

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)	

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

Introduction

The American Antitrust Institute (“AAI”)¹ submits these comments in opposition to the applications of AT&T Inc. (“AT&T”) and Deutsche Telekom AG to transfer control of the licenses held by T-Mobile USA, Inc. (“T-Mobile”) and its subsidiaries to AT&T. Based on the submission of the Applicants, it is evident that the Applicants have not met their heavy burden of demonstrating that the proposed merger is in the public interest. On the contrary, the merger is highly likely to be anticompetitive and not necessary to achieve AT&T’s claimed public interest benefits.

¹ AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. It is supported by voluntary donations into its general treasury and has no financial interest in this matter. AAI is managed by its Board of Directors, which alone has approved of this filing. (One member of the board was recused.) The Advisory Board of AAI, which serves in a consultative capacity, consists of over 110 prominent antitrust lawyers, law professors, economists, and business leaders. See <http://www.antitrustinstitute.org>. The individual views of members of the Advisory Board may differ from the positions taken by AAI. AAI has frequently commented on pending mergers, including mergers that have been before the Commission.

Overview

It is time to call a halt to what T-Mobile recently and correctly described as “a disturbing trend toward increasing concentration”² in the wireless communications market. The two industry leaders, AT&T and Verizon, now collectively control approximately 65% of all wireless subscribers and revenues.³ Indeed, these figures understate the dominance of AT&T and Verizon, which garner 80% of industry profits, have exclusive access to the iPhone, possess the best spectrum, and control essential inputs such as roaming and backhaul services required by other carriers. AT&T’s proposed acquisition of T-Mobile not only significantly increases the already high level of concentration in the industry, it is a giant step in the direction of replicating the original cell phone duopoly that years of public policy designed to promote wireless competition had sought to dismantle.⁴ Post merger, AT&T alone would control more than 40% of all subscribers, and together with Verizon would account for more than 72% of all subscribers and nearly 78% of revenues.⁵ It creates a substantial risk that the

² Reply Comments of T-Mobile USA, Inc. at 1, Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, WT Dkt. No. 10-133 (filed Aug. 16, 2010).

³ See Craig Moffet et al., *U.S. Wireless: Picking Winners and Losers in the Wake of the Deal . . . Raising Target Prices for T, VZ, Leap, and PCS*, Bernstein Research, April 5, 2011, at 5, 6.

⁴ Indeed, one respected analyst concludes, “The industry is already steaming towards duopoly, and at an accelerating rate, with or without a merger. Essentially all of [the industry’s 2010] growth, and all of the industry’s profits, are now being captured by just two companies. . . . They dominate capital spending and spectrum purchases. They have the marquee handsets. Their advertising budgets dwarf those of their competitors.” *Id.* at 4.

⁵ See Rebecca Arbogast & David Kaut, *AT&T/T-Mo: Data Point to Coming Brawl, Risk; Deal Still Looks Doable*, Stifel Nicolaus, March 29, 2011, at 2 (subscribers); John C. Hodulik & Batya Levi, *US Wireless 411*, UBS Investment Research, March 30, 2011, at 23 (revenues).

acquisition will result in higher prices, lower quality, less innovation, and fewer choices for consumers and businesses.⁶

Unlike other recent wireless mergers, which have been permitted to go forward conditioned on divestitures in certain local markets, this is the first merger that would eliminate another national facilities-based carrier. That carrier is also the low-priced provider, a leader in customer satisfaction, and an industry innovator. Moreover, the anticompetitive effects of the loss of this national competitor cannot be cured by divesting assets in certain local markets to other wireless carriers. AT&T's promise to allow T-Mobile customers to keep their current rate plans for a while is irrelevant for antitrust purposes and in any event does not address the loss of quality and price competition from an independent T-Mobile.

Based on AT&T's submission, we see no adequate legal or public policy justification for reducing the number of national carriers from 4 to 3 (or more realistically, 2 1/2, because the merger may have the effect of marginalizing Sprint as a competitor).⁷ The argument that it may be cheaper or faster for AT&T to increase its network capacity by buying its competitor, rather than investing in upgrading its network, as AT&T claims (but does not demonstrate), is not a sufficient justification for a merger that significantly reduces competition in an already highly concentrated market. It is often easier to expand capacity by buying one's competitor, but sound competition policy

⁶ See, e.g., N. Landell-Mills, *AT&T Investment Profile*, Indigo Equity Research, April 27, 2011, at 1 ("The real value of T-Mobile to AT&T is likely to be higher margins (and prices) generated due to its improved market position and industry consolidation.").

⁷ See Moffet, *supra* note 3, at 1 ("Sprint . . . appears to be the odd man out. Telecom is a business of scale, and with their scale Verizon and AT&T will have the ability to put intense pressure on the likes of Sprint, further extending their lead and perhaps permanently marginalizing Sprint in the process.").

insists that a firm as dominant as AT&T expand by internal growth, not by acquiring a significant rival.⁸ Insofar as there is a looming shortage of spectrum, then creating new spectrum, rather than consolidating what exists, is the far more preferable solution for consumers. And it is a solution wholly within the government's control. Indeed, if AT&T, which already holds the most spectrum in the industry, cannot compete effectively without additional spectrum, then surely the barriers to entry and expansion have become so high that new entry or expansion by other, far-smaller carriers can hardly be expected to counteract the loss of T-Mobile as a competitor.

At its investor conference only four months ago, T-Mobile convincingly presented its new "challenger" strategy pursuant to which it planned to challenge the market leaders by combining its high quality 4G network features and value pricing to capitalize on the growing demand for affordable and easy to use smartphones.⁹ It touted its spectrum position over the short and medium term and although it saw a long-term spectrum issue, it viewed that as a problem for the entire industry, not just T-Mobile. Now, it has decided that being acquired is easier than challenging its rivals. Nothing of course forbids T-Mobile's parent, Deutsche Telekom, from changing its strategy and exiting the U.S. mobile market. However, the Communications Act and the Clayton Act prevent it from sacrificing U.S. consumers in the bargain.

In these comments we first address the definition of the relevant markets, focusing in particular on AT&T's unsupportable position that the relevant markets in

⁸ Cf. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) ("Appellees do not contend that they are unable to expand . . . by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition").

⁹ See Transcript, T-Mobile USA Investor Day, Jan. 20, 2011 ("T-Mobile Investor Day Transcript"), http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/%20transcript_20012011.pdf.

which this acquisition should be evaluated are purely local. We explain why, in contrast, a national relevant market is appropriate and why that means there are only four participants in the market —AT&T, Verizon, Sprint, and T-Mobile—the four national carriers. Regardless of how markets are plausibly defined, however, the resulting levels of concentration and other factors, such as high barriers to entry, make the merger presumptively anticompetitive. Second, we address qualitative factors and conclude that they do not undercut the presumption of illegality. On the contrary, there is a significant risk of post-merger unilateral, coordinated, and exclusionary anticompetitive effects. Third, we address AT&T’s claimed efficiency and public interest benefits and conclude that they are not merger-specific and are otherwise defective. Finally, we maintain that a regulatory solution is neither sufficient nor appropriate to address the competitive concerns raised by the merger.

I. The Merger is Presumptively Anticompetitive Because it Reduces the Number of Significant Competitors from Four to Three and Otherwise Significantly Increases Concentration in Highly Concentrated Markets

AT&T seeks to minimize the risk of anticompetitive effects by defining the relevant markets as strictly local and pointing to the fact that the overwhelming majority of local markets “captured” by the Commission’s “spectrum screen” will contain at least four or more competitors after the merger. It makes no effort to calculate standard market shares or concentration levels in any local market, let alone on a national basis. In fact, a proper definition of the relevant markets and concentration analysis shows that the merger reduces the number of significant competitors from 4 to 3, and that it significantly increases concentration in highly concentrated markets.

A. Relevant Product Markets

Wireless mobile telecommunications services (voice and data) provided to consumers appears to be a relevant product market,¹⁰ and there are likely separate relevant markets for “prepaid” and “postpaid” services. Postpaid services, which account for roughly 74% of all subscribers and 87% of subscriber revenues,¹¹ typically involve long-term contracts that bundle services with subsidies on handsets and require customers to satisfy a credit check. Prepaid services require payment in advance and typically involve no contracts at all.¹² Prepaid plans tend to appeal to budget conscious consumers and those who do not have the credit to qualify for postpaid services.¹³ While prepaid plans have become more popular recently, especially the “all you can eat” variety, they do not appear to significantly constrain the pricing of postpaid plans, as the traditional

¹⁰ In recent wireless mergers, the DOJ has defined the relevant product market as “mobile wireless telecommunications services,” while the FCC has defined the relevant market as “mobile telephony/broadband services.”

¹¹ See Moffett, *supra* note 3, at 14, 15.

¹² “Prepaid services include traditional, pay-as-you-go services, in which customers buy minutes ahead of time on a card, as well as unlimited prepaid services, in which customers pay in advance for unlimited voice and/or data services each month with no long-term contract.” *Empowering Consumers to Avoid Bill Shock*, 25 FCC Rcd. 14625, 14638, ¶ 25 (Oct. 14, 2010); see also Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd. 11407, ¶¶ 98-99 (May 20, 2010) (“Fourteenth Wireless Competition Report”) (describing prepaid services).

¹³ As Cricket Communications, one the leading prepaid providers, explains, “A core component of Cricket’s business model consists of tailoring service plans to meet the needs of consumers who cannot afford or qualify for services from other wireless providers. Cricket offers its voice and broadband services without the typical long-term contract commitments or credit checks that prevent many economically disadvantaged customers from obtaining wireless services.” Reply Comments of Cricket Communications, Inc. at 2-3, State of Mobile Wireless Competition, WT Dkt. 10-133 (Aug. 16, 2010) (also noting that Cricket’s wireless broadband service is the first and only connection to the Internet for most of its customers); see also MetroPCS Communications, Inc., Annual Report 2010, at 7 (prepaid provider “target[s] a mass market that we believe has been largely underserved historically by traditional wireless broadband mobile carriers”).

national carriers have responded not by lowering the price of their postpaid plans, but by offering their own prepaid plans or entire “flanker” brands.¹⁴

Wireless services provided to businesses is also a separate relevant product market. Wireless services are often customized for businesses, sold by specialized sales forces, and priced differently from the consumer market, frequently on a bidding basis.¹⁵

B. Relevant Geographic Markets

In the past, the DOJ and FCC have considered only local geographic markets in wireless mergers, but that is because they have not previously reviewed a merger between two national carriers. Indeed, in recent wireless mergers, the DOJ has emphasized that “[t]he existence of local markets does not preclude the possibility of competitive effects in a broader geographic area, such as a regional or national area”¹⁶ Insofar as competitive effects may occur on a national level, it is appropriate to define a relevant market that is national in scope. This is consistent with the revised Horizontal Merger Guidelines, which provide that “The hypothetical monopolist test . . . does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the

¹⁴ See *Event Brief of Q1 2010 AT&T Earnings Conf. Call – Final*, FD (FAIR DISCLOSURE) WIRE, April 21, 2010 (AT&T CFO noted that AT&T would continue to tweak its prepay offerings to drive some growth in those categories, but “[w]e won’t do things that could bring a significant impact or a negative impact to our postpay business. And that is still to a large degree where our focus is.”); see also Philip Cusick et al., *Prepaid Wireless*, J.P. Morgan North America Equity Research, April 18, 2011, at 26 (“To avoid cannibalizing their attractive postpaid business AT&T and Verizon have kept branded prepaid pricing fairly high.”).

¹⁵ See, e.g., AT&T Wireless, <http://www.wireless.att.com/businesscenter/solutions/custom-solutions.jsp> (“AT&T Professional Services uses a unique, customer-driven methodology to successfully establish a customer’s wireless data business solution from analysis, design, and implementation through support and growth planning.”) (visited May 29, 2011).

¹⁶ Competitive Impact Statement at 7 n.2, *United States et al. v. Verizon Commc’ns Inc. and Alltel Corp.*, No. 1:08-cv-01878 (Oct. 30, 2008); Competitive Impact Statement at 6 n.2, *United States et al. v. AT&T and Centennial Commc’ns Corp.*, No. 1:09-cv-01932 (Oct. 13, 2009) (same).

market and measuring market shares is to illuminate the evaluation of competitive effects.”¹⁷ It is also consistent with *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966), in which the Supreme Court held that the relevant geographic market for accredited central station protection services was national because it “reflect[ed] the reality of the way in which” the business was built and operated, even though the service was provided on a local basis.¹⁸ As Professor Gavil notes, “an antitrust analysis that focused narrowly on local sales to consumers would simply overlook the many possible competitive ramifications of AT&T’s acquisition of T-Mobile.”¹⁹

Accordingly, the relevant geographic markets are likely to be *both* local and national in scope. While a consumer can only purchase service from a carrier that operates in his or her local market, competition among the national carriers is primarily national, as illustrated by the billions of dollars spent on national wireless advertising. In its acquisition of the regional carrier Centennial, AT&T claimed that “the predominant forces driving competition among wireless carriers operate at the national level. . . . AT&T establishes its rate plans and pricing on a national basis One of AT&T’s

¹⁷ U.S. DEPT OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 4.1.1 (Aug. 19, 2010); *see also* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 148 (2007) (“Recognizing the possibility of multiple markets in which the competitive effects of firm conduct could be evaluated allows for more accurate targeting of the competitive effects analysis in each case.”).

¹⁸ *See also Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (the geographic market “must . . . both ‘correspond to the commercial realities of the industry and be economically significant’”); *RSR Corp. v. F.T.C.*, 602 F.2d 1317 (9th Cir. 1979) (narrower geographic markets rejected where commercial realities suggested a single, national market); *Apani Southwest, Inc. v. Coca-Cola Enters.*, 128 F. Supp. 2d 988, 993 (N.D. Tex. 2001) (“Whether a geographic market corresponds to commercial realities takes into account practical considerations such as . . . the area in which the defendant and its competitors view themselves as competing.”), *aff’d*, 300 F.3d 620, 633 (5th Cir. 2002).

¹⁹ Written Statement of Professor Andrew I. Gavil, Howard University School of Law, Before the House Judiciary Committee Subcommittee on Intellectual Property, Competition, and the Internet, May 26, 2011, at 11, <http://judiciary.house.gov/hearings/pdf/Gavil05262011.pdf>.

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.”²⁰ AT&T explained that its plans were uniform throughout the country for efficiency and marketing reasons, and that “[v]ery infrequently,” it may offer a local promotion.²¹ In contrast, in its current application to acquire T-Mobile, AT&T emphasizes “the local nature of this marketplace,” but does not suggest that pricing of its service plans is done on anything other than a national basis. Rather, any local promotions appear to be limited to handsets and peripheral devices.²²

Verizon too has explained that “the wireless business today is increasingly national in scope with four major national providers competing vigorously through pricing plans and service offerings that are national in scope,” and that

Like other national carriers, Verizon Wireless primarily prices—and advertises—on a national basis, leaving very little room for local (or even regional) variation in pricing. Most prices are set on a national level, and therefore local market conditions are less relevant to a carrier’s competitive strategy than are actions taken by other national carriers.²³

²⁰ Description of Transaction, Public Interest Showing and Related Demonstrations 28-29, Merger of AT&T Inc. and Centennial Comm’cns Corp., WT Dkt. No. 08-246 (Nov. 21, 2008) (“AT&T/Centennial Public Interest Statement”). AT&T stated it “focuses on the other national carriers in its competitive decision-making and does not consider Centennial in deciding on pricing and service offerings.” *Id.* at 37. AT&T made a similar claim when it acquired the regional carrier Dobson in 2007, explaining, “Where national competitive forces determine prices and the same products are offered nationwide at the same price, the relevant geographic market is national, rather than local.” Description of Transaction, Public Interest Showing and Related Demonstrations 19 n.74, Merger of AT&T Inc. and Dobson Comm’cns Corp., WT Dkt. No. 07-153 (July 13, 2007).

²¹ AT&T/Centennial Public Interest Statement, Decl. of David A. Christopher, Chief Marketing Officer ¶ 6.

²² Application, Description of Transaction, Public Interest Showing and Related Demonstrations 74, Acquisition of T-Mobile USA, Inc. by AT&T Inc. (April 21, 2011) (“Application”).

²³ Description of Transaction, Public Interest Showing and Related Requests and Demonstrations 29, 31-32, Applications of Atlantis Holdings LLC, Transferor, and Cellco Partnership D/B/A Verizon Wireless, Transferree, WT Dkt No. 08-95 (June 13, 2008); *see also id.*, Decl. of Dennis Carlton, Allan Shampine, and Hal Sider ¶¶ 37-38 (June 13, 2008) (“there is virtually no regional

Regional and local wireless carriers are not participants in the national market because they do not offer or market their services on a national basis. They may offer “national” roaming but a person not located within their local or regional networks cannot become a subscriber. Moreover, smaller and regional carriers are limited in the competition they can provide to the national carriers even in the areas in which they do operate, for a number of reasons. These include the fact that they: lack brand names like those of the national carriers built up by years of intensive advertising; cannot match the array of smartphones offered by the national carriers; are significantly dependent on expensive roaming agreements with the national carriers; and tend to have slower data speeds. AT&T points to the growth of the likes of MetroPCS and Leap/Cricket as an indicator of the competitive vitality of the local and regional players, but the market share of *all* the local and regional carriers on a national basis is still less than 7% of national revenues.²⁴ And insofar as there are separate product markets for postpaid and business services, MetroPCS and Leap do not participate in those markets.

The Sprint-MCI merger that was blocked by the Justice Department a decade ago is instructive. In that case, there were three big national long distance carriers, AT&T, Sprint, and MCI WorldCom (“the Big 3”), and a host of “fringe” carriers (including non-Bell local telephone companies) that competed in the mass market and offered their services throughout the U.S. The merged firm would have had a combined market share of about 27%, with AT&T at 53%. Although the “fringe” carriers comprised 20% of the national market, and in some cases had become significant competitors in their local

variation in the pricing of [rate] plans” and “regional differences in loyalty bonuses . . . and occasional local handset promotions . . . are rare and small in magnitude”).

²⁴ See Hodulik & Levi, *supra* note 5, at 23.

service areas, the DOJ concluded that they would not be in a position to “prevent coordinated pricing or other anticompetitive behavior” because they were “handicapped in any competitive response, not only by their little-known brands, but also because their networks are often dependent upon the provision of wholesale services by the Big 3 and others.”²⁵ So, too, here, the smaller and regional players are not in a position to discipline the competitive behavior of the “Big 4.”

C. Market Concentration

In the national market for mobile wireless telecommunications services, as well as the separate markets for consumer postpaid services and business services (whether defined locally or nationally), the result of the merger is generally to reduce the number of participants from four to three. This increase in concentration in already highly concentrated markets²⁶ raises a strong presumption of illegality under the Horizontal

²⁵ Complaint ¶¶ 62-72, *United States v. WorldCom, Inc. and Sprint Corp.*, C.A. No. 1:00 CV 01526 (D.D.C., filed June 27, 2000). DOJ emphasized that the Big 3 had “collectively invested billions of dollars to market their long distance services and to establish, maintain, and enhance their brand images with mass market consumers,” and that “[b]rand recognition is often a deciding factor in mass market consumers’ choices when they face complex price decisions such as those often presented by competing long distance plans.” *Id.* ¶ 64. In this, the DOJ was reiterating the points made by experts retained by a firm opposing the deal, who emphasized the importance of brand names when consumers have imperfect information and that, accordingly, “a reduction in competition among branded suppliers may adversely affect consumers even in the presence of unbranded goods.” Decl. of Dennis W. Carlton & Hal S. Sider ¶ 16, Joint Applications of MCI WorldCom, Inc., and Sprint Corp. for Consent to Transfer Control, CC Dkt. 99-333 (Feb. 18, 2000).

²⁶ One report estimates the post-merger HHI at over 2900 when the market is defined to include all wireless subscribers nationwide. See Arbogast & Kaut, *supra* note 5, at 2. The concentration levels of the postpaid market are higher because that market does not include local and regional providers like MetroPCS and Leap/Cricket. And the concentration levels of the business market are likely higher still. According to T-Mobile, the pre-merger market shares in the business market are: Verizon 41%, AT&T 35%, Sprint 14%, and T-Mobile 4%. See T-Mobile USA Investor Day Slide Presentation at 64, Jan. 20, 2011 (“T-Mobile Investor Day Slide Presentation”), available at http://www.downloadtelekom.de/dt/StaticPage/97/67/90/tmo-invday11.pdf_976790.pdf. This suggests a post-merger HHI of approximately 3400 with a change of 280 points. T-Mobile’s small market share does not indicate its future

Merger Guidelines and the case law, particularly in light of the growing dominance of AT&T and Verizon and the obviously high barriers to entry in this market.²⁷ As DOJ has elsewhere noted, “Based in large part on its extensive experience in evaluating horizontal mergers, the Department starts from the presumption that in highly concentrated markets consumers can be significantly harmed when the number of *strong competitors* declines from four to three, or three to two.”²⁸ And indeed, the Justice Department and FTC have blocked numerous four to three mergers (under Republican and Democratic administrations alike).²⁹ Even assuming *arguendo* that the small local and regional carriers can be considered “significant competitors” in some local markets, the merger

competitive significance, however, as its new “challenger” strategy included a renewed focus and funding to compete in the business market. *See infra* at 17.

²⁷ *See* HORIZONTAL MERGER GUIDELINES § 5.3 (“Mergers resulting in highly concentrated markets [HHHI above 2500] that involve an increase in HHI of more than 200 points will be presumed to be likely to enhance market power.”); *see also id.* § 1 (“these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipency”); *see generally* Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction* (May 18, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850103 (“Under incipency standard, the AT&T/T-Mobile merger is highly problematic.”).

²⁸ *Ex Parte* Submission of the United States Dept. of Justice at 15, GN Dkt 09-51, Economic Issues in Broadband Competition (Jan. 4, 2010) (emphasis added).

²⁹ *See, e.g.*, Complaint, *In re Aligent Technologies, Inc.*, FTC Dkt No. C-4292 (filed June 25, 2010) (blocking consolidation from 4-3 competitors in two relevant markets; combined market share of 48%), *available at* <http://www.ftc.gov/os/caselist/0910135/100629sgilentvcmt.pdf>; Complaint, *United States v. Baker Hughes Inc.*, No. 1:10-cv-00659 (D.D.C. filed April 27, 2010) (challenging 4-3 merger; combined market share of 35%), *available at* <http://www.justice.gov/atr/cases/f258100/258179.pdf>; Complaint, *United States v. Republic Services, Inc.*, No. 1:08-cv-02076 (D.D.C. filed Dec. 3, 2008) (challenging merger that would reduce the number of “significant competitors” from 4 to 3 in several geographic markets; combined market shares as low as 37%), *available at* <http://www.justice.gov/atr/cases/f239900/239987.pdf>; Complaint, *United States v. Alcan, Inc.*, No. 1:03CV02012 (D.D.C. filed Sept. 29, 2003) (challenging merger between second and fourth largest firms that would reduce the number of significant competitors from 4 to 3; combined market share of 40%; top two remaining firms would control 80% of the market), *available at* <http://www.justice.gov/atr/cases/f201300/201303.pdf>. *See generally* William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMP. POLICY INT’L, Spring 2009, at 129, 143 (finding that in the 1990s and 2000s, the “threshold at which the federal agencies could be counted on to apply strict scrutiny” was a reduction in the number of significant competitors from 4 to 3).

appears to result in presumptively anticompetitive levels of concentration in most local markets.³⁰

II. Other Factors Confirm That The Merger Poses a Significant Risk of Anticompetitive Effects

AT&T's public interest filing fails to rebut the presumption of anticompetitive effects created by the high degree of concentration resulting from the merger³¹ or, as the Commission's precedent requires, that the merger "will *enhance* competition."³² On the contrary, publicly available information confirms that the merger poses a significant risk of unilateral, coordinated, and exclusionary anticompetitive effects. As the Horizontal Merger Guidelines and the case law emphasize, "anticompetitive effects" does not just mean higher prices, but also means reduced quality, service, innovation, or consumer choice.³³

³⁰ See Arbogast & Kaut, *supra* note 5, at 2 ("The wireless market is already concentrated nationally and even more so locally . . . and the available data suggest the AT&T/T-Mo[bile] merger would likely result in levels of concentration that would trigger additional scrutiny in most of their overlapping local markets.").

³¹ See HORIZONTAL MERGER GUIDELINES § 5.3 (presumption of anticompetitive effects "may be rebutted by *persuasive evidence* showing the merger is unlikely to enhance market power") (emphasis added).

³² *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control to NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 19987 ¶ 2 (1997) (emphasis added); see also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6555 ¶ 21 (2001) (same); Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 49 (noting that FCC, but not DOJ, will block a competitively neutral merger).

³³ See HORIZONTAL MERGER GUIDELINES § 1 (Guidelines are concerned about "non-price terms and conditions that adversely customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."); see also *United States v. Philadelphia National Bank*, 374 U.S. 363, 368 (1968) (finding a bank merger illegal under § 7 because it would limit consumer choice as to "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous special and extra services.").

A. Unilateral Anticompetitive Effects

Unilateral effects theory asks whether the merged firm alone will be able to raise price or otherwise reduce competition. Unilateral effects can occur in a number of scenarios including when, through merger, one firm can recapture enough of the sales it would lose from raising price pre-merger to make a price increase profitable post merger.³⁴ That could be the case here if a significant number of subscribers would (1) choose AT&T if T-Mobile's prices were raised, or (2) choose T-Mobile if AT&T's prices were raised, even if most subscribers would defect to other carriers. AT&T contends that AT&T and T-Mobile are not especially close substitutes and therefore unilateral effects are unlikely. However, the first scenario is particularly plausible. Indeed, there really is little dispute that unilateral price increases will occur, as AT&T moves T-Mobile subscribers to its more expensive, and more profitable, rate plans. Some of the synergy benefits of the deal depend on that occurring. AT&T has told investors that it sees the merger as an opportunity "to improve data ARPUs"³⁵ and "pull T-Mobile's numbers up to ours," and to "improve overall margins."³⁶ MetroPCS's CEO interpreted this to mean higher prices for T-Mobile subscribers, which would be beneficial to his company.³⁷

To be sure, AT&T says that it plans to allow current T-Mobile subscribers to maintain their existing rate plans for some unspecified period of time, which means that

³⁴ See HORIZONTAL MERGER GUIDELINES § 6.1.

³⁵ ARPU refers to average revenue per subscriber and is a key industry financial metric.

³⁶ *AT&T to Acquire T-Mobile USA from Deutsche Telekom – Final*, FD (FAIR DISCLOSURE) WIRE, March 21, 2011, at 7 (Ralph De La Vega, President & CEO of AT&T Mobility and Consumer Markets noting gap between AT&T and T-Mobile in terms of ARPUs and margins).

³⁷ See *MetroPCS Communications Inc. at Barclays Capital High Yield Bond and Syndicated Loan Conference – Final*, FD (FAIR DISCLOSURE) WIRE, March 24, 2011 ("Looking at the AT&T presentation, it was clear that one of the synergies there is increasing the ARPU of T-Mobile. And again, we look at that as very beneficial to us given that we are a value provider in the market place.").

“a substantial group of subscribers would have no prospect of facing a merger-related price increase.”³⁸ Yet even if this “rate freeze” – evidently designed to win regulatory approval – were relevant to the competitive analysis, which it should not be,³⁹ it also means that a substantial group of subscribers *would* face the prospect of a price increase, including those T-Mobile subscribers who want to change rate plans, those who remain with T-Mobile/AT&T when it decides to end the rate freeze, and those who would have become T-Mobile subscribers if its lower priced rate plans (and higher quality service) remained available.

In some respects T-Mobile *is* AT&T’s closest competitor because it is the only other major domestic carrier to use the GSM family of technologies,⁴⁰ which is the standard generally followed by the rest of the world.⁴¹ Indeed, AT&T and T-Mobile have engaged in direct head-to-head competition in rolling out various technology upgrades, from 2G to 3G to 4G. For example, T-Mobile launched an advertising campaign in November 2010 touting its upgraded HSPA-plus network as “America’s Largest 4G Network,” and targeted AT&T directly.⁴² AT&T criticized T-Mobile for calling the

³⁸ Decl. of Dennis W. Carlton et al. ¶ 144.

³⁹ See *infra* pp. 28-29.

⁴⁰ See Application at 7 (“Unlike other major U.S. wireless providers, AT&T and T-Mobile USA both use GSM and UMTS/HSPA+ technologies.”). Verizon and Sprint use CDMA technology.

⁴¹ See, e.g., William Ho & Kathryn Weldon, *Implications of AT&T’s Acquisition of T-Mobile USA on Consumers/SMBs and Enterprises*, Current Analysis, March 22, 2011, at 3 (“Both AT&T and T-Mobile have historically had an advantage over CDMA carriers courting European MNCs or U.S. MNCs with overseas operations, given their common GSM technology.”); Simon Flannery et al., *Telecom Services*, Morgan Stanley Research, March 28, 2011, at 59 (“GSM providers such as T-Mobile and AT&T are enjoying a growing advantage in terms of handset selection and pricing, with 80%+ of the world’s subscribers already on GSM.”).

⁴² See Kunur Patel, *Whatever 4G Means, the Ad Battle Has Begun*, ADVERTISING AGE, Jan. 10, 2011, at 3 (describing T-Mobile’s “piggyback” spoof ad taking a direct shot at AT&T’s often-criticized iPhone service).

technology they share “4G,” and then AT&T changed its own advertising to claim that its HSPA-plus network was 4G.⁴³

There are also examples of AT&T responding directly or indirectly to T-Mobile’s pricing and other competitive moves. For instance, when T-Mobile cut the prices of its unlimited plans in October 2009, Verizon and AT&T followed suit in January 2010.⁴⁴ And more recently, AT&T adopted free mobile-to-any-mobile for many of its plans in part in order to “close [the] gap a bit” between itself and T-Mobile and Sprint.⁴⁵ In short, the evidence suggests that T-Mobile does act as a competitive constraint and spur on AT&T, and the elimination of that constraint by merger will therefore likely lead to unilateral anticompetitive effects.

AT&T contends that the merger “will not harm competition for business customers because AT&T and T-Mobile are not frequent or close competitors in that space,” and “T-Mobile USA is not a significant player in this customer segment.”⁴⁶ Yet,

⁴³ See *id.*; see also NPR, Talk of the Nation/Science Friday, What Does “4G” Really Mean, Anyway?, Jan. 14, 2011 (Chris Ziegler, Senior Mobile Editor for Engadget explaining that AT&T figured “We can’t let T-Mobile get away with calling their network 4G, and we’re not”). Previously, AT&T jockeyed with T-Mobile in upgrading their networks to HSPA. See, e.g., William Ho & Kathryn Weldon, *CES 2010: AT&T HSPA 7.2 Software is Upgraded, But Backhaul Work Remains*, Current Analysis, Jan. 7, 2010 (reporting AT&T’s unexpected announcement that it had upgraded to HSPA 7.2 earlier than planned; “AT&T could not afford to let T-Mobile maintain a seemingly significant technology advantage in the eyes of the customer, especially as speed and coverage have become so important to the advertising and marketing messages of all the top carriers”).

⁴⁴ See *Fourteenth Mobile Wireless Competition Report* ¶¶ 91-92.

⁴⁵ *AT&T at Credit Suisse Group Convergence Conf. – Final*, FD (FAIR DISCLOSURE) WIRE, March 9, 2011 (in response to a question whether the company was seeing more competitive pressure from T-Mobile and Sprint, AT&T Senior Vice President and Wireless CFO said, “I think we are still at somewhat of a premium to some of the players in the marketplace, but this just helped close that gap a bit”).

⁴⁶ Application at 102.

T-Mobile itself expected to become a more significant player in the business market absent the merger. As CEO Phillip Humm explained:

We only have a market share of about 4% in B2B despite the fact that we have very, very strong assets[:] 4G leadership, global GSM and HSPA+ network, international proposition, international customer base. We have true assets here we can leverage being part of the bigger group Deutsche Telekom. [W]e had deprioritized this segment. This is now changing. We will leverage our assets like stores, partners, and call centers for small businesses where we want to gain a fair market share in the market overall[,] . . . comparable to our overall market share.

For large enterprises we are outsourcing our billing system and will intensify the [cooperation] with [Deutsche Telekom], outsourcing to get the complexity out of our billing system and move that out of the Company. And we want to significantly grow [the] large enterprise . . . segment.⁴⁷

B. Coordinated Interaction

The Horizontal Merger Guidelines provide that “[a] merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms consumers,” and that “[a]n acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.”⁴⁸ The wireless industry already seems prone to coordinated interaction, especially between the market leaders AT&T and Verizon.⁴⁹ Moreover,

⁴⁷ T-Mobile Investor Day Transcript at 25; *see also* Ho & Weldon, *supra* note 41, at 2-3 (noting that “SMBs were drawn to T-Mobile’s value pricing,” and that “T-Mobile USA had recently been positioning itself more aggressively in the business segment for both U.S. enterprises and MNCs, having joined the FreeMove alliance, and having become more involved with DT’s initiatives courting MNCs with its Multinational Corporations group.”).

⁴⁸ HORIZONTAL MERGER GUIDELINES §§ 7, 7.1.

⁴⁹ *See* Grunes & Stucke, *supra* note 27, at 14-15, 20-21; *see also, e.g.*, Note, Per Larsen, *Text Message Price Gouging: A Perfect Storm of Tacit Collusion*, 8 J. ON TELECOMM. & HIGH TECH. L. 217, 242 (2010) (analyzing lock-step pricing of per unit text messaging prices and concluding that “market is highly susceptible to collusion [which] may be the cause of monopoly prices for text messaging”).

pricing in the postpaid market has been firming,⁵⁰ suggesting a lessening in the intensity of competition. At the same time, T-Mobile has been the “value leader” among the four national carriers,⁵¹ and this had the effect of constraining the pricing of the market leaders, AT&T and Verizon.⁵² It has also been an innovator, most notably, for example, when it was the first carrier to introduce the Android phone.⁵³ And it has been responsible for numerous other innovations.⁵⁴

Yet AT&T claims that T-Mobile does not deserve the title of “maverick” largely because its market share was in decline.⁵⁵ This argument is unpersuasive for two reasons.

⁵⁰ See Moffet et al., *supra* note 3, at 2 (noting that “[p]ost-paid pricing is already firming, with or without a merger”).

⁵¹ See, e.g., Deepa Karthikeyan, *T-Mobile USA – Two-way Text Messaging, Picture & Video Messaging*, Current Analysis, Dec. 30, 2010, at 1 (“T-Mobile has always topped larger carriers in terms of price point, anytime minutes and data (e.g., messaging and Web access”).

⁵² See *supra* note 44.

⁵³ See Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 24 FCC Rcd. 6185 ¶¶ 171-74 (Jan. 15, 2009); T-Mobile Investor Day Transcript at 18 (“We continue to lead and innovate with Android in making it both affordable and also pushing performance boundaries for consumers.”). While T-Mobile’s lack of access to the iPhone has plainly hampered its ability to compete, it has also given it a greater incentive to push the development and marketing of other smartphones and devices. Moreover, its relationship to its parent, Deutsche Telekom, gives it a unique ability to compete on handsets. See *id.* at 4 (Deutsche Telekom CEO Rene Obermann stating, “Between us and our two bigger competitors is a huge gap when it comes to revenues, when it comes to margins, and to free cash flow. [But] we’re not disadvantaged when it comes to procurement because we can leverage in many respects—for instance infrastructure on devices . . . because of the volumes of our entire group.”).

⁵⁴ See *id.* at 17-24 (citing several other current innovations including, “We’re the leader in driving seamless integration of voice, text, and data services in the WiFi into the smart phones and broadband products we offer.”); see also Jason Notté, *5 T-Mobile Innovations, and 5 More We Lose*, The Street, March 28, 2011, <http://www.thestreet.com/story/11060885/1/5-t-mobile-innovations-and-5-more-we-lose.html>.

⁵⁵ See Decl. of Dennis Carlton et al. ¶ 155. AT&T also points to T-Mobile’s spectrum constraints as limiting its ability to act as a maverick, see *id.* at ¶ 154, but in fact T-Mobile told investors that its need for spectrum is a long-term issue, and over the short and medium terms it has excess capacity. See *infra* note 70. A firm with excess capacity is a prime candidate to be a maverick. Cf. HORIZONTAL MERGER GUIDELINES § 2.1.5 (firm’s ability and incentive to expand rapidly using available capacity may make it a maverick).

First, a firm losing market share can be a more, rather than less, disruptive force.⁵⁶ More significantly, T-Mobile was poised to reverse its market share declines with its new “challenger” strategy under its new leadership, and to compete not just on the basis of value, but to take on AT&T and Verizon on the basis of value and quality,⁵⁷ as illustrated by its aggressive 4G marketing campaign.⁵⁸

C. Exclusionary Effects

Although the Horizontal Merger Guidelines focus on unilateral and coordinated effects, they recognize that “[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct.”⁵⁹ Such effects may be significant in this case because AT&T and Verizon increasingly control essential inputs that other carriers need to compete, namely roaming and backhaul services.⁶⁰ T-Mobile, Sprint, and smaller carriers have long complained about the

⁵⁶ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 214 (1993) (Liggett became a maverick after its market share had steeply declined and it faced the prospect of going out of business).

⁵⁷ See generally T-Mobile Investor Day Transcript at 7 (describing plan to turn around T-Mobile, including, as a first lever, “we will not let our network competitive advantage go and will therefore monetize our 4G network. This will strengthen the quality perception of the T-Mobile brand overall.”).

⁵⁸ T-Mobile is also a consistent industry leader in customer satisfaction. It won the J.D. Power 2011 awards for best customer care and wireless retail sales satisfaction, and was rated higher than AT&T in business wireless satisfaction for small and midsized businesses. See Press Release, Feb. 3, 2011, <http://www.jdpower.com/news/pressrelease.aspx?ID=2011010> (wireless customer care); Press Release, Feb. 17, 2011, <http://www.jdpower.com/news/pressrelease.aspx?ID=2011016> (retail sales); Press Release, April 28, 2011, <http://www.jdpower.com/news/pressrelease.aspx?ID=2011049> (business satisfaction). And it ranked significantly above AT&T in Consumer Reports’ survey. See *Ratings: Cell-Phone Service With a Contract*, CONSUMER REPORTS, Jan. 2011, at 37.

⁵⁹ HORIZONTAL MERGER GUIDELINES § 1.

⁶⁰ This issue was a focus of the hearing on the merger held by the Intellectual Property, Competition and the Internet Subcommittee of the House Judiciary Committee on May 26, 2011. “Backhaul connections are an integral component of a wireless service provider’s network. Backhaul facilities link mobile providers’ cell sites to wireline networks, carrying wireless voice

availability and rates charged by AT&T and Verizon for such services.⁶¹ And while the Commission recently adopted an automatic data-roaming rule, that rule is being challenged in the courts, does not directly set rates, and may not be effective for other reasons.⁶² In any event, the elimination of T-Mobile as a competitor to provide roaming clearly increases the incentive and ability of AT&T to raise its smaller rivals' costs; indeed, AT&T would become the monopoly provider for carriers using GSM technologies. Moreover, the elimination of T-Mobile as a rival (and aggressive customer) may increase AT&T's ability to impose unreasonable terms and conditions for backhaul services on its remaining smaller rivals. Furthermore, because handset availability and cost significantly depends on volume, AT&T's addition of T-Mobile's subscriber base makes it more likely that AT&T can exclude its smaller rivals by obtaining exclusivity on marquee handsets and devices and increasingly favorable deals on handsets and devices in general.

In sum, the analysis of potential unilateral, coordinated, and exclusionary anticompetitive effects confirms, rather than rebuts, the strong presumption of

and data traffic for routing and onward transmission.” Fourteenth Wireless Competition Report ¶ 293. “Roaming arrangements between commercial mobile wireless service providers allow customers of one wireless provider to automatically receive service from another provider’s network when they are in areas that the that their provider’s network does not cover.” *Id.* ¶ 124.

⁶¹ *See, e.g.*, Reply Comments of T-Mobile USA, Inc. at 6, 7 n.23, WT Dkt. 10-133 (Aug. 16, 2010) (maintaining that “increased consolidation in the wireless industry has limited the number of overall potential partners, making a data roaming rule critical to ensure that T-Mobile and other carriers can be competitive with their larger rivals” and that “in areas with lower population densities where ILEC’s special access services are generally the only practical option for backhaul, the rates, terms and conditions are often unreasonable”). T-Mobile is both a supplier of roaming in areas covered by its network (and a competitor to AT&T in that regard) as well as a customer for roaming in areas not covered by its network.

⁶² *See* Testimony of Testimony of Steven K. Berry, President and Chief Executive Officer, Rural Cellular Association, before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet May 26, 2011, <http://judiciary.house.gov/hearings/pdf/Berry05262011.pdf>

anticompetitive effects entailed by the high degree of concentration that will result from this merger.

III. AT&T's Efficiencies Defense Is Inadequate

AT&T's efficiencies "defense" fails to satisfy the stringent requirements of the Horizontal Merger Guidelines and the case law. Under the Horizontal Merger Guidelines, efficiencies can justify a presumptively anticompetitive merger where they are: 1) cognizable, 2) substantiated and verifiable by reasonable means, 3) merger-specific, and 4) of a character and magnitude sufficient to reverse the merger's potential harm to consumers in the relevant market.⁶³ The Guidelines emphasize this last point:

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. . . . The greater the potential adverse effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers. . . . When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. *In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting consumers.*⁶⁴

AT&T's principal justification for the merger is that by acquiring T-Mobile's infrastructure and spectrum, it will alleviate its capacity constraints and allow it to deploy LTE ("Long Term Evolution") technology more broadly. Moreover, T-Mobile on its own is said to have "no clear path to deploy LTE services."⁶⁵ AT&T claims, "Although

⁶³ HORIZONTAL MERGER GUIDELINES § 10.

⁶⁴ *Id.* (italicized language added by revised guidelines); *see also In re Application of EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20605 ¶ 103 (2002) ("[W]here a proposed merger would result in a significant increase in concentration in an already concentrated market, parties advocating the merger will be required to demonstrate that claimed efficiencies are particularly large, cognizable, and non-speculative.").

⁶⁵ Application at 5.

[the merger] will not literally increase ‘the overall supply of spectrum,’ it will dramatically increase the efficiency of its use, and those efficiency gains are the functional equivalent of creating new spectrum.”⁶⁶ AT&T also claims an “additional” \$3 billion per year in cost savings by the third year after the merger closes, with a present value of \$39 billion.⁶⁷

As an initial matter, AT&T’s claims about its spectrum constraints are dubious on their face. AT&T already has more spectrum than anyone else in the industry.⁶⁸ Moreover, less than two weeks before the merger announcement, AT&T’s CFO was telling investors, “Fortunately for AT&T, we’re in a pretty good situation regarding where we are in the spectrum that we have and that we need here for the next few years.”⁶⁹ Similarly, in January, T-Mobile executives told investors that T-Mobile had enough spectrum for the near and medium term,⁷⁰ and they were in no hurry to upgrade

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 51. About a quarter of these “additional” savings (\$10 billion) are attributable to reduced capital expenditures for acquiring spectrum and building out infrastructure to address some of the companies’ “coverage and capacity issues.” Decl. of Rick L. Moore, Senior Vice President, AT&T Inc. ¶ 36. These savings are either duplicative of the principal spectrum and network efficiency gains claimed by AT&T, or they highlight the failure of AT&T to value those gains. *See infra* p. 25.

⁶⁸ *See* Martin Peers, *Spectrum of Choices Confronts AT&T Review*, WALL ST. J., Apr. 29, 2011, at C8 (noting that in top 20 markets, AT&T has about 100 megahertz of spectrum compared to Verizon’s 90). The fact that AT&T is willing to give up \$2 billion worth of spectrum to T-Mobile if the transaction is blocked, *see* Nadia Damounic & Paritosh Bansal, *AT&T, T-Mobile USA Break-Up is \$6 Billion; Sources*, REUTERS, May 12, 2011, is a further indication that AT&T’s spectrum needs are overstated.

⁶⁹ *AT&T at Credit Suisse Group Convergence Conference – Final*, FD (FAIR DISCLOSURE) WIRE, Mar. 9, 2011. The CFO also explained that AT&T was satisfied with the pace of its planned roll out of LTE, noting that “one strong sort of benefit we had here was that we just had a much more sort of logical and graceful transition strategy into LTE” by going from HSPA 7.2 to HSPA+ and then going to LTE, which “allows us to take advantage of our network speeds here in our transition to LTE and to maintain our leadership in the mobile broadband area.” *Id.*

⁷⁰ Deutsche Telekom CEO Rene Obermann said “we have a sufficient spectrum position medium-term.” T-Mobile Investor Day Transcript at 3; *see also* T-Mobile Investor Day Slide Presentation at 7 (“Enough spectrum for medium-term”). Management stressed that T-Mobile’s network was

to LTE given the speed and advantages of their HSPA-plus network.⁷¹ Both AT&T and T-Mobile told investors that they needed more spectrum over the long term, but that this was an industry problem, not unique to them.⁷² And although the path may not have been “clear,” T-Mobile was optimistic about the options for obtaining additional spectrum for LTE.⁷³

Second, AT&T has failed to show that the network and capacity benefits are merger specific.⁷⁴ AT&T claims that “alternative solutions to the two carriers’ capacity challenges would be far inferior” to the acquisition,⁷⁵ but does not claim that they would

underutilized, *see T-Mobile Investor Day Transcript* at 25 (T-Mobile USA CEO Phillip Humm stating “[w]e have a lot of capacity available to us which we can leverage to make additional revenues”), and that its “ability to grow in this wireless data space is much stronger than our competition. So we’re in a good spot,” *id.* at 16 (Chief Technology Officer Neville Ray, noting that T-Mobile’s ratio of spectrum to subscribers was much greater than AT&T’s or Verizon’s).

⁷¹ According to T-Mobile, “HSPA+ is competitive to LTE 4G technology, and is superior over the next years due to handset ecosystem.” T-Mobile Investor Day Slide Presentation at 38. CTO Neville Ray explained, “LTE is coming but it is going to take time for the technology to both mature from a technology perspective . . . [and for] the handset ecosystem to develop. . . . We’ll deliver 4G services with a broad HPSA+ footprint. At the right point in time when it’s needed for us, we can roll out LTE more as a capacity overlay . . . that will drive better economics and better performance for our customers.” T-Mobile Investor Day Transcript at 13-14.

⁷² *AT&T at Deutsche Bank Securities Inc. Media & Telecom Conference – Final*, FD (FAIR DISCLOSURE) WIRE, Mar. 8, 2011 (AT&T CFO stating, “I think we’ve got a good spectrum position. . . . [A]s time goes on, there will be more need for spectrum across the industry [B]ut we don’t feel that we are in sort of situation right now where we have to go do anything.”); T-Mobile Investor Day Transcript at 16 (Neville Ray stating that “longer term absolutely we need spectrum. . . . But we’re not alone. . . . The industry needs more spectrum”).

⁷³ *See id.* at 17 (Ray stating “there are more options developing around us today than there ever has been in my career in the US both from a regulatory perspective [and] in terms of sharing options and in terms of secondary market”); *see also AT&T at Oppenheimer & Co. Telecommunications, Media & Technology Conf. – Final*, FD (FAIR DISCLOSURE) WIRE, Aug. 11, 2010 (AT&T Mobility CEO stating that AT&T favored the D block going to public safety agencies: “There are always going to be a lot of options on spectrum I think there will be opportunities for companies like T-Mobile to use other spectrum bands.”).

⁷⁴ AT&T’s promise to build out its LTE network in rural areas so that 97% of the population will be covered (rather than its pre-merger plan to cover only 80% of the population) is plainly not a merger-specific efficiency and does nothing to offset the anticompetitive effects of concern.

⁷⁵ Application at 45; *see also Decl. of William Hogg* ¶ 10 (“This transaction provides by far the most effective, efficient, and immediate solution to address these capacity challenges.”).

be impractical, as the Horizontal Merger Guidelines require.⁷⁶ Indeed, industry observers and AT&T itself have suggested that adding or upgrading cell sites is a practical alternative to increase capacity.⁷⁷ Numerous other alternatives are used by AT&T and other carriers to increase capacity.⁷⁸ AT&T maintains that these alternatives would be more costly or take more time than the merger, but has failed to quantify the cost of the alternatives.⁷⁹ At most, only the net cost (or timing) advantage of the merger versus the available alternatives would count as a merger-specific efficiency.⁸⁰ Moreover, the net

⁷⁶ HORIZONTAL MERGER GUIDELINES § 10 n.13 (“The agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns”); *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001) (rejecting efficiencies argument where the merging parties failed to “address the question whether Heinz could obtain the benefit of better recipes by investing more money in product development and promotion—say, by an amount less than the amount Heinz would spend to acquire Beech-Nut”); *EchoStar*, 17 FCC Rcd at 20664 (“Applicants have not demonstrated that their proposed merger is *necessary* to achieve many, if not all, of their claimed public interest benefits”) (emphasis in original).

⁷⁷ *See, e.g.*, Spencer E. Ante and Amy Schatz, *Skepticism Greets AT&T Theory – Telecom Giant Says T-Mobile Deal Will Improve Network Quality, But Experts See Other Options*, WALL ST. J., April 4, 2011, at B1 (reporting that CEO of large independent operator of cell sites said that “AT&T and other wireless operators could double the amount of capacity they supply with current spectrum by investing in new wireless equipment on existing cell towers”); *see also AT&T at Credit Suisse Group Convergence Conference – Final*, FD (FAIR DISCLOSURE) WIRE, Mar. 9, 2011 (AT&T CFO explaining that AT&T measures the opportunity cost of additional spectrum based on the alternative of adding or splitting cell sites).

⁷⁸ *See* Decl. of William Hogg ¶¶ 31-35 (describing “off-loading” solutions such as Wi-Fi, use of more spectrally efficient technology, purchase and lease of spectrum in the secondary market, and tiered rate plans that limit heavy data users); *see generally* Onyeije Consulting LLC, *Solving the Capacity Crunch: Options for Enhancing Data Capacity on Wireless Networks*, April 2011, available at http://www.nab.org/documents/newsRoom/pdfs/042511_Solving_the_Capacity_Crunch.pdf (cataloging numerous practical methods to increase capacity of network without more spectrum).

⁷⁹ AT&T has placed a value of \$10 billion on its infrastructure savings, *see supra* note 67, but this value is included among AT&T’s claimed “additional” synergies.

⁸⁰ *See* HORIZONTAL MERGER GUIDELINES § 10 n.13 (“If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.”).

(i.e., merger-specific) cost savings would be potentially cognizable only to the extent of the economies of scale enabled by the merger.⁸¹

Third, even if AT&T could substantiate its claims of network and spectrum efficiency benefits, it has failed to show that they would “reverse the merger’s potential harm to customers in the relevant market, e.g., by preventing price increases in that market.”⁸² Rather, at most, the claimed efficiencies merely reduce the fixed-cost investments that AT&T would otherwise make in upgrading its network. AT&T claims that because it is capacity constrained,⁸³ fixed-cost savings should be considered to be variable, and any fixed-cost saving that lowers the cost of expanding output gives it the incentive to increase output, lower prices, and increase innovation.⁸⁴ Yet AT&T offers no evidence that its pricing, or pricing in the industry, is a function of its fixed costs or its level of capital investment spending.⁸⁵ Nor is it plausible that the merger will increase

⁸¹ So, for instance, AT&T maintains that combining the two firms cell towers will allow the combined firm to serve more customers than the firms could serve separately. *See* Decl. of William Hogg ¶ 68 (“Many of [T-Mobile’s] cell sites are well located to address our capacity challenges and would provide the combined company with a much more robust platform that will allow us to carry more traffic than the two companies collectively could carry standing alone.”). However, AT&T makes no effort to quantify these economies of scale, nor the costs of alternatives, such as leasing cell space on T-Mobile’s or other towers. (AT&T contends—without any support—that leasing may not be an option because “many of those sites may not have space or the structural reinforcement needed for two carriers’ equipment,” Application at 48).

⁸² HORIZONTAL MERGER GUIDELINES § 10.

⁸³ Actually, AT&T maintains that it “faces severe spectrum and capacity constraints in *certain* markets today and projects that such constraints will increase and expand to many other areas throughout the country over the next *several years*.” Decl. of William Hogg ¶ 4 (emphasis added). Moreover, it will apparently take years before T-Mobile’s spectrum will be repurposed for LTE. *See id.* ¶ 56. Efficiency benefits that are not expected for several years are inherently speculative and given little weight. *See EchoStar*, 17 FCC Rcd at 20634, ¶ 202 (“[M]any of the Applicants’ efficiency claims are inherently speculative because they are not projected to occur until three or more years after consummation of the merger.”).

⁸⁴ *See* Decl. of Dennis W. Carlton, Allan Shampine, and Hal Sider ¶¶ 70-71, 134.

⁸⁵ *Cf.* FED. TRADE COMM’N & U.S. DEPT. OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 57 (2006) (“[R]eductions in fixed costs—costs that do not change in the

AT&T's incentive to innovate in the products and services it offers. Assuming *arguendo* that a long-term network capacity constraint would inhibit innovation in service offerings, competition will drive AT&T to increase its network capacity without the merger; indeed the merger may be expected to reduce AT&T's incentive to adopt technologies that would increase the efficiency of its network without additional spectrum,⁸⁶ as well as to reduce the competitive pressures to adopt innovative products and services.

Fourth, even assuming that fixed-cost savings were cognizable, they would not justify the substantial loss in competition that will result from reducing the number of national competitors from four to three and perhaps lead to an effective duopoly in the wireless market.⁸⁷ As the Commission has noted:

Up to a point, horizontal concentration can allow efficiencies and economies that would not be achievable otherwise, and can therefore be pro-competitive, pro-consumer, and in the public interest. At some point, however, horizontal concentration starts to work against those goals because it results in fewer competitors, less innovation and experimentation, higher prices and lower quality, and these disadvantages outweigh any advantages in terms of economies and efficiency.⁸⁸

short run with changes in output rates—typically are not expected to lead to immediate price effects and hence to benefit consumers in the short term.”). It is noteworthy that AT&T prices on a national basis, while its claimed capacity constraints vary on a local market basis.

⁸⁶ See Charles B. Goldfarb, Congressional Research Service, *The Proposed AT&T/T-Mobile Merger: Would it Create a Virtuous Cycle or a Vicious Cycle?* 11 (May 10, 2011), available at <http://ieeusa.org/policy/eyeonwashington/2011/documents/attmerger.pdf> (“throwing spectrum at a perceived shortage might relieve a short-term problem but it also might provide a disincentive for investment in efficient network facilities and for innovation that increases the productivity of existing spectrum and facilities”); *EchoStar*, 17 FCC Rcd at 20633 ¶ 201 (suggesting that a merged firm “will have a reduced incentive to invest in productivity-enhancing technology” as it increases the total amount of spectrum it controls).

⁸⁷ See HORIZONTAL MERGER GUIDELINES § 10 (“Even when efficiencies generated through a merger enhance a firm’s ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.”).

⁸⁸ *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule*, 11 FCC Rcd 7824, 7869 ¶ 95 (1996). Even

Similarly, one independent commentator has noted the loss of dynamic efficiency may swamp any static efficiency gains from the consolidation of wireless carriers:

The mobile wireless industry is characterized by economies of scale and scope. In a static market, it would be less costly and/or more efficient to build out and operate a single network instead of multiple networks with partially duplicative facilities; to give a single provider use of a large block of spectrum rather than giving a number of providers use of a subset of that block; and to design and mass produce a single suite of handsets rather than making handsets for smaller groups of customers using many different standards and network technologies.

He points out, however, that

[i]n a dynamic market with rapidly changing technology . . . the claims of scale economies must be weighed against the possibility that any lessening of competition will lessen pressure for innovation and cost and price restraint. Consolidation that gives one or two providers a dominant share of the market and of the available spectrum may promote static efficiency, but it may undermine dynamic efficiency.⁸⁹

Fifth, AT&T's claim that it will realize "other" synergies valued at \$39 billion is entirely unsubstantiated. Indeed the mere four paragraphs that support these synergies⁹⁰ do not even distinguish between cost savings and revenue enhancements. As noted above, some of the "subscriber" synergies included in the \$39 billion figure include improving T-Mobile's ARPU and "overall margins,"⁹¹ which are obviously not cognizable. Other synergies, such as those attributable to lower subscriber acquisition

AT&T's experts recognize, "It is also possible that when firms face capacity constraints, the incentive to restrict output as a result of a merger can outweigh the incentive to expand output that results from merger-related reductions in marginal cost." Decl. of Dennis W. Carlton, Allan Shampine, and Hal Sider ¶ 139 n.196. They conclude that is not the case here, in contrast to a merger to monopoly, because "of the structure of the wireless industry that will remain after this merger," *id.*, that is, because they do not see potential anticompetitive effects in the first place.

⁸⁹ Goldfarb, *supra* note 86, at i.

⁹⁰ See Decl. of Rick L. Moore, Senior Vice President, AT&T Inc. ¶¶ 34-37.

⁹¹ See *infra* p. 14; AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband, Investor Slide Presentation at 35 (March 21, 2011).

costs, closure of retail stores, and reduced advertising spending do involve cost savings but also appear to “arise from anticompetitive reductions in output or service” and are likewise non-cognizable.⁹² Still others, like those involving reduced overhead and general and administrative costs, do not appear to be “substantial,” nor does AT&T specify how these reductions will reverse the anticompetitive potential of the merger or benefit consumers.⁹³ And AT&T does not account for the estimated \$9 billion in integration expenses in its efficiency “analysis.”⁹⁴ Finally, while AT&T claims that these efficiencies are likely to be realized based on its experience with prior mergers, some analysts are dubious.⁹⁵

IV. A Regulatory Fix Would Be Inadequate and Inappropriate

No regulatory solution can adequately solve the competitive problems with this merger. Divesting spectrum and other assets in certain local markets to the small local or “prepaid” carriers would not replicate T-Mobile’s national or “postpaid” presence, while divestitures to Verizon or Sprint would only further increase concentration.

A rate freeze would be inadequate because it does not address all of the other aspects of competition between the companies that would be lost, including competition on handsets, network coverage and quality, customer service, and innovation. Nor does it

⁹² HORIZONTAL MERGER GUIDELINES § 10.

⁹³ See *EchoStar*, 17 FCC Rcd at 20637-38, ¶ 212 (“what is important is the extent to which these lower costs lead to lower prices and can offset the reduction in competition, rather than whether the merged entity will achieve a lower cost structure . . . *per se*”).

⁹⁴ See HORIZONTAL MERGER GUIDELINES § 10 (“Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.”). According to one observer, even if AT&T hits its targets, the net present value of its synergies after deducting integration costs is only \$16.3 billion. See Martin Peers and Liam Denning, *AT&T Makes Pitch for Free Mobile*, WALL ST. J., March 25, 2011, at C8.

⁹⁵ See, e.g., Martin Peers, *AT&T’s Mobile Merger Benefits*, WALL ST. J., April 13, 2011, at C16 (maintaining that “it isn’t clear” that AT&T in fact achieved synergy claims in prior acquisitions); Landell-Mills, *supra* note 6, at 1, 2 (cost savings are “unlikely to be realised in full”).

address the possibility that, absent the merger, competition between the companies may lead to lower subscription prices in the future. Moreover, as the Commission stated in *EchoStar*, “even if the . . . pricing plan were likely to be an effective competitive safeguard, its implementation would not be consistent with the Communications Act or with our overall policy goals.”⁹⁶

While a regulatory solution might address the risk of exclusionary conduct in roaming and special access (backhaul) services, it would not do so as effectively as maintaining the competitive structure of the market, and would be insufficient to resolve the primary, horizontal concerns.

As Professor Gavil recently stated, “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 . . . would 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.”⁹⁷

⁹⁶ *EchoStar*, 17 FCC Rcd at 20663, ¶ 282 (remedy would be “the antithesis of the 1996 Act’s “pro-competitive, de-regulatory” policy direction”).

⁹⁷ Gavil, *supra* note 19, at 19.

Conclusion

For the foregoing reasons, the Commission should promptly deny the applications.

Respectfully submitted,

RICHARD M. BRUNELL
Director of Legal Advocacy
ALBERT A. FOER
President
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
617.435.6464

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