

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**PETITION TO DENY OF LEAP WIRELESS INTERNATIONAL, INC.  
AND CRICKET COMMUNICATIONS, INC.**

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## INTRODUCTION AND SUMMARY

### **“Beware of habitual monopolists bearing gifts.”<sup>1</sup>**

Leap Wireless International, Inc. and Cricket Communications, Inc. (collectively “Leap”) hereby petition the Commission to deny the applications seeking approval of the proposed acquisition of T-Mobile USA, Inc. (“T-Mobile”) by AT&T Inc. (“AT&T”).

Throughout the 1990’s, the Commission consistently pursued policies aimed at introducing competition to the cellular duopoly that it had created the previous decade. By introducing a multiplicity of carriers through its Personal Communications Service (“PCS”) spectrum allocations, for example, the Commission noted in 1999 that the “introduction of new providers and the end of the cellular duopoly has led to substantial consumer benefits through reductions in the price of service and in new and enhanced services.”<sup>2</sup>

In the new century, ironically, the industry began to move in the other direction with the consent of federal regulators. While consolidation of course can have many benefits, the wireless marketplace for years now has been experiencing rapid provider and spectrum concentration. Even prior to this proposed transaction, the industry was verging again on a national duopoly dominated by AT&T and Verizon.

Leap has experienced firsthand the ramifications of a being a mid-sized carrier in a market controlled by two dominant national carriers with entrenched market power. Leap has

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<sup>1</sup> *Not So Fast, Ma Bell: AT&T’s Takeover of T-Mobile USA Would Damage Mobile-Phone Choice. It Should Be Stopped*, The Economist, Mar. 24, 2011, available at <http://www.economist.com/node/18440809>.

<sup>2</sup> *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association’s Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission’s Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 15 FCC Rcd 9219, 9256 (1999).

encountered difficulties in securing nationwide roaming agreements. Leap also has experienced the challenges of obtaining scarce spectrum as AT&T and Verizon have dominated auction after auction and proceeded to lock up much of the spectrum available for mobile voice and data use. And Leap has purchased handsets and devices in the long shadow of AT&T's and Verizon's control of those products' availability and interoperability.

In the face of significant industry concentration and following a remarkable string of company and spectrum acquisitions, AT&T now proposes to acquire one of the three other nationwide wireless carriers, and reinforce its super-carrier status. The proposed transaction would greatly exacerbate the trend of concentrating market power, spectrum resources, cash flow, and capital in the hands of two massive companies, and threatens to unleash a litany of competitive harms. It would magnify what is already a tremendous mismatch in access to capital markets between AT&T and Verizon on the one hand and the rest of the industry on the other. It would add to AT&T's existing extraordinary cache of spectrum. It would eviscerate even the modest protections for data roaming that the Commission recently implemented at an especially critical period when the nation is transitioning to 4G technology. It would eliminate a low-cost provider of wholesale mobile wireless services. And it would increase AT&T's ability to impede regional and mid-sized carriers from obtaining popular handsets.

Against this backdrop, AT&T's Public Interest Statement is an extraordinary exercise in chutzpah. The narrative attempts to pay lip service to the principle that a competitive wireless industry is critical to wireless innovation, but it is difficult to envision AT&T crafting it without a smirk and a wink. According to AT&T, in the post-merger world, the wireless marketplace

will actually become “*more competitive*”<sup>3</sup> once Number One swallows Number Four. Leap and other mid-sized carriers will become transformed overnight into gargantuan competitive forces that will continue to safeguard “intense” competition, “grow rapidly,” and “continue winning consumers”<sup>4</sup>—indeed, as one commentator has observed, today “AT&T executives sometimes have a tendency to sound like their dream job is in the marketing department at Leap Wireless.”<sup>5</sup> Similarly, the Application characterizes wholesale startup carriers such as Lightsquared and Clearwire as spectrum-rich, well-capitalized new entrants that are off to a great start and are adding further froth to the competitive mix—even as AT&T’s head of enterprise business trumpets elsewhere AT&T’s assessment that “there really isn’t a profitable wholesale model in wireless today,” and that the U.S. market is hardly big enough for one wholesaler, let alone two.<sup>6</sup>

The truth is that, AT&T’s cynicism notwithstanding, small, mid-sized and startup carriers are indeed the drivers of innovation in the wireless industry today. Providers such as Leap have developed novel and industry-changing products and services, including unlimited voice and data offerings at fixed price points, and unlimited mobile music services such as Leap’s Muve Music.<sup>7</sup> But AT&T’s strategy is to point *backward* to a snapshot of innovation, and the

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<sup>3</sup> See AT&T Inc. and T-Mobile USA, Inc., Description of Transaction, Public Interest Showing, and Related Demonstrations, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket 11-65, at 11 (filed Apr. 21, 2011) (“*Public Interest Statement*”) (emphasis in original).

<sup>4</sup> *Id.*, 11-12.

<sup>5</sup> S. Jerome, *Leap Opposes AT&T Merger*, <http://thehill.com/blogs/hillicon-valley/technology/162985-leap-opposes-atat-merger>.

<sup>6</sup> Sinead Carew, *AT&T: No Room For Both Clearwire, LightSquared*, REUTERS (May 13, 2011), <http://www.reuters.com/article/2011/05/13/us-summit-att-idUSTRE74C6F220110513>.

<sup>7</sup> Leap introduced Muve Music as an unlimited music plan delivered to mobile devices. The service allows unlimited music downloads, ringtones and ringback tones included in

consumer benefits resulting from emerging competition, in order to justify a *forward* march to duopoly and beyond. That strategy should be recognized for what it is and resoundingly rejected. Approval of this acquisition would sharply curtail competition, and in doing so, would deal a crippling blow to wireless innovation. The wireless industry cannot continue to be at the forefront of the broadband revolution, for example, if the industry becomes dominated by super-carriers who lack the incentives to innovate and who are controlling the cash flow and the capital that small, mid-sized, and startup carriers need to generate new products and services.

Furthermore, the competitive harms flowing from the proposed acquisition are not outweighed by offsetting public interest benefits. The purported synergies of the acquisition that the Applicants have proffered are largely speculative, and indeed, many are inherently unlikely to materialize. The Applicants' assertion that AT&T faces a spectrum crunch is not supported by the record, and is belied by its existing spectrum assets, including significant amounts of spectrum that AT&T is not commercially deploying. The Applicants claim that the acquisition will enable greater deployment of 4G, but only in comparison to a benchmark that bears no connection to reality—AT&T cannot plausibly represent that it would not actually deploy 4G nationwide to compete with Verizon absent this transaction. The Applicants' contention that T-Mobile otherwise lacks a path to LTE is likewise overstated and inconsistent with T-Mobile's public advertising campaign in which it asserts that it *already* is the nation's largest 4G provider, and will offer data speeds that are comparable to LTE.<sup>8</sup> It also ignores T-Mobile's alternative paths to LTE, including deploying its own network or partnering with wholesalers.

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a wireless service for a flat monthly rate, and is expected to be an industry game changer. See Press Release, "Cricket Introduces First Wireless Rate Plan with Unlimited Music Included," (Dec. 20, 2010), <http://www.mycricket.com/pdf/muve/PressRelease121910.pdf>.

<sup>8</sup> See <http://newsroom.t-mobile.com/articles/4g-fact-sheet>.

Ultimately, the illusory benefits of this transaction must be compared to a more realistic assessment of what the alternative world would look like. Absent this transaction, AT&T would invest billions of additional dollars in 4G deployment, *creating* rather than cutting jobs. Absent this transaction, AT&T would be compelled to use *all* of its spectrum, and improve its efficiency and network management. Absent this transaction, T-Mobile would continue to be a maverick nationwide provider that would pursue its own path to 4G, either by evolving its current system (which it publicly represents that it can do to achieve speeds on par with LTE), or by partnering with other entities. And most significantly, absent this transaction, smaller and mid-sized carriers such as Leap would indeed continue to grow as vibrant competitors and have a greater opportunity to drive competition in the industry by expanding and improving their service offerings in a manner that would provide a better check on AT&T's conduct and pricing.

If the Commission were to consider this transaction from a neutral outsider's viewpoint, it likely would reject it on straight policy grounds as harmful to the future of the wireless industry, although the Commission no doubt would face some difficult choices. But under the relevant legal and policy standard, the decision is not a close one. The burden is squarely on the Applicants to demonstrate—through evidence, not assertions—that the transaction will affirmatively serve the public interest.<sup>9</sup> The evidence proffered by the Applicants falls far short of satisfying this burden, and indeed the record evidence indicates that this transaction would exacerbate market concentration and create a wireless industry characterized by market dominance, less competition, and higher prices. Because this transaction as proposed would harm competition and is not in the public interest, the Commission should deny the applications.

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<sup>9</sup> See *Applications of AT&T Wireless Services Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorities*, Memorandum Opinion and Order, WT Docket No. 04-70, ¶ 40 (Oct. 26, 2004).



## **LEAP'S INTEREST IN THIS PROCEEDING**

Leap is a leading provider of affordable, flat rate, unlimited voice and data service with no overage charges. Leap's service does not require credit checks, long-term contracts, or termination fees. Leap's customer base historically has been comprised of lower-income and value-seeking consumers who often cannot afford or qualify for services from other wireless providers such as AT&T and Verizon.

Leap has a keen interest in this proceeding. As a mid-sized carrier, Leap relies on nationwide roaming arrangements to secure seamless coverage for its customers, and a merger between two of the four nationwide carriers—and the only two nationwide GSM carriers—would have a significant impact on the availability and pricing of roaming arrangements, particularly nascent but essential 4G roaming agreements. Leap, like virtually every carrier, also has an interest in ensuring that the industry makes the most efficient use of scarce spectrum resources and that all carriers have a fair and reasonable opportunity to obtain access to spectrum. Leap also has a direct interest in preventing the concentration of market power in the hands of one or two providers who could use that market power to exclude competitors or raise rivals' costs. And Leap has an interest in procuring its devices and handsets in a competitive market in which AT&T and Verizon do not control the availability and interoperability of those products.

The Applicants moreover have placed Leap front and center in their applications, perhaps recognizing that if they cannot persuade the Commission that Leap and other mid-sized carriers would create genuine and significant checks on AT&T's post-merger pricing, then the transaction is doomed.<sup>10</sup> Leap of course is flattered that AT&T and T-Mobile have so

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<sup>10</sup> *Public Interest Statement* at 67, 70-71, 86-88, 98-99.

extensively emphasized Leap's position in the wireless industry. And Leap is a vibrant industry participant, to be sure, driving innovation and service to consumers, and particularly to underserved and value-seeking constituencies. Nonetheless, Leap's stature in the wireless marketplace is hardly in the vicinity of AT&T's, either pre-merger or post-merger. For example, as of the first quarter of 2011, Leap had approximately 5.8 million mobile wireless subscribers, compared to approximately 97.5 million for AT&T, and 131.1 million for AT&T and T-Mobile combined.<sup>11</sup> In other words, the combined AT&T and T-Mobile would have a subscriber base that is *approximately 2,200 percent larger than Leap's*, at a time when AT&T already has been steadily gaining share.<sup>12</sup> Similarly, Leap had approximately \$2.7 billion in operating revenue last year, compared to \$124 billion for AT&T and \$145 billion for AT&T and T-Mobile combined.<sup>13</sup> Finally, Leap does not offer enterprise services at all, and thus is not even arguably a competitor to AT&T in service to enterprise customers.

As a mid-sized carrier, Leap has a unique perspective as to how competition actually manifests in the wireless industry, and on what the effects of the proposed acquisition on competition would be. That perspective leads Leap to petition the Commission to deny the instant applications and proposed acquisition.

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<sup>11</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, ¶ 4 (May 20, 2010) ("*14<sup>th</sup> Wireless Competition Report*").

<sup>12</sup> *14<sup>th</sup> Wireless Competition Report*, ¶ 4.

<sup>13</sup> Compare Leap First Quarter 2011 results, (May 4, 2011) available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=iro-newsArticle&ID=1559644&highlight=>, with AT&T Inc. First Quarter 2011 results (April 20, 2011) available at <http://www.att.com/gen/press-room?pid=19727&cdvn=news&newsarticleid=31831&mapcode=financial>, and T-Mobile USA First Quarter 2011 results (May 9, 2011) available at [http://www.t-mobile.com/Company/InvestorRelations.aspx?tp=Abt\\_Tab\\_InvestorRelations](http://www.t-mobile.com/Company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations).

## DISCUSSION

Whether viewed at the national or local level, the proposed acquisition would tremendously increase concentration in the already highly concentrated wireless industry, and would engender a variety of serious competitive harms. These competitive harms, coupled with the highly questionable and largely unsupported efficiency claims, should cause the Commission to reject the transaction.

### **I. THE WIRELESS INDUSTRY ALREADY IS HIGHLY CONCENTRATED, DOMINATED BY AT&T AND VERIZON, AND VEERING DANGEROUSLY TOWARDS *DE FACTO* DUOPOLY**

The principal competitive trend affecting the wireless industry over the last several years has been the tremendous concentration of market power at both the national and local levels in the hands of AT&T and Verizon. Approving this transaction would drive the industry back two decades into an era of effective duopoly.

#### **A. The Commission Should Investigate the Competitive Effects of the Proposed Acquisition at the National Level**

The Applicants have labored mightily in their Public Interest Statement to focus the Commission's attention strictly on local markets,<sup>14</sup> out of a well-justified fear that any analysis of competition at the national level would reveal that AT&T and Verizon have dominant positions, and that this transaction would greatly increase AT&T's market power. But less than three years ago, when AT&T acquired Centennial Communications, AT&T itself argued to the Commission that "the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level."<sup>15</sup> AT&T represented to the Commission that the

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<sup>14</sup> *Public Interest Statement* at 72-75.

<sup>15</sup> *See* Description of Transaction, Public Interest Showing, and Related Demonstrations, *Application of AT&T Inc. and Centennial Communications Corp. For Consent to*

facts regarding its pricing strategies and practices were as follows: “In the mainland U.S., AT&T establishes its rate plans and pricing on a national basis, *without reference to market structure at the CMA level*. One of AT&T’s objectives is to develop its rate plans, features and prices in response to competitive conditions and offerings at the national levels – primarily the plans offered by the other national carriers.”<sup>16</sup> AT&T argued that, because Centennial was a regional carrier, its “pricing *is an inconsequential factor* in AT&T’s competitive decision-making.”<sup>17</sup> Thus, according to AT&T, the relevant constraints on its pricing occur exclusively at the national level.

AT&T correctly notes that the Commission historically has concluded that the relevant geographic market for purposes of its competitive analysis is local and consists of CMAs, on the ground that consumers typically shop for mobile telephony or data services among options that are available in their local area. However, it is not clear that this remains the best geographic market definition (or the only geographic market definition) that the Commission should employ today in light of recent industry trends.

The tremendous increase in industry concentration over the last decade has created super-carriers that advertise based on national offerings and capabilities, offer nationwide services, price at the national level, and engage in activities (such as restricting handset availability and interoperability) whose competitive effects are felt by other carriers on a nationwide basis. Both AT&T and Verizon are publicly representing through their marketing campaigns that they compete with each other principally at the national level, as exemplified by their current national advertising war over which nationwide network is largest and which has better nationwide

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*Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, at 28 (filed Nov. 21, 2008).

<sup>16</sup> *Id.* at 28-29 (emphasis added).

<sup>17</sup> *Id.* at 29 (emphasis added).

coverage.<sup>18</sup> In addition, important customers of AT&T and T-Mobile are national customers. For example, enterprise customers frequently demand nationwide service offerings, or, at a minimum, regional offerings whose geographic reach extends far beyond individual CMAs. Consumers also increasingly demand nationwide service and thus view wireless service as a nationwide product.<sup>19</sup> Furthermore, carriers such as Leap that seek nationwide voice and data roaming arrangements are constrained to pursue wholesale agreements from nationwide carriers on a nationwide basis. And when AT&T and Verizon roll out new services or devices, develop and implement particular standards for next generation technology, or restrict the availability or interoperability of devices, the competitive effects of those actions reverberate and impact competition nationwide.

AT&T's own economic expert acknowledges that "there are both national and local dimensions to competition in the provision of wireless service,"<sup>20</sup> and thus even if the Commission ultimately defines relevant geographic markets on a more local basis as part of its public interest analysis, it should also evaluate the national dimensions of competition to inform its analysis of the transaction's competitive effects.

## **B. The Proposed Acquisition Would Dramatically Increase Concentration at the National Level**

The telecommunications industry already faces a rapidly accelerating trend in which capital, cash flow, spectrum, and subscribers are concentrated in two massive wireless

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<sup>18</sup> Compare <http://www.verizonwireless.com/its-the-network.shtml> with <http://www.wireless.att.com/learn/why/network/index.jsp?wtSlotClick=1-00245D-0-1&WT.svl=calltoaction>.

<sup>19</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, ¶ 15 (April 7, 2011)

<sup>20</sup> Declaration of Dennis W. Carlton, Allan Shampine and Hal Sider ("Carlton Declaration") ¶ 83.

companies: AT&T and Verizon. The GAO has recognized that the “primary change in the wireless industry” over the last decade is “industry consolidation [that] has created some challenges for small and regional carriers to remain competitive.”<sup>21</sup> The GAO noted that from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent.<sup>22</sup> Similarly, the Commission’s most recent Wireless Competition Report reported “continued industry concentration” in which AT&T and Verizon “have 60 percent of both subscribers and revenue, and continue to gain share.”<sup>23</sup> It is hardly surprising that the Commission *for the first time* failed to conclude that the wireless industry is characterized by effective competition.

This transaction would significantly increase nationwide concentration by eliminating the nation’s fourth largest wireless competitor. Economists Roger Noll and Greg Rosston note that nationwide concentration in wireless telecommunications services already is approximately 2,500 on the Hirschman-Herfindahl Index (HHI), which is the Department of Justice’s threshold that indicates a highly concentrated market.<sup>24</sup> According to the Department of Justice, “mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.”<sup>25</sup> Noll and Rosston note that this acquisition would increase the HHI by 600, and that these numbers likely *understate* the effective concentration in the industry because in many areas only the four major carriers can

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<sup>21</sup> U.S. Gov’t Accountability Office, GAO-10-779, *Telecommunications: Enhanced Data Collection Could Help FCC Better Competition in the Wireless Industry* at 10 (2010) (“GAO 2010 Wireless Report”).

<sup>22</sup> *GAO 2010 Wireless Report* at 13.

<sup>23</sup> *14<sup>th</sup> Wireless Competition Report* ¶ 4.

<sup>24</sup> Roger G. Noll & Gregory L. Rosston, *SIEPR Policy Brief: Competitive Implications of the Proposed Acquisition of T-Mobile by AT&T Mobility*, Stan. Inst. for Econ. Pol’y Res., Apr. 2011 (“Noll and Rosston”); Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 5.3 (Aug. 19, 2010).

<sup>25</sup> *Horizontal Merger Guidelines* § 5.3.

serve customers and also because the market for mobile data services is even more concentrated than the market for mobile voice services.<sup>26</sup> Other analysts agree with those conclusions.<sup>27</sup> In addition, analysts estimate that after the merger AT&T and Verizon would have a combined national market share of approximately 76 percent.<sup>28</sup> Finally, the merger would result in AT&T and Verizon together enjoying a staggering 89 percent of industry EBITDA (earnings before interest, taxes, depreciation, and amortization).<sup>29</sup> Nor are there signs that competition would increase following the transaction; to the contrary, the increasing concentration would make it harder and harder for small and mid-sized carriers to compete with AT&T and Verizon.<sup>30</sup>

The transaction thus would create a significant increase in market power and would concentrate a significant amount of that market power in AT&T's hands.

**C. The Proposed Acquisition Also Would Cause Substantial Concentration at the Local Level**

Even if the Commission focuses on competition at the local level, this transaction would lead to striking increases in concentration in numerous markets around the country.

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<sup>26</sup> Noll and Rosston at 2.

<sup>27</sup> *See, e.g.*, Am. Antitrust Inst., “The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions,” at 2 (HHI would increase by over 600 points to over 3,000).

<sup>28</sup> *See And Then There Were Three: AT&T to Swallow T-Mobile*, ETI Views and News (Econ. and Tech. Inc., Boston, Mass.), Mar. 2011, (estimating 76% combined pro forma market share for AT&T and Verizon); Am. Antitrust Inst., “The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions,” (estimating greater than 70 percent market share for AT&T and Verizon).

<sup>29</sup> Independent industry analyst.

<sup>30</sup> Notably, Cox Communications, which AT&T has trumpeted as an emerging wireless competitor with deep pockets, *see Public Interest Statement* at 91-92, recently announced that it will cease to be a facilities-based wireless carrier and instead will resell Sprint's service. *See* Associated Press, “Cox to Shut Wireless Network It Started Building,” (May 24, 2011), <http://tinyurl.com/3j7xdok>.

Leap's analysis establishes that, today, there are only five of Leap's markets in which the top two wireless carriers combined have greater than 70 percent of subscriber market share.<sup>31</sup> If the transaction proceeds, there would be 33 Leap markets in which the top two carriers have greater than 70 percent market share.<sup>32</sup> Similarly, today there are only six Leap markets in which any single carrier has greater than 47 percent market share.<sup>33</sup> After the transaction, there would be 12 Leap markets in which *AT&T alone* would have greater than 47 percent market share.<sup>34</sup> In Oklahoma City, AT&T would go from having 54 percent share to 67 percent share; in Houston, AT&T would go from 29 percent to 52 percent; in Memphis, AT&T would go from 39 percent to 53 percent; and in Tulsa, the acquisition would give AT&T 61 percent market share.<sup>35</sup>

This transaction also would have a significant impact on the concentration of spectrum assets in local markets. The deal would result in 37 separate Leap markets in which post-merger AT&T would control at least 150 MHz of spectrum.<sup>36</sup> As Exhibits 4 and 5 graphically demonstrate, the proposed acquisition would represent a dramatic transition in which significant number of Leap markets become highly concentrated and dominated by AT&T.<sup>37</sup> Absent the transaction, there would be only five of Leap's markets in which the top two carriers control 50 percent or more of available spectrum, and only three Leap markets in which any single carrier controls more than 35 percent of available spectrum.<sup>38</sup> After the transaction, instead of five

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<sup>31</sup> See Exhibit 1 (attached).

<sup>32</sup> See Exhibit 2.

<sup>33</sup> See Exhibit 1.

<sup>34</sup> See Exhibit 2.

<sup>35</sup> Independent third-party analyst, 2010 data.

<sup>36</sup> See Exhibit 3.

<sup>37</sup> Exhibits 4-5.

<sup>38</sup> See Exhibit 4.



markets there would be 36 markets in which the top two carriers control 50 percent or more of available spectrum, and instead of three markets there would be 31 markets in which AT&T alone would control more than 35 percent of available spectrum.<sup>39</sup> This transaction thus would significantly change the competitive landscape at the local level.

## **II. INCREASED CONCENTRATION RESULTING FROM THE PROPOSED TRANSACTION THREATENS A LITANY OF COMPETITIVE HARMS**

The transaction will create numerous significant competitive harms that will foreclose competition and result over time in higher prices, less innovation, and poorer service quality for consumers.

### **A. The Proposed Acquisition Would Create Anti-Competitive Spectrum Aggregation**

The proposed acquisition would give AT&T control over vast quantities of wireless spectrum, particularly when viewed in conjunction with its proposed acquisition of Qualcomm's beachfront 700 MHz spectrum and other pending acquisitions.

#### **1. AT&T Already Holds Large Amounts of Spectrum**

Today, AT&T already holds enormous amounts of spectrum, including:

- PCS/Cellular – AT&T has extensive PCS and cellular spectrum from its acquisitions of Telecorp (2002), Highland Cellular and BellSouth (2006), Dobson Communications (2007), Edge Wireless and McBride Spectrum Partners I (2008), Centennial Communications (2009), and former Alltel spectrum from Verizon (2010).
- AWS – AT&T bought 48 AWS-1 licenses at auction in 2006 that cover nearly 200 million POPs.

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<sup>39</sup> See Exhibit 5.

- 700 MHz – AT&T bought 700 MHz spectrum from Aloha in 2007, covering 72 of the largest 100 markets. In 2008, AT&T bid \$6.6 billion to acquire an additional 227 B Block licenses during the Commission’s 700 MHz auctions. AT&T also recently filed applications seeking to acquire substantially more 700 MHz spectrum from Qualcomm.<sup>40</sup>

Even prior to this transaction and prior to the proposed Qualcomm transaction, AT&T today already controls enormous amounts of spectrum, the most of any of the four major nationwide carriers. AT&T has not put to use significant portions of this spectrum. For example, AT&T acquired approximately \$1.3 billion in AWS spectrum in 2006, but has yet to deploy commercial operations in this band.<sup>41</sup> Indeed, AT&T is sufficiently uninterested in deploying its AWS spectrum that it has offered significant blocks of it to T-Mobile as part of the breakup fee in this acquisition.<sup>42</sup> In other words, if this deal is not approved, AT&T is prepared to transition its network to 4G *without using its AWS spectrum at all*.

## **2. This Acquisition Would Further Expand AT&T’s Spectrum Holdings**

This transaction would further solidify AT&T’s control over vast amounts of broadband wireless spectrum. According to the Commission’s data, post-merger AT&T would hold approximately 24.3% of 700 MHz (not including its proposed acquisition of Qualcomm’s 700

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<sup>40</sup> See *AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18 (applications filed Jan. 13, 2011).

<sup>41</sup> See, e.g., <http://www.dailywireless.org/2010/06/18/phoney-spectrum-scarcity> (noting that “T-Mobile, Cricket and MetroPCS are using their expensive AWS spectrum. Verizon and AT&T are not.”); see also *14th Wireless Competition Report* ¶ 257.

<sup>42</sup> See Steven M. Davidoff, *AT&T Deal Shows How Different a Private Sale Can Be*, N.Y. Times, Mar. 25, 2011, available at <http://dealbook.nytimes.com/2011/03/25/att-deal-shows-how-different-a-private-sale-can-be>; Philip Elmer-DeWitt, *AT&T-Mobile: What the Analysts Say*, CNN Money, (Mar. 21, 2011), <http://tech.fortune.cnn.com/2011/03/21/att-mobile-what-the-analysts-say>; see also Stock Purchase Agreement § 7.5 and Annex E (attached to Application).

MHz spectrum), 42.3% of Cellular (850 MHz), 45.6% of PCS (1.9 GHz), and 38.7% of AWS (1.7/2.1 GHz) spectrum measured on a MHz-POPs basis.<sup>43</sup> At a more local level, there would be more than 35 Leap markets in which post-merger AT&T would have greater than 150 MHz of spectrum—compared to zero today.<sup>44</sup> Moreover, in vast regions of the country, AT&T would have between 91 and 150 MHz, again a dramatic increase over today’s spectrum concentration levels.<sup>45</sup>

In addition, this acquisition would enable AT&T to control an extensive Wi-Fi hotspot ecosystem. AT&T has thousands of Wi-Fi hotspots, including many Starbucks stores, Barnes & Noble stores, and McDonald’s restaurants nationwide.<sup>46</sup> AT&T also has an extensive Wi-Fi presence at sports stadiums, universities, hospitals, and retail stores.<sup>47</sup> T-Mobile likewise has hotspots at thousands of locations including Starbucks and Barnes & Noble, large airports, and the airline clubs of four of the five largest U.S. airlines, among other locations.<sup>48</sup> The combined Wi-Fi network of AT&T and T-Mobile would give AT&T effective control over an additional large swath of unlicensed spectrum as a result of this transaction. As mobile voice service transitions to being an Internet Protocol-based service, AT&T’s extensive WiFi network would give it even greater advantages over competitors.<sup>49</sup>

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<sup>43</sup> See 14<sup>th</sup> *Wireless Competition Report*, ¶ 266 & table 25.

<sup>44</sup> See Exhibit 3.

<sup>45</sup> See Exhibit 3.

<sup>46</sup> See <http://www.wireless.att.com/learn/internet/wifi-faq.jsp?wtSlotClick=1-005MZP-0-2?wtSlotClick=1-005MZP-0-2>.

<sup>47</sup> *Id.*

<sup>48</sup> See <https://selfcare.hotspot.t-mobile.com/locations/viewLocationMap.do>.

<sup>49</sup> Competitors seeking to match AT&T’s extensive WiFi network would need to raise substantial capital. But smaller carriers such as Leap already face challenges attracting

### 3. AT&T's Massive Post-Merger Spectrum Position Would Harm Competition

There are several harmful competitive effects that would arise in the spectrum market from AT&T's proposed acquisition of T-Mobile's. Spectrum is a critical input for all wireless carriers, and the availability and pricing for spectrum generally is unrelated to the degree of retail competition. The "competition" that the Applicants describe in their Public Interest Statement focuses on retail competition, and thus even if their analysis were accurate (which it is not), it does not account at all for the immense increase in concentration in the market for spectrum as an input, which would significantly impede retail competition going forward.

The transaction could effectively prevent smaller players from acquiring spectrum at future auctions. The wireless industry is a heavily capital-intensive industry, and the trend for years has been to concentrate cash flow and capital in the hands of AT&T and Verizon.<sup>50</sup> This proposed acquisition would significantly worsen the disparity between AT&T's vast capital and the capital of smaller carriers. Recent auctions and private sector transactions have already confirmed the challenges that smaller carriers face: the recent 700 MHz auction, AT&T's acquisition of Aloha Partners, and its proposed acquisition of Qualcomm's 700 MHz spectrum, all demonstrate AT&T's ability to secure spectrum at prices with which smaller carriers cannot compete. This transaction would exacerbate the problem and increase the likelihood that future auctions and after-market spectrum acquisitions will continue to be dominated by AT&T and Verizon.

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capital, and this transaction would represent yet another example of most of the industry capital being concentrated in the hands of AT&T and Verizon.

<sup>50</sup> See, e.g., *14th Wireless Competition Report* ¶¶ 219-221 & charts 34-37 (providing different measures of wireless providers' cash flows).

AT&T's extensive spectrum holdings, coupled with significant spectrum constraints for Leap, would mean that if AT&T were to raise its prices by a small but significant and non-transitory amount, Leap would face significant spectrum limitations in its efforts to substantially and rapidly expand its service offerings to recruit AT&T retail customers. Leap's Exhibit 6 demonstrates the tremendous contrast in the amount of spectrum that AT&T would hold versus the amount of spectrum that Leap currently holds in many markets. For example, in the top ten markets that Leap serves, its spectrum holdings range from 10 MHz to 30 MHz of spectrum.<sup>51</sup> By contrast, the combined AT&T and T-Mobile would have spectrum holdings in the range of 122 MHz to 171 MHz in those same markets.<sup>52</sup> In Houston, AT&T would have eight times more spectrum than Leap; in Chicago, AT&T would have fourteen times more spectrum than Leap; in Denver, Baltimore, Philadelphia, and Washington DC, AT&T would have greater than seven times more spectrum than Leap.<sup>53</sup> The transaction thus would result in a tremendous concentration of spectrum in the hands of AT&T in cities and towns around the country, and put AT&T in an even more dominant position vis-à-vis Leap.

Leap already faces a significant disadvantage in its spectrum holdings relative to AT&T, and confronts challenges responding to AT&T's business decisions because of its relatively weaker spectrum position and spectrum constraints. But the addition of T-Mobile's spectrum and resources to AT&T's current holdings would widen the gulf and make Leap far weaker in comparison to its largest competitor. Because no new spectrum is coming onto the market in the near term, the transaction would confer an enormous competitive advantage to AT&T. And again, the capital-intensive nature of deployment coupled with the concentration of cash-flow in

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<sup>51</sup> Exhibit 6.

<sup>52</sup> Exhibit 6.

<sup>53</sup> Exhibit 6.

AT&T and Verizon's hands create further impairments to smaller and mid-sized carriers' ability to compete with the super-carriers.

It is thus wholly disingenuous for AT&T to point to Leap as a competitor that will be able to discipline AT&T's conduct when this transaction would expand AT&T's spectrum position so tremendously. AT&T's spectrum position would be enormous relative to Leap's. If AT&T raised its prices, Leap and other carriers' spectrum constraints would sharply diminish their ability to respond competitively to AT&T's actions with regard to pricing and service offerings or to provide any meaningful discipline on AT&T's pricing. Leap would like to compete on a fair playing field with AT&T, and believes that it could take share from AT&T in a fully competitive environment, but Leap will face challenges competing with AT&T if Leap remains spectrum-constrained but AT&T is not.

Finally, the transaction also alleviates AT&T's need to deploy its current tremendous cache of AWS and 700 MHz spectrum assets. As discussed above, AT&T has not deployed many of these assets. If the Commission rejects this transaction, then AT&T will be forced to employ its existing spectrum assets to their fullest capabilities—which would lead to greater investment in deployment, more jobs, and higher utilization of spectrum resources. Were the transaction to proceed, however, AT&T would have no incentive to maximize the use of its spectrum resources. AT&T already is hoarding vast spectrum resources that other carriers such as Leap could put to much better use to provide more robust competition, and this transaction would greatly exacerbate the trend.<sup>54</sup>

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<sup>54</sup> In addition, the transaction would reduce AT&T's incentive to advocate for allocating more spectrum to wireless services. As Noll and Rosston note, "the acquisition may cause two advocates of allocating more spectrum to wireless to be replaced by one opponent." Noll and Rosston at 4.

**B. The Proposed Acquisition Would Increase the Impediments to Reaching Roaming Arrangements and Would Increase Roaming Rates**

The Commission recently adopted rules regarding data roaming that, among other things, require carriers to offer data roaming arrangements on commercially reasonable terms and conditions.<sup>55</sup> In light of the competitive effects of this proposed acquisition, those rules unfortunately would not go nearly far enough to ensure that a merged AT&T/T-Mobile would negotiate voice and data roaming agreements on reasonable terms, particularly with respect to the critical rollout of 4G LTE services.

As an initial matter, the Commission found in its recent data roaming order that AT&T already exercises market power and engages in exclusionary conduct with regard to reaching data roaming agreements. The Commission observed that “AT&T has largely refused to negotiate domestic 3G roaming arrangements,” and noted that AT&T did not enter into a *single* 3G roaming agreement until March 2011.<sup>56</sup> The Commission also found that it was “unlikely” that AT&T (or Verizon) would be willing to offer roaming arrangements for 4G LTE networks “at any time in the near future.”<sup>57</sup> T-Mobile itself acknowledged that, even prior to this transaction, existing industry consolidation had led to conditions in which “AT&T, the dominant provider of roaming services for the GSM technology platform, now has the incentive and the ability to resist entering into reasonable data roaming agreements. *It is a classic case of market*

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<sup>55</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, ¶¶ 1, 13 (April 7, 2011) (“*Data Roaming Order*”).

<sup>56</sup> *Data Roaming Order* ¶ 25.

<sup>57</sup> *Id.*, ¶ 27.

*failure...*”<sup>58</sup> Thus, just weeks before the merger announcement, T-Mobile agreed that AT&T abuses its market power by denying smaller providers roaming rights. T-Mobile appears to have changed its tune after the announcement of this proposed acquisition, but there is no serious question that a fully independent T-Mobile shares the concerns of Leap and others in the industry.

AT&T’s dominance and market power arising from this proposed acquisition will severely impact roaming arrangements because Leap and other regional carriers depend on nationwide carriers to achieve nationwide roaming. Leap has no alternative—even leaving aside the considerable transaction costs of reaching multiple agreements, there is no longer a feasible way to assemble the nationwide coverage that consumers demand through piecemeal roaming arrangements.<sup>59</sup> Thus the market for roaming agreements needed to achieve nationwide coverage is limited to nationwide carriers.

The proposed acquisition would create a monopoly in AT&T for 3G GSM roaming, and eliminate a critical nationwide partner for 4G LTE roaming in the near future. As a result, this acquisition would strengthen AT&T’s ability to resist data roaming agreements altogether or reduce the quality of service that it provides to roaming carriers. As explained above, AT&T has resisted roaming arrangements at every opportunity, and the greater its nationwide coverage, the less incentive it has to reach agreements with other carriers and the greater leverage it has to withhold or delay such agreements. T-Mobile has previously noted that AT&T’s position on data roaming demonstrates “that roaming is increasingly becoming a monopoly service provided

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<sup>58</sup> T-Mobile USA, Inc., Notice of Ex Parte, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at 4 (filed Mar. 10, 2011) (emphasis added).

<sup>59</sup> The Commission has found that consumers increasingly expect their providers to offer mobile data and expect “to have access to the full range of services available on their devices wherever they go.” *See Data Roaming Order*, ¶ 15.



on a unilateral basis.”<sup>60</sup> This acquisition plainly would make AT&T a genuine monopoly in the provision of GSM roaming. If T-Mobile—a fellow nationwide carrier—was unable to secure a roaming agreement from AT&T prior to this transaction,<sup>61</sup> it is clear that smaller carriers would face even greater impediments to securing agreements with AT&T after its market power increased significantly due to this transaction.

The proposed acquisition also would result in higher roaming rates. By eliminating a major roaming partner in T-Mobile, creating a monopoly in nationwide roaming partners for GSM, and strengthening AT&T’s already dominant competitive position, this transaction would result in much higher GSM roaming rates, and ultimately higher 4G LTE roaming rates. AT&T would have such market power following this transaction that an increase in AT&T’s rates would have an upward effect on prices industry-wide.

Unfortunately, the Commission’s recent data roaming order would not prevent these harms. The order suggests that the Commission will evaluate “commercially reasonable terms and conditions” on a case-by-case basis, taking into account the totality of the circumstances.<sup>62</sup> The problem is that what is deemed “commercially reasonable” in a duopoly environment where one party to the agreement has market power is very different from what is commercially reasonable in a more competitive market. Short of terms that are so oppressive that they are “tantamount to a refusal to offer a data roaming arrangement,”<sup>63</sup> AT&T could, and would, introduce a number of restrictive terms, and raise roaming rates to extravagant levels, and would argue that such terms are “commercially reasonable,” as Verizon’s similar leverage would

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (noting that AT&T represented that it has no desire to enter into a roaming agreement with T-Mobile).

<sup>62</sup> *Data Roaming Order* ¶¶ 42, 85.

<sup>63</sup> *Data Roaming Order* ¶ 86.

prevent roaming carriers from pointing to a more reasonable benchmark. The Commission's data roaming rules do not provide the Commission with the tools to distinguish between contexts in which one party controls the industry and coerces oppressive terms versus hypothetical competitive conditions. The criteria that the Commission identified for evaluating commercial reasonableness have as a premise the existence of relatively robust competitive processes. But in an industry characterized by immense additional concentration and market power, nearly all of those criteria would be subject to manipulation by AT&T.<sup>64</sup>

Finally, although voice and data roaming are the principal wholesale arrangements impacted by this transaction, the proposed acquisition will adversely affect all wireless wholesale arrangements. The overall spectrum shortage in the industry is likely to incentivize creative spectrum sharing arrangements, MVNO arrangements, and other wholesale arrangements in the future. The proposed acquisition would eliminate T-Mobile as a major nationwide wholesale provider of mobile wireless services altogether. AT&T's strong spectrum position also would make it much less likely to want to partner with others in wholesale arrangements. Thus, the acquisition would effectively eliminate not one but two nationwide wholesale providers from the wholesale market, and in the unlikely circumstance that AT&T were to participate in any such arrangement, its dominance in any event would enable it to demand restrictive arrangements and higher wholesale prices, which would reduce the potentially competitive, pro-consumer benefits of such arrangements.

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<sup>64</sup> In addition, Verizon has filed a petition for review of the Commission's data roaming order and seeks to have it overturned. Although Leap supports the Commission's order, and believes that it rests on ample statutory authority, there is no certainty that even these relatively weak rules, implemented in a 3-2 vote, will be sustained.

**C. The Proposed Acquisition Would Increase AT&T's Market Power in the Provision of Special Access Services Used To Provide Backhaul**

AT&T today owns nearly 45 percent of all telephone loops,<sup>65</sup> and controls an extensive backhaul network. Leap today relies on AT&T for 55 percent of its last mile access. Wireless providers need special access services to provide backhaul in order to connect base stations to switching centers. Backhaul services are an essential input for wireless providers, and the Commission has referred to backhaul as a potential “bottleneck.”<sup>66</sup> The GAO has found that “rates for special access are a significant expense for wireless carriers because connections to backhaul provided by special access are an integral component of wireless networks.”<sup>67</sup> As demand for mobile bandwidth grows, wireless providers depend on backhaul as well as spectrum to manage data loads. Moreover, “to the extent rates are not just and reasonable, special access may serve as a barrier to entry and growth for some wireless carriers.”<sup>68</sup>

AT&T already has sufficient market power in backhaul services that it can charge “many multiples of cost” for access to its network.<sup>69</sup> T-Mobile itself previously has acknowledged that “increased oversight is particularly important for those suppliers of special access, including AT&T and Verizon, that compete with T-Mobile and other independent wireless carriers through their wireless affiliates. Because of their dominance in the special access marketplace, these

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<sup>65</sup> Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Tables 7.3, Chart 7.1 (Sept. 2010).

<sup>66</sup> *14<sup>th</sup> Wireless Competition Report* ¶ 293.

<sup>67</sup> *GAO 2010 Wireless Report* at 41.

<sup>68</sup> *Id.*

<sup>69</sup> *And then there were three: AT&T to swallow T-Mobile*, ETI Views and News (Econ. and Tech. Inc., Boston, Mass.), Mar. 2011, at 1.

ILECs have both the ability and the incentive to discriminate against competitors in favor of their wireless affiliates.”<sup>70</sup>

AT&T, by combining its traffic with T-Mobile traffic, would have a significantly greater incentive to price-discriminate in favor of its own vertically integrated wireless traffic. AT&T will be able to leverage its dominant position in last-mile facilities to selectively benefit or disadvantage competitors. AT&T inevitably will favor its own T-Mobile traffic over competitors’ traffic and in doing so will cause tremendous harm to competition in the wireless industry.

The transaction also threatens the quality of backhaul that Leap receives from AT&T. Local exchange carriers already have minimal incentives to prioritize access to competitive carriers or to improve the quality of their backhaul services. AT&T will be able to wield service quality as a competitive weapon by providing favorable service to its own traffic, but reducing the quality of its backhaul services to competitors.

**D. The Transaction Will Enable AT&T To Expand its Control of the Supply Chain of Mobile Devices**

Consumers and carriers alike understand that device selection is a critical component of the decision to purchase wireless services. As one article recently observed, “for many smaller wireless carriers, smartphones represent a critical element of their growth strategies,” yet the largest carriers “hinder their access to the latest gadgets as well as their ability to provide affordable devices.”<sup>71</sup> AT&T already has engaged in a variety of exclusionary tactics to ensure that the most attractive devices remain out of the hands of rivals, either forever or for a

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<sup>70</sup> Comments of T-Mobile, *Special Access Rates for Price Cap Local Exchange Rates*, WC Docket No. 05-25, at 5 (filed Aug. 8, 2007).

<sup>71</sup> See Fierce Wireless, “Tier 2 Wireless Carriers Clamoring For More Smartphones,” available at <http://www.fiercewireless.com/special-reports/tier-2-wireless-carriers-clamoring-more-smartphones>.

sufficiently long period that it can reap all of the first-mover advantages of a popular new device. Particularly because the life cycle of devices can be rapid, AT&T—together with Verizon—has successfully controlled the device market for years.

AT&T and Verizon have achieved this control of the market in several ways. First, they have used their market power to achieve exclusive arrangements with manufacturers, such as AT&T's long exclusivity period for the iPhone, which today still remains available exclusively through AT&T and Verizon. AT&T and Verizon also have monopolized inventory in several instances during parts shortages when consumer demand outpaced supply. They have demanded devices that are not compatible with other networks in order to limit their availability to other carriers and increase their leverage in roaming negotiations.<sup>72</sup> They have achieved favorable cost advantages due to their size and volume purchase ability, which leave smaller rivals facing markedly higher costs. And particularly during the transition to 4G, AT&T and Verizon have advocated narrow, virtually carrier-specific standards that will allow them to procure devices that they will assert are incompatible with other carriers' 4G standards.<sup>73</sup>

The proposed acquisition would make an already problematic situation dramatically worse. AT&T's dominant position after this acquisition would greatly enhance its ability to exclude competitors from obtaining the most sought-after devices. Even absent express exclusivity agreements, AT&T's monopsony power would enable it in practice to procure the lion's share of a manufacturer's production, particularly during parts shortages. AT&T also would have a much greater ability to extend the duration of exclusivity periods for new devices.

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<sup>72</sup> See, e.g., D. Hyslop and C. Helzer, "700 MHz Band Analysis," (May 6, 2010), attached to Ex Parte of MetroPCS *et al.*, WT Docket No. 06-150, PS Docket No. 06-229, GN Docket No. 09-51, RM Docket No. 11952 (May 10, 2010).

<sup>73</sup> See, e.g., *Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to Be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks*, Petition for Rulemaking, at ii-iii, RM-11592 (filed Sep. 29, 2009).

The acquisition also would increase AT&T's ability to prevent or delay the development of spectrum management technologies that would help interoperability of devices across spectrum bands by leveraging its buying power to coerce the production of non-interoperable devices. Such interoperability is crucial for carriers such as Leap to provide their subscribers with the services that they demand.

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The Applicants may assert that Leap's concerns arise simply from the fact that AT&T is big and Leap is smaller. But the concerns expressed above are not simply about big versus small. It is one thing for a large carrier to capitalize on the scope and scale efficiencies that it can achieve through an acquisition. But it is another thing altogether for a carrier to achieve market dominance by swallowing competitors, engage in anticompetitive conduct, and leave smaller remaining rivals too weak to respond. A merger that enables a carrier to realize economies of scale is not the same as a merger that would facilitate the exploitation of market power and would result in both higher prices for consumers and the exclusion of competitors.

The Commission cannot run from the fact that the wireless industry already is dominated by two major carriers, and that this increasing concentration of power already is having adverse effects on competition. This transaction would make a bad situation much worse. It would create fundamental, structural problems in the industry that cannot meaningfully be mitigated through conditions. If the Commission is serious about promoting a genuinely competitive wireless industry—and promoting the innovation, service quality, and lower prices that accompany robust competition—it must reverse the trend. The Commission should work to mitigate the effects of AT&T's existing market power, not approve a transaction that would greatly enhance its market power.

### **III. THE SUGGESTED EFFICIENCY BENEFITS OF THE PROPOSED ACQUISITION ARE OVERSTATED AND DO NOT OUTWEIGH THE COMPETITIVE HARMS**

The Applicants would need to demonstrate tremendous benefits arising from the proposed acquisition to overcome the significant competitive harms described above.

Unfortunately, the purported benefits asserted in the application are more bluster than reality.

#### **A. AT&T's Asserted Spectrum Crunch Is Not Credible and Is Not Supported by the Record**

The principal argument that the Applicants put forth to justify this transaction is that AT&T faces a significant spectrum shortage that can only be cured through this transaction. These claims are highly questionable and unsupported by the current record. Moreover, to the extent AT&T faces any spectrum constraints, they are largely constraints of its own making that have arisen through its mismanagement of resources. That mismanagement does not remotely justify creating a dominant carrier with market power that will have the ability and incentive to harm competition.

It bears emphasis that AT&T already controls enormous amounts of spectrum, and indeed is sitting on an extensive spectrum reserve that it has not tapped. For example, despite acquiring approximately \$1.3 billion of AWS spectrum in 2006, AT&T has yet to deploy commercial operations on this band. Indeed, AT&T is so disinclined to put this spectrum to use that it has offered this AWS spectrum to Deutsche Telekom as part of its breakup fee.<sup>74</sup> It is impossible to credit AT&T's claim that it is spectrum constrained when it is prepared, if

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<sup>74</sup> See Steven M. Davidoff, *AT&T Deal Shows How Different a Private Sale Can Be*, N.Y. Times, Mar. 25, 2011, available at <http://dealbook.nytimes.com/2011/03/25/att-deal-shows-how-different-a-private-sale-can-be>; Philip Elmer-DeWitt, *AT&T-Mobile: What the Analysts Say*, CNN Money, Mar. 21, 2011, <http://tech.fortune.cnn.com/2011/03/21/att-mobile-what-the-analysts-say>; see also Stock Purchase Agreement § 7.5 and Annex E (attached to Application).

necessary, to move to LTE on its own without using *any* of its valuable AWS spectrum. AT&T also has an extensive and rapidly growing WiFi network, and AT&T does not explain at all the impact of its WiFi network on its ability to alleviate any purported spectrum crunch.

AT&T mentions in passing that its principal rival Verizon—despite having more subscribers than AT&T, and less spectrum than AT&T—has publicly stated that it faces no significant spectrum shortage.<sup>75</sup> Verizon’s statements are a strong indication that AT&T already has ample resources at its disposal, and simply needs to manage them more efficiently. AT&T’s spectrum crunch argument is akin to claiming that it needs more scarce fuel to heat its house while it refuses to close the windows, or claiming that it needs more water for its fields even though it insists on transporting it in a leaky bucket. The solution, especially with a resource as scarce as spectrum, is for AT&T to deploy all of its spectrum and to manage it efficiently, not to harm competition by creating a dominant carrier with market power that usurps limited resources. If Verizon can manage the transition to LTE with more customers and less spectrum, then AT&T can do the same.

AT&T asserts that it must support legacy technologies during its transition to LTE,<sup>76</sup> but that does not justify acquiring T-Mobile and creating a dominant carrier in order to support legacy technologies. This is a phenomenon that many carriers must navigate as they evolve to newer technologies, and is not unique to AT&T. AT&T claims that it must continue to support the 2G GSM standard, but AT&T does not offer any justification for why the Commission should approve a massive deal that would cause enormous concentration and competitive harms in order to subsidize an older, outdated standard. AT&T argues that it would face difficulties

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<sup>75</sup> See *Public Interest Statement* at 78-79.

<sup>76</sup> *Public Interest Statement* at 22-25.



rapidly transitioning those users to newer technologies,<sup>77</sup> but this is little more than an assertion, and AT&T certainly does not demonstrate why the net competitive effect of more rapidly transitioning those legacy customers to a newer standard would not be less harmful than permitting this transaction to go forward. AT&T has not met its burden of quantifying the costs of alternatives, such as giving subsidized handsets to 2G customers to migrate them, just as some cable operators gave customers free or discounted set top boxes to migrate them from analog to digital service.

AT&T also claims that it must manage a surge in data volume,<sup>78</sup> but, again, that is true of all carriers. The Commission has recognized that the tremendous increase in data usage is a characteristic of the wireless industry on a broad level.<sup>79</sup> Leap confronts this phenomenon, and many other carriers do as well. AT&T's self-serving rhetoric about being a "leader in wireless innovation"<sup>80</sup> does not establish that it faces any greater challenges than many carriers that serve urban markets whose subscribers are transitioning to data-centric usage. The issue is whether AT&T should be allowed to acquire a built-out network and millions of customers in lieu of building out its own spectrum assets. Viewed through the public interest lens, it is clear that allowing AT&T to become even more dominant will heighten the hurdles that the rest of industry faces in managing the transition to a data-centric world.

Finally, it is simply implausible to think that AT&T would not devote significant resources to deploying LTE on its own absent this transaction. Verizon already has publicly

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<sup>77</sup> *Id.* at 24-25.

<sup>78</sup> *Id.* at 20-22.

<sup>79</sup> *See 14th Wireless Competition Report*, ¶¶ 2, 181; *see also* Federal Communications Commission, OBI Technical Paper Series, *Mobile Broadband: The Benefits of Additional Spectrum* (Oct., 2010).

<sup>80</sup> *Public Interest Statement* at 20.

stated that it plans to cover its entire existing nationwide footprint, covering 97 percent of the population, with LTE by the end of 2013.<sup>81</sup> Prior to announcing this transaction, AT&T had announced that it was already transitioning its network to LTE and preparing initial trials of LTE equipment for trials. AT&T now claims that absent this transaction it would deploy LTE only to 80 percent of the population.<sup>82</sup> But it is unthinkable that AT&T, with the most spectrum resources in the nation, would build out LTE to 80 percent of the population and then stop, while its principal rival would deploy to 97 percent. No one can seriously doubt that AT&T would do everything in its power including rapidly transitioning users of legacy technologies to keep pace with Verizon.

In sum, all that AT&T has done is to describe industry conditions generally: there is a transition to data-centric usage, data requires more spectrum, and carriers must support legacy systems while transitioning to 4G. But the question is not whether this transition will be challenging, or whether some carriers are managing it better or worse than others. The question is why AT&T should be permitted to attain market dominance, create significant competitive injuries, and harm rivals and consumers, to navigate the same industry conditions that many carriers face. This is an especially acute question because AT&T already holds the largest horde of spectrum in the country, and is not exploiting that spectrum to its full potential. AT&T's assertions about the merger are at best an *explanation* for its interest in pursuing the transaction, not a *justification* for it.

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<sup>81</sup> See <http://network4g.verizonwireless.com/#/coverage>; see also <http://news.vzw.com/news/2011/04/pr2011-04-18.html>.

<sup>82</sup> *Public Interest Statement* at 54.

**B. T-Mobile’s Asserted Lack of a Clear Path to LTE is Overstated and Does Not Justify Creating Significant Competitive Harms to the Industry**

The Applicants assert that T-Mobile lacks a clear path to LTE absent this proposed acquisition.<sup>83</sup> This is less of an issue than the application suggests. T-Mobile already advertises not only that it has the nation’s largest 4G network, but also that it will offer speeds comparable to LTE.<sup>84</sup> The application’s representations thus are not consistent with what T-Mobile is telling its customers. In addition, the application makes clear that AT&T intends to use T-Mobile’s assets to deploy LTE. It is not clear why T-Mobile itself could not do the same. The only limitation identified in the application is that it might take T-Mobile longer, but the benefit of reducing that delay—during what will surely be a very lengthy nationwide transition to LTE in any event—does not come close to outweighing the competitive harms identified above.

In addition, even if T-Mobile faces challenges in repurposing its existing spectrum for LTE, it could partner with wholesale providers to offer LTE service, either during a transition period while it repurposes its spectrum, or as a long-term solution. Both Clearwire and LightSquared developed their business models for the express purpose of serving as wholesale providers of LTE to other wireless carriers. Partnering with a wholesaler would mitigate T-Mobile’s asserted problem without causing significant harm to competition.

**C. The Proposed Acquisition is Likely to Cut Jobs and Reduce Infrastructure Investment**

Finally, the Application’s claim that the proposed acquisition will increase economic growth and create jobs requires a healthy appreciation for irony. The reality is that many of the “scale efficiencies” that the Applicants tout throughout their application will be achieved through

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<sup>83</sup> *Public Interest Statement* at 31-33.

<sup>84</sup> See <http://newsroom.t-mobile.com/articles/4g-fact-sheet>.

job cuts. Broadband deployment may create jobs as a general matter, but with this transaction, we know that they won't be AT&T jobs.

Again, an important question for the Commission to consider is what the alternative to this transaction would look like. Absent this transaction, AT&T would invest billions of dollars in deploying its own LTE network, utilizing its own spectrum more efficiently, and reaching more Americans through its own investment, while leaving T-Mobile as a vibrant competitor that is deploying its own LTE facilities. *That* is a story about job creation.

### **CONCLUSION**

The proposed acquisition would significantly increase concentration in an already highly concentrated market. It would give AT&T significant market power and enable it to become even more dominant. It would harm competitors, and would harm consumers. The purported offsetting benefits consist principally of generalities with little evidentiary support. The transaction thus is not in the public interest, and the Commission should deny the applications.

Respectfully submitted,

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General Counsel  
Leap Wireless International, Inc.  
10307 Pacific Center Court  
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May 31, 2011

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**DECLARATION OF ROBERT J. IRVING JR.**

I, Robert J. Irving Jr., hereby declare as follows:

1. I am Senior Vice President and General Counsel of Leap Wireless International, Inc. and Cricket Communications, Inc. I am familiar with the matters and assertions set forth in the foregoing Petition to Deny.
2. I have reviewed the Petition to Deny. I declare under penalty of perjury that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

5/31/11  
Date

  
Robert J. Irving, Jr.

**CERTIFICATE OF SERVICE**

I, James H. Barker, certify that on this 31st day of May, 2011, I caused the foregoing

Petition to Deny to be served upon the following recipients as follows:

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/s/ James H. Barker  
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