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Universal Service Funds to establish a Mobility Fund to fund rural deployment.⁷⁴ Therefore, there is no need for the Commission to accept the competitive harm that comes from an AT&T/T-Mobile merger in order to get rural deployment.

Given this uncomfortable fact, AT&T has not adequately explained its contention that acquisition of T-Mobile's PCS and AWS spectrum will allow AT&T to more rapidly or effectively build-out in rural areas. Rather, this promise seems to be nothing more than a blandishment which plays to the Commission's goal of rural coverage.

Experience shows that the Commission must take with a grain of salt any promises that the merger will result in greater rural buildout. This promise sounds eerily like the argument (but in reverse) that AT&T (then Southwestern Bell) made to the government to get its 1999 merger with Ameritech approved. In that merger, AT&T committed to buildout wireline facilities in the top 30 markets outside of its area (called the "national-local" strategy).⁷⁵ By many accounts, though AT&T would insist that it technically complied with the merger condition, this plan was a failure and resulted in AT&T basically operating a single switch in many of these markets –not effectively providing competition to the incumbent local exchange carriers, such as BellSouth, outside of its home area as the condition was intended to ensure.⁷⁶ AT&T did not really compete outside its home market areas until its purchase of BellSouth a few years later – and then only through yet another merger. The lesson is that the Commission

⁷⁴ See *Universal Service Reform, Mobility Fund*, Notice of Proposed Rulemaking, WT Docket No. 10-208 (Oct. 14, 2010).

⁷⁵ The condition was as follows: "The SBC/Ameritech Out-of-Territory Entities shall provide local service, as described in Subparagraph c of this Section, in 30 markets in which SBC/Ameritech currently does not operate as an incumbent LEC (the "out-of-territory markets"), which may include markets in states currently served by the SBC/Ameritech's incumbent LECs."

⁷⁶ See "FCC Can't Create Enforceable Merger Conditions," <http://www.newnetworks.com/TeletruthAT&TBellSouth2.htm> (last viewed May 27, 2011).

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should not rely on empty promises when AT&T has done the bare minimum, if that, to comply with prior conditions.

J. The merger will not result in greater consumer choice

Particularly ludicrous is AT&T's claim that the merger will result in customers having access to a greater number of rate plans.⁷⁷ There is nothing today to stop either AT&T or T-Mobile from offering any rate plan they want to their own customers without the merger. And, of course, a T-Mobile customer who is dissatisfied with T-Mobile's rate plans and prefers an AT&T plan could switch to AT&T (or vice versa). The only thing stopping customers is the carrier's own behavior imposing termination fees on customers who want to leave service before the expiration of their contract.

Indeed, the situation is exactly the opposite of what AT&T claims will happen. T-Mobile's customers in fact will have even less choice if the merger is completed. AT&T has promised that T-Mobile subscribers will be able to stay in service on their existing rate plans. However, AT&T is silent on what happens once the customer's contract runs out. Will that customer be able to continue on the old rate plan or will it be forced onto the AT&T rate plans? Further, once their rate plans run out at least one competitive choice – T-Mobile – will be gone so customers will have even less choice than they have today. AT&T's rate plans are in fact considerably higher priced than T-Mobile. For example, for a data customer who only uses 200MB of data, the increase in rates would be 50% and a 10GB user, the rate would be 64% higher.⁷⁸ This can hardly be seen as leading to lower prices or greater choice for consumers.

⁷⁷ *Id.* at 44-45.

⁷⁸ See Testimony of Parul P. Desai, "How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?" House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, May 26, 2011, at 4. This testimony provides a good overview of the impact that this merger will have on subscriber rates.

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Finally, today, customers who want to leave T-Mobile will be able to continue to use their handset on AT&T's network since they both use GSM. However, after the merger, once their T-Mobile customer contracts run out, they will not be able to take their phone anywhere since the only other national GSM provider will have vanished.

AT&T also has not addressed what will happen to those subscribers who are on T-Mobile's plan and want access to the handsets only currently available to AT&T subscribers – such as the iPhone. Today, consumers can terminate their service with T-Mobile and switch to AT&T and get the new customer contract (and iPhone subsidy). Will they get the same choice if they merely want to upgrade from an old T-Mobile phone? The merger, therefore clearly does not result in greater consumer choice.

K. Without effective competition, consumers may not benefit from the anticipated efficiencies resulting from the merger

The Commission should not be blinded by AT&T's promises of anticipated efficiencies for another reason.⁷⁹ AT&T is investing \$39 billion dollars to acquire T-Mobile. The AT&T stockholders are going to demand a return on their investment. If AT&T passes through to its customers all of the savings resulting from the efficiencies gains it may enjoy as a result of the merger, it is not clear how AT&T stockholders' investment will earn a return. Of course, AT&T may not pass through all of its efficiencies, but even a modest return on a \$39 billion investment will require that a substantial portion of those efficiencies will need to be retained by AT&T and not passed along to consumers. The only way to ensure that greater efficiency gains are delivered to consumers is to have competitors who can effectively compete. To the extent that consumers do not enjoy the efficiency dividends resulting from the removal of a competitor and

⁷⁹ AT&T has told the financial markets that it will enjoy synergies of over \$39 billion – or in other words 100% of the investment. Such a return is highly unusual and makes it highly unlikely to actually occur.

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remaining competitors do not receive the spectrum and other conditions they need to ensure a level playing field, the balance clearly weighs against the merger.

Of course, anticipated efficiencies are just that – anticipated. What happens if the efficiency gains do not materialize or do not materialize in the amount that AT&T anticipates? The answer is simple -- AT&T will be forced to raise prices or engage in anti-competitive efforts to increase its market share. The stockholders of AT&T will not sit idly by while they have made an investment of \$39 billion which is not producing an acceptable return on investment. Increasing market share at the expense of competitors who do not enjoy the same economies of scale means that those competitors will become less profitable and will ultimately cease being a competitive threat. When this happens, AT&T will be able to raise prices further.⁸⁰

Prices have not been broadly increased in this industry in some time. But because the merger, without conditions, will lead to a return to a duopoly, the duopolists will be able to raise prices, or at a minimum slow the decline or hold it steady, since no competitor can emerge to stop them given the existing barriers to entry. The Commission therefore needs to make sure that the merger is subject to conditions that ensure that consumers are not hurt if AT&T's anticipated efficiencies do not materialize or do not materialize in the amounts anticipated by AT&T. The best way to do that is to approve the deal only upon conditions that ensure that the remaining competitors can act as an effective competitive check against AT&T raising prices. If AT&T will not agree to those conditions, then the Applications should be denied.

L. The current spectrum screen should not be altered

The Petitioners note AT&T's suggestion that the Commission's usual spectrum screen should not be applied here. Instead, AT&T asks for the screen to be significantly increased, with

⁸⁰ Prices can be raised directly – through moving rate plan prices higher – or indirectly – through such actions as caps, usage based pricing, and the like.

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the inclusion of all BRS spectrum (only 55.5 MHz is currently considered by the Commission) and MSS spectrum.⁸¹ If followed, AT&T's request could increase the spectrum screen to close to 200 MHz, rendering it nugatory. Yet, as the preceding analysis shows, this is far in excess of an amount that would clearly give AT&T market power. Moreover, AT&T's proposal to raise the spectrum cap ignores the fact that the spectrum nearly monopolized by AT&T and Verizon – *i.e.*, 700 MHz, cellular, and AWS – is clearly better spectrum for providing reliable and cost-effective mobile broadband services. AT&T's suggestion here should be rejected out of hand. Even unchanged, the spectrum screen is a tool for competitive analysis, not the be-all-and-end-all. And the evidence is overwhelming that, spectrum screen or no spectrum screen, the impact of this merger on the public interest would be enormously destructive.

VI THIS TRANSACTION WILL RESULT IN THE SOLIDIFICATION OF A DUOPOLY IN THIS MARKET AND THEREBY SIGNIFICANTLY INCREASE THE RISKS OF UNILATERAL ANTICOMPETITIVE EFFECTS AND COORDINATED INTERACTION

For horizontal transactions, the Commission has identified two main antitrust concerns that may be implicated and must factor into any competitive analysis: (1) unilateral effects and (2) coordinated interaction. By making possible an AT&T-Verizon virtual duopoly, this transaction drastically increases the potential of both harms, and the Commission should take these concerns into account whether its examination of the market is national or local.

A. The dangers of unilateral effects

Unilateral effects arise when the merged firm finds it profitable to alter its behavior following the merger by elevating price and suppressing output. The Commission previously has noted that in the case of mobile telephony/broadband services, “this might take the form of delaying improvements in service quality or adversely adjusting plan features without changing

⁸¹ *Public Interest Statement* at 76-78.

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the plan price. Incentives for such unilateral competitive actions vary with the nature of competition in the relevant markets.”⁸²

In a determination of whether there would be an increased likelihood, on a market-by-market basis, of unilateral effects as a result of a transaction, the Commission has considered, among other factors, “the merging firms’ individual and combined market shares, the degree of substitutability between the merging firms, and the number of rivals with sufficient ability and capacity to respond to a unilateral action by the merged entity.”⁸³ Further, this analysis considers, where appropriate, the role of MVNOs and other resellers in disciplining the market.

In *AT&T/Centennial*, the Commission found a number of markets in its market-by-market analysis in which it determined that other providers are not present or do not possess the capacity to prevent the exercise of unilateral market power.⁸⁴ The Commission should come to the same conclusion here, except on a much greater and national scale. For instance, as noted herein, AT&T and T-Mobile are considered competitors to each other, and may be considered relatively close substitutes for each other in the eyes of consumers. Indeed, T-Mobile consistently has referenced AT&T in its marketing materials. In addition, for those customers that require a GSM handset or international roaming, particularly traveling business executives, AT&T and T-Mobile may be the only game in town. In many markets, other providers generally are unable to match the price/service options offered by the Applicants. Moreover, other licensees in these markets have limited ability to reposition in response to any attempted exercise of market power by the merged firm. Nor can entry by firms not currently providing service in

⁸² *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer of Control of Licenses, Authorizations and Spectrum Leasing*, Memorandum Opinion and Order, 24 FCC Rcd 13915, at ¶ 54 (2009) (“*AT&T/Centennial Order*”).

⁸³ *Id.* at ¶ 56.

⁸⁴ *Id.* at ¶ 58.

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these markets be counted on to prevent possible exercise of market power. And forces pushing firms away from setting differing prices between local markets cannot be counted on to prevent such differential pricing by AT&T in the future. For the above reasons, the Commission must conclude that unilateral effects will certainly result from the proposed transaction – and such effects must be guarded against by appropriate conditions to allow this transaction to proceed.

B. The dangers of coordinated Interaction

The proposed transaction also drastically increases the risks of coordinated interaction.

The Commission has noted that:

In markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their actions. Accordingly, one way in which a transaction may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete. Successful coordination depends on two key factors. The first is the ability to reach terms that are profitable for each of the firms involved, and the second is the ability to detect and punish deviations that would undermine the coordinated interaction.⁸⁵

The Commission has found that a number of market conditions may affect whether coordinated interaction is more likely as a result of the transaction, "including the availability of information about market conditions, the extent of firm and product homogeneity, and the presence of maverick providers in the market."⁸⁶ The Commission's analysis of coordinated interaction has also been taken into account in its market-by-market analysis.

With the proposed transaction, it is certain that only a few firms will account for most of the sales of a product – and both of the Commission's factors noted above will clearly be met.

⁸⁵ *Id.* at ¶ 59.

⁸⁶ *Id.* at ¶ 61 However, the Commission has noted that there is considerable variation across local markets with respect to all of the above, and thus has noted that it is difficult to "generalize about the impact of the transaction in facilitating coordinated interaction to restrict competition on price or non-price terms in specific markets." *Id.*

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Both AT&T and Verizon will be able to reach terms that are profitable for each of them, and it will be easy for AT&T and Verizon to detect and punish violations that would undermine such tacit interaction.

As noted herein, AT&T and Verizon will have by far the lion's share of the market, both nationally and in the vast majority of local markets across the country. AT&T and Verizon, while not likely to directly coordinate prices, would certainly be able to tacitly coordinate pricing for wireless plans and handsets. Moreover, the structure of the wireless marketplace makes it easy for AT&T and Verizon to see what each other is doing, and match each other accordingly. Indeed, AT&T and Verizon often follow each other currently when it comes to pricing decisions. This practice will only get worse if the proposed transaction is approved. With two players controlling the vast majority of the wireless market, the Commission should be extremely concerned about the prospect of coordinated interaction between the two – both at the national and local market levels.

C. The proposed merger will concentrate the wireless market dramatically

The AT&T/T-Mobile merger, if allowed to take place as proposed, will combine the second and fourth largest (by subscribers) wireless carriers and further entrench AT&T as a dominant behemoth in terms of subscribers, resources and spectrum. This combined entity will enjoy overwhelming market power on its own. Worst of all, the merger will bring to fruition the long-held dream of the “Big 2” wireless carriers: to effectively recreate the duopoly in wireless services that existed in the early cellular era – and was a source of such competitive concern.⁸⁷ Indeed, Congress and the Commission in the mid 1990s allocated additional spectrum in order to

⁸⁷ *Commercial Mobile Radio Services (Annual Report and Analysis of Competitive Market Conditions)*, Second Annual Report, 12 FCC Rcd 11266, at 11272 (1997) (finding that “competitive forces would generally be much stronger than they had been in a cellular market duopoly market structure”).

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remake the wireless market from a then duopoly to the competitive market that exists today. The transaction will eliminate that market structure. Along with Verizon, the merged entity will control the mobile wireless marketplace, as shown by the following, among many other indicators:

- The combined AT&T/T-Mobile entity will hold an average of more than 1700MHz of spectrum in each major metropolitan market;⁸⁸
- The combined AT&T/T-Mobile entity will hold in excess of 43% of all customers;⁸⁹
- The combined entity will hold approaching half of the industry EBITDA;⁹⁰
- The combined AT&T/T-Mobile and Verizon together would hold in excess of 91% of the free cash flow of the industry, 80% of the subscribers in the industry, over 92% of the EBITDA of the industry, approaching 300MHz on average in every major metropolitan area.⁹¹

In the past several years, the number of terrestrial wireless broadband mobile facilities-based carriers has decreased dramatically as a result of FCC-approved industry consolidation. Since 2007, AT&T has absorbed Dobson, Aloha, and Centennial and has recently applied for approval, among other things, to acquire up to 24 MHz of 700 MHz spectrum held by Qualcomm as well as acquire all of T-Mobile.⁹² Verizon, meanwhile, has acquired Rural Cellular and Alltel. Finally, in the past several years T-Mobile acquired Sun Com Wireless and Sprint was on its own acquisition spree which included Nextel, IPCS, Ubiquitel, Nextel Partners, Alamosa, and US Unwired. As a result of this consolidation, the wireless market has become even more highly concentrated than when the Commission last faced a major acquisition.

⁸⁸ Bernstein Research, "AT&T Buys T-Mobile: A 'High Degree of Confidence' that the Deal Can Get Done," at Exhibit 5, EBITDA 2010 and Pro Forma for Merger (by Subscribers), March 21, 2011 ("*Bernstein Research Report - March 2011*")

⁸⁹ *Id.* at Exhibit 7, HHI Today and Pro Forma for Merger (by Subscribers).

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 5-6.

⁹² In 2008, T-Mobile acquired Suncom, so that this merger would also result in the roll-up of the old Suncom into AT&T. *Wireless Competition Fourteenth Report* at ¶ 75. See e.g., Lower 700 MHz Band Auction Closes, Public Notice, Attachment A (listing Redwood County Telephone Company as a winning bidder in the Lower 700 MHz Band Auction) (Sept. 20, 2002).

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According to the *Wireless Competition Fourteenth Report*, the concentration of the U.S. mobile telephone market, based on each carrier's number of mobile subscribers nationwide and measured by the Herfindahl-Hirschman Index ("HHI"), calculated as a weighted average by Economic Area ("EA") population, already was 2848 at the end of 2008, before the closing of the AT&T-Centennial and Verizon-Alltel mergers. With this HHI, the U.S. Department of Justice and the Federal Trade Commission would consider the wireless industry to have been "highly concentrated" in 2008 without regard to this merger according to their *Horizontal Merger Guidelines*, because it exceeded the 2500 HHI benchmark number necessary for such designation.⁹³

The recently-consummated Verizon-Alltel and AT&T-Centennial mergers have increased the HHI further. Based on the same 2008 *Wireless Competition Fourteenth Report* numbers cited above, and using the metric that the increase in HHI resulting from the merger of two entities is equal to twice the product of their pre-merger market shares, the HHI following the consummation of the AT&T-Centennial and Verizon-Alltel mergers would have increased to approximately 3120, and the AT&T/T-Mobile merger would result in a further increase to 3800, an increase of *far* more than the 200 points that the *Horizontal Merger Guidelines* recognize as "presumed to be likely to enhance market power."⁹⁴

These numbers are consistent with the estimate of another knowledgeable industry analyst based on 2010 (as opposed to 2008) data. That analyst estimates that the HHI following

⁹³ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, revised Aug. 19, 2010, at § 5.3.

⁹⁴ *Id.* Before any of these three mergers, AT&T's national market share of subscribers was 29%, while Verizon's was 27%, Alltel's was 5%, T-Mobile's was 12% and Centennial's was somewhat less than 1%. *Fourteenth Report* at Table C-4. Thus, the increase in HHI from the first two mergers would have been about $2 \times 27 \times 5$, or 270 points, and from the currently proposed merger would be $2 \times 29 \times 12$, or about 696 points. Note that the scale of measurement is not precisely the same in the before and after numbers, so that these results must be seen as approximate. MetroPCS and NTELOS expect that further HHI information will be filed by other parties in this proceeding and reserve the right to modify their comments appropriately.

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the proposed merger, treating subscribers as the relevant measure of market share, would rise from about 2800 to about 3500 – a swing of some 700 points. Again, this far exceeds the 200-point threshold at which the *Horizontal Merger Guidelines* presumes that the increase will enhance market power. Based on revenues, this same analyst estimates an even greater HHI increase – from about 2600 to about 3500.⁹⁵ By any measure, the increase in concentration resulting from this merger must set off loud alarms requiring intense Commission scrutiny here.

Incredibly, AT&T and T-Mobile argue that they do not *really* compete against each other.⁹⁶ This argument does not pass the laugh test. T-Mobile has actively promoted its 4G speeds against the AT&T network – even referencing the iPhone and its slower data speeds by name in recent commercials.⁹⁷ T-Mobile’s footprint greatly overlaps with AT&T’s and they compete for the same retail customers. As discussed earlier, on the wholesale side, T-Mobile is the only significant competitor to AT&T for GSM-based services. For AT&T to argue that T-Mobile is not a real competitor, while much smaller carriers are, is breathtakingly disingenuous.

D. AT&T’s market dominance goes beyond end users services to essential competitive inputs

The adverse effects of the emerging duopoly will not be limited to the wireless market. AT&T and Verizon already dominate the overall telecommunications industry in the United States. This overall dominance allows them to dictate terms to wireless competitors for other essential inputs, notably special access facilities and wireline termination facilities. When dominant carriers effectively control important inputs to a non-dominant competitor’s services, the dominant carriers effectively control the entire market since they can cause the competitor to

⁹⁵ *Bernstein Research Report - March 2011* at 2.

⁹⁶ *Public Interest Statement* at 13. See also *Humm Testimony* and *Stephenson Testimony*.

⁹⁷ Indeed, AT&T started calling its 3G HPSA+ network 4G apparently in response to T-Mobile’s advertisements claiming that its 3G HPSA+ network was 4G.

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incur higher costs and thus prevent effective competition.⁹⁸ This is as true today as it was in the early days of the original antitrust laws, when a single group of railroads in St. Louis controlled the only railroad bridge over the Mississippi and various other critical terminal facilities and used that control to squeeze competitors.⁹⁹

1. AT&T and Verizon dominate essential backhaul markets

Competitors such as Sprint, MetroPCS and NTELOS all use AT&T and Verizon wireline facilities to backhaul their traffic from cell sites back to their switches and to interconnect with the Public Switched Telephone Network (“PSTN”).¹⁰⁰ These facilities are a critical input to Petitioners’ services. Notably, even before this transaction was announced, repeated concerns were expressed regarding the need for the Commission to address competitive issues with the special access facilities used for backhaul.¹⁰¹ The costs and availability of these facilities will be of even greater importance going forward, as the requirements for backhaul increase exponentially with broadband data. If the merger proceeds without conditions relating to backhaul, AT&T and Verizon will have even greater ability – and greater incentive – to whipsaw their bottleneck wireline facilities to further disadvantage their wireless competitors.

2. AT&T and Verizon control essential roaming services and the merger will remove T-Mobile, which has more reasonable roaming policies

AT&T and Verizon are the only realistic providers to which carriers such as Petitioners can go for nationwide roaming.¹⁰² AT&T and T-Mobile admit in their Senate testimony that

⁹⁸ Indeed, it was the bottleneck control of AT&T over access to the local telephone loop, which other carriers needed access to that motivated the divestiture by AT&T of the local telephone companies.

⁹⁹ See *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912).

¹⁰⁰ See, e.g., *Hesse Testimony* at 5-6. As Mr. Hesse notes, while AT&T’s and Verizon’s competitors must pay billions of dollars in backhaul fees, the Big 2 provide backhaul to themselves without (net) cost and rake in huge profits from the backhaul fees they charge their competitors.

¹⁰¹ *Wireless Competition Fourteenth Report*, at ¶¶ 297-98.

¹⁰² While Sprint does provide roaming, it only covers around 200 million POPs while AT&T and Verizon cover over 97% of POPs. This difference can make a substantial difference to some customers.

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consumers expect nationwide service, not just service in their home areas,¹⁰³ and any carrier which cannot offer truly nationwide service at a competitive rate is doomed to die a slow and painful death. But the only way mid-tier, regional and rural carriers such as Petitioners, can offer nationwide service is through roaming agreements with these very same providers. As has been shown to the Commission over and over, AT&T and Verizon have been less than model citizens when it comes to offering roaming services on reasonable terms and conditions. These carriers have pervasively charged rates greatly in excess of their costs (plus a reasonable profit), imposed exclusionary terms forbidding certain types of competition from the regional and smaller carriers, or both.¹⁰⁴ Indeed, AT&T repeatedly has refused to make 3G data roaming available, and has prevented regional competitors from competing for roaming traffic by requiring its roaming partners to route to AT&T rather than competitors whenever AT&T's signal is available.¹⁰⁵ Verizon has charged competitors a rate for voice services roaming that is many times higher than the rate it charges its own retail customers for comparable services. Yet its cost to serve its own customers must be *higher* than those to serve roamers, since Verizon need not incur costs such as number administration and billing for roamers. Verizon also has denied even 2G data roaming and offered it at rates that are simply breathtaking.¹⁰⁶

¹⁰³ See Oral Testimony of Randall Stephenson, Chairman, CEO and President of AT&T Inc. and Philipp Humm, CEO of T-Mobile USA, Inc. before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" on May 11, 2011.

¹⁰⁴ See e.g. Petition of MetroPCS Communications Inc. and NTELOS Inc. to Condition Consent or Deny Application, *Applications of Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-95 (filed Aug. 11, 2008); Petition of Cincinnati Bell Wireless LLC to Condition or Deny Application, *Applications of Centennial Communications Corp. and AT&T, Inc. for Consent to the Transfer of Control of Commission Licenses, Leasing Arrangements and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-246 (filed Jan. 15, 2009) ("Cincinnati Bell Comments").

¹⁰⁵ *Id.* at 7 (describing AT&T's "primary carrier" provisions in roaming agreements).

¹⁰⁶ OPASTCO indicated that a nationwide carrier for 3G roaming services (which, on information and belief, MetroPCS understands to be Verizon) had offered data roaming at rates up to \$1 per megabyte. See

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The serious problems in the roaming market will be exacerbated if and when AT&T and T-Mobile join forces. T-Mobile has been a better roaming partner than AT&T— and the Petitioners expect it would still have been one for 4G LTE when deployed.¹⁰⁷ Today, at least, T-Mobile provides some level of competition to AT&T in GSM roaming. By acquiring T-Mobile, AT&T will at one stroke eliminate its only large competitor for GSM roaming partners. Mid-tier, regional and rural carriers using GSM will not even have the limited roaming alternative to AT&T that T-Mobile has provided.

This loss of choice will go beyond GSM services. As noted above, AT&T has in the past refused to allow 3G data roaming and, given its track record, it can be expected to exploit every possible means of denying advanced data roaming service even under the Commission's new data roaming order,¹⁰⁸ such as by denying that services are technically compatible or technically feasible, imposing exorbitant rates, or insisting upon anticompetitive terms such as those it has historically used for hobbling competitors.

T-Mobile has provided a useful competitive alternative in the 3G market and but for the merger might eventually cause AT&T to step up to its duties in this regard. But now, to support the merger, T-Mobile claims to have insufficient spectrum to deploy LTE on a single 20 MHz

Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at 4 (filed June 14, 2010) (stating that roaming rates for data range from 30 cents/MB to \$1/MB). If a customer uses just 20% of its data usage while roaming and has 400 MB per month on average, the roaming charged would be \$160 per month *just for roaming*.

¹⁰⁷ While T-Mobile has indicated that it might not have adequate spectrum to deploy 4G LTE on virgin spectrum, it could have deployed 4G LTE just like MetroPCS on channel widths of 1.4 MHz or 3 MHz and refarmed its existing spectrum. Further, T-Mobile no doubt would have participated in future auctions *that it was pushing for immediately prior to the announcement of the merger* for 700 MHz D Block and AWS-2 and AWS-3 spectrum.

¹⁰⁸ See *Data Roaming Order* at Appendix A, Final Rules (adopting rules requiring “facilities-based provider of commercial mobile data services ... to offer roaming arrangements to other such providers for commercially reasonable terms and conditions”).

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channel,¹⁰⁹ thereby suggesting that it will be unable to provide a competitive alternative to AT&T for data roaming in the post-3G world. T-Mobile fails to mention, however, that: (1) it can offer LTE on a channel as small as 1.4 MHz to start – or 3 MHz in total – and can reform its inefficient technology; (2) technology improvements are coming which will allow bonding of non-adjacent channels to form a single 20 MHz channel for LTE, and (3) additional spectrum should be forthcoming that would allow T-Mobile to deploy 4G LTE. These are not pipe dreams – MetroPCS is today offering 4G LTE on 1.4 MHz channels in Boston and Philadelphia, among others. While the Petitioners, like others, needs more spectrum to compete as technology continues to develop, they stand as living proof that T-Mobile’s characterization of its current spectrum situation is mere poor-mouthing.

E. The merger will silence a strong critic of the wireless duopoly

The merger also will silence a strong pro-competitive voice on a number of issues that face the wireless industry. For example, T-Mobile has been a strong proponent for roaming,¹¹⁰ lower access rates,¹¹¹ 700 MHz interoperability¹¹² and the allocation of additional spectrum, among others.¹¹³ Its voice has been an important counterweight to the Big 2 carriers in regulatory proceedings – a very important function given the massive funds and staffs devoted by the Big 2 to promoting their own interests in regulatory proceedings. The simple reality has been that when T-Mobile aligns with small, rural and mid-tier carriers in a regulatory proceeding

¹⁰⁹ Introductory Remarks by Philipp Humm, CEO T-Mobile USA, Inc., May 11, 2011, at 1 (“*Humm Testimony*”).

¹¹⁰ See e.g. Comments of T-Mobile USA, Inc., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66 (filed Sept. 30, 2009).

¹¹¹ See e.g. Comments of T-Mobile USA, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (filed June 13, 2005).

¹¹² See Reply Comments of T-Mobile USA, Inc., *Implementing a Nationwide Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229 (filed Jan. 7, 2011)

¹¹³ See e.g. Comments of T-Mobile USA, Inc., *Annual Report and Analysis of Competitive Market Condition With Respect to Mobile Wireless Including Commercial Mobile Services*, WT Docket No. 09-66 (filed Sept. 30, 2009).

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against Verizon and AT&T, the Commission takes note. Thus, yet another benefit of the merger for AT&T – but not for the public interest – would be the stilling of one of the last effective voices opposed to the Big 2 in the regulatory arena. With the removal of T-Mobile’s strong voice on these issues, it is less likely that the remaining competitors in the industry will be as effective at getting the necessary attention to the competitive issues facing the industry.

F. AT&T and Verizon have strong buy-side market power which allows them to enter into exclusive handset arrangements and discourage interoperability

AT&T’s and Verizon’s market dominance post-merger will not be limited to the provision of carrier services. They will have market power on the buy side as well. Because of their overwhelming market power, AT&T and Verizon each will be able to insist upon exclusivity when they buy handsets from manufacturers. Indeed, in the last several years, AT&T and Verizon combined have launched 24 handsets on an exclusive basis to Sprint’s three and T-Mobile’s eight.¹¹⁴ If T-Mobile’s exclusive handset launches are now included with AT&T, the number of exclusive launches by the Big 2 would be 29 or more than 90% of these exclusive handset launches. And the merger will only increase AT&T’s ability to force these terms on manufacturers.

At the same time, the downside to the manufacturers of accepting exclusivity will be reduced by the merger. Since AT&T and Verizon will have over 80% of all customers,¹¹⁵ any manufacturer will be able to sell a product exclusively to one or the other of them and still recover its costs of developing the product. In effect, standing alone AT&T or Verizon will be big enough to make a market for the manufacturer. Thus, AT&T and Verizon will always be able between them to lock up the newest, “coolest” devices and ensure that customers who want

¹¹⁴ *Wireless Competition Fourteenth Report*, at 84.

¹¹⁵ *Bernstein Research Report - March 2011*, at 1.

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these devices will be forced to obtain service – generally under a long-term contract – from AT&T or Verizon. Since a large proportion of customers purchase services based on handset selection, lack of access to the newest handsets can be major market barrier to the remaining carriers in the market.¹¹⁶

Other carriers in the industry have no chance to compete effectively for state of the art devices as long as AT&T and Verizon are free to insist on exclusivity. Their much smaller post-merger market share – only about 20% in the aggregate – alone would likely deny them the ability to compete for these exclusive deals. But even further, these carriers are split in their use of different technologies, different frequency bands and widely different demographic customer bases. No one of them has enough clout to even encourage development of handsets to meet its customers' needs, let alone obtain exclusivity. Indeed, the *Wireless Competition Fourteenth Report* does not show any exclusive handset launches by other than the largest four carriers and the Petitioners do not anticipate that would change if the proposed merger is allowed to close.

Nor will the Big 2 voluntarily refrain from entering into exclusive deals out of altruism or wider concerns. As noted above, in only the years 2008-2009, AT&T had *fifteen* exclusive smart phone launches and Verizon Wireless had nine.¹¹⁷ Sprint had only three, while T-Mobile had five, meaning that these two carriers *combined* had only eight exclusive smartphone launches.¹¹⁸ Since T-Mobile and Sprint's combined share of customers was a bit less than Verizon's, this evidence demonstrates clearly that as a carrier's market share goes up, the number of exclusive handset deals that it can wrangle from manufacturers goes up as well.

¹¹⁶ See *Wireless Competition Fourteenth Report*, at 311-17; Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497 (filed May 20, 2008).

¹¹⁷ *Wireless Competition Fourteenth Report* at Table C-5.

¹¹⁸ *Id.*

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AT&T and Verizon have another highly effective way to use their growing market power to further disadvantage mid-tier, regional and rural carriers: by engaging in monopsony buying practices, they can (and will) refuse to encourage manufacturers to produce handsets that are interoperable across all bands. This will further lock both manufacturers and consumers into their networks and deny mid-tier, rural and other carriers access to the economies of scale that come from purchasing the same products as the largest carriers. This is not mere conjecture. This serious problem – which was raised with the Commission long before this transaction was announced – will be seriously exacerbated by the proposed combination of AT&T and T-Mobile.

The 700 MHz equipment compatibility controversy which is already occurring is an excellent example of the kind of tactic that the duopoly will be both more free and more motivated than ever before to employ with impunity against its competitors. On September 29, 2009, four Lower 700 MHz Band A Block licensees filed a petition for rulemaking, asking the Commission to “assure that consumers will have access to all paired 700 MHz spectrum that the Commission licenses, to act so that the entire 700 MHz band will develop in a competitive fashion, and to adopt rules that prohibit restrictive equipment arrangements that are contrary to the public interest.”¹¹⁹ The petitioners alleged that the Big 2 carriers were reportedly issuing RFPs seeking the manufacture of equipment that would be capable of using only the Big 2’s allocated portion of the 700 MHz band, and would not be able to use the portion of the band held by other carriers such as the petitioners. By engaging in such behavior, the Big 2 seek to ensure that their competitors do not even receive collateral benefits from the Big 2’s scale economies, since if the Big 2 get away with such behavior any manufacturer development of interoperable

¹¹⁹ See Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks 700 MHz Mobile Equipment, filed Sept. 29, 2009, in RM-11592.

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equipment, or equipment to serve the remainder of the 700 MHz band, would have to be based solely on a business plan of serving only the much smaller customer base of the non-Big 2 carriers. Thus, recovery of the large fixed costs of development would be artificially restricted so that the smaller carriers would have to cover a much higher unit R&D cost for these devices. The anticompetitive nature of such behavior is obvious, and AT&T and Verizon would be freed to engage in such practices on an even grander scale if the merger is allowed.

G. The spectrum concentration resulting from the merger will increase barriers to entry

The proposed merger between AT&T and T-Mobile would leave AT&T and Verizon with much larger resources than the rest of the industry, which will allow them to have greater economies of scale and in turn lower their costs and will increase barriers to entry. Indeed, AT&T cites having more resources as the major benefit of the merger.¹²⁰ But without effective competition, neither of these carriers will have any incentive to pass those efficiencies along to consumers or to engage in aggressive innovation. It is Economics 101 that a duopolist is incented to keep any efficiency gains and cost savings it attains to itself. The increased concentration of spectrum will increase barriers to entry by increasing the difference in costs between what an efficient new entrant can enjoy and the reduced costs enjoyed by the duopolists. This increase in barriers to entry are essential to the merger as without conditions AT&T would have sole access to these efficiencies. The only way to have effective competition and for consumers to reap the efficiency gains and cost savings promised by AT&T would be to condition the merger in a meaningful manner that creates opportunities for competitive carriers and a regulatory regime that will preserve competition and consumer benefits. If such conditions cannot be imposed or agreed to by AT&T, then the merger must be denied.

¹²⁰ *Public Interest Statement* at 8.

VII. IF THE MERGER PROCEEDS AS PROPOSED, THE WIRELESS DUOPOLISTS WILL BE ABLE TO EXERCISE CONTROL OVER BOTH THE RETAIL AND WHOLESALE MARKETS

A. Once established, the duopoly will be irreversible

As the American Antitrust Institute has rightly observed, “[t]his merger, if approved, would give AT&T a “government-assisted competitive advantage over its rivals in providing national wireless broadband service.”¹²¹ The consequence, as discussed above, would be the establishment of a nationwide wireless duopoly. As a result, as the American Antitrust Institute warns:

The merger will tighten the oligopolistic structure of the industry and enhance the possibility of adverse effects through coordinated interaction. This could drive prices higher, reduce choice, and stymie innovation related to easing the spectrum problem. In an industry where consumer unhappiness about service and billing runs high, it is particularly important to maintain an adequate range of choices, so that consumers can switch service providers with relative ease.¹²²

Of course, even this reference to an “oligopolistic structure” assumes that Sprint will remain an effective third competitor, which it has disavowed will be the case. In reality, we are talking here about an effective duopoly.

And, the American Antitrust Institute further notes, the very spectrum scarcity that AT&T relies upon to support its proposed merger creates an extremely high barrier to entry by new competitors, or to expansion of capacity by the remaining existing competitors, and makes it virtually impossible for competition to discipline AT&T’s pricing or to cause AT&T to innovate.¹²³ In addition, the high capital cost to acquire spectrum and deploy networks, the relatively high penetration rates, the significant market shares held by incumbent operators, all

¹²¹ American Antitrust Institute, “The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions,” http://www.antitrustinstitute.org/sites/default/files/AAI_Brief%20on%20ATT-T-Mobile.pdf, at 2 (“*American Antitrust Institute Analysis*”), quoted in *Sohn Testimony* at 11.

¹²² *Id.* at 3.

¹²³ *Id.* at 4.

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act as effective barriers to entry by new carriers. As a consequence, the duopoly, once in place, will become perpetual.

Unfortunately, the Commission cannot expect that a future allocation of additional spectrum will have the same impact of breaking up an effective duopoly. In 1995 the Commission allocated and auctioned PCS spectrum to break the original cellular duopoly. The process worked then because, at that time, there were no effective nationwide operators, the cost to acquire nationwide spectrum was considerably less than the most recent auction prices, and the market was significantly under penetrated. The costs associated with nationwide deployment and the maturing market make new entry unlikely.¹²⁴

B. AT&T and Verizon will be able to control the retail market

The post-merger duopolists will be able to exercise control over the retail market, especially for pre-paid and broadband services. The middle market already is beginning to wither and the post-paid providers – which AT&T cites as a bulwark of remaining competition after the merger¹²⁵ – cannot hope to discipline the duopoly’s pricing absent conditions. Without conditions on the merger to level the playing field, the post-paid and non-national providers lack adequate market shares, spectrum resources and geographic footprints to impose meaningful competitive discipline on the Big 2. As Public Knowledge points out, AT&T cites “[s]uch strong ‘competitors’ [as] companies that are 4/10ths of one percent the size of AT&T (Cincinnati Bell), to a company reported to be exiting the retail wireless broadband market (Clearwire), to a

¹²⁴ The current national plans of LightSquared and others similarly situated are not to the contrary. Hopes for these plans seem to be pinned on sharing the infrastructure of existing carriers presumably because the cost to deploy a new network are so high – and LightSquared did not have to pay for its spectrum at auction as any new entrant would be required to do.

¹²⁵ *Public Interest Statement* at 78.

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wholesale company (Lightsquared) that does not exist today and may never exist as a competitor.”¹²⁶

The fact that this merger reduces the number of major competitors in the wireless market from four to three understates the problem. The ostensible third national carrier post-merger, Sprint, by its own admission, will be in no position to serve as a competitive counterweight to the Big 2. In testimony before the senate Judiciary Committee, Sprint’s CEO, Daniel R. Hesse, described the true state of affairs in stark terms:

[F]or many Americans, wireless has become their only means of accessing information, communicating, and increasingly, conducting business. It is their lifeline. But, if the Department of Justice and the FCC allow AT&T to devour the nation’s 4th largest carrier, the Twin Bells would be uniquely positioned as the gatekeepers of this lifeline. They will control access to, and the price of, the digital ecosystem and related industries. Upstream content providers and device manufacturers would have little choice but to deal with these entrenched duopolists controlling about 80% of the market.

Allowing AT&T and Verizon to control approximately 80% of the wireless industry’s revenues will increase the scale and scope advantages that these companies already possess with regard to market share, spectrum holdings, infrastructure control, and ability to invest. These enormous companies would be significantly more profitable than all other wireless providers combined, which creates a formidable barrier to entry and expansion by other potential rivals. For example, AT&T and T-Mobile’s combined 2010 EBITDA was approximately \$27.2 billion and Verizon’s was \$26.5 billion. Sprint’s 2010 EBITDA, in contrast, was only \$4.5 billion. If the T-Mobile takeover is approved, AT&T and Verizon would control 88% of all wireless industry profits. Consequently, the disparity between the duopolists and all other providers is likely only to worsen. Going forward, it would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce quality, raise prices charged to content sellers for access to consumers or raise prices to customers for access to voice or Internet service.¹²⁷

As Mr. Hesse shows, AT&T’s and Verizon’s financial resources dwarf those of Sprint. Their combined 2010 EBITDA was more than *thirteen times* that of Sprint. And the merger would only worsen this disparity. Small wonder that he concludes that “[I]f AT&T is allowed to takeover T-Mobile, the benefits of competition that have driven the wireless marketplace for

¹²⁶ *Sohn Testimony* at 9 (citations omitted).

¹²⁷ *Hesse Testimony* at 4-5.

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nearly two decades could virtually disappear.”¹²⁸ Based on Sprint’s own statements as well as all the other evidence discussed above, the Commission simply cannot count on Sprint alone to discipline the market.

Other competitors who are smaller than Sprint will be even more at the mercy of the post-merger Big 2.¹²⁹ Mid-tier, regional and rural carriers lack the geographic footprints to compete on a facilities-based retail basis. They are highly dependent on roaming from other carriers. Just as the local loop proved to be an anti-competitive bottleneck facility when competing wireless carriers were seeking interconnection to terminate local traffic from local exchange carriers with market power, so the nationwide systems of the dominant wireless carriers have become an essential facility for competing carriers. In the recent Verizon-Alltel and AT&T-Centennial mergers, the FCC acknowledged the nature of roaming as an essential facility by imposing conditions that would keep in place, for a limited period, roaming arrangements that had been reached with the smaller carrier in each merger, since the smaller carrier was more likely to have provided roaming at market-based rates and conditions.

In sum, if allowed to proceed, the merger will completely undo the worthy efforts the Congress, the Commission and consumer advocates have made since the inception of cellular service to eliminate the duopoly market structure that throttled competition and hampered innovation in the wireless industry. The harm this will cause the public interest is impossible to overstate.

¹²⁸ *Id.* at 6.

¹²⁹ See e.g., Leap Opposes Proposed AT&T Acquisition of T-Mobile USA, Press Release, May 24, 2011, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1567098&highlight>.

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VIII. IF THE MERGER IS APPROVED, THE COMMISSION MUST RE-EXAMINE ITS REGULATORY STRUCTURE FOR WIRELESS

Mid-tier, regional and rural carriers also are affected by the high relative costs of complying with one-size-fits-all regulatory mandates – such as net neutrality – that are by their nature designed to constrain the anticompetitive and anti-consumer behavior of carriers with bottleneck facilities and/or market power, neither of which the mid-tier, regional and rural carriers possess. At the same time, other aspects of the regulatory structure assume the opposite: that all carriers are subject to adequate competition. Clearly, this one-size-fits-all approach has become more and more untenable, and would be patently inadequate to address the state of the marketplace following the proposed merger.

If the merger is allowed to proceed, the Commission must, among other things, revamp its regulatory approach to assure that the two dominant carriers, AT&T and Verizon, are adequately constrained from charging unjust and unreasonable prices to, and imposing unjust and unreasonable terms on, both their wholesale and retail customers, and that they are required to provide the necessary inputs to their competitors – including spectrum, roaming, access facilities, and handsets – to allow them to effectively compete with the combined AT&T/T-Mobile. At the same time, since the remaining carriers will have considerably less ability to drive higher prices or deter innovation, the Commission need not regulate them the same as AT&T and Verizon since AT&T and Verizon can act as a competitive check on their behavior. Accordingly, the Commission must be careful to reduce regulatory constraints on non-dominant carriers to assure that they are not hobbled by restrictions that make no sense when applied to non-dominant carriers because they lack market power and are subject to complete market discipline.

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IX. THE COMMISSION DECIDES TO APPROVE THE MERGER IT MUST DO SO ONLY AFTER IMPOSING CERTAIN CONDITIONS

As amply demonstrated above, the proposed merger will disturb the delicate competitive equilibrium which has existed for the last several years and the Commission, if it decides to approve the merger, must do so only after imposing conditions on the merger which establish a new equilibrium to allow competition to flourish and innovation to continue.

In the context of other recent mergers, the Commission has sought to address competitive concerns by imposing conditions on the merged entity. It is clear, however, that applying only the typical conditions adopted in the past would not be adequate to protect against the massive consumer harm that would result from this merger. If the transaction proceeds, the needed outcome is for the Commission to adopt more stringent conditions that promise to foster multiple viable competitors – not just two. For example, even a divestiture condition would not solve the spectrum problem if Verizon is allowed to acquire the divested spectrum and thereby increase its own market-dominating spectrum holdings. Moreover, divestitures would not work if the divested spectrum is saddled with antiquated non-state-of-the-art systems, since these tag-along assets would merely force AT&T's inefficiencies onto the buyer. Instead, only the divestiture of presently unused or cleared AT&T/T-Mobile spectrum divestiture would have any chance of promoting meaningful competition.

Accordingly, given the transformational nature of this proposed transaction, the Commission should only approve the transaction, if at all, with the following conditions *at a minimum*:

- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check