Written Statement of
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Before the
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Subcommittee on Intellectual Property, Competition, and the Internet
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Hearing on
"*How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?*"

INTRODUCTION

Chairman Goodlatte, Ranking Member Watt, and members of the Subcommittee, Chairman Smith and Ranking Member Conyers, my name is Andrew Gavil and I am a professor at the Howard University School of Law where I have taught Antitrust Law since 1989.[1] Thank you all for this opportunity to offer my views on the competitive issues posed by the proposed acquisition by AT&T Inc. of T-Mobile USA, which is now being reviewed by the Antitrust Division of the Department of Justice and the Federal Communications Commission. As the Subcommittee is well aware, few industries are likely to be as important to our national economic, social, and political health in the twenty-first century as wireless telecommunications. As we migrate as a nation towards ever greater reliance on increasingly sophisticated and capable mobile communications devices and platforms, we need to carefully scrutinize efforts like this one to significantly alter the shape of that industry through the merger of two of its leading firms as opposed to internal expansion and innovation. Will the merger enhance the

[1] For complete biographical information and curriculum vitae, see: http://www.law.howard.edu/418. By way of disclosure, I do not represent any party with an interest in the proposed AT&T-T-Mobile merger and have not received any remuneration or other support in return for preparing this Statement.

competitiveness of this field, producing lower prices, higher quality, and robust innovation, or will it increase the incentives of the merging firms and other firms in the industry to exploit consumers, impair rivals, and stunt the growth and advancement of the industry?

These are not simple questions. Making a prediction about the likely future competitive consequences of a merger is challenging, especially in the case of such large-scale mergers in technologically sophisticated industries. The costs and consequences of error may be high if due to a challenge the merger is abandoned and consumers are denied real benefits. On the other hand, lack of a challenge when warranted may subject consumers to years of higher prices and reduced innovation owing to the loss of a vital and leading competitor that the agencies and the Congress will be powerless to resurrect.

Merger analysis under both the competition-focused framework used by antitrust agencies and the broader "public interest" standard used by the FCC is fact intensive and necessarily begins with in-depth review of often vast quantities of material provided by the merging parties and their rivals. These are all sophisticated, but also quite obviously self-interested firms, and they will be inclined through their respective armies of lawyers, lobbyists, and economists to present their cases in the most favorable light, painting potentially exaggerated pictures respectively of enormous costs or benefits for consumers. Your task, as is the task of the agencies, is to separate the wheat from this considerable mound of self-interested chafe. The necessary investigation, therefore, must probe beyond the more obvious, publicly available information and prepared statements of industry participants, to include the internal strategic planning documents and communications that can more clearly illuminate the parties' goals and the likely effects of the transaction. It will also be necessary, as is evident in today's Hearing, to

go outside the merger candidates and their rivals to talk to customers, suppliers, and advocates of various interest groups.

Without access to the full range of information necessary to a fully informed analysis, I cannot as I sit here today offer you a confident professional opinion as to whether the merger will likely or not prove to be a violation of Section 7 of the Clayton Act, a boon to consumers, or perhaps even an event of little or no durable competitive consequences. My goal is far most modest. In my brief time, I hope that I can help to identify some of the critical questions this Subcommittee's members may want to pose in reaching your own conclusions.

I will confess, however, that I am deeply concerned that the proposed merger presents very substantial risks of anticompetitive effects across multiple dimensions of competition in what can only be viewed as an awesomely strategic and already highly concentrated industry. While AT&T and T-Mobile have begun to make their case that consumers will realize benefits from the merger, the assertions are as yet unsubstantiated. Hence, the question I am asking myself, and the one I urge you to ask as well, is this: "Why would we want to take the risk?" To explain, my remarks will focus on three points:

- The competition issues raised by the proposed acquisition are obvious, substantial, and wide-ranging, and cannot be analyzed solely through the lens of local consumer markets;
- The public justifications offered to date by AT&T and T-Mobile are vague, do not sufficiently address the likely competitive concerns raised by the merger, and may be based on strategies that the parties could well pursue now without the merger; and
- A negotiated, regulatory fix between AT&T and the federal agencies seems unlikely to be adequate to address the merger's competitive problems and will return an important segment of the telecommunications industry to the kind of ad-hoc, judicially managed regulatory approach that the Telecommunications Act was intended to supplant.

I. DISCUSSION

A. The Competition Issues

The first and most fundamental question to ask in merger analysis is: "*What is the probability that the proposed acquisition will be 'anticompetitive'"*? For the overwhelming number of mergers and acquisitions consummated each year in the U.S., the answer to this question is "it can't," largely because the merging firms lack the power to affect prices or other dimensions of competition. To be anticompetitive, a merger must involve firms that have some degree of "market power" or the hope of establishing it through the merger. Consistent with the case law, the Horizontal Merger Guidelines issued jointly last summer by the Antitrust Division of the Department of Justice and the Federal Trade Commission thus take the position that: "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[2] As they go on to explain: "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[3]

The focus of the competitive effects evaluation of AT&T's bid to acquire T-Mobile, therefore, should not only be the immediate impact of the merger on conditions facing consumers, such as price, type, and quality of voice and data services, but must include the longer term implications of the merger for innovation in telecommunication services, handsets, mobile device operating systems, software applications, chipsets, and screen technologies, as well as transmission and compression technologies. AT&T, T-Mobile, Verizon, and Sprint, are

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[2] *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES §1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html (hereinafter "Horizontal Merger Guidelines").

[3] *Id*.

not just service providers, they are the principal conduits through which all of the extraordinary technological advances in this industry flow and are delivered to various categories of consumers, such as individuals and enterprise clients. Their smaller rivals simply do not perform that gateway function, at least not to the same degree.

How then can a merger be "anticompetitive"? A merger can be anticompetitive because it makes it easier for all of the firms in an industry to coordinate their pricing or other competitive behavior ("coordinated effects"), because it permits the merged firm alone profitably to raise price or otherwise restrict competition ("unilateral effects"), or because it makes it profitable for the merged firm or other firms to impair the opportunities of rivals to compete on the merits ("exclusionary effects").[4] All three theories of anticompetitive effect share a common focus on the incentives of the firms and how they might be influenced by the merger. In the case of AT&T's proposed acquisition of T-Mobile, there are important questions to ask about all three kinds of potential adverse effects.

Historically, courts and agencies have presumed that anticompetitive effects become increasingly likely as the concentration in an industry reaches very high levels. Today, although the analysis of a merger goes well beyond a simple calculation of market shares before and after a deal,[5] market shares remain an important benchmark of most merger analyses because

[4] *See, e.g.*, ANDREW I. GAVIL, ET. AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 434 (2d ed. 2008). Although the Horizontal Merger Guidelines focus primarily on coordinated and unilateral effects, *see* HORIZONTAL MERGER GUIDELINES §§ 6 & 7, they acknowledge that "[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct." *Id*. at §1.

[5] The agencies might look, for example, at evidence of the effects of previous mergers in the industry, of the effects of recent entry or exit of firms, at variations in pricing and other dimensions of competition in different regions or with respect to different kinds of customers, and the disruptive role of "maverick" firms, which tend to stir up competition in some industries. *See* HORIZONTAL MERGER GUIDELINES §2.1.

"[m]arket shares can directly influence firms' competitive incentives."[6] Under the Horizontal Merger Guidelines, a merger that reduces the number of principal players in an industry from 5 to 4, the equivalent of a Herfindahl-Hirschman Index of 2500, results in a "highly concentrated" market and raises substantial competitive concerns.[7] Likewise, the courts have concluded that a 3-2 merger can rarely, if ever be justified.[8] So from the point of view of competitive effects, however one defines the markets involved here, AT&T's acquisition of T-Mobile is squarely within a zone of high concern.

Finally, because merger analysis is not complete with an analysis of the likely impact of the merger on the merging firms, we must also look to the industry, specifically its likely state after the merger. An important and obvious question is whether this will in fact turn out to be a "4 to 3" merger or whether it will in reality be a "4 to 2," because Sprint Nextel will be so marginalized that its effectiveness as a competitor – even if it remains viable as one – will be compromised. Will it be a competitive peer of Verizon and AT&T? It will also be important to evaluate the impact of the merger on conditions of entry in the industry, which are already difficult. Will anything about the merger further increase existing barriers to entry, or create new ones, such that the likelihood of supply responses to higher prices or other kinds of diminished competition will go unchecked?

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[6] *Id*. at §5.

[7] "Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." HORIZONTAL MERGER GUIDELINES §2.1.3; "Mergers resulting in highly concentrated markets [defined as having an HHI of 2500 or more] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id*. at §5.3.

[8] *See, e.g., FTC v. H.J. Heinz Co*., 246 F.3d 708 (D.C. Cir. 2001).

With this overall framework in mind, I turn to four more specific issues that warrant careful consideration in the antitrust analysis of the proposed acquisition.

1. Price, Quality and the Proper Use of "Market Definition"

Whenever two direct competitors merge, the immediate and most obvious question is whether the merger will lead to higher prices or some other incident of reduced competition such as lower quality services. This will be an important focus of the agencies' evaluation of the instant merger given the degree of direct competition between AT&T and T-Mobile and the very high level of concentration. Essential questions will include whether the merger is likely to make it easier for the merged firm to coordinate its pricing and other competitive decisions with its principal rivals, Verizon and Sprint Nextel.[9] Will it lead these firms collectively to compete less aggressively? Another important area of inquiry will be whether AT&T and T-Mobile sell differentiated products that are especially close substitutes for one another, either for specific customers or in specific geographic areas, such that T-Mobile currently acts as a constraint on AT&T's pricing. This might suggest that a pre-merger effort to raise price that might not have been profitable could become profitable post-merger, because AT&T could recapture the customers that it likely would have lost to T-Mobile prior to the merger.[10]

These two scenarios focus on the most immediate potential consequences for consumers of wireless voice and data services, but they are not the sole areas of competitive concern. AT&T and T-Mobile also buy and sell other products and services that could be affected by the

[9] For a more complete discussion, see HORIZONTAL MERGER GUIDELINES §7.2. A related question will be whether the industry already exhibits signs of coordination, as was recently alleged in a private antitrust case. *See In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010).

[10] This scenario describes one kind of "unilateral effects". *See* HORIZONTAL MERGER GUIDELINES §7.1.

merger. It is important to also ask, therefore, whether the merger will alter AT&T's incentives (and Verizon's) in its dealings with its smaller rivals, with whom it negotiates interconnection agreements for its wired lines as well as wireless roaming agreements that today facilitate rivalry. Here the concern is the future incentive to engage in *exclusionary conduct*. Will the merged firm be in a position to impose additional costs on its rivals that might enhance its own profitability?[11] AT&T's assertion that the merger will permit T-Mobile's customers to have access to the latest and best devices, such as the iPhone and iPad, which are currently distributed by AT&T but have been denied to T-Mobile, is an indirect admission that it is already difficult for smaller providers to compete effectively for the latest equipment. How will the merger affect that and other incentives for AT&T and Verizon in the future?

And what of the merged firm's incentives with respect to handset manufacturers, mobile operating system and applications developers, and manufacturers of cell towers – the full range of firms with whom AT&T and T-Mobile currently interact? Are any of those firms concerned about the consequences of the merger and the prospect of the combined firm's potential as a "power buyer"?[12] Their choices in seeking to market new products and technological innovations could be severely curtailed.

As a response to these kinds of questions, AT&T has sought to focus discussion on "market definition," arguing that city-by-city analysis should be used to judge the effects of its acquisition of T-Mobile. Its primary argument for such an approach is that market power must

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[11] Concerns about the exclusionary effects of mergers were recently on display in the Department of Justice's review of the Comcast-NBC/Universal deal and in Google's acquisition of ITA. For an explication of the economic analysis of exclusion that was undertaken in Comcast, see Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, ANTITRUST, Spring 2011, at 36.

[12] HORIZONTAL MERGER GUIDELINES §12.

be judged in terms of buyer substitution – "what choices are available to consumers in the event of a price increase?" AT&T appears to believe that more choices than just "the big four" are available to consumers in some localized markets, and hence the case for market power will be weakened if assessed in that context. Implicit in this approach is that any severe "local" competitive problems can be cured through "slice and dice" localized divestitures. These arguments should be scrutinized carefully.

First, based on the localized data prepared each year by the FCC, many of the leading local areas of service are already significantly or highly concentrated. So it is not clear that limiting the inquiry to localized competition will significantly alter the statistical analysis.[13] Moreover, even if the relevant *geographic markets* are local, the "*product*" being sold by AT&T and T-Mobile may be national and international wireless service. We have all seen the advertising campaigns with accompanying maps touting the breadth of AT&T and Verizon's coverage. Yet nationwide wireless coverage is something that their smaller rivals cannot offer absent interconnection and roaming agreements with their larger rivals. So the "local market" argument may tend to distort, not aid, the competitive effects analysis, because those local options may not constrain the pricing of national service providers like AT&T.

This may be an instance where the pre-merger internal documents of the merging parties are more revealing than their after-the-fact public statements, which have been crafted to make

[13] The most recent FCC annual review of competition in the industry concludes that levels of concentration are already very high in many regions of the country and have been steadily increasing. *See* FEDERAL COMMUNICATIONS COMM'N, 14TH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES §C2 (May 20, 2010), *available at* http://www.fcc.gov/reports/commercial-mobile-radio-services-cmrs-competition-report-14th-annual. According to a Wall Street Journal analysis based on 2008 FCC data, the wireless service markets in ten leading U.S. geographic areas accounting for nearly 87 million subscribers are already highly concentrated. *See* Spencer E. Ante & Roger Cheng, *The Changing Telecom Landscape: Wireless Deal Dials Up Worries*, WALL ST. J., Mar. 22, 2011, at B4.

their case for the merger. While it is relatively easy in the heat of battle to imagine all kinds of peripheral rivals that constrain one's pricing, the internal documents, advertising campaigns, and other more objective evidence will tell the fuller story of which firms constrain AT&T pricing.[14] Those documents may reveal, for example, that in making their primary pricing and service decisions, AT&T and T-Mobile focus predominantly on each other, Verizon, and Sprint Nextel, paying little mind to smaller rivals, or they may support the assertion that competition is more robust and varied.[15]

More importantly, a myopic approach to defining the relevant markets is neither analytically sound nor complete. The essential inquiry in merger analysis is not market definition, but anticompetitive effect. Market definition and market share calculations are at best indirect ways of predicting anticompetitive effects. As a result, market definition may not be a necessary step in merger analysis in cases where more direct measures of competitive effect are available.[16] Those kinds of measures may yet emerge as significant in this case. Moreover, even to the extent market definition is an integral part of the analysis it is possible and often wise to evaluate competitive effects on multiple dimensions, not simply through the lens of a single

[14] This was true in the Microsoft monopolization case, where Microsoft persistently asserted that its Windows operating system competed with many other kinds of desktop and portable operating systems. The courts soundly rejected the arguments, however, because there was little evidence to support the argument that such peripheral rivals actually affected Microsoft's pricing and other strategic decisions. *See United States v. Microsoft Corp*., 253 F.3d 34, 51-54 (D.C. Cir. 2001).

[15] This kind of evidence was found to be persuasive with respect to defining the relevant product markets in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). There, although the merger was evaluated based on metropolitan areas, the product market was defined as "the sale of consumable office supplies through office superstores," so the market share calculations did not include non-superstore suppliers.

[16] As is explained in the Horizontal Merger Guidelines, "The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis." HORIZONTAL MERGER GUIDELINES §4.

"relevant market." Here, AT&T and T-Mobile's business activities are not limited to the provision of wireless communication services to "local" consumers. They sell their services through their respective Internet websites nationally, they sell directly to enterprise clients, and they buy various handsets that include various operating systems, and enter into roaming agreements with smaller rivals on a national and international scale. AT&T, T-Mobile, Verizon and Sprint also compete head-to-head by bundling handset and wireless services for sale through large, national retail chains like Best Buy, Staples, and Office Depot, a dimension of competition that has influenced competitive effects analysis in other merger cases.[17] So to gain an accurate picture of the impact of the merger, it may be necessary to look at multiple relevant markets.

Indeed, an antitrust analysis that focused narrowly on local sales to consumers could simply overlook the many possible competitive ramifications of AT&T's acquisition of T-Mobile.[18] The problem can be illustrated with some common examples. Consumers purchase major appliances and automobiles locally, but we would not analyze a merger of Whirlpool and General Electric or General Motors and Chrysler solely through local market data. In both examples, the firms are obviously national rivals, as is also obviously the case with AT&T, Verizon, Sprint Nextel and T-Mobile. In such cases, exclusive reliance on local market analysis would ignore too many dimensions of the mergers that could impact competition. That is why a formalistic, market definition-driven approach, rather than an effects-driven approach, could lead to inaccurate predictions about the likely effects of the merger.

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[17] *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

[18] As will be discussed at greater length below, this is also why a "local fix" strategy based solely on a simplistic, localized vision of competition would likely prove to be inadequate.

AT&T surely has been well-counseled as to all of this. It seems likely, therefore, that it has consciously chosen to argue its case for approval in this way for strategic reasons. First, doing so downplays the broader implications of the merger for significantly altering the structure of the entire industry – it focuses on the market definition trees in lieu of the competitive effects forest. Second, it justifies including in the market share calculations service providers that offer only local services, which might in some areas appear to lower the market shares of the merging firms. Third, and most obviously, it lays the foundation for suggesting that there is a fix for the competitive problem that need only be negotiated between the merging parties and the agencies. If competition is local, one should seek to identify the areas in which AT&T and T-Mobile have the most significant overlap – where their combined market shares are unacceptably high. Then, local solutions can be found in the form of some kind of slice and dice divestiture order. This "sacrificial lamb" strategy is designed from the outset to lead ineluctably to the conclusion that the competitive problems presented by the merger can be isolated and excised like a localized instead of a metastasized cancer. It is an invitation to negotiate, as if the merger involved supermarkets or local factories, so that attention is turned away from the larger question: "should the transaction be permitted at all?"

2. Elimination of a Maverick

A distinct issue in the analysis of the AT&T-T-Mobile acquisition concerns T-Mobile. Although for purposes of the competitive effects analysis it is important to understand *how much* of a competitor it is, it is also important to understand *what kind* of a competitor it is. The academic commentary and Horizontal Merger Guidelines recognize that we should be especially cautious about permitting the acquisition of a "maverick" – "a firm that plays a disruptive role in

the market to the benefit of customers."[19] Has T-Mobile been such a positive, disruptive force in the industry? Has it been a leader in adopting new technologies, business strategies, or in lowering prices?

According to a March 2011 Wall Street Journal article, "Sprint Nextel Corp. and T-Mobile USA have been the most aggressive discounters among U.S. wireless providers, offering plans that are cheaper than those of both AT&T and Verizon Wireless…. They also are the only providers offering unlimited calling and data services."[20] The absorption of T-Mobile into AT&T, therefore, could result in the loss of an important constraint on the pricing behavior of AT&T and Verizon and an important channel for introducing new technologies to consumers. The end result might be to move the industry closer to the "quiet life" that favors coordination and leader-follower behavior over aggressive competition. This is an issue that must be carefully evaluated.

3. Innovation

One area that has received increasing attention in merger analysis – indeed in all antitrust analysis – is "innovation."[21] Innovation has always been a driving force behind competition and economic progress, but it is especially pivotal to today's technology industries. Even a casual

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[19] HORIZONTAL MERGER GUIDELINES §2.1.5. For a more complete explanation of the role of mavericks in merger analysis, see Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002).

[20] *See* Spencer E. Ante & Roger Cheng, *The Changing Telecom Landscape: Wireless Deal Dials Up Worries*, WALL ST. J., Mar. 22, 2011, at B4. *See also* Jeff Bliss, *AT&T's Purchase of T-Mobile Questioned on Prices by FCC Official*, BLOOMBERG NEWS, Apr. 12, 2011 ("One way T-Mobile has sought to distinguish itself is on price."), *available at* http://www.bloomberg.com/news/2011-04-12/at-t-s-t-mobile-usa-takeover-questioned-by-fcc-official-over-price-impact.html.

[21] HORIZONTAL MERGER GUIDELINES §6.4.

observer would have to be impressed by the advances that competition has delivered in the last decade in telecommunications. In just over two decades we have advanced from the heavy, large "brick phones" that introduced mobile telephony, to far smaller, lighter, and more sophisticated handsets, smart phones, and tablet PCs, that have been enabled by a range of innovative mobile operating systems, more advanced processors, and faster data transmission. All of these fruits of competition have inured to the benefit of consumers. Importantly, many did not come from the telecommunications service companies, but from their suppliers.

Like pricing incentives, innovation incentives can be affected by a merger, but with longer term and potentially significant ramifications. The agencies and this Subcommittee will want to carefully consider the likely impact AT&T's acquisition of T-Mobile will have on innovation in the telecommunications industry. Here, as in the general analysis of competitive effects, the focus cannot be limited to an evaluation of innovation competition between AT&T and its primary rivals. It must go further to include the incentives of all of the industry participants who will need to channel their inventions through essentially two mega-portals: AT&T and Verizon. With the two largest installed bases of customers, they will become the gatekeepers of much of the innovation that flows to consumers. How will that affect their incentives and how will it affect the incentives of their suppliers? Like twin neutron stars, their gravitational force may well alter the trajectory of innovation for a generation.

B. The Proffered Justifications

Although concentration measures can provide a useful initial screen for identifying mergers that may substantially lessen competition, concentration alone is not a sufficient basis for condemning a merger. As the case law and the Horizontal Merger Guidelines recognize,

even in the case of highly concentrated markets, the presumption of harm "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."[22] However, the courts and the agencies have used a "sliding scale" to establish the relative burdens on the parties and have consistently concluded that the higher the post-merger level of concentration, the greater the concern for competition, and hence the more demanding the standard of proof will be for the merging firms who seek to justify their deals.[23] So if the agencies conclude that the merger presents a substantial threat to competition, the second major question will be "*has AT&T proffered sufficient justifications in kind and evidence to suggest that, despite the inferences to be drawn from industry concentration, the merger will not create, enhance, or entrench its market power"*?

Although it is surely true that as a technical legal matter the government would bear the burden of proving likely anticompetitive effect if the merger is ultimately challenged in court, as a part of the agency review process AT&T can be expected to produce evidence of what our Horizontal Merger Guidelines call "cognizable efficiencies." Cognizable efficiencies are *verifiable* and *merger-specific*, and they cannot arise out of the anticompetitive effects of the merger.[24] All three requirements are very important. If two merging firms challenge the prediction that the profitability of a post-merger price increase will provide them with the

[22] HORIZONTAL MERGER GUIDELINES §5.3.

[23] "The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis." HORIZONTAL MERGER GUIDELINES §5.3. *See also FTC v. H.J. Heinz Co*., 246 F.3d 708, 725 (D.C. Cir. 2001)("'[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully,'" *quoting United States v. Baker Hughes, Inc*., 908 F.2d 981, 991 (D.C. Cir. 1990)(an opinion authored by then Judge Clarence Thomas and joined by then Judge Ruth Bader Ginsburg).

[24] HORIZONTAL MERGER GUIDELINES §10.

incentive to raise price and harm competition by arguing that a second, more dominant incentive will lead them to instead achieve efficiencies that will lead to lower prices or improved services, they must produce evidence to support the claim – evidence that typically only they possess. And evidence of benefits that are unlikely to alter the incentives to restrict competition is simply not relevant for purposes of the antitrust analysis. Although it might be considered by the FCC as part of its broader "public interest" charge, because such non-competitive benefits do not tend to dissipate the predicted anticompetitive effect, they are simply irrelevant for antitrust purposes.

If the merging parties can show that efficiencies will create a counter-acting incentive to compete, they must also show that those efficiencies can only be achieved through the merger. If they can be achieved *without* the merger, than the merging firms' arguments falter in two ways. First, the merger does not appear to be a necessary vehicle for achieving them and hence cannot be used as an excuse for doing so. Second, however, the entire defense suffers from a lack of credibility: if the acquiring firm, for example, has current strategies available to it to lower its costs or improve its product, but has failed to pursue them, then the promise that it will do so post-merger can be fairly questioned. Finally, it is fair to question the stated scope of efficiencies and the promise that they will directly benefit consumers.[25]

AT&T has focused its public efforts to justify the merger on its need for additional spectrum. As reported in the Wall Street Journal, "T-Mobile lacked sufficient spectrum to upgrade to next-generation wireless technology. AT&T faced a longer-term capacity crunch

[25] *See, e.g., FTC v. Staples, Inc*., 970 F. Supp 1066, 1088-90 (D.D.C. 1997)(rejecting efficiency defense as unsubstantiated, exaggerated, and unlikely to be passed on to consumers).

because of the explosion of traffic."[26] It promises that with more and/or more effective use of spectrum, it will be able to provide higher quality voice and data services (fewer dropped calls, for example), and a broader range of data-intensive mobile Internet services. The argument invites two immediate questions: (1) how can two capacity constrained firms increase their capacity through merger? In other words, how can 0 + 0 = 1? And (2) why can't AT&T utilize the substantial cash it is using to acquire T-Mobile to instead make these improvements on its own?

In his prepared statement before the Senate Judiciary Committee on May 11, 2011, AT&T's Chairman, CEO, and President made the case this way:

> So, to meet the ever increasing demand by consumers, we have to find ways to get more capacity from existing spectrum. That is exactly what the combination of AT&T and T-Mobile will do. Our two companies have very complementary assets, which means that combining them will create much more service-enhancing network capacity – the equivalent of new spectrum – than the two companies could have done operating separately. That, in turn, means more room for growth and innovation, fewer dropped and blocked calls, and a faster, more reliable mobile Internet experience.[27]

The agencies and this Subcommittee should carefully scrutinize these assertions. Are they logical? Puffery? Are they supported by technical proof? And most importantly, will the post-merger incentives of AT&T actually lead it to pursue this strategy? In addition, as already noted above, under the Horizontal Merger Guidelines it is necessary to probe whether these alleged efficiencies are merger-specific, i.e. are improved methods of deploying spectrum somehow only possible through a combination with T-Mobile? Is there anything that currently constrains

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[26] Shayndi Raice & Anupreeta Das, *AT&T to Buy Rival in $39 Billion Deal*, WALL ST. J., Mar. 21, 2011.

[27] Written Statement of Randall Stephenson, Chairman, CEO, and President, AT&T Inc., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights: "The AT&T/T-Mobile Merger," May 11, 2011.

AT&T from deploying these methods to enhance efficient use of existing spectrum on its own?[28] Finally, some of AT&T's "justifications" do not appear to relate directly to the competition analysis and hence are simply irrelevant for those purposes.

C. The Efficacy of a Negotiated, Regulatory Consent Decree

One of my greatest concerns is that the Justice Department and the FCC will be tempted to resolve these complicated issues through negotiation rather than challenge, if warranted, as it recently did in the cases of Ticketmaster's merger with LiveNation, Comcast's acquisition of NBC-Universal, and Google's acquisition of ITA. While such negotiated decrees have long served an important role in antitrust enforcement, and may well have been appropriate in those cases, the unique history of the telecommunications industry poses some unique questions about the wisdom of such an approach here.

As this Subcommittee well knows, for much of the twentieth century what became known as "the Bell System" operated as a heavily regulated monopoly. As a result of the antitrust case brought against it by the Justice Department, that monopoly was disassembled in the early 1980s in the hope of re-introducing principles of competition to telecommunications services and equipment that had long since dissipated. Until the passage of the Telecommunications Act of 1996, we operated under an uncomfortable hybrid system of regulation, competition, and judicial oversight guided by the Justice Department. The Telecommunications Act was intended in significant part to complete the work of the antitrust

[28] Some critics of the merger have argued that the justifications proffered by AT&T fail these tests and hence should not be credited. *See* Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction* (May 22, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850103.

case against the Bell System, more fully completing the transition from fully regulated monopoly to greater reliance on competition in light of then-emerging developments in technology.[29]

In light of this unique history, reversion to reliance on a negotiated decree requiring judicial oversight guided by the Justice Department – even with the involvement of the FCC -- would not only be inconsistent with the goals of both the original antitrust case and the Act, but unwise as a matter of national telecommunications policy. We should not waiver in our commitment to competition, especially given its extraordinary success in producing a diverse range of high quality services, devices, applications, operating systems, and capabilities. Permitting a negotiated decree to substitute for a definitive judgment as to the likely impact of the merger would in short be an admission of failure and an invitation for a creeping return to regulated monopoly that in the end worked well and comfortably for the Bell System, but not for the American consumer.

An illustration of my concern is glaring back at us in AT&T's insistence that the relevant markets for purposes of evaluating the merger are local. As I mentioned earlier, that strategy may reflect a strategic choice designed to illicit a posture of negotiation from the Justice Department and the FCC that would likely lead to divestitures. Such a divestiture strategy raises three obvious issues: (1) Could it be effective to counteract any anticompetitive effect, i.e. would it create a competitor of sufficient viable scale to counteract the predicted incentive to raise price?[30] (2) What exactly would be "divested"? and (3) Could the divestiture be achieved

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[29] For a valuable and thoughtful account of this history, see TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011).

[30] The analysis of the likely effectiveness of divestitures is similar to the evaluation of likely entry under the Horizontal Merger Guidelines. In effect, a divestiture is an example of designed new entry. As is true under the

without agreements on interconnection and roaming between the company owning the divested assets and AT&T/T-Mobile? The second and third points are critical if the first is to become a reality. As to the second, it is important to understand how telecommunications is different from other, more traditional kinds of manufacturing industries where divestitures can be effective. AT&T does not have distinct plants or factories that would be divested. Unlike something like supermarkets, specific locations cannot be sold off and re-branded by a new owner. Indeed, for AT&T to continue to operate itself in any area of the country, it will need to maintain its full infrastructure. So what would be divested in a divestiture plan and how? One press report suggests that AT&T "is prepared to divest itself of 'substantial' parts of its *wireless subscriber base* in certain markets to appease regulators…."[31] No court will have any continuing authority over AT&T or T-Mobile's customers, however, once their contracts expire. At that point, they will once again be free to choose their wireless provider, which could promptly undermine the "divestiture."

Although divestitures might also include transmission towers, spectrum, and other facilities, the more fundamental flaw with such an approach would be that it simply does not address the whole of the likely competition problem. As noted above, by focusing solely on the allegedly local markets, the agencies would be ignoring the national and international competitive ramifications of the merger. Consumers will ultimately pay the price, but that does not mean that local divestitures can eliminate the problem.

Guidelines, to be effective, entry must be timely, likely, and *sufficient* to counteract the incentive to raise price. See HORIZONTAL MERGER GUIDELINES §9.

[31] Shayndi Raice & Anupreeta Das, *AT&T to Buy Rival in $39 Billion Deal*, WALL ST. J., Mar. 21, 2011.

Finally, unless the entity acquiring the divested assets already can offer national service, it will not satisfy the goal of being a truly viable source of competition for the merged firms – a "sufficient" new entrant. If offering such services requires interconnection agreements with AT&T to access its wired line customers, as well as roaming agreements to provide national wireless service, those firms will be vulnerable to any manner of exclusionary conduct designed to raise their costs and diminish their impact as competitors. Perhaps no more complex strategy will be needed than to deny them access to the latest 4G LTE networks and devices.

CONCLUSION

In conclusion, I have tried to outline for the Subcommittee some of the issues that now present themselves for resolution before the agencies. As I noted at the outset, in preparing my testimony for today I have come to focus on a single overarching issue: "Why would we want to take this risk?" As an experienced antitrust lawyer and professor, I worry that the merger will in effect lead to a wireless telephone market reduced to two principal players that lack the proper incentives to provide competitive prices, service, and a level of innovation consummate with the technological promise of these industries. I am also deeply skeptical of AT&T's ability to deliver the efficiencies and other benefits it has promised and doubt that they are directly related to the competitive problems. As a consumer, every instinct tells me to hold on to my wallet and get out my checkbook (on-line version, of course). And finally, as an American I am fearful and find disquieting the thought of in effect entrusting almost plenary control of our Nation's wireless communications infrastructure to but two firms.

Thank you again for inviting me to testify today and of course, I would be happy to respond to any questions you may have.