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

REPLY IN SUPPORT OF PETITION TO DENY BY THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

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Dated: June 20, 2011

EXECUTIVE SUMMARY

CCIA, along with several Petitioners and Commenters such as the American Antitrust Institute and the Rural Cellular Association, has demonstrated that the proposed AT&T/T-Mobile merger will result in an unacceptable level of consolidation, both horizontal and vertical, will empower the merged entity to engage in unilateral and coordinated anticompetitive conduct, will stifle innovation while raising prices, and is not necessary to achieve the public benefits that the Applicants purport to hold dear. The Applicants have failed to refute any of these showings, and indeed failed to set forth a *prima facie* case that the proposed transaction will further the public interest as they are required to do under longstanding Commission precedent. The Commission cannot grant the Application on this record.

The Applicants do not even attempt to refute the horizontal consolidation analysis that their opponents, including CCIA, set forth. CCIA calculated a post-merger Herfindahl-Hirshman Index ("HHI") of 3274 based on the data in the Commission's *Fourteenth Report* on the wireless market, which reflected a 780-point increase. The Applicants have no response. Cablevision posits a 3500 post-merger HHI based on different data. The Applicants have no response. Instead, they devote their antitrust analysis to advocating a product market definition that is as vague as it is disingenuous. In brief, to include restricted spectrum like Educational Broadband Spectrum in the spectrum screen while excluding prepaid wireless service and no-contract wireless service – which the Applicants never define – from the product analysis would be, to borrow their term, unfounded market "gerrymandering".

With regard to the staggering degree of vertical integration that the merger would create, the Applicants' response is minimally more engaged. The Applicants' Opposition ignores the fact that their GSM roaming service in the United States, which would comprise a pure monopoly nationally, gives them the power to impose exorbitant roaming fees at will. They blithely forget that AT&T was a vocal complainant, prior to the AT&T-BellSouth and AT&T-SBC mergers, against the incumbents' unchecked ability to charge excessive fees for special access facilities. They also fail to acknowledge that the Commission imposed lower special access rates within the AT&T-BellSouth merger conditions, and that the post-merger AT&T raised those rates back to pre-merger levels as soon as that condition expired. And it is telling that the Applicants conflate and compress wholesale backhaul with special access, two very different facilities, in their analysis – that is the degree of consideration that the Applicants feel these crucial wholesale inputs deserve. CCIA and the many like-minded opponents are justly concerned that the post-merger AT&T/T-Mobile could shut down its competitors by pricing wholesale inputs prohibitively.

The Applicants are similarly dismissive of their opponents' valid concerns about the effect of this merger on the market for wireless handsets. They have the temerity to assert that the size of a carrier's subscriber base is not a large factor in obtaining exclusive deals on handsets, and they mock opponents' well-founded prediction that an AT&T/T-Mobile behemoth could, together with Verizon Wireless, influence handset manufacturers, either by a threatened boycott or by simply offering more money, not to deal with other carriers. CCIA urges the Commission not to adopt the Applicants' deliberate myopia with regard to this key issue.

The mobile wireless ecosystem contains hundreds of innovative companies focusing on hardware, software, e-commerce, and application development. Many of these companies feel immediate pressure from two of the biggest wireless carriers to support this merger, but CCIA remains free to defend the longer-term strategic goal of preserving a competitive industry uninhibited by carrier dominance.

The numbers on this merger do not lie. A 43% or higher retail market share for the proposed AT&T/T-Mobile entity. A nearly 80% share between that entity and Verizon Wireless. HHI numbers at the top of the "highly concentrated" Department of Justice metric. An 80% share of the GSM roaming market in the United States – a virtual monopoly on nationwide GSM roaming – for AT&T, with T-Mobile as the only other GSM-based carrier with a national footprint. These are not theories, they are unrefuted facts. They compel the denial of the Application, and they render any possible merger condition ineffectual. And if the current competitive situation makes it as difficult as AT&T maintains for T-Mobile to survive, there is no reasonable hope that its even smaller competitors could withstand the *Road Warrior*-like environment of the post-merger wireless marketplace.

The Applicants fared no better with regard to the public interest analysis, and failed to disprove that the merger will injure the public interest in three crucial respects: stifled innovation; decreased consumer choice and service quality; and increased retail prices. Having already discounted T-Mobile's role as a maverick in the mobile wireless marketplace, the Applicants fail to acknowledge that the loss of T-Mobile as a competitor will likely mean the loss of its innovation in service offerings, its aggressive pricing plans, and the differentiated products it developed, such as the Sidekick – the first integrated voice-data mobile device. Moreover, AT&T fully admits that it will reduce device and service plan choices for consumers. It also admits that it will look to extract as much revenue from historical T-Mobile customers as possible, which can only mean a sharp increase in prices.

Finally, the public interest is not furthered by AT&T's promises to increase its broadband deployment in unserved areas. Its promise contains no real detail that could result in enforceable milestones. Its promise to build wireless broadband to cover 97% of the U.S.

population is almost meaningless, because its current wireless broadband network already has a footprint covering 97% of Americans. Its promise to invest $8 Billion in wireless broadband deployment is unimpressive when compared to the $12.7 Billion that Verizon Wireless, T-Mobile, and Sprint already have spent without extracting permission for a mega-merger. And with such investment having been deployed by other carriers, AT&T could not afford competitively to avoid enhancing its broadband network as it threatens to do in the event the Application is denied. Actually, the competition might be good for both AT&T and the nation's consumers.

As CCIA has argued and many others have requested, the Commission should simply reject the Application, and do so expeditiously.

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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 Reply in Support of its 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 record in this proceeding demonstrates that the Applicants have failed to satisfy their burden to prove that the proposed merger is in the public interest, and Applicants' Opposition[2] fails to refute, and often to address, those showings. The Application therefore should be denied.

I. THE APPLICANTS FAIL TO EXPLAIN WHY THE MERGED ENTITY WOULD NOT ACHIEVE SUFFICIENT VERTICAL INTEGRATION AND HORIZONTAL CONSOLIDATION TO IMPOSE ANTICOMPETITIVE HARM IN THE MOBILE WIRELESS MARKET

CCIA demonstrated in its Petition to Deny that the proposed transaction would result in an unacceptable degree of horizontal consolidation.[3] Many parties agreed.[4] It would

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1 WT Docket No. 11-65, *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*., DA 11-799 (Apr. 28, 2011).

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

3 WT Docket No. 11-65, Petition to Deny of the Computer & Communications Industry Association (CCIA) at 5-11 (May 31, 2011).

4 WT Docket No. 11-65, Alarm.com's Petition to Deny at 12 (May 31, 2011) (regarding Global System for Mobile Communications (GSM) service); Comments of the American Antitrust Institute at 2-3, 11-13 (May 31, 2011) ("AAI Comments"); Clearwire Comments at 7-8 (May 31, 2011); Cablevision Comments at 14 (May 31, 2011); COMPTEL Petition to Deny at 6-7 (May 31, 2011); Cox Communications Petition to Condition Consent at 2 (May 31, 2011); DISH Network Petition to Deny at 4 (May 31, 2011); Petition to Deny of Free Press at 21-26 (May 31, 2011); Japan Communications Inc. and Communications Security & Compliance Technologies, Inc. Comments at 10 (May 31, 2011) ("Japan/CSCT Comments") (regarding GSM service); Leap Wireless and Cricket Communications Petition to Deny at 10-12 (May 31, 2011) ("Leap

reduce the number of domestic nationwide carriers from 4 to 3,[5] if not to 2-1/2,[6] and the unrefuted general consensus among opponents of the merger is that AT&T/T-Mobile would capture approximately 80% of the retail wireless market.[7] For the Applicants to continue making statements like "four to three rhetoric is meaningless"[8] and deny that such overwhelming market power will lead to anticompetitive conduct is laughable.

CCIA also showed that the degree of vertical integration that the merged entity would achieve is likewise startling and dangerous.[9] The record is replete with warnings of how this vertically integrated entity could harm wireless competition through its monopoly on roaming[10] and market power over special access facilities[11] and backhaul.[12] The Applicants do

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Petition"); Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent, or Deny Application at 2, 50-52 (May 31, 2011) ("MetroPCS Petition"); Petition to Deny of Public Knowledge and Future of Music Coalition at 6 (May 31, 2011) ("Public Knowledge Petition"); Petition to Deny of Sprint Nextel Corporation at ii, 8-14 (May 31, 2011); Rural Cellular Association Petition to Deny at 4-9 (May 31, 2011); Rural Telecommunications Group Petition to Deny at 49 (May 31, 2011) ("RTG Petition").

5 CCIA Petition at 9; WT Docket No. 11-65, Joint Petition to Deny of Center for Media Justice *et al*., at 2-3 (May 31, 2011); Petition to Deny of Earthlink, Inc. at 2 (May 31, 2011); Petition to Deny of IDT Domestic Telecom at 6 (May 31, 2011).

6 AAI Comments at 3; CCIA Petition at 9 (quoting Letter from Albert A. Foer and Richard N. Brunell, AAI, to Chairman Herb Kohl and Ranking Member Michael S. Lee at 1 (May 16, 2011)); *see also* CBW Petition at 2 (two national carriers who can dominate the market"); MetroPCS Petition at 3 ("unequivocal duopoly"); Sprint Petition at ii ("Twin Bell duopoly"); Petition to Deny of Paetec Holding Corp. *et al*. at 5 (May 31, 2011) ("effectively a duopoly").

7 CCIA Petition at 8; Clearwire Comments at 7, DISH Petition at 4; Free Press Petition at 21; Sprint Petition at ii ("82 percent of post-paid subscribers"); *see also* Leap Petition at 12 ("approximately 76 percent").

8 Opposition at 138.

9 CCIA Petition at 11-14; *see also* WT Docket No. 11-65, Petition to Deny of Texaltel at 5 (May 31, 2011).

10 CCIA Petition at 11; WT Docket No. 11-65, Cincinnati Bell Wireless Petition to Consent to Conditions or Deny at 13-18 (May 31, 2011) ("CBW Petition"); Cox Petition at 11; Japan/CSCT Petition at 8-9; Petition to Deny of Iowa Wireless Services, LLC at 7 (May 31, 2011); Leap Petition at 21; Letter from Robert Clarke, New Zealand Ministry of Economic Development at 2 (May 31, 2011); Comments of Vodafone Group ¶¶ 2-7 (May 31, 2011).

not present a serious response to these concerns, but rather they display amnesia of their prior, loudly expressed frustration over wholesale special access market abuses and while conflating special access and backhaul into one terse, conclusory discussion. The Commission should not dismiss these concerns as lightly as the Applicants have done.

Nor should the Commission accord different or less weight to the antitrust analysis of this merger than to the public interest analysis. For purposes of measuring the impact of the merger on consumers, antitrust ***is*** public interest: where, as here, the market figures and opportunities for collusion are so stark, the necessary conclusion is that consumers will be harmed and the public interest will be damaged. As such, using ancillary promises of good public works as a thumb on the public interest side of the scale should not supplant the plainly anticompetitive and anti-consumer effects of the proposed merger.

As former FCC Chairman Reed Hundt pointed out in relation to telecom mergers, "From time to time, communications markets may not be perfectly competitive. As a result, government should be more, not less, concerned to disapprove mergers that lead to excessive concentration."[13]

A. The Record Supports Defining the Relevant Market as the National Market for Postpaid Retail Wireless Services

The Commission should reject Applicants' unreasonably drawn definitions of the

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[11] CCIA Petition at 12-14; COMPTEL Petition at 7; Earthlink Petition at 13-14; Paetec Petition at 2; Petition to Deny of NoChokePoints at 3-6 (May 31, 2011); Comments of Fibertech Networks, LLC at 2-3, 23 (May 31, 2011).

[12] CCIA Petition at 14; AAI Comments at 20; COMPTEL Petition at 7; Cox Petition at 7; CBW Petition at 13; Fibertech Petition at 26; Japan/CSCT Petition at 11-12; Comments of the Mobile500 Alliance at 2 (May 31, 2011) (discussing "back channel" facilities); RCA Petition at 22; Texaltel Petition at 6-7.

[13] Reed Hundt and Gregory Rosston, *Communications Policy for 2006 and Beyond*, 58 Fed. Comm. L.J. 1, at 34 (2006).

relevant market in favor of the definitions almost universally supported by CCIA and the many opponents of this merger: the relevant geographic market is national; and the relevant product market is postpaid retail mobile wireless services without the unsupportable carve-outs that the Applicants persist in demanding.

1. Opponents of the merger have proven that the appropriate geographic market is national.

The CCIA Petition explains why the appropriate geographic market in this merger is national.[14] Almost every opponent of the merger to address this issue takes the same position.[15] The Applicants simply ignore the realities of the market,[16] as well as their own service, in seeking a market-by-market geographic analysis.

The Applicants advertise on a nationwide basis.[17] They obtain handsets for nationwide distribution.[18] They price service nationally.[19] These indicia define the geographic market and are not, as AT&T purports, a mistaken application of product market analysis.[20] Further, as the American Antitrust Institute (or "AAI") explains, the Commission's prior practice of adopting a local-market rubric for geographic market analysis should be replaced, in this

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14 CCIA Petition at 6-7.

15 *E.g.*, AAI Comments at 7-9; WT Docket No. 11-65, Comments of USA Mobility, Inc. at 4 (May 31, 2011); DISH Petition at 2-3; Free Press Petition at 15; Leap Petition at 8; MetroPCS Petition at 17-20; Sprint Petition at 16-25. *But see* COMPTEL Petition at 9-10 (citing *Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-194, Memorandum Opinion and Order, FCC 10-116 ¶ 23 (rel. June 22, 2010)).

16 As AAI cogently recites, the United States Supreme Court has reviewed "'the reality of the way in which' [a] business was built and operated" in deciding to adopt a national geographic market definition. AAI Comments at 8 (quoting *United States v. Grinnell Corp*., 384 U.S. 563, 575-76 (1966)).

17 CCIA Petition at 7; Sprint Petition at 23-24.

18 CCIA Petition at 8; Sprint Petition at 23.

19 Sprint Petition at 21-22.

20 Opposition at 107.

merger, with a national-market analysis, because it "ha[s] not previously reviewed a merger between two national carriers."[21]

In fact, AT&T ignores its own advocacy before the Commission in previous mergers in which it recognized the characteristics of the wireless industry that are national in scope.[22] AT&T told the Commission during the Centennial merger review in 2008 that "'the predominant forces driving competition among wireless carriers operate at the national level … AT&T establishes its rate plans and pricing on a national basis[.]'"[23] AT&T argued during the Cingular merger in 2002[24] that "'the geographic scope of competition in the provision of wireless calling plans should be analyzed as national.'"[25] And though the Commission did not apply a national geographic market in those proceedings, it renders AT&T's self-serving policy reversal no less troubling.[26]

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21 AAI Comments at 7.

22 AAI Comments at 8; MetroPCS Petition at 20.

23 AAI Comments at 8 (quoting *Applications of AT&T Inc. and Centennial Commc'ns Corp. for Transfer of Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-246, Description of Transaction, Public Interest Showing and Related Demonstrations at 28-29 (Nov. 21, 2008)); *see also* MetroPCS Petition at 20.

24 MetroPCS states that this statement was made in 2004, but Commission records indicate that the application and supporting materials were filed in October and November 2002, with the final order being adopted February 12, 2003. WT Docket No. 02-354, "Wireless Telecommunications Bureau Grants Consent for the Full and Partial Assignment and Transfer of Control of Licenses to Implement GSM Corridor, LLC Joint Venture," DA 03-418 (Feb. 12, 2003).

25 MetroPCS Petition at 20 (quoting *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Transfer of Control of PCS Licenses*, WT Docket No. 02-354, Description of Transaction, Public Interest Statement and Waiver Project at 30).

26 AT&T's advocacy has been echoed by Verizon Wireless, who likewise has stated that it "'primarily prices – and advertises – on a national basis, leaving very little room for local (or even regional) variation in pricing.'" AAI Comments at 9 (quoting *Applications of Atlantis Holdings LCC, Transferor, and Cellco Partnership D/B/A Verizon Wireless, Transferee,* WT Docket No. 08-95, Description of Transaction, Public Interest Showing and Related Requests and Demonstrations at 29 (June 13, 2008)).

2. The Applicants' persistent product market definition is vague and disingenuous.

AT&T persists in asking the Commission to shape the relevant product market using a definition that is not only vague, it is over-inclusive and under-inclusive to the point of being intellectually dishonest. The record provides ample reason to reject that flawed definition as being, to borrow the Applicants' term, "gerrymandered".[27]

First, AT&T continues to ask that "prepaid" and "no contract" wireless service be excluded from the relevant product market but AT&T cannot adequately define those terms.[28] But it then states that the term "prepaid" is "an inexact label" and does not "meaningfully distinguish" that service from "postpaid" service.[29] In addition, AT&T provides a hollow definition of so-called "no contract" service, emphasizing the fact that a mandatory term contract is not involved but failing to admit that such service is often "postpaid" service – the end user is billed monthly in arrears.[30] As such, AT&T gives the Commission no grounds on which to cull "no contract" service out from "postpaid" service. In the end, AT&T cannot provide a clear definition of the product market it believes is appropriate, thus prohibiting the Commission from departing from its typical definition of the market as one composed of mobile wireless telephony and mobile wireless broadband.[31]

Secondly, AT&T still insists that significant swaths of spectrum, such as

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27 Opposition at 115.

28 *Id*. at 119-25.

29 *Id*. at 120.

30 *Id*. at 120 n.178. CCIA notes that with regard at least to Verizon Wireless, once long-term contracts expire, a customer can continue to pay the same rates on a month-to-month basis in arrears, at least until the customer purchases a new handset which nearly always requires a new long-term service contract.

31 *Applications of AT&T Inc. and Centennial Communications Corp*., WT Docket No. 08-246, Memorandum Opinion and Order, FCC 09-97, 24 FCC Rcd. 13915, 13932 ¶ 37 (2009).

Educational Broadband Spectrum ("EBS"), should be included in the product market.[32] EBS spectrum has no place in this proceeding. It is highly restricted for usage within the educational mission of a school or university,[33] and thus cannot be a substitute for mainstream wireless spectrum such as Personal Communications Service spectrum.[34] Other parties have alerted the Commission to this fact.[35] AT&T's attempt to slide EBS spectrum into the relevant spectrum pool is unhelpful and displays an unfortunate lack of candor.

The relevant product market in this proceeding therefore should be the retail

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[32] Opposition at 183 (arguing that Clearwire's spectrum, which concededly includes EBS, belongs within spectrum screen).

[33] An EBS licensee has provided "substantial service" when:

> (i) The EBS licensee is using its spectrum (or spectrum to which the EBS licensee's educational services are shifted) to provide educational services within the EBS licensee's GSA;
> (ii) the EBS licensee's license is actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; or
> (iii) the level of service provided by the EBS licensee meets or exceeds the minimum usage requirements specified in Sec. 27.1214.

47 C.F.R. § 27.14(o)(2). Rule 27.1214, referenced above, states in pertinent part that

> the licensee must provide at least 20 hours per week of EBS educational programming (as defined in Sec. 27.1203(b) and (c)) on that channel, except as provided in paragraphs (a)(2) and (a)(3) of this section. An additional 20 hours per week per channel must be strictly reserved for EBS use and not used for non-EBS purposes, or reserved for recapture by the EBS licensee for its EBS educational usage, subject to one year's advance, written notification by the EBS licensee[.]

Id. § 27.1214(a)(1).

[34] A relevant product market must consist of items that are substitutes for each other. *E.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); U.S. Dept. of Justice, Horizontal Merger Guidelines § 4.2 (Aug. 2010) *available at* http:// www.justice.gov/atr/ public/guidelines/hmg-2010.html ("group of substitute products").

[35] WT Docket No. 11-65, Green Flag Wireless, LLC Petition to Deny at 5 (May 31, 2011).

market for postpaid mobile wireless service, both voice telephony and broadband.

B. The Record Demonstrates That The Post-Merger Near-Duopoly in Wireless Retail Service Would Harm Competition

CCIA demonstrated that the proposed AT&T/T-Mobile transaction will result in an unacceptable level of horizontal market concentration in mobile wireless services.[36] The Opposition does not challenge the market share or HHI calculations that CCIA and several other parties have submitted.[37] The Applicants do attempt, albeit weakly, to take issue with the credible showing of several parties that T-Mobile was a market maverick whose competitive effect outshines its market share, but that attempt fails due to their fundamental refusal to acknowledge the reality of how markets, including the wireless market, operate. And with regard to handsets and retail prices, AT&T has effectively stated, either here or to its investors, that consumer choice will decrease and prices will increase.

1. The Applicants do not even attempt to refute opponents' market share calculations proving the horizontal concentration that would result from the merger.

CCIA calculated the post-merger HHI of this transaction, based on the latest data on which the Commission relies in the *Fourteenth Report*,[38] to be 3274.[39] That number represents an increase of 780 HHI points.[40] As CCIA noted, those figures indicate a "highly

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36 CCIA Petition at 5-14.

37 *E.g.*, Cablevision Comments at 14; AAI Comments at 11; WT Docket No. 11-65, New York State Public Service Commission Petition at Deny at 10 (May 31, 2011) ("NYPSC Petition").

38 *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 (2010) ("*Fourteenth Report*").

39 CCIA Petition at 9 n.37.

40 *Id.* at 9.

concentrated market" under the Horizontal Merger Guidelines,[41] and far exceed the 200-point threshold for an HHI delta that "''will be presumed to be likely to enhance market power.''"[42]

Other parties derived similar HHI numbers. Cablevision found a post-merger HHI of nearly 3500 in local markets presently having an HHI of 2824.[43] AAI notes that Stifel Nicholas estimates a post-merger HHI of "over 2900" in the national wireless market.[44] And the New York Public Service Commission stated that the post-merger HHI would be 3300 nationwide, with an average HHI of 3446 in economic areas within New York State.[45]

The Applicants do not respond to, let alone acknowledge, these figures. They ask the Commission to look the other way, blustering that "those figures prove nothing by themselves."[46] Though technically correct, because both DOJ and the Commission obviously do more in a merger review than calculate HHI figures, the Applicants' statement attempts to breeze by the fact that mergers exhibiting such high HHI numbers, together with high HHI increases, are daunting to regulators. Approval of such transactions requires "***persuasive evidence*** showing that the merger is unlikely to enhance market power."[47]

The Applicants provide very little evidence in this regard. Instead, they give the Commission a tautology: the post-merger market will be competitive because today's market is competitive. They also confuse the competitiveness of the mobile wireless "ecosystem" as a

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[41] CCIA Petition at 6 (quoting Horizontal Merger Guidelines § 5.3).

[42] *Id.* at 9 (quoting Horizontal Merger Guidelines § 5.3).

[43] Cablevision Comments at 14.

[44] AAI Comments at 11 n.26 (citing Rebecca Arbogast & David Kaut, "AT&T/T-Mo: Data Point to Coming Brawl, Risk; Deal Still Looks Doable," Stifel Nicholas, at 2 (Mar. 29. 2011)).

[45] NYPSC Petition at 10.

[46] Opposition at 99.

[47] Horizontal Merger Guidelines § 5.3 (emphasis added).

whole, which includes hundreds of handset makers and mobile app developers, with competition among carriers.[48] Carriers with national networks are few, and all other market participants must depend upon them for wholesale network inputs or access to end users.

Instead, the Applicants recite data about Sprint's performance in the first quarter of this year and ignore record evidence that Sprint would be increasingly marginalized in the post-merger environment.[49] They trumpet Leap's and MetroPCS's growth, failing to mention that those carriers each served only 2% of wireless subscribers nationally as of 2Q09.[50] Having put on both blinders and rose-colored glasses, the Applicants pretend that they see a vibrantly competitive post-merger mobile wireless market. But they have no answer to the data that opponents have submitted to the contrary.

Even worse, the Applicants have the temerity to state that "wireless competition is more intense today than it has ever been."[51] That statement is stunning. The Commission could not even state in the *Fourteenth Report* that the wireless market was meaningfully competitive, let alone "intensely" competitive.[52] That bold misstatement of the state of wireless competition is emblematic of the Applicants' entire Opposition.

Applicants also give short shrift to the formidable barriers to entry that carriers face in the wireless market. Where, as here, a transaction is proposed in a highly concentrated industry and would cause a significant increase in concentration, barriers to entry can kill a

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48 *See* Opposition at 126 ("endless permutations of … mobile applications").

49 AAI Comments at 3 (stating that the market change is "more realistically" from 4 to 2-1/2 "because the merger may have the effect of marginalizing Sprint as a competitor").

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

51 Opposition at 146.

52 CCIA Petition at 6-7 (citing *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).

merger.[53] In the wireless market, the most impenetrable barrier is of course access to spectrum.[54] In fact, according to the Application, the core purpose of this transaction is to hand AT&T the spectrum it purports to need in order to continue providing service.[55] If the Commission accepts the premise that an integrated legacy carrier like AT&T, which has acquired half of the Regional Bell Operating Companies' monopoly rate bases, cannot obtain spectrum absent this merger,[56] then it cannot possibly believe that young entrants like MetroPCS and Leap can obtain it. This transaction falls apart on this bit of illogic alone.

Access to capital also was identified in the record as a significant barrier to entry.[57] As RCA relates in its Petition, Cellular South told the Commission during the *Data Roaming* proceeding that

> "[I]nvestment banks and other sources of investment capital are likely to make the judgment that a small rural or regional carrier that cannot obtain data roaming agreements with the large national carriers will find it more difficult to attain and retain customers."[58]

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[53] "[T]he anticompetitive effect of the merger is further enhanced by high barriers to market entry." *Federal Trade Comm'n v. H.J. Heinz Co*., 246 F.3d 708, 717 & n.13 (D.C. Cir. 2001) (reversing trial court's denial of government's motion to enjoin merger).

[54] AAI Comments at 4; Cablevision Comments at 8; Cox Petition at 7; Center for Media Justice Petition at 38.

[55] WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations at 20-30 (Apr. 21, 2011).

[56] This premise is severely undercut by AT&T's own admissions to regulators that its prospects for obtaining new spectrum are good. *See* WT Docket No. 11-65, Petition to Deny of The Diogenes Telecommunications Project at 12 (May 31, 2011) (citing AT&T filings with the Securities and Exchange Commission).

[57] RCA Petition at 23 (post-merger environment will create "lower investor confidence in RCA's member and higher capital costs").

[58] *Id.* at 23 (quoting *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52 ¶ 17 (rel. Apr. 7, 2011)) ("*Data Roaming Order*").

The Commission accepted and relied upon this statement as one of the grounds supporting adoption of a data roaming mandate.[59]

It is reasonable to predict that once two wireless carriers hold 80% of the market, investment banks will likewise be skittish about smaller carriers' ability "to attain and retain customers."[60] They may well be less likely to invest in or lend to those smaller carriers. This additional barrier to entry demonstrates that the proposed merger not only displays astronomical HHI figures, but it creates tangible anticompetitive effects.

2. The Applicants cannot credibly refute that T-Mobile is a maverick, or displays several characteristics of a maverick, which has disciplined and enriched the wireless retail market.

T-Mobile's proposed exit from the wireless retail market will result in a more significant loss of competitive pressure than its market share would convey, because it is a true maverick.[61] A "maverick" firm in the antitrust sense is one that "plays a disruptive role in the market to the benefit of customers."[62] The Applicants' attempt to discredit T-Mobile's strength as a competitor[63] in no way disproves T-Mobile's maverick status – as AAI explains, often a

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[59] *Data Roaming Order* ¶ 21.

[60] RCA Petition at 23.

[61] AAI Comments at 18; Free Press Petition at 37; Public Knowledge Petition at 7; USA Mobility Comments at 10; see also CCIA Petition at 17; AAI Comments at 4, 16-18, WT Docket No. 11-65, Comments of Consumer Electronics Retailers Coalition ("CERC") at 3-4, 23 (May 31, 2011).

[62] Horizontal Merger Guidelines § 2.1.5.

[63] AT&T states that T-Mobile lost 318,000 customers in the fourth quarter of 2010, and 471,000 in the first quarter of 2011. Opposition at 126. The unknown in this story is how much of these losses is due to speculation, and the later announcement, that T-Mobile was up for sale. *See, e.g.*, CCIA Petition at iii (warning of "competitive damage to T-Mobile that will happen in the interim"); Letter from U.S. Chamber of Commerce to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 31, 2011) ("once regulatory uncertainty becomes too great, investors may revolt and the entire business plan may unravel without ever having received a decision on the merits by the regulator").

firm actually ***becomes*** a maverick upon losing market share, because it must act boldly to differentiate itself and out-compete other firms.[64]

The record demonstrates that T-Mobile exhibits many characteristics of a maverick:

Pricing – T-Mobile's aggressive and creative pricing plans, such as its "Even More Plus" plan in 2009[65] and its "challenger strategy" pricing[66] forced AT&T and Verizon Wireless to respond in kind.[67] In addition, the *Fourteenth Report* recognized that "T-Mobile's price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings."[68]

Petitioner Alarm.com tells a compelling story about the price-disciplining power T-Mobile has exerted on the wholesale wireless market. Alarm.com provides wireless-based security systems and relies on general packet radio service ("GPRS") to do so.[69] It began using T- Mobile GPRS in 2008, and increased its usage of T-Mobile steadily over the following 18 months. "It was not until then, roughly fifteen months ago, that AT&T began lowering" its price for GPRS service.[70] Alarm.com thus presents itself in this proceeding as "witnesses to and

64 AAI Comments at 19 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 590 U.S. 209, 214 (1993) (Liggett was forced to become a maverick to avoid going out of business)).

65 CERC Comments at 25.

66 AAI Comments at 4.

67 *Id*. at 16 ("Verizon and AT&T followed suit in January 2010"); *see also* Clearwire Comments at 13-14; Cox Petition at 4.

68 *Fourteenth Report*, 25 FCC Rcd. at 11471 ¶ 92; *see also id*., Table 10 (Comparison of Unlimited Pricing Plans).

69 Alarm.com Petition at 1-2.

70 *Id*. at 3.

beneficiaries of the significant downward price pressure that T-Mobile's presence in the GPRS market has caused."[71]

Innovation – T-Mobile is also an aggressive innovator, being the first carrier to introduce the Android phone.[72] It also spearheaded the deployment of WiFi hotspots, the Sidekick integrated, qwerty-keyboard phone, an integrated Blackberry for voice and data, and technology for the AWS band.[73] In addition, T-Mobile was a founding member of the Open Handset Alliance.[74] It already is well underway in building out its version of 4G service with the HSPA+ network.[75]

T-Mobile was particularly praised in the record for being the only nationwide carrier willing to provide GSM service to Mobile Virtual Network Operators ("MVNOs")[76] which in turn "have played a significant role in the mobile wireless marketplace by introducing innovative and differentiated service offerings to consumers."[77]

Service Quality – As the CCIA Petition noted, T-Mobile's service quality "has earned 'highest ranking' status in multiple awards in 2008 and 2009 from J.D. Power and Associates," and "was also ranked 96th on FORTUNE's 12th annual 'Best Companies to Work For' list."[78] In addition, T-Mobile has the fastest network for smartphones according to a recent

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71 Alarm.com Petition at 4.

72 AAI Comments at 18; CERC Comments at 3; Center for Media Justice Petition at 23-24.

73 Cox Petition at 3; Center for Media Justice Petition at 24.

74 Cox Petition at 3.

75 Center for Media Justice Petition at 23-24.

76 IDT Petition at 2; CERC Comments at 4, 27-28.

77 CERC Comments at 4.

78 CCIA Petition at 17 n.65.

test by *PC World* and Novarum.[79]

AT&T's attempts to portray T-Mobile as a failing firm or unimportant market player are firmly disproven by this record evidence. The Commission should be alert to the fact T-Mobile's exit from the market easily could deprive customers of the benefits its maverick behavior has brought them.

3. Opponents of the merger have presented a well-founded, significant risk of anticompetitive conduct by the merged entity with respect to handsets and retail prices.

The CCIA Petition identified the handset market as being particularly vulnerable to the adverse effects of the highly concentrated post-merger wireless market.[80] Several other parties did as well.[81] In fact, many parties characterized the post-merger handset market as a monopsony for AT&T/T-Mobile.[82]

Though the Applicants pretend otherwise,[83] it is not difficult to understand that, if two entities (Verizon Wireless and the proposed AT&T/T-Mobile) capture 80% of the retail wireless market, they have tremendous power over handset manufacturers. Even acting alone, AT&T/T-Mobile would be a dominant purchaser that could "pressure handset manufacturers for exclusive rights or … to design handsets to prevent interoperability on other networks."[84]

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79 Cox Petition at 16.

80 CCIA Petition at 10.

81 AAI Comments at 20; CBW at ii, 30, CERC Petition at 26; COMPTEL Petition at 31; Cox Petition at 8; Japan/CSCT Comments at 12; Leap Petition at 25; Mobile500 Comments at 2; RCA Petition at 18-19.

82 *E.g.*, Free Press Petition at 34; Leap Petition at 26; RCA Petition at 18.

83 Opposition at 150-53.

84 RCA Petition at 18; *see also* COMPTEL Petition at 31 (merged entity "could pick winners and losers" among mobile device manufacturers); Leap Petition at 26 ("AT&T's dominant position after this acquisition would greatly enhance its ability to exclude competitors from obtaining the most sought-after devices"); Mobile500 Comments at 2 (AT&T/T-Mobile could prevent

The Applicants boldly purport that it is "implausible" that the size of a carrier's subscriber base is the "most important force" that causes a handset manufacturer to grant the carrier an exclusive distribution deal.[85] If indeed size is not the "most important force," then surely size plus the closely-related benefit of having an enormous stream of retail revenue are enough to make a carrier the presumptive winner in any exclusive-deal analysis. It strains credulity to its breaking point to suggest that the size of AT&T's subscriber base was not a driving factor in Apple's decision to give it the exclusive iPhone deal.

With regard to prices, the post-merger entity's retail market share, which will be approximately 43% of wireless subscribers,[86] combined with its ability to obtain exclusive deals on the most attractive wireless devices, plainly will give it the ability to raise prices. AT&T has essentially admitted this fact, having told its investors that it plans to extract more revenue per subscriber from acquired T-Mobile customers.[87] Antitrust law defines market power, in part, as the ability to raise prices.[88] The post-merger entity essentially admits having this ability, a fact that should convince the Commission that the proposed transaction endangers competition and consumers.

C. The Record Provides Substantial, Credible Evidence of the Harm that the Post-Merger, Vertically Integrated Entity Likely Will Create

CCIA stated in its Petition that the increased vertical integration that would come with this transaction would create "nothing less than a Ma Bell for the 21st Century with more

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manufacturers from installing chips needed for mobile digital television ("DTV")).

85 Opposition at 148.

86 CCIA Petition at 6; COMPTEL Petition at 12; MetroPCS Petition at 51. The Petitioner group led by the Center for Media Justice estimates that AT&T/T-Mobile's share will be 45%. Center for Media Justice Petition at 9.

87 AAI Comments at 14.

88 *E.g.*, Horizontal Merger Guidelines § 1 (Overview).

reach and power than the old AT&T ever could have imagined[.]"[89] It also showed that the Department of Justice remains concerned about the "primary vice" of vertically integrated firms in foreclosing competition.[90] The record bears out and amplifies these concerns with respect to both wholesale inputs and the demonstrable risk of monopoly leveraging by the post-merger entity.

1. The Applicants fail to persuade that a vertically integrated AT&T/T-Mobile could not impose competitive harm through its control over wholesale inputs.

The CCIA Petition identifies three crucial wholesale inputs to wireless service – roaming, special access, and backhaul – that provide further reason to deny the Application. It was joined by many parties who demonstrated in detail the anticompetitive harm that the merged AT&T/T-Mobile entity could wreak by virtue of its monopoly (in GSM roaming), or at the least market power (in special access and backhaul), in these crucial inputs.

The Opposition makes the absurd accusation that smaller wireless carriers who filed Petitions are simply afraid or unwilling to compete.[91] We must ask why these companies, unless very eager to compete, would ever have risked a dime of investment or one day's work to challenge two former monopolists who are from three to one hundred times larger than they are … and from whom they must purchase special access, backhaul facilities and roaming.

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89 CCIA Petition at 11.

90 *Id*. at 11 & n.47 (quoting U.S. Dep't of Justice, Non-Horizontal Merger Guidelines § 4.21 (June 1984)).

91 Opposition at 94 ("the same parties have invoked this same refrain in pushing for a broad range of regulations and merger conditions, all promoted ostensibly to foster 'competition' but designed in fact to help insulate industry participants from the very pressures of competition").

a. AT&T/T-Mobile would have a virtual monopoly over domestic and international GSM roaming with virtually no pricing discipline.

CCIA raised wireless data roaming as one input that is crucial to the wireless retail market and is gravely endangered by the proposed merger.[92] And it is essentially stipulated in this proceeding, because the Applicants concede the point, that AT&T and T-Mobile are the only two carriers that can provide GSM roaming on a nationwide basis.[93]

Cincinnati Bell Wireless has calculated that the post-merger AT&T/T-Mobile entity would have 250 times the market share of the next largest GSM roaming provider.[94] The Rural Cellular Association states very specifically that AT&T's refusal to deal with regard to roaming is proven by the fact that it did not – as the Commission is well aware[95] – sign its first roaming agreement until March 2011.[96] And it is both telling and poignant that foreign commenters, notably Japan Communications, Vodafone, and the New Zealand Ministry of Economic Development, have joined this proceeding, from their far-away vantage points, to raise the danger posed to wireless roaming by this transaction.[97]

The ability to obtain roaming at reasonable rates is a crucible for wireless carriers.[98] But as Cincinnati Bell Wireless cogently points out, once T-Mobile ceases to be an independent

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92 CCIA Petition at 11.

93 Opposition at 156; Leap Petition at 21; Cox Petition at 11.

94 CBW Petition at 15.

95 *Data Roaming Order* ¶ 25.

96 RCA Petition at 15.

97 Japan/CSCT Comments at 8-9 (obtaining roaming in the U.S. for its carriers is "extremely difficult" and rates are "at extremely high levels"); Comments of Vodafone Group ¶¶ 2-7 (May 31, 2011); New Zealand Letter at 2 ("New Zealand operators … will effectively have only one viable supplier" of roaming in the U.S.).

98 *E.g.*, WT Docket No. 11-65, Petition to Deny of Iowa Wireless Services at 7 ("T-Mobile is the preferred roaming partner for Iowa Wireless's customers"); CBW Petition at 13.

provider of GSM roaming, how can anyone possibly gauge what is a "reasonable rate"?[99] What is "commercially reasonable" when nationwide GSM roaming is provided by only one carrier? The analysis would likely devolve to counting the number of wireless competitors who are driven out of business by exorbitant service costs, and conducting *post mortems* on whether monopolistic roaming prices were the determining factor.

The trade-killing effect of high roaming rates was the topic of an editorial in *The New York Times* just a few days ago.[100] The author spoke of the "exorbitant rates" applied to roaming – $6 to $10 per megabyte on average, according to a survey by the Organisation for Economic Cooperation and Development – and stated that these rates "reflect[] a lack of competition among wireless carriers[.]"[101] The author also notes that the situation "has likely been compounded in the United States by a lack of regulation[.]"[102]

AT&T attempts to assuage the industry's concerns by stating that, as a "net purchaser" of GSM roaming, it has no incentive to increase roaming rates.[103] As evidence, it points to its existing roaming contracts that are "typically with a single, reciprocal rate" or are "generally reciprocal."[104] But when a GSM roaming monopoly is coming, words like "typically" and "generally" are of little comfort. On their face they reveal that in at least some cases the other party pays a different rate, and, given AT&T's careful wordsmithing, one can reasonably infer that the other party's rate is higher than what AT&T pays. The Opposition thus does almost nothing to

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99 CBW Petition at 23.

100 "Unaffordable Roaming," N.Y. Times, June 15, 2011, *available at* http://www.nytimes.com/2011/ 06/16/opinion/16thu3.html?_r=2&emc=eta1.

101 *Id*.

102 *Id*.

103 Opposition at 157.

104 *Id*. at 157, 158.

address the well-founded conclusion that the proposed transaction will harm competition through unreasonable roaming rates.

Contrary to the Applicants' response that is equal parts hopeful and dismissive,[105] the *Data Roaming Order* will not resolve these concerns. It does not actually regulate rates, but rather rejects "more specific prescriptive regulation of rates requested by some commenters" in favor of the indeterminate "commercially reasonable" standard for rates.[106] That order cannot prevent the predicted rate increases. Finally, and perhaps most importantly, Verizon has appealed the *Data Roaming Order*.[107] Even if AT&T does not intervene in favor of Verizon, and acknowledging that T-Mobile intervened in the appeal in favor of the Commission, the fact remains that the data roaming rules are far from settled. For AT&T to tout those rules as the absolute guarantor of its reasonable conduct with respect to wireless roaming is, frankly, a shameless instance of chicanery.

b. AT&T/T-Mobile would have the ability to skew competition through exorbitant special access rates.

CCIA explained, borrowing from the analysis of Public Knowledge, the "double whammy" that the proposed transaction presents with respect to special access.[108] Two effects will come from T-Mobile's exit from the market: the remaining competitors will lose a powerful ally in their fight for reasonable special access rates; and the post-merger AT&T/T-Mobile will enjoy a windfall in the form of avoiding the cost of purchasing special access for existing T-Mobile customers. Many other parties also raise concerns over the effect this merger will have on the

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105 Opposition at 157, 159.

106 *Data Roaming Order* ¶ 21.

107 *CellCo Partnership v. FCC, et al.*, Case Nos. 11-1135, *et al*. (D.C. Cir., filed May 25, 2011).

108 CCIA Petition at 12.

availability of special access facilities.[109]

The Applicants dismiss concerns over special access by asserting that existing Commission rules will constrain the merged entity's ability to raise prices to prohibitive levels.[110] It is widely known and sharply criticized, however, that the Commission has not imposed any type of cost-based regulation on special access rates that truly would prevent foreclosure or anticompetitive price squeezes.[111] A statistic commonly quoted in this proceeding is AT&T's **138% rate of return** on its special access services.[112] Others remind the Commission that although AT&T was required to impose low special access rates within the former BellSouth region by the voluntary merger conditions, that merger condition expired in June 2010 and AT&T raised its rates back to pre-merger levels effective June 30, 2010.[113] Further, the prevailing price-flexibility scheme for special access, according to Dr. Lee Selwyn, Declarant for the Ad Hoc Telecommunications Users Committee, provides "no regulatory constraints on the prices that AT&T and Verizon charge their affiliates – and others – for these services."[114] And goodness knows that special access services sold to wireless carriers are not subject to Total Element Long-Run Incremental Cost (TELRIC) regulation, because wireless carriers are not entitled to obtain

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109 *See generally* WT Docket No. 11-65, Comments of the Ad Hoc Telecommunications Users Committee (May 31, 2011); NoChokePoints Petition; *see also* Paetec Petition at 12 (noting that AT&T presently has 90% market share in special access within its 22-state incumbent region); Fibertech Petition at 2-3, 22-23.

110 Opposition at 172.

111 *E.g.*, CCIA Petition at 13 (quoting AT&T's Petition for Rulemaking in WC Docket No. 05-25, RM No. 10593, *In re AT&T Corp. Petition for Rulemaking to Reform Regulation of ILEC Rates for Special Access Services* (Oct. 15, 2002)).

112 Paetec Petition at 2; Fibertech Petition at 4.

113 NoChokePoints Petition at 5 & n.12; *see also* CC Docket No. 05-25, *Special Access Rates for Price Cap Local Exchange Carriers*, Comments of the Ad Hoc Telecommunications Users Committee at 12, Table 1 (Aug. 8, 2007).

114 WT Docket No. 11-65, Declaration of Lee L. Selwyn ¶ 30 (May 31, 2011).

unbundled network elements.[115]

The lack of cost-based regulation aside, the record contains well-supported concerns that losing T-Mobile as a fellow purchaser of AT&T special access will leave the remaining, much smaller, purchasers considerably diminished in negotiating power.[116] AT&T attempts to refute this argument by asserting that T-Mobile never was a significant purchaser of AT&T special access,[117] but that assertion is belied by T-Mobile's enthusiastic participation in the Commission's *Special Access* proceeding in which it urged the Commission to intervene in favor of competitors to protect this key wholesale input.[118]

In sum, the Applicants have failed to refute their opponents' arguments that the need for fairly priced special access service provides valid grounds for denying the Application.

c. AT&T/T-Mobile could choke off all competitors' access to crucial backhaul services.

CCIA also demonstrated that wireless backhaul services are at risk under the proposed merger.[119] A large number of carriers who depend on wholesale backhaul express worry that their access to that service will be foreclosed, or made prohibitively expensive, in the post-merger environment.[120] The American Antitrust Institute also commented on the potential for

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115 Fibertech Petition at 22.

116 *Id*. at 3.

117 Opposition at 163.

118 CCIA Petition at 13 (quoting *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); *T-Mobile Responses to Special Access NPRM Data Requests*, WC Docket No. 05-25, at 1 (Jan. 27, 2011)).

119 CCIA Petition at 14.

120 CBW Petition at 13; Earthlink Petition at 13; Fibertech Petition at 26; Japan/CSCT Comments 11-12; Texaltel Petition at 6; Cox Petition at 7; Mobile500 at 2 ("back channel" facilities). Japan Communications states that it has encountered carriers in the United States that "offer … ***no wholesale access*** to their high-speed data networks[.]" Japan/CSCT Comments at 8 (emphasis added). AT&T may well be one of those carriers; CCIA did not obtain the proprietary

anticompetitive harm through AT&T/T-Mobile's abuse of its market power in backhaul services.[121]

The Applicants' first mode of response is to conflate backhaul with special access and recite a litany of statistics applicable to that amorphous mass of wholesale inputs.[122] That is not an honest or fair treatment of these very different types of facilities. In addition, and more fundamentally, that tactic renders the Applicants' presentation an unintelligible muddle.

The Applicants then speak, again with regard to both services indiscriminately, of the "significant and growing competition" in the provision of these inputs. But this point likely regards the resale market for these services which, according to the Department of Justice, is not "'effective as a competitive constraint'" because AT&T "'would control the price of the resold circuits.'"[123] Thus, if the Applicants intend to address concerns over backhaul by harkening to backhaul resale, that attempt fails.

To the extent the Applicants' assertion that T-Mobile is not "a substantial enough purchaser of such service"[124] is meant to apply to backhaul service, CCIA notes that as the number four wireless carrier in America, with a 12.6% share of retail wireless subscribers as of 2Q09,[125] T-Mobile's status as a purchaser of backhaul is competitively meaningful.[126] CCIA also notes that,

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version of these comments which appear to describe in detail the experience of Japan Communications with respect to obtaining wholesale inputs.

121 AAI Comments at 20.

122 *See* Opposition at 162 (discussing "AT&T's ability and incentive to use its special access services to raise its wireless rivals' backhaul costs").

123 Fibertech Petition at 22 (quoting *U.S. v. SBC Complaint* ¶ 25; U*.S. v. Verizon Complaint* ¶ 25).

124 Opposition at 162.

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

126 *See* GN Docket No. 09-191, *Preserving the Open Internet*, Comments of CCIA on the Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding at 11 (noting

even with T-Mobile as a purchaser of backhaul attempting to negotiate the best terms, the Commission could not conclude in the *Fourteenth Report* that the wholesale backhaul market is competitive.[127]

For these reasons, the Applicants have also failed to refute the opponents' showing that the existing and growing threat of wireless backhaul unavailability provides grounds for denying the Application.

2. Opponents of the merger have shown, through AT&T's own past conduct, a credible threat of monopoly leveraging by the merged entity.

One of the most attractive benefits of being vertically integrated is the ease with which that power can be leveraged into new and/or adjacent markets.[128] Several parties provided cogent analysis, and some concrete examples, on this point.[129]

Sprint warns generally of "a bottleneck between downstream customers and the upstream content and product developers that need a wireless bridge to offer their products to consumers."[130] It notes more specifically that AT&T/T-Mobile "could also exercise market power over video, music, and other content providers" by leveraging its market power into discriminatory rates or terms of service.[131]

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that T-Mobile is among the "smaller carriers" that depend on AT&T and Verizon for special access and wireless backhaul facilities) (citing, *inter alia*, Comments – NBP Public Notice # 11 of T-Mobile USA, Inc. at 8 (Nov. 4, 2009)).

127 *Fourteenth Report*, 25 FCC Rcd. at 11582 ¶ 296.

128 *E.g.*, *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948) ("bearing on the question whether monopoly power is created by the vertical integration, is … leverage on the market which the particular vertical integration creates or makes possible").

129 Sprint Petition at 45-47; DISH Network at 12; Clearwire Comments at 10-11; Center for Media Justice Petition at 30-31.

130 Sprint Petition at 45-46.

131 *Id*. at 46.

DISH Network is concerned that "AT&T could use its market power in wireless broadband to choke off valuable programming inputs[.]"[132] Specifically, AT&T/T-Mobile "could demand that any programmers wanting access to its vast subscriber base grant exclusive distribution rights to AT&T."[133] The resultant leveraging by AT&T/T-Mobile into the video market is immediately apparent. The coalition led by the Center for Media Justice raises the same concern.[134]

Clearwire's experience in building its WiMAX network is particularly illustrative of how the merger would allow monopoly leveraging into Long-Term Evolution ("LTE") services. AT&T and Verizon Wireless used their substantial weight in the 4G LTE standards-setting process to "muscle WiMAX out of the picture in the United States … [j]ust as Clearwire announced a large expansion of its WiMAX 4G network."[135] AT&T and Verizon Wireless then announced their own plans to build a 4G LTE network, now free of the competition that Clearwire's WiMAX product would have posed.[136] This is one of many chilling reminders of what a vertically integrated and horizontally consolidated AT&T/T-Mobile could do to emerging telecommunications services.

II. THE RECORD DEMONSTRATES THAT THE PROPOSED MERGER IS CONTRARY TO THE PUBLIC INTEREST

As the CCIA Petition and several other filings state,[137] section 310 of the Act prohibits the Commission from granting the Application unless the Applicants show, by a

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132 DISH Petition at 12.

133 *Id*. at 12.

134 Center for Media Justice Petition at 30-31 ("approval of this merger would prevent the development of a competitive and innovative market for video distribution").

135 Clearwire Comments at 10.

136 *Id*. at 10.

137 CCIA Petition at 15; *see also* Sprint Petition at 1-2; COMPTEL Petition at 4-5; Earthlink Petition at 4-5; MetroPCS Petition at 14.

preponderance of the evidence, that the merger will serve the public interest.[138] The record in this proceeding demonstrates that the Applicants have failed to carry their burden,[139] and thus the Commission is constrained from granting the Application.[140]

A. The Applicants Fail to Refute Their Opponents' *Prima Facie* Case that the Merger Will Stifle Innovation

CCIA demonstrates in its Petition to Deny that the proposed combination will stifle innovation and investment in wireless services and devices.[141] Although the Applicants assert that the proposed combination will preserve and promote competition, the facts clearly show that a merged AT&T/T-Mobile would drastically reduce innovation in the mobile broadband market.

In the Opposition, the Applicants claim that the proposed combination will not stifle innovation.[142] They point to the support of only a handful of technology companies that have voiced support for the transaction. They also display a vivid imagination when it comes to innovative partnerships and business models that new market entrants might hypothetically provide.[143] This is somewhat reminiscent of wireline carrier predictions about the competitive threat of broadband-over-powerlines in the early 2000s. The Applicants do not, however, address

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[138] CCIA Petition at 15 (quoting, *inter alia*, 47 U.S.C. § 310(d); *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 ¶ 7 (2011)).

[139] *E.g.*, Earthlink Petition at 7; Sprint Petition at 2; COMPTEL Petition at 1; Leap Petition at 5; Diogenes Petition at 28.

[140] *E.g.*, Sprint Petition at 2, 130; COMPTEL Petition at 9; Leap Petition at 5; WT Docket No. 11-65, Petition to Deny of The New Jersey Division of Rate Counsel at 10 (May 31, 2011).

[141] CCIA Petition at 16.

[142] Opposition at 103-104.

[143] *Id*. at 132.

the assertions of CCIA and several others that a combined AT&T/T-Mobile would stifle innovation in devices, applications, and services.[144]

The Applicants then trot out the mantra that the wireless industry is innovative, and that efficient wireless networks are vital for innovation and American competitiveness.[145] CCIA does not disagree with these ideas in principle. Many parts of the wireless industry have long been innovative – AT&T, however, has not. Efficient wireless networks are vital for innovation and American competiveness; AT&T, however, is actually the least efficient holder of wireless spectrum,[146] and this transaction will only exacerbate the spectrum constraints that face the entire wireless industry. The Applicants fail to explain how the combined company will promote innovation in handsets, mobile operating systems, and applications beyond asserting that other companies and subsectors in the market are innovative.

In a word, this transaction, if approved, would eliminate the industry's most innovative carrier: T-Mobile. *See* Section I.B.2., *supra*.

AT&T's allies purport that the combined firm will be pro-innovation; however, AT&T's history tells a different story. Recently, AT&T has been found to stand in the way of innovations that device manufacturers want to offer customers.[147] Even powerful manufacturers like Apple and Research in Motion ("RIM") have had to fight with AT&T over the services they can offer on their devices. As MetroPCS cogently explains,

> If Apple – the world's largest technology company by market capitalization, and certainly one of the most influential –

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144 CCIA Petition at 16; MetroPCS Petition at 38-39; New Jersey Rate Counsel Petition at 13; Clearwire Comments at 9-11; WT Docket No. 11-54, Petition to Deny of New Networks Institute at 3 (May 31, 2011).

145 Opposition at 103-104.

146 *E.g.*, CCIA Petition at 20-22.

147 *See* New Networks Institute Petition at 3.

> encountered such stout resistance to innovation … from AT&T, imagine the problems that smaller and less powerful handset manufacturers will have negotiating with AT&T and Verizon post-merger."[148]

According to *The Wall Street Journal*, AT&T has prevented handset manufacturers from installing pre-loaded applications on their devices to be used on AT&T's network.[149] AT&T offered only services that it could charge users for, but prevented the handset manufacturers from installing competing applications on devices that users could access without paying AT&T for the privilege. The article points out that RIM sought to offer a free mapping service to Blackberry customers, but AT&T refused because it wanted users to pay $10 per month for AT&T's own mapping service.[150]

Several other parties warned the Commission of the merger's threat to innovation. Clearwire, Free Press, the Center for Media Justice group, and Public Knowledge state that AT&T will be unlikely to bring innovative handsets to market, and device makers that want to remain relevant will have to kowtow to the demands of the largest carriers rather than consumers.[151] This is not the first instance in which equipment manufacturers are unable to be candid publicly about their concerns, for fear of retaliation from the big carriers.

Public Knowledge points out that device manufacturers will have to deal with AT&T and Verizon to remain viable – if those carriers reject the next great iteration of technology, innovation will not happen. And device makers surely will not develop what AT&T and Verizon would deem "objectionable innovations" – innovations that require carriers to adjust their existing

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148 MetroPCS Petition at 38-39.

149 Jessica Vascellaro, "Air War: A Fight Over What You Can Do on a Cell Phone – Handset Makers Push Free Features for Which Carriers Want to Charge," Wall St. J., June 14, 2007.

150 *Id.*

151 Free Press Petition at 34; Center for Media Justice Petition at 28; Public Knowledge Petition at 40-41; Clearwire Comments at 9-11.

business models or cut into existing revenue streams.[152] Further, the Center for Media Justice group notes that AT&T already indicated it plans a scaling-back of handset innovation by reducing the number of AT&T/T-Mobile handsets in order to improve T-Mobile's margins.[153]

In addition to frustrating innovation in the mobile broadband retail market, the proposed merger also will stifle the ability of others to innovate. The story of Alarm.com (*see* Section I.B.2., *supra*), shows that AT&T's reluctance to provide service in innovative ways will – with T-Mobile's exit – prevent their customers from creating new and innovative retail services.[154]

The Applicants fail to address these issues in the Opposition, and for good reason. It is clear that a combined AT&T/T-Mobile will possess monopsony power to stifle innovation and investment in mobile broadband submarkets such as handsets and applications. The transaction also removes T-Mobile as an independent maverick in the market – both in retail mobile broadband and wholesale services. AT&T's track record and representations to Wall Street thus make clear that clamping down on innovation is part of the firm's business model, and would continue to be after the merger.

B. The Applicants Do Not Refute Their Opponents' Demonstration that the Merger Will Result in Decreased Choice and Service Quality

CCIA demonstrates in its Petition to Deny that AT&T's planned acquisition of T-Mobile will reduce choices for consumers, will increase prices, and will reduce the quality of service.[155] Eliminating T-Mobile as a competitor to Verizon and AT&T will remove a strong, maverick competitor from the marketplace and reduce the types of services, products, and service plans available in the market. Further, having fewer service providers will result in increased

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152 Public Knowledge Petition at 40-41.

153 Center for Media Justice Petition at 29

154 *See* Alarm.com Petition at 1, 3-4.

155 CCIA Petition at 17, 30-33.

prices for mobile services, because the remaining firms would be less constrained by competition in setting prices.[156]

In the Opposition, the Applicants acknowledge that eliminating T-Mobile from the marketplace will decrease the number of wireless carriers from which Americans can choose.[157] That tiny concession grossly understates the competitive impact of T-Mobile's exit. As the record demonstrates, T-Mobile is an industry maverick, many of whose customers have taken the time to file complaints about the merger with the Commission, which the Opposition conveniently ignores when it blithely states, almost as an afterthought, that the merger will "benefit" T-Mobile customers, too.[158] In addition, Section I.B.2., *supra*, explains in detail how T-Mobile has been a leader in bringing new mobile broadband products, services, and pricing plans to market before its competitors, thus forcing its competitors to adapt. Without T-Mobile, there will simply be fewer choices and higher prices for consumers.

AT&T already has admitted that it plans to reduce choices for consumers.[159] In addition to that, the Center for Media Justice group reports that AT&T has stated that, in order to improve T-Mobile's margins, it will reduce the number of handsets offered to consumers.[160]

The Applicants do not address these facts in the Opposition. Rather, they continue to point to small regional and rural carriers as examples of the panoply of choices for

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

157 *See* Opposition at 95 (asserting that the transaction will reduce the number of facilities-based competitors from which three-quarters of Americans can choose).

158 Opposition at 60.

159 *See* Center for Media Justice Petition at 29.

160 *Id*.

consumers.[161] The Applicants do not address T-Mobile's unique position in the market as a maverick firm with a large subscriber base.[162] Because of its service quality and price differentiation, T-Mobile's position in the market is more than the mere sum of its market share.

Thus, it remains clear that eliminating T-Mobile from the mobile wireless marketplace will lead to reduced consumer choice in devices, technologies, and service plans, as well as degraded customer service.[163] These harms to consumer choice do not serve the public interest.

C. The Applicants Do Not Refute Their Opponents' Demonstration that the Merger Will Result in Increased Prices

CCIA explains in its Petition to Deny why the proposed combination will raise prices for consumers.[164] It is simply a market reality that reducing the number of carriers from which customers can choose results in higher prices. This reality will be especially acute were T-Mobile – the low-cost innovator in service plans – to be removed from the market. Other Petitioners note that there is little dispute that price increases will occur.[165]

Rigorous competition is vital to constraining prices. A market where the number of national wireless carriers has been reduced from four to three will be less competitive than the current market[166] – a market the Commission itself has declined to classify as competitive.[167] As

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161 *See* Opposition at 126-133 (citing the existence of MetroPCS, Leap, Cellular South, Cincinnati Bell, Clearwire, and Lightsquared as evidence of a competitive market).

162 *See Fourteenth Report*, 25 FCC Rcd. at 11455 (Table 3) (T-Mobile had 33.5 million subscribers as of 2Q09).

163 As stated in Section I.B.2. above, T-Mobile's customer service has received two awards from J.D. Power and Associates.

164 CCIA Petition at 17.

165 AAI Comments at 14; Sprint Petition at 31-32; CBW Petition at i, 8; Free Press Petition at 2; WT Docket No. 11-65, Petition to Deny of TelLawCom Labs at 6 (May 30, 2011).

166 *E.g.*, New Networks Institute Petition to Deny at 3; Cox Communications at 10; Earthlink

Congressman Ed Markey has noted, "The AT&T, T-Mobile deal is like a telecommunications time machine that would send consumers back to a bygone era of high prices and limited choice."[168] As noted in Section I.B.2., *supra*, AT&T and Verizon have been somewhat constrained in pricing by T-Mobile.[169] Even with T-Mobile as a constraint on price hikes, however, AT&T and Verizon remain the most expensive wireless carriers in the United States. Without T-Mobile, they will be virtually unconstrained from raising prices.

CCIA has shown that for over a decade, AT&T's rates – for voice, data, and SMS – do not reflect network efficiencies or economies of scale, but rather the maximum amount that AT&T can extract from its subscribers.[170] AT&T's assertions that permitting the proposed transaction will lead to reductions in consumer prices are thus either fantasy or deliberate misstatements. Removing T-Mobile as the low-cost alternative that on occasion has successfully constrained AT&T's pricing will undoubtedly lead to higher prices.

In the Application, the Applicants asserted that the proposed transaction will result in significant "cost synergies" and that consumers will benefit from the merged entity's decreased costs.[171] They repeat these claims in the Opposition.[172] They also state that the Cingular

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Petition to Deny at 18; WT Docket No. 11-65, Petition to Deny of Credo Mobile, Inc. at 2 (May 31, 2011).

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

168 Maisie Ramsay, "Markey: AT&T, T-Mobile Deal Would be 'Historic Mistake'," Wireless Week, May 25, 2011, *available at* http://www.wirelessweek.com/News/2011/05/Policy-and-Industry-Markey-ATT-T-Mobile-Deal-Historic-Mistake-Government/.

169 Indeed, AT&T has previously admitted to lowering prices to keep up with T-Mobile. WT Docket No. 10-133, *In the Matter of Mobile Broadband Wireless Competition*, Comments of AT&T at 43 (July 30, 2010) (quoting *Fourteenth Report* ¶ 92).

170 *See* CCIA Petition at 32-33.

171 WT Docket No. 11-65, Application, Description of Transaction, Public Interest Showing

acquisition in 2004 and the SBC/AT&T merger in 2005 are examples of mergers that resulted in significant cost savings.[173] But though AT&T proclaims that those mergers reduced its *own* costs, it does not even attempt to claim that the expected cost savings will be passed on to consumers.[174]

In fact, some of AT&T's purported synergy benefits are dependent on moving T-Mobile customers onto its more expensive and more profitable rate plans.[175] AT&T has admitted as much. According to Ralph De La Vega, President & CEO of AT&T Mobility and Consumer Markets, AT&T "sees the merger as an opportunity 'to improve data ARPUs'"[176] and "'pull T-Mobile's numbers up to ours,'" and to "'improve overall margins.'"[177] Thus, AT&T plainly intends to raise prices in order to squeeze more revenue out of each subscriber and equalize rates on T-Mobile subscribers with those of AT&T's current customers.

In addition, CCIA demonstrated in its Petition that AT&T has not passed its merger-based cost savings down to its customers.[178] AT&T's rates remain high – between $10 and

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and Related Demonstrations at 51 (Apr. 21, 2011) ("Description").

172 Opposition at 74.

173 Description at 53.

174 *See* Opposition at 74-75 (AT&T asserts that the transaction will generate tens of billions in savings, surpassing the $39 billion cost of the acquisition with an annual run rate exceeding $3 billion starting the third year after closing. Cost savings will come from "combining the AT&T and T-Mobile USA networks; reductions in customer acquisition costs; savings in network infrastructure investment and equipment purchases; and savings in customer-supported and general administrative costs." These synergies "will in turn increase the combined company's incentives to expand output … .").

175 AAI Comments at 14.

176 "Average Revenue Per Subscriber"

177 AAI Comments at 14 (quoting "AT&T to Acquire TMobile USA from Deutsche Telekom – Final," FD (Fair Disclosure) Wire, Mar. 21, 2011 at 7 (Mr. De La Vega notes the gap between AT&T and T-Mobile in terms of ARPUs and margins)).

178 *See* CCIA Petition at 30.

$20 higher than T-Mobile's.[179] Thus, though AT&T has reduced its costs via several acquisitions, the resultant synergies have done little to drive prices down for American wireless consumers.

AT&T's pricing practices, combined with its implied concession that this merger will not lower retail prices, makes clear that AT&T/T-Mobile would not pass along its cost savings to consumers.

D. The Record Demonstrates That the Proposed Combination Is Not Necessary to Facilitate Broadband Deployment

CCIA demonstrated in its Petition that the proposed combination does not help AT&T expand its broadband coverage.[180] AT&T ***already*** has the spectrum holdings necessary to build out to the 97% of the population that, it claims this merger will allow it to cover.[181] The Commission should not be swayed by the Applicants' promises to build out to rural areas, because this transaction does nothing to change the underlying economic value proposition of rural deployment.

As an initial matter, the Applicants' statements that T-Mobile's spectrum is a *sine qua non* to deploy to 97% of the population are fictitious. As other Petitioners demonstrate, acquiring T-Mobile is not necessary for AT&T to expand its LTE coverage.[182] AT&T's current wireless data network already reaches 97% of the population, and T-Mobile's spectrum holdings are largely duplicative of what AT&T already owns; acquiring T-Mobile expands AT&T's footprint by less than 1% of additional population coverage.[183] Thus, AT&T's promise to deploy

179 *Fourteenth Report*, 25 FCC Rcd. at 11471 ¶ 92 & Table 10.

180 CCIA Petition at 27-30.

181 Opposition at 75.

182 *See* Sprint Petition at 124-125; Center for Media Justice Petition at 33

183 Sprint Petition at 124-125; Center for Media Justice Petition at 33.

to 97% of Americans within six years ***when it already reaches nearly 97% of the population*** is very modest progress that undoubtedly could be achieved without the merger.

Moreover, even if AT&T makes good on its threats that it will not build out to unserved areas without this acquisition,[184] and that without the merger it will stand pat as Verizon builds out its LTE network,[185] the Commission need not worry that consumers will go unserved. If the mobile broadband market is as competitive as the Applicants insist, consumers can simply choose a provider with better coverage: Verizon is planning to deploy LTE to cover nearly all of its 3G network footprint, covering 92% of the population, by 2013.[186] Sprint is also deploying 4G to its cell sites.[187] Thus, even if this merger is blocked, deployments by Verizon and Sprint will require AT&T to respond and build out its 4G LTE network.[188] In fact, forcing AT&T finally to compete will only accrue to the nation's benefit. As such, **denying the application outright**, which CCIA and several others request,[189] **is the action that will serve the public interest**.

Further, the Applicants' deployment claims are vague and speculative. The Applicants fail to identify any specific new communities or rural counties that will be served with LTE post-merger, or on what timetable. The Applicants also fail to provide cost, revenue and deployment data to demonstrate how the merger would transform the financial characteristics of

184 *See* Opposition at 80.

185 *See id*. at 83.

186 *See* Sprint Petition at 128-129 (citing Cellco Partnership, Annual Report (Form 10-K), 3 (Mar. 12, 2010); Free Press Petition at 41-42; Dave Burstein, "CTO Dick Lynch on Verizon LTE Coverage," DSL Prime, Apr. 2, 2011, *available at* http://www.dslprime.com/a-wireless-cloud/61-w4214-cto-dick-lynch-on-verizon-lte-coverage); .

187 Sprint Petition at 128-29.

188 *See id*. at 128-129; Free Press Petition at 41-42.

189 *E.g.*, CCIA Petition at 1, 33; DISH Petition at 1, 2; Leap Petition at 5; Sprint Petition at 2; RCA Petition at 1; Cablevision Comments at 16 ("the Commission could reasonably reject the proposed transaction outright"); *see generally* Petition to Deny of Cellular South, Inc. (May 31, 2011) (urging the Commission to reject the Application as procedurally defective).

deploying in rural areas.[190] Other than a vague promise to cover 97% of the country within six years, the Applicants have provided no schedule for deployment and no timeline for migrating of T-Mobile's UMTS/HSPA+ service to LTE.[191]

As Sprint notes, the Commission has stated that

> benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.[192]

Here, the Applicants only provide conclusory promises about deploying LTE within six years, and fail to describe a ***new*** business plan for rural deployment that would serve the public interest. Applicants' broadband promises therefore fail actually to demonstrate any tangible benefit to public interest.

Finally, the Applicants' promise to invest $8 billion over seven years to build out and integrate an LTE network[193] is unimpressive. Although AT&T claims that this level of investment is significant, in reality it is a reminder that AT&T will continue to underinvest in its network. Just last year, Verizon invested over $8 billion in its network,[194] T-Mobile invested $2.8 billion,[195] and Sprint invested $1.9 billion.[196] In 2006-2007 Sprint invested a combined

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190 *See* New Jersey Rate Counsel Petition at 14; Sprint Petition at 120.

191 *See* Sprint Petition at 121.

192 *Id*. (quoting *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp*., Hearing Designation Order, 17 FCC Rcd. 20559, 20630 ¶ 190 (2002)).

193 Opposition at 83-84.

194 Verizon Communications Inc., Annual Report (Form 10-K), Exhibit 13 (Feb. 28, 2011), *available at* http://www22.verizon.com/investor/secfiling.htm.

195 Press Release, T-Mobile USA, T-Mobile USA Reports Fourth Quarter 2010 Results, at 6 (Feb. 25, 2011), *available at* http://www.t-mobile.com/company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations&ViewArchive=Yes (follow link to "T-Mobile USA Reports Fourth Quarter 2010 Results").

$13.9 billion.[197] In 2010, AT&T itself invested $8.4 billion.[198] Thus, a promise to invest $8 billion over seven years somewhere in America is actually an apt proxy for the less-than-aggressive and painfully slow rate of innovation that is characteristic of dominant firms in concentrated markets like today's mobile wireless industry. AT&T's promised broadband investment is therefore both unenforceable and trivial.

CONCLUSION

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

Dated: June 20, 2011

Respectfully submitted,

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196 Sprint Nextel Corp., Annual Report (Form 10-K), 23 (Feb. 24, 2011), *available at* http://investors.sprint.com/phoenix.zhtml?c=127149&p=irol-reportsannual.

197 *Id*.

198 AT&T Inc., Annual Report (Form 10-K), 22 (Mar. 1, 2011), *available at* http://phx. corporate-ir.net/phoenix.zhtml?c=113088&p=irol-sec&control_selectgroup= Annual%20Filings.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2011, I served true and correct copies of the foregoing Petition to Deny via electronic mail on the following persons:

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