, and government mobile telecommunications services markets, which involve the carriage of traffic internationally.

The carriage of international traffic alone as part of mobile wireless telecommunications services suffices to trigger the provisions of Section 314. But there are other international aspects to these services, which—whether analyzed as discrete markets or as “lines of commerce” or submarkets—provide independent grounds to block the transfer of licenses under 314. For example, as a Title II service requiring common carrier authorization under Section 214 of the Act,²³ international roaming is a component of the “mobile wireless telecommunications” markets identified by the DoJ. It consists of reciprocal agreements between domestic and international carriers to each carry traffic from the other’s customers when they are travelling abroad, and it is ultimately part of the service that AT&T and T-Mobile provide to their customers. The Commission has already received numerous submissions from foreign carriers,²⁴ foreign governments,²⁵ and

²⁰ *Application of General Telephone Co. of the Northwest, Inc.*, 17 FCC.2d 654, 657 (1969) (“*General Telephone Co.*”); *American Telephone & Telegraph Co. Lease and Maintenance of Equipment and Facilities for Private Communication Systems*, 22 FCC 1220, 1223 (1957).

²¹ *Applications of RCA Corp. (Transferors), and General Electric Co., (Transferee), for Transfer of Control of RCA Corporation and Its Wholly-Owned Subsidiary, National Broadcasting Company, Inc., Licensee of WNBC(AM), WYNY(FM) and WNBC-TV New York, New York; KNBC(TV), Los Angeles, California; WMAQ(AM), WKQX(FM) and WMAQ-TV, Chicago, Illinois; WJIB(FM), Boston, Massachusetts; KNBR(AM) and KYUU(FM), San Francisco, California; WKYS(FM) and WRC-TV, Washington, D.C.; and WKYC-TV, Cleveland, Ohio*, 60 Rad. Reg.2d (P&F) 563 (1986) ¶13 (“*RCA GE Transfer*”).

²² *See id.*

²³ Amendments of Parts 1 and 63 of the Commission’s Rules, 22 F.C.C.R. 11398, 11406 (2007) ¶¶19-22.

²⁴ *See, e.g.*, Comments of Japan Communications, Inc., and Communications Security & Compliance Technologies, Inc., WT 11-65 (filed May 31, 2011) (“*Japan Communications*”); Comments of Vodafone Group, WT 11-65 (filed May 31, 2011) (“*Vodafone*”).

²⁵ *See* Comments of New Zealand Ministry of Economic Development, WT 11-65 (filed May 31, 2011) (“*NZ Ministry*”).

others²⁶ that the combination of assets will “substantially lessen competition” in international roaming for GSM-based carriers, which would have direct effects on consumers and enterprises. The negative effects on international roaming, therefore, provide ample reason for the FCC to deny the transfer of licenses under Section 314.

The Commission has also identified “devices” as part of the mobile wireless telecommunications services offered by AT&T and T-Mobile.²⁷ A relevant product market themselves, devices are also a key line of commerce within mobile wireless telecommunications markets. They have clear international effects. In AT&T’s own words, “[t]he market for GSM handsets is *global*” (emphasis in original), “GSM is the standard that is used around the world,” and “at least 35 companies from all over the world” design and manufacture handsets for GSM networks.²⁸ The United States has recently served as a testbed of smartphone innovation—the two dominant smartphone platforms, Apple’s iOS and Google’s Android, were developed and first marketed here. As the DoJ recognizes, T-Mobile has been a disruptive and innovative player in the US market—for example, in marketing the first Android-based phone.²⁹ The elimination of a disruptive player in the US market would have international implications that could slow the pace of mobile handset innovation domestically and worldwide and reduce US international trade. Thus, the FCC must deny the transfer of licenses pursuant to Section 314.

PK appreciates the Commission’s thorough examination into whether it should grant the application to transfer licenses. The Commission’s review often remedies harms that antitrust law by itself cannot address. But the DoJ in this instance has chosen to block this merger entirely and has not attempted to “balance” its clear harms with pledges, commitments, or divestitures. The FCC should follow suit, and deny the application to transfer licenses under Section 314, or, at a minimum, refer the matter to a hearing.

Respectfully submitted,
/s Harold Feld
Legal Director
PUBLIC KNOWLEDGE

²⁶ See, e.g., Petition to Deny of Rural Telephone Group, WT 11-65 (filed May 31, 2011) at 34-35 (“RTG”); Petition of MetroPCS and NTelos, Inc. to Condition Consent, or Deny Application, WT 11-65 (filed May 31, 2011) at 48 (“MetroPCS/NTelos”) (“for those customers that require a GSM handset or international roaming, particularly travelling business executives, AT&T an T-Mobile may be the only game in town.”); Comments of Cablevision Systems Corp., WT 11-65 (filed May 31, 2011) at 15 (“Cablevision”) (both domestic and international GSM users “would have no alternative” post-transaction).

²⁷ Complaint ¶¶ 12, 37.

²⁸ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc., to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (June 10, 2011), at 149.

²⁹ Complaint ¶ 38.

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