

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

In the Matter of

Application of AT&T, Inc. and Deutsche
Telekom AG for Consent to the Transfer
Of Control of Licenses and Authorizations
Held By T-Mobile USA, Inc. and Its
Subsidiaries to AT&T, Inc.

WT Docket No. 11-65

**PETITION TO DENY
BY THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)**

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EXECUTIVE SUMMARY

The Commission should deny the AT&T/T-Mobile Application expeditiously and without entertaining any merger conditions. AT&T and T-Mobile have failed to satisfy their burden of demonstrating that the Application serves the public interest, and there are no conditions that could ameliorate the competitive damage that the proposed transaction would wreak on the American telecommunications market. To approve the Application would turn back the clock to 1983, creating a dominant, vertically integrated Ma Bell with a degree of network control unprecedented in this country for the last 40 years.

Mobile services are a critical industry for economic growth in the United States. A healthy and competitive mobile services industry is vital to individuals, businesses, and government, and is necessary for business productivity, economic growth, and job creation. Competition brings about greater innovation in devices, operating systems, and applications; it encourages investment in networks and infrastructure, as well as the efficient use of wireless spectrum. The proposed AT&T/T-Mobile combination will harm this vital industry in several irreparable ways – competition will be diminished, prices for service will rise, innovation in networks and devices will falter, and the quality of mobile broadband service will suffer. These unavoidable results are not in the public interest, and thus the Application should be denied.

The mandates of the Communications Act and the conclusions drawn in prior merger precedent instruct that the Commission must conduct an analysis of the competitive effects of the proposed transaction. The relevant market, regardless of Applicants' claims, is the national market for mobile services. According to widely reported market figures, the national wireless market already exhibits significant concentration, so much so that the Commission could not conclude in the May 2010 *Fourteenth Report* that wireless service is subject to

effective competition. Were the Application approved, a core part of that market would be a virtual duopoly between the merged entity and Verizon Wireless, who together would own approximately 80% of the wireless market. Such horizontal concentration is unprecedented in that market, poses a direct and imminent threat to the public interest, and cannot be neutralized by any merger condition, voluntary or involuntary, that the Commission could conjure.

In addition to horizontal concentration in the market for mobile services, the proposed AT&T/T-Mobile transaction would also exacerbate the existing vertical integration problem, diminishing – if not extinguishing – competition in the wholesale backhaul, special access, and roaming markets. AT&T and Verizon Wireless already control backhaul and special access facilities and that are vital to the operation of all wireless networks, including their national competitors as well as small rural and regional wireless carriers. In addition, AT&T and Verizon Wireless are the nation’s largest carriers by orders of magnitude and retain a legacy of cellular licenses granted in the 1980s ahead of their competitors. Their head start has rendered other carriers dependent on them for roaming, or nationwide interoperability. The acquisition of T-Mobile by AT&T will only enhance the competitive advantages of the former Bell companies over their smaller competitors and make other carriers increasingly reliant on entrenched incumbents for backhaul, special access, and roaming. That outcome would be harmful to competition and the public interest.

The proposed AT&T/T-Mobile union would be detrimental to the public interest for reasons in addition to diminished competition. The merger would harm mobile broadband customers through higher prices, both in the individual subscriber and the enterprise markets. In addition, the history of telecommunications evolution demonstrates that the combination would halt innovation in several aspects of wireless service, including handset models, mobile operating

systems, and network management technologies. Yet another immediate harm would occur in the form of a grossly disproportionate allocation of spectrum resources in direct contravention of the Commission's obligation to manage spectrum efficiently. These injuries to the public interest would be the inevitable, and irreversible, results of the proposed combination.

AT&T and T-Mobile assert in their Application that the combined company would serve the public interest in many ways that will help the Commission and the Administration to achieve their stated goals. These claims are overstated, speculative, unsupported in fact, and unenforceable. AT&T also claims that it needs to acquire T-Mobile in order to satisfy its need for additional wireless spectrum. Even if AT&T does need additional spectrum, acquiring T-Mobile would do nothing to alleviate AT&T's spectrum problems. AT&T's problems are the result of its own mismanagement and under-investment. And allowing AT&T to acquire T-Mobile's wireless spectrum and simultaneously eliminate a low-cost, customer service award winning "maverick" competitor would stand in stark contrast to the FCC's mandate to promote competition and require license transfers serve the public interest.

Finally, there are no conditions available to the Commission that will allow the combination to proceed and concurrently meet the public interest burden. If the Commission already had adopted Title II common carrier regulations for mobile broadband or if structural separation of AT&T's and Verizon's local wireline networks – along with wholesale interconnection requirements – were already in effect, the circumstances might be different. But this proposed further concentration of the wireless market, given the existing level of deregulation, is unthinkable. The Commission therefore must grant this Petition and deny the Application, and it should do so as soon as possible in order to minimize competitive damage to T-Mobile that will happen in the interim.

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Appendix A Letter from Albert A. Foer and Richard N. Brunell, American Antitrust Institute, to Chairman Herb Kohl and Ranking Member Michael S. Lee (May 16, 2011)

The Computer & Communications Industry Association (“CCIA”), through counsel and pursuant to sections 214 and 309(d) of the Communications Act of 1934 (the “Act”), 47 U.S.C. §§ 214, 309(d), and the Commission’s Public Notice,¹ files this Petition to Deny the application of AT&T, Inc. (“AT&T”) and Deutsche Telekom for the transfer of licenses from T-Mobile USA, Inc. (“T-Mobile”) to AT&T filed April 21, 2011 (“Application”). The Application fails both antitrust and public interest analysis, and the purported benefits that the applicants have promised are illusory. In accordance with the mandates of the Communications Act and the Commission’s precedent in prior mergers, the Application should be denied summarily.

I. MOBILE BROADBAND IS CRITICAL TO THE U.S. ECONOMY

A healthy and competitive telecommunications industry is vital to the health of the U.S. economy. Telecommunications, whether wireline or wireless, are the nation’s highway for sharing information, offering goods and services, and facilitating business transactions.

Mobile services in particular are an essential component in enabling productivity growth in the United States.² Over the last five years, mobile broadband has become a crucial service for Americans. In 2005, a CTIA report titled *The Impact of the US Wireless Telecom Industry on the US Economy* estimated that productivity gains in 2004 from a then-nascent

¹ *AT&T and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, DA 11-799 (Apr. 28, 2011).

² Roger Entner, THE INCREASINGLY IMPORTANT IMPACT OF WIRELESS BROADBAND TECHNOLOGY AND SERVICES ON THE U.S. ECONOMY, A STUDY FOR CTIA-THE WIRELESS ASSOCIATION at 3 (2008) (“2008 CTIA Study”).

mobile broadband sector were worth over **\$8 Billion** to the U.S. economy,³ and in 2005, realized productivity gains were **\$28 Billion**.⁴

After an initial period of deliberate duopoly licensing of cellular phone systems – two licenses per local market – the early commercialization of mobile services benefited from nearly perfect competition. In the years following Congress’s authorizing the Commission to hold spectrum auctions,⁵ investment in mobile telecommunications soared. Increased investment led to better, faster networks and the transition from analog to digital technology. Competition flourished, prices plummeted, and subscribership increased dramatically. These benefits flowed directly from the Commission’s resolute determination to ensure that the new frontier of wireless services were not captured by incumbent wireline providers whose monopoly rate bases subsidized their entry.⁶

Over the next ten years, productivity gains attributable to the deployment and use of mobile broadband services are projected to generate approximately **\$860 Billion** in additional gross domestic product.⁷ The health care industry and small businesses are particularly likely to realize productivity gains by using mobile broadband.⁸

³ *Id.* (citing Roger Entner & David Lewin, *THE IMPACT OF THE US WIRELESS TELECOM INDUSTRY ON THE US ECONOMY, A REPORT FOR CTIA-THE WIRELESS ASSOCIATION* (2005)).

⁴ 2008 CTIA Study at 3.

⁵ The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), *codified at* 47 U.S.C. § 332(c).

⁶ “Mobile wireless developed much more quickly after the FCC made additional spectrum available and companies without legacy wireline investments entered the market.” Charles Goldfarb, Congressional Research Service, “The Proposed AT&T/T-Mobile Merger: Would It Create a Virtuous Cycle or a Vicious Cycle?,” at 20 (May 3, 2011) *available at* <http://ieeusa.org/policy/eyeonwashington/2011/documents/attmerger.pdf>.

⁷ 2008 CTIA Study at 4.

⁸ *Id.* at 2.

The Commission stated in the National Broadband Plan that “wireless communications – and mobile broadband in particular – promises to continue to be a significant contributor to U.S. economic growth in the coming decade.”⁹ The proposed AT&T/T-Mobile combination, as explained herein, is the greatest threat that the wireless industry has yet faced. CCIA urges the Commission to remain mindful during this merger review of its recognition, if not prediction, of wireless communications as a cornerstone of American economic growth.

II. THE PROPOSED COMBINATION IS UNACCEPTABLE UNDER ANY REASONABLE MARKET SCRUTINY

The proposed AT&T/T-Mobile transaction will diminish competition in wireless services. It is both a horizontal combination and a vertical integration situation exhibiting astronomical figures in terms of market share in retail services and market power in wholesale inputs such as backhaul, special access, and roaming. It will lead to diminished innovation in the mobile handset and operating system markets, and will harm customers through reduced choice and increased prices. In addition, a merged AT&T/T-Mobile will hold an unacceptably high concentration of wireless spectrum, thus depriving the few remaining competitors of a viable means for growth or for achieving any economies of scale. The undeniably severe and negative impact of this transaction on both the retail and wholesale wireless market requires that the Application be denied.

⁹ FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 75 (Mar. 2010).

A. The Commission's Mandate Includes Promoting Competition

In the Telecommunications Act of 1996,¹⁰ Congress directed the Commission to promote competition in all telecommunications markets.¹¹ Indeed, the purpose of the 1996 Act was the promotion of vibrant telecommunications competition.¹² Moreover, the Commission itself has expressly acknowledged “a deeply rooted preference for preserving and enhancing competition in relevant markets,”¹³ and stated in the *Fourteenth Report* that “[p]romoting competition is a fundamental goal of the Commission’s policymaking.”¹⁴

In accordance with Congress’s mandate and its own policy, the Commission historically has conducted an antitrust analysis when reviewing applications for the transfer of control of licenses.¹⁵ The Commission has adopted the methodology that the Department of

¹⁰ Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 153 *et seq.* (1996) (“1996 Act”).

¹¹ See H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.) (1996 Act was intended to promote competition in all telecommunications markets.).

¹² The Hon. Chip Pickering, “The End of the Telecom Revolution?,” REAL CLEAR POLITICS (May 18, 2011), available at http://www.realclearpolitics.com/articles/2011/05/18/the_end_of_the_telecom_revolution_109875.html.

¹³ *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148, 20 FCC Rcd. 13967, 13977 ¶ 21 (2005) (“*Sprint/Nextel Order*”).

¹⁴ See *Implementation of Section 6002(b) of the Omnibus 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, Fourteenth Report, FCC 10-81, 25 FCC Rcd. 11407 ¶ 1 (2010) (“*Fourteenth Report*”).

¹⁵ *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, FCC 11-47, 26 FCC Rcd. 4194, 4199-4200 ¶¶ 8-9 (2011) (“*Qwest/CenturyTel Order*”); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer of Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, Memorandum and Opinion and Order and Declaratory Ruling, FCC 08-258, 23 FCC Rcd. 17444, 17463 ¶¶ 27-29 (2008) (“*Verizon-Alltel Order*”); *Sprint/Nextel Order*, 20 FCC Rcd. at 13977-78 ¶¶ 21-22.

Justice employs by calculating the Herfindahl-Hirschman Index (“HHI”) to measure market concentration both before and after the proposed transfer.¹⁶ And though the Commission’s analysis is not limited to antitrust,¹⁷ and it must conduct a broader public interest review, *see* Section III below, the Commission recognizes that severely anticompetitive consequences can outweigh any pro-competitive benefits perceived for the public interest.¹⁸

B. The Proposed Transaction Is An Unreasonable Horizontal Combination That Would Result in an Effective Duopoly In Retail Wireless Services

The Application proposes a transaction that would result in a market in which two carriers, the merged AT&T/T-Mobile entity and Verizon Wireless, would hold more than 80% of the retail wireless market. This extreme level of consolidation would establish an innovation-killing wireless and wireline duopoly that would siphon off value from the rest of an economy dependent on telecommunications services.

Over the past decade, the mobile industry has steadily consolidated. In the *Fourteenth Report*, the Commission was not able to conclude that this once-dynamic and

¹⁶ *Verizon-Alltel Order*, 23 FCC Rcd. at 17568 ¶ 41; *Sprint-Nextel Order*, 20 FCC Rcd. at 13993 ¶ 63.

¹⁷ *E.g.*, *Verizon-Alltel Order*, 23 FCC Rcd. at 17461 ¶ 28.

¹⁸ We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.

Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses and Authorizations, WT Docket No. 04-70, FCC 04-255, Memorandum Opinion and Order, 19 FCC Rcd. 21522, 21545 ¶ 42 (2004).

competitive industry remains competitive.¹⁹ Its reticence was only proper given the market conditions it found. The HHI for transactions in the wireless market in 2009 *on average* was **2848**;²⁰ the Department of Justice Horizontal Merger Guidelines define a “highly concentrated market” as having an HHI of more than 2500.²¹ And even if the Commission refuses to acknowledge that the relevant market is nationwide, the HHI numbers are startling: According to Economics and Technology, Inc., at year-end 2008, the top 19 Economic Areas (by subscriber count) showed HHI numbers of **2574** or higher.²² As of the Second Quarter of 2009, Verizon Wireless had captured a **33% share** of wireless subscribers, and AT&T served **30%** of subscribers.²³ T-Mobile served 12.6% of wireless subscribers at that time.²⁴ The Commission calculated that concentration in the wireless market had increased 32% since 2003.²⁵

The *Fourteenth Report* expressed the Commission’s market share data on a national basis. Its market analysis for this merger likewise should view the proposed AT&T/T-Mobile combination as it affects the national market. Ninety percent of the wireless market is comprised of four national carriers: AT&T, T-Mobile, Sprint/Nextel (“Sprint”), and Verizon

¹⁹ *Fourteenth Report*, 25 FCC Rcd. at 11429 ¶ 6, 11623 ¶ 368 (2010) (declining to affirm finding in 2009 *Thirteenth Report* that the Commercial Mobile Radio Services market was subject to effective competition).

²⁰ *Id.*, 25 FCC Rcd. at 11452 ¶ 51, at 11453, Table 8.

²¹ U.S. Dept. of Justice, Horizontal Merger Guidelines § 5.3 (Aug. 2010) available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

²² Economics and Technology, Inc., *Views and News* at 4 (Apr. 2011), available at <http://econtech.com/newsletter/ETIViewsandNewsApril2011.pdf>.

²³ See *Fourteenth Report*, 25 FCC Rcd. at 11441, Table 3 (providing number of mobile wireless subscribers in Q209 for Verizon Wireless, AT&T, Sprint Nextel, T-Mobile, MetroPCS, US Cellular, and Leap).

²⁴ *Id.*

²⁵ *Id.*, 25 FCC Rcd. at 11412 ¶ 4.

Wireless.²⁶ Those four carriers own or control nationwide networks. They advertise nationally, and they establish arrangements with handset manufacturers that enable nationwide distribution. All of these factors support the adoption of a nationwide relevant geographic market.

The classic rubric for determining the relevant geographic market in antitrust is finding “the area of effective competition ... in which the seller operates, and to which the purchaser can practicably turn for supplies.”²⁷ In keeping with this methodology, the Horizontal Merger Guidelines endorse two criteria for defining a relevant geographic market: the location of a firm’s suppliers; and the location of a firm’s customers.²⁸

As applied to the proposed AT&T/T-Mobile combination, the suppliers of necessary inputs cover the entire United States. According to Appendix A (Spectrum Aggregation) of the Application, both firms hold, at the least, PCS spectrum establishing a nationwide footprint via 729 cellular market areas (“CMAs”).²⁹ Both firms obtain handsets in quantities that enable nationwide distribution, particularly for smartphones which already comprised **44% of handset sales** in the Third Quarter of 2009.³⁰ Even a casual observer of the wireless market can observe numerous indicia of a nationally based supply chain for the top four wireless carriers, including AT&T and T-Mobile.

²⁶ *Fourteenth Report*, 25 FCC Rcd. at 11440 ¶ 20 (expressed as a share of wireless subscribers). CCIA notes that based on the figures in Table 3 of the Fourteenth Report, 25 FCC Rcd. at 11441, those four carriers serve **93.6%** of wireless subscribers.

²⁷ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

²⁸ Horizontal Merger Guidelines §§ 4.2.1, 4.2.2.

²⁹ This number includes Puerto Rico but excludes the U.S. Virgin Islands, Guam, and non-U.S. protectorates.

³⁰ *Fourteenth Report*, 25 FCC Rcd. at 11495 ¶ 137; *see also id.* at 11496-98 ¶¶ 138-40 (describing iPhone and DROID).

The customers of AT&T and T-Mobile also span the full United States. Both carriers invested in nationwide ad campaigns to reach customers,³¹ most recently T-Mobile's ads featuring the young woman in the pink dress.³² Both carriers, along with Verizon and Sprint, have established chains of retail stores across the country in addition to establishing retail channels with nationwide retailers such as Wal-Mart, Best Buy, and Amazon.³³ The applicants themselves admit the scope of their existing services: AT&T describes itself as "a leading provider in the United States" with "worldwide wireless coverage," and T-Mobile "offers nationwide wireless voice and data services[.]"³⁴ Based on this data, applied to the customary market-definition methodology, the Commission should analyze the proposed merger based on a national geographic market.

Granting the Application would subject the national market to a virtual duopoly in wireless retail services. Based on the most recent data set on which the *Fourteenth Report* relies, and taking the unlikely assumption that market share has remained unchanged for two years, AT&T/T-Mobile would control almost **43% of wireless subscribers**,³⁵ and Verizon Wireless will control **33%** on its own.³⁶ Based on the 2Q09 figures in the *Fourteenth Report*, the

³¹ *Fourteenth Report*, 25 FCC Rcd. at 11493 ¶¶ 132-33.

³² *E.g.*, L.A. Times Blog, "Burning Questions: Just Who Is T-Mobile's Stylish New 4G Girl, and Who Made That Pink-and-White Dress?," Nov. 16, 2010, *available at* <http://latimesblogs.latimes.com/alltherage/2010/11/who-made-t-mobile-mytouch-4g-girls-pink-and-white-dress.html>.

³³ *Fourteenth Report*, 25 FCC Rcd. at 11494 ¶¶ 134.

³⁴ Application, Description of Transaction, Public Interest Showing and Related Demonstrations at 15 (Apr. 21, 2011) ("Description").

³⁵ *See Fourteenth Report*, 25 FCC Rcd. at 11441, Table 3.

³⁶ *Id.*

transaction would result in an HHI increase of **780 points**.³⁷ An increase of just 200 in a highly concentrated market³⁸ “will be presumed to be likely to enhance market power.”³⁹ Analysts now estimate that more recent data will show that the putative AT&T/T-Mobile entity, together with Verizon Wireless, would control approximately 80% of the wireless market.⁴⁰

The market share figures are so alarming, in fact, that the American Antitrust Institute has written a letter to Senator Kohl, Chair of the Senate Antitrust Subcommittee, stating that the proposed consolidation is not actually from four carriers to three, but rather is from four carriers to “more realistically, 2 1/2, since the merger may have the effect of marginalizing Sprint as a competitor[.]”⁴¹

This degree of market concentration will have far- and long-reaching consequences. In this regard, the Commission should review the state of telecommunications markets in Canada and Mexico, where near-duopolies have reigned for decades. Right now in Mexico, two companies dominate: Telmex holds more than 80% of the wireline market, and

³⁷ 3274 (post-merger HHI) – 2494 (2Q09 HHI) = 780 (market shares rounded to closest whole number)

³⁸ *Fourteenth Report*, 25 FCC Rcd. at 11453, Table 8 (average HHI in 2009 was 2848); Horizontal Merger Guidelines § 5.3 (market with HHI above 2500 generally classified as Highly Concentrated Market).

³⁹ Horizontal Merger Guidelines § 5.3.

⁴⁰ *E.g.*, Senator Herb Kohl, D-Wis., Chairman of the Judiciary Subcommittee on Antitrust, Competition Policy & Consumer Rights, Statement, “The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?” (May 11, 2011), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=5141&wit_id=470; Statement of Aparna Sridhar, Free Press Policy Counsel (May 25, 2011), *available at* <http://www.freepress.net/press-release/2011/5/25/free-press-statement-opposing-proposed-att-t-mobile-merger>.

⁴¹ Letter from Albert A. Foer and Richard N. Brunell, American Antitrust Institute, to Chairman Herb Kohl and Ranking Member Michael S. Lee at 1 (May 16, 2011) (attached as **Appendix A**).

Telcel has more than 70% of the wireless market.⁴² At this time, and what cannot be a mere coincidence, prices for telecommunications service in Mexico “still rank among the more expensive of the 34 mostly developed countries in the [Organisation for Economic Co-operation and Development],” and Mexico “is at the bottom of the OECD table” as to broadband penetration.⁴³

In Canada today, three companies, TELUS, Bell Mobility, and Rogers Communications, own 95% of the wireless market.⁴⁴ Of those carriers, Rogers is the sole GSM service provider, and as a direct result, Canada did not get the iPhone until a year after it had launched in the United States.⁴⁵ Approving the proposed AT&T/T-Mobile transaction will subject American consumers to the same kind of market delay and pricing inflexibility that Canada and Mexico now live with.

The numbers quantifying the degree of horizontal concentration that would result from the proposed merger are both astronomical and unprecedented in the post-Modified Final Judgment⁴⁶ era. Such severe concentration is certain to result in decreased choice, increased price, and stalled innovation in the wireless market. With the gravity of these numbers, which

⁴² Elizabeth Malkin, “Mexico Takes Aim at a Titan in Telecom,” N.Y. Times (May 8, 2011), *available at* http://www.nytimes.com/2011/05/09/business/global/09telecoms.html?pagewanted=1&_r=2.

⁴³ *Id.*, *available at* http://www.nytimes.com/2011/05/09/business/global/09telecoms.html?_r=2&adxnnl=1&pagewanted=2&adxnnlx=1306857605-nxAzxVvoVKSmgXe8hRBJng.

⁴⁴ “An Audacious Merger With a Poor Reception,” *The Economist* (May 24, 2011), *available at* http://www.economist.com/node/18440903?story_id=18440903&fsrc=rss.

⁴⁵ Michael Geist, “iPhone Shines Spotlight on Our Wireless Flaws,” *Toronto Star* (May 5, 2008), *available at* <http://www.thestar.com/sciencetech/article/421352>.

⁴⁶ Modified Final Judgment, *United States v. AT&T*, 552 F. Supp. 131 (1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (“MFJ”).

rely on the Commission's own market data in the *Fourteenth Report*, the Application should be denied.

C. The Proposed Transaction Would Solidify Vertical Integration of a Type and Degree Unprecedented in the Telecommunications Industry

The Application seeks to create a vertically integrated entity providing the full panoply of telecommunications services on both the retail and wholesale level. Vertical integration is of particular concern in merger analysis, because it carries great risk that the integrated firm can foreclose competitors from the market by restricting supply of inputs.⁴⁷ That risk is demonstrably acute in the wireless telecommunications market, in which competitors rely on the two largest carriers – AT&T and Verizon Wireless – for wholesale inputs to retail service.

The new AT&T/T-Mobile, as the Application proudly describes, would provide integrated voice, data, and broadband services over both the wireline and wireless platforms on a retail basis. It would also be the chief supplier of several crucial wholesale inputs to its remaining competitors, such as transport and loops (for the wireline platform) as well as backhaul, special access, and roaming service (for the wireless platform). And the merged entity would enjoy considerable market share, if not market power, in all of those services. AT&T/T-Mobile would be nothing less than a Ma Bell for the 21st Century with more reach and power than the old AT&T ever could have imagined back when it was neglecting cellular technology and the early Internet.

⁴⁷ U.S. Dep't of Justice, Non-Horizontal Merger Guidelines § 4.21 (June 1984) *available at* <http://www.justice.gov/atr/public/guidelines/2614.pdf>; *see also* *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962) (“The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a ‘clog on competition,’ which ‘deprive(s) rivals of a fair opportunity to compete.’” (citation omitted)).

AT&T's provision of special access facilities to wireless carriers has received particular attention within the discussion of the proposed merger.⁴⁸ The effect of the merger with regard to special access presents, as Public Knowledge puts it, "a double whammy."⁴⁹ First, one fewer competitor – one with significant market share – would be ordering special access from AT&T. The remaining competitors would have even more decreased negotiating power to obtain special access under tolerable terms, and would have a diminished voice at the Commission and at state agencies to urge enforcement of AT&T's obligation to provide network facilities under reasonable rates and conditions. Second, the new AT&T/T-Mobile would enjoy a windfall in the form of the decreased cost of serving T-Mobile customers, because the merged entity could simply self-provision special access rather than purchasing it as T-Mobile has routinely done. Special access thus provides an illustrative example of how the horizontal and vertical impacts of the merger will buttress and enhance each other to the detriment of competition and consumers.

Even absent this "double whammy" analysis, special access already was a substantial barrier to entry for AT&T's competitors, and one that AT&T itself acknowledged when it was a long distance company prior to its mergers with SBC and BellSouth. In a 2002 filing with the Commission, AT&T wrote "There is now indisputable proof that (i) large ILECs, and particularly Bell Operating Companies, retain pervasive market power in the provision of

⁴⁸ Testimony of Gigi B. Sohn, President, Public Knowledge, before the Senate Judiciary Subcommittee on Antitrust, Competition Policy & Consumer Rights, "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" at 7 (May 11, 2011) *available at* <http://judiciary.senate.gov/pdf/11-5-11%20Sohn%20Testimony.pdf>; Sara Jerome, "PK's Feld Questions AT&T's Special-Access Claim," The Hill (Hillicon Valley Blog) (May 24, 2011) *available at* <http://thehill.com/blogs/hillicon-valley/technology/162929-pks-feld-questions-atats-special-access-claim>.

⁴⁹ Jerome, "Feld Questions AT&T's Special-Access Claim."

[special access] services, and (ii) the large ILECs are abusing that market power with patently unjust and unreasonable rates that impose a multi-billion dollar annual overcharge or tax on American businesses and consumers.”⁵⁰ AT&T also wrote that “The Bell’s claims that their rates are constrained by market forces were false when made, are false today, and will remain false for the foreseeable future ... special access rates are grossly excessive ... and becoming more so ... The resulting harm to consumers and competition is immense.”⁵¹ Over eight years later, the FCC still has not provided special access rate relief, which has consistently been sought by an industry coalition, including non-telecom businesses, of which AT&T was once a part.

T-Mobile, in fact, participated extensively in the Commission’s proceeding to review the terms and conditions under which special access is provided, and stated in 2005 that “[t]he current lack of competition in the supply of special access services gives the ILECs the ability and the incentives to take anticompetitive actions against T-Mobile.”⁵² As recently as January 2011, T-Mobile filed data responses in the *Special Access* docket stating that

T-Mobile again urges the Commission to focus its special access analysis and reform on geographic areas in which competition has failed to discipline the market. In these markets, the Commission should intervene as necessary to ensure the reasonableness of the rates, terms, and conditions for special access services.⁵³

⁵⁰ *In re AT&T Corp. Petition for Rulemaking to Reform Regulation of ILEC Rates for Special Access Services*, WC Docket No. 05-25, RM No. 10593, Petition for Rulemaking at 3-4 (Oct. 15, 2002).

⁵¹ *Id.*

⁵² *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of T-Mobile USA, Inc. at ii (June 13, 2005).

⁵³ *T-Mobile Responses to Special Access NPRM Data Requests*, WC Docket No. 05-25, at 1 (Jan. 27, 2011).

The situation will become only more dire if T-Mobile is swallowed by AT&T, now one of the chief suppliers of special access.

Wireless backhaul is another crucial wholesale input that has raised concerns among competitors, including T-Mobile.⁵⁴ Sprint CEO Dan Hesse testified to the Senate Judiciary Subcommittee for Antitrust that “[b]y controlling the availability and price of backhaul, AT&T and Verizon are also able, to a large degree, to control their competitors’ costs and quality of service.”⁵⁵ As explained above with regard to special access, the proposed AT&T/T-Mobile combination would result in decreased negotiating power for the remaining wireless carriers, and would grant the merged entity a windfall in terms of avoided costs of serving T-Mobile customers. The negative impact on access to backhaul facilities is an independent and equally severe competitive harm that will flow from establishing a vertically integrated AT&T/T-Mobile entity.

Ma Bell was a vertically integrated monopolist in wireline voice services and associated consumer premises equipment (“CPE”). The proposed AT&T/T-Mobile firm would be the Ma Bell of *both* wireline *and* wireless services – not only voice service but data and content-delivery services as well. This vertical integration, fortified by unacceptable horizontal concentration within each component service, would render the MFJ and the Telecommunications Act of 1996 empty nullities. The Commission must not permit this “tipping point” transaction to undo decades of market entry, competition, and regulatory reform. The Application should be denied.

⁵⁴ Goldfarb, “Virtuous Cycle,” at 2; Sohn Testimony at 7.

⁵⁵ Written Testimony of Daniel R. Hesse, CEO, Sprint Nextel Corporation, Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights at 6 (May 11, 2011), *available at* <http://judiciary.senate.gov/pdf/11-11-5%20Hesse%20Testimony.pdf>.

III. THE PROPOSED COMBINATION WILL NOT SERVE THE PUBLIC INTEREST

Section 310 of the Act states in pertinent part that “[n]o construction permit or station license, or any rights thereunder, shall be transferred ... except ... upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”⁵⁶ Thus, absent a supportable determination that a particular transaction is in the public interest, the Commission cannot approve an application for transfer of control.⁵⁷ Further, Commission precedent consistently states that applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.⁵⁸

The proposed AT&T/T-Mobile combination will not serve, but rather will damage, the public interest in at least three significant ways. First, it will stall innovation in wireless services and devices by drastically reducing the large carriers’ incentives to develop or market new technologies and by reducing the small remaining carriers’ ability to do so. Secondly, it will result in price increases due to a similarly decreased incentive, or need, to compete on price. Third, it will constitute gross mismanagement of the nation’s most valuable resource for the Information Age: spectrum. These injuries to the public interest, coupled with the unprecedented market concentration discussed in Section II above, warrant summary denial of the Application.

⁵⁶ 47 U.S.C. § 310(d).

⁵⁷ *Id.*

⁵⁸ *Qwest-CenturyTel Order*, 25 FCC Rcd. at 4199 ¶ 7; *Verizon-Alltel Order*, 23 FCC Rcd. at 17460-61 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd. at 13976-77 ¶ 20.

A. The Proposed Combination Will Stifle Innovation and Investment in Wireless Services and Devices

It is axiomatic that where fewer firms compete in a given product market, each firm has less incentive to innovate or invest. The threat to innovation has been a marquee issue in Congressional hearings,⁵⁹ with good reason. AT&T's network troubles, brought into front-page prominence by Apple's decision to terminate its iPhone exclusivity with AT&T,⁶⁰ have been viewed as the direct and inexorable result of AT&T's failure to innovate and invest in its network to increase its capacity and reliability.

As Public Knowledge has put it, "AT&T simply chose to invest less and profit more."⁶¹ And let us remember that old AT&T (Ma Bell) told America that innovation or competition in CPE would damage the public switched telephone network ("PSTN"). The Commission has no reason to believe that AT&T, having paid billions of dollars simply to buy T-Mobile, will also devote meaningful resources to innovation once it achieves 43% market share (*see* Section II.B above).

⁵⁹ *E.g.*, Kohl Statement ("The more providers of cell phone service, the lower the price, the better the quality of service, and the more innovation that results."); Statement Of Senator Patrick Leahy, D-Vt., Chairman, Senate Judiciary Committee, "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" (May 11, 2011) *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=5141&wit_id=2629 ("There is no doubt that AT&T and T-Mobile are at the forefront of innovation in the wireless market. . . . But it is this history of innovation that highlights the importance of the antitrust laws. The antitrust laws promote competition, which drives this innovation.").

⁶⁰ *E.g.*, Walter S. Mossberg, "Verizon Beats AT&T in Voice Calls for iPhones," *Wall. St. J.*, Feb. 3, 2011, *available at* <http://online.wsj.com/article/SB10001424052748703960804576120174165554798.html>.

⁶¹ Sohn Testimony at 16.

B. The Proposed Combination Will Decrease Consumer Choice and Increase Prices

The elimination of T-Mobile as a competitor to Verizon Wireless and AT&T will remove meaningful choices of services and service plans from the market. Decreased choice of service provider quickly equates to increased price of service, simply because the remaining firms have fewer external factors affecting their ability to set prices.⁶²

Consumers Union has performed a detailed price analysis for the proposed AT&T/T-Mobile combination.⁶³ It finds that AT&T's existing prices are **43% to 64% higher** than T-Mobile prices for wireless data services, depending on the size of the data plan.⁶⁴ In addition, because this proposed combination would not be a marriage of equals, T-Mobile's award winning customer service would also quickly become a thing of the past.⁶⁵

C. The Proposed Combination Would Be a Mismanagement of a Critical Public Resource: Spectrum

The Commission recognizes that spectrum is a crucial national resource and “an increasingly pivotal input” to the broadband industry generally.⁶⁶ For this reason, the

⁶² See, e.g., *Fourteenth Report*, 25 FCC Rcd. at 11469 ¶ 87 (“One way that mobile wireless providers compete is through differentiated pricing plans.”).

⁶³ Testimony of Parul P. Desai, Policy Counsel, Consumers Union, Regarding “How will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?,” Before the House Committee on the Judiciary Subcommittee on Intellectual Property, Competition, and the Internet at 4-5 (May 26, 2011) *available at* <http://judiciary.house.gov/hearings/pdf/Desai05262011.pdf>.

⁶⁴ Desai Testimony at 4.

⁶⁵ T-Mobile's commitment to customer satisfaction and quality has earned “highest ranking” status in multiple awards in 2008 and 2009 from J.D. Power and Associates, the leading conductor of independent customer satisfaction and product quality surveys. T-Mobile was also ranked 96th on FORTUNE's 12th annual “Best Companies to Work For” list.

⁶⁶ *Fourteenth Report*, 25 FCC Rcd. at 11412 ¶ 4.

Commission was vigilant in protecting new entrants' ability to obtain newly licensed spectrum when structuring the first commercial wireless auctions.⁶⁷ In addition, the Commission remains, in the context of reviewing a proposed transfer or consolidation of wireless licenses, bound by its obligation to “manag[e] the spectrum in the public interest.”⁶⁸ The proposed AT&T/T-Mobile combination would undo, in large part, those efforts in one transaction.

AT&T's acquisition of T-Mobile will not serve the public interest, because the combination would lead to an inefficient misallocation of the nation's spectrum. AT&T by itself already holds more spectrum than any other wireless carrier, with 100 MHz of licensed spectrum covering the national footprint.⁶⁹ AT&T holds approximately 10 MHz more spectrum, using that metric, than Verizon Wireless, and approximately 50 MHz more spectrum than Sprint.⁷⁰ Adding T-Mobile's licenses to AT&T's pot would give the merged entity **150 MHz total spectrum nationwide**, giving it 60 MHz more spectrum than Verizon, and 100 MHz more spectrum than Sprint.⁷¹ This disproportionate allocation is even more objectionable when one considers, as explained in Section IV.A below, how little AT&T has done with the spectrum it has.

⁶⁷ See Goldfarb, “Virtuous Cycle” at 2; see also *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157, Notice of Inquiry, FCC 09-66, 24 FCC Rcd. 11322, 11327 ¶ 22 (“a variety of licensing approaches are used that are often intended to encourage competition”).

⁶⁸ *Sprint-Nextel Order*, 20 FCC Rcd. at 13977 ¶ 21; *Verizon-Alltel Order*, 23 FCC Rcd. at 17461 ¶ 27.

⁶⁹ J.P. Morgan, “Wireless Services: Overview of Carrier Spectrum Holdings” at 1, Mar. 30, 2011, available at https://mm.jpmorgan.com/stp/t/c.do?i=62A4E-B32&u=a_p*d_569842.pdf*h_ifi22f3.

⁷⁰ See *id.*

⁷¹ See *id.*

AT&T is also the least efficient wireless carrier in its use of spectrum. Allowing AT&T to add to its already sizable spectrum holdings will lead to mismanagement of an even larger swath of valuable spectrum, and such a result is harmful to the public interest.

IV. THE PROPOSED COMBINATION WILL NOT ACHIEVE ANY OF APPLICANTS' CLAIMED PUBLIC INTEREST BENEFITS

The bulk of the AT&T/T-Mobile Application is dedicated to arguing that approval of the proposed transaction will result in significant public interest benefits. Below, we demonstrate that these are hollow promises, and that a grant of approval would grossly disserve the public interest.

A. The Purported "Efficiencies" of Combining AT&T's and T-Mobile's Spectrum Are Wholly Illusory – In Fact, the Proposed Merger Would Result In An Enormous Waste of Spectrum

The Application's purported benefits of the proposed combination do not withstand any reasonable scrutiny.

1. The AT&T/T-Mobile Arguments.

AT&T/T-Mobile make a variety of assertions that the public interest will be served by a grant of their Application. In particular, AT&T/T-Mobile argue that increasing demand for data-intensive mobile applications has caused a surge in bandwidth demand, and they assert that, individually, both AT&T and T-Mobile would face enormous capacity constraints without the proposed merger.⁷²

AT&T argues that its networks currently run "three generations" of technology – Global System for Mobile (GSM), the GSM upgrade called Universal Mobile Telecommunications System (UMTS), in some cases enhanced with High Speed Packet Access

⁷² See generally Description at 19-45.

(HSPA) technology, and the new standard to which all large wireless carriers are migrating, Long Term Evolution (LTE) technology. AT&T argues that the two older technologies are incompatible and require different handsets, and yet will have to be maintained for years, thereby imposing an enormous burden on the carrier.⁷³ The resultant “capacity crunch,” AT&T argues, would prevent it from introducing advanced technologies in some markets, and could actually lead to dropped calls and service degradation in a significant number of Cellular Market Areas in the relatively near future.⁷⁴

AT&T/T-Mobile make similar arguments for T-Mobile. They acknowledge that T-Mobile could “try to alleviate these problems by purchasing new spectrum and investing in the necessary network infrastructure” – but contend that this is too costly.⁷⁵

2. The merger is not necessary to prevent a “spectrum crunch” for either AT&T or T-Mobile, and would result in an enormously wasteful use of spectrum.

i. There is no “spectrum crunch” for AT&T.

The “spectrum crunch” asserted by AT&T/T-Mobile, along with dire warnings of service degradation, dropped calls, and technological obsolescence, is a complete fabrication. AT&T/T-Mobile lament the inefficiencies of the older GSM and UMTS technology that dominates their networks, but all wireless carriers have the same problems. AT&T/T-Mobile freely admit, however, and the industry fully knows, that transitioning to LTE technology – “the gold standard for advanced mobile broadband services”⁷⁶ – as rapidly as possible will resolve the

⁷³ Description at 22-25.

⁷⁴ *Id.* at 25-30.

⁷⁵ *Id.* at 30-33.

⁷⁶ *Id.* at 1.

network management concerns raised by increasing data usage among wireless subscribers. But despite holding massive amounts of spectrum,⁷⁷ AT&T's argument that it must obtain even more spectrum to resolve these problems is disingenuous in the extreme. In fact, prior to the time that the T-Mobile opportunity arose, AT&T was bragging about its network and its ability to upgrade to broadband:

AT&T today announced plans to upgrade the nation's fastest 3G network to deliver considerably faster mobile broadband speeds. The network upgrades are slated to begin later this year, with completion expected in 2011. * * * "AT&T's network infrastructure gives us a tremendous advantage in that we're about to deliver upgrades in mobile broadband speed and performance with our existing technology platform," said Ralph de la Vega, president and CEO, AT&T Mobility and Consumer Markets.⁷⁸

It was widely reported that subscribers to AT&T's iPhone service expressed high levels of dissatisfaction with AT&T's network, which was not fast or robust enough to enable users to employ many of the applications that the iPhone made available.⁷⁹ It was similarly

⁷⁷ Some observers have compared the spectrum holdings and market shares of AT&T and Verizon Wireless and, finding them relatively similar, have wondered why AT&T is complaining of a spectrum shortage and its customers in key cities are experiencing dropped calls and slow data speeds while Verizon Wireless is not having those problems. One critic alleges that "AT&T is today sitting on more spectrum than any other wireless operator in the top 21 markets in the U.S., and about a third of that spectrum is still being unused."

Goldfarb, "Virtuous Cycle," at 14 (quoting 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).

⁷⁸ AT&T Media Newsroom, "AT&T To Deliver 3G Mobile Broadband Speed Boost," May 27, 2009, *available at* <http://www.att.com/gen/pressroom?pid=4800&cdvn=news&newsarticleid=26835&mapcode=corporate|wireless-networks-general>.

⁷⁹ *E.g.*, Casey Newton, "AT&T's Challenge: Retaining iPhone Users," San Francisco Chronicle, Feb. 10, 2011, *available at* <http://www.tectrends.com/cgi/showan?an=00178773>.

widely reported that consumers flooded to Verizon as soon as it was able to sell the iPhone, and that customer satisfaction with the Verizon network was much higher.⁸⁰

Why this highly disparate experience with the two largest telecom providers in the country, both of which are operating under the same technological constraints? Because Verizon has been spending its time and money investing in upgrading its network, while AT&T has been focused on growing through acquisition. According to one commenter, AT&T began to experience congestion problems when it introduced the iPhone in 2007, yet it increased its wireless capital expenditures **by only 1% in 2009** while Verizon Wireless increased its wireless capital expenditures by **10%** and, in total, had lower capital expenditures than Verizon Wireless.⁸¹ AT&T's failure to upgrade its existing technology to make effective use of the spectrum it already owns cannot be grounds for it to seek new spectrum.

ii. AT&T/T-Mobile are proposing an enormous waste of spectrum.

AT&T/T-Mobile admit that the proposed transaction would provide only a short-term solution to their asserted problems: "AT&T estimates that the efficiencies resulting from this transaction, in combination, will push back the date of expected spectrum exhaust in many markets" ⁸² They further note that this temporary measure will buy AT&T/T-Mobile additional time to implement a long-term solution, which is the "ramping down of GSM networks, the fuller deployment of efficient, capacity-increasing LTE technologies, and new

⁸⁰ *E.g.*, Walter S. Mossberg, "Verizon Beats AT&T in Voice Calls for iPhones," Wall Street Journal, Feb. 3, 2011, *available at* <http://online.wsj.com/article/SB10001424052748703960804576120174165554798.html>.

⁸¹ Reardon, "Spectrum Hog?"

⁸² Description at 9.

spectrum available at auction.”⁸³ AT&T/T-Mobile therefore admit that upgrading their existing networks to LTE is the true solution, and that the acquisition of vast amounts of new spectrum in the proposed combination is merely an interim step before that upgrade can take place.

What do AT&T/T-Mobile propose to do with their combined spectrum before this transition to LTE takes place? AT&T/T-Mobile argue that it will “be exceptionally difficult, if not impossible, for AT&T to repurpose its existing spectrum quickly enough to alleviate the capacity crunch it faces.”⁸⁴ This situation purportedly has arisen because AT&T must continue to support “tens of millions of GSM and UMTS subscribers” as it upgrades to LTE.⁸⁵ In addition, these subscribers will have to give up their GSM or UMTS handsets in order to use the new technology, and “it can take years for subscribers to migrate to new technologies in volumes sufficient to provide material offload from the legacy network.”⁸⁶ In making this argument, AT&T/T-Mobile are proposing to use their combined spectrum to maintain three separate networks: a GSM network, a UMTS network, and an LTE network, until all their subscribers decide to upgrade to LTE. And apparently the driving factor for this consumer choice will be consumers’ own willingness to buy new handsets. A more wasteful use of scarce spectrum can hardly be imagined.

In short, we have a problem – to the extent one exists at all – of AT&T’s own making, because it has spent its time and energy on acquiring other networks rather than

⁸³ Description at 33-34. *See also id.* at 39 (the AT&T/T-Mobile GSM networks “can hold substantially more traffic than before if [they are] repurposed for more efficient UMTS technology.”).

⁸⁴ Application, Attachment 2 at 48 (Apr. 21, 2011) (“Attachment 2”).

⁸⁵ *Id.* at 49.

⁸⁶ *Id.* at 49.

integrating and upgrading the networks it already owned. And the AT&T/T-Mobile proposed solution is to maintain separate, old-technology networks until their customers decide to buy new cell phones at a time when other carriers are pricing their handsets and services aggressively in order to encourage consumer migration to the efficient new technologies. In essence, AT&T is asking to be rewarded by the Commission for its failure to maintain and upgrade its networks.

AT&T/T-Mobile's proposed solution to their asserted problem is to spend \$25 Billion in cash on yet another acquisition, rather than invest in network upgrades. As one commentator notes:

The FCC may want to explore whether the proposed merger would deplete the new entity of cash for its proposed LTE deployment. The FCC's Fourteenth Mobile Wireless Competition Report shows that in 2009, the latest year for which data were available, AT&T had capital expenditures of slightly less than \$6 billion and T-Mobile had capital expenditures of more than \$3.5 billion. Under the terms of the proposed merger, AT&T will have to pay Deutsche Telekom \$25 billion in cash. AT&T states that the "the consolidation of these two companies is projected to produce operational savings and other costs synergies exceeding \$39 billion, with annual savings of approximately \$3 billion starting in year three." Even with the projected savings, it is unclear how AT&T will finance the proposed network buildout.⁸⁷

We can thus summarize AT&T's proposal as follows: 1) AT&T is facing a "spectrum crunch" because, despite being the largest spectrum holder in the nation, it has failed to upgrade its network. 2) AT&T will fix self-induced problem this by buying T-Mobile, which will massively increase AT&T's spectrum holdings. It will use this spectrum to maintain two separate networks using its old technology, while it introduces new technology on a third network at some point in the future. 3) In order to acquire the new spectrum, AT&T will spend

⁸⁷ Goldfarb, "Virtuous Cycle," at 17.

\$25 Billion in cash. 4) This acquisition is expected, if AT&T's estimates are accurate, to generate annual savings of \$3 Billion, starting in year three, which will then be used to upgrade the AT&T/T-Mobile networks.

The AT&T/T-Mobile transaction would be humorous if it were not so dangerous. It will diminish competition, frustrate technology deployment, waste spectrum, and otherwise disserve the public interest. The Commission must reject the AT&T/T-Mobile Application.

B. The Proposed Transaction Would Undermine the Commission's Goal To Free Up Spectrum For Mobile Broadband

It is undeniable that the increasing popularity of mobile data applications is driving demand for spectrum. Chairman Genachowski has been a tireless advocate of freeing up additional spectrum for use by existing carriers, non-carriers, and for technologies that do not yet exist. In a presentation to the White House last month, the Chairman stated:

There's much we need to do – including fostering greater efficiency in technology and software, spurring dynamic spectrum sharing and secondary markets, and releasing unlicensed spectrum for the next generation of Wi-Fi, machine-to-machine communication and other innovations. The single most important step we can take is implementing voluntary incentive auctions.⁸⁸

The AT&T/T-Mobile proposed transaction could not be more at odds with this vision or the Commission's overall policy agenda. As discussed in the sections above, the proposed transaction would provide enormous additional spectrum resources to the one carrier in the country that already has the most spectrum, and would employ it in duplicative, unnecessary,

⁸⁸ FCC Chairman Julius Genachowski, Remarks on Spectrum As Prepared for Delivery, The White House, Washington, D.C., April 6, 2011, at 2, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0406/DOC-305593A1.pdf (“Chairman’s White House Presentation”).

and profoundly wasteful ways. A similar sentiment was recently expressed by former Representative Chip Pickering:

A hundred years of economic evidence of what works and what does not work are crystal clear. ‘Too Big to Fail’ is our wake up call. This merger decision should not even be difficult. If the proposed merger goes through, prices will go up for millions of Americans, investment and innovation will decline, jobs will be lost and quality will deteriorate. Free market competition across all segments, wireless and wireline, will suffer. Moreover, the spectrum auctions that brought billions of dollars to the Treasury, helped balance budgets and reduce deficits over the last 15 years will be rendered meaningless and dramatically devalued. The two old monopolies will simply divide the spectrum spoils among themselves. Their market dominance will allow them to hoard spectrum, and frustrate any competitor’s efforts to roll out new technology, services, apps and devices. Their special status as national carriers will leave them as the only carriers able to secure government contracts. Without the threat of sustainable competition, they will slow roll the introduction of new technology, thereby undermining the efficiencies and productivity gains needed to keep the nation competitive. These are not merely predictions, they are the lesson that history teaches.⁸⁹

Assignment of such a valuable resource to a carrier with a decade-long history of evading necessary network upgrades and which favors mergers and acquisitions rather than innovation would, quite simply, waste spectrum.

Moreover, as Rep. Pickering’s statement above makes clear, approval of the proposed transaction would also devalue existing spectrum, and would deny the U.S. Treasury and the industry the full economic value of the resource. To this point, analysts from Stifel Nicolaus have noted that “The planned AT&T/T-Mobile merger ... would eliminate T-Mobile as

⁸⁹ Pickering, “Telecom Revolution”.

a spectrum buyer and lower AT&T's need – thus reducing auction projections.”⁹⁰ Spectrum auctions – including the new voluntary incentive auctions proposed by the Chairman, and supported by over 100 leading economists ⁹¹ – are a market-based mechanism to identify and realize the optimal economic value of spectrum assets, and to ensure that they are used in the industry in a way that reflects this value. Allowing AT&T to bypass the auction process through an acquisition of T-Mobile would contravene one of the Commission's most important policies, and would disserve the public and the country.

C. The Proposed Combination Does Not Help AT&T To Expand Its Coverage To Unserved or Underserved Areas and Consumers

AT&T/T-Mobile argue that approval of the proposed transaction is necessary to bring advanced services to rural areas and currently underserved populations by promoting the deployment of LTE technology and reducing rates. Both assertions are belied by ample historical evidence.

1. The proposed transaction would not result in the provision of advanced services in rural areas.

AT&T/T-Mobile state that approval of the proposed transaction will result in massive deployment of LTE wireless technology in rural areas:

AT&T's current (pre-merger) plans call for deployment of LTE to approximately 80 percent of the U.S. population but no more. ... The remaining 20 percent of the population generally lives in less populated areas, including rural and smaller communities, where economies of scale and density are very low and per customer costs are very high. ... This transaction, however, will give AT&T the scale, scope, resources, and spectrum it needs to increase its LTE deployment from 80 percent to more than 97 percent of the U.S.

⁹⁰ Rebecca Arbogast & David Kaut, “Senators Push for Public Safety Build, Wireless Broadband Spectrum Bill,” at 1, Stifel Nicolaus TMT Regulatory, May 18, 2011.

⁹¹ Chairman's White House Presentation at 2-3.

population.⁹²

As an initial matter, to the extent AT&T suggests that it needs the proposed combination to provide additional spectrum in order to cover 97 percent of the U.S. population, it is flatly wrong. Following AT&T's acquisition last year of a large segment of Alltel spectrum, AT&T proudly announced that "Your new AT&T coverage will be similar to Alltel's non-roaming coverage footprint and you will be on the network that covers over 97% of all Americans."⁹³

As to AT&T's assertion that, if the proposed transaction is approved, AT&T will deploy LTE technology to 97 percent of the country,⁹⁴ that assertion is belied by AT&T's very recent actions in providing service on rural lands. In July 2010, AT&T submitted a request that the Commission allow it to collect federal Universal Service support for providing cellular service on the Oglala Sioux Reservation in Pine Ridge, South Dakota, as part of its acquisition of spectrum and network facilities from Verizon. That request was granted by the Commission two weeks ago.⁹⁵ In doing so, the Commission agreed with AT&T that USF funding was necessary to support service to this rural area. However, even with the grant of USF funding to support its operations, in an area where AT&T already owns the spectrum and a number of cell sites that it acquired from Verizon, AT&T declined to build out LTE technology, but has committed only "to

⁹² Description at 55-56.

⁹³ AT&T Website Notice, "Alltel Is Joining AT&T In Your Area," *available at* <http://www.att.com/mergers/alltel/index.jsp>.

⁹⁴ Description at 54-55.

⁹⁵ *Petition of AT&T Mobility LLC for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act and Transfer of the Alltel Pine Ridge Reservation Eligible Telecommunications Carrier Designation*, WC Docket 09-197, DA 11-859, Order, 2011 WL 1806802 (rel. May 11, 2011).

building a 3G HSPA broadband wireless network on the Reservation”⁹⁶ and even then would only commit to maintaining service to the Reservation for three years.⁹⁷

In addition, numerous commentators argue that AT&T will refuse to build out its wireless networks if the Commission adopts pro-competitive regulations, such as its recent imposition of mandatory data-roaming requirements. This concern is born out of AT&T’s own posturing: AT&T’s former Chairman, Edward Whitacre famously stated that

“Now what they would like to do is use my pipes free, but I ain’t going to let them do that because we have spent this capital and we have to have a return on it.”⁹⁸

That sentiment recently has been reiterated by AT&T in its opposition⁹⁹ to the Commission’s newly-adopted data-roaming rules.¹⁰⁰ It is also reflected in Commissioner Meredith Attwell Baker’s dissenting statement opposing adoption of those rules: “[R]egulator-sanctioned roaming rates could well create disincentives for host carriers to build the next tower and would create similar disincentives for roaming carriers to invest and expand their own networks.”¹⁰¹

⁹⁶ *Petition of AT&T Mobility LLC for Designation As An Eligible Telecommunications Carrier and Transfer Of the Alltel Pine Ridge Reservation Eligible Telecommunications Carrier Designation*, WC Docket No. 09-197, AT&T Petition at 19 (July 30, 2010).

⁹⁷ Reply Comments of AT&T, WC Docket No. 09-197, at 2 (Sept. 27, 2010).

⁹⁸ Business Week, “At SBC, It’s All About “Scale and Scope,” Nov. 7, 2005, *available at* http://www.businessweek.com/magazine/content/05_45/b3958092.htm.

⁹⁹ “‘A data-roaming mandate is unwarranted and will discourage investment and build-out of broadband facilities,’ Bob Quinn, chief privacy officer and senior vice president of federal regulatory affairs at AT&T, echoed in a statement.” National Law Journal, Apr. 7, 2011, *available at* <http://www.nationaljournal.com/tech/fcc-approves-data-roaming-rules-on-party-line-vote-20110407>.

¹⁰⁰ *See generally Reexamination of Data Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52, 26 FCC Rcd. 5411 (rel. Apr. 7, 2011).

¹⁰¹ *Id.*, Dissenting Statement of Commissioner Meredith Attwell Baker.

Given the Commission’s awareness that direct USF cannot incent AT&T to build out LTE in a discrete rural area, and that AT&T has repeatedly held out the threat of refusing to invest in its network in response to procompetitive regulatory initiatives, the Commission cannot reasonably rely on AT&T/T-Mobile’s current assertion that approval of the proposed transaction will somehow result in massive LTE investment in rural areas.

2. The proposed transaction would not result in lower rates for consumers.

AT&T/T-Mobile assert that the proposed transaction would result in significant “cost synergies” and that, in turn, “[c]onsumers will benefit as the combined company realizes these cost reductions.”¹⁰² AT&T/T-Mobile also state that the Cingular acquisition of AT&T Wireless in 2004 and the merger of SBC and AT&T Corp in 2005 are examples of mergers that resulted in significant cost savings.¹⁰³

Although CCIA does not doubt that previous mergers have generated enormous cost savings to AT&T, it is easily demonstrated that AT&T has not passed such cost savings down to consumers. Over the last decade, AT&T has grown enormously by mergers and acquisitions. In 2003, AT&T Wireless acquired Telecorp PCS and Tritel PCS; and it merged with Cingular in 2004. In 2007, AT&T acquired Dobson Communications Corp,¹⁰⁴ and in 2009, AT&T acquired Centennial Communications¹⁰⁵ and large segments of the Alltel Network.¹⁰⁶

¹⁰² Description at 52.

¹⁰³ *Id.* at 53.

¹⁰⁴ *See generally Applications of AT&T Inc. & Dobson Communications Corporation*, WT Docket No. 07-153, FCC 07-196, Memorandum Opinion and Order, 22 FCC Rcd. 20295 (2007).

¹⁰⁵ *See generally Applications of AT&T Inc. & Centennial Communications Corporation*, WT Docket No. 08-246, FCC 09-97, Memorandum Opinion and Order, 24 FCC Rcd. 13915 (2009).

The result of all these mergers and acquisitions? The United States has the second-highest average monthly wireless rates in the world, second only to Japan.¹⁰⁷ These rates undoubtedly are driven by AT&T, the second-largest U.S. wireless carrier.¹⁰⁸ Indeed, the Commission's *Fourteenth Report* shows that AT&T's monthly rate plans – which are set at levels identical to Verizon's rates – are \$10-\$20 higher per month than the next largest carrier, T-Mobile.¹⁰⁹ And even in the rare instances that the monthly rate plans have decreased, AT&T and Verizon change their rates in lock-step – this year, both AT&T and Verizon dropped the rates for their voice calling plans from about \$100 to \$70.¹¹⁰ This coordinated pricing demonstrates that demand elasticity, and not costs, are the factors that drive AT&T's rates.

We note that the recent reduction in the price of voice calling plans was not an act of generosity. Although earlier this year AT&T and Verizon reduced their voice calling plans by about \$30, last year they introduced new requirements that their subscribers purchase new data plans¹¹¹ which are expected to more than offset any reduction in voice plan revenues. As

¹⁰⁶ See generally *Applications of Cellco Partnership D/B/A/ Verizon Wireless and AT&T, Inc.*, WT Docket No. 09-121, DA 10-1554, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 10985 (2009).

¹⁰⁷ “Japan has the highest average monthly bill (ARPU) for mobile services (\$56.82), followed by the United States (\$51.54). The U.S. average monthly bill is significantly higher than the Western European average (\$33.45).” *Fourteenth Report*, 25 FCC Rcd. at 11428 (Executive Summary).

¹⁰⁸ *Id.*, 25 FCC Rcd. at 11441, Table 8 (subscriber figures).

¹⁰⁹ *Id.*, 25 FCC Rcd. at 11471-72, Table 10, ¶ 92.

¹¹⁰ Barbara Ortutay and Rachel Metz, “Verizon Wireless, AT&T Lower Voice Plan Prices,” *USA Today*, Jan. 17, 2010, available at http://www.usatoday.com/money/industries/telecom/2010-01-15-calling-plan-price-cuts_N.htm.

¹¹¹ “[O]n Sept. 6, AT&T will require all new smartphone users to subscribe to the carrier's wireless data plans, the company confirms to *BusinessWeek.com*.” Olga Kharif, “AT&T to

Business Week reported, “Today, some of AT&T’s smartphone customers can chose not to buy a data plan, or they can subscribe to MEdia Net [*sic*], a cheaper service that offers wireless e-mail and news access for as little as \$2 per Megabyte. Currently, AT&T’s data plans range from \$5 to \$60 a month.”¹¹²

And these rate increases are just for data plans on smart phones. For other data services, AT&T has been raising its rates dramatically for year, despite the fact that telecommunications overall is a declining-cost industry. In 2006, Cingular/AT&T raised its rates for SMS messages from 10¢ to 15¢ per message.¹¹³ AT&T repeated this increase the next year, increasing SMS message rates again, from 15¢ to 20¢ per message.¹¹⁴ This doubling of SMS message rates took place at a time in which AT&T was expanding massively through acquisitions, and at a time when SMS usage was increasing exponentially; a Sybase official reported that text messages increased from approximately \$360 Billion in 2007 to \$865 Billion in 2008.¹¹⁵ Doubling rates in the face of such increased demand is indefensible in economic terms.

For over a decade, AT&T has demonstrated – in voice, data and SMS – that its rates do not reflect network efficiencies or economies of scale – they reflect only the maximum

Require Data Plans for Smartphones, Bloomberg/Businessweek, Aug. 21, 2009, *available at* http://www.businessweek.com/the_thread/techbeat/archives/2009/08/att_to_require.html.

¹¹² *Id.*

¹¹³ *Cingular Hikes Text Messaging, Waives Termination Fees*, PhoneNews, Dec. 14, 2006, *available at* <http://www.phonenews.com/cingular-hikes-text-messaging-waives-termination-fees-1632/>.

¹¹⁴ Elijah Nicolas, *AT&T Raising SMS Rates*, PhoneNews, January 28, 2008, <http://www.phonenews.com/att-raising-sms-rates-2662/>.

¹¹⁵ William Dudley, *US Census Text Messaging (SMS) Traffic Estimates – The Rest of the Story*, Sybase, Dec. 17, 2009, *available at* <http://blogs.sybase.com/wdudley/?p=635>.

amount that AT&T can extract from its subscribers. AT&T's assertions that a grant of the proposed transaction will lead to reductions in consumer prices are demonstrably unfounded.

CONCLUSION

For all these reasons, the Commission should deny the Application on an expedited basis.

Dated: May 31, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2011, I served true and correct copies of the foregoing Petition to Deny via electronic mail on the following persons:

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APPENDIX A



May 16, 2011

Chairman Herb Kohl
Ranking Member Michael S. Lee
Senate Judiciary Committee
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Hearing on the AT&T/T-Mobile Merger

Dear Senator Kohl:

We appreciate the opportunity to submit this statement on behalf of the American Antitrust Institute in connection with the hearing on the AT&T/T-Mobile merger held on May 11th before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights. The American Antitrust Institute is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws.

We think it is time simply to call a halt to the increasing consolidation by the two dominant firms in the wireless communications market, AT&T and Verizon. Together these two firms already control approximately 65% of wireless subscribers nationwide. This latest merger will come close to replicating the original cell phone duopoly that years of public policy designed to promote wireless competition had sought to dismantle. It is likely to result in higher prices, lower quality, less innovation, and fewer choices for consumers and businesses.

Unlike other wireless mergers in recent years, which have been permitted to go forward conditioned on divestitures in certain local markets, this is the first merger that would eliminate another national facilities-based carrier, which is the low-priced carrier and an industry innovator to boot. The loss of this national competitor cannot be replaced by divesting assets in certain local markets to other wireless carriers. AT&T's promise to allow T-Mobile customers to keep their current rate plans for a while is irrelevant for antitrust purposes and does not address the loss of quality and price competition from an independent T-Mobile.

Based on the publicly available information, we see no adequate legal justification for reducing the number of national carriers from 4 to 3 (or more realistically, 2 1/2, since the merger may have the effect of marginalizing Sprint as a competitor). The argument

that it may be cheaper or faster for AT&T to increase its network capacity by buying its competitor, rather than investing in upgrading its network, as AT&T claims, is not a sufficient justification for a merger that significantly reduces competition in an already concentrated market. It is often easier to expand capacity by buying one's competitor, but the antitrust laws insist that dominant firms, at least, expand by internal growth, not by acquiring their competitors. Insofar as there is a looming shortage of spectrum, then creating new spectrum, which is within the government's authority, rather than consolidating existing spectrum, is the correct solution. Indeed, if AT&T, which already holds the most spectrum in the industry, cannot compete effectively without additional spectrum, then surely the barriers to entry are so high that expansion by other, far-smaller carriers, will be impossible.

At its investor conference only four months ago, T-Mobile convincingly presented its new "challenger" strategy by which it planned to challenge the market leaders by combining its high quality 4G network features and value pricing to capitalize on the growing demand for affordable and easy to use smartphones. It touted its spectrum position over the short and medium term and although it saw a long-term spectrum issue, that was a problem for the entire industry, not just T-Mobile. Now, it has decided that merging is easier than challenging its rivals. Nothing of course forbids T-Mobile's parent, Deutsche Telekom, from changing its strategy and exiting the U.S. mobile market. However, the Clayton Act prevents it from selling out U.S. consumers in the bargain.

Based on the available evidence, we intend to urge the Department of Justice and the Federal Communications to block this merger.

Sincerely,

A handwritten signature in black ink that reads "Albert A. Foer". The signature is written in a cursive, flowing style.

Albert A. Foer
President
Richard M. Brunell
Director of Legal Advocacy