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

In the Matter of	)	
	)	
Applications of AT&T, Inc. and	)	WT Docket No. 11-65
Deutsche Telekom AG	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	

PETITION TO DENY OF FREE PRESS

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Executive Summary

In this application before the Federal Communications Commission, AT&T, Inc. and Deutsche Telekom AG propose to combine the nation's second- and fourth- largest mobile telecommunications providers (AT&T and T-Mobile USA, Deutsche Telekom's U.S. subsidiary) and create a duopoly in the market for mobile telecommunications. The Commission should conclude that this breathtaking horizontal consolidation does not serve the public interest.

First, **the merger raises serious antitrust concerns.** While the Commission should evaluate the impact of this transaction on the national market for postpaid smartphone services, the merger will undoubtedly have anticompetitive effects no matter how the Commission defines the market. The mobile market already exhibits high levels of consolidation, and new entrants face significant barriers to entry. Taking into consideration both market share changes and facts about the structure of the industry, an antitrust analysis of the transaction reveals that the transaction will have substantial unilateral harms and exacerbate coordinated effects. In particular, prices will likely rise, consumers will suffer the loss of maverick competitor in the marketplace, and AT&T will avoid infrastructure investments it would otherwise make.

Second, the merger will cause public interest harms beyond those cognizable under an antitrust inquiry. Specifically, the merger will:

- strengthen the position of the two largest providers of mobile telecommunications services and increase their market power in vertical markets such as backhaul and roaming;
- diminish innovation and investment in coordinate markets;
- reduce consumer choice and satisfaction;
- diminish incentives to invest in the new entity's network;
- cost many American workers their jobs in the midst of one greatest recessions this country has ever experienced; and

- imperil the chances that mobile broadband connectivity becomes a meaningful competitor to fixed broadband services.

Third, Applicants exaggerate the fleeting benefits of proposed transaction. AT&T and T-Mobile rely heavily on their claim that the merger will alleviate capacity constraints on both networks and will speed the deployment of next generation networks. But when systematically deconstructed, these claims appear speculative at best, specious at worst. Any significant benefits associated with increased capacity inure solely to the companies' slowest, soon-to-be-obsolete 2G network. Other capacity gains would come at significant cost to current T-Mobile consumers. And these limited benefits could be achieved simply and cheaply without resorting to a massive consolidation. Similarly, AT&T and T-Mobile's claim that this transaction will allow for faster deployment of LTE and other next-generation technologies does not stand up to exacting scrutiny. AT&T can readily deploy an LTE network using the vast spectrum resources already at its disposal. Moreover, consolidating the two networks could discourage future investments in infrastructure because the new entity will face limited competition from other providers.

This consolidation may serve the interests of AT&T's and Deutsche Telekom's shareholders, but it does not serve the public interest. The Commission should deny the application in its entirety.

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I. Introduction

In this proceeding, AT&T, Inc. and T-Mobile USA[1] seek nothing less than to create the largest mobile telecommunications provider in the country. But this proposed transaction would not only create a telecommunications behemoth. It would also create an entrenched duopoly in the market for mobile service, making the mobile telecommunications industry more consolidated than the markets for oil, banking, automobiles, and air travel (see Figure 1).

Figure 1: Concentration in U.S. Industries[2]

Industry	Top Two Firm Market share	Top Four Firm Market share
Oil	24.0%	43.8%
Airline	30.7%	54.5%
Banking	20.2%	31.8%
Auto	35.3%	60.7%
Mobile Telecommunications*	76.1%	92.5%

* post AT&T acqusition of T-Mobile USA

In order to gain the Commission's approval of this staggering consolidation of the nation's second- and fourth-largest cellular service providers, Applicants must demonstrate approving the acquisition serves the public interest.[3] They simply cannot meet that burden. The merger would create serious anticompetitive, consumer, and public interest harms. It would

[1] We refer to AT&T, Inc. and T-Mobile USA as "AT&T" and "T-Mobile" throughout this Petition to Deny. Where appropriate, we refer to the two entities as "Applicants" for simplicity's sake, even we recognize that Deutsche Telekom AG, T-Mobile's parent company, would be the formal transferor of licenses.

[2] Oil refining industry data compiled by Public Citizen's Energy Program. Airline industry data from Research and Innovative Technology Administration, Bureau of Transportation Statistics (market share based on revenue passenger miles, Jan. - Dec. 2010). Banking data from FDIC, Top 50 Commercial Banks and Savings Institutions by Total Domestic Deposits, June 2010. Auto industry data from WardsAuto.com. Wireless data from SNL Kagan, *Wireless Industry Benchmarks*.

[3] *News Corp. and DirecTV Group, Inc., and Liberty Media Corp. for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd. 3265, ¶ 22 (2008) (*News Corp./DirecTV Order*).

result in a patently inefficient allocation of spectrum. And AT&T and T-Mobile could achieve its limited, speculative benefits without resorting to combination. The Commission should deny the application for transfer of licenses and reject this transaction.

II. Statement of Interest

Free Press is a national nonpartisan organization working to reform the media and increase informed public participation in crucial media and telecommunications policy debates. Free Press has participated in numerous merger proceedings before the Federal Communications Commission.[4] In each, Free Press has advocated for policies that promote competition and serve in the public interest. As such, Free Press constitutes a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, and has standing to participate in this proceeding.

III. The Proposed Transaction Would Not Serve the Public Interest Because It Would Create a Duopoly in the Market for Nationwide, Post-Paid Smartphone Service, Resulting in Substantial Unilateral Harms and Exacerbating Coordinated Effects.

The proposed merger of AT&T and T-Mobile would dramatically reduce competition in the market for post-paid smartphone mobile service. In determining whether a transaction serves the public interest, the Commission considers its competitive effects.[5] This analysis is informed by, but not limited to, traditional antitrust principles.[6] In this case, an antitrust analysis alone demonstrates substantial competitive harm. In assessing the competitive impact of this

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[4] For example, Free Press filed extensive comments in *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56; *Consolidated Application for Authority To Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.*, MB Docket No. 07-57; and *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74.

[5] *News Corp./DirecTV Order*, ¶¶ 23-24 (2008).

[6] *Id.*, ¶ 24.

transaction, the Commission should determine that the relevant product market is the market for nationwide post-paid smartphone service. But even if the Commission chooses some broader definition of the market that either encompasses pre-paid service or includes regional carriers, it cannot escape the conclusion that the merger will decrease competition and raise serious antitrust concerns.

A. The Relevant Product Market is the Nationwide Post-Paid Smartphone Mobile Service Market.

AT&T's proposed acquisition of T-Mobile is a massive horizontal merger that would combine the operations of the nation's second- and fourth-largest cellular service providers. As the Department of Justice ("DOJ" or "Department") and the Commission consider the merger application, they must first define the relevant product market.

Though this merger involves the combination of two companies that operate in the broad "wireless" market, the data demonstrate that the relevant product market is the *nationwide, post-paid smartphone mobile service market*. In the past, the Commission has relied on a combined "mobile telephony/broadband services" product market.[7] The Commission is right to focus on

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[7] *See Applications of Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and Request for Declaratory Ruling on Foreign Ownership*, WT Docket No. 09-121, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 10985, ¶ 32 (2010) (*Verizon-AT&T Centennial Divestiture Order*) ("Mobile telephony/broadband services is the relevant product market because it includes not only the traditional wireless services identified in older transactions but also encompasses the recent significant advances in mobile broadband services technology that is rapidly evolving for next-generation services. The market for mobile telephony/broadband services includes mobile voice and data services provided over wireless broadband networks, as well as mobile voice and data services provided over less advanced, earlier generation (e.g., 2G, 2.5G) legacy wireless networks. In addition, the market includes a wide array of mobile data services, ranging from handset-based mobile data services marketed primarily as an add-on to mobile voice services to standalone mobile Internet access services for laptop users.").

the combined mobile telephony/broadband service.[8] However, the available evidence and changing market trends indicate that post-paid services constitute a separate market from pre-paid services, and national carriers operate in a different product market from regional carriers.

i. Post-paid and pre-paid services exist in separate product markets.

There is a clear market boundary between the pre-paid, no-contract cellular services offered by companies like Tracfone or Leap Wireless and the post-paid, contract services sold by carriers like AT&T or T-Mobile.

First, post-paid services cost substantially more than pre-paid services. For example, AT&T's own pre-paid "GoPhone" line offers unlimited talk and text service for $60 per month with no contract or early termination fees, while their post-paid unlimited talk and text package retails for $90 (initially with a long-term contract and early termination fees).

Second, the companies that offer both pre- and post-paid services view these offerings as non-competitive and sold in separate markets. AT&T itself has repeatedly indicated to Wall Street analysts that it views the pre- and post-paid markets as separate and distinct.[9] For example,

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[8] We note below that carriers sell such services primarily as smartphone services.

[9] Last year during an investor call, AT&T Mobility CEO Ralph de la Vega was asked, "[O]ne of the concerns that many have and we've heard a lot of it this week is this sort of idea that postpaid [*sic*] growth is slowing down dramatically. . . for postpaid-focused carriers like yourselves it raises concerns by investors that growth might be over in the wireless business outside of new ARPU opportunities of connected devices. But how do you see that landscape developing over time? And is there a place that you want to play in that prepaid marketplace?" De la Vega responded in part, "If you take a look at the EBITDA growth of AT&T year-over-year and compare that to the EBITDA growth of the entire prepaid industry, the entire prepaid industry, we grew 4 times the EBITDA that the entire prepaid industry grew year- over-year. So when I get asked that question, I said, we go after where the revenue is. We go where the margin growth is. And it is unquestionable to me that this growth is in postpaid. It is in data." *See* Transcript of AT&T Inc.'s J.P. Morgan Global Technology, Media and Telecom Conference on 05/19/2010.

AT&T has been quick to note that its promotion of its GoPhone pre-paid line does not cannibalize its higher-margin post-paid service.[10]

Third, pre-paid services maintain far fewer handset choices than with post-paid services. For example, AT&T's website currently lists 35 different smartphones for sale, while no-contract pre-paid carrier MetroPCS's website lists just six.[11] For consumers who want the latest and most advanced handsets, pre-paid services is simply not an option.

Fourth, pre- and post-paid carriers target different market demographic segments. Pre-paid carriers focus particularly on younger, lower-income customers that lack a satisfactory credit history.[12]

In responding to this evidence, AT&T may argue that pre- and post-paid services are merely differentiated products within same product market. However, antitrust principles demonstrates otherwise. In determining whether a group of products in a candidate market is sufficiently broad to constitute a relevant antitrust market, the Department of Justice (DOJ) and

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[10] According to AT&T, "GoPhone" pre-paid service constitutes a separate and distinct offering that does not compete against its own post-paid services. Richard G. Lindner, AT&T's Chief Financial Officer, told investors in 2009: "With respect to GoPhone and prepaid results for the quarter, prepaid results were weaker for the quarter. Obviously we had a net loss of customers of about 400,000. We had lower churn year over year, and we've been working to bring churn down and we're seeing some benefits there. But the impact was more on the gross sales side, and certainly we're seeing impacts from other competitive offers in the market. . . . But one thing that I think we feel is important is we're not going to put offers in the market that we don't feel will be profitable or earn a reasonable return. And we won't do anything obviously that would impact or cannibalize our postpaid base." *See* Transcript of AT&T Inc.'s Q2 2009 Earnings Call on 07/23/2009.

[11] Free Press comparison of the available handsets listed for consumers in San Francisco, a market where both MetroPCS and AT&T offer service.

[12] For example, pre-paid carrier Leap Wireless has stated that its "target customers [are] young, ethnically diverse and in households typically making less than $50,000 a year." *See* Leap 2008 Annual Review: CEO Letter, http://www.leapwireless.com/ar2008/ceo_letter2.php.

the Federal Trade Commission employ a hypothetical monopolist test.[13] Specifically, the agencies define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory increase in price" (SSNIP), presuming no change in the terms of sale of other products.[14] "Put another way, when one product is a reasonable substitute for the other in the eyes of a sufficiently large number of consumers, it is included in the relevant product market even though the products themselves are not identical."[15] But if a category of products does not constitute a reasonable substitute for the products being sold by the merging firm, then the antitrust market definition should exclude that category of products. In this case, evidence in the market affirmatively demonstrates that a SSNIP will not result in a critical level of customers substituting post-paid for pre-paid services. The prices of the unlimited talk, text and data plans of the post-paid carriers are *already* nearly twice that of the pre-paid carriers,[16] yet post-paid subscriber gains continue to outpace pre-paid gains.[17] Pre-paid products are not merely

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[13] *See* Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" 8 (2010) (*Horizontal Merger Guidelines*). The Department of Justice and Federal Trade Commission note that "[t]he SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger." *Id.*

[14] *Id.*

[15] *Skyterra Communications and Harbinger Capital Partners Funds*, 25 FCC Rcd. 3059, ¶ 37 (2010) (*Skyterra/Harbinger Order*).

[16] For example, according to plans published on their websites, Verizon Wireless offers a post-paid unlimited talk, text and data plan for $119.98 per month (plus taxes and fees) versus MetroPCS's pre-paid unlimited talk, text and data offering for $60 per month.

[17] During 2010, total U.S. pre-paid subscriptions increased by 3.88 million, while post-paid subscriptions increased by 4.71 million. *See* SNL Kagan, *Wireless Industry Benchmarks*.

differentiated by service or product quality claims.[18] Instead, they represent fundamentally distinct products that most post-paid consumers would not likely view as substitutes when faced with small but significant and non-transitory service price increases.[19]

ii. Smartphone and voice- or data-only services exist in separate product markets.

While the merging parties offer voice-only or data-only wireless service options in competition with other carriers, they sell smartphone service in a separate and distinct market.[20] Approximately one-third of mobile subscribers currently use a smartphone,[21] but analysts estimate that by the end of the decade, nearly the entire retail subscriber base of wireless subscribers will use smartphones.[22] Given the rapid decline in non-data capable handset sales and

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[18] Even though both services offer wireless connectivity, pre- and post-paid services are not merely offerings within the same product market differentiated by price. "Premium" product markets often exist despite a continuum of pricing within the broader product category. In *United States v. Gillette Co.*, 828 F. Supp. 78, 81 (D.D.C. 1993), a district court upheld the DOJ's definition of a separate premium pen market. In so holding, the court recognized that "the determination of what constitutes the relevant product market hinges on a determination of those products to which consumers will turn given reasonable variations in price. Therefore, the definition must exclude those items to which only a limited number of buyers will turn." *Id.* (*internal citation and quotation marks omitted*).

[19] Nearly every aspect of the consumer experience is distinct between the pre- and post-paid services. For example, pre-paid services do not require credit checks, while post-paid services do. Pre-paid services are not tied to long-term contracts, while post-paid services require such contracts, which in turn impose substantial early termination fees. The most popular handsets are only available with post-paid services. And carriers with wireline operations like AT&T and Verizon limit their "triple play" and "quadruple play" services that include wireless voice and data packages to post-paid wireless service.

[20] Smartphone service consists of a monthly plan that offers both voice and data access through a handheld device capable of traditional telephone calls and other multimedia activity including Internet access and the running web-connected applications.

[21] *See* "State of the Media, Mobile Usage Trends: Q3 and Q4 2010," *Nielsen*, Apr. 2011.

[22] *See* Sharon Armbrust, "US carrier CapEx spend in the midst of a decade-long ramp," *SNL Kagan*, Feb. 28, 2011 ("SNL Kagan estimates that wireless subscriptions, including connected devices, hit 97% penetration of the U.S. population as of year-end 2010. And we

the recent moves by the major carriers to eliminate voice-only plans for less capable "feature phones,"[23] it is clear that this transaction affects the smartphone market as distinct from the market for service associated with other, more limited mobile phones. The Commission has already recognized this market transformation: in the context of recent mergers, it has described a "mobile telephony/broadband" product market, and shied away from considering "the traditional wireless services identified in older transactions."[24]

As consumers increasingly adopt telephony service plans with mandatory data service in place of traditional voice/text plans, the Commission must further refine the "mobile telephony/broadband" definition and consider smartphone service as a separate product. When defining the boundaries of the relevant product market, the DOJ and Commission must investigate how and to what extent consumers can and would substitute other products in response to price increases in the candidate market.[25] For smartphone consumers, there are no viable substitutes for all-in-one mobile telephony and computing. A smartphone consumer facing sustained price increases in the market controlled by a hypothetical monopolist has no choice but to pay the increased rate or exit the market to a variety of unsatisfactory options, including (1) relying on voice-only services and PC-facilitated computing via fixed telecommunications networks (thereby sacrificing mobile data connectivity) or (2) paying for two separate

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expect smartphones to be in use by 93% of the retail subscriber base by the end of this decade.").

[23] *Infra note* 32.

[24] *See e.g.*, *Verizon-AT&T Centennial Divestiture Order*.

[25] *See Horizontal Merger Guidelines* at 11 ("In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to: . . . objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market. . . .").

connections, one for mobile voice and one for mobile data via a MiFi card or similar device, which would likely cost more than the increased rate for smartphone service. Neither option seems preferable to simply paying higher prices for smartphone service. The ability for the hypothetical monopolist to target the post-paid smartphone subset of customers and impose a SSNIP means that the relevant product market definition is narrower than the broader "mobile telephony" market.[26]

iii. National and regional services exist in separate <u>product</u> markets.

Evidence demonstrates that the services offered by carriers with a national footprint exist in a separate and distinct *product* market from those offered by regional carriers, and these distinctions will become more apparent as smartphones utilizing so-called 4G network technologies become the dominant cellular product.

The U.S. market currently has four facilities-based carriers with national footprints — Verizon Wireless, AT&T, Sprint, and T-Mobile — who control approximately 97 percent of the post-paid market.[27] These carriers all establish prices and service offerings nationally and do not

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[26] *See Horizontal Merger Guidelines* at 12 ("If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.").

[27] *See* SNL Kagan, *Wireless Industry Benchmarks*. SNL Kagan's data encompass data from publicly traded companies and estimates from select private companies. According to this information, the four national carriers controlled 93 percent of the entire national and regional post- and pre-paid subscriptions at the end of 2010. However, these data exclude many extremely small regional post-paid carriers. Our preliminary analysis of the June 2010 Numbering Resource Utilization/Forecast (NRUF) data indicates the four national carriers controlled approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of all mobile wireless numbers in the U.S.

alter prices based on the offerings of the much smaller regional providers. From their perspective, the market is national. For example, AT&T has declared to the Commission that it "establishes its rate plans and pricing on a national basis, without reference to market structure at the CMA level."[28] It has also noted that one of its "objectives is to develop its rate plans, features and prices in response to competitive conditions and offerings at the national levels — primarily the plans offered by other national carriers."[29] AT&T has repeatedly told the Commission that "the predominant forces driving competition among wireless carriers operate at the national level."[30] Verizon and Sprint agree.[31]

From the consumer perspective, the *product* market is also national. Though consumers primarily use their smartphones where they live and work, data clearly indicate that consumers view national offerings as functionally different and superior to regional or local services. The top four carriers (Verizon, AT&T, Sprint, and T-Mobile) are the *only* post-paid providers

[28] *See Applications of AT&T Inc. and Centennial Communications Corp.,* WT-Docket No. 08-246, Description of Transaction, Public Interest Showing and Related Demonstrations, Nov. 21, 2008 (*AT&T-Centennial Application*).

[29] *Id.*

[30] *Id.; see also Applications of AT&T Inc. and Dobson Communications Corporation*, WT Docket No. 07-153, Description of Transaction, Public Interest Showing and Related Demonstrations, July 13, 2007 (*AT&T-Dobson Application*); *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless,* WT Docket No. 09-104, Description of Transaction, Public Interest Showing and Related Demonstrations, May 22, 2009 (*AT&T-Verizon Alltel Divestiture Application*); Testimony of Dan Hesse, CEO, Sprint-Nextel, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, Regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" May 11, 2011 (*Hesse Testimony*).

[31] "While a national geographic scope has been rejected in certain prior merger proceedings, growing national forces — such as the increasing reliance on national rate plans — argue more and more for redefining how the Commission judges the competitive effects of transactions." *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Description of Transaction, Public Interest Showing and Related Demonstrations, June 13, 2008 (*Verizon-Alltel Application*).

currently widely offering post-3G quality data services (HSPA+, LTE, or WiMax), and the depth and quality of their smartphone portfolios are far superior to those of the regional carriers. Indeed, these four carriers controlled 94 percent of all cellular market revenues in 2010, and their share of smartphone revenues is likely higher.[32]

This trend is expected to continue, particularly concentrating subscribers and revenues at the very top between AT&T and Verizon. If past is prologue, the experience of 2010 provides a cautionary tale. During a period when both AT&T and Verizon Wireless raised prices and reduced choice for consumers,[33] they still managed to increase their subscriber totals while most other post-paid carriers, regional and national, lost subscribers.[34]

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[32] *See* SNL Kagan, *Wireless Industry Benchmarks*.

[33] In early 2010, Verizon implemented an effective price increase by forcing all customers of feature and smartphones to purchase a data plan. AT&T shortly followed suit. Also in 2010, AT&T eliminated its unlimited data plan for smartphones, forcing new customers into capped plans with overage charges. *See e.g.*, Karl Bode, "Verizon Announces Wireless Pricing Changes," *DSLReports*, Jan. 15, 2010 ("The biggest news of course is that Verizon's 25 megabyte for $9.99 per month plan (the one we're sure Verizon makes the most money from) is now mandatory for all of Verizon's '3G Multimedia' phones."). *See also*, *e.g.*, Marguerite Reardon, "AT&T-Verizon price war debunked (FAQ)," *CNET News*, Jan. 20, 2010 ("In fact, both AT&T and Verizon Wireless are extending data plans to a whole slew of customers who formerly were not subscribing to any data plans. And it is likely these are the customers who will see a bigger phone bill when they upgrade their phones or renew their contracts."); Jeffry Bartash, "AT&T to end unlimited plans for wireless data," *MarketWatch*, June 2, 2010.

[34] In 2010, Verizon Wireless added 2.6 million post-paid subscribers while AT&T added 3.4 million. However, regional carrier Cincinnati Bell lost 28,000 post-paid subscribers, and other major regional carriers NTELOS and Atlantic-TeleNetwork saw no growth or end-of-year subscriber losses. US Cellular, a post-paid carrier that uses roaming agreements to offer national coverage, lost 66,000 subscribers. In 2010, Sprint lost 855,000 subscribers, and T-Mobile lost 390,000. *See* SNL Kagan, *Wireless Industry Benchmarks*.

While the regional carriers had more consumer relevance a decade ago, it is clear that today's market is a national market.[35] Market share for the regional carriers is in decline as a direct consequence of the market shift from voice to smartphone service, and AT&T and Verizon's control of the national market for handsets, backhaul, and data roaming. And the lack of interoperability in the highly valuable 700 MHz spectrum band will further reduce the competitive threat from the few regional carriers who did secure some of that spectrum at auction. There is simply no evidence to suggest that when faced with a small but significant and non-transitory price increase, a meaningful number of smartphone customers of the national carriers would switch to a regional provider.

iv. Regardless of the definition of the geographic market, the merger will cause harms at the national level.

Though there is ample evidence that the relevant *product* market is national, the Department and the Commission must also define the relevant *geographic* market. But the definition of the geographic market matters little: the harms associated with this merger will be felt nationally because the wireless market has shifted from a regional to national carrier market, and this current transaction proposes to combine two of the four national carriers.

Certainly consumers' buying decisions in this market are influenced by what services are available in the geographic area where they live and work, but supplier behavior is determined solely at the national level. Indeed, the DOJ has recognized the difference in local purchasing markets and the impact of mergers in broader markets, explicitly acknowledging that "[t]he

[35] In 2001, most of the wireless market consisted of regional carriers that in some cases offered nationwide service through roaming agreements. Since then, the major national carriers have gone on a buying spree, building a nationwide footprint through mergers and acquisitions and turning the market from regional to national. In 2001, the top two cellular providers controlled 43 percent of all subscriptions, compared with 65 percent at the end of 2010.

existence of local markets does not preclude the possibility of competitive effects in a broader geographic area, such as a regional or national area. . . ."[36]

As discussed above, data plans are priced nationally regardless of the level of local competition. The competitive forces that will constrain AT&T post-merger operate at the national level, as AT&T has repeatedly told the Commission.[37]

Further, smartphone devices are procured and introduced to the national market, not regionally.[38] And there is no geographic characteristic to innovation in the wireless market; the harms to innovation from unilateral and coordinated effects will be felt nationally, regardless of what individual carrier choices a consumer has in a given local market.

In this merger between two of the four national carriers, AT&T argues against a national geographic (and product) market. But these arguments contradict numerous declarations AT&T has made before the Commission in transactions where it sought to acquire smaller regional carriers.[39] The company's prior statements about the national product market apply with

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[36] *See United States, State of Alabama, State of California, State of Iowa, State of Kansas, State of Minnesota, State of North Dakota, and State of South Dakota v. Verizon Communications Inc. and Alltel Corp.*, Competitive Impact Statement, Oct. 30, 2008.

[37] *AT&T-Centennial Application* at 28-29 ("Nonetheless, the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level. Therefore, examining market structure in areas as small as CMAs or CEAs does not accurately account for the competitive forces that will constrain the behavior of the merged firm and assure continued intense competition in all the local areas affected by the merger. As the Commission has recognized, rate plans of national scope, offering nationwide service at a single price without roaming charges, have become the standard in the wireless industry."); *see also AT&T-Dobson Application* at 18-19.

[38] *See Hesse Testimony*.

[39] For example, in this transaction, AT&T's Chief Marketing Officer David A. Christopher stated, "AT&T's sales organization is designed in large part to respond to the reality that consumers make their wireless purchasing decisions at the local level—where they can see the devices, speak with sales representatives about the products and services, and comparison shop among competitors." *See Applications of AT&T Inc. and Deutsche*

particular force to this current transaction. Antitrust analysis focuses on geographic market definition in addition to product market definition because "competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers."[40] While it is true that a mobile service provider has to actually offer service in the area where customers primarily use their service, all the available evidence indicates that the presence of regional carriers has no impact on the supply decisions of the national carriers.[41]

Change in subscriber figures for the regional "competitors" cited in AT&T's application further demonstrate that regional and national carriers operate in distinct markets. Over the past two years, Cincinnati Bell's post-paid subscriber base declined by 13 percent.[42] U.S. Cellular's also declined. Furthermore, regional carriers enjoy little market share even at the local level.

Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations, Apr. 21, 2011 (*AT&T-T-Mobile Application*), Christopher Declaration, ¶ 12. However, in his declaration for the AT&T-Centennial acquisition, Mr. Christopher said, "Within the continental United States, excluding Puerto Rico and the U.S. Virgin Islands, AT&T makes nearly all competitive decisions in response to national competition. AT&T offers national plans that give subscribers a consistent number of minutes of service for a single monthly price, with no roaming charges, and does not provide regional or local plans that vary depending on subscriber location." *See AT&T-Centennial Application*, Christopher Declaration, ¶ 3.

[40] *See Horizontal Merger Guidelines* at 13.

[41] *See AT&T-Dobson Application*, Roth Declaration, ¶ 5 ("AT&T Mobility develops its rate plans, features, and prices in response to competitive conditions and offerings at the national level-primarily the plans offered by the other national carriers. In particular, AT&T Mobility does not view Dobson as a competitor to which it must respond in developing or modifying its rate plans and service offerings, or to which it must respond with competitive local promotions. It does not view Dobson as a price leader. Accordingly, Dobson plays an insignificant role in AT&T Mobility's pricing decisions. In fact, I am unaware of any particular instance in which AT&T Mobility has reduced pricing or otherwise responded to plans offered by Dobson nationally or in any local area.").

[42] *See* SNL Kagan, *Wireless Industry Benchmarks* (data for year-end 2008 to year-end 2010).

According to our preliminary analysis of the June 2010 Number Resource Utilization/Forecast (NRUF) data, the four national carriers (AT&T, Verizon Wireless, Sprint, and T-Mobile) have a combined market share of greater than 90 percent in Cellular Market Areas (CMAs) that encompass **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** of the U.S. population.[43]

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[43] **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

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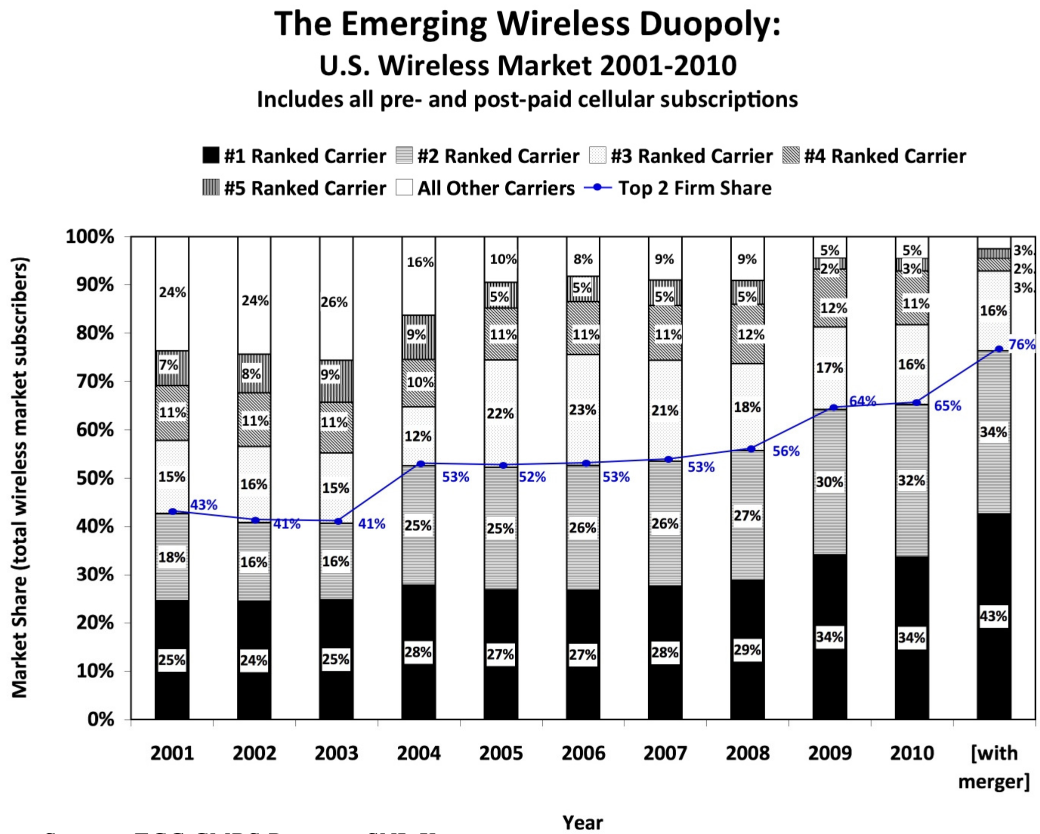
B. The Relevant Product Market is Already Highly Concentrated, and AT&T's Proposed Acquisition of T-Mobile Would Result In the Re-Formation of a Tight Duopoly in Wireless Service.

With the relevant product market appropriately defined as the nationwide post-paid smartphone cellular service market, the harms of this merger will be impossible to ignore. However, though there is ample evidence to define the market as the nationwide post-paid smartphone cellular service market, the domination of the top four carriers of the overall cellular market is so extensive that including pre-paid carriers and all subscriptions from both national and regional carriers into the antitrust analysis would not impact the conclusions about harmful unilateral effects and coordinated behavior.

i. The merger will result in alarming increases in market concentration, regardless of how the product or geographic markets are defined.

The U.S. wireless market is already highly concentrated. Over the past decade, it has transformed from a market dominated at a regional level by a handful of carriers to a market dominated at a national level by just two companies — AT&T and Verizon Wireless. In 2001, the top two carriers' share of total U.S. wireless subscriptions was 43 percent. By the end of 2010, this two-firm share rose to 65 percent. And the two-firm share and will be close to 80 percent if AT&T is allowed to take over T-Mobile (see Figure 2). During this same period, as the large national carriers began creating a true national footprint through mergers and acquisitions of smaller regional companies, the share of subscriptions outside the top five carriers shrunk from 24 percent to 5 percent (see Figure 2).

Figure 2:



Source: FCC CMRS Reports; SNL Kagan

This merger raises competitive concerns no matter which product or geographic market the FCC chooses.[44] The DOJ's *Horizontal Merger Guidelines* specify that where the post-merger Herfindahl-Hirschman Index[45] ("HHI") will increase by more than 100 points and will exceed 1500, a transaction "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny.[46] Mergers that increase HHI by 200 or more points and result in a post-merger HHI of

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[44] The exact HHI values will depend on how the product and geographic market is defined, whether subscribers or revenues are considered, and the available data.

[45] The HHI is calculated by summing the squares of each firm's market share. This gives greater proportional weight to larger market shares. A market with 10 equal sized competitors has an HHI of 1,000, while a monopoly has the maximum HHI of 10,000.

[46] *See Horizontal Merger Guidelines* at 19.

2,500 or greater "will be presumed to be likely to enhance market power."[47] If the market is restricted to carriers that have a national footprint (through self-provisioning and/or roaming, including pre- and post-paid carriers), the HHI would increase from approximately 2,600 to 3,300 as a result of the merger.[48] If the analysis is restricted to post-paid carriers with national footprints, then the HHI would increase from 2,900 to 3,600.[49]

If the market is analyzed at the CMA level,[50] the average population-weighted[51] HHI would increase **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** Post-merger, the top firm in each CMA will have an average population-weighted share of **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**; the 2-firm share

47 *Id.*

48 *See* SNL Kagan, *Wireless Industry Benchmarks*.

49 *Id.*

50 We strongly feel that the relevant *product* market is one of national service plans and that the substantial competitive impacts of this merger at the national level render geographic considerations largely irrelevant. However, it should be noted that if the agencies ultimately choose to analyze the transaction at the local level, that the CMA/CEA geographic boundary may actually *overstate* the level of "local" competition. Our preliminary analysis of the NRUF data indicates that **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

51 When describing the average concentration of CMAs, it is necessary to weigh the observation by population count because CMAs range in size from near 10,000 to near 20 million persons. For example, consider a hypothetical market with just two areas; Area A has an HHI of 10,000 and a population of 9900, while Area B has an HHI of 1,000 and a population of 100. Simply averaging the two HHIs and describing the result (5,500) as the "average Area" HHI would vastly understate the level of competition available to the average consumer. Weighting by population produces an accurate representation of the competition in the market of the average consumer (HHI = 9,910).

will be **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**; the 3-firm share will be **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**; and the 4-firm share will be **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

Consumers all across the country will directly feel the effects of this transaction. At the CMA level, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population lives in areas impacted by the merger.[52]

We analyze the DOJ thresholds for consolidation first. A full **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population lives in CMAs where the post-merger HHI will increase by more than 100 points and will exceed 1500, the level that according to the *Horizontal Merger Guidelines* "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny.[53] According to our preliminary analysis of the LNP/NRUF data, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population live in CMAs where DOJ's guidelines presume that the merger "will . . . likely . . .

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[52] **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

[53] *See Horizontal Merger Guidelines* at 19.

enhance market power."[54] Put another way, in **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** CMAs across the country does the post-merger HHI remain below 2,500 and increase by fewer than 200 points. In sum, relying on DOJ's guidelines, the merger causes substantial and troubling consolidation.

The FCC's precedents compel the same conclusion. In prior mergers, the FCC has employed an initial market concentration screen of an increase of 100 HHI points and post-merger HHI of greater than 2,800, *or* an HHI increase of more than 250 points irrespective of the post-merger HHI.[55] Our preliminary analysis of the NRUF data indicates that **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population lives in CMAs that will exceed this screen.

The extent of the transformation of this merger at both the national and local level cannot be overstated. Currently, the HHI is below 2,500 in **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** CMAs, encompassing approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population. But if AT&T is allowed to acquire T-Mobile, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

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[54] *Id.*

[55] *See e.g.*, *Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Licenses and Authorizations and Modify a Spectrum Licensing Agreement*, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd. 8704, ¶ 42 (2010) (*AT&T-Verizon-Alltel Divestiture Order*).

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] CMAs will have an HHI below 2,500, representing **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population.

And while this transaction does not represent a true merger to monopoly at the national level, the NRUF data reveal serious concerns about duopoly market concentration. If the merger is permitted, approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population will live in CMAs where the top two firms will control more than 70 percent of subscribers.[56]

ii. AT&T and T-Mobile's claims of post-merger competitive discipline are wholly without merit.

AT&T and Verizon already dominate the wireless market. AT&T and Verizon together accounted for 67 percent of the total cellular market revenue in 2010, while the top four carriers captured 94 percent.[57] And while Verizon and AT&T saw substantial subscription growth in 2010, most other post-paid carriers lost customers.[58]

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[56] We discuss unilateral effects below, which are highly probable in highly concentrated markets where firms have as little as 30 percent market share. According to our preliminary analysis of the NRUF data, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of Americans live in CMAs where AT&T's post-merger share will exceed 30 percent. *See AT&T-Verizon Alltel Divestiture Order*, ¶ 65.

[57] SNL Kagan, *Wireless Industry Benchmarks*.

[58] *See supra* note 34.

This concentration of customers and revenues at the top is not the result of price competition, as AT&T and Verizon both implemented effective price increases in 2010[59] while carriers with lower-priced offerings continued to lose market share. Indeed, Verizon and AT&T's wireless profit margins dwarf those earned by pre-paid and other post-paid carriers.[60]

The domination of the market at the top is a strong indicator of a broken market, one that the proposed acquisition of fourth-place carrier T-Mobile by AT&T would only exacerbate.[61] The proposed concentration of nearly 80 percent of the market between two carriers, with only one remaining company with double-digit shares, will have a particularly corrosive impact on innovation and what remains of competitive incentives.[62] The lower cost offerings from the other two major national post-paid carriers have made no impact on AT&T's or Verizon's ability to grow revenues, subscribers, margins, or market share.

[59] *See supra* note 33.

[60] For example, in 2010, Verizon's average wireless EBITDA margin was 47 percent while AT&T's was 41 percent. By contrast, Sprint's average wireless EBITDA was 18 percent; U.S. Cellular's was 20 percent; Leap Wireless's was 21 percent; and T-Mobile's was 29 percent. *See* John Fletcher, "Verizon Wireless: The best spectrum, wireless EBITDA," *SNL Kagan*, March 16, 2011.

[61] The *Horizontal Merger Guidelines* observe that "even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings." *Horizontal Merger Guidelines* at 18. However, this is not the case in the U.S. wireless market, with Verizon and AT&T steadily growing their share through mergers, acquisitions, and capturing of customers from other carriers.

[62] *See Horizontal Merger Guidelines* at 15 ("Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does.").

In fact, AT&T and Verizon's conduct demonstrates a significant lack of competition in the present market: they raised prices relative to other carriers without sacrificing share, margins, or subscribers. Indeed, the *Horizontal Merger Guidelines* state:

> If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger.[63]

T-Mobile constitutes one of those important rivals. T-Mobile has focused on earlier rollout of higher quality HSPA+ data services at substantially lower prices than the other major national carriers.[64] Its elimination from the marketplace would further cement the division between the pre- and post-paid markets and remove a major source of what little pricing discipline currently exists on AT&T and Verizon.

Post-merger, remaining competitors in the market will not discipline the two giants at the top. In their application, AT&T and T-Mobile go to great lengths to convince the Commission that this is not a merger to duopoly; instead, they argue that the small regional and pre-paid carriers with their *single digit* aggregate national market shares represent significant competitors. This claim borders on farce.

AT&T pays particular notice to two pre-paid-only carriers, MetroPCS and Leap Wireless. But in these attempts to paint a rosy competitive picture, AT&T has twisted its logic pretzel beyond the breaking point. For example, in its application AT&T states that it "is seeing increased competitive threats from rapidly growing mavericks like MetroPCS and Leap and

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[63] *See Horizontal Merger Guidelines* at 18.

[64] *See e.g.*, Om Malik, "In AT&T & T-Mobile Merger, Everybody Loses," *GigaOm*, March 20, 2011.

other providers."[65] But later in the filing, Applicants state that AT&T and T-Mobile "are positioned very differently in the marketplace. . . . Data usage also accounts for a far lower percentage of T-Mobile USA's revenues than AT&T's, and T-Mobile USA has a far higher share of non-contract subscribers."[66] If these attributes distinguish T-Mobile from AT&T, then they also distinguish MetroPCS and Leap from AT&T. If anything, MetroPCS and Leap "are positioned" *even more* "differently in the marketplace" because they *only* offer non-contract pre-paid service and earn much smaller relative data revenues than T-Mobile.[67]

In fact, Applicants argue *every carrier except T-Mobile* exerts substantial competitive pricing pressure upon AT&T, but these claims do not comport with common sense and fall apart upon closer examination. For example, AT&T states that Sprint "has reversed its earlier setbacks, add[ing] nearly 1.8 million net subscribers in 2010" while T-Mobile's "percentage of U.S. subscribers has been falling for nearly two years."[68] But this is a highly misleading presentation. Sprint lost 800,000 *postpaid* subscribers in 2010 (or 2.5 percent) and gained 2.6 million *prepaid* subscribers (resulting in a net gain of 1.8 million). During 2010, T-Mobile lost 400,000 postpaid subscribers (or 1.4%) and gained 350,000 prepaid subscribers. Sprint actually lost *more* as a percentage of postpaid subscribers in 2010 than T-Mobile, and Sprint's "reversal of its earlier setbacks" derived solely from gains in the low-margin prepaid market. Focusing on the bigger picture, among national and regional carriers, only AT&T and Verizon experienced

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[65] *See AT&T-T-Mobile Application*, Description of Transaction at 13.

[66] *Id.* at 99.

[67] *See e.g.*, SNL Kagan, *Wireless Industry Benchmarks*.

[68] *AT&T-T-Mobile Application*, Description of Transaction 12-13. This misleading presentation is also repeated on page 79 and page 101 of the description of the transaction.

post-paid market growth over the past two years, and T-Mobile fared *far better* than Sprint during this recent period (see Figure 3).

Figure 3: Post-Paid Market 2008-2010

National and Regional Post-Paid Carriers	Post-Paid Subscribers YE 2008	Post-Paid Subscribers YE 2010	Post-Paid Subscribers % Change	Post-Paid Share (National & Regional) YE 2008	Post-Paid Share (National & Regional) YE 2010
AT&T	59,653,000	68,041,000	14.1%	30.4%	31.3%
ATN	N/A	522,950	N/A	N/A	0.2%
Cincinnati Bell	403,700	351,200	-13.0%	0.2%	0.2%
nTelos	311,009	306,769	-1.4%	0.2%	0.1%
Sprint-Nextel	36,678,000	33,112,000	-9.7%	18.7%	15.2%
T-Mobile USA	26,806,000	26,375,000	-1.6%	13.7%	12.1%
U.S. Cellular	5,420,000	5,416,000	-0.1%	2.8%	2.5%
Verizon Wireless	66,973,000	83,125,000	24.1%	34.1%	38.3%

Source: SNL Kagan

Nor will small regional or pre-paid carriers provide sufficient competition for the two remaining duopolists. In the past, AT&T won merger approvals by convincing regulators that similarly situated companies like Dobson and Centennial were not legitimate competitive threats. If neither Dobson or Centennial was "a competitor to which [AT&T] must respond in developing or modifying its rate plans and service offerings, or to which it must respond with competitive local promotions," then neither are MetroPCS, Leap, U.S. Cellular, Cellular South, or Cincinnati Bell. These players all possess market shares at approximately the same level as Dobson and Centennial before they merged with AT&T.[69]

[69] According to subscriber counts in prior FCC CMRS reports, Dobson's share of the nation's subscribers was about 1 percent when it was acquired, while Centennial's was about one-half of one percent. Based on SNL Kagan data, MetroPCS currently has about 2.5 percent of all subscribers while Leap has about 2 percent. U.S. Cellular current has about 2 percent of all subscribers while Cincinnati Bell has a 0.2 percent share. Moreover, as noted below, MetroPCS and Leap operate in a different market because they only offer pre-paid plans.

As both AT&T and Verizon have noted in past merger pleadings, the market has trended towards a national product market and the competitive significance of regional players is non-existent. National carriers simply do not respond to regional pricing, regional carriers cannot compete effectively nationally through roaming agreements and regional carriers have no hope of obtaining popular handsets. If we take AT&T at its word — as stated in these past applications — that it competes in a national market, then the elimination of a maverick national carrier will have *substantial* competitive impacts.

Though MetroPCS and Leap have much larger reaches than all other regional carriers, they sell no contract, pre-paid carriers in a separate product market, and AT&T or Verizon do not view them as significant competitors. They also have no viable path to becoming significant competitors. Both companies lack the spectrum and buying power necessary to "replace" T-Mobile's competitive impact and have shown no desire to enter the post-paid market. They reach a small fraction of the population, and expansion of their footprint to match T-Mobile's reach is impossible.[70] In sum, none of these competitors can discipline a post-merger duopoly.

C. AT&T's Acquisition of T-Mobile Would Result in Substantial Unilateral Harms.

Though the proposed merger does not create a monopoly, it would cause substantial unilateral harms in the national post-paid smartphone cellular service market. These harms

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[70] Though AT&T claims in its application that MetroPCS can reach over 200 million of the more than 300 million U.S. population, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

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include relatively reduced capital investment, reduced innovation, higher prices of certain specific services, and removal of certain products from the market.

First, AT&T explicitly states that this transaction will allow it to reduce capital investments. By acquiring T-Mobile's tower infrastructure, it avoids capital investments it certainly would otherwise make.[71] On its face, the transaction stems from an output suppression strategy. (The DOJ considers any action to refrain from building or buying capacity that would have otherwise been obtained to be an output suppression strategy).[72]

This unilateral output suppression strategy would unequivocally benefit AT&T. Post-merger, it would control a substantial portion of the smartphone service market;[73] its competitors would be unlikely to have a non-trivial supply response as they are already in a vastly inferior spectrum holding position; the near-term incremental margins earned on the capital investment would have been low; and the elasticity of demand for smartphone cellular service would be low.[74] Indeed, AT&T is paying a $29 billion "kill off the competition" premium, as the $39

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[71] These capital investments include deploying fiber optic infrastructure to towers currently served by copper circuits, upgrading towers to HSPA+ or LTE, cell splits, purchasing excess capacity from competing carriers, and most importantly, more rapidly deploying AT&T's immensely valuable but unused AWS and 700 MHz spectrum.

[72] *See Horizontal Merger Guidelines* at 22 ("A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities.").

[73] While the *post-paid* smartphone subscriber counts are not publicly available, other data indicate that this market is even more top-heavy than the broader mobile market. AT&T has publicly stated that it has "twice as many smartphone users . . . as any other U.S. carrier." Thus, given that post-merger AT&T would have a 43 percent share of the entire post-paid mobile market, it is possible that AT&T's share of the smartphone market following this merger would exceed 50 percent. *See* "AT&T to Offer iPhone 3G S on June 19," *PR Newswire*, June 8, 2009.

[74] *See Horizontal Merger Guidelines* at 23 ("A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the

billion this transaction will cost them far exceeds the estimated $10 billion of incremental capital investment that it would need to make to deploy high-quality universal mobile data networks.[75] Further, **[BEGIN CONFIDENTIAL INFORMATION]**

[END CONFIDENTIAL INFORMATION] Taken together, these facts clearly demonstrate that the merger is a highly inefficient allocation of capital designed to earn AT&T economic rents at the expense of competition, innovation, and investment.

Second, while a lack of adequate competition stifles innovation even the current marketplace, eliminating T-Mobile would both remove a firm with a decent track record of product innovation. It would also reduce AT&T's incentive to innovate.[76] T-Mobile has taken on the role of a maverick competitor, using product innovation to differentiate and compete. T-Mobile was the first carrier to offer the now market-leading Android platform.[77] T-Mobile also has a track record of offering its customers innovative service packages, including in-home Wi-

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output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.").

[75] *See* AT&T, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband," March 21, 2011, slide 35, *available at* http://mobilizeeverything.com/investors.php. It is unclear from this presentation whether this $10 billion represents just AT&T's "avoided" spectrum purchases and capital investments or *both* AT&T and T-Mobile's. If it is in fact the latter, then the price of the kill-the-competition premium is even greater.

[76] *See Horizontal Merger Guidelines* at 23 ("The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.").

[77] *See* Ryan Kim, "Google, T-Mobile introduce first Android phone," *San Francisco Chronicle*, Sept. 24, 2008.

Fi service and discounts for customers who do not purchase subsidized handsets.[78] T-Mobile also upgraded capacity at its towers and deployed the more robust HSPA+ cellular standard long before AT&T began its upgrades to this "3.5G" technology.[79] The loss of this innovative competitor along with the concentration of nearly 80 percent of the broader cellular market in the hands of the former Bell companies should cause significant concern at the Commission and at DOJ.

Third, after the merger, AT&T would enjoy monopsony buying power in the market for U.S. GSM-cellular standard handsets. The abuse of this monopsony power could result in poor quality and choice in devices. AT&T's monopoly over the GSM standard, which is used in most other foreign countries, could also result in higher international service plan prices.

Fourth, AT&T plans to reduce the total number of handsets available to customers of the combined firm,[80] resulting in a clear unilateral harm.[81] Currently, AT&T's product inventory consists of 85 handsets while T-Mobile offers 60, with an overlap of just 13 devices.[82] AT&T will likely remove many handset offerings popular among T-Mobile consumers, and in the future, AT&T would be less likely to bring an innovative but risky GSM handset to market.

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[78] *See* Marguerite Reardon, "T-Mobile's home phone service goes nationwide," *CNET News*, June 24, 2008. *See also* Devindra Hardawar, "T-Mobile makes Wi-Fi calls free — yet another reason to dread the AT&T merger," *VentureBeat*, May 16, 2011.

[79] *See* Karl Bode, "T-Mobile Launching First HSPA+ (21 Mbps) Devices," *DSLReports.com*, Feb. 16, 2010.

[80] *See supra* note 75 at slide 29 (discussing AT&T's intention to implement "device portfolio rationalization").

[81] *See Horizontal Merger Guidelines* at 24 ("If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product."). Example 21 in the *Horizontal Merger Guidelines* is particularly apt here.

[82] *See* Sascha Segan, "My Letter to the FCC About AT&T-Mobile: Time to Submit Yours," *PCMag.com*, May 3, 2011.

Removing handsets, along with the removal of certain popular service plans like the "Even More Plus" offering, should raise concerns with regulators.[83]

D. AT&T's Acquisition of T-Mobile Would Further Exacerbate Harmful Coordinated Effects.

AT&T and Verizon already benefit from coordinated interaction, and this merger would only exacerbate this harmful behavior. While assessing the potential for coordinated interaction necessarily requires prediction, the structure of the wireless marketplace leaves it particularly vulnerable to this behavior. First, competing firms can easily observe each other's prices. Unlike in the wired broadband market, carriers rarely offer new customer discounts or retention incentives, and they price their services nationally.[84]

Because of handset exclusivity, two-year contracts, high early-termination fees, lack of handset portability, and a switching customer's need to repurchase applications, it is unlikely that a firm exercising market power through increased prices would immediately lose a substantial portion of customers to competing carriers.[85] Indeed, as stated above, AT&T and Verizon continue to see the greatest gains in subscribers despite substantially higher prices and recent effective price increases. In most markets, the impact of coordination would be greatly reduced

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[83] T-Mobile's "Even More Plus" plans offer customers lower-priced, contract-free subscriptions if the customer brings their own GSM handset to the network or purchases an un-subsidized handset from T-Mobile. None of the other major U.S. carriers offer this kind of European-style "BYOD" (bring your own device) plan.

[84] *See Horizontal Merger Guidelines* at 26 ("A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent.").

[85] *See id.* ("A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase.").

by smaller firms expanding output and capturing share.[86] But the smartphone cellular service market is not a typical market: Smaller firms cannot rapidly expand their sales due to handset exclusivity, other switching costs, and the lack of beachfront spectrum. Thus, the structure of the wireless market makes it particularly vulnerable to coordinated interaction.

This market is also particularly vulnerable to coordinated conduct because it is so top-heavy, with much of the subscriber base and revenues already concentrated between two firms (currently two-thirds, and four-fifths post-merger).[87] Because of this duopoly, the harms from coordination would be substantial even if most firms do not engage in the behavior.[88] Further, because demand elasticity for service is relatively low, the coordinated behavior will be more profitable, increasing the likelihood of such harms post-merger.[89]

Indeed, while this merger would exacerbate pressures for the top firms to engage in coordinating behavior, it is apparent that such activity is already occurring. The high pre-merger

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[86] *See id.* ("This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.") But as mentioned above, the smaller regional and pre-paid firms are simply unable to rapidly expand sales, both due to supply (prime spectrum) and demand (switching costs) constraints.

[87] There is already ample evidence of coordinated conduct, most notably in text message pricing. The old AT&T Wireless Services Company (a subsidiary of the former AT&T Corp.) used to offer *free* text messaging service prior to its merger with Cingular in the fall of 2004. Two years later the major wireless providers all nearly simultaneously increased per-text prices to 15 cents, followed by another increase in 2008 to 20 cents. *See* Testimony of Joel Kelsey, Policy Analyst, Consumers Union, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, Regarding "Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market," June 16, 2010.

[88] *See Horizontal Merger Guidelines* at 26 ("Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct."

[89] *See id.* at 26 ("Coordination generally is more profitable, the lower is the market elasticity of demand.").

margins earned by AT&T and Verizon relative to all other national and regional (pre- or post-paid) carriers is strong evidence of existing coordination. It is an open secret (and preference) among Wall Street analysts that the top carriers are careful to avoid setting off any price wars.[90] That this merger would eliminate a maverick competitor and lead to "a more stable pricing environment" has been one of the main selling points of this transaction on Wall Street.[91]

E. There is No Prospect of Competitive Entry That Could Mitigate Against the Unilateral Harms and Coordinated Effects Resulting from AT&T's Acquisition of T-Mobile.

Horizontal mergers of this size raise particular concern in markets where competitors are unable to enter sufficiently and quickly. In the wireless market, and especially in the wireless data market, sufficient new entry is impossible, and the smaller firms lack the ability to quickly and efficiently expand output at levels needed to offset the unilateral and coordinated harms.

No firm has entered the cellular telephony and data market in the past decade, and with the massive amount of consolidation, many have exited.[92] The absence of new entrants combined

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[90] The avoidance of price wars indicates coordinated interaction. *See id.* at 24 ("Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction.").

[91] AT&T readily says it plans to "improve T-Mobile ARPU" since AT&T post-paid subscribers pay on average $10.57 more per month. The five goals for AT&T listed in a recent investor presentation include "#2 Grow ARPU" and "#4 Expand Margin." *See supra* note 75 at slides 26, 26, 29.

[92] Clearwire, a firm whose majority share is controlled by Sprint, has entered the mobile data market, but not the cellular market. However, it has struggled in building a retail base and is shifting focus to the wholesale market. Lightsquared, the mobile satellite spectrum firm, has stated its intention to offer nationwide wholesale LTE services (including voice-over-LTE), but the firm's prospects for timely and sufficient entry are dubious given the serious regulatory and engineering obstacles surrounding interference concerns with its technology.

with *increasing* margins[93] indicates strongly that market entry is incredibly difficult.[94] New entrants would have to amass substantial spectrum assets, navigate local and federal regulations, and incur substantial fixed deployment costs prior to signing up a single customer. In addition, the high valuation of existing leading firms indicates intangible assets that a new entrant would not be able to sufficiently and quickly duplicate.[95]

Even if timely entry were possible, the existing market structure makes it such that this entry would not be sufficient to mitigate the unilateral and coordinated harms of this merger. In the smartphone cellular service market, AT&T and Verizon have used handset exclusivity to differentiate, and this practice, along with the substantial switching costs, creates insurmountable barriers to effective entry.[96]

Further, when considering the core market of nationwide smartphone cellular service, AT&T and Verizon are the *only* carriers with excess capacity in the form of unutilized

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[93] See *supra* note 60. The margins of the carriers at the very top, particularly Verizon, are increasing, while the margins at other firms erode and subscribers flee. "Only four of the 12 leading carriers were able to log sequential EBITDA gains last quarter, as smaller carriers struggle to manage costs amid shrinking or flattening subscriber bases and high smartphone handset subsidies increase equipment expenses."

[94] *See Horizontal Merger Guidelines* at 28 ("Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult.").

[95] *See id.* at 28 ("Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate."). AT&T's market valuation is approximately $190 billion, far in excess of the nearly $100 billion in value of its tangible assets.

[96] *See id.* at 29 ("Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable.").

beachfront spectrum.[97] This means that sufficient output expansion by a rival firm is all but impossible.[98] Regional carriers have very little AWS and 700 MHz spectrum and rely on the national carriers for data roaming (at terms set by the national carriers). The major pre-paid carriers similarly lack prime spectrum for data services and would not be a sufficient check on the market power of the strengthened post-merger duopoly.

F. The Claimed Efficiencies of AT&T's Acquisition of T-Mobile Are Speculative, Non-Merger Specific, Non-Cognizable, and Would Not Outweigh the Adverse Competitive Impact of This Transaction.

As discussed above, AT&T's primary justification for this horizontal merger is the achievement of efficiencies through the combination of its and T-Mobile's network infrastructure. AT&T claims that it is in the midst of a "spectrum crunch" that only acquisition of T-Mobile's spectrum and infrastructure assets can solve. But this claim is misleading and contradicts prior AT&T statements about its spectrum capacity outlook[99] made at a time when

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[97] We discuss the implications of this merger for the Commission's spectrum policy in greater detail in section IV, *infra*.

[98] *See id.* at 17 ("[A] firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable.").

[99] Following the closing of the most recent 700MHz spectrum auction, AT&T released a statement saying, "Combined with the Aloha Partners transaction, which closed earlier this year, AT&T has supplemented its holding of high-quality spectrum and continues to have a leading spectrum position in the industry. AT&T's spectrum holdings position the company to further enhance the quality and reliability of existing wireless broadband and voice services that consumers are demanding, and set the foundation for more customer choices for new, more advanced wireless broadband technologies and services. The complementary nature of the spectrum AT&T acquired through the FCC auction and from Aloha Partners gives AT&T the capacity to meet customer needs as the company moves to higher-speed 4G (fourth-generation) services." *See* "AT&T Acquires Key Spectrum to Set Foundation for Future of Wireless Broadband, More Choices for Customers," AT&T Press Release, Apr. 3, 2008.

predictions about future wireless data utilization were far higher than they are today.[100] But even if AT&T's spectrum crunch claims have some validity, this is an efficiency that is non-merger specific,[101] non-cognizable[102] and does not outweigh the competitive harms of this transaction.

While there is no doubt that mobile data services are increasingly popular and growing, AT&T has offered no actual evidence that it cannot manage this predictable growth through normal means. Indeed, AT&T has been widely criticized for under-investing in its wireless network at a time when Verizon and other carriers were expending capital at higher relative rates.[103] While T-Mobile, which is in a far worse spectrum position, worked on increasing capacity by deploying more spectrally efficient technology, AT&T focused on mergers and acquisitions. But most specious of all is AT&T's claim of spectrum poverty, when it is not only the best positioned carrier in spectrum, but has not yet deployed any of its AWS or 700 MHz

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[100] For example, in 2008 Cisco (the leading firm for predictions about future data usage) estimated that in 2009 North American mobile data usage would reach 48 petabytes per month, and would climb to 378 petabytes by 2012. However, their 2011 report reveals that 2009 usage was actually 3 times lower (17 petabytes). The 2011 report now estimates the 2012 usage at 235 petabytes, far lower than the predictions in their 2008 study. Cisco's reports repeatedly reflect downward revisions, and industry observers should view skeptically the prognostications of a company with a direct financial stake in convincing private industry and regulators that there is a looming capacity crunch. *See* "Cisco Visual Networking Index – Forecast and Methodology, 2007–2012," June 16, 2008; *see also* "Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010–2015," Feb. 1, 2001.

[101] *See Horizontal Merger Guidelines* at 30 n.13 ("The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing.").

[102] *See Horizontal Merger Guidelines* at 30 ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

[103] During 2006-2009, AT&T's wireless capital expenditures as a percentage of revenues were 12.6 percent, versus Verizon's 14 percent. T-Mobile led the major carriers during this period, spending 15.7 percent of its wireless revenues on network investments.

spectrum.[104] Thus, AT&T's efficiency claims are non-merger specific and non-cognizable,[105] as the company could achieve these same gains either through utilization of existing assets or other methods such as licensing deals that would enable it to share capacity with other carriers.

AT&T's promises of wider 4G deployments if the merger is approved (which sound similar to those made in the 1913 Kingsbury Commitment) also need to be evaluated in context. According to FCC and NTIA data, 3G wireless services are currently available to 97 percent of the U.S. population,[106] and Verizon's LTE deployments are widely expected to reach this level of coverage.[107] AT&T has previously indicated its intention to reach at least 87 percent of the population with LTE,[108] and T-Mobile has made past statements of its intention to deploy LTE to its entire footprint by 2015.[109] So while AT&T touts its new deployment promise as a public interest benefit, it is critical that the Commission consider the high likelihood that these rural

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[104] It is noteworthy that AT&T is claiming spectrum poverty while Verizon's CEO has been quoted as saying, "I don't think we'll have a spectrum shortage." Verizon has *less* total spectrum than AT&T (and a nearly equivalent amount of AWS and LTE spectrum). AT&T has a total of 2,122 MHz of 3G and 4G spectrum versus 1,838 MHz for Verizon. *See* Marguerite Reardon, "Is AT&T a wireless spectrum hog?," *CNET News*, April 29, 2011; "A Conversation with Ivan Seidenberg," Council on Foreign Relations, Apr. 6, 2010, *available at* http://www.cfr.org/technology-and-foreign-policy/conversation-ivan-seidenberg/p21840.

[105] These claimed efficiencies are non-cognizable because they are non-merger specific and would come at the expense of AT&T reducing efficient output by reducing capital deployment. *See Horizontal Merger Guidelines* at 30.

[106] *See* National Broadband Map, National Summary Statistics, http://www.broadbandmap.gov/summarize/nationwide (last visited May 29, 2011).

[107] *See, e.g.*, Remarks of Anthony J. Melone, Executive Vice President and Chief Technology Officer, Verizon Wireless, Internet Caucus Advisory Committee's (ICAC) 7th Annual State of the Net Conference, Jan. 19, 2011; Sara Jerome, "AT&T Subsidies an Issue in Merger," *The Hill*, May 10, 2011; Sascha Segan, "Verizon Wireless Says LTE Network Will Be Huge," *PCMag.com*, Feb. 18, 2009.

[108] *See* Comments of Ralph de la Vega, President and Chief Executive Officer, AT&T Mobility and Consumer Markets, Q3 2009 Earnings Call, Oct. 22, 2009; Dave Burstein, "AT&T LTE Result On U.S. Coverage: ~0%," *Fast Net News*, March 22, 2011.

[109] *See* Marguerite Reardon, "T-Mobile considers 4G network partnership," *CNET News*, May 4, 2010.

consumers will be able to purchase LTE service from other carriers, and that the need to remain competitive in the national market means AT&T would have likely extended their LTE coverage without this merger.

But even if these claimed efficiencies were merger-specific and cognizable, they would not outweigh the competitive harm of this transaction. AT&T has offered no evidence to suggest that the *net* benefit of these supposed efficiencies would be passed along to its customers. Indeed, AT&T is selling this deal to Wall Street by highlighting its much higher profit margins and plans to raise T-Mobile's.[110] If the DOJ and the FCC follow precedent, they will have no choice but to find that the supposed efficiencies do not offset the harms from this merger.[111]

IV. The Merger Would Cause Substantial Public Interest Harms Beyond Those Cognizable Under a Traditional Antitrust Inquiry.

The evidence is so compelling that the DOJ will have no choice but to challenge this merger.[112] The merger will significantly increase market concentration in an already highly concentrated market. The market structure is such that it is extremely vulnerable to coordinated conduct, and this merger's elimination of a maverick competitor would only exacerbate that vulnerability.

[110] *See* AT&T Fact Sheet, "AT&T and T-Mobile USA: The Future of Mobile Broadband," *available at* http://www.mobilizeeverything.com/documents/Factsheet.pdf.

[111] *See Horizontal Merger Guidelines* at 31 ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.").

[112] *See Horizontal Merger Guidelines* at 25 ("The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.").

But the merger would cause public interest harms over and above those traditionally considered in an antitrust analysis. The Commission's public interest standard encompasses a broader set of considerations, including but not limited to "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing spectrum in the public interest."[113] In particular, with respect to competitive impacts, "[t]he Commission's competitive analysis under the public interest standard is somewhat broader. For example, the Commission considers whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market."[114] It recognizes that a transaction "may . . . create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways."[115] This transaction would harm the public interest in numerous ways: (1) it would cause significant competitive harms, particularly harms related to vertical power and other harms over and above those cognizable under antitrust law; (2) it will cause significant job losses; and (3) it may slow the adoption of broadband by all Americans.

The merger's concentration of nearly 80 percent of the market's subscribers (and an even higher level of revenue concentration) between the legacy wireline monopoly companies, AT&T and Verizon, will have substantial impacts on competition in critical adjacent product markets that will spill over into the primary market. First, the regional and pre-paid carriers already

[113] *Skyterra/Harbinger Order*, ¶ 11.
[114] *Id.*
[115] *News Corp/DirecTV*, ¶ 25.

operate at a competitive disadvantage to the national carriers when it comes to buying power for exclusive handset agreements. Further concentration of this buying power will only serve to reduce competition and harm consumers. Second, AT&T and Verizon are the largest providers of special access and other backhaul services that are a critical input into the provision of mobile voice and data service. The largest non-RBOC purchasers of these services are Sprint and T-Mobile, and this merger will remove one of those buyers. This removal of a non-RBOC buyer will negatively impact the alternative backhaul providers[116] and subsequently will increase AT&T and Verizon's market power in the provision of special access and backhaul services. Third, as discussed above, the removal of a maverick competitor from the market will reduce AT&T and Verizon's innovation incentives.

This merger will also frustrate the forces of competitive discipline as it relates to customer service. In the post-paid smartphone market (where the bulk of smartphone subscriptions are), consumers are locked into long-term contracts with substantial early termination penalties. These early termination fees and the subsequent need to purchase a new access device create substantial switching barriers. As a result, they reduce carriers' incentives to compete on non-price aspects like customer service and local network quality. However, dissatisfied customers who do choose to incur the switching cost or leave once out of contract currently do have the choice of three other national post-paid carriers. This merger will remove one of those alternatives and weaken Sprint. AT&T's dismal performance in customer

[116] *See* Sara Jerome, "Backhaul industry fears AT&T merger," *The Hill*, May 11, 2011.

satisfaction surveys, especially when compared to T-Mobile's and Sprint's superior reviews, should call into question AT&T's claims that this transaction benefits consumers.[117]

AT&T's takeover of T-Mobile also threatens to destroy tens of thousands of jobs at a time when America is suffering an unprecedented lengthy period of high unemployment. Since 2002, during a period when it acquired firms with more than 180,000 employees, AT&T has seen a net job loss of well above 100,000 workers.[118] This mirrors the pattern in the overall RBOC industry following years of consolidation, where employment figures saw a net decline of nearly 40 percent.[119] In addition to the "synergies" of firing former T-Mobile workers, AT&T will substantially reduce capital expenditures relative to what they would have been absent the merger.[120] This will result in a multiplier effect of fewer jobs in adjacent industries.

Finally, the merger has the potential to impede increased broadband adoption. In the National Broadband Plan, the Commission expressed hope that technological advancements "may make wireless [service] a viable price/performance competitor to wired solutions at far higher speeds than are possible today, further increasing consumer choice."[121] Cost often impedes adoption, and the Commission suggested that wireless service may provide the vaunted "third pipe" to compete with incumbent telephone and cable companies and drive down prices for broadband service. But this merger has the significant potential to squash mobile wireless service as a meaningful competitor to wireline broadband. When the two biggest wireless

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[117] *See* "T-Mobile beats AT&T in CR satisfaction survey," *Consumer Reports*, Apr. 11, 2011.

[118] Figures calculated based on annual company filings of AT&T and acquired firms.

[119] *See* Comments of Free Press, *Preserving the Open Internet*, GN Docket No. 09-191, Jan. 14, 2010, at fig. 6.

[120] *See supra* note 75 at slides 14, 29, 35.

[121] Federal Communications Commission, *Connecting America: The National Broadband Plan* 41 (2010).

companies, AT&T and Verizon, also have substantial share in the market for residential wireline broadband service, those companies will have little incentive to ensure that mobile and fixed offerings compete with each other. As such, because the merger allows AT&T to grow bigger and increase its share of the mobile market, it also decreases the likelihood that mobile service will emerge a substitute for fixed residential service. The price of both services will remain high and AT&T and Verizon will have every incentive to ensure their customers subscribe to both. In sum, this transaction causes significant harms to consumers.

V. Approving the Merger Would Harm the Public Interest Because One Entity Would Possess Too Much Spectrum.

Applicants are mistaken in arguing that combining the spectrum holdings of AT&T and T-Mobile would serve the public interest. In its merger analysis, the Commission must ensure that it "manag[es] spectrum in the public interest."[122] This transaction completely fails that test. First, a cursory spectrum screen analysis demonstrates that under the Commission's own framework, this transaction raises serious concerns. Second, the purported benefits of the transaction — alleviating capacity constraints and deploying an LTE network more quickly — could be achieved even if the Commission rejects the merger; therefore, they cannot be invoked to support this massive consolidation. Third, approving the merger could diminish Applicants' incentive and ability to invest in network infrastructure over the long term, potentially compromising the most effective use of the spectrum at issue. Fourth, AT&T's pending application to buy spectrum licenses from Qualcomm only exacerbates the problems associated with this transaction. Fifth, approving this merger would send a message to future merger applicants that they need not manage their spectrum efficiently because even if they fail to do so,

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[122] *See SkyTerra/Harbinger Order*, ¶ 11.

the Commission will simply reward them with more spectrum. For all these reasons, the Commission should find that placing all of AT&T and T-Mobile's spectrum in the hands of one entity does not serve the public interest.

A. The Commission's Spectrum Screen Analysis Demonstrates That This Transaction Should Cause Grave Concern.

The Commission's spectrum screen analysis, which is designed to identify transactions that would result in harmful concentrations of spectrum holdings, demonstrates that this merger would result in problematic levels of spectrum consolidation. The screen works by identifying particular, granular markets in which spectrum holdings would exceed a specific threshold.[123] The threshold was originally set in 2004 at approximately one-third of the spectrum available for mobile broadband use.[124] Transactions that would result in one provider holding spectrum licenses in excess of the threshold trigger further review by the Commission to identify whether other providers can compete effectively with available spectrum, and if not, the Commission requires divestiture.[125] Although the Commission should assess this transaction's effect on the *national* product for post-paid smartphone mobile service,[126] a spectrum screen analysis vividly demonstrates the magnitude of the proposed consolidation.

The spectrum holdings of the proposed merged entity would *far* exceed the screen throughout the United States. The current screen threshold varies between 95 MHz of spectrum

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[123] *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* Fourteenth Report, WT Docket No. 09-66, 25 FCC Rcd. 11407, ¶ 263 (2010) (*Fourteenth Report*).

[124] *Id.*

[125] *Id.*

[126] *See supra* section III.A.

and 145 MHz.[127] The combined AT&T-T-Mobile would exceed 160 MHz in hundreds of CMAs across the country.[128] In Brevard County, Florida, AT&T would hold 195 MHz in spectrum licenses;[129] in Orange, Osceola, and Seminole Counties, it would hold 197.5 MHz.[130] In 15 different counties in Georgia, AT&T would hold 200 MHz.[131] In San Francisco, California, and several surrounding counties, AT&T would hold 201 MHz in licenses[132] — and in Kern County California, 211 MHz.[133] In four counties in Utah, AT&T would hold 210 MHz in spectrum.[134] But the "winner" in this unfortunate competition is Whatcom County in Washington State, where AT&T would hold a staggering 215 MHz in spectrum licenses.[135] Applicants state that AT&T's holdings exceed the screen in 202 of 734 CMAs;[136] however, this assessment does not include AT&T's WCS spectrum holdings, which, if included, would put the company above the screen in many more CMAs.[137]

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[127] *See AT&T-T-Mobile Application* at 76.

[128] *See AT&T-/T-Mobile Application*, App. A (listing thousands of counties in hundreds of CMAs and giving the total AT&T holdings in several spectrum bands in each county).

[129] *Id.* at 13.

[130] *Id.* at 8.

[131] *Id.* at 3-4.

[132] *Id.* at 2.

[133] *Id.* at 11.

[134] *Id.* at 6.

[135] *Id.* at 19.

[136] *AT&T-T-Mobile Application* at 76.

[137] Applicants provide a listing of their 202 asserted CMAs in Appendix C of their application. Cursory examination of the list, compared to Applicants' Appendix A providing post-merger spectrum holdings, reveal that other CMAs not listed in Appendix C would exceed 145 MHz upon the inclusion of AT&T's WCS holdings, including CMA 29, 37, and 45 from within the first 50 CMAs alone. In five Louisiana counties in CMA 29, AT&T holds

The spectrum screen analysis becomes all the more stark when one compares the combined AT&T and T-Mobile's national spectrum position to its purported competitors. A typical assessment of national spectrum holdings is population-weighted average megahertz, designed to approximate the value of a set of spectrum licenses by factoring in the number of people covered by each.[138] This measurement has been used in past Commission reports on wireless competition.[139] If AT&T acquires the licenses of both T-Mobile and Qualcomm, it would hold a nationwide average in excess of 138 MHz,[140] not counting its WCS spectrum holdings. Nationwide, Verizon Wireless — AT&T's closest competitor — currently holds a population-weighted average of 87.7 MHz of spectrum.[141] Sprint Nextel holds an average of 52.5 MHz.[142] MetroPCS, Leap, and US Cellular — all entities that supposedly exert competitive pressure on AT&T — each hold a nationwide average of 11 MHz or less.[143] The "spectrum-

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135 MHz of spectrum not including WCS and 25 MHz of WCS spectrum, for a total of 160 MHz. The same is true of two counties in Indiana and two in Kentucky in CMA 37. In five counties in Oklahoma in CMA 45, AT&T holds 143 MHz of spectrum not including WCS and 20 MHz of WCS spectrum, for a total of 163 MHz. CMAs 29, 37, and 45 are not listed in AT&T's Appendix C, nor included in its count of 202 CMAs.

[138] Population-weighted average holdings can be computed by adding the MHz-POP value for all of a provider's licenses, divided by the U.S. population. The MHz-POP value of a license is the amount of spectrum in the license (in frequencies) multiplied by the population covered by the geographic area of the license.

[139] *See Fourteenth Report* at 148, table 26.

[140] The FCC's most recent report on the state of wireless competition calculates AT&T's current population-weighted average to be 82 MHz, and T-Mobile's to be 50.4. *Id.* Qualcomm holds 6 MHz in one nationwide license (which consequently translates to 6 MHz population-weighted average), and 6 MHz of additional spectrum in some urban markets. The sum of these numbers is the population-weighted average of a merged entity including all three, and is greater than 138.4 MHz.

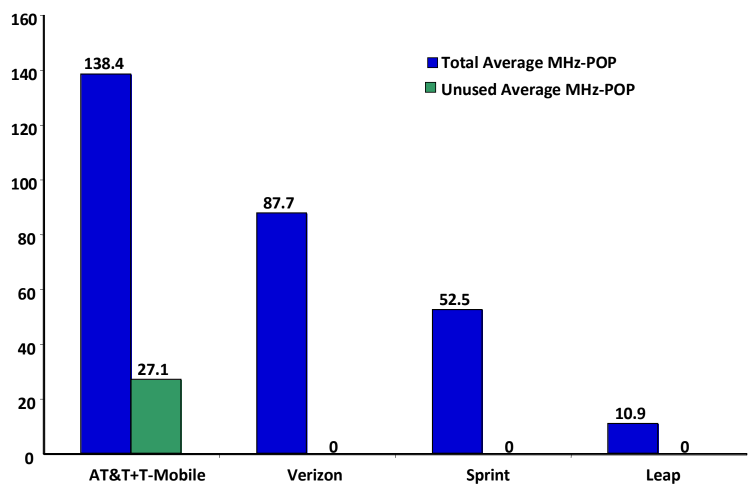
[141] *Id.*

[142] *Id.*

[143] *Id.*

rich"[144] LightSquared has 59 MHz of spectrum nationwide,[145] which represents less than half of the proposed new AT&T's holdings. Indeed, even without this transaction, AT&T already holds more spectrum than any of its competitors in the top 21 markets in the country.[146] Furthermore, much of this spectrum, including AT&T's most valuable 700 MHz spectrum holdings, is not even being used — about a third of AT&T's total current holdings.[147] AT&T holds as much unused, beachfront spectrum as many of its supposed competitors hold combined (see Figure 4).

Figure 4: Major Carrier Spectrum Holdings



Source: Fourteenth Report

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[144] *AT&T-T-Mobile Application* at 13.

[145] *E.g.*, LightSquared, "Our Investors," *available at* http://www.lightsquared.com/about-us/our-investor/. Additionally, the GPS community is raising significant concerns over interference risks with the largest chunk of this spectrum; this controversy has put the long-term potential of the LightSquared network into serious doubt. *See, e.g.*, Stacey Higginbotham, "With LightSquared, Did the FCC Bet on the Wrong Horse?", *GigaOm*, Feb. 24, 2011, *available at* http://gigaom.com/broadband/with-lightsquared-did-the-fcc-bet-on-the-wrong-horse/.

[146] Marguerite Reardon, "Is AT&T a Wireless Spectrum Hog?", *CNet News*, Apr. 29, 2011, *available at* http://news.cnet.com/8301-30686_3-20058494-266.html.

[147] *Id.*

B. A More Accurate Analysis of the Relative Value of AT&T's Spectrum Holdings Raises Even More Grave Concerns Regarding the Proposed Merger.

Finally, even these calculations fail to account for the relative value of the spectrum licenses. AT&T and Verizon Wireless hold a disproportionate share of so-called "beachfront spectrum," which far exceeds other spectrum in utility and value. Spectrum below 1 GHz is considered "beachfront" because low frequencies have better propagation characteristics — mobile networks built on such spectrum can manage far better coverage and penetration than identical networks using higher frequency spectrum.[148] Accordingly, it comes as no surprise that beachfront spectrum has commanded the highest prices in recent auctions.[149] There are three bands of spectrum used for mobile broadband below 1 GHz — the cellular band, consisting of approximately 50 MHz in population-weighted average licenses; the 700 MHz band, approximately 70 MHz; and the SMR band, 19 MHz. Sprint holds the vast majority of the small SMR band.[150] AT&T currently holds 42.3 percent of cellular band licenses, and Verizon Wireless holds 48.5 percent; the companies together hold over 90 percent.[151] Verizon Wireless holds 42.7 percent of 700 MHz spectrum licenses, and AT&T currently holds 24.3 percent[152] — and would hold more than 33 percent after acquiring the licenses currently held by Qualcomm.

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[148] *See Fourteenth Report*, ¶ 269.

[149] *Id.*, ¶ 271 ("The higher value that many providers have placed on low-band spectrum with respect to the provision of mobile service — especially mobile broadband service — is demonstrated by a comparison of market valuations. . . . In the 2008 auction of 700 MHz spectrum, the average price for the 700 MHz spectrum was $1.28 per MHz-pop. This unit price was more than twice the average price of $0.54 per MHz-pop for AWS spectrum auctioned in 2006.").

[150] *Id.* at ¶ 275.

[151] *Id.*

[152] *Id.*

Clearly, other than the large holdings of AT&T and Verizon Wireless and the smaller holdings of Sprint, there is no remaining room in beachfront spectrum for any significant competitors.

Throughout the country and particularly in prime spectrum bands, a merged AT&T and T-Mobile would maintain problematically dominant spectrum positions. If spectrum policy is to have any meaningful value in promoting competition, the Commission must block this merger, as it would result in excessive concentration in spectrum ownership.

C. AT&T and T-Mobile Exaggerate the Imagined Benefits of the Merger and Fail to Prove Those Benefits Would Not Otherwise Accrue Even If the Commission Rejects the Transaction.

In arguing that this merger would confer public interest benefits, Applicants rely primarily on arguments that the merger would alleviate capacity constraints and accelerate deployment of LTE technology. Applicants overstate both of these supposed public interest benefits. Moreover, the Commission should disregard both of these benefits when conducting its public interest analysis because neither benefit is cognizable under the Commission's precedents. The Commission includes a claimed benefit in its merger analysis only if the claimed benefit is "transaction- or merger-specific."[153] That is, the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."[154] The proposed benefits — alleviating capacity constraints and speeding deployment of faster networks — fail to meet this criterion.

[153] *AT&T, Inc. and Bell South Corp.*, WC Docket No. 06-74, Application for Transfer of Control, 22 FCC Rcd. 5662, ¶ 202 (2006).

[154] *Id.*

i. The proposed merger will do little to alleviate capacity constraints in current networks.

Invoking the bogeyman of limited capacity, Applicants claim that merging the two companies would result in better service for consumers.[155] The application insists that "AT&T's network-capacity challenges… are not just 'looming' a few years down the road — they are here today."[156] In fact, the combination of AT&T's strained network with T-Mobile's strained network would not create significant benefits in the short or long term. AT&T and T-Mobile both currently operate two different networks, a "2G" network using GSM technology, and a network using HSPA technology,[157] sometimes referred to as "3G" and sometimes as "4G." A different network standard, LTE, is also referred to as "4G", but neither AT&T nor T-Mobile has yet deployed any LTE services.

Applicants have asserted the potential for billions of dollars in financial savings as a result of "synergies" in the existing networks[158] — but the numbers do not seem to add up. The only clear "synergy" in the companies' spectrum holdings lies in their shared use of 2G GSM technology on partially overlapping spectrum bands.[159] Their HSPA networks are deployed on different spectrum, and any combination thereof — including a combination to free up spectrum to create "synergies" for future LTE networks — would require extensive equipment and handset replacements.

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[155] *E.g.*, *AT&T-T-Mobile Application* at 42.

[156] *Id.* at 26.

[157] *Id.* at 7.

[158] *Id.* at 19 (discussing "tens of billions of dollars in overall cost synergies").

[159] *See id.* at 33 (presenting a chart with 'X' marks for network deployment by technology and spectrum band, in which the only overlap between AT&T and T-Mobile is a shared 'X' under 'GSM' and for '1900 MHz', with AT&T also using 850 MHz spectrum for GSM).

Proposed benefits for subscribers to the 2G GSM network

The *only possible* efficiency benefits attributable to this merger apply to 2G GSM networks, which have been outdated for many years. By definition, these benefits have a limited shelf life because AT&T plans to move its users off of 2G GSM networks over time.[160] And even those benefits are extremely limited because all of the users of both networks will use the combined network. As former FCC chief economist and frequent AT&T consultant Gerald Faulhaber says, "Putting the two networks together does not create spectrum."[161]

A significant portion of the alleged GSM synergies arise from the ability of a merged AT&T and T-Mobile to remove one GSM control channel.[162] Although control channels do represent potential inefficiencies in spectrum utilization, Applicants fail to show any specific details demonstrating that the control channels used by the two companies are different or redundant, or otherwise can be combined in an integrated network to reduce the inefficiency. Furthermore, AT&T's and T-Mobile's GSM networks are primarily used for voice and not data, because the fastest data rates available on these networks are extremely low.[163] Consolidating control channels to make more spectrum available for communications would therefore have

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[160] *See AT&T-T-Mobile Application*, Hogg Declaration, ¶ 5 ("[AT&T's GSM] customers will migrate over time to more spectrally efficient UMTS and/or LTE services. . . .") (Hogg Declaration).

[161] *See, e.g.*, Spencer E. Ante and Amy Schatz, "Skepticism Greets AT&T Theory," *Wall Street Journal*, Apr. 4, 2011.

[162] Hogg Declaration, ¶ 48.

[163] The theoretical peak bit rate for one GSM carrier is 480 kbps. *See, e.g.*, Hakan Axelsson, Peter Bjorken, Peter de Bruin, Stefan Eriksson, and Hakan Persson, *GSM/EDGE continued evolution*, Ericsson Review No. 1 (2006), at 22, *available at* http://www.ericsson.com/ericsson/corpinfo/publications/review/2006_01/files/gsm_edge.pdf. Multiple logical carriers can be combined into a single transmission channel to gain some benefit, but each carrier requires a separate, significant spectrum allocation.

little financial value for so long as the spectrum is used for GSM — and converting it to use for newer technologies would render moot any arguments of efficiency in GSM control channels.

Applicants offer no more convincing an argument for other supposed GSM efficiencies if their own assertions of network constraints are to be believed. Applicants raise the possibility of "channel pooling efficiencies" which they allege can be used to reduce network delays and congestion just by merging the loads and the resources of both companies. They assert "initial analysis" suggests that they can achieve 10-15% capacity gains through such pooling without providing that analysis.[164] Instead, they offer a metaphor to explain the benefits. According to applicants, pooling channels is like combining two ticket lines, each with two ticket agents, into a single line with four agents.[165] The combined line is more efficient because it is not empty unless there are no customers, whereas with two lines, one line could be empty and not serving customers while the other is overfull.[166] Fundamentally, this metaphor falls apart under an assumption of heavy load. If every ticket line is full of people all the time, whether there's one line with four agents or two lines with two agents each won't make any difference, because each of the agents will be working, all the time. As Applicants insist that their 2G GSM networks are already in or near a state of crisis due to capacity constraints,[167] channel pooling efficiencies seem unlikely to deliver any significant benefits. Yet, applicants insist that the efficiencies "are independent of, and unaffected by, the load levels on the networks being combined."[168] At best,

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[164] Hogg Declaration, ¶ 50.

[165] *Id.*, ¶ 51.

[166] *Id.*

[167] *AT&T-T-Mobile Application* at 26.

[168] Hogg Declaration, ¶ 52.

the asserted efficiencies from channel pooling are unproven; more likely, they are not significant or nonexistent.

The clearest benefits for 2G GSM subscribers arise in the asserted utilization efficiencies,[169] but even these benefits are highly limited. In those areas where one company has a heavily constrained GSM network and the other company has an underutilized GSM network, then the combination of those two networks would indeed improve service for the subscribers of one company. However, one subscriber's benefit might be another subscriber's detriment, as the lighter loaded network would become more heavily loaded as a result of the combination. The exact amount of improvement for a constrained network in an area and the amount of degradation for the other network would depend heavily on the relative degrees of utilization. Any benefits would only occur in areas that fit a pattern of unbalanced use. The identification of a few such areas, as provided in the application,[170] does not itself amount to a showing of substantial benefit for a significant number of customers nationwide. Overall, the asserted benefits for the companies' 2G GSM networks appear speculative and limited, despite the overlap in spectrum and technology usage.

Proposed benefits for subscribers to the HSPA network

Nor will combining lead to significant HSPA network improvements. If anything, Applicants' claims regarding the efficiencies to be achieved in the delivery of HSPA service should cause even more skepticism. Because AT&T currently deploys HSPA technology on cellular and PCS spectrum and T-Mobile deploys HSPA on AWS spectrum, the two companies' networks cannot be rapidly combined to achieve efficiency gains. Applicants make clear their

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[169] *Id.*, ¶ 54.

[170] *Id.*

intention to achieve improvements in their allegedly constrained HSPA network by repurposing some spectrum currently deployed as GSM.[171] The application again offers a broken metaphor rather than a detailed explanation of the efficiencies. The proffered metaphor alleges that the companies' GSM networks are like two separate bottles of water, one 80% full and one 10% full, and that the load of both networks can easily be combined into the resources of one.[172] But if the networks are as heavily loaded as applicants would have us believe, combining them would seem to be more like pouring one 70% water bottle into another 90% full bottle. The result would be a lot of water spilled on the ground, or in the real world, one overwhelmed and overloaded GSM network with even poorer service than either original network. Given the assertions from applicants that their GSM networks are already constrained, combining the two networks will make the networks far worse, not better.

Applicants then argue that the spectrum used for one of the two GSM networks (presumably T-Mobile's PCS spectrum) can be repurposed to hold HSPA traffic (presumably T-Mobile's HSPA traffic, currently carried on T-Mobile's AWS spectrum) — after a full consolidation of the GSM networks.[173] But there are significant and unstated costs in such a transition. T-Mobile's HSPA network was built to work on AWS spectrum, not PCS, and all of

[171] *See id.*, ¶¶ 42, 49, 53-55. At times, Applicants also assert that freed GSM control channels can be used for UMTS/HSPA traffic. *Id.*, ¶ 48. However, these benefits are limited only to places where AT&T has 5 MHz of spectrum already available, the available spectrum is sufficiently located that it can be paired with the 5 MHz freed by the control channel into a downlink and uplink pair, and such engineering would not create any interference concerns. Consequently, the benefits seem minimal at best.

[172] *Id.*, ¶ 55.

[173] *Id.*

T-Mobile's infrastructure would be updated to use PCS. Furthermore, *every T-Mobile HSPA handset* currently in the hands of consumers would need to be replaced.

ii. The proposed merger will not significantly improve future LTE deployments, and any improvements would come at great cost.

Applicants' argue that AT&T's current 700 MHz and AWS spectrum holdings cannot fully support its LTE deployment, but the Commission should view this claim with skepticism. The company already has a nationwide average of 27 MHz of 700 MHz and AWS spectrum for LTE deployment.[174] Adding Qualcomm's spectrum would give the company a nationwide average of approximately 35 MHz for LTE, with a minimum of 6 MHz of spectrum covering 300 million people.[175] However, these holdings are allegedly insufficient because AT&T claims it needs 20 MHz of *contiguous* spectrum nationwide for its LTE services to be sufficiently robust.[176] Consequently, applicants plan to clear and repurpose the AWS spectrum currently used for T-Mobile's HSPA network to supplement AT&T's holdings and create a minimum of 20

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[174] *AT &T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses,* WT Docket No. 11-18, Application, Description of Transaction, Public Interest Statement, and Related Demonstrations, Jan. 13, 2011 (*AT&T-Qualcomm Application*), Rinne Declaration, ¶ 12 (Rinne Declaration).

[175] *See, e.g.*, Greg Bensinger and Brett Pulley, "AT&T to Pay $1.93 Billion for Qualcomm Mobile Spectrum," *Bloomberg*, Dec. 20, 2010, *available at* http://www.bloomberg.com/news/2010-12-20/at-t-agrees-to-acquire-wireless-licenses-from-qualcomm-for-1-93-billion.html ("The spectrum, in the lower 700 megahertz frequency band, covers 300 million people in the U.S., the companies said today in a statement."). Based on a current population estimate of approximately 311 million as of May 2011, the Qualcomm spectrum would allow the company to cover at least 96% of the population of the United States, and likely already more than AT&T's 97% target threshold.

[176] *AT&T-T-Mobile Application at* 5; *see also* Hogg Declaration at ¶ 60 (noting that "T-Mobile USA's AWS spectrum will provide the combined company with at least an average of 20 MHz of AWS spectrum" in areas where AT&T currently lacks adequate AWS or 700 MHz spectrum).

MHz of spectrum for LTE nationwide.[177] According to AT&T's own prior arguments, this is a solution without a problem, despite the company's newfound 20 MHz AWS requirement. Furthermore, the "solution" would be actively harmful to current AT&T and T-Mobile customers.

AT&T has given numerous signals that it has adequate spectrum already to deploy LTE nationwide. Most prominently, in the parallel AT&T/Qualcomm proceeding, the application and alleged public interest showing contend that AT&T could transition its PCS or cellular spectrum licenses to use for LTE in areas where the company lacks adequate 700 MHz or AWS spectrum licenses.[178] Furthermore, the company's threshold of 20 MHz is set far too high. MetroPCS, AT&T's supposed competitor,[179] is currently deploying LTE in many areas on a scant 10 MHz of spectrum, often broken into 2 paired 5 MHz channels.[180] If MetroPCS can be considered a competitor with 10 MHz of spectrum for LTE, AT&T cannot logically insist on 20.

Certainly, putting additional spectrum into use for an LTE network would improve the network's overall performance. However, repurposing T-Mobile's AWS spectrum, as applicants have planned, would come at great cost, if it is feasible at all. T-Mobile's HSPA users would need to be moved off of the AWS spectrum and onto AT&T's cellular and PCS spectrum

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[177] *Id.*

[178] Rinne Declaration, ¶ 15 ("Where AT&T currently does not hold 700 MHz or AWS spectrum, AT&T may take steps to clear a portion of its 850 MHz or 1900 MHz spectrum for LTE, as customers begin transitioning to LTE devices.").

[179] *See, e.g.*, *AT&T-T-Mobile Application* at 82-86 (arguing that MetroPCS is "taking an 'increasing percentage' of subscribers . . . prompting other major providers, including AT&T, to make competitive responses.").

[180] *See, e.g.*, Harish Vadada, "MetroPCS — first LTE network in the US," *Telecom Cloud*, Aug. 29, 2010, *available at* http://www.telecom-cloud.net/?p=408.

licenses.[181] Such a transition seems nearly impossible when, according to applicants, AT&T is already experiencing significant network capacity constraints.[182] At minimum, the short-term impact of the merger under such a plan would be a significant worsening of any capacity constraints currently affecting both AT&T's and T-Mobile's networks as the two are temporarily combined onto AT&T's spectrum resources.

D. Both AT&T and T-Mobile Could Alleviate Any Capacity Constraints and Improve Next Generation Deployment Without Resort to a Merger.

Applicants fail to demonstrate that combining their spectrum holdings is the only, or the best, way to mitigate capacity constraints and to improve LTE deployment. From the outset, the merger appears unnecessary in light of actual examples of more efficient providers. AT&T's closest competitor, Verizon Wireless, handles more customers and has deployed robust LTE services using equivalent total spectrum.[183] Verizon Wireless shares its spectrum across multiple generations of network technology like AT&T, and yet it maintains that its network and spectrum position is strong and will be for many years.[184] Applicants have not clearly explained why Verizon Wireless is able to avoid similar constraints, or why AT&T cannot achieve the same efficiencies with its existing resources.

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[181] The application asserts that there are "some areas" in which T-Mobile holds AWS spectrum that the company does not currently use. Hogg Declaration, ¶ 56. Presumably, this spectrum could be deployed for LTE service without transition cost. However, the full scope and bandwidth of available spectrum is uncertain, and most of T-Mobile's AWS spectrum is currently in use.

[182] *See, e.g. AT&T-T-Mobile Application* at 26.

[183] According to the Commission's *Fourteenth Report*, Verizon Wireless had just over 91 million subscribers at year-end 2009, and AT&T had just over 85 million. *Fourteenth Report* at 9. Verizon Wireless currently holds 87.7 MHz of average spectrum, measured on a population-weighted nationwide basis; in the same source, AT&T currently holds 82 MHz of spectrum, within 10% of the holdings of Verizon Wireless (and would hold more than Verizon Wireless if the Qualcomm acquisition is approved). *Id.* at 148, table 26.

[184] *E.g.*, *AT&T-T-Mobile Application* at 79.

In fact, AT&T has better alternatives than this merger to improve its network. AT&T is currently sitting on $9 billion in undeployed beachfront and AWS spectrum.[185] AT&T holds enormous and valuable undeployed spectrum licenses, including a population-weighted national average of 17 MHz in beachfront 700 MHz licenses, far more than many other carriers such as MetroPCS possess in total.[186] A more efficient, fast, and lower cost approach to alleviating AT&T's alleged capacity constraints on both its GSM and HSPA networks would be for AT&T to spend the $24 billion in cash it has committed for T-Mobile on rapidly deploying its current unused spectrum towards its LTE network, entering into roaming agreements or making smaller acquisitions[187] to cover gaps in its territory, generating incentives for some of its current users to rapidly transition from GSM and HSPA networks to LTE, and easing the load on the remaining GSM and HSPA subscribers. Applicants argue that a transition of AT&T users from GSM and HSPA to LTE will take a long time,[188] yet their proposal requires a complete transition of T-Mobile's users.[189] The primary difference appears to be whether T-Mobile's customers or

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[185] *E.g.* Reply of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation to Joint Opposition, *In re Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated for Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18, Mar. 28, 2011, at 3 (*Public Interest Qualcomm Reply*).

[186] *See Fourteenth Report* at 148, table 26.

[187] For example, AT&T recently filed to acquire the small wireless provider Redwood Wireless and its lower 700 MHz B and C Block licenses (which match AT&T's current 700 MHz licenses). *Shareholders of Redwood 700 Inc. and AT&T Inc. Seek FCC Consent to the Transfer of Control of Lower 700 MHz Band B and C Block Licenses Held by Redwood Wireless Corp.*, Public Notice, DA 11-943, ULS File No. 0004643747 (rel. May 24, 2011).

[188] Hogg Declaration, ¶¶ 40-41.

[189] *Id.* at 56. Regardless of whether T-Mobile subscribers will be migrated to an integrated UMTS network or to AT&T's LTE network, T-Mobile's network equipment would need to be modified, and T-Mobile consumers would move to different spectrum and would need new devices. Furthermore in areas where T-Mobile's AWS spectrum is allegedly needed for LTE deployment, those users would be forced to share AT&T's UMTS network

AT&T's are forcibly moved, and whether the affected customers receive a benefit in performance or not (because AT&T users would be moving to a faster LTE network, whereas T-Mobile users might be moving onto an already constrained and slower AT&T network).

Although applicants allege that AT&T has a shortage of LTE-worthy spectrum available for use without this merger, the company has previously made clear that it could repurpose its PCS or cellular spectrum in part to fill these gaps.[190] Data roaming agreements with other carriers can also help fill any remaining gaps, and AT&T would have multiple potential partners for such agreements. For example, Verizon Wireless has already begun deploying a nationwide LTE network on highly compatible 700 MHz spectrum and is required by the FCC's recent data roaming rules to negotiate roaming on commercially reasonable terms and conditions.[191] Data roaming is a less expensive, less disruptive, and more efficient solution than a corporate merger with attendant network overhauls and consumer device transitions. Data roaming agreements allow many carriers to achieve nationwide coverage — in fact, Applicants cite the data roaming abilities of other carriers at least six times in arguing that these carriers provide meaningful competition.[192] Applicants cannot simultaneously argue that data roaming is appropriate for AT&T's competitors, but not for AT&T.

Although T-Mobile does not hold spare spectrum in reserve comparable to AT&T's, it, too, has other options to alleviate scarcity. The company leads in development of ever newer and

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to clear the spectrum for LTE — they could not be moved to a LTE network that does not yet exist.

[190] *Rinne Qualcomm Declaration*, ¶ 15.

[191] *See 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, 2011 WL 1341353 (Apr 7, 2011).

[192] *AT&T-T-Mobile Application* at 12, 75, 83, 86, 89, 93.

more efficient versions of HSPA+. Continued investment and innovation in HSPA+ deployment, continued expansions of T-Mobile's widespread WiFi hot-spot network,[193] additional data roaming agreements, and partnerships with carriers offering wholesale services seem more than sufficient to address constraints. Moreover, active bidding in future spectrum auctions would provide opportunities for T-Mobile to build LTE-Advanced networks and other future technologies.

The picture is no different in the near term. Even on a shorter timeframe, both AT&T and T-Mobile could achieve significant benefits in improving service on their HSPA networks without merging. Because T-Mobile and AT&T use different spectrum for their HSPA networks, AT&T is unable to use T-Mobile's spectrum immediately to alleviate capacity on its HSPA network — AT&T users would all require new devices to take advantage of the new spectrum. As a result, the primary alleged benefit of the merger for AT&T's HSPA network derives from cell splitting — installing AT&T equipment onto T-Mobile cell sites.[194] But cell splitting does not require a merger. The proposed merger adds no value to the efficiencies that could be gained from a separate, non-merger agreement between the two companies to share cell sites. AT&T's assertion that it is increasingly difficult to locate suitable new sites is irrelevant, because AT&T would not need to locate new sites under either scenario.[195]

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[193] According to T-Mobile, the company's HotSpot Network includes more than 45,000 locations across the United States. T-Mobile HotSpot U.S. Location Map, T-Mobile USA home, *available at* https://selfcare.hotspot.t-mobile.com/locations/viewLocationMap.do (last visited May 29, 2011).

[194] Hogg Declaration, ¶¶ 43-47.

[195] *Id.*, ¶ 43 ("In many cases, there simply are no suitable locations that could be brought on line in time to meaningfully address spectrum exhaust issues.").

In sum, the merger itself provides few, if any, benefits in either relieving capacity constraints or speeding buildout. What minimal benefits it confers come with significant drawbacks and could be achieved without merging the two entities. Given its limited benefits, this merger appears to be at best a stopgap move, extending slightly the window of time before AT&T's GSM and HSPA networks are so constricted as to cause significant churn, as subscribers leave for better designed and built networks, networks with cheaper service plans, or faster networks like Verizon Wireless's LTE network.

E. Applicants Fail to Acknowledge That Consolidating So Much Spectrum in the Control of One Entity Could Actually Diminish Investments in Infrastructure, Leading to Inefficient Use of Spectrum.

In addition to ignoring the real harms and disruptions the merger could cause for AT&T and T-Mobile customers, Applicants ignore the possibility that merging could diminish their post-merger incentives and ability to upgrade their infrastructure. First, consider the following hypothetical: If this proposal is rejected, AT&T might begin seeing rising churn. AT&T might then be pressured to accelerate its LTE deployment, expand the use of WiFi offload, and offer incentives to its subscribers to transition more rapidly to the new network to lighten the load on its older networks. Such actions would produce greater efficiency in spectrum use and greater network performance for AT&T subscribers more quickly — and likely at lower cost than the purchase price for T-Mobile. By contrast, with fewer choices in the market, the merged entity could retain customers even after its network became capacity constrained, without needing to correct the constraints through aggressive investment.

AT&T's experience with the iPhone provides an illustrative example. When Apple released the iPhone, Apple and AT&T signed a contract guaranteeing that AT&T would be the sole network provider offering iPhone service for the first five years after the phone's release.[196] As a result, AT&T had an artificial monopoly on iPhone service. This one exclusive deal brought many millions of data-hungry customers onto AT&T's network, creating a load the company quickly acknowledged.[197] But the company did little to remedy these capacity constraints. Worse, rather than recognize the growing demand and limit the number of new iPhone users when facing network constraints, AT&T continued to encourage more and more users to use its network.[198] Imagine if an airline oversold a flight by a factor of two — but instead of taking immediate action to secure a larger plane, or giving travel vouchers to half the customers who

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[196] Sam Diaz, "Apple, AT&T had five-year exclusive iPhone deal but have the terms since changed?" *ZDNet*, May 10, 2010, *available at* http://www.zdnet.com/blog/btl/apple-at-t-had-five-year-exclusive-iphone-deal-but-have-the-terms-since-changed/34280 (noting that court documents have confirmed the original contract was for five years). The contract was later modified, and ended after nearly four years with the introduction of the Verizon iPhone in January of 2011. Amy Thomson, Adam Satariano and Olga Kharif, "Verizon Said to Plan iPhone Launch, Helping Apple Combat Google," *Bloomberg*, Jan. 9, 2011, *available at* http://www.bloomberg.com/news/2011-01-07/verizon-wireless-may-debut-iphone-next-week-to-match-at-t-analysts-say.html.

[197] *See* Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66, Oct. 22, 2009, at 20-21 (detailing the history of AT&T's introduction of the iPhone, and the company's failure to invest adequate resources to accommodate the ongoing growth in demand).

[198] Only once, for a brief period, did AT&T pause its rapid iPhone user addition. *See* Charlie Sorrel, "Reports: AT&T Stops Some iPhone Sales in NYC," *Wired*, Dec. 28, 2009, *available at* http://www.wired.com/gadgetlab/2009/12/att-stops-iphone-sales-in-nyc/ (reporting on a temporary suspension of iPhone sales in New York City, during which time one representative stated that the phone was unavailable because the city did not "have enough towers to handle the phone").

show up, the airline simply told everyone to share their seats. No wonder consumers complained, and AT&T's service quality fell to the nation's worst.[199]

But AT&T could only ignore these capacity constraints because it had a monopoly on iPhone service. A truly competitive market — one without exclusive deals for devices, where consumers can choose the device they want and the network they want — would have alleviated these problems. Consumers purchasing iPhones would have distributed themselves naturally across carriers, and if any one carrier's network grew overloaded, new and switching consumers would shift to another network. Instead, the popularity of the iPhone drew all of these customers to AT&T, despite its relatively higher service prices and its reputation for poor quality.

An even more dominant post-merger AT&T will have still fewer incentives to invest in network infrastructure because it will face fewer competitors who can take away its customers. Finally, the merged entity will be comparatively cash-poor, so its *ability* to deploy infrastructure may be compromised even if it remains committed to doing so.

F. Allowing AT&T to Acquire Spectrum from Qualcomm Would Exacerbate the Problems Caused By the Proposed Merger.

AT&T's proposed acquisition of spectrum licenses from Qualcomm would further increase the company's dominance and the potential harms of this transaction. On the day AT&T announced its proposed acquisition of T-Mobile, this Commission was in the midst of collecting filings on an earlier proposed AT&T acquisition, a nearly $2 billion purchase of spectrum

[199] Andrew Dowell, "*Consumer Reports* Says AT&T 'Worst-Rated' U.S. Carrier," *Wall Street Journal*, Dec. 7, 2010 (noting that AT&T finished last in consumer surveys for the second consecutive year, and that "AT&T was the only carrier to see a substantial drop in its overall satisfaction score").

licenses from Qualcomm.[200] The licenses at issue include 6 MHz of contiguous nationwide spectrum in beachfront 700 MHz range, adjacent to AT&T's current 700 MHz holdings, and an additional adjacent 6 MHz of spectrum in several major metropolitan areas throughout the country.[201] Numerous petitions to deny were filed in response to that application, emphasizing the potential of harm in allowing AT&T and Verizon Wireless to own a disproportionately large share of 700 MHz spectrum.[202] The Commission has not yet acted on the application, and the proceeding remains open.

Overall, the combined effect of the two transactions would be to create one single entity with an overwhelmingly dominant spectrum position, which could then be leveraged into anticompetitive control over a broad range of device manufacturers and competitors seeking roaming agreements. The combined acquisitions would give AT&T a commanding share in multiple distinct spectrum bands allocated for mobile broadband. AT&T already holds over 40% of spectrum in the cellular band at 850 MHz.[203] Combined with T-Mobile, AT&T would hold over 40% of PCS spectrum and just under 40% of AWS spectrum.[204] Adding Qualcomm's 700

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[200] *See AT&T-Qualcomm Application* at 3.

[201] *Id.* at 3, 5.

[202] *E.g.*, Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation, *Applications of AT&T Mobility Spectrum LLC and Qualcomm Incorporated for Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18, Mar. 11, 2011, at 9-12.

[203] *See Fourteenth Report* at 148, table 25.

[204] *Id.*

MHz licenses would give AT&T 33% of beachfront 700 MHz spectrum in addition.[205] AT&T would then own more than 30% of *four separate spectrum bands*. Verizon Wireless and Clearwire each hold more than 30% of *two* bands; other carriers have less. AT&T's spectrum holdings would not only far exceed the holdings of other carriers in total size, but also in diversity. Diverse and dominant spectrum holdings gives AT&T significant influence in the design of radios and devices that work on separate bands, as well as significant power over carriers seeking to roam on those bands.

G. Allowing AT&T to Merge with T-Mobile Would Send a Message to Spectrum License Holders That They Need Not Put Spectrum to its Most Efficient Use Because If They Fail to Do So, the FCC Will Simply Reward Them With More Spectrum.

Approving this merger would send exactly the wrong message to license holders because it would reward AT&T's inefficient use of spectrum. If AT&T faces capacity constraints as a result of its own poor allocation decisions or underbidding at auction, such an argument should not be sufficient to justify massive consolidation. Rather, the company should face the consequences of its business judgment or invest aggressively in its own infrastructure to remedy the problems it created.

First, AT&T holds several billion dollars worth of licenses for additional spectrum in 700 MHz and AWS bands.[206] The company has decided to save *both* its 700 MHz and AWS holdings

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[205] *See id.* at 148, tables 25-26 (the addition of Qualcomm's 6+ MHz of population-weighted average 700 MHz licenses to AT&T's existing 17.0 MHz gives the company over 23 MHz, out of a total 70 MHz in licenses).

[206] *See Public Interest Qualcomm Reply* at 3, n.3 (briefly listing AT&T's undeployed 700 MHz holdings); *AT&T-T-Mobile Application* at 33 (labeling both AT&T's 700 MHz and AWS license holdings as 'UC' for 'Under Construction', and not marked as 'Active').

for LTE deployment, which it has not yet deployed.[207] Although applicants assert that this spectrum cannot be efficiently "borrowed" for 2G or 3G network use,[208] such an assertion does not eliminate the conclusion that AT&T made a poor business judgment in not allocating its AWS licenses for its current HSPA network in the first place.

Second, AT&T had more than sufficient capital to purchase sufficient 700 MHz spectrum in 2008 to support an LTE network, which would have allowed it more leeway to free its AWS spectrum to meet growing demand on its HSPA network. AWS spectrum is well suited for HSPA deployment — in fact, T-Mobile's HSPA network is built on AWS spectrum.[209]

Third, AT&T has a documented history of underinvestment in its network infrastructure relative to its peers, further demonstrating that it has failed to mine the full potential of the licenses it already possesses. One analyst has directly attributed AT&T's recent capacity problems to underinvestment, noting that the company spent several billion dollars less than Verizon Wireless over a period from 2006 to 2009, and stating that AT&T needed to invest $5 billion more than its current investment levels in order to catch up.[210] The company is quick to point to its overall level of investment in the United States, but less quick to separate out investment in wireless infrastructure and wireline infrastructure — particularly its U-Verse television services; in fact, according to the same analyst, the company takes in more than half of its operating income from wireless, but only directs about a third of its capital expenditures into

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[207] Hogg Declaration, ¶ 27. Verizon Wireless acquired 700 MHz spectrum at the same auction as AT&T, and has already deployed LTE service in many areas of the United States.

[208] *AT&T-T-Mobile Application* at 24.

[209] *Id.* at 33.

[210] Stephen Lawson, "Analyst: AT&T Needs to Spend US$5B to Catch up," *IDG News*, Jan. 19, 2010, *available at* http://www.pcworld.com/businesscenter/article/187216/.

wireless.[211] More aggressive investment by AT&T in its wireless infrastructure and more rapid deployment of LTE could have put AT&T in the same position Verizon Wireless stands in today — with a new, powerful LTE network in many places in the United States that can already be used to take customers off of older networks.

Approval of this merger would be equivalent to the FCC rewarding AT&T's poor long-term business decisions by allowing the company to simply buy a competitor, significantly reducing competition to prevent the company from suffering the market repercussions of its own decisions. In sum, if the Commission intends on managing spectrum in the public interest, it will deny this merger.

VI. Conclusion

AT&T's acquisition of T-Mobile will create an entrenched duopoly in the market for mobile wireless service. The merger would stifle competition and innovation. It would lead to significant consumer harms and would not serve the public interest. The Commission must deny approval of the transaction and grant all other relief as may be just and proper.

Respectfully submitted,

______/s/______________

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[211] *Id.*