

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Applications of AT&T Inc. and Deutsche Telekom AG	)	WT Docket No. 11-65
	)	DA 11-799
For Consent to Assign or Transfer Control of Licenses and Authorizations	)	ULS File No. 0004669383

**REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF  
AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC.  
TO PETITIONS TO DENY AND REPLY TO COMMENTS**

**I. INTRODUCTION AND SUMMARY.**

DISH Network L.L.C. (“DISH Network”) opposes a combination of AT&T Inc. (“AT&T”) and T-Mobile USA, Inc. (“T-Mobile”) (collectively, “Applicants”). In their Joint Opposition, Applicants did nothing to address DISH Network’s concerns about their proposed transaction. Indeed, Applicants went so far as to use DISH Network as an example of a would-be competitor in the wireless broadband market, despite DISH Network’s very clear statement to the contrary: the merger, if approved, would discourage it from entering the wireless broadband market.

As DISH Network explained in its Petition to Deny, the proposed merger likely would harm competition in video markets, including traditional multichannel video programming distributor (“MVPD”) and online video platforms, because Applicants would acquire significant market power in program distribution and could abuse that power to choke off video competition. The past behavior of AT&T towards Sling Media and other competitive products reflects a propensity to abuse market power to anti-competitive ends that should weigh against

Commission approval of the merger. Finally, the high concentration post-merger of spectrum below 1 GHz is of particular concern to a would-be competitor, such as DISH Network, because lower-frequency spectrum means lower capital expense in building a network, among other things.

**II. DESPITE DISH NETWORK’S CLAIM THAT THE PROPOSED MERGER WOULD DISCOURAGE ITS ENTRANCE INTO THE WIRELESS BROADBAND MARKET, APPLICANTS USE DISH NETWORK AS AN EXAMPLE OF A POTENTIAL NEW COMPETITOR.**

In an attempt to address concerns about post-merger market concentration, Applicants state that new and innovative wireless broadband competitors are on the horizon. Specifically, they cite to DISH Network’s pending acquisition of New DBSD Satellite Services G.P. (“DBSD”) and the possible use of the licensee’s Ancillary Terrestrial Component as proof that new competition will arise post-merger.<sup>1</sup> This completely ignores the arguments DISH Network made in its Petition to Deny.

DISH Network stated unequivocally that the proposed merger would discourage its use of recent and pending wireless spectrum acquisitions, including 700 MHz and the Mobile-Satellite Services (“MSS”) spectrum held by DBSD, to compete in the wireless broadband market.<sup>2</sup> Post-merger, at the retail level, almost 80% of subscribers would be controlled by the top two providers, who would have the power to subsidize rates, withhold critical interconnection and roaming agreements, and otherwise abuse their market power to thwart a potential new competitor. At the wholesale level, the merged entity could exercise its market power to drive

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<sup>1</sup> Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65, at n. 346 (filed June 10, 2011) (“Joint Opposition”).

<sup>2</sup> DISH Network Petition to Deny at 8-9.

smaller and regional wireless providers out of the market, leaving only AT&T and Verizon. These two remaining duopolists, in turn, would be highly unlikely to use a new wholesale competitor's network at favorable rates, terms, and conditions. DISH Network is far less likely to invest in a new wireless broadband network under such circumstances.

Applicants' use of DISH Network's potential market entry to justify their proposed merger, when DISH Network expressly stated that the merger would have the opposite effect, reflects an unawareness of irony worthy of a Comedy Central skit. Ignoring the arguments of your would-be competitors has no place in an application for approval of a merger that threatens consumer welfare and would profoundly and permanently reshape the communications industry. And DISH Network was not alone in showing that the proposed merger would discourage new entrants in the wireless broadband market. Cablevision, a highly capitalized public company with significant holdings, pointed out how the proposed merger would discourage its own efforts to build wireless broadband platforms.<sup>3</sup>

Applicants might choose to ignore these arguments in their filings, or even (as they did with respect to DISH Network) completely misconstrue the statements of would-be competitors. The Commission, however, should take very seriously the assertions of parties who would have to make the investments, take the risks, and deliver the competition in the wireless broadband market. The proposed merger would discourage market entry by the very parties Applicants point to in support of their transaction.

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<sup>3</sup> Cablevision Petition to Deny at 7-8, 10. *See also* Cox Communications, Inc. Petition Condition Consent at 7-8, 11; Public Knowledge and Future of Music Coalition Petition to Deny at 34-35; Free Press Petition to Deny at 37-39; American Antitrust Institute Comments at 4-5; and Petition to Deny of Center for Media Justice, Consumers Union, Media Access Project, New American Foundation, and Writers Guild of America, West at 8 (“Joint Public Interest Petition to Deny”).

### **III. THE PROPOSED MERGER THREATENS COMPETITION IN THE MVPD AND ONLINE VIDEO MARKETS.**

The Commission should consider the harm to competition and consumer well-being posed by the proposed merger, not only in the wireless broadband market but in other product markets that could suffer from foreclosure effects. As DISH Network explained in its Petition to Deny, the concentration of wireless broadband market share by Applicants likely would harm competition in video markets, including traditional MVPD and online video platforms. The merged entity would have the incentive and ability to bundle the AT&T Wireless and U-verse products, and to choke off key content from competing video platforms.<sup>4</sup>

First, the market power resulting from the merger would give AT&T the ability to offer its U-Verse product at a steep discount to any AT&T Wireless subscriber. Competition from cable and satellite providers would give it the incentive to do so. DISH Network can compete against another MVPD that offers bundled services but not when the competitor has significant market power over one of those bundled elements and uses it anti-competitively. Other parties also recognize the danger in a vertically integrated provider with dominant market positions in many different market segments.<sup>5</sup> Moreover, as the Consumer Electronics Retailers Coalition notes, AT&T could harness its post-merger market power require independent retailers to bundle AT&T video service with its mobile wireless service.<sup>6</sup>

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<sup>4</sup> DISH Network Petition to Deny at 10-12.

<sup>5</sup> *See, e.g.*, Petition to Deny of Public Knowledge and Future of Music Coalition at 5-6 (“AT&T is also one of the largest providers of residential broadband service (frequently the dominant provider of residential DSL services in its service territories), one of the top ten providers of MVPD services, and one of the largest national and international providers of enterprise data service. These advantages would work synergistically with AT&T’s enhanced market power in the wireless market to the detriment of the Commission’s policies to promote competition and protect consumers.”)

<sup>6</sup> Consumer Electronics Retailers Coalition Comments at 31.

Second, as more video moves to online platforms, AT&T's dominant post-merger market position as a key distributor of content would give it the ability to demand exclusive programming deals, starving DISH Network and other competitors of critical programming inputs needed to compete. AT&T could demand, for example, that ESPN make certain sports events available only on the AT&T wireless platform, to the exclusion not only of other wireless competitors but also to the exclusion of other traditional MVPD competitors.

Several commenters in this proceeding made similar assertions. Public interest groups stated that merger would have a "detrimental impact on the nascent market for wireless delivery of video programming" and would "prevent the development of a competitive and innovative market for video distribution."<sup>7</sup> Along similar lines, Public Knowledge and Future of Music Coalition caution that "[t]o the extent that carriers seek exclusive deals on particular content, the merged entity has an increased ability and incentive to prevent content from reaching consumers via less-monetized channels, such as the Web, instead of more profitable proprietary services or MVPD services."<sup>8</sup> After the elimination of T-Mobile as a competitor, Sprint warns that AT&T could also "exercise market power over video, music, and other content providers by, among other things," raising prices, charging a premium to deliver quality video content to AT&T's more than 130 million post-merger wireless customers, or charging a premium to place a phone application in a visible location on its customers' devices.<sup>9</sup>

Video markets would not be the only adjacent markets to experience reduced competition post-merger. Competition in the mobile software applications market likely would suffer, as

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<sup>7</sup> See Joint Public Interest Petition to Deny at 30-31.

<sup>8</sup> See Petition to Deny of Public Knowledge and Future of Music Coalition at 42.

<sup>9</sup> See Sprint Nextel Petition to Deny at 46.

well, to the detriment of consumers.<sup>10</sup> There, as with video markets, a strengthened AT&T would have the incentive and ability to abuse its market power in the wireless broadband market to demand exclusive deals, thwart new products, and otherwise foreclose competition.

#### **IV. THE ACTIONS OF AT&T REGARDING SLING MEDIA ARE RELEVANT TO APPLICANTS' POST-MERGER BEHAVIOR.**

In response to DISH Network's account of AT&T thwarting Sling Media's 3G "app" for the iPhone, Applicants assert that AT&T "has refuted these assertions" in the net neutrality proceeding.<sup>11</sup> Not so.

First, Applicants confuse the relevant standard at issue in a merger review. The Horizontal Merger Guidelines allow reviewing agencies to consider a wide range of information to discern whether the specific applicants would have a propensity to behave anti-competitively.<sup>12</sup> A rule-making, by contrast, considers whether an industry-wide prophylactic rule is necessary to guide industry-wide behavior.

Second, AT&T's willingness to preclude a video-related application from its wireless network for what appeared to be anti-competitive reasons speaks directly to how the Applicants

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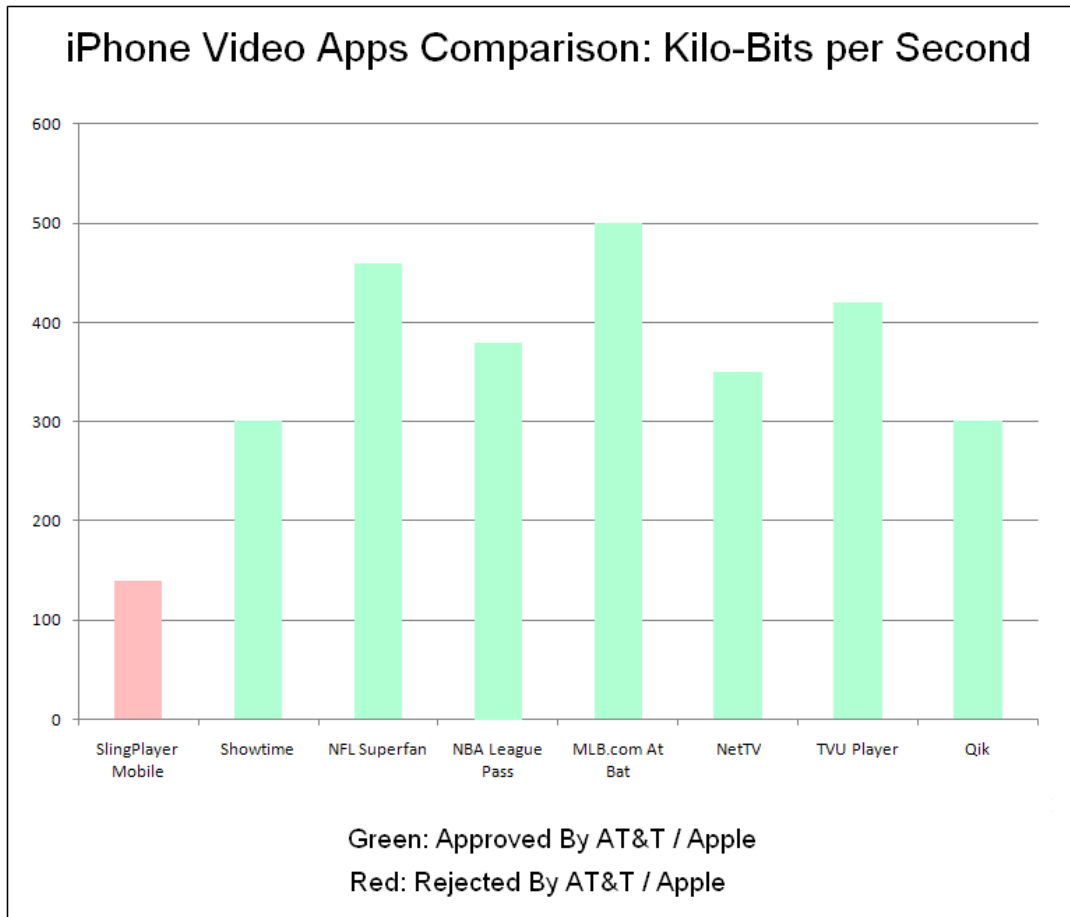
<sup>10</sup> Consumer Electronics Retailers Coalition Comments at 26.

<sup>11</sup> Joint Opposition at n.399.

<sup>12</sup> See U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 2 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#2> (last visited June 20, 2011) ("Merger Guidelines") ("The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."). See also Merger Guidelines at § 2.1.2 (anti-trust enforcement agencies "look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger. For example, [they] may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.").

are likely to abuse their post-merger market power. Other commenters pointed to similar, anti-competitive behavior by AT&T.<sup>13</sup>

Indeed, in 2009 and into 2010, AT&T refused to authorize the SlingPlayer Mobile application for use on AT&T's 3G network, while contemporaneously approving other video applications that used significantly more bandwidth:<sup>14</sup>



<sup>13</sup> Joint Public Interest Petition to Deny at 26-27 (AT&T prevented placement of the Sling Media application on iPhones but T-Mobile readily distributed it); Consumer Electronics Retailers Coalition Comments at 26-27 (noting AT&T reported in August 2009 that Apple had agreed not to allow the iPhone to use AT&T's 3G network for VoIP calling without first obtaining AT&T's consent and that "[w]hile AT&T later dropped this requirement, the increase in AT&T's market power as a result of the proposed transaction will likely increase its incentive to engage in such conduct.").

<sup>14</sup> See generally Comments of Sling Media, *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

Tellingly, DIRECTV's approved 3G application – NFL Superfan – consumed 3.2 times more bandwidth than the SlingPlayer Mobile application. That apparent favoritism was of particular concern to DISH Network given AT&T's close business partnership with DIRECTV. In addition, it was ironic that the Sling application would be denied on network congestion grounds when Sling's technology was uniquely designed to help address network congestion issues by automatically minimizing its bandwidth usage to compensate for unanticipated network stress – a fact that was communicated to AT&T at the time.<sup>15</sup>

The salient point for the Commission here is that the AT&T's propensity to abuse market power when presented with the opportunity to do so is self evident. Even in the event that the market concentration levels resulting from the merger alone were not enough to convince the Commission to deny the application, the concentration levels combined with the past anti-competitive behavior of AT&T should impel the Commission to reject the merger.

**V. THE HIGH CONCENTRATION OF SPECTRUM BELOW 1 GHZ HELD BY APPLICANTS POST-MERGER IS BOTH MERGER-RELATED AND MATERIAL.**

Applicants dispute DISH Network's claim that spectrum below 1 GHz is particularly valuable and would be held disproportionately by AT&T post-merger.<sup>16</sup> They argue that any discussion of concentration in the 700MHz spectrum band is not merger-specific and that lower-frequency spectrum is not necessarily more valuable.

Applicants' argument that the 700 MHz issue is not merger-specific ignores DISH Network's claim that the Qualcomm and T-Mobile acquisitions must be examined in a combined

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<sup>15</sup> *See id.* at 6-9.

<sup>16</sup> Joint Opposition at 189.



docket in order to capture accurately the true extent of consolidation posed by the merger.<sup>17</sup>

These transactions simply cannot be examined in isolation from one another because, as DISH Network explained, the impact on competition from AT&T's acquisition of Qualcomm is amplified by its acquisition of T-Mobile.<sup>18</sup>

Applicants' claim that low-frequency spectrum is not necessarily more valuable ignores the arguments of would-be competitors like DISH Network. Applicants assert that low-frequency spectrum achieves coverage more effectively but that high-frequency spectrum supports greater data capacity, roughly equating to an equal measure of quality between higher- and lower-frequency spectrum.<sup>19</sup> DISH Network disagrees. As a Direct Broadcast Satellite provider, DISH Network is familiar with the capacity characteristics of high-frequency data, given the 12.2-12.7 GHz and other satellite spectrum bands it uses for its video service. DISH Network also, however, understands the propagation limitations of such high-frequency spectrum. For a would-be new market entrant, as between coverage and capacity, the coverage afforded by lower-frequency spectrum is much more important.<sup>20</sup>

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<sup>17</sup> DISH Network Petition to Deny at n.26.

<sup>18</sup> *Id.* at 13-14 (market concentration of the top two wireless carriers compounded by the concentration of the most valuable spectrum, such as 700MHz, by those carriers).

<sup>19</sup> Joint Opposition at 189.

<sup>20</sup> *See, e.g.*, Sprint Nextel Petition to Deny at 64 (noting that “[t]he Commission stated that [frequency bands below 1 GHz] have better intrinsic spectrum propagation than spectrum in higher bands and therefore provide signal coverage over larger geographic areas, including in adverse climate conditions and through difficult terrain.”). *See id.* at 71-72 (“... following the transaction, Sprint and other carriers would be unable to meet their capacity needs by accessing spectrum in these core wireless bands. Nor would Sprint and other carriers likely have near-term access to significant new spectrum in the critical bands below 1 GHz, given the uncertain timing of Congressional legislation authorizing incentive auctions for broadcast spectrum.”). *See also* Cincinnati Bell Wireless LLC Petition to Deny at 37 (“The post-merger AT&T, together with Verizon, will control all of the ‘beachfront’ spectrum in the 850 MHz cellular and 700 MHz

**VI. CONCLUSION.**

For the foregoing reasons and those set forth in DISH Network's Petition to Deny, the Commission should deny the proposed transaction.

Respectfully submitted,

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June 20, 2011

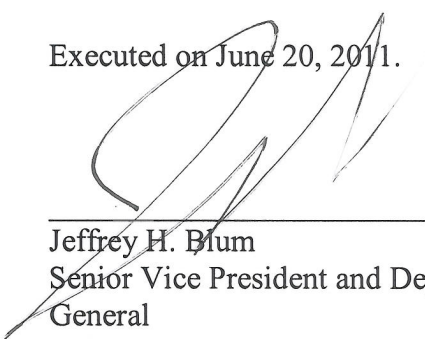
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bands, which will provide them with great advantages for cost-effectiveness, quality and speed of service.”).

## DECLARATION

The foregoing REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on June 20, 2011.



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## CERTIFICATE OF SERVICE

I, Vanessa L. Tran, hereby certify that on this 20<sup>th</sup> day of June 2011, I caused true and correct copies of the foregoing REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS to be served by First Class U.S. Mail upon:

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