

**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)	WT Docket No. 11-65
and Authorizations Held by T-)	
Mobile USA, Inc. and Its)	
Subsidiaries)	

**PETITION TO DENY OF PUBLIC KNOWLEDGE
AND FUTURE OF MUSIC COALITION**

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INTRODUCTION

Public Knowledge (PK) and the Future of Music Coalition (FMC) (collectively “PK/FMC”) petition the Commission to deny the above captioned application of AT&T and T-Mobile as contrary to the public interest. The transfer would create an unprecedented level of market concentration in the hands of AT&T, and would dramatically increase the danger of coordinated effects with similarly situated Verizon (with whom it would control over 80% of the market). In addition to the traditional concerns that permitting such market power in the hands of a single firm and allowing such a dramatic rise in market concentration generally will harm consumers and undermine the ability of surviving firms to compete, the combination would put AT&T—on its own or in coordination with Verizon—in a unique position to frustrate the Commission’s goals of encouraging disruptive innovation and promoting an open Internet. Because no divestiture or behavioral conditions can adequately address these concerns, the Commission must deny the Application.

If after giving the Applicants every possible benefit of the doubt, the merger would *still* fail a standard antitrust screen, the Commission must ask itself how it can possibly justify grant of the Application under any set of conditions. At some point, an Application crosses a line and becomes intrinsically inimical to the public interest. While it may difficult to define that line with precision, the inability of Applicants to meet their own public interest standard must surely indicate they have crossed this line.

SUMMARY

As the Commission has oft stated, its review of license transfers encompasses both traditional antitrust concerns and broader concerns that the merger serve the purposes of

the Communications Act and confer positive benefits to the public.¹ It follows that where a merger fails on antitrust grounds alone, it certainly fails the broader public interest standard employed by the Commission. The proposed transaction would create a vertically integrated telecommunications colossus, dominating the wireless world and extending or enhancing AT&T's market power in nearly all areas of the Commission's jurisdiction. Today, AT&T is the second largest wireless provider nationally (and either largest or second largest in numerous local markets). AT&T is also—in those territories where it offers these services—the dominant provider of special access service. AT&T is also one of the largest providers of residential broadband service (frequently the dominant provider of residential DSL services in its service territories), one of the top ten providers of MVPD services, and one of the largest national and international providers of enterprise data service. These advantages would work synergistically with AT&T's enhanced market power in the wireless market to the detriment of the Commission's policies to promote competition and protect consumers.

Under Any Market Definition, A Bad Deal For The Public

Even using the market definition most advantageous to the Applicants, AT&T's post-acquisition market share would be approximately 45%, well above the traditional trigger for market power concerns.² This would allow AT&T to exercise direct market power in the relevant product market for mobile voice and mobile data services and to exercise

¹ Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings, Memorandum Opinion & Order & Declaratory Ruling, 23 FCC Rcd 17444, ¶¶ 26-29 (2008) (hereinafter "Verizon/Alltel Order").

² Allen P. Grunes & Maurice E. Stucke, "Antitrust Review of the AT&T/T-Mobile Transaction," (2010) at 5. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850103 ("Grunes & Stucke"); Economics and Technology, Inc., "And Then There Were Three, AT&T Swallows T-Mobile," <http://econtech.com/newsletter/march2011/march2011a1.php> (March, 2011).

monopsony power over those businesses that use spectrum as a necessary “input” (such as handset and application providers). Further, in light of the already concentrated national and local markets for these services,³ the combination would dramatically increase the likelihood of coordinated action, particularly with similarly situated Verizon, which with AT&T would control 80% of the post-acquisition market. Given the trend to further market differentiation noted by many analysts distinguishing the market for high-end smart phone/data contracts from low-end voice only contracts⁴ and the distinction between the pre-paid and post-paid markets,⁵ the effective market power of AT&T post acquisition (and the danger of coordinated effects with similarly situated Verizon) should be regarded as even greater than the already toxic levels under the analysis most favorable to the Applicants.

As the Department of Justice reaffirmed only last week, increasing concentration in markets already moderately concentrated or highly concentrated is presumptively illegal.⁶ In this case, the combination is particularly disfavored because, as the Commission has previously noted in the *14th Competition Report*, high barriers to entry such as the general

³ Of the top 30 markets, 19 markets are already “highly concentrated” under the DoJ/FTC Horizontal merger guidelines, with the remaining 11 markets “moderately concentrated.” Economics and Technology, Inc., (ETI) April 2001 (available at: <http://www.econtech.com/newsletter/april2011/april2011a3.php>)

⁴ Craig Moffett et al., U.S. Telecommunications: The Wireless Barbell, Bernstein Research (May 10 2011), at 1.

⁵ See letter from Free Press to The Honorable Herb Kohl and The Honorable Mike Lee at 2, *available at* http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf.

⁶ Complaint at 14-16, *United States v. H&R Block*, No. 1:11-cv-00948 (D.C. Cir. May 23 2011) (hereafter H&R Block Complaint).

lack of spectrum for new entrants⁷ and high switching costs for consumers⁸ make new entry highly unlikely, and increase the difficulty of surviving firms to compete effectively.

Furthermore, as the Commission also noted in the *14th Competition Report*, T-Mobile is a direct competitor to AT&T and Verizon, whose pricing behavior and non-price competition (such as its rapid deployment of HSPA+ “4G” wireless, introduction of new handsets, and alternative network management practices) has compelled AT&T and Verizon to lower prices and respond with their own innovative handsets and accelerated 4G deployment.⁹ In antitrust terms, therefore, T-Mobile is not merely a direct competitor but a “maverick” whose behavior forces pro-consumer responses from larger firms despite T-Mobile’s relatively modest market share.¹⁰ Elimination of a “maverick” firm is particularly disfavored under traditional antitrust law, and raises separate concerns under the Commission’s public interest obligation to encourage innovation.¹¹

Such concentration runs contrary to the express policies of Congress and the Commission to rely on competition rather than regulation to protect consumers and spur deployment of new services. As detailed below, even if one set aside the antitrust concerns, AT&T would have an enormously enhanced ability to frustrate the Commission’s policy on fostering an open internet and encouraging pro-competitive roaming agreements. The Commission has chosen in these areas to rely on developing

⁷ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fourteenth Report, 25 FCC Rcd 11407, 1145-57, ¶ 25 (2010) (hereinafter “Wireless Competition Report 2010”).

⁸ *Id.* at ¶¶ 229-30.

⁹ Grunes & Strucke at 15-20 (describing Commission findings).

¹⁰ H&R Block Complaint at 2.

¹¹ Sprint/Nextel at 79.

commercial standards rather than direct regulation. AT&T has aggressively resisted both the Commission's open Internet rulemaking and the requirement to enter into commercially reasonable roaming requirements, as has similarly situated Verizon. It seems likely, especially in light of AT&T's history of refusing to enter into commercially reasonable roaming agreements with its chief competitors, that AT&T will use its enhanced market power to frustrate implementation of these rules. At a minimum, the elimination of T-Mobile as a "benchmark" firm for these purposes frustrates the FCC's ability to monitor the emerging marketplace and ensure compliance with the pro-competitive rules adopted by the Commission.¹² In addition, the size and complexity of AT&T post-acquisition, as well as its unique position in all aspects of the broadband and mobile services supply chain, make it much more difficult for the Commission to police compliance.

The FCC Should Look Skeptically On the Promised Benefits of the Merger

While the public interest harms are both significant and likely to occur, the public interest benefits listed by the Applicants are extremely modest, and either unlikely to materialize or are achievable by other means. As the Commission noted in the *14th Wireless Competition Report*, 98% of the country already has access to some form of mobile wireless broadband.¹³ AT&T claims that the acquisition will allow it to expand their projected 80% coverage with superior 4G coverage to include rural areas AT&T had

¹² Ameritech Corp., Transferor, AND SBC Communications INC., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts, 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion & Order, 14 FCC Rcd 14712, ¶ 57 (1999); Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Memorandum Opinion & Order, 21 FCC Rcd. 8203, ¶ 83, (2006) (hereinafter "Adelphia/Time Warner Order").

¹³ AT&T Public Interest Statement at 55.

apparently intended to neglect despite its pre-existing build out obligations and previous commitments from acquisition of rural carriers Dobson and Centennial. Yet even if one were to accept what one former FCC Chairman has characterized as a “state-sanctioned bribe” to do what AT&T is already obligated to do,¹⁴ the Commission has no assurance that AT&T will actually keep its commitment this time. In the past, AT&T has threatened to withhold investment if the Commission adopts this or that pro-competitive or pro-consumer regulation, while simultaneously promising to invest in rural deployment if granted license transfers or waivers. How long after the Commission approves this merger will it be before AT&T returns, once again demanding some new “incentive” to serve rural areas it is already obligated to serve?

In any event, as demonstrated below, the justifications offered by Applicants that AT&T must be allowed to acquire T-Mobile to ensure deployment of mobile broadband to rural areas, to rescue AT&T’s customers from AT&T’s previous failure to manage its assets effectively, or to rescue T-Mobiles assets from abandonment by its parent Deutsche Telekom AG (DT), are simply false to fact. ***None of the problems cited by AT&T that the merger supposedly solves are unique to AT&T or T-Mobile.*** All carriers face spectrum constraints and difficult choices as to how to migrate subscribers off of less efficient legacy networks.¹⁵ It is competitive pressures that force networks such as AT&T and T-Mobile to overcome these challenges, as Verizon and Sprint have done, or risk losing their market share to more nimble competitors.

¹⁴ *AT&T/T-Mobile deal offers risk, reward for Obama*, POLITICO PRO, April 22 2011, April 22, 2011 (quoting former Chairman Reed Hundt).

¹⁵ *See, e.g.*, Stephen Lawson, “Sprint’s IDEN Finally Heading For Sign Off,” PC World (December 7, 2010), available at: http://www.pcworld.com/businesscenter/article/212782/sprints_iden_finally_headed_for_signoff.html

In particular, the Commission should reserve its greatest skepticism for the claim that T-Mobile would wither on the vine, with no clear path to LTE, unless AT&T generously volunteers to pay T-Mobile's parent DT the \$39 billion that AT&T could otherwise spend investing in its own network. Applicants routinely lament to the Commission that, absent grant of an Application contrary to the public interest, they will fall by the wayside to the detriment of their customers and Commission policy. To take but one memorable example, DBS providers DIRECTV and DISH insisted that without approval to merge they would be unable to compete with incumbent cable operators because they would lack sufficient spectrum to offer sufficient programming channels or carry all broadcast channels in all markets. Eight years after the Commission denied the merger, both DISH and DIRECTV remain in business, forced by competitive pressures to find a different solution than an anticompetitive merger.

Nor is T-Mobile the equivalent of a sickly gazelle waiting to be devoured by the mighty AT&T lion as part of the circle of life in the wireless ecosystem, as Applicants would urge the Commission to believe. T-Mobile's existing HSPA+ network compares favorably to the LTE network AT&T proposes to deploy in the near term.¹⁶ If the Commission denies the Application, T-Mobile will receive significant spectrum assets and cash that will allow it to address its current spectrum constraints. If DT still wants to abandon the U.S. market even after receiving a sizable break up fee, it can undoubtedly find other buyers (including wireline telephone and cable companies) if it puts T-Mobile up for auction. While DT might not get as high an offer as AT&T was willing to make,

¹⁶ See Kevin Fitchard, "Is LTE Really Better Than Another 4G Flavor?" Connected Planet (March 8, 2011) <http://connectedplanetonline.com/3g4g/news/is-lte-really-better-than-any-other-4g-flavor-0308/index.html/>

maximizing DT's premium on the sale of T-Mobile hardly counts as a "public interest benefit."

At the end of the day, to the extent the Commission must take action to achieve the public interest benefits promised by Applicants, the Commission has more reliable means at its disposal to address the market as a whole. The Commission should not grant approval of an anti-competitive merger when it can rely on competition, efforts to reclaim spectrum and promote spectrum efficiency, or its general rulemaking authority.

No Divestitures Or Conditions Can Make This Serve the Public Interest

Finally, even if the Commission were to believe the Applicants with regard to possible benefits, the Commission must recognize that no conditions can adequately mitigate the harms caused by the acquisition. No divestiture will permit entry by a new participant. The best divestiture would do is increase the ability of surviving competitors to compete effectively, a result that increases market concentration overall and is therefore traditionally regarded as inadequate. Indeed, existing market concentration has generally meant that the dominant players, AT&T and Verizon, have captured the divested licenses intended to promote competition.¹⁷ And, in any event, any divestiture sufficient to mitigate the harms of increased concentration would be so significant that they would effectively eliminate any benefit of the merger.

Behavioral remedies are even less likely to prove effective. Not only are they

¹⁷ See, e.g., Christopher Stern, Cingular to Sell Cellular Spectrum, WASHINGTON POST, May 26, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A55682-2004May25.html>; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of License and Authorizations, *Memorandum Opinion & Order*, 19 FCC Rcd 21,522 ¶ 141 (2004); T-Mobile USA to End Network Venture with Cingular and Acquire California/Nevada Network and Spectrum, May 25, 2004, <http://newsroom.t-mobile.com/articles/t-mobile-cingular>.

historically difficult to enforce, but AT&T has a poor history of compliance.¹⁸ The fact that such remedies are generally limited to some term of years further undermines their effectiveness, particularly where, as here, there exists no reasonable expectation of new entry that would alter the competitive landscape.

The Commission should therefore reject the proposed acquisition outright, or designate the matter for hearing. The harms are simply too great, and the putative benefits so limited and unlikely to emerge, for the Commission to find this transfer could ever serve the public interest, convenience, and necessity.”¹⁹

¹⁸ *See, e.g.*, Justice Department Settles Civil Contempt Claim Against AT&T Inc., Jan. 14, 2009, http://www.justice.gov/atr/public/press_releases/2009/241435.htm.

¹⁹ 47 U.S.C. § 310(d).

ARGUMENT

AT&T has argued that the Commission and the Department of Justice (DOJ) are inextricably bound to a narrow view of the relevant product market and geographic scope. As two antitrust experts recently explained:

So the merging parties' endgame, as we see it, is to keep the DOJ focused on narrowly defined geographic markets. AT&T will progressively whittle down the number of geographic markets where DOJ has concerns. By compartmentalizing the merger into small regions, AT&T and T-Mobile can horse trade with DOJ on divestiture of assets in smaller markets like Knoxville, Tennessee. . . . While we were at the DOJ in the 1990s-2000s, we saw this piecemeal approach for radio and bank mergers. In retrospect, it is questionable whether these piecemeal divestitures actually restored competition lost by the mergers and prevented risks from the trend toward consolidation.²⁰

Regardless of whether Applicants are successful in this “endgame” at the DOJ, the Commission has a broader responsibility—designed precisely to prevent this sort of “horse trading” at the expense of the public interest. PK/FMC outline below the harms from the proposed merger, both from a classic antitrust perspective and under the broader public interest analysis, and illustrate the proper product market and scope of review. As demonstrated below, under any rational product and market definition consistent with Commission precedent and its statutory responsibilities, the Commission must deny the proposed license transfer.

I. THE MERGER FAILS THE PUBLIC INTEREST TEST AS A MATTER OF PURE ANTITRUST REVIEW.

Whether the Commission analyzes the merger under a local market standard or under a national standard, traditional antitrust analysis alone requires the Commission to reject the merger. Every single negative trend the Commission identified in the *14th Annual Report* that prompted the Commission to withhold a finding of “effective competition”

²⁰ Grunes & Stucke at 28 (citations omitted).

would be profoundly worsened by grant of the application. The national Herfindahl-Hirschman Index (HHI), already highly concentrated at 2848 in 2008 (the last year for which the Commission published data) would rise, based on publicly available sources, by an **additional 650-700** points,²¹ a strong presumption of illegality under the Clayton Act.²² If one prefers to analyze the market locally, the top 30 markets are already “highly concentrated” or “moderately concentrated,” and will experience similar presumptively illegal rises in the level of concentration post merger.²³ In such a circumstance, it is almost comical to argue whether the appropriate analysis focuses on “national markets” or “local markets.” Either way, the Commission must reject the merger on antitrust grounds alone.

The second overarching anticompetitive factor is AT&T’s market share post-acquisition. AT&T will control approximately 43-44% of the residential mobile voice and mobile data market. In addition, AT&T’s post-acquisition spectrum position will dwarf that of its rivals with the exception of Verizon. As the *14th Annual Report* stated: “Spectrum is a necessary component of providing mobile wireless service. Sufficient access to spectrum with propagation characteristics suited to the efficient provision of mobile broadband service may be a contributing factor in the ability of a wireless service provider to compete effectively.”²⁴ Post acquisition, AT&T will hold far more spectrum than any of the rivals it points to as sources of competitive discipline, particularly with regard to spectrum “with propagation characteristics suited to efficient provision of

²¹ Stifel Nicolaus, Washington Telecom, Media and Tech Insider (March 29, 2011). AT&T/T-Mo: Data Point to Coming Brawl, Risk: Deal Still Looks Doable.

²² DoJ 2010 Merger Guidelines.

²³ Economics and Technology, Inc., (ETI) April 2001 (available at: <http://www.econtech.com/newsletter/april2011/april2011a3.php>)

²⁴ 22-23.

mobile broadband service.”

This combination of market dominance and spectrum dominance will allow AT&T to exercise heretofore unprecedented power over the so-called “input market,” markets for which spectrum and access to wireless customers are necessary inputs, such as handsets and applications. AT&T will also be able to exert monopsony power in related markets, such as the intercarrier compensation (ICC) market and roaming market. The rise in concentration likewise increases the danger of coordinated effects, especially as the next largest provider, Verizon Wireless, is similarly structured to AT&T and therefore shares many of the same incentives to coordinate, tacitly or explicitly, in a way that raises barriers to entry, frustrates disruptive innovation, and increases cost to consumers.

Nothing in Commission precedent permits, let alone requires, the Commission to ignore these negative impacts. To the extent that the circumstances presented by the merger require the Commission to reexamine its previous determinations on the proper methodology for analysis, the Communications Act requires the Commission to alter its approach.

A. The FCC’s Examination Covers All Relevant Product Markets And Is Not Nearly As Limited As Applicants Suggest.

While providing a reasonably accurate description of the nature of the public interest inquiry, Applicants dramatically understate the scope of the FCC’s examination of competitive issues. As the FCC has previously explained, the markets impacted by a large and complex merger involving a vertically integrated firm in the wireless space require careful examination of both the “output markets,” *i.e.*, the market for the merged firm’s goods and services, and the “input market,” *i.e.*, markets where participants rely on the merged firm for necessary inputs, or where the enhanced market power of the merged

firm allows it to impact the market for necessary inputs to the advantage of the merged firm or to the detriment of the public interest.²⁵ Nor is analysis limited geographically. Indeed, the Communications Act requires the FCC to explicitly consider whether the merger will create monopoly or substantially lessen competition in foreign markets as well as domestic markets.²⁶

As discussed below, the Commission previously determined that the relevant product market consists of a number of discrete market segments, but that it would capture the potential competitive dangers by analyzing the market under a fairly limited product definition (residential voice market)²⁷ and narrow geographic scope (local markets defined by cellular market areas (CMAs) and cellular economic areas (CEAs)).²⁸

Perhaps somewhat inconsistently, however, the Commission has also analyzed the impact on national markets in mergers involving national carriers.²⁹ In particular, despite its insistence on a local market definition for the analysis of “output” markets, the Commission analyzed the national market with regard to the impact on “input markets,” and devoted considerable analysis to reassuring itself that the national market would

²⁵ Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion & Order*, 19 F.C.C. Rcd. 21,522, ¶58, (2004) (hereinafter “AT&T/Cingular Order”); Applications of Nextel Communications Inc. and Sprint Corporation, *Memorandum Opinion & Order*, 20 F.C.C. Rcd. 13967, ¶27 (2005)(hereinafter “Sprint/Nextel Order”)(explaining that the Commission would also consider input markets, such as spectrum licenses, because the proposed merger between Sprint and Nextel would affect this market.)

²⁶ See 47 U.S.C. 314 (prohibiting any license transfer where “the purpose is and/or the effect thereof may be to substantially lessen competition” in any line of commerce in any state, territory, or foreign jurisdiction).

²⁷ AT&T/Cingular at ¶ 77-79.

²⁸ AT&T/Cingular at ¶ 89-90.

²⁹ Sprint/Nextel at ¶ 30, 45.

remain competitive despite the elimination of a national competitor.³⁰

The Commission's analysis evolved over time as the wireless market changed. In addition, the Commission's approach analyzing the relevant product market as purely local in scope and ignoring the impact of national consolidation has been subject to increasing criticism.³¹

The Historical Basis For A Restricted Product and Geographic Market No Longer Apply.

In AT&T-Cingular, the FCC considered for the first time the complex questions relating to a merger of a national wireless carrier and a vertically integrated national wireless and wireline carrier. The FCC recognized the importance of HHIs as the relevant measure of concentration for both the national and local market.³² The analysis also recognized distinct markets for mobile data and mobile voice/text,³³ enterprise service and residential service,³⁴ and the impact on the related wireline broadband and voice markets.³⁵ Critically, however, the Commission determined that—at the time of the AT&T-Cingular decision, analysis on the basis of local mobile voice would capture the impacts on these related markets because of the market structure as it existed at the time of the transaction.³⁶ Above all, the FCC stressed when it considered the AT&T-Cingular merger that it must take a conservative approach when analyzing possible competitive harms.³⁷

In addition, the FCC recognized in other mergers that concentration of particular spectrum frequencies or technologies constitutes a separate market that the Commission

³⁰ Sprint/Nextel at ¶¶ 71-89.

³¹ Verizon/Alltel, Statement of Commissioner Adelstein, 23 Fcc Rcd. at 17,570.

³² AT&T/Cingular Order, *supra* note 2, ¶¶ 106-108 (explaining how the Commission used HHI to screen out markets where there would be no harm to competition.)

³³ *Id.* at ¶¶ 74-78.

³⁴ *Id.*

³⁵ *Id.* at ¶¶ 237-246.

³⁶ *Id.* at ¶ 77.

³⁷ AT&T/Cingular Order, *supra* note 2, at ¶ 109.

must consider when analyzing the merger.³⁸ The Commission has also consistently observed that the nature of these dynamic markets is constantly changing, and that the proper definition of the relevant product markets, while guided by past precedent, must expand in scope and sophistication in response to changes in the marketplace and the FCC's greater understanding of how the relevant markets operate.³⁹

That the Commission may at one point have doubted or even rejected a particular market definition in a previous merger does not preclude the Commission from coming to a different conclusion based on the merger before it, as Applicants suggest.⁴⁰ Indeed, AT&T in particular has demonstrated a remarkable malleability in its desired product definition, geographic scope, and what competitor it claims to fear at the moment. For example, in its acquisition of Centennial, AT&T urged the Commission to adopt a

³⁸ Sprint/Nextel Order, *supra* note 2, at ¶ 27; Application of Echostar Communications Corporation, General Motors, and Hughes Electronics Corporation, *Hearing Designation Order*, 17 FCC Rcd 20559, ¶¶ 3, 110-115 (2002)(hereinafter "Echostar/Hughes Electronics Corp. Order") (discussing how the applicants are likely to constitute a separate market distinct from the larger market for MVPD services).

³⁹ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee, *Memorandum Opinion & Order*, 16 FCC Rcd 6547, ¶¶ 69-73, (2001)(hereinafter "AOL/Time Warner Order"); Verizon/Alltel Order at ¶ 45 (explaining that because of the increasing prominence of mobile broadband, the Commission would revisit its previous market definition and include mobile broadband services as a relevant product market.); Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, *Memorandum Opinion & Order*, 24 FCC Rcd 13915, ¶37 (2009)(hereinafter "AT&T/Centennial Order").

⁴⁰ AOL/Time Warner Order, *supra*, note 11, at ¶¶69-73 (determining that broadband Internet access constitutes a separate market reversing from its previous decision in its *AT&T Media One* order refusing to determine if broadband Internet Access constituted a separate market. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc., Transferor, To AT&T Corp., Transferee, *Memorandum Opinion Order*, 15 FCC Rcd. 9816, ¶116 (2000)).

national product market.⁴¹ At that time, AT&T argued that competed directly against “Claro, *T-Mobile*, and Sprint,”⁴² a stunning contrast with AT&T’s statement in its current public interest statement that it lives in terror of local providers such as MetroPCS and Leap, or unbuilt systems such as Lightsquared, but does not regard T-Mobile as a serious competitor.

More recently, AT&T stressed in a related proceeding,⁴³ that the Commission has a statutory duty to consider the unique nature of each merger before it. Such a position is hardly consistent with insistence that the Commission is legally bound to ignore the implications of national concentration and most focus only on local markets. Of course, AT&T’s position that it does not regard T-Mobile as a competitor is not merely inconsistent, but flatly contradicted by its previous statement in Centennial (which, as with all such submission, was made with an affidavit attesting to the truth of the matter stated). Whatever the merits of AT&T’s previous positions, it can hardly deny the Commission the right to alter its previous market definition when it has consistently urged the Commission to do just that.

The Commission should therefore reject any effort to artificially limit the scope of its review. Instead, as required by the Communications Act, the Commission must examine the impact on all relevant markets.

⁴¹ AT&T/Centennial at 39. To be fair, AT&T is hardly alone in proposing market analysis based on convenience rather than precedent. Verizon has made similar arguments. See VZ/AllTel at ¶50.

⁴² AT&T/Centennial at ¶40 (emphasis added).

⁴³ See Paul Margie and William E. Cook, *Ex Parte Notification – WT Dkt. Nos. 11-65, 11-18, DA 11-252, ULS File No.0004566825*, (May 20, 2011), available at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021649742>.

B. The Enormous Level of Concentration Created By This Merger Will Severely Impact Traditional “Output” Markets and “Input” Markets.

The sheer number of distinct markets negatively impacted by the merger makes it difficult to categorize and list all of them, especially in light of Applicants failure to address these markets explicitly in their Application. Accordingly, the Commission should consider the specific examples given in this Petition (and by other parties) as illustrative rather than definitive. Adopting the framework established in *ATT-Cingular*, Petitioners address the respective harms to both the post-acquisition “Output Market” and the post-acquisition “Input Market.” Next, continuing to follow the *ATT-Cingular*, analysis, Petitioners will discuss related markets such as wireline voice and data, and unique concerns arising from vertical integration, such as the impact on the special access market.

1. Output Markets

Mobile Voice and Text. Traditionally, the Commission’s inquiry begins here.⁴⁴

Residential mobile voice and text remain the core output markets for many consumers. This does not, of course, negate the growing importance of residential mobile data which, in light of current trends, should be analyzed as a separate market. Nevertheless, it is important to note that even under the most favorable product definition and geographic market urged by the applicants, assuming away all switching costs and information asymteries that would impact the ability to switch, the merger would presumptively fail the hypothetical monopoly test in the top 30 markets under a standard antitrust screen. The same result holds true for a national HHI analysis.

If after giving the Applicants every possible benefit of the doubt, the merger would

⁴⁴ See AT&T/Cingular Order, *supra*, note 2, at ¶72.

still fail a standard antitrust screen, the Commission must ask itself how it can possibly justify grant of the Application under any set of conditions. At some point, an Application crosses a line and becomes intrinsically inimical to the public interest. While it may difficult to define that line with precision, the inability of Applicants to meet their own public interest standard with regard to product definition and geographic markets must surely indicate they have crossed this line.

Mobile Data. As the Commission previously recognized in the ATT-Cingular transaction, mobile data constitutes a separate market. This definition has been followed in subsequent mergers.⁴⁵ In the Verizon Alltel merger, the Commission revised its previous definitions of product markets to include mobile broadband services, highlighting the growing importance of data services.⁴⁶

As one leading analyst has noted, the wireless market is increasingly differentiating between a high end market dominated by AT&T and Verizon, to the detriment of Sprint, and a low end market for voice/text only where AT&T and Verizon compete with low-cost providers such as MetroPCS.⁴⁷ As the Commission itself has recognized, differentiated technologies and market strategies may negate the potential of a competitor to mitigate the harms of concentration.⁴⁸ In other words, even if the Commission accepted the Applicants' assertion that MetroPCS or Cricket have such strong appeal to a niche market of cost-conscious consumers of such enormous potential that the

⁴⁵ AT&T/Centennial Order, *supra*, note 11, at ¶37; Verizon/Alltel Order, *supra*, note 11, at ¶45; Sprint/Nextel Order, *supra*, note 2, at ¶38.

⁴⁶ Verizon/Alltel Order, *supra*, note 11, at ¶45.

⁴⁷ Wireless Barbell at 5-20.

⁴⁸ See Echostar/Hughes Electronics Corp. Order, *supra*, note 9, at ¶¶110-115; *see also* Applications for Consent to the Transfer of Licenses; XM Satellite Holdings Inc., Transferor To Sirius Satellite Radio inc., Transferee, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd 12348, ¶42 (2008).

Commission may ignore the HHI analysis, it would not magically eliminate the anti-competitive nature of the merger. Whatever AT&T would gain by a more relaxed analysis of the voice/text market, it loses far more as a consequence of the more restrictive analysis of the mobile data market.

Enterprise Markets. Again, as the Commission has long recognized, the enterprise market constitutes an entirely separate market from the residential market.⁴⁹ This is particularly important given that several “competitors” identified by Applicants simply do not compete in the enterprise market.

The enterprise market itself has numerous product markets that require analysis. In the AT& T Bell South merger, the Commission found that local voice, long distance voice and data services constituted separate markets for enterprise customers.⁵⁰ In addition, the Commission also found that, in many instances, small business customers could be classified as a separate product market than large enterprise customers. The Commission explained that this was because of differences in the nature of products purchased by these customers as well as their different abilities to negotiate contracts with the providers.⁵¹

2. Input Markets

Roaming. The Commission has long recognized roaming as a separate market.⁵² This definition is reinforced by the FCC’s recent Data Roaming Order, which requires market

⁴⁹ Sprint/Nextel at ¶ 43.

⁵⁰ AT&T Inc. and Bell South Corporation, Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd 5662, ¶64, (December 29, 2007), (hereinafter “AT&T/Bell South Order”).

⁵¹ *Id.* at ¶66.

⁵² Verizon/Alltel Order, *supra*, note 11, ¶178-181; Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

negotiations on commercially reasonable terms.⁵³ Roaming is a critical “input market.” As the Commission has found in its recent competition report, roaming can be “particularly important for small and regional providers” who want to “remain competitive by meeting their customer’s expectations of nationwide service.”⁵⁴ The Commission also explained that roaming is also critical to new entrants.⁵⁵

As the Commission is already aware from its recently concluded proceeding on roaming, AT&T has already demonstrated that, absent a Commission rule, AT&T will not willingly enter into roaming deals at market rates. So critical is roaming for successful competition, and so difficult has it been to obtain from AT&T, that Commissioner Robert McDowell jokingly referred to the proposed transaction as “the mother of all roaming agreements.”⁵⁶ AT&T will, by operation of the merger, become the dominant potential provider for voice roaming and future LTE roaming by virtue of its enhanced spectrum position, and the only possible provider of roaming for 3G GSM providers.

Spectrum Secondary Markets. In addition to using roaming, those requiring spectrum access can lease spectrum through the Commission’s secondary market rules. The

⁵³ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report & Order, WT Docket No.05-265, (April 7, 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0408/FCC-11-52A1.pdf.

⁵⁴ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourteenth Report*, 25 FCC Rcd 11407, ¶125, (2010)(hereinafter “Wireless Competition Report 2010”).

⁵⁵ *Id.*

⁵⁶ Paul Kirby, “McDowell, Baker, Decline Comment on AT&T-T-Mobile Deal,” *Telecommunications Daily* (March 23, 2011), available at <http://www.ipi.org/IPI/IPIPressReleases.nsf/9fce97dc4660e5e78625763a007d9cba/3baa579f86b15dcc8625785c00461a81?OpenDocument>. While Commissioner McDowell was obviously speaking humorously, this is a fine application of the old saw that “many a true word is spoken in jest.”

Commission has recently recognized the importance of these markets in promoting efficient uses of spectrum.⁵⁷ The acquisition will enhance AT&T's already significant spectrum advantage, increasing its ability to raise prices in secondary markets either by raising the price of leasing its own spectrum or by withdrawing available spectrum from the market.

Handsets and applications. The FCC's refusal to adopt rules that would decouple the handset market and the applications market from the wireless carrier market makes these markets inextricably linked. Indeed, the Applicants themselves, at various times, have argued extensively that they need to maintain control over handsets and applications for the purpose of competing with each other and differentiating their wireless service from that of their competitors.⁵⁸ Applicants cannot now seriously argue that the presence of numerous handset manufacturers or application providers somehow negates their ability to influence these markets. In fact, the applicants continue to engage in anti-competitive control over handset vendors using their market power. This has been the case with the AT&T iPhone deal between 2007 and this year. AT&T has continued to exhibit this exclusive handset control with a new HP credit card sized smartphone in May, 2011.⁵⁹

Similarly, both applicants have demonstrated the ability to exert control over the

⁵⁷ See Promoting More Efficient Use of Spectrum Through Dynamic Use Technologies, ET Docket No. 10-237, ¶4, (November 30, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-198A1.pdf.

⁵⁸ See Preserving the Open Internet, *Comments of T-Mobile USA*, GN Docket No. 09-191, 11-14, (October 12, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916628>; *Comments of AT& T Inc.*, 53-66, (October 12, 2010), available at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916485>

⁵⁹ See Mark Hachman, *AT&T Gets Exclusive on HP Veer, Due May 15*, PC Mag., (May 5, 2011), <http://www.pcmag.com/article2/0,2817,2384970,00.asp>.

market for applications.⁶⁰ AT&T has also argued strenuously that it needs to maintain control over applications in order to protect its networks against apps that are bandwidth intensive.⁶¹ Historically, however, AT&T has appeared particularly keen on applying this limitation where its restrictions on applications neatly align with its competitive interests. For example, in 2009, AT&T blocked the iPhone slingbox application from streaming television from a subscriber's home, ostensibly on the grounds of limiting consumption of bandwidth. At the same time, it permitted streaming of live baseball games from MLB.com, after MLB agreed to an affiliation agreement.⁶² While AT&T eventually removed the restriction, this history provides an example of how AT&T is likely to use its enhanced market power over the application and equipment market to favor its own products and disadvantage rivals.

This problem is aggravated by AT&T's bandwidth caps, which appear calculated to enhance AT&T's profitability rather than to limit bandwidth consumption at peak times. At present, T-Mobile does not regulate use by charging penalties, but opts to throttle the downloads of users who exceed their capacity caps. Post-acquisition, AT&T will have greater freedom to influence the application market by control of bandwidth caps for nearly 45% of the mobile market, combined with reduced alternatives for dissatisfied

⁶⁰ 14th Competition Report at ¶ 151-52.

⁶¹ Comments of AT&T, *In the Matter of Preserving The Open Internet and Broadband Industry Practices*, GN Docket No.09-191, WC Docket No. 07-52, 56, (October 12, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916485>; Comments of T-Mobile USA Inc., *In the Matter of Preserving The Open Internet and Broadband Industry Practices*, GN Docket No.09-191, WC Docket No. 07-52, 16, (October 12, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916628>.

⁶² Chris Foresman, *AT&T's Move to Block iPhone SlingPlayer From 3G is Poppycock*, ArsTechnica, May 13, 2009 <http://arstechnica.com/apple/news/2009/05/atts-move-to-block-iphone-slingplayer-from-3g-is-poppycok.ars>.

consumers.

Equipment and Protocol Development. The experience with the 700 MHz band and its multiple band classes where equipment specified by AT&T is not interoperable throughout the band and the shift to 4G wireless demonstrates that the market is already dangerously concentrated, and that permitting further concentration will enhance both the specific market power of AT&T and the danger of coordinated action with surviving competitors. For example, the manufacturers and vendors of chipsets are unwilling to create handsets for smaller competitors in the 700 MHz band.⁶³

More telling is the “death of WiMAX.” Until 2008, WiMax was the leading protocol for emerging 4G technology. Sprint and Clearwire had invested heavily in WiMax, as had numerous other smaller wireless providers, and WiMax was regarded as a thriving market. After the 700 MHz auction, Verizon, AT&T, and T-Mobile announced they would adopt LTE, not WiMAX, as the 4G technology. No sooner had these three carriers made this pronouncement when industry watchers rushed to declare WiMAX “dead.”⁶⁴ Despite strenuous efforts by Sprint and Clearwire, and despite the fact that WiMAX was an established market and LTE equipment did not even exist at the time the three carriers made this pronouncement, the decision of the three major carriers to abandon WiMAX in favor of LTE shifted the market dramatically. Today, there is no doubt that CMRS will

⁶³ See Phil Goldstein, *AT&T, Cellular South Debate 700 MHz Interoperability at FCC*, Fierce Wireless, April 26, 2011, <http://www.mediaaccess.org/2011/04/att-cellular-south-debate-700-mhz-interoperability-at-fcc/>.

⁶⁴ Jim Duffy, *LTE vs. WiMAX*, Network World, June 07, 2010, <http://www.networkworld.com/news/2010/060710-tech-argument-lte-wimax.html>; Lance Whitney, *Report: LTE to Dominate WiMAX in 4G Market*, Digital Media, February 8, 2011, http://news.cnet.com/8301-1023_3-20030996-93.html; Maija Palmer, *Intel Succumbs to Evolution of 4G*, Financial Times, August 16, 2010, <http://www.ft.com/intl/cms/s/2/a1f4522c-a956-11df-a6f2-00144feabdc0.html#axzz1Ngt7kmv7>.

adopt LTE as the dominant technology, a fact recognized by the Commission⁶⁵ and the Applicants themselves.⁶⁶

If the independent decisions of AT&T, T-Mobile and Verizon could so dramatically alter the less concentrated market of 2008, how can applicants possibly argue that the combined AT&T/T-Mobile constitutes no danger to the market of 2011, either through enhanced market power or collective action with the next largest firm?

GSM. The Commission has consistently recognized that dominance in a particular technology. Many of these harms would be aggravated by AT&T's enhanced position in the GSM market. For the remaining smaller carriers using GSM, they would face a monopoly provider for national or even regional roaming.

Special access. Many wireless service providers, including T-Mobile, purchase backhaul services from LECs, including AT&T.⁶⁷ As the Commission has explained, wireless backhaul is a critical input for wireless services in connecting their networks to other carriers and to the Internet.⁶⁸ Furthermore, the roll out of advanced wireless networks that support higher data throughput "will make access to sufficient backhaul for wireless services even more critical over time."⁶⁹ The proposed merger between AT&T and T-Mobile would enhance the power of AT&T to extract extremely high prices from its wireless competitors who purchase backhaul services from AT&T's wireline services.

⁶⁵ FCC White Paper, *The Public Safety Nationwide Interoperable Broadband Network: A Model for Capacity, Performance and Cost*, 4, June 2010, available at <http://transition.fcc.gov/pshs/docs/releases/DOC-298799A1.pdf>.

⁶⁶ Michelle Maisto, *AT&T, T-Mobile Deal Faces More Scrutiny, Debate*, eWeek.com, May 27, 2011, <http://www.eweek.com/c/a/Mobile-and-Wireless/ATandT-T-Mobile-Deal-Faces-More-Scrutiny-Debate-107100/>.

⁶⁷ Wireless Competition Report 2010, *supra*, note 22, at ¶295.

⁶⁸ *Id.* at ¶ 64.

⁶⁹ Wireless Competition Report 2010, *supra*, note 22, at ¶295.

Thus, AT&T's already significant power over its competitors would be enhanced.

Tower and telco equipment. The proposed merger would increase AT&T's ability to dictate terms to tower companies. Thus AT&T would be able to unilaterally determine contract terms that give it favorable tower sitings and antenna positions. The Commission has noted in its recent competition report that inability to get desirable tower citing and favorable antenna positions act as barriers to new firm entry.⁷⁰ Similarly, the market for some kinds of telecommunications gear will trend toward monopsony as the number of buyers of telecommunications gear continues to shrink.

Intercarrier compensation. As AT&T aggregates voice traffic, its ability to negotiate intercarrier compensation rates increases. This is particularly true in light of AT&T's announced plan to shift its wireless network and wireline networks to VOIP.⁷¹ With nearly 45% of all wireless voice minutes, joined to its own wireline VOIP traffic, AT&T will be well situated to demand highly favorable intercarrier compensation rates for exchanges of traffic, particularly if it joins with Verizon to demand \$.0007 for all VOIP traffic. Indeed, it is difficult to see how even significant rural carriers such as CenturyLink, let alone smaller wireless or wireline carriers, could resist a coordinated effort by AT&T and Verizon to set the exchange rate for VOIP traffic by fiat.

Retail: The proposed merger would also adversely impact retailers, such as Best Buy, who sell handsets. The merged company would have immense power to impose onerous conditions on retailers. For example, AT&T could refuse to permit Best Buy to sell the next version of the iPhone, unless Best Buy agreed to funnel a larger portion of its

⁷⁰ Wireless Competition Report 2010, *supra*, note 22, at ¶292.

⁷¹ "AT&T Also Looking at Voice Over LTE, Paints A Bullseye on 2013," Endgadget, (February 15, 2011). <http://www.engadget.com/2011/02/15/atandt-also-looking-at-voice-over-lte-paints-a-bullseye-on-2013/>

revenue from sales to AT&T.

In addition, AT&T could use its enhanced market power in the retail market to require independent retailers to disadvantage competitors or advantage its own products. AT&T could insist on superior display positioning for its products, or require retailers to limit the number of handsets it carries from rival providers. This would prove particularly potent to smaller competitors, who have fewer retail outlets and therefore rely more on third-party retailers, electronic stores, and box stores.

In either case, it will ultimately be consumers who suffer through the loss of competitive outlets where they can readily find alternative providers and easily compare products. The Commission must act to protect the retail market in mobile services by denying the Application.

Mobile commerce. As the Commission noted in its recent wireless competition report,⁷² successful mobile commerce needs buy in and investment from a number of players, including wireless service providers. Indeed, wireless service providers control a bottleneck infrastructure that facilitates mobile commerce. As explained above, wireless service providers currently exert control over the wireless applications and devices that use their networks. The incentive and ability to exercise such control is only going to increase if the proposed merger were to be approved. For mobile commerce, this would mean that the merged company would have the ability to control the types of vendors who may sell their products and services, the types of mobile commerce applications that may be downloaded to a device, and the types of products and services that may be purchased using mobile commerce applications. For example, the merged company could

⁷² *Id.* at ¶¶ 333-338.

use its control of applications to prevent or discourage users from purchasing, via mobile commerce, applications that would require greater throughput.

Shortcodes. In addition to standard person-to-person text messaging, the proposed merger would negatively impact the short code market.⁷³ Carriers exert immense control over short codes. They control what short codes can be used for, the content they transmit, who can use them, and how much that transmission costs.

Although all major carriers adhere to the standard Mobile Marketing Association guidelines for short code content, each carrier also creates its own additional short code rules and regulations. As a result, the rules governing conduct on short codes are different for every carrier. Also, the enforcement of those rules varies from carrier to carrier. In some instances, a single carrier will object to a use of short code that is allowed by other carriers.⁷⁴

Carriers also differ in the prices they charge users to transmit short code messages over carrier networks, and even to create the initial network connection. These prices are often one of the highest costs to a user of text messaging and can significantly impact the viability of the use.

While the short code market is far from a model of competition and is in no way free from abuses, there is some indication that the limited competition that does exist curbs

⁷³ Short codes are 5- or 6- digit numbers used for various text message-based “campaigns.” For more information *see* Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, *Petition for Declaratory Ruling*, WT Docket No. 08- 7, Dec. 11, 2007, at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf>; *see also* *Public Knowledge Explains Short Codes*, available at http://www.youtube.com/watch?v=2tf_qyB-m68&.

⁷⁴ *See, e.g. T-Mobile SUED For Blocking Marijuana App!*, PerezHilton.com, Sep. 21, 2010, available at http://perezhilton.com/2010-09-21-t_mobile_sued_for_blocking_marijuana_application.

the most abusive carrier practices. In the past, industry outcry convinced Verizon to cancel a planned increase in the fee charged for sending messages to Verizon customers.⁷⁵ More recently ESPN, The Weather Channel, and MSNBC announced that they were ceasing delivery of messages to Sprint customers due to an increase in Sprint connection fees.⁷⁶ However, they are able to continue to offer service to customers on other carriers.

Although such drastic responses to carrier practices are rare, they are able to occasionally occur because there is some competition between wireless carriers. Further consolidation of national wireless carriers would further reduce the ability of a business, organization, or individual who wishes to make use of short codes to push back against predatory industry practices.

Wireline voice and broadband. The Commission has recognized that wireless service providers and wireline service providers compete with each other and that this competition is likely to increase in future.⁷⁷ Furthermore, the Commission has expressed its commitment to promoting such competition.⁷⁸ Because AT & T provides wireline services in addition to wireless services, the proposed merger would adversely impact this intermodal competition.

In the Cingular/AT&T merger, the Commission recognized that a company that

⁷⁵ See Mickey Alam Khan, *Verizon rescinds decision to levy SMS fee hike Nov. 1*, MobileMarketer.com, Oct. 23, 2008, available at <http://www.mobilemarketer.com/cms/news/messaging/1965.html>.

⁷⁶ See Karl Bode, *ESPN Refuses to Pay New Sprint SMS Fee*, DSLReports.com, May 12, 2011, available at <http://www.dslreports.com/shownews/ESPN-Refuses-to-Pay-New-Sprint-SMS-Fee-114185>.

⁷⁷ AT&T/Cingular Order, *supra*, note 2, at ¶237; Sprint/Nextel Order, *supra*, note 2, at ¶141.

⁷⁸ Sprint/Nextel Order, *supra*, note 2, at ¶141.

provides both wireline and wireless services has an incentive to protect its wireline services from competition from wireless services.⁷⁹ Merger of such a company, in that case Cingular, with one that provided wireless services only, in that case AT&T Wireless, would act as a disincentive on the merged entity to offer new innovative plans that increased intermodal competition.⁸⁰ However, the Commission was less concerned with this effect because the Commission found that at that time intermodal competition was still very limited.⁸¹ However, the Commission cautioned that “further losses of significant independent wireless carriers to wireline-affiliated carriers [would] be closely scrutinized, and absent significant offsetting public interest benefits, may lead to different conclusions.” The proposed merger presents that opportunity for scrutiny. As explained below, the proposed merger does not present offsetting public interest benefits.

International concerns. Two inevitable key consequences of the AT&T/T-Mobile Deal, if approved by the FCC and the DOJ, will be: 1) The establishment in the US of an effective monopoly supplier of GSM/HSPA services and monopsony buyer of GSM/HSPA equipment and devices. And 2) the removal of T-Mobile USA from the joint global purchasing venture between Deutsche Telekom (DT) and Orange (France Telecom, FT), whose negotiating power with respect to GSM/HSPA/LTE suppliers is greater than that of AT&T, even if the latter is combined with T-Mobile USA. Stemming from these two consequences are several undesirable impacts:

- GSM/HSPA operators, who currently account for 90% of global mobile connections, will be left with only one negotiating partner for continuing or establishing national roaming agreements, both for broadband data and

⁷⁹ AT&T/Cingular Order, *supra*, note 2, at ¶ 237.

⁸⁰ *Id.* ¶ 245.

⁸¹ *Id.* ¶ 238.

voice, in order to fully service their customers while traveling in the US. This issue will certainly raise concern among foreign regulatory authorities that will demand action from the FCC.

- For US GSM/HSPA mobile customers roaming abroad, there will be no basis for competition in terms of alternative innovative international roaming services, for example the kind of arrangement an independent T-Mobile USA might introduce across its parent's (and perhaps even some of Orange's international roaming services) non-US properties, whereby its US customers would be able to access service within their coverage areas on the same terms as when they are in their "home" network, without incurring any of the typically high international roaming charges.
- Other US-based wireless companies, including small GSM as well as CDMA2000 providers, and in particular the smaller ones, e.g., Metro PCS, Leap, and US Cellular, will find themselves at an even greater disadvantage with respect to their ability to get the attention of large foreign GSM/HSPA companies when attempting to negotiate competitive international roaming agreements, either through separate GSM/HSPA handsets, made available to their customers for their international trips, or through multi-mode (GSM/HSPA/ CDMA2000) devices.
- T-Mobile, and hence the entire community of GSM/HSPA users in the US, will be denied access to the potentially wider range of devices, along with other more favorable conditions, that the joint purchasing venture between DT and FT should be able to negotiate with equipment and device vendors compared to those that AT&T will pursue or be likely to achieve.

B. The Specific Circumstances Of This Merger Aggravate The Competitive Harms.

A number of factors aggravate the harms to the relevant markets. As an initial matter, the market structure of wireless makes it highly unlikely a new competitor will emerge, or that an existing competitor will be able to expand rapidly and thus discipline AT&T post-acquisition. Second, T-Mobile has consistently moved to introduce new pricing plans and services that place pressure on AT&T and Verizon despite T-Mobile's significantly lower market share. In other words, T-Mobile is a "maverick" firm in the antitrust sense, whose loss is particularly disfavored and particularly hard to replace.⁸²

⁸² See Sprint/Nextel ¶ 79.

Finally, the transaction dramatically increases the risk of coordinated action among the surviving firms. As a general matter, the likelihood of increased coordination among surviving firms is one reason why mergers that enhance concentration in already concentrated markets are presumptively illegal.⁸³ In the instant case, the close similarity between AT&T and Verizon with regard to their structure and position in the marketplace makes the danger of coordinated activity between the two firms particularly acute. That the two firms have generally advocated for similar regulatory outcomes with regard to many of the markets identified in Part I.B (*e.g.*, ICC, Special Access) lends further credence to the likelihood of coordinated action between the two firms, which will jointly control over 80% of the mobile marketplace.

1. No Competitor is Likely to Enter The Market To Mitigate The Anticompetitive Impacts.

Certainly, after conducting an HHI analysis, the FCC may also consider whether the presence of an actual or potential competitor mitigates the dangers of enhanced concentration. But this analysis does not stop at counting noses and weighing all competitors equally. Indeed, the entire point of HHI is that concentration in the market gives the dominant firm substantial power to undermine its competitors and enhances the attraction of coordinated action among the remaining market participants. To ignore HHI because of the presence of remaining competitors, when the HHI demonstrates how much harder it will be for these competitors post-merger, would be to stand antitrust analysis and the FCC's public interest analysis on its head.

Additionally, several other factors undermine the ability of potential or existing competitors to offset post-merger concentration. First, as AT&T has acknowledged

⁸³ Grunes & Strucke at 14; Sprint/Nextel at ¶ 71-78.

elsewhere,⁸⁴ consumers seeking to move from one carrier to another face numerous switching costs. Second, new entrants cannot enter the market without additional spectrum, and all other competitors face the same spectrum constraints as AT&T professes to face in its application. Nor can providers hope to win customers without competitive devices.⁸⁵ But, as discussed above, AT&T will be in a strong position post transaction to impede the ability of existing firms or new entrants to develop and market wireless devices capable of competing with AT&T.

Indeed, the economics of the wireless industry ensure that AT&T would have plenty of warning if a potential new rival began to emerge and significant opportunity to use its enhanced market power to undermine those emerging competitors. Finally, both existing competitors (with the exception of Verizon) and any potential new competitor would be utterly dependent on AT&T for crucial inputs, giving AT&T further opportunity to squeeze its rivals. As explained below, the Commission cannot hope to address these concerns adequately with conditions.

2. Loss of a Maverick Firm

As the Commission has noted in previously, T-Mobile has acted as both a price leader and an innovation leader despite its smaller size and spectrum constraints. As a price competitor, T-Mobile's aggressive "all you can eat" price for voice and text forced the dominant firms AT&T and Verizon to moderate the premium they exacted from the market based on the anticompetitive advantages described above (superior spectrum position, superior access to handsets, and customer lock in via high switching costs). T-

⁸⁴ See AT&T Inc., *Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, Commission File Number 1-8610, available at <http://www.sec.gov/Archives/edgar/data/732717/000073271710000074/att2q10.htm>.

⁸⁵ 14th Competition Report ¶ 60.

Mobile also engaged in aggressive non-price competition, becoming the first to deploy devices with the Android operating system and one of the first to deploy a “4G” network technology in the form of HSPA+.

These aggressive actions have benefitted consumers and prompted innovation otherwise resisted by the dominant firms. T-Mobile’s embrace of the more open Android operating system, for example, has helped to push other smart phone operating systems to operate in a more open manner. Elimination of this maverick firm will therefore have a disproportionately negative impact on the market and on consumers.

3. The Transaction Enhances the Risk of Coordinated Action

As a general rule, dramatic increases in concentration such as those found here increase the risk of coordinated action.⁸⁶ In addition, the risk of coordinated action is further enhanced by the similarity between post-transaction AT&T and the second largest firm, Verizon. Like AT&T, Verizon is a vertically integrated firm, with significant market share in special access markets, residential DSL, enterprise services, and the MVPD market. Like AT&T, Verizon has sought to control the handset and application market, has resisted entering into reasonable roaming agreements absent a Commission mandate, and has insisted on freedom to manage its network in an anticompetitive fashion. Unsurprisingly, although Verizon and AT&T compete for customers, the two firms have adopted similar strategies of seeking to target high-end customers.

Post acquisition, with the maverick T-Mobile eliminated, it is logical to assume that AT&T and Verizon wireless will act in a coordinated fashion to avoid potentially

⁸⁶ Jonathan Baker, Market Concentration in the Antitrust Analysis of Horizontal Mergers at 10 (“a reduction in the number of firms through merger, particularly when the transaction involves sizeable firms, increases the odds of industry coordination.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092248.

disruptive competition or avoid engaging in “price wars” that would undermine their profitability. Further, the fact that AT&T and Verizon have remained in lockstep on a number of regulatory issues bearing on their future business models likewise highlights the danger of future coordinated effects.

Merger critics have argued that permitting the transfer of at issue here will create an effective duopoly with the surviving competitors unable to exercise significant competitive pressure. As the HHI analysis shows, this concern cannot be dismissed as idle speculation. When two firms control over 80% of the market, particularly a market with significant barriers to entry, there is a significant danger of coordinated effects. Where, as here, history supports this inference, the Commission must regard the likelihood of coordinated effects as approaching certainty.

II. THE MERGER CREATES NON-MARKET HARMS CONTRARY TO THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.

Significantly reducing competition in these markets not only removes competitive pressure to discipline pricing; it also removes the incentives provided by competition for the parties to innovate, invest in deployment, and offer open access to networks and the Internet. Moreover, the Commission’s public interest goals—of ensuring innovative and open networks, available and affordable to the entire country—reach beyond merely what might be supplied by a competitive market.

The scope of the Commission’s merger oversight is not limited to merely analyzing the effect of the merger on competition in the relevant markets. Instead, the Commission is required by Congress to evaluate the effects of the merger on the public interest, convenience, and necessity. This four-part public interest inquiry requires that the Commission investigate: (1) whether the transaction would result in a violation of the

Communications Act; (2) whether the transaction would result in a violation of the Commission's rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act; and (4) whether the transaction promises to yield affirmative public interest benefits. A license transfer that implicates these factors should not be approved, regardless of the outcome of an analysis based purely on antitrust considerations.

Many of the results, both those inevitable and those predictable, will substantially frustrate the Commission's implementation or enforcement of the Act. Among other things, the Act provides the Commission with the goals of:

- Providing access to advanced telecommunications and information services across the country and encouraging deployment to all Americans;⁸⁷
- Ensuring quality services...available at just, reasonable, and affordable rates;⁸⁸
- Promoting the development of the Internet and preserving the competitive free market for its provision;⁸⁹
- encouraging the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet;⁹⁰
- Preventing unjust or unreasonable discrimination by carriers.⁹¹

The Commission's implementation of the Act comprises rules and orders further enshrining the principles of open networks, broad deployment, and non-discrimination.

In addition to the numerous competitive harms mentioned in Part I, AT&T's acquisition of T-Mobile threatens to substantially impair these Congressionally mandated

⁸⁷ 47 U.S.C. §§ 254(b)(2), 706(a).

⁸⁸ 47 U.S.C. §§ 254(b)(1), 201(b), 151.

⁸⁹ 47 U.S.C. §§ 230(b)(1), 230(b)(2).

⁹⁰ 47 U.S.C. § 230(b)(3).

⁹¹ 47 U.S.C. § 202(a).

goals, and would significantly frustrate the Commission's implementation of these goals through its rules.

For instance, the merged entity would have increased incentives and abilities to restrict the access of compatible handsets to its network. It would also have similar incentives to adopt closed-network policies for applications and content. The acquisition also disincentivizes deployment of wireless voice and data service to underserved areas. The consolidation also impairs the Commission's ability to curb anticompetitive or discriminatory behavior by hampering its ability to benchmark AT&T's policies against a competitor's.

A. The Merger Reduces The Potential For Open Networks and Innovation

The proposed merger would also have effects that harm the public interest beyond the expected increases in cost that accompany market concentration. With increased market share also comes increased ability to dictate the terms upon which devices, software, and content become available on the network. The clear incentives that a dominant player has to employ restrictive terms illustrates the need to prevent carriers from amassing further market concentration as well as the need for open Internet rules that apply to wireless access as well.

1. The Merged Entity Has the Incentive to Restrict Device Access

The advantage of controlling a commanding market share of wireless data and communications makes the merged entity far less susceptible to competitive pressure to open its networks to non-approved devices. The Commission's professed goal of ensuring that consumers should be able to attach non-harmful devices of their choosing to

the network could conceivably be met in a robustly competitive sphere or with adequate regulation. Allowing the merger to go forward does nothing towards the latter and makes the former an increasingly remote possibility.

The removal of T-Mobile from the competitive landscape enhances AT&T's market power and reduces the potential for innovation in the handset market. For example, prior to the introduction of the iPhone, it was common for the wireless carriers to dictate the entire design and functionality of the devices that ran on their networks. In fact, the iPhone was originally rejected by Verizon on the grounds that Apple wanted too much control over the device.⁹² Even during negotiations with AT&T, its eventual exclusive partner, Apple had to fight constantly over what features would be allowed, such as the ability of YouTube to function over the network, video calling—which is allowed in Europe, Asia, and on T-Mobile, but not domestically on AT&T—and device tethering.⁹³ Device manufacturers with less clout than Apple have even dimmer prospects for innovation in an even more concentrated market.

Handset manufacturers are dependent on wireless carriers for access to their customer base, and will necessarily have to deal with the largest company if they are to establish a business model in the United States. Should the two largest providers decline the next great innovation, that innovation will simply not happen here, if at all. Currently, AT&T is the largest wireless telephony provider based on GSM/HSPA/HSPA+ technology (“GSM”) in the United States. Absorbing T-Mobile would make the merged entity the *only* GSM-based wireless carrier, and thus the only major buyer of GSM handsets from

⁹² Leslie Cauley, *Verizon rejected Apple iPhone deal*, USA TODAY, Jan. 29, 2007, http://www.usatoday.com/tech/news/2007-01-28-verizon-iphone_x.htm.

⁹³ Fred Vogelstein, *Bad Connection: Inside the iPhone Network Meltdown*, WIRED, Jul. 19, 2010, http://www.wired.com/magazine/2010/07/ff_att_fail/all/1.

various manufacturers. To the extent that the merged entity is a monopsony buyer of GSM handsets, it will determine what features will be present in the United States. If denied access to this market, a hardware manufacturer may simply decline to build a phone with the objectionable innovation. If AT&T had had its way with the iPhone in 2006, consumers would not be able to access YouTube (except over WiFi) or perform many other tasks now taken for granted.⁹⁴ Every new innovative service that might require additional investment by the carrier can either be subjected to profit-maximizing additional charges, or simply be rejected to preserve legacy revenue streams.

Existing competition between AT&T and T-Mobile has at least been a factor in ensuring competition for device innovation. In fact, in disputing the need for “wireless *Carterfone*” regulations, both companies said such rules were unnecessary precisely because the firms compete with each other to offer the most innovative devices and applications.⁹⁵ Without even that competitive pressure, innovation is sure to suffer.

2. *The Merged Entity Will Have Incentives to Restrict Applications and Content*

Similarly, increased market share allows the merged entity to condition the software and applications available on users’ handsets. Carriers have incentives to ban or impose surcharges on applications that require additional infrastructure buildout. Carriers also have clear incentives to ban applications that cannibalize profitable services, like VoIP running off of data plans. Other applications that simply compete with proprietary services or applications could also be stifled.

⁹⁴ *Id.*

⁹⁵ Reply Comments of T-Mobile, *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, ("700 MHz Further Notice")* WT Docket No. 06-150 (June 4, 2007) 4-5, 7-9; Reply Comments of AT&T, *700 MHz Further Notice*, (June 4, 2007) 3-6.

AT&T's acquisition of T-Mobile shows no indication of reversing this trend. AT&T currently has the most restrictive data policies among the four national carriers, and is the only carrier that financially punishes consumers for high data usage.⁹⁶ In contrast, T-Mobile currently only slows down high capacity users⁹⁷ and Sprint offers completely unlimited access.⁹⁸ However, AT&T fines consumers that use too much of their wireless data—a practice that will be adopted by Verizon in the coming months.⁹⁹ With close to 80 percent of the wireless market under these more restrictive data plans in a post-merger environment, application developers will need to curtail next generation services to work in a more restricted ecosystem in order to reach their customers.

To the extent that carriers seek exclusive deals on particular content, the merged entity has an increased ability and incentive to prevent content from reaching consumers via less-monetized channels, such as the Web, instead of more profitable proprietary services or MVPD services. Furthermore, there is legitimate concern about how a merged AT&T and T-Mobile would impact the ability of creative entrepreneurs, particularly independents, to access the marketplace through its networks.

Consumers have come to expect a diverse range of content from not only mainstream content companies, but also independent and unaffiliated creators, as evidenced by the

⁹⁶ AT&T data plans, retrieved from AT&T Wireless, *Wi-Fi Data & Tethering Data Plan* (2011), <http://www.att.com/shop/wireless/plans/data-plans.jsp>.

⁹⁷ Marin Perez, T-Mobile Will Throttle Your Data After 5 GB, IntoMobile.com (Oct. 13, 2010), <http://www.intomobile.com/2010/10/13/tmobile-throttle/>.

⁹⁸ Press Release, Sprint, *Sprint CEO Dan Hesse defines "unlimited" in new TV ad* (Mar. 12, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=1818.

⁹⁹ Matt Hamblen, *Verizon data caps coming, probably by mid-summer*, COMPUTERWORLD (Mar. 1, 2011), http://www.computerworld.com/s/article/9212378/Verizon_data_caps_coming_probably_by_mid_summer.

popularity of such platforms as Pandora¹⁰⁰ and hybrid entertainment apps such as Tapulous¹⁰¹ and the thousands of creator-driven, discovery-oriented products in the mobile marketplace. Currently, independent and unaffiliated artists continue to enjoy a relatively low barrier to entry into the broadband marketplace, thanks in no small part to the Commission's policies preserving access and innovation in the wireline context. The mobile Internet, which was left with less definite protections in the Open Internet Order, may hold a different future for creative entrepreneurs who have come to depend on Internet-engendered technologies in nearly every aspect of their lives and careers. Without clear, enforceable and transparent rules, and decreasingly constrained by competitive pressures, consolidated mobile providers would have tremendous incentive to favor their own products at the expense of other entrepreneurial activity.

AT&T also has a spotty history with regard to protecting free speech on its networks. In 2007, the company censored a live performance by the rock band Pearl Jam after singer Eddie Vedder made a few critical remarks about then-president George W. Bush.¹⁰² AT&T had the exclusive right to webcast the Lollapalooza festival where the group was performing, which shows what can happen when a company has the sole authority to determine what should and should not be communicated online. While AT&T apparently has not attempted anything similar for its mobile Internet subscribers, the example is instructive when considering how a company with tremendous market power may behave with few restrictions on its ability to act as a mobile broadband

¹⁰⁰ Pandora, *About Pandora*, <http://www.pandora.com/corporate/>.

¹⁰¹ Tapulous, *About Tapulous*, <http://tapulous.com/about/>.

¹⁰² Nate Anderson, *Pearl Jam censored by AT&T, calls for a neutral 'Net*, ARS TECHNICA (Aug. 9, 2007), <http://arstechnica.com/old/content/2007/08/pearl-jam-censored-by-att-calls-for-a-neutral-net.ars>.

gatekeeper.

B. The Proposed Merger Will Have Negative Effects On Broadband Deployment and Adoption

Pricing above competitive rates not only decreases aggregate consumer welfare below efficient levels; it also frustrates the public policy goal of ensuring that all Americans can be connected with high-speed networks. The national goal of ensuring that all Americans have access to affordable broadband is unlikely to be met purely through competitive means; there will likely always be some households that are expensive enough to reach that provisioning them with access will not be profitable.¹⁰³ However, decreasing the number of competitors can only decrease the number of households served, whether through competitive offerings or through a universal service program.

The Commission has recognized that wireless providers like AT&T and T-Mobile may in fact be able to supply broadband connectivity to currently unserved and underserved areas.¹⁰⁴ To the extent that this is possible, the merger will reduce the number of competitors for these markets, whether or not they receive Connect America funding.

In a more competitive market, competing firms must content themselves with smaller margins than a dominant firm would. Competitive firms thus have incentives to enter geographic areas with higher deployment costs, and smaller margins, whereas an oligopolist would have no incentive to enter a market with margins below those it

¹⁰³ Gregory Rose, *Wireless Broadband and the Redlining of Rural America*, New America Foundation (Apr. 2010), available at http://newamerica.net/publications/policy/wireless_broadband_and_the_redlining_of_rural_america.

¹⁰⁴ *In the Matter of Connect America Fund and High-Cost Universal Service Support*, WC Docket No. 10-90, WC Docket No. 05-337, Notice of Proposed Rulemaking (Feb. 9, 2011) ¶ 104.

deemed optimal. For those geographic areas that will be served by Connect America funding, the merger eliminates yet one more potential bidder for deployment funds.

Furthermore, lower-income households and consumers in all areas are obviously less likely to adopt broadband if prices remain the same or increase. The likely effects of the merger on consumer prices thus not only reduce the aggregate amount of consumer welfare, but the public good of universal access, by reducing the number of users who can afford connectivity.

C. The Merger Impairs the Ability for the Commission and Others to Benchmark Carriers Against Each Other.

Another loss to the public interest by the elimination of T-Mobile results from the deprivation of a competitive benchmark. The Commission has found that mergers can frustrate the Commission's statutory mandates by depriving it of sufficient independent sources of observation for comparison.¹⁰⁵ Particularly in cases where federal and state regulators wish to implement their mandates through adjudication, the actions of independent firms can signal existing obligations and practices, as well as indicating new approaches. These signals provide regulators with points of comparison that indicate when a firm may be seeking supra-competitive rates, or highlight that its practices are unreasonable, discriminatory, or otherwise detrimental to the public interest.

In the Ameritech-SBC Order, the Commission found that merging two of the six then-remaining major incumbent LECs, depriving regulators of a critical benchmark. Not only would the merger concentrate the market, the acquisition of an independently-owned

¹⁰⁵ Ameritech Corp., Transferor, and SBC Communications INC., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts, 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, *Memorandum Opinion & Order*, 14 FCC Rcd 14712, ¶ 57 (1999).

company threatened to reduce the amount of innovation that regulators and competitors could observe and analyze.¹⁰⁶ Ameritech’s innovative approaches then can be compared to T-Mobile’s maverick status now. A merger creates strong incentives for remaining competitors to coordinate their behavior to resist market-opening measures. As the number of competitors shrinks, the probability of coordination significantly increases.¹⁰⁷

Similarly, in the Adelphia-Time Warner application, the Commission found that the license transfers would leave Time Warner the sole operator in the Los Angeles metropolitan area, depriving regulators of independent sources of comparison on price and service, and considered this deprivation a harm to the public interest requiring remedy.¹⁰⁸

In this case, the merger deprives the Commission of an invaluable benchmark in several markets, most notably in the market for roaming, as well as the reasonability of the carriers’ network management practices.

In its Data Roaming Order, the Commission requires facilities-based CMDS providers to offer roaming arrangements to other carriers on “commercially reasonable terms and conditions.”¹⁰⁹ Judging whether terms and conditions are commercially reasonable will be a considerably more difficult task with fewer points of comparison. Even harder will be the Commissions’ task in judging reasonable terms and conditions for the merged entity, since AT&T will become the only national facilities-based CMDS

¹⁰⁶ *Id.* at ¶ 59.

¹⁰⁷ *Id.*

¹⁰⁸ Applications for Consent to the Assignment and/or Transfer of Control of Licenses, *Memorandum Opinion & Order*, 21 FCC Rcd. 8203, ¶ 83, (2006) (hereinafter “Adelphia/Time Warner Order”).

¹⁰⁹ *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order (Apr. 7, 2011).

based on GSM. Since facilities-based providers are presumed to be reasonable not to allow roaming of incompatible technologies on their networks, AT&T's unilateral actions will become the industry standard by default. Likewise, technological explanations for offering particular rates will not be tested against the practices of independent competitors.

The Open Internet Order also requires ongoing monitoring model in judging whether or not the practices of mobile broadband Internet providers are reasonable.¹¹⁰ To begin with, the Commission's ability to compare and evaluate carriers' compliance with the explicit requirements of the Order would be impaired absent independent points of comparison. Evaluating compliance with transparency requirements will involve judgments about what level of detail carriers provider, as well as what practices they claim might compromise network security or undermine reasonable network management. The no-blocking rule also benefits from having independent sources of comparison.¹¹¹ Although finding whether or not a provider is blocking sites may initially appear to be a straightforward question, there are many nuances in practice that can benefit from comparative analysis of practices. For example, if carriers may engage in restrictive technical practices under the guise of reasonable network management, comparison with independent firms can reveal whether or not these practices amount to *de facto* blocking. Other gray areas exist to the extent that the distinction between websites and applications is becoming increasingly blurred. Website contents frequently function as applications themselves, providing users with Internet-based applications for email, word processing, instant messaging, social networks, media players, and other

¹¹⁰ *Open Internet Order* ¶ 104-05.

¹¹¹ *Open Internet Order* ¶ 99-101.

tasks that may vary in their level and style of data usage or in the amount of competition they offer to carriers and their business partners. Carriers' varied management practices with respect to certain applications can implicate site blocking or other forms of prohibited actions.

Beyond the enforcement of the existing Open Internet rules, though, the Commission is committed to ongoing investigation and evaluation of mobile broadband practices.¹¹² Accurate evaluation of evolving network management practices requires the Commission's ability to compare the dominant firms' practices with independent firms', lest the unilateral actions of one or two firms automatically constitute industry practice.

Consumers can also discipline a firm's pricing and other behaviors by comparing them to another, similar firm, even if the two businesses are not direct competitors.¹¹³ For instance, a regional carrier such as Cellular South, although it does not compete for the same customers as Cellular One, may still lose customers if its prices and terms of service are significantly worse than Cellular One's, should consumers decline to purchase service they feel is being offered on unfair terms.

Even assuming for the sake of argument that AT&T's acquisition of T-Mobile was not the removal a direct competitor, certainly it removes the benefit of a benchmark firm. This is particularly true to the extent that, as a far smaller player than either AT&T or Verizon, T-Mobile has had to offer competitive rates and terms to its subscribers, as well as investing more in the prepaid market than AT&T or Verizon has. In those markets, if any, in which the two firms have not been direct competitors, T-Mobile has served as a

¹¹² Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd 13064, ¶105 (2009).

¹¹³ Adelphia/Time Warner Order, *supra*, note 45, at ¶83.

benchmark against which other carriers' terms and rates have been measured by consumers. Removing this point of comparison leaves consumers and regulators alike with so few firms to compare that publishing terms and rates is all that is necessary for price signaling collusion. Coordinated effects regarding terms of service are likewise far easier to achieve in a heavily consolidating market.

III. THE BENEFITS CLAIMED BY AT&T ARE EITHER ILLUSORY OR NOT DEPENDENT ON MERGING WITH T-MOBILE.

The numerous benefits claimed by AT&T are not specifically dependant on merging with T-Mobile. In some cases the benefit is entirely illusory. In others the real benefit is unrelated to a merger with T-Mobile. As the Commission has noted, for a benefit to be considered, it must be transaction-specific, verifiable, and non-speculative. Furthermore when harms are “substantial and likely,” as they are in this proposed merger, “a demonstration of claimed benefits must also reveal a higher degree of magnitude and likelihood than [the Commission] would otherwise demand.”

Ultimately, there is very little evidence that the merger of AT&T and T-Mobile directly generates benefits for the public. Whatever meager merger-specific benefits that that could possibly accrue are of extremely limited magnitude and likelihood.

A. Many Benefits Cited by AT&T are Simply Illusory.

AT&T points to many benefits that would result from its merger with T-Mobile. Oftentimes, those benefits flow from the perceived advantages that result from combining AT&T's existing network with the network of T-Mobile. While it is likely true that AT&T's network would benefit from the addition of T-Mobile's network infrastructure and spectrum holdings in the abstract, those benefits are largely mitigated by the

concurrent addition of T-Mobile's 33 million customers to the newly constituted network.

1. *The Addition Of T-Mobile Spectrum And Network Architecture Will Not Make A Significant Impact On Network Congestion.*

AT&T explains that it has done an especially poor job of managing its existing network and spectrum resources. Unlike its competitors, AT&T's network capacity challenges "are here today." As a result of poor planning and inefficient network management, AT&T seeks more spectrum to support its network. AT&T hopes that the addition of T-Mobile's spectrum and network infrastructure will allow it to expand its network in order to meet growing demand.

However, what AT&T fails to note is that T-Mobile's network and spectrum are already being used by millions of T-Mobile customers. As a result, the new network will approach capacity almost as soon as it comes into existence. AT&T tries to paper over this inconvenient fact by summoning the image of two water bottles. In AT&T's description, one bottle is 80 percent full while the other is merely 10 percent full. Combining these two bottles results in an almost full 90 percent bottle and a completely empty second bottle.

While this ratio may exist in some markets, networks in the most congested cities are not operating at 80 percent capacity, let alone 10 percent. Combining one mostly full bottle with a second mostly full bottle can result in only one thing—two mostly full bottles. Adding a second network operating at or near capacity to an existing network at or near capacity will do little to alleviate the systemic network congestion that AT&T has proven uninterested in addressing through network investment.

2. *Competitive Pressure on AT&T to Manage Its Network in a More Efficient Manner is the Only Long-Term Solution.*

Fortunately, AT&T's network congestion problems are mostly of its own making. That is why, while all wireless carriers use spectrum and have seen exponential traffic growth flowing from the adoption of smartphones, AT&T customers are the least satisfied wireless customers.

AT&T, like all wireless service providers, must support more than one network technology simultaneously over many years as new, more efficient and more powerful technologies are introduced, and customers demand access to new, wider bandwidth applications. New technologies often differ in major respects, as in the case of wireless networks, new air interface protocols and, in common with a universal trend throughout telecommunications, the adoption of packet switched in contrast to circuit-switched network architectures. At the same time, again like all service providers with a significant installed customer base, AT&T cannot migrate all its customers to new technologies and new devices overnight (some may only want to use legacy services for years to come), nor can it afford to replace existing networks completely (a so-called "forklift" replacement strategy) within one or even a few years. AT&T has in fact embarked on a transition toward the deployment of mobile broadband systems by "refarming" some of its existing 850 MHz spectrum (much of which was awarded to its predecessors in the early 1980s at no charge, a continuing subsidized advantage against all other competitors (except Verizon) which have had to pay billions of dollars for all the spectrum they use) and 1900 MHz frequencies for HSPA/HSPA+ in place of GSM.

It is unclear why AT&T's network and its transition should be encountering significantly more severe congestion than any other network. This is especially curious in light of the fact that AT&T can exploit as much or more spectrum than even its largest

rival Verizon (which itself faces comparable transition issues while serving more customers). AT&T's capacity issues are ultimately the result of its own under-investment and/or inefficiency, and are not due as it claims to an allegedly spectrum-poor situation. Increased investment in deploying broadband capacity in unused spectrum that AT&T already holds would be a more efficient and rapid path for providing additional capacity than trying to combine spectrum from a second, already fully utilized network.

This acquisition requires AT&T to disburse \$25 billion in cash, which if spent on additional network investment that could be initiated now, would be equivalent to more than three years of its recent level of investment in its wireless business. This acquisition does not add one single MHz to the total quantity of spectrum available for mobile networks in the US, or one single Mbps of additional capacity without substantial further investment and network transitions. The Commission cannot reward AT&T's inability to efficiently manage its current network and spectrum holding by allowing it to take control of a rival.

Of course, AT&T is not the first major nationwide wireless company to be faced with a network made inefficient by mutual unintelligible wireless protocols. Sprint's acquisition of Nextel, ranked as one of the worst mergers of the mergers-and-acquisition boom of the mid 2000s by Bloomberg, saddled it with an inefficient system of mutually incompatible networks. In 2008, Sprint was at the bottom of customer satisfaction surveys, ranking 15 points below (on a 100 point scale) the second worst provider. By 2009, analysts were including Sprint on lists of large companies most likely to declare bankruptcy.

Today, Sprint sits atop those same customer satisfaction surveys. It is shutting down

its legacy networks and focusing on a strong migration to next generation technology. Although this process requires a significant upfront capital expenditure, Sprint has the long-term vision to understand that the initial investment will pay dividends in the future. Sprint is also rededicated itself to improving the customer experience.

Sprint did not achieve this change by continually purchasing additional networks and spectrum to bring into a dysfunctional system. Instead, Sprint focused on investing in upgrading its own network and internal processes. Competitive pressure—of a type that would severely reduced with the elimination of T-Mobile from the market—drove Sprint to innovate and improve. Allowing AT&T to merge with T-Mobile will do little to change the reality that AT&T’s only real path forward is to focus on consolidating its network protocols, not to allow inefficient practices to spill over into larger and larger swaths of spectrum.

3. Advantages Flowing From The Creation Of “Instant” Cell Splits Are Limited.

In addition to claimed benefits related to increased spectrum capacity, AT&T also claims that the merger will help expand the capacity of its physical network. This will be achieved by linking nearby AT&T and T-Mobile towers, effectively doubling the number of towers in a given area. As with spectrum, these splits would be helpful additions to AT&T’s existing network at its existing capacity. However, also as with spectrum, the additional towers AT&T will acquire from T-Mobile are already servicing T-Mobile customers.

These instant cell splits will not be without merit. A combined network would require them just to maintain service in the most congested locations. The areas where additional towers are most needed are the highly congested urban areas that are least likely to have

excess capacity on existing towers. The most congested areas—nominally the areas whose congestion is driving the necessity of the merger—will find their congestion largely unchanged.

Once the limited benefits of the instant cell splits fully manifest themselves, AT&T would find itself in the same position it is in today—working through the slow process of locating and building new cell towers. The acquisition of T-Mobile would do little to improve AT&T’s capacity to “locate a suitable and available location, arrange to acquire the site through purchase or lease, comply with regulatory requirements that necessitate extensive studies and consultation, apply for and obtain building permits and zoning approvals, contract with third-party vendors to purchase the needed equipment, construct the site and associated backhaul, and then integrate the site into the network.” Instead, AT&T will find itself in the same position it is today: uninterested or unable to engage in the type of advanced planning required to maintain its network in the face of increased demand.

4. The Market Barriers To LTE Rollout Are Unimpacted By The Merger.

Pre-merger, AT&T had planned to extend LTE service to 80 percent of the U.S. population. This goal was set after an analysis considering “the availability of capital, the anticipated return on investment, and other typical cost and risk factors.” It was also based, “in part” on existing spectrum holdings. After the analysis AT&T concluded that “[i]n light of the business realities concerning the billions of dollars required for this expansion [of LTE service] and the challenges we faced with our existing network, our senior management concluded that an 80% build was the limit our company could justify to shareholders.” Notably, this conclusion appears to be driven primarily by investment

costs, not spectrum availability. The excluded 20 percent generally live “in less populated areas, including rural and smaller communities, where economies of scale and density are very low and per-customer costs are very high.” In other words, the remaining 20 percent live in areas AT&T does not view as economically viable to provision.

There is nothing in AT&T’s filing that suggests how a merger with T-Mobile would significantly alter these facts on the ground.

Acquiring T-Mobile would not increase the population density of the remaining 20 percent. It would not impact the economies of scale inherent in building an advanced network to serve them. It would not significantly reduce the per-customer costs. Nor would it increase the amount those living in the remaining 20 percent are willing or able to pay for wireless service.

Unless those 20 percent live in an area that is already viable for T-Mobile to serve, simply combining AT&T and T-Mobile will do little to make serving them more economically attractive. This is especially true because the spectrum that AT&T would acquire from T-Mobile (AWS and 1900 MHz) is less economically efficient to use to reach currently unserved areas than AT&T’s existing 850 MHz and 700 MHz holdings. In fact, eliminating a carrier who might some day compete to serve the remaining 20 percent could reduce the competitive pressure to serve them at all.

The Commission should recognize this claim for what, in the words of former FCC Chairman Reed Hundt, it is—a “state authorized bribe.”¹¹⁴ In return for allowing the merger, AT&T is promising to expand buildout beyond what it sees as economically viable. Of course, that is the best-case scenario. The most likely outcome is that the state

¹¹⁴ *AT&T/T-Mobile deal offers risk, reward for Obama*, POLITICO PRO, April 22 2011, April 22, 2011 (quoting former Chairman Reed Hundt).

authorized bribe will purchase nothing. Once the merger is approved, AT&T will consider the unchanged economic reality of serving currently unserved areas and begin the process of walking back its ambition.

5. *T-Mobile's Capacity to Roll Out Specific Technologies is Not Relevant to This Analysis.*

In its public interest statement, AT&T expresses concern that T-Mobile does not have a clear path to deploying LTE within its current spectrum holdings.¹¹⁵ Even assuming that this assertion is correct, it is largely irrelevant.

Historically, the Commission has not focused on the deployment of specific technologies in wireless networks.¹¹⁶ As a result of this policy, wireless providers have been free to deploy the technology that they believe best meets their needs and the needs of their customers.¹¹⁷ Technical differentiation in wireless networks has created two major paths of technological divergence, each containing a handful of sub-technologies.¹¹⁸ The Commission has recognized that this technological diversity creates advantages that benefit consumers and the public.¹¹⁹

A diversity of technological paths was true for the development of 3G technologies, and will no doubt be true for 4G technologies. T-Mobile's lack of a clear path to deploy one specific type of 4G technology - LTE—does not mean that it will be incapable of offering customers a 4G level of service.

In fact, all evidence indicates that T-Mobile is responding to the current mismatch between its spectrum holdings and LTE technology in precisely the manner the

¹¹⁵ AT&T Public Interest Statement at 30 – 33.

¹¹⁶ 14th Wireless Comp Report at ¶ 108

¹¹⁷ 14th Wireless Comp Report at ¶ 108

¹¹⁸ 14th Wireless Comp Report at Appendix B

¹¹⁹ 14th Wireless Comp Report at ¶ 109

Commission should hope: by innovating. T-Mobile's HSPA+ network has been so successful that it has caused at least one commentator to ask "Why the heck should we even bother with LTE networks?"¹²⁰ The history of wireless networks illustrates that the inability to efficiently deploy a single specific technology is not a bar to deploying other technologies that can effectively compete in the marketplace.

6. *A Merger Is Most Likely to Have No Impact or a Negative Impact on Rural Deployment.*

Contrary to AT&T's claims, this merger would have either no impact or a negative impact on broadband deployment in underserved areas.

The Commission has already found that 98.1 percent of the population has access to at least one mobile broadband provider.¹²¹ While Public Knowledge has some concerns about the adequacy of the Commission's definition of mobile broadband, Public Knowledge recognizes the value in consistent performance benchmarks. Generalized promises from AT&T regarding deployment of some type of LTE service to more than 97 percent of the population—fewer than currently have access to mobile broadband under the Commission's own standards—does little to assuage the public interest concerns raised by this merger. Using the Commission's own definition, even if AT&T met this ambitious and unlikely deployment goal it would have no impact on overall broadband deployment.

Furthermore, there is every reason to be skeptical that a combined AT&T/T-Mobile will prioritize deployment of LTE technologies to areas that lack economies of scale and

¹²⁰ Kevin Fitchard, *CTIA-ATIS Preview: Is LTE really better than another 4G flavor?*, Connected Planet, Mar. 8, 2011, available at <http://connectedplanetonline.com/3g4g/news/is-lte-really-better-than-any-other-4g-flavor-0308/index1.html>.

¹²¹ 14th Wireless Comp Report at ¶ 4

suffer from low population density and high per-consumer costs.¹²² Instead, after a merger AT&T would focus on the same high-value markets as it does today.

While it is unlikely that a post-merger AT&T would act quickly (if at all) to provide increased wireless data speeds to underserved areas, the merger is likely to have some impact on underserved customers. Unfortunately, that impact is most likely to be negative.

The newly expanded AT&T will have near monopoly control over GSM roaming in many of the areas it sees fit to serve. Even in light of the Commission's data roaming rules, this monopoly power will inevitably drive up the roaming costs for existing GSM-based rural carriers and their consumers, who will have no other option than to deal with AT&T. That will make it even more expensive for rural consumers to affordably access wireless data networks.

AT&T will also undermine the rural carriers trying to serve underserved areas by increasing its near monopsony power over handsets and GSM networking equipment. A merged AT&T will be the largest buyer for both GSM handsets and GSM networking equipment by many orders of magnitude. As they have in the past, in many cases AT&T will use this power to cut exclusive deals that prevent competitors from gaining access to the newest and most popular GSM handsets. Similarly, the scope and scale of their buying power for networking equipment will distort the market for all other GSM carriers.

B. Any actual benefits cited by AT&T are not merger dependent.

1. *More Efficient Network Technologies Are Waiting To Be Deployed Today.*

¹²² AT&T Public Interest Statement at 55.

Not all of AT&T's claims merely point to the improbable or impossible. The future *will* bring increased data speeds, increased data coverage, and more reliable networks. However, these advances are not predicated on the merger of AT&T and T-Mobile. If the merger has any impact, it would delay their adoption by eliminating the competitive pressure created by the presence of an independent T-Mobile in the national wireless market.

Today, AT&T appears to be actively avoiding moving towards a world of increased data speeds, increased data coverage, and more reliable networks. Although it styles itself a leader smartphone deployment—a technology that consumes “24 times as much data as traditional cell phones,” AT&T has been a laggard in network investment. In recent years, as its mobile data volume on its network has “surged by a staggering 8000%,” it has invested less, both in absolute terms and in percentage of revenues than its rivals.

This aversion to network investment helps to explain why AT&T alone is unable to find a way to operate within its current spectrum restraints. AT&T's shortcomings are especially curious when considered in the context of its actual spectrum holdings. AT&T has more spectrum in the top 21 markets than any other carrier. Of this spectrum, a full one third sits fallow.¹²³ Nationwide, as much as 70 to 90 percent of AT&T's network capacity is unused, waiting for the investment necessary to optimize its use.¹²⁴ Merging with T-Mobile will do little to alleviate these problems.

AT&T rival Verizon is already planning on replacing its entire 3G footprint with 4G

¹²³ Burnstein, Dave (March 22, 2011). 70-90% Of AT&T Spectrum Capacity Unused [Online] In DSLPrime.com Retrieved April 25, 2011 from <http://www.dslprime.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused>

¹²⁴ Reardon, Marguerite (April 29, 2011). Is AT&T a wireless spectrum hog? [Online] In CNet News. Retrieved May 6, 2011 from http://news.cnet.com/8301-30686_3-20058494-266.html

LTE technology by the end of 2013. It is doing so by making the unglamorous but prudent and necessary decision to invest in its existing network. If AT&T expands its next generation footprint it will be in response to competitive pressure from carriers such as Verizon, not because of a merger with T-Mobile.

2. *Data Roaming Can Be Used To Complete Network Coverage Areas.*

The Commission's wireless data roaming rules provide a mechanism for wireless carriers to efficiently access other networks in areas where their own are inadequate. As a result, there is no need for AT&T to own T-Mobile's network in order to address its own shortcomings. Instead, AT&T can come to a data roaming agreement with T-Mobile. Although AT&T questioned the necessity of the formal rules, they will help provide a framework to facilitate roaming agreements. This allows AT&T to meet its LTE coverage goals without eliminating its rival T-Mobile.

3. *Infrastructure Buildout Will Be Largely Unchanged By The Merger.*

As mentioned above, any immediate benefits to physical infrastructure brought by a merger would largely be illusory. Instant cell splits will be used in areas that already require both sites to be active. Cell reductions might reduce operating costs, but will be largely unnoticed by consumers.

As a result, the need for effective future network planning will be largely unimpacted by any merger. The additional network, and additional customers, will require investment and planning just as the current network does. Because of the delays inherent in building new network infrastructure, that planning will need to begin today. Any new tower sites will be subject to the same delays as today's tower sites. The process of upgrading existing towers with new technologies will not fundamentally change simply because the

network includes elements from T-Mobile.

Combining two networks operating at or near current capacity will not change the underlying challenges facing AT&T's network. It must invest in a process to upgrade existing network infrastructure, as well as begin to take advantage of the large areas of unused spectrum it currently controls. These core challenges will remain with or without T-Mobile. Merging with T-Mobile would simply reduce competitive pressure to do so quickly and efficiently.

4. Challenges Are Industry Wide And Cannot Be Solved By Mergers.

While they may be uniquely acute for AT&T as a result of poor resource management, the underlying challenges facing AT&T are not specific to AT&T. The entire wireless industry must strive to make more efficient use of its existing spectrum. The entire wireless industry must invest in upgrading outdated technologies to new, efficient standards. The entire wireless industry must innovate around limitations inherent to whatever spectrum they may control.

By and large, the industry is doing these things. Software defined radios, mesh networking, channel bonding, use of unlicensed frequencies, femtocells, and next generation standards are all potential solutions to spectrum limitations. None of these require a merger in order to be brought to market. Instead, they require investment and a sustained commitment to finding new solutions to existing problems. This investment and commitment will be driven in large part by competitive pressure. While this path is clearly not as exciting to AT&T as a merger to eliminate a rival, it is the only sustainable choice in the long term. "Merge again" is not the way to address network congestion problems that have existed in the past, exist today, and will exist in the future.

IV. DIVESTITURES OR OTHER REMEDIES CANNOT PROTECT THE PUBLIC INTEREST IN A MERGER OF THIS SCOPE

No remedies are enough to save this merger. It must be blocked, not “fixed.”

There are limited ways to try to alleviate the competitive and public interest harms that can result from a merger. The remedies used by the antitrust authorities as well as the FCC “take two basic forms: one addresses the structure of the market, the other the conduct of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms.”¹²⁵ But both structural and conduct remedies would be unable to fix the numerous harms to many markets this merger would cause—much less assure that the merger “provide[s] affirmative public benefits,”¹²⁶ as all transactions approved by the Commission must.

A. Remedies Cannot Cure the Competitive Harms of This Merger

1. Structural Remedies Are Not Sufficient in This Market

Some analysts have suggested that AT&T might be required to divest spectrum holdings as a structural condition of a merger with T-Mobile.¹²⁷ This would not be enough to protect competition. In the first place, such a divestiture would be directed only to remedying harms in the consumer market for wireless services. But as discussed above, the competitive harms this merger would cause go far beyond just the consumer wireless service market, affecting competitors’ access to roaming and special access

¹²⁵ DEPARTMENT OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (2004).

¹²⁶ Comments of FCC General Counsel Christopher J. Wright, Introducing the Transactions Team Presentation on Timely Consideration of Applications Accompanying Mergers (March 1, 2000), <http://transition.fcc.gov/Speeches/misc/statements/wright030100.html>.

¹²⁷ *Analysts Say AT&T Will Have To Divest Part Of T-Mobile, Possibly To Sprint*, TMONews, Mar. 24, 2011, <http://www.tmonews.com/2011/03/analysts-say-att-will-have-to-divest-part-of-t-mobile-possibly-to-sprint>.

services, buyers for handsets, enterprise markets, and many others. No remedy short of blocking the merger would be sufficient to address these wide-ranging harms. Spectrum divestitures, particularly, would be ineffective even to protect competition in consumer wireless services.

The very local markets where AT&T claims to need spectrum most, such as New York and San Francisco,¹²⁸ are already highly concentrated and uncompetitive.¹²⁹ To protect the public in any meaningful way, AT&T could not be permitted to acquire new spectrum in concentrated markets like these. In essence, the spectrum that AT&T wants most is the spectrum it cannot be permitted to have. Meaningful divestitures would unwind nearly the entire merger (while still removing a competitor). The Commission faced different market conditions and different facts when it approved mergers subject to divestitures in the past.¹³⁰ It cannot rely on this tool any longer.

Nor would any divestiture (short of all of T-Mobile's assets) be enough to allow a new entrant or a local carrier to become a national competitor. Because new entrants generally cannot enter the wireless market (given the FCC's limited spectrum licenses

¹²⁸ AT&T cites reports of congestion in those markets. *See* DECLARATION OF DENNIS W. CARLTON, ALLAN SHAMPINE AND HAL SIDER ¶ 28. The Congressional Research Service additionally singles out those markets as congested. Charles M. Goldfarb, *The Proposed AT&T/T-Mobile Merger: Would It Create a Virtuous Cycle or a Vicious Cycle?* 21 (Congressional Research Service 7-5700). The CRS further inventories AT&T's large low-band spectrum holdings, *see id.* at 14, which indicate that AT&T does not have a spectrum shortage in rural areas.

¹²⁹ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 25 FCC Rcd 11407, App. C Table C-3 (2010) (14th CMRS Report).

¹³⁰ Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444 (2008).

and other hurdles), merger-related divestitures offer one of the few opportunities for new entrants to acquire the assets they need to compete in the wireless market. But T-Mobile is already the smallest national carrier; it is unlikely that a new entrant that acquires only a portion of its assets would be left in a strong position.

If divested assets were purchased by one of the other national carriers, Verizon or Sprint, the national wireless market would remain uncompetitive. There are ever-fewer national carriers, and current policy appears only to require them to exchange spectrum with each other every few years as a condition of a merger. For example, in purchasing T-Mobile, AT&T would be re-acquiring spectrum that it had divested once before in the AT&T/Cingular merger.¹³¹ And AT&T already has spectrum it acquired when two other giant wireless companies, Verizon and AllTel, merged. If Verizon ends up re-acquiring this spectrum, the Commission will have undone in one transaction the benefits it tried to achieve in another. This spectrum shell game cannot continue. America's pro-competition wireless policy should require more than having national carriers pass spectrum back and forth between themselves.

In the event that a national carrier purchased some T-Mobile assets, the market would still remain highly concentrated—less so than if AT&T retained all of T-Mobile's assets, but highly concentrated nonetheless. But as the Supreme Court has explained, “if concentration [in a market] is already great, the importance of preventing even slight

¹³¹ Christopher Stern, Cingular to Sell Cellular Spectrum, WASHINGTON POST, May 26, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A55682-2004May25.html>; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of License and Authorizations, *Memorandum Opinion & Order*, 19 FCC Rcd 21,522 ¶ 141 (2004); T-Mobile USA to End Network Venture with Cingular and Acquire California/Nevada Network and Spectrum, May 25, 2004, <http://newsroom.t-mobile.com/articles/t-mobile-cingular>.

increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.”¹³² This is especially true when the company to be eliminated is, like T-Mobile, an innovative competitor that keeps larger players in check.¹³³ The wireless market cannot afford more concentration, and no divestiture could be enough to protect competition. For this and many other reasons, the merger should be blocked.

2. *Conduct Remedies Cannot Overcome The Harmful Effects of This Merger*

Conduct remedies treat the symptoms of a sick marketplace rather than the disease—and address themselves only to one actor. The Commission should adopt policies that promote competition rather than continuing to cope with what happens when it’s missing. And to the extent that consumer protections are necessary, it should apply them industry-wide rather than targeting just AT&T.

Although in this instance they would be ineffective to protect the public interest, as a general matter structural merger remedies are preferred to conduct remedies. As discussed above, structural remedies usually involve requiring the merging firm to divest assets. Conduct remedies, by contrast, are restrictions on the conduct of the merged firm. From an antitrust perspective, conduct remedies are disfavored. According to the Department of Justice,

Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.¹³⁴

¹³² *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, n. 42 (1963).

¹³³ *United States v. Aluminum Co. of America*, 377 U.S. 271, 281 (1964).

¹³⁴ Department of Justice, Antitrust Division Policy Guide to Merger Remedies 7-8 (2004). See also *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)

The DOJ continues,

Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter....Third, a conduct remedy may restrain potentially procompetitive behavior....Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.¹³⁵

Despite these drawbacks, the FCC has often relied on conduct remedies to attempt to preserve the public interest in mergers. This strategy cannot work here. The multi-market harms that need to be remedied are so wide-ranging, and the merged company would be so large, that any attempted conduct remedies would likely be ineffective. In order to ensure that the new entity did not abuse its power in the many markets in which it would be dominant, the FCC would require more resources, time, and legal tools than it has now—or will ever have. Competitors, fearful of retaliation, should not be burdened with policing the merged company's behavior—and average citizens will have an even harder time fighting a company that, last year, spent \$15.4 million on lobbying alone.¹³⁶ Put simply, conduct rules applied to AT&T cannot re-create the features and benefits of a competitive market.

A further drawback to conduct remedies is the recent trend of limiting them in time, even when conditions that would make them unnecessary fail to arise. For example, AT&T has been subject to a number of merger-related conduct remedies in recent years. In the AT&T/BellSouth merger, the Commission required that AT&T comply with Open

("Antitrust courts normally avoid direct price administration, relying on rules and remedies that are easier to administer.").

¹³⁵ *Id.* 8-9.

¹³⁶ Open Secrets Data for AT&T, <http://www.opensecrets.org/lobby/clientsum.php?id=D000000076&year=2010>.

Internet principles for 30 months after the merger closing date.¹³⁷ And in the AT&T/Centennial merger, AT&T “voluntarily” agreed to continue offering some roaming services to regional carriers for 48 months.¹³⁸ If those conditions were needed to protect the public interest when they were adopted, they were still needed when they expired: market conditions in wireline and wireless markets did not change significantly over the course of several months, and truly competitive conditions failed to emerge. But while time-limited merger conditions are *always* suspect, they would be entirely powerless to alleviate the anti-competitive, anti-consumer effects of an AT&T/T-Mobile merger. The merger would leave national wireless competition in a dire state—an effective national duopoly—without much prospect for new entry or increased competition. Time-limited merger conditions, even if they were easily enforceable and comprehensive, would simply delay the inevitable consumer harms.

B. Remedies Cannot Cure the Public Interest Harms of this Merger

While competitive harms are relevant to any public interest analysis,¹³⁹ the Commission’s public interest inquiry ranges further.¹⁴⁰ As discussed above, the merger

¹³⁷ AT&T/BellSouth Commitments Letter, http://transition.fcc.gov/ATT_FINALMergerCommitments12-28.pdf.

¹³⁸ Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, *Memorandum Opinion & Order*, 24 FCC Rcd 13915, ¶129 (2009).

¹³⁹ *See FCC v. RCA Communications*, 346 U.S. 86 (1953).

¹⁴⁰ *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, 2011 FCC LEXIS 414, ¶ 25 (F.C.C. Jan. 20, 2011) (“

Our public interest authority enables us, where appropriate, to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction. Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act. Indeed, unlike the role of antitrust enforcement authorities, our public interest authority enables us to rely upon our

fails the Commission’s public interest test because it does not provide any affirmative public interest benefits, and because it frustrates the goals of the Communications Act. For many of the same reasons that remedies cannot cure the competitive harms of this merger, remedies cannot outweigh the public interest harms the merger would cause.

By reducing competition and eliminating a low-cost competitor, this merger would frustrate one of the primary goals of the Communications Act—to promote a communication service at “reasonable charges”¹⁴¹ and at “affordable rates.”¹⁴² After the merger, AT&T would have the ability to raise its prices beyond the reach of even many of T-Mobile’s current customers. Even if the Commission were to adopt full price regulation of AT&T as a condition of the merger, the reduced competition and elimination of T-Mobile would allow Verizon to raise its prices. Remedies applied to AT&T alone can never cure the harms this merger would cause. In order to protect the public interest and promote the goals of the Communications Act, the Commission is left with two choices: Embark on complete rate regulation of the entire wireless industry (a measure, even if wise, could be at most only partly effective), or simply block the merger and allow competitive forces to keep prices low.

Several other aims of the Communications Act would be frustrated by the merger, and they are similarly irremediable by merger conditions. For example, the Commission

extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits. In exercising this broad authority, the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission’s responsibilities under the Act and related statutes.

”
¹⁴¹ 47 U.S.C. § 151.

¹⁴² 47 U.S.C. §§ 201(b); 254(b)(1).

is charged with preventing unjust and unreasonable discrimination by carriers,¹⁴³ promoting the competitive development of the Internet,¹⁴⁴ and maximizing user control of content.¹⁴⁵ All of these goals would be best served by blocking the merger, and leaving competition in place. And all of them would be frustrated if the Commission allows this merger, even if it chose to apply broad obligations on AT&T.

Furthermore, there is good reason to think that public interest remedies would be particularly ineffective against AT&T, whatever may be their merits generally. AT&T has a history of resisting public interest obligations and regulation. Recently, it has simply failed to comply with certain merger obligations—in fact, it paid two million dollars after the Department of Justice complained it had not met its obligations for its merger with Dobson.¹⁴⁶ Or it has “complied” with merger conditions half-heartedly. For instance, AT&T hid its “naked DSL” option from consumers¹⁴⁷ after being required to offer it after the BellSouth merger. And relatedly, AT&T has “endanger[ed] public health and safety” by failing to meet service and repair standards,¹⁴⁸ and generally resisted

¹⁴³ 47 U.S.C. § 202(a).

¹⁴⁴ 47 U.S.C. § 230.

¹⁴⁵ 47 U.S.C. § 230(b).

¹⁴⁶ Justice Department Settles Civil Contempt Claim Against AT&T Inc., Jan. 14, 2009, http://www.justice.gov/atr/public/press_releases/2009/241435.htm.

¹⁴⁷ Ben Popken, *How to Get Naked DSL Redux*, CONSUMERIST, Aug. 28, 2008, <http://consumerist.com/2008/08/how-to-get-att-naked-dsl-redux.html>; Jacqui Cheng, *AT&T offers \$20 Naked DSL, If You Know Where to Look*, ARS TECHNICA, Dec. 2007, <http://arstechnica.com/old/content/2007/12/att-offers-20-naked-dsl-if-you-know-where-to-look.ars>; Eric Bangeman, *AT&T Launches \$10 DSL It Hopes No One Signs Up For*, ARS TECHNICA, June 2006, <http://arstechnica.com/old/content/2007/06/att-launches-10-dsl-it-hopes-no-one-signs-up-for.ars>

¹⁴⁸ Attorney General Calls AT&T Failure To Meet Service, Repair Standards “Unacceptable,” Demands DPUC Compel Improvements, Nov. 18, 2008, <http://www.ct.gov/ag/cwp/view.asp?A=2795&Q=428332>.

build-out requirements.¹⁴⁹ It has even threatened to withhold deploying wireless service to rural America if the FCC made decisions it disagreed with.¹⁵⁰ Given AT&T's combative posture with public authorities, any public interest "commitments" it comes forth with should be taken with a shaker of salt. The FCC should not rely on either these commitments or other public interest remedies in this merger. Instead, it should block it.

CONCLUSION

WHEREFORE, for the above stated reasons, the Commission should deny the Application, or refer the matter for a hearing pursuant to Section 310(d).

Respectfully submitted,

PUBLIC KNOWLEDGE
FUTURE OF MUSIC COALITION

/s Harold Feld
Legal Director
Public Knowledge

¹⁴⁹ Nate Anderson, *Suburbs Against the U(ni)verse: The Battle Over AT&T's Fiber Rollout*, ARS TECHNICA, Dec. 2006, <http://arstechnica.com/business/news/2006/12/u-verse.ars>

¹⁵⁰ Dave Burstein, *AT&T'S Quinn: We May Renege on 80%, 95% LTE Buildout*, DSLREPORTS, Apr. 26, 2011, <http://www.dslreports.com/shownews/ATTS-Quinn-We-May-Renege-on-80-95-LTE-Buildout-113924>.

DECLARATION OF HAROLD FELD

I, Harold Feld, declare under penalty of perjury that:

1. I have read the foregoing “Petition to Deny of Public Knowledge and Future of Music Coalition.”
2. I am the legal director for Public Knowledge (PK), an advocacy organization with members, including AT&T and T-Mobile subscribers, who, in my best knowledge and belief, will be adversely affected if the Commission approves the merger.
3. PK members use the wireless devices associated with their accounts to make and receive voice calls, send and receive text messages, and use data services when they travel to various locations throughout the United States.
4. In my best knowledge and belief, PK members will be directly and adversely affected if the Commission allows the proposed merger of AT&T and T-Mobile to proceed. They will likely face higher rates for voice, data, and text messages. Furthermore, if the merger is approved, they will be subject to more restrictive content-related policies regarding data and text messaging services, more restrictive usage plans and data caps, and will have fewer choices of wireless devices and usage plans.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s Harold Feld
Legal Director
Public Knowledge

CERTIFICATE OF SERVICE

I certify that on May 31, 2011, I sent the foregoing "Petition to Deny" by email to the following:

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