REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
In the Matter of	)	
	)	
Applications of AT&T Inc. and	)	
Deutsche Telekom AG	)	WT Docket No. 11-65
	)	
for Consent to the Transfer of Control of	)	
Commission Licenses and Authorizations	)	
Pursuant to Sections 214 and 310(d) of the	)	
Communications Act	)	

REPLY OF METROPCS COMMUNICATIONS, INC. AND NTELOS INC. TO JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS

Mark A. Stachiw
General Counsel, Secretary, and Vice Chairman
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082

Mary McDermott
Senior Vice President-Legal and Regulatory Affairs
NTELOS
401 Spring Lane
Waynesboro, VA 22980

Jean L. Kiddoo
Patrick J. Whittle
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, DC 20006-1806
Tel: (202) 373-6034
Fax: (202) 373-6001
Email: jean.kiddoo@bingham.com
patrick.whittle@bingham.com

Counsel for MetroPCS Communications, Inc. and NTELOS Inc.

Dated: June 20, 2011

SUMMARY

The Joint Opposition of AT&T, Inc. ("AT&T"), Deutsche Telekom AG ("DT") and T-Mobile USA, Inc. ("T-Mobile") (collectively, "Applicants") to Petitions to Deny and Reply to Comments (the "Opposition") fails to adequately address many of the core issues raised by MetroPCS Communications, Inc. ("MetroPCS") and NTELOS Inc. ("NTELOS") (collectively, "Petitioners") in their Petition to Condition Consent, Or Deny Application ("Petition"). The Petition showed persuasively that the Applicants' proposed merger would not be in the public interest *unless* at least the following Necessary Conditions are attached to the consent sufficient to ensure that consumers receive the benefit of any increased efficiencies and lower costs resulting from increased capacity:

- Significant divestitures of paired 700 MHz, 850 MHz, PCS or AWS spectrum prior to any AT&T/T-Mobile closing to one or more of the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to enable there to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;

- Roaming obligations which would allow carriers which do not have a nationwide network to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to compete effectively with the combined AT&T/T-Mobile; and

- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment.

Repeatedly, AT&T resorts to the bottom-line argument that bigger is better – but this argument, if accepted, leads inexorably to the conclusion that the wireless industry is a natural monopoly (or at best, a duopoly), which AT&T nevertheless claims should not be regulated. AT&T's attempt to marshall impressive-seeming political support cannot mask the fact that the substance of its Opposition is built of red herrings, half-truths and inconsistencies. Moreover, AT&T's attempt to minimize the dangers of the market concentration that will result from this

merger, and its endeavor to convince the Commission that the market for wireless is purely local, are not only substantively wrong but are directly contrary to AT&T's previously held positions.

AT&T asserts that only by doing this merger can it achieve the spectrum efficiencies needed to fulfill the Commission's central policy goal of extending broadband services to as much of the nation as possible. AT&T offers only cursory explanations of how such efficiencies will be achieved and fails to provide the concrete, quantitative proof of such benefits needed to even begin to weigh them against the harm to competition that the merger will cause if not adequately conditioned. AT&T also disregards the evidence provided by Petitioners and others that there many other ways to achieve these efficiencies without the merger. AT&T does not genuinely deny that these alternative methods exist, arguing only that they are too slow, too expensive or too hard when compared with simply buying up T-Mobile and its spectrum assets. But these same methods are being successfully employed *today,* and have been deployed for quite some time, by smaller competitors who lack the vast resources of AT&T. Thus, the alleged spectrum efficiencies are not merger-dependent and do not count as a public interest reason for approving the transaction. In reality, AT&T is attempting to have the Commission bail AT&T out from years of poor decisions resulting in inefficiencies, and bail T-Mobile out from the private decision of its parent not to invest in its network.

Other alleged benefits of the merger are equally dubious. AT&T claims, for example, that the merger will add jobs, but it is far more probable (and indeed part of the claimed synergies of the merger) that the merger will reduce jobs.

The Applicants have also failed to rebut Petitioners' and other parties' showings that the merger will harm competition. Applicants claim that many entities have argued for years that the wireless market has become a duopoly. But carriers such as MetroPCS and Leap repeatedly

have noted the competitiveness of the wireless industry (and in particular, the market for retail wireless services). Now, however, the industry is at a tipping point and this transaction would force it into duopoly.

Petitioners showed in the Petition that a duopoly will arise not merely because of AT&T's and Verizon's great size but because of their ability to control their competitors' behavior by limiting their access on a cost-effective basis to three inputs which are inherently critical to these competitors' ability to compete. These inputs are *spectrum, roaming* and *handsets.* This problem need not be fatal to the merger provided that adequate conditions are imposed to prevent the Big 2 from abusing their market position by denying competitors reasonable access to these inputs.

The Applicants have failed to rebut the Petitioners' showing here. As to spectrum, their attempts to both minimize the spectrum held by the post-merger AT&T and inflate the usable spectrum of others are unavailing. Moreover, they have failed to refute petitioners' showing that if indeed a "spectrum dividend" is realized from this merger, that dividend should be used to benefit the public, not merely AT&T. As to roaming, the Applicants argue that the Commission should simply trust them post-merger to "do the right thing" – in disregard of AT&T's history of imposing anticompetitive rates, terms and conditions in its roaming agreements with smaller competitors. As to handsets, they have failed to rebut the Petitioners' clear showing that AT&T is already employing anticompetitive tactics in this area today and will be both more able and more incented to do so if the merger is approved.

REDACTED - FOR PUBLIC INSPECTION

TABLE OF CONTENTS

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
In the Matter of	)	
	)	
Applications of AT&T Inc. and	)	
Deutsche Telekom AG	)	WT Docket No. 11-65
	)	
for Consent to the Transfer of Control of	)	
Commission Licenses and Authorizations	)	
Pursuant to Sections 214 and 310(d) of the	)	
Communications Act	)	

REPLY OF
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.
TO JOINT OPPOSITION OF
AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC.
TO PETITIONS TO DENY AND REPLY TO COMMENTS

MetroPCS Communications, Inc. ("MetroPCS")[1] and NTELOS Inc. ("NTELOS")[2] (collectively, "Petitioners"), by their undersigned counsel and pursuant to the Federal Communications Commission's ("FCC" or the "Commission") April 28, 2011, *Public Notice* in the above-captioned proceeding, hereby respectfully reply to the Joint Opposition (the "Opposition") of AT&T, Inc. ("AT&T"), Deutsche Telekom AG ("DT") and T-Mobile USA, Inc. ("T-Mobile") (collectively, the "Applicants") to Petitions to Deny and Reply to Comments, filed on June 10, 2011, in the above-captioned proceeding.

I. INTRODUCTION

The Opposition fails to adequately address many of the core issues raised by Petitioners in their Petition to Condition Consent, Or Deny Application ("Petition"), filed May 31, 2011 in

---

[1] For purposes of this Reply, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its Commission-licensed subsidiaries.

[2] For purposes of this Reply, the term "NTELOS" refers to NTELOS Inc. and all of its Commission-licensed subsidiaries.

this proceeding. The Petition showed persuasively that the Applicants' proposed merger would not be in the public interest *unless* conditions are attached to the consent sufficient to ensure that consumers receive the benefit of any increased efficiencies and lower costs resulting from increased capacity. The only way the Commission can ensure that consumers reap the benefits which the Applicants' claim will result from the proposed merger is for Petitioners or others like them to be accorded sufficient spectrum and other critical inputs to allow them to provide a competitive check on AT&T/T-Mobile (such conditions, the "Necessary Conditions"). These Necessary Conditions include, at minimum:

- Significant divestitures of paired 700 MHz, 850 MHz, PCS or AWS spectrum prior to any AT&T/T-Mobile closing to one or more of the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to enable there to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;

- Roaming obligations which would allow carriers which do not have a nationwide network to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to compete effectively with the combined AT&T/T-Mobile; and

- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment.

If the proposed merger is allowed to proceed without these Necessary Conditions, the wireless market would devolve into an outright, unconstrained duopoly where consumers do not enjoy the proposed efficiency gains claimed by AT&T and where innovation is crushed..

The Applicants' Opposition fails to adequately address the serious and substantial public interest concerns raised by Petitioners and, in many cases, fails to explain the radical changes from prior positions taken by AT&T and T-Mobile in merger transactions. Instead, the Opposition boils down to a stew composed of equal parts red herrings, half-truths, irrelevancies,

trivialities and internal contradictions – which add up to little more than a smug message that, to paraphrase the 1950s-era saw about General Motors, what is good for AT&T is by definition good for America.[3] Time and time again, AT&T resorts to the bottom-line argument that bigger is better – but this argument, if accepted, leads inexorably to the conclusion that the wireless industry is a natural monopoly (or at best, a duopoly), which AT&T nevertheless claims should not be regulated. AT&T even denies that the market today is dominated by Verizon, that the market is a near duopoly and that the proposed merger will turn it into a confirmed duopoly.[4] The Applicants' constant refrain is that the only way for AT&T to meet the coming demand for wireless is not to innovate and grow organically – as others have done and must do – but to gobble up T-Mobile, its spectrum, its cell sites, its network, its supplier contracts, its customers and so on. In essence, AT&T claims to be driving the express train of progress and there is nothing for the Commission to do but get on board. Unfortunately for the Applicants, this Commission cannot approve the proposed merger without an express finding that the merger will serve the public interest. In this case, the only way the merger can benefit the public is if the claimed merger benefits are delivered to consumers – which cannot be assured unless there is robust competition remaining in the market to force AT&T to share the benefits with customers. That requires that the Commission impose the Necessary Conditions.

---

[3] This message can be found in such statements as this, from the Opposition at 180: "Because of *its* smartphone leadership and need to support three generations of technology, AT&T faces *uniquely* serious and urgent capacity constraints. .... The Commission would promote no rational policy objective by blocking AT&T's access to the resources *it* needs to expand output and support *its* customers' escalating demands for bandwidth-intensive mobile applications." AT&T's conflation of its own interests with those of the public pervades both Opposition and the Applicants' Public Interest Statement

[4] Among AT&T's contradictions is its claim that today T-Mobile does not compete effectively with it (and presumably with Verizon). Following that logic, the market today would be characterized by just three national carriers – AT&T, Verizon and Sprint. Given that almost all of the free cash, customers, and earnings before interest, depreciation and amortization ("EBITDA") currently reside in AT&T and Verizon, the market is already a virtual duopoly on its way to a true duopoly.

AT&T also largely ignores the blatant reversals of its position from prior mergers. For example, as Petitioners and others amply demonstrated, AT&T and T-Mobile consistently have argued that the wireless market is national, not local. In the Applications and the Opposition, AT&T and T-Mobile do not adequately explain how the market has changed in a manner that justifies their change of position on such a critical issue. AT&T's only argument – made interestingly in a footnote – is that, since DOJ and the Commission traditionally have reviewed transactions on a local basis AT&T merely has accepted "those repeated determinations as settled" and has not "flip-flopped."[5] But according to AT&T's characterization, this local versus national issue was "settled" by the FCC long ago, yet that did not deter AT&T from continuing to advocate that wireless is a national market right up to the point when it was no longer in AT&T's interest to do so. The inescapable conclusion is that AT&T is willing to abandon principle to treat the market as a local one so that it can now hold up carriers such as Petitioners as effective competitors. Otherwise, the merger would be reducing competition from four to three national competitors. AT&T goes so far as to chastise its opponents who argue for a national market claiming that they only hope "to distract the Commission."[6] In truth, it is AT&T who hopes to distract the Commission from a fundamental fact – the recent mergers analyzed by the Commission on a local basis involved acquisitions of regional or rural carriers, not a national carrier like T-Mobile. AT&T also fails to address Petitioners' argument that the wireless market must be viewed differently because the ability of a carrier to offer a nationwide service has become the minimum table stakes for any and all carriers hoping to compete in this segment.

---

[5] Opposition at n.153.
[6] Opposition at 106 (emphasis in original).

Participation requires either the operation of or access to a nationwide footprint, which mandates a national market definition.

AT&T also claims that the merger enjoys unprecedented support from many constituencies, but ignores the fact that tens of thousands of ordinary consumers already have filed comments fundamentally opposed to the merger.[7] These consumers view with grave alarm the notion that the old Ma Bell Humpty Dumpty is being put back together again, this time to dominate the wireless market just as it dominated the wireline market for decades.

Of course, AT&T has not been idle in marshaling what it claims is an impressive amount of support. It has engaged in what might be called a "gold-plated Astroturf" campaign, soliciting cursory statements in support of the merger by various elected officials, for what are patently political reasons. It boasts of having lined up a number of labor unions in support, but this is not particularly significant or surprising when the merger would eliminate a non-unionized company in favor of its absorption by a unionized one. Just as it is not the case that what is good for AT&T is good for America, so the Commission cannot automatically assume that the support of the Communications Workers of America means that the transaction will create jobs, help all workers or promote economic growth.[8] AT&T also has recruited a number of public interest groups to its cause, yet press reports show that these groups have in many cases received

---

[7] The fact that many of these may be brief form letters does not take away from the fact that these thousands of individuals were sufficiently concerned to take the time and effort to file then, and so they should be given weight by the Commission.

[8] There can be no denying that among the "synergies" of the merger will be a substantial loss of employment by the combined AT&T-T-Mobile, clearly a negative impact on the public interest. But of course, it can be expected that most of the merger-resultant job loss will fall among the non-unionized T-Mobile work force, an expectation that no doubt in part motivates CWA's support for the merger.

significant funds from AT&T.[9] AT&T has gotten support from certain companies and others in the high tech community – some of which are themselves dominant players in their own markets, such as Microsoft. These companies no doubt feel the need to curry favor with the increasingly dominant AT&T given the ever increasing importance of wireless platforms to the technology sector. Their support in no way assures that consumers will not be harmed by the merger.[10] Similarly, AT&T has rounded up in support a number of equipment manufacturers, who also clearly have an interest in catering to a customer like AT&T in view of the dominant market power the combined company will have. So the fact that AT&T, having pulled out all of its public relations stops, has mustered some self-interested support cannot carry the day. Public relations is irrelevant to the Commission's substantive task: if this merger is allowed to proceed, it must be conditioned in such a way that it benefits rather than harms the public interest.

AT&T tries to score political points by asserting that only by doing this merger can it achieve the spectrum efficiencies needed to fulfill the Commission's central policy goal of extending broadband services. AT&T, however, offers only cursory explanations of how such efficiencies will be achieved. For example, AT&T claims that the combination of its network with T-Mobile's will free up 4.8 to 10 MHz of spectrum.[11] However, AT&T does not explain how this calculation was done in technical terms – but rather just explains that such efficiencies result from "the elimination of redundant control channels."[12] Similarly, AT&T states without

---

[9] "AT&T ramps up lobby for proposed T-Mobile merger", Washington Post, May 31, 2011, http://www.washingtonpost.com/business/economy/atandt-ramps-up-lobby-for-proposed-t-mobile-merger/2011/05/31/AGYcGmFH_story.html

[10] Since many of these same commenters were supporters of net neutrality, one wonders how much AT&T's agreement to support the Commission's net neutrality rules played in their decision to support the merger. Perhaps they believe that once the AT&T/T-Mobile merger is consummated the Commission will revisit its more relaxed rules on wireless in the net neutrality order.

[11] Opposition at 57.

[12] *Id.*

justification that another "10 to 15 percent" in efficiencies result from channel pooling.[13] These showings are inadequate. AT&T must be required to make a detailed showing on the record of how such efficiencies are to be achieved so that the technical community can weigh in.[14] Moreover, AT&T willfully disregards, minimizes and mischaracterizes the evidence provided by Petitioners and others that there are any number of other ways to achieve these efficiencies without fatally wounding the competitive marketplace. AT&T does not genuinely attempt to deny that these alternative methods exist, arguing only that they are too slow, too expensive or too hard when compared with simply buying up T-Mobile and its spectrum assets. But these same methods are being successfully employed *today,* and have been deployed for quite some time, by smaller competitors who lack the vast financial and personnel resources of AT&T. AT&T's position here stretches the concept of "too big to fail" into "too big to bother."

In the end, AT&T is attempting to have the Commission turn a blind eye to the public interest harms that the merger will cause in order to bail AT&T out from years of poor decisions. These poor decisions have resulted in a level of spectrum efficiency well below that achieved by many of its smaller competitors. While AT&T seeks to dismiss MetroPCS' showing that MetroPCS is a considerably more efficient user of spectrum, AT&T's analysis fails to withstand scrutiny. AT&T also argues that the Commission is not allowed to look back at its past conduct in determining whether the merger is in the public interest.[15] But turning a blind eye to AT&T's mistakes, and simply handing over to it all of T-Mobile's spectrum without conditions, would be

---

[13] Opposition at 57.

[14] In other contexts, AT&T admits that the efficiencies or saving are not able to be quantified except in gross terms. Opposition at 5, 44-45. Such imprecise showing cannot satisfy AT&T's burden of showing merger specific benefits. Indeed, many of the benefits AT&T claims can be gotten without undertaking the proposed merger with T-Mobile.

[15] Opposition at 36-38.

a textbook example of "moral hazard." As described by Nobel-winning economist Paul Krugman, "moral hazard … refer[s] to any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly."[16] As Mr. Krugman notes, moral hazard is especially likely, and especially problematic, when "the moral hazard game is played at taxpayers' expense."[17] Handing over spectrum – a public resource -- to AT&T (without conditions to ensure the competitiveness of the market), in order to relieve AT&T of the cost and effort of correcting its long-standing inefficiencies fits this description perfectly: it is nothing more than the public picking up the tab for AT&T's years of poor decisions. While such a bailout by taxpayers may be justified in cases of true crisis, AT&T faces no such crisis: it made over *$3.4 billion* in profits in the first *quarter* of this year – up nearly 40 percent from the first quarter of 2010.[18] And its wireless business led the way, with the largest revenue growth of any of its business segments.[19] AT&T has more than ample resources to improve spectrum efficiency the same way its competitors have done: by hard work, shrewd investment and bold innovation.[20]

The fundamental purpose of the Commission's inquiry here, as set forth in Section 1 of the Communications Act of 1934: is "to make available, so far as possible, to all the people of

---

[16] P. Krugman, *The Return of Depression Economics and the Crisis of 2008* (2009) at 63.
[17] *Id.* at 64.
[18] http://www.att.com/Investor/Financial/Earning_Info/docs/IS_IB_1Q11.xls
[19] *Id.*
[20] Despite the petitioners' clear showing to the contrary, AT&T indignantly denies that it has underinvested in its wireless network, stating that "Over the past four years, AT&T has invested more than $75 billion to upgrade its *wireline and* wireless networks." Opposition at 37. But its wireline investment is beside the point and various parties have shown that its *wireless* investment has lagged. Nor is it any more to the point that AT&T has invested $23 billion (it says) in "spectrum purchases and company acquisitions." *Id.* The question is what AT&T has done to improve the efficiency of its *existing* spectrum , not the extent to which it has fed its appetite for more. Further, it is not *how* much a carrier spends, but rather on *what* it spends on. AT&T is clearly spending its money not on LTE, which is the wave of the future, but rather on past generations of technology which are not improving its efficiency. As demonstrated by the fact that MetroPCS, not AT&T, is the most efficient user of spectrum.

the United States, without discrimination … a rapid, efficient, Nation-wide, and world-wide … radio communication service with adequate facilities at reasonable charges…."[21] In the Petition, Petitioners set forth the conditions, summarized above, that are necessary to ensure that this proposed merger is consistent with those objectives. The Applicants have failed to show that there is any alternative and, therefore, the merger must be made subject to the Necessary Conditions, or else denied.

II. THE PURPORTED "BENEFITS" OF THE MERGER EITHER CAN BE ACCOMPLISHED WITHOUT THE MERGER OR ARE MERE PRIVATE BENEFITS TO THE APPLICANTS.

Commission precedent permits a merger to be approved *only* if the public interest benefits outweigh the harms.[22] Applicants continue to wave the flag of broadband deployment as the primary justification for the merger. According to Applicants:

> AT&T and T-Mobile USA confront growing spectrum and network capacity constraints, and this transaction will create immense new capacity that will provide enormous benefits to consumers. That new capacity will provide a more robust platform for the next generation of bandwidth-intensive mobile applications while improving consumers' overall service quality through faster data speeds and fewer dropped and blocked calls. And with the scale, spectrum, and other resources generated by this transaction, the combined company will be able to offer Long Term Evolution ("LTE")—the premier next-generation wireless broadband technology—to more than 97 percent of the U.S. population. In the process it will create jobs and investment, help bridge the digital divide, and help achieve the Administration's rural broadband objectives, all without the expenditure of government funds.[23]

---

[21] 47 U.S.C § 151.

[22] *See* Petition at 14-16.

[23] Opposition at 1. As Petitioners demonstrate below, AT&T can clearly repurpose spectrum and take other measures to achieve spectrum efficiencies, including deployment of LTE, without the proposed merger. *See, e.g.*, Section II.A. *infra* at pp. 14-20.

AT&T undoubtedly felt that these grandiose claims were necessary because, otherwise, it would be out of the question for the Commission to approve a merger resulting in such high market concentration. Indeed, AT&T (when it was still called SBC) went on record in 2000 characterizing as "*presumptively unlawful*" a merger that would have resulted in a merged entity having only about half the AT&T/T-Mobile market share, in an industry segment with far lower entry barriers. Specifically, in a Commission public forum discussing the proposed MCI WorldCom-Sprint merger, AT&T said unequivocally:

> [T]he place we have to begin when contemplating this merger is that by every quantitative measure, the presumption of unlawfulness is not only there, it is there in multiple times. If you take the long distance market in toto, quantifiably measured, the likely competitive impacts or the likely impacts on competition of this merger is more than five times the effect necessary to conclude that the merger is presumptively unlawful.[24]

As noted in the Petition, this AT&T/T-Mobile merger would increase market concentration far more than the increase that so alarmed AT&T in 2000 – to approximately three and one-half times the (now doubled) threshold above which the Department of Justice and Federal trade Commission's *Horizontal Merger Guidelines* recognize as "presumed to be likely to enhance market power."[25]

Now that the shoe is on the other foot, AT&T cavalierly dismisses the traditional importance of market concentration in assessing this merger:

---

[24] *In Re the Matter of: Common Carrier Bureau Public Forum MCI WorldCom - Sprint Proposal Merger,* April 5, 2000, http://transition.fcc.gov/realaudio/tr040500.txt, testimony of Sandy Wagner, transcript at 13.

[25] Petition at 52, citing U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines,* revised Aug. 19, 2010, at § 5.3. The former threshold past which an increase in the Herfindahl-Hirschman Index ("HHI") resulted in a presumption that market power would be enhanced by a proposed merger, in effect at the time of the proposed MCI WorldCom Sprint merger, was 100 points rather than the 200 point threshold in the new Guidelines. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines,* revised 1997, at § 1.51. Thus, the increase in concentration which AT&T found so dire in 2000 was only in the 500-point range – significantly less than the 700-plus point jump that would result from this merger.

> [A]lthough the opponents' submissions abound with HHI and other market concentration statistics, those figures prove nothing by themselves. As courts and antitrust scholars have agreed, "often highly concentrated markets . . . may actually yield competitive pricing," a point reaffirmed in the Commission's National Broadband Plan: "modern analyses find that markets with a small number of participants can perform competitively."[26]

This AT&T analysis conveniently ignores that, even under the recently liberalized *Horizontal Merger Guidelines,* the proposed merger is "presumed" to result in enhanced market power. Thus, AT&T must carry the heavy burden of overcoming this presumption, or of unequivocally showing that the benefits of the merger outweigh the harm to competition. It has done neither.

As will be shown below, AT&T has failed to rebut the showings of Petitioners and other parties that, unless adequately conditioned, this merger will significantly reduce competition in the wireless marketplace – and harm consumers. The critical threshold point for the Commission to grasp is that all or nearly all of the benefits AT&T claims from the merger can be accomplished *without* the merger. For the most part, AT&T does not even bother to deny this. Rather, it asserts that the benefits can be achieved faster, or more conveniently or more economically through the merger. This means that, even if all the benefits cited above by AT&T come to fruition (and many of them are speculative at best), they cannot be counted on the plus side of the ledger for this merger – and, absent the Necessary Conditions, do not outweigh the harms to the public interest. Even any alleged *incremental* increases in speed, savings or convenience could weigh in favor of the merger *only* to the extent they are *required* to be passed through to the public through the Necessary Conditions. The fact that the transaction may be a

---

[26] Opposition at 99-100 (footnotes and citations omitted). While the current retail market may be competitive, what is important is whether the market will be less competitive as a result of the merger. There can be no doubt that by taking out a significant competitor the wireless market will be more concentrated and thus less competitive. However, if conditioned with the Necessary Conditions, the retail market can remain competitive even after the merger. Without the Necessary Conditions, however, the post-merger market concentration will yield a considerably less competitive market and consumers will suffer.

shortcut or a money-saver for AT&T is *not* in itself relevant to the public interest; rather, it is only a private benefit for AT&T.[27] Indeed, unless the Commission works to preserve competition, only AT&T shareholders will enjoy these putative benefits. Thus, in large part, AT&T's claims of benefits are red herrings.

A. AT&T Can Achieve Spectrum Efficiencies Without the Merger.

AT&T insists repeatedly that the merger will give it the flexibility to deploy spectrum more efficiently, thereby speeding its deployment of broadband wireless service. As an initial matter, many of AT&T's claims are not detailed enough for any commenter or the Commission to adequately assess whether they are in fact real. Indeed, AT&T freely admits that some of these benefits are difficult to quantify. Further, some of the benefits, such as the improvements in spectrum utilization which in AT&T's view would yield a spectrum dividend are not supported by a technical showing. Such a technical showing is an absolute necessity.

In addition, upon examination, many of AT&T's claims are not that it would be unable to carry out a speedy deployment of broadband absent the merger, but rather that such deployment would more difficult, more cumbersome or more costly. While AT&T admits that it can shift portions of its existing spectrum to UMTS and LTE to provide broadband, it argues that the merger will allow it to shift spectrum "more quickly."[28] But even if such a benefit might accrue to the public interest, AT&T provides no meaningful timetable to quantify this alleged acceleration of benefits over what would occur even without the merger. Similarly, AT&T

---

[27] The Commission has held unequivocally that such mere private efficiencies are by themselves irrelevant: "The record indicates that Applicants would clearly realize a private benefit from eliminating duplicative carriage of programming channels and that alternative means of achieving comparable efficiencies appear to have significant operational and economic disadvantages. Nonetheless, the record does not support Applicants' assertions that these private efficiencies will result in cognizable public interest benefits under our merger review standard.." *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronic Corp. and EchoStar Communications Corp., Hearing Designation Order*, 17 FCC Rcd 20559 (2002), at para. 57.

[28] Opposition at 7.

alleges, not that its existing spectrum will not permit it to deploy LTE, but merely that the merger will allow it to do so "with optimal speed and spectral efficiency."[29] AT&T likewise acknowledges that it could (and will) transition customers to more efficient technologies, but complains that without the merger, this process will be too difficult and slow ("not nearly as easy or fast as merger opponents suggest"), because it takes "years" to transition customers off their outmoded devices.[30] What AT&T misses, however, is that the rest of the industry is having to do exactly that without the attendant harms to the public interest from this merger.

In their Petition, Petitioners make a clear showing that AT&T could achieve equivalent or better efficiencies – without harm to competition – if it made greater use of such technologies as six-sector cells and DAS. The Petition stated:

> For example, MetroPCS has deployed 6-sector cells on a wide spread basis, while the rest of the industry is still largely tied to 3-sector cells. MetroPCS has successfully deployed DAS in core outdoor metropolitan areas – such as Philadelphia – to increase spectrum utilization. AT&T in its Petition has downplayed DAS as a solution, arguing that DAS is really only good for indoor deployments and for limited area deployments. However, DAS offers substantial capacity improvements over existing macro cell deployments. DAS allows a carrier to initially deploy sites that are simulcast together. As capacity needs increase, the carrier can increase capacity by first making each DAS node a separate site and then, when further capacity increases are necessary, going to three or six sectors. This is how MetroPCS has been able to serve Philadelphia on CDMA and 4G LTE with just 10 MHz of combined spectrum. AT&T has also identified the costs of developing cell sites as an important impediment to adding capacity, but DAS provides a solution to this need as well. DAS networks allow quicker and easier deployment since in many instances the carrier can avoid having to obtain site by site approval from local municipalities. Nothing prevents

---

[29] Opposition at 23.

[30] Opposition at 31-33. While it may be that a few customers will cling to their devices, this is much less of an issue in wireless than it was in wireline, where the classic black rotary phone was in use for decades before alternatives became available and remained useful for decades thereafter. No one is using "brick" cell phones any more, and even if a few were, that would be a bobbed tail wagging a Great Dane if it were deemed sufficient justification for this game-changing, anticompetitive merger.

> AT&T from enjoying success from DAS similar to that of MetroPCS, yet it has not done so.[31]

AT&T's response to this showing in its Opposition is little more than a weak "we tried." AT&T claims to have "deployed the largest Wi-Fi network of any carrier; pioneered the use of Wi-Fi 'hotzones' in high traffic urban and campus environments; deployed DAS systems throughout the country; and deployed hundreds of thousands of femtocells. Each of these techniques has appropriate applications in a cellular network, and AT&T employs each of them today (and has for years). But these techniques also have significant limits...."[32] It is true to some extent that these and other techniques "have their limits." But the question is not *whether* AT&T engaged in these technologies but rather *how much* it has engaged in them, and AT&T has not supplied a meaningful answer to this question. AT&T has not shown that it has in fact reached, or even neared, the limits of these technologies – particularly since, as shown in the Petition, carriers like MetroPCS, with far fewer resources and millions fewer customers, have been able to achieve much greater efficiencies than AT&T.

To further illustrate this point, almost **[***BEGIN CONFIDENTIAL***]** [redacted] **[***END CONFIDENTIAL***]**of MetroPCS' cell sites nationwide use six-sector base stations today. In Los Angeles, as an example, over **[***BEGIN CONFIDENTIAL***]** [redacted] **[***END CONFIDENTIAL***]** of MetroPCS' cell sites use six sector base stations. The Commission should ask AT&T to quantify how many of its base stations are six-sector. What the Commission will undoubtedly find is that AT&T has used six-sector sites much less intensively than MetroPCS. AT&T also points out that it has "1,800 public DAS systems".[33] Despite its

---

[31] Petition at 32.
[32] Opposition at 8.
[33] Opposition at p. 70.

smaller network, MetroPCS has over **[***BEGIN CONFIDENTIAL***]** [redacted] **[***END CONFIDENTIAL***]** times the number of DAS nodes on air today that AT&T has and projects to have over **[***BEGIN CONFIDENTIAL***]** [redacted] **[***END CONFIDENTIAL***]** times as many DAS nodes as AT&T by the end of 2011.[34] The widespread and intensive deployment of these facilities has enabled MetroPCS, with a small fraction of AT&T's spectrum and financial resources, to achieve urban densification that has resulted in spectrum use efficiencies that are, as the Petition shows, far in excess of AT&T's. AT&T has not rebutted this strong evidence. Before allowing AT&T to simply swallow up massive additional spectrum without conditions, the Commission should first require AT&T to show that it has exhausted these technological means to greater spectrum efficiency.

Further, AT&T argues that MetroPCS' efficiency measures are inaccurate because AT&T has significant numbers of smartphone users which "consume 24 times the data of traditional cell-phone users."[35] AT&T's criticism is hollow for at least two reasons. First, AT&T fails to mention that, due to the unlimited, flat-rate nature of the MetroPCS service, MetroPCS' subscribers consume considerably more *voice* minutes than AT&T's subscribers. Based on public data, AT&T's subscribers on average consume less than 700 minutes[36] of use per month while MetroPCS' subscribers average around 2,000 minutes per month. This high voice usage rate places particular stress on MetroPCS' network because it requires a real-time connection with relatively small delays which means that voice usage is considerably more

---

[34] These numbers are even more important when you consider that AT&T covers approximately three times the covered pops with its own network than MetroPCS. AT&T's number of DAS nodes should be three times MetroPCS', not one-third.

[35] Opposition at p. 26. AT&T ignores the fact that MetroPCS has significant smartphones with data usage.

[36] AT&T Corp. "AT&T Financial and Operational Results," 54th Quarter 2010, at 9, http://www.att.com/Investor/Growth_Profile/download/master_Q4_10.pdf

network intensive than data usage which can accept delays.[37] Further, because MetroPCS, unlike AT&T, currently offers unlimited short messaging and unlimited multimedia messaging to all new customers, the disparities between the MetroPCS and AT&T usage patterns are not as great as AT&T suggests. Moreover, while the spectral efficiency measure that Petitioners offered may not be perfect, the measure put forth by AT&T is nonsensical. There can be no realistic argument that MetroPCS is an inefficient user of spectrum when, in many instances MetroPCS has a comparatively larger market share in each major metropolitan area in relation to its comparative spectrum position vis-à-vis AT&T and AT&T/T-Mobile.[38]

AT&T seeks to capitalize on the observation by MetroPCS that it serves "*fewer* subscribers per MHz than AT&T" in certain markets where MetroPCS "only recently started operations."[39] AT&T then argues that this weighs in AT&T's favor since AT&T will just be getting started on LTE and thus will have less customers. The fallacy here is that MetroPCS' calculation was based on *total* spectrum holdings versus *total* subscribers in *all* categories – i.e., regardless of whether the subscribers are on CDMA or LTE. MetroPCS was simply making the obvious point that a network will be less congested and thus less spectrally efficient when it is first placed in service. AT&T fails to admit that it should be at least as efficient as MetroPCS, since it has been in operation for decades longer than MetroPCS and has had plenty of time to overcome the loss of efficiency at start-up.

---

[37] Voice also different than video or audio streaming in that voice cannot be buffered which does allow video and audio streaming to accept some latency.

[38] Indeed, in some of MetroPCS' metropolitan areas, MetroPCS may have more or at least as many subscribers as AT&T, but with considerably less spectrum.

[39] Opposition at 27. What MetroPCS actually said is "MetroPCS has significantly more subscribers per MHz of spectrum than AT&T, with the exception of only three metropolitan areas – Boston, New York and Las Vegas – and in these three metropolitan areas MetroPCS has only recently started operations so that *slightly* lower yield per MHz is to be expected." (emphasis added). Obviously AT&T ignores the fact that this statement applied only to a few metropolitan areas and that even in those the difference was minimal.

AT&T also admits that "[o]ver time, in certain markets, AT&T may decide it makes sense to 'clear' the T-Mobile spectrum of UMTS service so as to use it for LTE service, and in those cases T-Mobile USA customers will have to obtain new handsets to transition to LTE or to stay on UMTS using AT&T's 850 MHz or 1900 MHZ spectrum."[40] This argument concedes two important points. First, that T-Mobile can and should make such a migration in order to effectively utilize the AWS spectrum. The Applicants do not explain why that transition cannot be accelerated so that T-Mobile can get the benefit of the clearing without a merger. Second, if the Commission approves the proposed merger, AT&T plans to continue to allow customers to use inefficient technology by staying on UMTS even when they should move over to more efficient technology – LTE. This merely proves the point that the merger, far from accelerating efficiency gains, will allow AT&T to continue its inefficient ways and for a much longer period. The proposed merger has not changed and will not change AT&T's behavior; it simply does not plan to be as efficient as others in the industry.

Indeed, the entire spectrum efficiency justification for this merger should be discounted by the Commission. What AT&T gets from the merger is scale – it will increase its subscribers by some 39% and its EBITDA by 25%.[41] AT&T also will be able to reduce its non-network costs (mostly general and administrative and sales and marketing) considerably through reductions of personnel. Further, AT&T will be able to spread its fixed costs (such as its sales staff, marketing expenses, etc.) over a larger base of customers and over a larger base of gross additions. Moreover, although T-Mobile may have had declining *net gains* in the last several years, it still had robust *gross gains*. Gross gains are what affect the cost of sales and marketing

---

[40] Opposition at 62, n.70.

[41] Bernstein Research, "AT&T Buys T-Mobile: A 'High Degree of Confidence' that the Deal Can Get Done," at 5, 6.

and also the willingness of manufacturers and suppliers to give a carrier exclusive products or to give reduced prices. This merger will allow AT&T to gain these economies of scale and the question for the Commission is what can be done to make sure that these benefits are passed through to consumers. The only effective way to do this short of robust rate and service regulation is to ensure that the remaining competitors are strong and can act as a market check on AT&T's behavior by imposing the Necessary Conditions.

B. AT&T Can Achieve Cell-Site Efficiencies Without the Merger.

As another example, AT&T urges the Commission to recognize a merger-specific benefit in allowing it to simply acquire T-Mobile's cell-sites rather than requiring AT&T to forage for its own,[42] as it has done in the past and as all other carriers must continue to do. According to AT&T, the process of identifying and procuring cell sites on its own is too slow and arduous, since "AT&T must not only find a suitable and available location, but then arrange to acquire the site through purchase or lease, comply with regulatory requirements that necessitate extensive studies and consultation, apply for and obtain building permits and zoning approvals, contract with third-party vendors to purchase the needed equipment, construct the site, obtain the necessary backhaul, and then integrate the site into the network."[43]

The difficulty of putting up new cell sites, while real, burdens all carriers and is not a special hardship on AT&T.[44] The acceleration in deployment here, if it even exists, is not a public benefit, but merely a private benefit to AT&T since the overall pool of cell sites is not

---

[42] Opposition at 45-46.
[43] Opposition at 58-59, 66-68.
[44] MetroPCS agrees that using additional spectrum to add capacity is an easier path than constructing additional cell sites. The issue, however, is whether the cell site issue is somehow unique to AT&T or the merger gives unique benefits to AT&T – and the answer is no. Any carrier which would acquire T-Mobile would get the same benefits since it would have access to a number of cell sites that it may not currently be located.

expanded and since AT&T proposes to keep for itself any synergies from combining the two sets of cell sites. There is also a risk that AT&T will be acquiring T-Mobile sites it does not need and will opt to withhold them from competitors in order to gain a market advantage. This is a particular concern because, already today, AT&T is the most difficult carrier with whom NTELOS deals in attempting to collocate on cell sites – slow, uncooperative, and unwilling to negotiate even on seemingly minor issues. Moreover, AT&T seems to acknowledge that its own cell site procurement and construction processes are slower and more cumbersome than those of the industry generally. Sprint has stated that "industry averages for new site constructions are from six to twelve months for tower collocations and nine to eighteen months for rooftop installations or new tower sites." AT&T provides no data to refute this but merely states that its own experience is that the process takes much longer.[45] Indeed, AT&T claims that it will take *eight years* to add as many sites if it does not proceed with the merger.[46] But this is hardly the Commission's or the public's fault. Not only would it be unwise to reward AT&T for its *past* inefficiencies, granting it the merger approval without conditions would serve to *perpetuate* these inefficiencies, since sooner or later, AT&T will be forced to add new cells even post-merger.

Another concern that the Commission must have about the merger is the concentration of scarce cell sites in the hands of the combined AT&T/T-Mobile. AT&T admits that it would be difficult for it to co-locate on many of the T-Mobile sites and that is one of the reasons that the merger should be approved. AT&T also admits that many of the T-Mobile sites are not ones in

---

[45] Opposition at 67 note 72, quoting Sprint Petition, Stravitz Declaration at para. 26.

[46] Opposition at 69. AT&T acknowledges that, even with the merger, it cannot integrate all T-Mobiles' sites overnight, but that even the first sites will not be integrated for months and that the process will take "approximately" two years. Opposition at 58. Needless to say, given AT&T's own admission as to the complexity of integrating the T-Mobile sites, this process is likely to take substantially longer than AT&T's rosy scenario.

which AT&T is currently collocated.[47] The other side of the coin, however, is that with AT&T/T-Mobile controlling both the AT&T and T-Mobile sites, AT&T/T-Mobile will now be a dominant player in the site market and may well approach monopsony power in the leasing of cell sites. In previous acquisitions the Commission did not need to consider the level of concentration in the market for the purchase of cell sites. It must do so now given the considerable concentration resulting from the proposed merger.

C. Many of AT&T's Claims of "Benefits" Are Mere Vague Judgment Calls, Which Do Not Justify This Merger.

AT&T does not meaningfully quantify the alleged savings in time and disruption that would result from letting it merge with T-Mobile rather than innovate in the same way that other carriers must. Nonetheless, AT&T seeks credit for having used its "ordinary course of business" methods in developing its pro-merger projections,[48] and for having relied on "well-established cellular technology engineering practices and judgments" based on its engineers' "extensive real-world experience."[49] The problem, of course, as shown in the Petition, is that AT&T has not departed *enough* from its ordinary course of business and its past experience to innovate in the same ways and to the same extent that Petitioners and other mid-tier, regional and rural carriers have done. AT&T huffily denies that "AT&T's engineers have somehow missed the past decade of cellular technology advancements."[50] But, as Petitioners have made clear, AT&T's failure to maximize the efficiency of its existing spectrum is not a reflection on its engineers but a testament to the poor business decisions the company's management has made. AT&T's attempt

---

[47] Opposition at 47-48
[48] Opposition at 24.
[49] *Id.*
[50] Opposition at 8.

to veil these decisions behind a thick cloud of "engineering judgment" should not be countenanced.

At bottom, AT&T's asserted merger benefits boil down to the trivial proposition that, with more spectrum and more cell sites, migration to other technologies can be accomplished faster and more painlessly. The same could be said for any wireless provider, from the smallest to the largest. AT&T has made no showing that its ability to make use of the spectrum to facilitate such migration is so unique as to justify the obvious anticompetitive effects of this merger or constitutes anything other than a private benefit to AT&T.[51]

D. DT's Unwillingness to Fund T-Mobile Is Irrelevant to Whether This Merger Would Be in the Public Interest.

Interestingly, T-Mobile joins with AT&T in making the argument that the demise of T-Mobile as a separate competitor would be no great loss to the market because it will not deploy LTE if the merger does not occur. Applicants do not deny that T-Mobile *could* move to LTE, but merely state that its parent, DT, *does not wish* to fund this effort, having its priorities elsewhere.[52] Their argument here is completely circular: DT does not wish to fund T-Mobile because it "has no clear path to … LTE"[53] – but the reason T-Mobile has no "clear path" to LTE is that DT refuses to fund it. Clearly, DT's self imposed recalcitrance is not a reason for approving this merger: "won't" is not the same as "can't." There are many other ways for T-Mobile to obtain the funding to deploy LTE, whether from venture capitalists, joint ventures, or

---

[51] Similarly, AT&T asserts (Opposition at 72) that entering into commercial arrangements such as roaming agreements or channel sharing agreements would not be adequate to meet AT&T's needs. Ironically, AT&T has no trouble holding up mid-tier, regional and rural carriers such as MetroPCS and NTELOS as major competitors after the merger, when these carriers are by definition dependent on the very types of arrangements that AT&T claims are non-starters for it.

[52] Opposition at 9.

[53] Opposition at 40-41.

use- and revenue-sharing arrangements with other carriers. DT also could sell to a carrier willing to invest that does not raise the serious competitive concerns raised by the proposed AT&T acquisition. In sum, DT's desire to spend its money elsewhere as justification for this transaction is merely a private concern of DT, not a public interest concern.

The Applicants repeat at least fifteen times in the Opposition[54] that T-Mobile has no "clear path" to LTE, indicating the great weight which they put on this point. Significantly, the Applicants do not say that T-Mobile cannot be successful *today* or even in the *future* without LTE. Rather, AT&T focuses on whether T-Mobile has the spectrum *today* to upgrade to LTE *today*. That is the wrong question. The question needs to be whether T-Mobile can effectively compete *today* and in the *future* with its existing networks. The answer is yes. T-Mobile has deployed HSPA+ which has data rates (and capacity) similar to the initial versions of LTE. As the Commission may recall, T-Mobile originally deployed HSPDA and then has subsequently upgraded its network to HSPA+ which gives T-Mobile considerably more data speed (and capacity) than HSPDA. Further, T-Mobile is now marketing its services as "4G" and claims that it has the "largest 4G network."[55] Clearly T-Mobile is not being harmed today by not having LTE.[56] And AT&T repeatedly argues that many consumers cling to older technology even when new technology is superior.[57] If AT&T is right, then T-Mobile will not be at a competitive

---

[54] Opposition at 4, 13, 39, 41, 55, 72, 77 (three times), 142, 156 (twice), 160, and 194.

[55] *See, e.g.*, "T-Mobile Makes America's Largest 4G Network Even Faster by Lighting Up 42 Mbps Speed in Las Vegas, New York and Orlando," http://newsroom.t-mobile.com/articles/4g-smartphone-tablet-network-sidekick-g2x-gslate; http://t-mobile-coverage.t-mobile.com/?cm_mmc_o=Vzbp+mwzygt*-czyEwll*4bpCdAEEwk*4bpCdAEEwk;

[56] Interestingly AT&T ignores the fact that many of its and T-Mobile's customers are perfectly happy to receive only EDGE or UMTS which has considerably slower data rates and capacity.

[57] *E.g.*, Opposition at 32-33.

advantage because its subscribers will similar cling to HSPA+ once AT&T converts to LTE and so T-Mobile will not be at a competitive disadvantage.[58]

Whether T-Mobile has a "clear path" to LTE would be important only if all other carriers' migration to LTE would be smooth, painless, quick and costless. Of course, this is absurd. No carrier has a "clear path" to LTE. All face the same challenges – funding, spectrum, cell sites, engineering, customer migration – that T-Mobile faces (and that AT&T would face but for the merger). Indeed, NTELOS has hit a brick wall in its LTE planning because of lack of spectrum and no promising way of obtaining it. Singling out these Applicants for regulatory relief from these industry-wide challenges would not serve the public interest. AT&T claims, baselessly, that other carriers do not face spectrum constraints, noting among other things a statement on a MetroPCS earnings call allegedly to the effect that MetroPCS has the spectrum it needs "for the next 'two or three years.'"[59] But this statement is taken completely out of context. With its current spectrum holdings, MetroPCS may be to able meet the needs of its existing and projected customer base for its existing services for a period of time, but it may not be able to expand and upgrade its services to stay competitive with a merged AT&T. As noted in the Petition, spectrum limitations already inhibit MetroPCS from offering services to tablets, laptops and other connected devices.[60] Moreover, AT&T sets forth in the Application a six-year

---

[58] Indeed, the differences in speed and capability between HSPA+ and UMTS and EDGE are dramatic and make the point more forcefully. If customers cling to EDGE and UMTS, many will be happy with HSPA+ since the difference in speed and capability of LTE and HSPA+ is substantially less than between HSPA+ and UMTS/EDGE.

[59] Opposition at 129.

[60] Petition at 34. Thus, AT&T's bald claim that "all carriers have access to these devices" (Opposition at 146) is simply false. There very well could be a point in the future that without additional spectrum MetroPCS will have to undertake herculean efforts to keep up with the pace of subscriber usage and MetroPCS doubts that AT&T thinks otherwise. Further, whether MetroPCS needs spectrum in the next year or two is largely irrelevant to the question whether AT&T should be allowed to corner the market on excess spectrum. The Commission has recognized that all carriers need more spectrum and if spectrum were to be assigned based on average holdings, MetroPCS would be first in line.

timetable to roll out its post-merger LTE network. So two or three years would not be an adequate horizon for assessing its competitors' spectrum needs and future competitiveness. Absent the merger, the pressure would be on AT&T to innovate and react nimbly to the marketplace – which would in turn force competitors to act even more nimbly, all to the benefit of consumers and the public. By postponing the day of reckoning for AT&T to face up to these challenges, the merger, if approved without conditions, would affirmatively harm competition and the public interest.

T-Mobile, of course, has the option of deploying LTE by refarming its existing channels just as MetroPCS has done. Indeed, MetroPCS has deployed LTE on channels as small as 1.4 x 1.4 MHz and these channels have delivered speeds (and capacity) at least equal to HSPA+ of similar bandwidths. If AT&T is right that T-Mobile has additional unused capacity that can be used to support AT&T's subscriber's use, that same underutilized spectrum could be devoted to LTE by T-Mobile without the merger To some extent, AT&T may be saying that T-Mobile has made a poor choice of technology by not waiting for LTE – and that may be true. The Commission, however, should not reward the errors of both AT&T and T-Mobile for being late to the LTE party by allowing them to merge when doing so will have a serious negative impact on the public interest.

AT&T makes the unsubstantiated claim that "it is indisputable that a 20 MHz LTE deployment is more spectrally efficient (and therefore improves overall capacity) and provides greater throughput speeds per sector."[61] AT&T is plain wrong; 20 MHz of spectrum is not needed. The data rate (and resulting capacity) are a function of a number of parameters – and

---

[61] Opposition at 55.

spectrum bandwidth is but one of them.[62] For example, whether the radio access network uses single input multiple output ("SIMO") or multiple input multiple output ("MIMO") has a significant effect on data rate (and capacity). Further, whether a carrier uses MIMO Advanced I (2x2 down, 1x4 up), MIMO Advanced II (4x2 down, 1x4 up), or MIMO Advanced III (4x4 down, 1x4 up) will have considerably more effect on data rates (and capacity) than whether the channel is 5 x 5 MHZ or 20 x 20 MHz. Indeed, MetroPCS' analysis shows that the ratio of spectrum to data speeds (and capacity) is a linear one – not an exponential one as suggested by AT&T. For example, based on industry studies MetroPCS' engineers project that a 5 x 5 MHz MIMO Advanced I channel can deliver 12 Mbps down and 10 Mbps up while a 10 x 10 MHz MIMO Advanced I channel can deliver 24 Mbps down and 20 Mbps up. This clearly demonstrates an essentially linear relationship – and the linear relationship continues even on to a 15 x 15 MHz channel. And even in the smaller configurations LTE provides more capacity than AT&T enjoys today for the vast portion of its users on EDGE and UMTS.

E. AT&T Has Failed to Show That Its Purported Expansion of LTE to Cover More of the Population Cannot or Will Not Be Achieved Without the Merger.

AT&T has proclaimed that this merger will be a blessing for the public because it will allow AT&T to cover a larger percentage of the nation's population with 4G LTE services. AT&T asserts that the Commission cannot simply "assume" that, without the merger, AT&T would proceed on its own to expand the deployment of broadband from its current 80 percent planned population coverage projection to the 97 percent it holds out as a benefit of this

---

[62] Other things that affect total network capacity include, *inter alia*, backhaul capacity, cell site density, and whether DAS systems are used.

merger.[63] But AT&T has the burden of proving that the 97 percent deployment is in fact a merger benefit, and it has not satisfied this burden. Indeed, other parts of its argument directly contradict this claim. AT&T claims that only the merger will allow it to expand its footprint in this manner – and even then only when six years have passed[64] At the same time, AT&T claims that the merger is not anticompetitive because AT&T is and will remain subject to vigorous competition from mid-tier, regional and rural (and other) carriers. AT&T cannot claim that it will be vigorously competing with these carriers and at the same time deny that this purported competitive environment would not force AT&T to expand its footprint on its own, even without the merger. Either AT&T is wrong about the continuing viability of such competition -- in which case the merger would have to be denied as anticompetitive -- or it is right, in which case the merger is not necessary to accomplish the purported benefit. AT&T cannot have it both ways.

AT&T has not credibly rebutted Petitioner's argument that the spectrum AT&T would gain from this merger is not necessary to allow it to build-out the remaining 10-17% of the population. AT&T makes only anecdotal showings that it needs the T-Mobile spectrum to build-out rural America. Moreover, AT&T does not address the simple fact that PCS and AWS are

---

[63] Opposition at 89. Free Press noted in its petition that AT&T had as recently as 2009 stated its intent to reach 87% rather than 80% of the US population with LTE, citing a quote to that effect from an AT&T earnings call. Petition to Deny of Free Press ("Free Press petition"), filed herein on May 31, 2011, at 41. In the Opposition at 82 n. 92, AT&T supplies the exact quote to which Free Press refers, in which AT&T had represented that it "would be using our 700 megahertz and AWS spectrum *exclusively* for LTE. This spectrum will cover 100% of the top 200 markets *and 87% of the US population*." Conference Call Tr., Q3 2009 AT&T Earnings, Seeking Alpha (Oct. 22, 2009) (emphasis added), http://seekingalpha.com/article/168288-at-amp-t-q3-2009-earnings-call-transcript. In an amazing attempt at word-mincing, however, AT&T denies that this means what it says, asserting that it meant only that the *spectrum* would cover 87% of the population, not that AT&T would supply LTE to the whole 87%. But since it plainly said that this spectrum would be used "exclusively" to provide LTE, its efforts to interpret away this truth are to no avail – unless AT&T meant that it would simply sit on spectrum that would cover 7% of the population. Regardless, AT&T clearly has the self-admitted capacity with its existing spectrum to cover at least 87% of the population so its suggestion that only the merger will allow it to move above 80% is patently false.

[64] Opposition at 75.

just not suited for widespread rural build-out. The Petition posited the indisputable fact that 700 MHz has a considerably larger coverage area than PCS or EBS/BRS. That being the case, T-Mobile's cache of PCS and AWS spectrum is unlikely to entice AT&T into building out the remaining population of the United States. Indeed, if the merger is approved, the Commission should affirmatively require AT&T to accomplish the promised coverage on a fixed timetable.

F. AT&T's Claims That the Merger Will Add Jobs Are Dubious At Best.

AT&T goes so far as to claim that the merger will add jobs, citing various broad-brush economic estimates of the extent to which, as a general matter, investment results in job growth.[65] According to AT&T, "The Economic Policy Institute ('EPI') recently published an analysis of the job-creating effects of investment.... Applying its analysis to the proposed merger, EPI estimates that the additional investment of $8 billion will result in approximately 55,000-96,000 new jobs, which includes direct jobs, supplier jobs and 'induced jobs.'"[66] But even if these back-of-the-envelope numbers were otherwise valid (and they are far from proven), this is not a merger-specific benefit. Using the same mathematics, AT&T could generate the same benefit by *internal* investment of a mere *one-fifth* of the $39 billion it wants to spend on buying T-Mobile. Or it could invest the entire $39 billion internally and create five times as many jobs without T-Mobile's employees being laid off.[67]

AT&T cannot credibly contend that jobs will not be lost as a result of the merger. From a purely financial standpoint, AT&T contends that the merger will result in more than the $39

---

[65] Opposition at 85.

[66] *Id.*

[67] Of course, such an outcome may not be the best for certain of AT&T supporters, namely the labor unions, since T-Mobile's employees would still not be represented by the labor unions.

billion purchase price in cost savings to the combined entity,[68] and AT&T is not claiming that it will recoup savings of this magnitude without any personnel cuts. There will obviously be redundancy post-merger and there is no question that positions will be eliminated, which is a clear public harm given the bleak unemployment picture in the U.S. The Applicants seek to mitigate this obvious concern by suggesting that most of this job loss will result from not filling positions that are made vacant by attrition.[69] But even if this were factually true, which is doubtful, the fact is that those unfilled positions represent (i) eliminated entry-level jobs that otherwise could be filled by young people new to the job market (or those laid off from other jobs) and (ii) eliminated higher-level jobs that otherwise could be filled from outside or by internal promotion – in the latter case opening up entry-level positions as their holders are promoted. The Applicants' reliance on the attrition argument is little more than an exercise in pulling up the ladder. While reduction through attrition may not result in as much acute pain to identifiable individuals, the harm to the public interest from the net reduction in jobs is very real.

III. THE APPLICANTS HAVE FAILED TO REBUT PETITIONERS' AND OTHER PARTIES' SHOWINGS THAT THE MERGER WILL HARM COMPETITION.

As noted above, when it suits, AT&T has not been shy about trumpeting the *prima facie* dangers of increased market concentration on the scale being proposed here. Yet, in addition to arguing falsely that the harm resulting from this merger will be outweighed by its public interest benefits, AT&T goes so far as to deny that this merger will harm competition in any fashion and claims there is nothing to worry about. In fact, as Petitioners have shown, unless the

---

[68] Opposition at 74-75.
[69] Opposition at 93.

Commission imposes adequate conditions, the merger will harm competition by choking off the ability of all but AT&T and Verizon to compete in this market.

Applicants claim that many entities have argued for years that the wireless market has become a duopoly. This comment attempts to diminish the game-changing nature of this transaction, and quite frankly, is not true. Carriers such as MetroPCS and Leap repeatedly have noted the competitiveness of the wireless industry (and in particular, the market for retail wireless services). But the industry is at a tipping point that this transaction slams to the ground. Approval of this transaction would effectively turn the wireless industry into a duopoly controlled by AT&T and Verizon, and it is significant that this is the first time that many carriers, including MetroPCS, have noted such a fact.[70]

AT&T spends considerable energy denying that the post-merger market will be an AT&T-Verizon duopoly because a "duopoly" is by definition "a [relevant] market in which there are *only two sellers* of a product.".[71] AT&T then seeks comfort in the claim that Sprint and certain mid-tier, regional and rural carriers will still exist following the merger. In fact, of course, a duopoly is an oligopoly market in which there are two *dominant* sellers – sellers having market power, such that other sellers (of which there may be quite a number) are price-takers, not price-makers.[72] Petitioners have shown in detail that by this correct definition, a duopoly will clearly exist after the merger,[73] and Applicants have not materially refuted this showing.[74]

---

[70] What AT&T may be confusing is that the market for *roaming* services today is a duopoly by air interface. The merger will convert the duopoly for GSM roaming into a monopoly.

[71] Opposition at 94, quoting *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 71 n.2 (2d Cir. 2005) (which in turn is quoting *Black's Law Dictionary*) (emphasis added by AT&T); see also Opposition at 9-10.

[72] *See, e.g.,* Areeda & Hovenkamp, IIB *Antitrust Law* 9 (3d ed. 2007): "An oligopoly market is one in which a few relatively large sellers account for the bulk of the output. It may include a 'competitive fringe' of numerous smaller sellers who behave competitively because each is too small individually to affect market prices or output."

[73] Petition at 47-61.

Moreover, Applicants' efforts to prop up the competitiveness of Sprint in order to argue against a wireless duopoly post-transaction do not pass muster. One cannot read Sprint's Petition to Deny and believe that Sprint will be able to play on anywhere close to a level playing field with AT&T and Verizon. Indeed, Sprint, despite being a public company, has conceded that "no divestitures or conditions can remedy [the] fundamental anti-consumer and anti-competitive harms" caused by this transaction.[75] Sprint will have a subscriber base that is less than 20% of the combined AT&T/T-Mobile and Verizon, a spectrum position that includes less spectrum as well as less useable and valuable spectrum than the two new duopolists, and less access to capital than the two new duopolists.[76] Applicants can attempt to prop up Sprint all they want, but the facts are clear – the private merger benefits flowing to a combined AT&T/T-Mobile and Verizon will turn the industry into a duopoly against which no other competitor, not even Sprint, will be able to compete effectively. Without such competition, consumers and the public interest will suffer.

Petitioners also showed that a duopoly will arise not merely because of AT&T's and Verizon's great size but because of their ability to control their competitors' behavior by limiting their access on a cost-effective basis to three inputs which are inherently critical to these

---

[74] AT&T claims that its "arch-adversary" Verizon would never engage in tacit collusion with AT&T to keep prices high, even if the market structure would allow it. Opposition at 15-16. But AT&T and Verizon are rational businesses, not Montagues and Capulets; they are "arch-adversaries" only in the same sense as pro wrestlers. Of course they would do whatever the law and the market structure allow to keep prices high and maximize profits. Their "ubiquitous warring advertisements" (*id.*) no more prove the contrary than did those of Crest and Gleem toothpaste, which were both made by the same manufacturer. *See* http://en.wikipedia.org/wiki/Gleem_toothpaste; http://en.wikipedia.org/wiki/Crest_%28brand%29

[75] Sprint Petition to Deny at i.

[76] AT&T attempts to argue that Sprint's relationship with Clearwire means that Sprint has access to considerably more spectrum than AT&T. What AT&T ignores, however, is that the EBS/BRS spectrum held by Clearwire is not the same as the spectrum that AT&T/T-Mobile will have after the merger. Also, Sprint has reduced its stake in Clearwire below 50% and thus cannot be considered to control this spectrum. Clearwire Corporation, Form 8-K, filed June 8, 2011, http://www.sec.gov/Archives/edgar/data/1442505/000095012311057433/v59385e8vk.htm

competitors' ability to compete. These inputs are *spectrum, roaming* and *handsets.* This problem need not be fatal to the merger *provided that adequate conditions are imposed to prevent the Big 2 from abusing their market position by denying competitors reasonable access to these inputs.* Accordingly, Petitioners showed, the Commission could approve the merger *only if* it imposed the following Necessary Conditions, at a minimum:

- Significant divestitures of paired 700 MHz, 850 MHz, PCS or AWS spectrum prior to any closing of the AT&T/T-Mobile merger to one or more non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow them to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;

- Roaming obligations which would allow carriers which do not have nationwide networks to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and

- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment. [77]

Applicants also argue that the Commission should not impose certain of these conditions because they address issues being considered in other pending proceedings – such as 700 MHz interoperability and handset exclusivity. The Commission should ignore these arguments for a number of reasons. First, the serious concerns relating to 700 MHz interoperability and handset exclusivity are made significantly worse as a direct result of this transaction.[78] This fact alone makes Petitioners' proposed remedies appropriate because, to effectuate them, the Commission would be attaching transaction-specific conditions to fix transaction-specific problems.[79]

---

[77] Petition at iv-v, 67-68.

[78] Petition at 58-61.

[79] The Commission has often imposed conditions regarding issues that were being considered in other proceedings on its approval of transactions. For instance, in its orders approving the Verizon/Alltel and AT&T/Centennial transactions, the Commission conditioned its approval of both transactions on the Applicants in

Moreover, the Commission has an obligation to consider the public interest in a post-transaction world. If, as a result of this transaction, certain negative effects are likely to diminish the public interest, the Commission has the ability, the right and the obligation to mitigate such effects as part of its approval of such transaction. The Commission should certainly do so here. Kicking the can down the road cannot be justified.

In sum, the Applicants have utterly failed to show that the market alone will restrain AT&T from abusing its power to restrain its competitors' access to these critical inputs. Thus, it remains vitally important that the Commission impose the conditions requested by Petitioners, or failing that, block this merger.

A. The Applicants Have Failed to Rebut the Clear Showing That the Merger Will Give AT&T the Ability to use Its Spectrum Holdings in an Anticompetitive Manner.

The Petition showed that AT&T's usable spectrum holdings post-merger would give it a clear lead even over Verizon, and would dwarf those of its other competitors, especially the mid-tier, regional and rural "mavericks" that, according to AT&T, would be its fiercest competitors after the merger. AT&T will be able to leverage these holdings to stifle competition.[80] Other parties made similar showings.[81] In their Opposition, the Applicants attempt by a variety of stratagems to chip away at this stubborn fact, but none of them are successful.

First of all, the Applicants' position here is inherently contradictory. They argue that only by allowing AT&T to amass huge amounts of spectrum, can it effectively compete in the

---

each transaction committing to various roaming requirements – despite the fact that the Commission was considering roaming regulations generally at the time.

[80] Petition at 33-36.

[81] *See, e.g.,* Petition to Deny of Sprint Nextel Corporation ("Sprint Petition"), filed herein on May 31, 2011, at 55-76; Petition to Deny of Leap Wireless International, Inc. and Cricket Communications, Inc. ("Leap Petition"), filed herein on May 31, 2011, at 14-19; Petition to Deny of Rural Telecommunications Group, Inc. ("RTG" Petition"), filed herein on May 31, 2011, at 16-18 and Exh. B.

broadband wireless world. Yet, at the same time, they assert that the mid-tier, regional and rural "mavericks" – which all have far less spectrum than AT&T today, let alone after the merger, but nevertheless are more efficient in their use of this important ingredient– will be able to compete effectively against AT&T. The only way to reconcile these positions is to consider AT&T a "helpless giant" incapable of competing with the much smaller but more nimble mavericks unless the Commission puts a thumb on the scale by giving AT&T even *more* spectrum. That is effectively what Applicants are arguing. They state, for example that (even though its competitors have made do with far less spectrum) the T-Mobile spectrum will give AT&T the "turnaround" time it needs to transition customers and redeploy spectrum.[82] But even if AT&T were a helpless giant, can it possibly be in the public interest to give it ever more spectrum? Better to give it the incentive to become lean and agile, by forcing it first to match, with its existing spectrum, the efficiencies already achieved by its competitors.

The Applicants argue in defense of their position that (i) the post-merger AT&T will have less usable spectrum than is supposed; and/or (ii) its competitors have substantially more and better spectrum than they claim. Neither of these positions withstands scrutiny and, as will be seen, they contradict each other.

AT&T uses several methods to try to cut back its apparent post-merger spectrum holdings relative to its competitors. Foremost among these tactics is its argument that its WCS holdings should be carved out of the analysis because this spectrum currently is "unsuitable" for mobile wireless.[83] Similarly, it argues that the spectrum it concurrently proposes to acquire separately from Qualcomm should not be considered because it is unpaired and current AT&T

---

[82] Opposition at 31.
[83] Opposition at 28-30.

handsets can't use it.[84] AT&T has not shown that these obstacles cannot be overcome or that this spectrum cannot be used to replace other spectrum which can then be repurposed to mobile wireless. But if the obstacles cannot be overcome, why is AT&T buying the spectrum? Its position reduces to the proposition that, because it cannot immediately turn this spectrum to mobile wireless use, it simply doesn't count. AT&T then makes an irreconcilable argument on the other side that spectrum, such as mobile satellite spectrum, should be included in the spectrum screen[85] when a large swath of it currently is not useable as a result of GPS interference issues or because the spectrum currently is in the hands of bankrupt entities.

AT&T's position is untenable. AT&T acknowledges that it will take six years for its LTE plans to come to fruition post-merger. Thus, the relevant time frame for assessing AT&T's holdings in ascertaining the effects of the merger must be this same six-year period, and AT&T has made no showing that the WCS and Qualcomm spectrum cannot be repurposed within that time frame. Thus, this spectrum must clearly count in the analysis.

Certain spectrum also should not be included in any screen – namely all EBS/BRS spectrum and all mobile satellite spectrum.[86] As an initial matter, Sprint makes a credible argument that not all EBS/BRS spectrum should be considered as it is not immediately usable (and may never be usable).[87] Further, a large swath of satellite spectrum currently is under a serious cloud as to whether it will be useable – if ever – as a result of GPS interference issues. Indeed, some have speculated that, of the 59 MHz of spectrum LightSquared plans to make

---

[84] Opposition at 30-31

[85] Opposition at 181-84, 214-15.

[86] Petitioners do agree with AT&T, however, that resale should not be considered a viable substitute for facilities based competition. As a practical matter, the only way a competitor can act as an effective competitive check is to have its own facilities because it will be in the best position to be able to control its cost structure which is what will be required to compete in the future.

[87] Sprint Petition at 63-70.

available to secondary users, perhaps as much as 40 MHz will be "unusable forever."[88] This also means that, although AT&T points to LightSquared as a potential competitive check, it is highly unlikely that LightSquared is able to fill that role now – or even in the future. This is particularly true in light of recent reports that investors are abandoning the private equity fund that is backing LightSquared.[89] Further, the remaining 40 MHz currently is held by bankrupt companies which obviously cannot act a competitive check on AT&T/T-Mobile at present and may never emerge as meaningful competitors, particularly in the near term

AT&T also asserts that certain competitors will have more spectrum than it will have. Notably, it does not claim that the competitors it has singled out as most effective – the mid-tier, regional and rural carriers – are in a preferred spectrum position, because such an assertion would be facially ridiculous. Instead it focuses on Clearwire and MSS carriers such as LightSquared, arguing that their spectrum should be included in the spectrum screen as well as in the general spectrum analysis.[90] But, as is well known, Clearwire lacks funding to develop its network to an extent that would pose a competitive threat to AT&T,[91] and as noted above, LightSquared faces both funding challenges and significant GPS interference issues that may permanently cripple its efforts to use its spectrum to provide terrestrial service. Interestingly, AT&T argues strongly that the Clearwire and LightSquared spectrum would not be useful to AT&T on a leased basis, even though AT&T arguably is in the best possible position to benefit

---

[88] "LightSquared Report Expected to Warn of Widespread Interference," Communications Daily, June 15, 2011, at 1-2; "Wireless Carriers Disagree on LightSquared Threat," Communications Daily, June 16, 2011, at 1-2.

[89] *See* Shira Ovide, *Investors Seek to Pull $1 Billion from Hedge Fund*, The Wall Street Journal, June 8, 2011; Shira Ovide, *Phil Falcone's Endless LightSquared Headaches*, The Wall Street Journal, June 8, 2011.

[90] Opposition at 186-88.

[91] *See* Amy Thomson, *Clearwire Cash Shortfall May Prompt Retail Retreat*, Bloomberg, Dec. 16, 2010, *available at* http://www.fiercewireless.com/story/sprint-cfo-remains-noncommittal-clearwire-funding-hints-lte/2011-05-24; *Sprint CFO Remain Noncommittal on Clearwire funding, hints at LTE*, FierceWireless, May 24, 2011, *available at* http://www.fiercewireless.com/story/sprint-cfo-remains-noncommittal-clearwire-funding-hints-lte/2011-05-24.

from this spectrum because it is much further along in every developmental respect than those two companies.[92] If anything, AT&T's attempt to put this spectrum on its competitors' side of the ledger is far flimsier than the case for including both WCS and the Qualcomm spectrum on AT&T's side.

B. Even if AT&T Can Achieve a "Spectrum Dividend" by the Merger, the Public Interest Will Not be Served Unless that Spectrum Dividend is Divested in a Manner That Assures the Continuing Viability of Competitors in the Marketplace.

AT&T asserts that the additional spectrum it will gain from the merger will be leveraged further because resulting efficiencies will free up even more of AT&T's existing spectrum. It claims that such gains are the functional equivalent of brand-new spectrum:

> [E]stablished engineering principles and the real-world experience of the engineers running AT&T's network demonstrate that the transaction will enable AT&T to effectively double the capacity in the thousands of areas in which it can engage in cell-splitting due to the integration of T-Mobile USA's sites; free up significant capacity due to the elimination of redundant control channels that currently occupy 4.8 to 10 MHz of spectrum; increase capacity by another ten to fifteen percent as a result of channel pooling; and enable spectrum utilization efficiencies throughout the country, including in markets where AT&T confronts significant capacity constraints. Moreover, these gains will be multiplied on a network-wide basis as they permit AT&T to redeploy spectrum to more spectrally efficient technologies: for every MHz of spectrum that no longer needs to be used for GSM and can be redeployed for UMTS as a result of the synergies produced by the transaction, AT&T will not only gain that 1 MHz, but also will be able to use that 1 MHz with enormously greater efficiency.[93]

In short, AT&T claims, "combining the two networks will create new capacity"[94] and "generate the functional equivalent of new spectrum."[95]

---

[92] Opposition at 73. AT&T claims in part that this is true because of the lack of interoperability of its existing handset base. But given all the obstacles that AT&T has thrown up to the achievement of interoperability in this industry (Petition at 60-61), it cannot now be heard to complain that it is prejudiced by the lack of interoperability.

[93] Opposition at 57.

[94] Opposition at 61.

[95] Opposition at 180.

The Petitioners doubt AT&T's grand claims that the proposed merger will in fact yield such benefits. AT&T has not adequately explained the basis of its analysis and whether the analysis truly holds across all of its network. For example, AT&T makes much of its queuing argument to the effect that serving all customers in a single queue is more efficient than serving them in different queues. This argument ignores the fact that many key sites in both networks – usually those in congested downtown areas and major intersections in major metropolitan areas – may be congested simultaneously, thus limiting access. Having a single queue makes no difference when sites are saturated and no additional calls may be placed.[96] In effect, the efficiency gains that AT&T claims exist as a result of the proposed merger would the use of require significant amounts of now-underutilized spectrum to be achieved. But if T-Mobile's networks are not fully loaded then T-Mobile should be able to upgrade to LTE without the merger.

Finally, Petitioners are certain that many of AT&T's problems stem from its continued use of GSM. AT&T has not explained how its ability to take spectrum out of one cell site and use it in another cell site in fact works when technologies such as GSM require strict reuse patterns. All of this leads inescapably to the conclusion that AT&T's projected efficiencies are more illusory than real and need to be supported in the record by hard technical studies.

Even if AT&T's claims were correct, AT&T still has not shown why it alone should be allowed to keep all the capacity gains from this transaction, especially when (i) history shows that AT&T repeatedly has failed to make as effective use of spectrum as its competitors; (ii) allowing AT&T to reap all the benefit of this "spectrum dividend" would unfairly tilt the

---

[96] Of course if one carrier's site is underutilized and the other carrier's site is not, roaming and network sharing arrangements might solve the problem and the proposed merger is not required.

competitive playing field in AT&T's favor; and (iii) AT&T's duopolist status following the merger will ensure that it does not have to pass these efficiency gains through to consumers. In other contexts when a licensees' use of spectrum is made more efficient though rebanding or the Commission wants spectrum to be used more efficiently, the Commission does not leave the spectrum efficiency dividend with the original licensee – but rather insists that the spectrum dividend come back to the public. Here, the public interest demands that the merger be conditioned in a manner that ensures that any spectrum dividends are shared by the public as a whole, not just by AT&T. The Petition contains the kind of divestiture conditions that are necessary to ensure this outcome. What is required is significant spectrum divestitures *prior to closing* of *paired* 700 MHz, 850 MHz, PCS or AWS spectrum to the *non-national carriers*, in *sufficient amounts* to allow the remaining non-national carriers to have adequate spectrum to be an *effective competitive check* on the combined AT&T/T-Mobile for all of the services which will be or could be offered by the combined AT&T/T-Mobile.[97]

Note that *all* of these elements are essential for divestitures to serve their intended purpose. AT&T argues that it should be allowed to close this merger first, then divest later,

---

[97] The transaction documents governing the AT&T/T-Mobile transaction specifically recognize the inevitability of spectrum divestitures by allowing such divestitures to be ordered without enabling either party to walk away from the deal. And, AT&T's CEO has referenced that Applicants are likely to have to divest certain spectrum assets in order to receive approval of this transaction. *See, e.g., http://www.intomobile.com/2011/03/30/att-may-forced-divest-select-assets-tmobile-deal* (Mar. 30, 2011); "AT&T Sees Some Trade-Offs," Wall Street Journal, March 31, 2011, http://online.wsj.com/article/SB10001424052748703806304576232500013208770.html; "AT&T braces for divestitures on T-Mobile deal," Chicago Tribune, June 15, 2011, http://www.chicagotribune.com/business/breaking/chi-ceo-att-will-likely-have-to-sell-assets-to-win-ok-to-buy-tmobile-20110615,0,4627136.story.

Nonetheless, despite specific calls for divestitures by multiple commenters, Applicants have failed to be forthcoming regarding the nature and extent of the divestitures it is willing to accept. Despite the fact that anything Applicants are willing to accept may not match what DOJ/FCC determines to be in the public interest, Applicants, and all parties, would be better served if Applicants came clean with a proposal sooner rather than later. In light of this "hide the ball" approach, Applicants should never be heard to complain that the approval process is taking too long.

perhaps many months or even years later.[98] But if the non-national competitors are to provide the competitive check that AT&T claims they will provide, one or more of them needs to receive this spectrum no later than the same time that AT&T receives its spectrum – i.e., at closing – not 18 or 24 months later. Otherwise AT&T will obtain a headstart that will enable it to establish an unassailable competitive beachhead. The Commission must adopt a "fix it first" approach here, not a "close now, fix it (much) later" approach.[99]

Similarly, the spectrum divestiture must be of immediately usable prime cellular, PCS or AWS spectrum. Otherwise, AT&T will achieve the same headstart that it would achieve by simply delaying the divestiture. As AT&T and others have shown, not all spectrum is created equal. AT&T has made the case that WCS is not currently useable for mobile wireless services. AT&T should not now be heard to claim that it can divest that spectrum to meet any merger divesture requirement. Further, AT&T argues that the unpaired 700 MHz spectrum it is obtaining from Qualcomm should not be taken into account since it is not readily useable. The Petitioners believe it should nonetheless be taken into account in the screen, but AT&T should not be able to claim that it can divest that spectrum to meet any divesture requirement.

Finally, the divestiture must be to existing carriers with proven competitive track records. New entrants cannot hope to deploy the spectrum in a timeframe that will allow them to overcome AT&T's headstart. Of course, AT&T tries to make much out of the fact that the Petitioners' merger conditions seem to favor them. That should not be a surprise since it is AT&T who identify Petitioners as "mavericks" and claims that the proposed merger should be

---

[98] Opposition at 207 fn. 409.

[99] The wireless industry has a phrase in connection with cell to cell handoff which is appropriate here: "make before break". AT&T should be required to fix the competitive problems which will result from the propose merger *before* it is allowed to consummate it.

approved since they will act as a competitive check on AT&T/T-Mobile. AT&T clearly has no idea what it is like to be in Petitioners' shoes – fighting day in and day out in a marketplace where the national carriers' financial and spectrum resources dwarf our own. There is nothing AT&T/T-Mobile would like more than to have divested spectrum languish, and then ultimately end up in the hands of an unproven competitor with no market experience. The Petitioners' recommendation merely takes seriously AT&T's claim that the Petitioners are successful, competitive "mavericks." In order to fill that role post-divestiture, the mavericks need access to spectrum and to the other necessary inputs (roaming and handsets) that have identified. AT&T seeks to use Petitioners as a competitive foil to garner approval the proposed merger; therefore, AT&T should not be heard to complain these same "mavericks" should not be given priority access to divested spectrum and access to the other necessary inputs in order to ensure that AT&T passes through to consumers the efficiency gains resulting from the merger. And the divestitures must be to non-national carriers, not to Verizon, in whose hands the spectrum would further consolidate rather than dilute the power of the duopoly.[100] Only with these specific features can a divestiture condition achieve its intended goal of reducing the competitive harm that otherwise will result from the merger.

---

[100] AT&T argues conclusorily that that Commission should not limit the pool of potential spectrum purchasers in this manner, leaving it entirely to the "market" to decide. Opposition at 207-08. Unfortunately, the effect of this merger will so skew the market that a failure to adopt these limits will only increase, not alleviate, the competitive harms resulting from the merger.

C. The Applicants Have Failed to Show That Conditions Are Not Necessary to Prevent the Merger from Having an Anticompetitive Impact on the Roaming Market.

Petitioners have shown that AT&T and Verizon are the only feasible outlets to provide the nationwide roaming service that mid-tier and regional carriers absolutely need to survive.[101] Petitioners and others have further shown that both AT&T and Verizon have a long history of squeezing competitors in ways that prevent them from offering nationwide roaming to their customers in a cost-effective manner.[102] The Applicants themselves emphasize that the smaller carriers on whose competition they rely to justify the merger "compete in the same product market as larger wireless providers, offering service plans with nationwide coverage and limited (if any) retail roaming charges."[103] As to MetroPCS, they stress that "many providers that market services only in some geographic regions – such as U.S. Cellular, MetroPCS, Leap, Cincinnati Bell, and Cellular South – nonetheless offer nationwide coverage, generally without retail roaming fees in areas covering most of the U.S. population."[104] All of this is in furtherance of their attempt to show that these carriers will continue to be strong competitors with AT&T post-merger. But plainly, if AT&T (and its co-duopolist Verizon) are allowed to charge roaming partners rates greatly in excess of cost/wholesale rates – or saddle them with anticompetitive restrictions – the ability of these carriers to compete will be short-lived.

AT&T argues in response that, because it and T-Mobile do not offer CDMA services, the merger can affect only other GSM-based carriers.[105] But AT&T ignores that, if a carrier such as

---

[101] Petition at 54-57.

[102] *Id.; see also, e.g.,* RTG Petition at 21-22, 25; Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications ("CBW Petition"), filed herein on May 31, 2011, at 15-21; Leap Petition at 20-23.

[103] Opposition at 11.

[104] Opposition at 107-08.

[105] Opposition at 155-56.

MetroPCS could obtain interoperable handsets, it would be entitled under the *Data Roaming Order* to obtain 4G HSPA+ services on T-Mobile's network but for AT&T's announced plans to shut down T-Mobile's network.[106] Thus, the merger will directly impact MetroPCS' ability to obtain roaming services. Also, roaming obligations will have a significant beneficial impact as the market continues to evolve to LTE services and the traditional CDMA/GSM technical dichotomy fades.

AT&T also asserts that the Commission need have no fear that it will price roaming services at anticompetitive levels because the *Data Roaming Order* requires it to provide roaming at "commercially reasonable" prices.[107] Unfortunately, this standard is as yet untested and, thus provides no real comfort. Any notion that the "commercially reasonable" standard can be relied on to protect competition after the merger vanishes because, as AT&T acknowledges, *whatever rates AT&T/T-Mobile sets* become the only market benchmark for what is reasonable.[108] Perversely, AT&T argues that this rate should prevail even where it grossly exceeds AT&T's cost of providing the service, and even where it is a large multiple of AT&T's *retail* rate for the same service.

According to AT&T, this is all perfectly reasonable because it is a net buyer of roaming services today.[109] The true significance of AT&T being a net buyer is that it should never be heard to complain about a Commission requirement that it provide roaming at a cost-based rate since it would benefit in any reciprocal roaming deal. Of course, as the Applicants' Public

---

[106] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 (2011). Again, AT&T's constant resistance to the development of interoperable handsets cannot now be used as a defense to its obligation to provide roaming services at reasonable rates and terms.

[107] Opposition at 159.

[108] *Id.*

[109] Opposition at 157-58.

Interest Statement itself shows,[110] AT&T purchases a large amount of roaming services from T-Mobile, so the (doubtful) extent to which this factor might be thought to restrain AT&T's roaming pricing would dissipate in any event post-merger. But as for the cases in which AT&T is a net seller or is even a seller only and not a buyer at all (as Cincinnati Bell has indicated is its own situation[111]), this factor does nothing to prevent AT&T from squeezing competitors.[112]

The amount of traffic AT&T is sending and receiving from its roaming partners today may be a function of its less than enlightened roaming policies and the nature of the carriers with which it has chosen to enter into agreements. For example, AT&T may be a net payer on roaming today because it has chosen to enter into arrangements whereby it purchases roaming from carriers, unlike the Petitioners, who largely do not overlap with AT&T coverage. It is very likely that, if the major mid-tier carriers signed roaming agreements with AT&T/T-Mobile, the payments from the mid-tier carriers to AT&T/T-Mobile would far exceed what AT&T has to pay today to its existing roaming partners.

AT&T also argues that using cost or retail rates as a benchmark would "embroil the Commission in complex ratemaking proceedings." This too is a red herring. It would be straightforward to set a benchmark that roaming rates can be no higher than retail rates, since by definition the cost to AT&T to provide roaming is *less* than that of providing retail services. Indeed, the Commission could easily adopt a presumptive discount off retail rates to reflect these cost differences and allow AT&T to overcome this presumption by an appropriate showing.

---

[110] *See* Declaration of William H. Hague to Joint Opposition, at ¶ 7.

[111] CBW Petition at 19.

[112] AT&T suggests that it is often a net buyer even with smaller carriers because its much larger customer base compensates for the fact that the geographic area in which it must buy roaming is much smaller than that in which it sells roaming. While mathematically this may be the case, in these instances AT&T can absorb a high roaming rate and still not raise its own rates, since it is spreading these minutes over many more customers than the smaller carrier, who must pass through the higher rates or lose money.

This is exactly what the Commission did in the context of resale services under the Telecommunications Act of 1996. The Commission started with the retail rates for services the incumbent local exchange carrier ("ILEC") offered and reduced them by a fixed percentage which was meant to address the marketing and sales costs which the ILEC avoided through resale. Alternatively, since today every carrier reports (or is capable of calculating and reporting) its cash cost per user (CCPU), the Commission could take a bottom-up approach and provide that the rate per minute should be the CCPU (on a per minute basis) plus a fixed percentage margin. Indeed, in the Commission's data requests issued in this proceeding, it seeks data from certain carriers, including AT&T and T-Mobile, and could easily request further data on AT&T's and T-Mobile's CCPU (to the extent it has not already done so) which could readily form a basis for such a benchmark.

AT&T's silliest argument is that setting rates in this fashion would "give carriers incentives to free ride on other carrier networks and thus refrain from making their own broadband initiatives."[113] The purchase of roaming service at cost-recovering rates can hardly be said to be "free riding." As for the disincentive argument, AT&T has argued at length that non-national carriers are strong competitors for the *very reason* that they can use roaming in lieu of building out nationwide networks. AT&T cannot have it both ways – it cannot use the mid-tiers carriers as support for the proposed merger and then deny the very essential inputs that these carriers need to compete. Its argument here is also absurd because, as AT&T cannot help but admit, carriers like MetroPCS have in fact beaten AT&T to market with LTE. Any concern that

---

[113] Opposition at 160.

they would be disincented from continuing this effort by receiving cost-based roaming rates is nonsensical.[114]

IV. CONCLUSION

Petitioners showed – and the Applicants have failed to refute – that AT&T's acquisition of T-Mobile, if allowed to proceed without stringent, meaningful conditions, would be extremely detrimental to the public interest. Meaningful conditions are vitally necessary to prevent the re-establishment of the wireless duopoly, which would allow AT&T and Verizon to choke off the remaining competition in this market. As a result, prices would rise, and quality and innovation would decline. Accordingly, if the Commission allows the proposed merger to proceed, the Commission must condition the proposed merger on the following Necessary Conditions, at a minimum:

- Significant divestitures of paired 700 MHz, 850 MHz, PCS or AWS spectrum prior to any closing of the AT&T/T-Mobile transaction to one or more non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to provide an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;

- Roaming obligations which would allow carriers which do not have nationwide networks to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and

- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment.[115]

---

[114] The Opposition is dotted throughout with factual misrepresentations regarding MetroPCS in addition to those called out above, which would require more words to refute than they are worth. For example, Applicants assert (Opposition at 195-96) that MetroPCS is a vigorous competitor in the business market with its ChatLINK service. But MetroPCS has discontinued ChatLINK and does not market its services to business customers in any way.

[115] Petition at 6-7.

If the Commission is unwilling or unable to impose such Necessary Conditions, it must deny the applications.

Respectfully submitted,

/s/ Jean L. Kiddoo

Jean L. Kiddoo
Patrick J. Whittle
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, DC 20006-1806
Tel: (202) 373-6034
Fax: (202) 373-6001
Email: jean.kiddoo@bingham.com
patrick.whittle@bingham.com

Counsel for MetroPCS Communications, Inc. and NTELOS Inc.

Mark A. Stachiw
General Counsel, Secretary, and Vice Chairman
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082

Mary McDermott
Senior Vice President-Legal and Regulatory Affairs
NTELOS
401 Spring Lane
Waynesboro, VA 22980

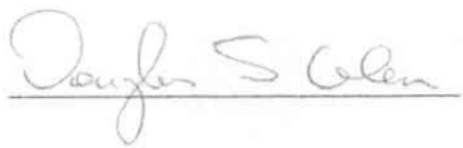
Dated: June 20, 2011

VERIFICATION

I, Douglas Glen, declare that I am Senior Vice President - Corporate Development for MetroPCS Communications, Inc.; and that the facts set forth in the Reply of MetroPCS Communications, Inc. and NTELOS, Inc. to Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, except for statements uniquely pertaining to NTELOS, Inc., are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20, 2011



VERIFICATION

I, James A. Hyde, declare that I am the Chief Executive Officer for NTELOS, Inc. and that the facts set forth in the Reply of MetroPCS Communications, Inc. and NTELOS, Inc. to Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, except for statements uniquely pertaining to MetroPCS Communications, Inc., are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20, 2011

REDACTED - FOR PUBLIC INSPECTION

SERVICE LIST

I, Kimberly A. Lacey, hereby certify that on this 20th day of June 2011, I have caused a copy of the foregoing Reply of MetroPCS Communications, Inc. and NTELOS Inc. 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, as specified, upon the parties listed below:

Peter J. Schildkraut Kate Dumouchel Arnold & Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter.schildkraut@aporter.com kate.dumouchel@aporter.com *Outside Counsel to AT&T Inc* **(Via Electronic Mail - Redacted Version)**	Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com *Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.* **(Via Electronic Mail - Redacted Version)**
Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov **(Via Hand Delivery - Confidential Version)** **(Via Electronic Mail - Redacted Version)**	Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov **(Via Electronic Mail - Redacted Version)**
David Krech, Policy Division International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 david.krech@fcc.gov **(Via Electronic Mail - Redacted Version)**	Jim Bird, Office of General Counsel Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 jim.bird@fcc.gov **(Via Electronic Mail - Redacted Version)**
Best Copy and Printing, Inc. 445 12th St., S.W. Washington, D.C. 20554 FCC@BCPIWEB.COM **(Via Electronic Mail - Redacted Version)**	

/s/ Kimberly A. Lacey
Kimberly A. Lacey