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**BY HAND DELIVERY**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

FILED/ACCEPTED

MAY 31 2011

Federal Communications Commission  
Office of the Secretary

May 31, 2011

**Re: *Applications of AT&T, Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65***

Dear Ms. Dortch:

Pursuant to the protective orders issued in this proceeding, please find enclosed two of copies of our redacted petition to deny the applications of AT&T, Inc. and Deutsche Telekom AG. We have also submitted one unredacted copy under separate cover.

Respectfully submitted,

*Aparna Sridhar*

\_\_\_\_\_  
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FILED/ACCEPTED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAY 31 2011  
Federal Communications Commission  
Office of the Secretary

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 )

**PETITION TO DENY OF FREE PRESS**

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May 31, 2011

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### Executive Summary

In this application before the Federal Communications Commission, AT&T, Inc. and Deutsche Telekom AG propose to combine the nation's second- and fourth- largest mobile telecommunications providers (AT&T and T-Mobile USA, Deutsche Telekom's U.S. subsidiary) and create a duopoly in the market for mobile telecommunications. The Commission should conclude that this breathtaking horizontal consolidation does not serve the public interest.

**First, the merger raises serious antitrust concerns.** While the Commission should evaluate the impact of this transaction on the national market for postpaid smartphone services, the merger will undoubtedly have anticompetitive effects no matter how the Commission defines the market. The mobile market already exhibits high levels of consolidation, and new entrants face significant barriers to entry. Taking into consideration both market share changes and facts about the structure of the industry, an antitrust analysis of the transaction reveals that the transaction will have substantial unilateral harms and exacerbate coordinated effects. In particular, prices will likely rise, consumers will suffer the loss of maverick competitor in the marketplace, and AT&T will avoid infrastructure investments it would otherwise make.

**Second, the merger will cause public interest harms beyond those cognizable under an antitrust inquiry.** Specifically, the merger will:

- strengthen the position of the two largest providers of mobile telecommunications services and increase their market power in vertical markets such as backhaul and roaming;
- diminish innovation and investment in coordinate markets;
- reduce consumer choice and satisfaction;
- diminish incentives to invest in the new entity's network;
- cost many American workers their jobs in the midst of one greatest recessions this country has ever experienced; and

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- imperil the chances that mobile broadband connectivity becomes a meaningful competitor to fixed broadband services.

**Third, Applicants exaggerate the fleeting benefits of proposed transaction.** AT&T and T-Mobile rely heavily on their claim that the merger will alleviate capacity constraints on both networks and will speed the deployment of next generation networks. But when systematically deconstructed, these claims appear speculative at best, specious at worst. Any significant benefits associated with increased capacity inure solely to the companies' slowest, soon-to-be-obsolete 2G network. Other capacity gains would come at significant cost to current T-Mobile consumers. And these limited benefits could be achieved simply and cheaply without resorting to a massive consolidation. Similarly, AT&T and T-Mobile's claim that this transaction will allow for faster deployment of LTE and other next-generation technologies does not stand up to exacting scrutiny. AT&T can readily deploy an LTE network using the vast spectrum resources already at its disposal. Moreover, consolidating the two networks could discourage future investments in infrastructure because the new entity will face limited competition from other providers.

This consolidation may serve the interests of AT&T's and Deutsche Telekom's shareholders, but it does not serve the public interest. The Commission should deny the application in its entirety.

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**I. Introduction**

In this proceeding, AT&T, Inc. and T-Mobile USA<sup>1</sup> seek nothing less than to create the largest mobile telecommunications provider in the country. But this proposed transaction would not only create a telecommunications behemoth. It would also create an entrenched duopoly in the market for mobile service, making the mobile telecommunications industry more consolidated than the markets for oil, banking, automobiles, and air travel (see Figure 1).

**Figure 1: Concentration in U.S. Industries<sup>2</sup>**

Industry	Top Two Firm Market share	Top Four Firm Market share
Oil	24.0%	43.8%
Airline	30.7%	54.5%
Banking	20.2%	31.8%
Auto	35.3%	60.7%
Mobile Telecommunications*	76.1%	92.5%

\* post AT&T acquisition of T-Mobile USA

In order to gain the Commission’s approval of this staggering consolidation of the nation’s second- and fourth-largest cellular service providers, Applicants must demonstrate approving the acquisition serves the public interest.<sup>3</sup> They simply cannot meet that burden. The merger would create serious anticompetitive, consumer, and public interest harms. It would

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<sup>1</sup> We refer to AT&T, Inc. and T-Mobile USA as “AT&T” and “T-Mobile” throughout this Petition to Deny. Where appropriate, we refer to the two entities as “Applicants” for simplicity’s sake, even we recognize that Deutsche Telekom AG, T-Mobile’s parent company, would be the formal transferor of licenses.

<sup>2</sup> Oil refining industry data compiled by Public Citizen’s Energy Program. Airline industry data from Research and Innovative Technology Administration, Bureau of Transportation Statistics (market share based on revenue passenger miles, Jan. - Dec. 2010). Banking data from FDIC, Top 50 Commercial Banks and Savings Institutions by Total Domestic Deposits, June 2010. Auto industry data from WardsAuto.com. Wireless data from SNL Kagan, *Wireless Industry Benchmarks*.

<sup>3</sup> *News Corp. and DirecTV Group, Inc., and Liberty Media Corp. for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd. 3265, ¶ 22 (2008) (*News Corp./DirecTV Order*).

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result in a patently inefficient allocation of spectrum. And AT&T and T-Mobile could achieve its limited, speculative benefits without resorting to combination. The Commission should deny the application for transfer of licenses and reject this transaction.

### II. Statement of Interest

Free Press is a national nonpartisan organization working to reform the media and increase informed public participation in crucial media and telecommunications policy debates. Free Press has participated in numerous merger proceedings before the Federal Communications Commission.<sup>4</sup> In each, Free Press has advocated for policies that promote competition and serve in the public interest. As such, Free Press constitutes a “party in interest” within the meaning of Section 309(d) of the Communications Act of 1934, as amended, and has standing to participate in this proceeding.

### III. The Proposed Transaction Would Not Serve the Public Interest Because It Would Create a Duopoly in the Market for Nationwide, Post-Paid Smartphone Service, Resulting in Substantial Unilateral Harms and Exacerbating Coordinated Effects.

The proposed merger of AT&T and T-Mobile would dramatically reduce competition in the market for post-paid smartphone mobile service. In determining whether a transaction serves the public interest, the Commission considers its competitive effects.<sup>5</sup> This analysis is informed by, but not limited to, traditional antitrust principles.<sup>6</sup> In this case, an antitrust analysis alone demonstrates substantial competitive harm. In assessing the competitive impact of this

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<sup>4</sup> For example, Free Press filed extensive comments in *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56; *Consolidated Application for Authority To Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.*, MB Docket No. 07-57; and *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74.

<sup>5</sup> *News Corp./DirecTV Order*, ¶¶ 23-24 (2008).

<sup>6</sup> *Id.*, ¶ 24.



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transaction, the Commission should determine that the relevant product market is the market for nationwide post-paid smartphone service. But even if the Commission chooses some broader definition of the market that either encompasses pre-paid service or includes regional carriers, it cannot escape the conclusion that the merger will decrease competition and raise serious antitrust concerns.

### **A. The Relevant Product Market is the Nationwide Post-Paid Smartphone Mobile Service Market.**

AT&T's proposed acquisition of T-Mobile is a massive horizontal merger that would combine the operations of the nation's second- and fourth-largest cellular service providers. As the Department of Justice ("DOJ" or "Department") and the Commission consider the merger application, they must first define the relevant product market.

Though this merger involves the combination of two companies that operate in the broad "wireless" market, the data demonstrate that the relevant product market is the *nationwide, post-paid smartphone mobile service market*. In the past, the Commission has relied on a combined "mobile telephony/broadband services" product market.<sup>7</sup> The Commission is right to focus on

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<sup>7</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and Request for Declaratory Ruling on Foreign Ownership*, WT Docket No. 09-121, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 10985, ¶ 32 (2010) (*Verizon-AT&T Centennial Divestiture Order*) ("Mobile telephony/broadband services is the relevant product market because it includes not only the traditional wireless services identified in older transactions but also encompasses the recent significant advances in mobile broadband services technology that is rapidly evolving for next-generation services. The market for mobile telephony/broadband services includes mobile voice and data services provided over wireless broadband networks, as well as mobile voice and data services provided over less advanced, earlier generation (e.g., 2G, 2.5G) legacy wireless networks. In addition, the market includes a wide array of mobile data services, ranging from handset-based mobile data services marketed primarily as an add-on to mobile voice services to standalone mobile Internet access services for laptop users.").

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the combined mobile telephony/broadband service.<sup>8</sup> However, the available evidence and changing market trends indicate that post-paid services constitute a separate market from pre-paid services, and national carriers operate in a different product market from regional carriers.

**i. Post-paid and pre-paid services exist in separate product markets.**

There is a clear market boundary between the pre-paid, no-contract cellular services offered by companies like Tracfone or Leap Wireless and the post-paid, contract services sold by carriers like AT&T or T-Mobile.

First, post-paid services cost substantially more than pre-paid services. For example, AT&T's own pre-paid "GoPhone" line offers unlimited talk and text service for \$60 per month with no contract or early termination fees, while their post-paid unlimited talk and text package retails for \$90 (initially with a long-term contract and early termination fees).

Second, the companies that offer both pre- and post-paid services view these offerings as non-competitive and sold in separate markets. AT&T itself has repeatedly indicated to Wall Street analysts that it views the pre- and post-paid markets as separate and distinct.<sup>9</sup> For example,

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<sup>8</sup> We note below that carriers sell such services primarily as smartphone services.

<sup>9</sup> Last year during an investor call, AT&T Mobility CEO Ralph de la Vega was asked, "[O]ne of the concerns that many have and we've heard a lot of it this week is this sort of idea that postpaid [*sic*] growth is slowing down dramatically. . . for postpaid-focused carriers like yourselves it raises concerns by investors that growth might be over in the wireless business outside of new ARPU opportunities of connected devices. But how do you see that landscape developing over time? And is there a place that you want to play in that prepaid marketplace?" De la Vega responded in part, "If you take a look at the EBITDA growth of AT&T year-over-year and compare that to the EBITDA growth of the entire prepaid industry, the entire prepaid industry, we grew 4 times the EBITDA that the entire prepaid industry grew year-over-year. So when I get asked that question, I said, we go after where the revenue is. We go where the margin growth is. And it is unquestionable to me that this growth is in postpaid. It is in data." See Transcript of AT&T Inc.'s J.P. Morgan Global Technology, Media and Telecom Conference on 05/19/2010.

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AT&T has been quick to note that its promotion of its GoPhone pre-paid line does not cannibalize its higher-margin post-paid service.<sup>10</sup>

Third, pre-paid services maintain far fewer handset choices than with post-paid services. For example, AT&T's website currently lists 35 different smartphones for sale, while no-contract pre-paid carrier MetroPCS's website lists just six.<sup>11</sup> For consumers who want the latest and most advanced handsets, pre-paid services is simply not an option.

Fourth, pre- and post-paid carriers target different market demographic segments. Pre-paid carriers focus particularly on younger, lower-income customers that lack a satisfactory credit history.<sup>12</sup>

In responding to this evidence, AT&T may argue that pre- and post-paid services are merely differentiated products within same product market. However, antitrust principles demonstrates otherwise. In determining whether a group of products in a candidate market is sufficiently broad to constitute a relevant antitrust market, the Department of Justice (DOJ) and

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<sup>10</sup> According to AT&T, "GoPhone" pre-paid service constitutes a separate and distinct offering that does not compete against its own post-paid services. Richard G. Lindner, AT&T's Chief Financial Officer, told investors in 2009: "With respect to GoPhone and prepaid results for the quarter, prepaid results were weaker for the quarter. Obviously we had a net loss of customers of about 400,000. We had lower churn year over year, and we've been working to bring churn down and we're seeing some benefits there. But the impact was more on the gross sales side, and certainly we're seeing impacts from other competitive offers in the market. . . . But one thing that I think we feel is important is we're not going to put offers in the market that we don't feel will be profitable or earn a reasonable return. And we won't do anything obviously that would impact or cannibalize our postpaid base." *See* Transcript of AT&T Inc.'s Q2 2009 Earnings Call on 07/23/2009.

<sup>11</sup> Free Press comparison of the available handsets listed for consumers in San Francisco, a market where both MetroPCS and AT&T offer service.

<sup>12</sup> For example, pre-paid carrier Leap Wireless has stated that its "target customers [are] young, ethnically diverse and in households typically making less than \$50,000 a year." *See* Leap 2008 Annual Review: CEO Letter, [http://www.leapwireless.com/ar2008/ceo\\_letter2.php](http://www.leapwireless.com/ar2008/ceo_letter2.php).

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the Federal Trade Commission employ a hypothetical monopolist test.<sup>13</sup> Specifically, the agencies define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a “small but significant and non-transitory increase in price” (SSNIP), presuming no change in the terms of sale of other products.<sup>14</sup> “Put another way, when one product is a reasonable substitute for the other in the eyes of a sufficiently large number of consumers, it is included in the relevant product market even though the products themselves are not identical.”<sup>15</sup> But if a category of products does not constitute a reasonable substitute for the products being sold by the merging firm, then the antitrust market definition should exclude that category of products. In this case, evidence in the market affirmatively demonstrates that a SSNIP will not result in a critical level of customers substituting post-paid for pre-paid services. The prices of the unlimited talk, text and data plans of the post-paid carriers are *already* nearly twice that of the pre-paid carriers,<sup>16</sup> yet post-paid subscriber gains continue to outpace pre-paid gains.<sup>17</sup> Pre-paid products are not merely

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<sup>13</sup> See Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines” 8 (2010) (*Horizontal Merger Guidelines*). The Department of Justice and Federal Trade Commission note that “[t]he SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.” *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Skyterra Communications and Harbinger Capital Partners Funds*, 25 FCC Rcd. 3059, ¶ 37 (2010) (*Skyterra/Harbinger Order*).

<sup>16</sup> For example, according to plans published on their websites, Verizon Wireless offers a post-paid unlimited talk, text and data plan for \$119.98 per month (plus taxes and fees) versus MetroPCS’s pre-paid unlimited talk, text and data offering for \$60 per month.

<sup>17</sup> During 2010, total U.S. pre-paid subscriptions increased by 3.88 million, while post-paid subscriptions increased by 4.71 million. See SNL Kagan, *Wireless Industry Benchmarks*.

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differentiated by service or product quality claims.<sup>18</sup> Instead, they represent fundamentally distinct products that most post-paid consumers would not likely view as substitutes when faced with small but significant and non-transitory service price increases.<sup>19</sup>

### **ii. Smartphone and voice- or data-only services exist in separate product markets.**

While the merging parties offer voice-only or data-only wireless service options in competition with other carriers, they sell smartphone service in a separate and distinct market.<sup>20</sup> Approximately one-third of mobile subscribers currently use a smartphone,<sup>21</sup> but analysts estimate that by the end of the decade, nearly the entire retail subscriber base of wireless subscribers will use smartphones.<sup>22</sup> Given the rapid decline in non-data capable handset sales and

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<sup>18</sup> Even though both services offer wireless connectivity, pre- and post-paid services are not merely offerings within the same product market differentiated by price. “Premium” product markets often exist despite a continuum of pricing within the broader product category. In *United States v. Gillette Co.*, 828 F. Supp. 78, 81 (D.D.C. 1993), a district court upheld the DOJ’s definition of a separate premium pen market. In so holding, the court recognized that “the determination of what constitutes the relevant product market hinges on a determination of those products to which consumers will turn given reasonable variations in price. Therefore, the definition must exclude those items to which only a limited number of buyers will turn.” *Id.* (internal citation and quotation marks omitted).

<sup>19</sup> Nearly every aspect of the consumer experience is distinct between the pre- and post-paid services. For example, pre-paid services do not require credit checks, while post-paid services do. Pre-paid services are not tied to long-term contracts, while post-paid services require such contracts, which in turn impose substantial early termination fees. The most popular handsets are only available with post-paid services. And carriers with wireline operations like AT&T and Verizon limit their “triple play” and “quadruple play” services that include wireless voice and data packages to post-paid wireless service.

<sup>20</sup> Smartphone service consists of a monthly plan that offers both voice and data access through a handheld device capable of traditional telephone calls and other multimedia activity including Internet access and the running web-connected applications.

<sup>21</sup> See “State of the Media, Mobile Usage Trends: Q3 and Q4 2010,” *Nielsen*, Apr. 2011.

<sup>22</sup> See Sharon Armbrust, “US carrier CapEx spend in the midst of a decade-long ramp,” *SNL Kagan*, Feb. 28, 2011 (“SNL Kagan estimates that wireless subscriptions, including connected devices, hit 97% penetration of the U.S. population as of year-end 2010. And we

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the recent moves by the major carriers to eliminate voice-only plans for less capable “feature phones,”<sup>23</sup> it is clear that this transaction affects the smartphone market as distinct from the market for service associated with other, more limited mobile phones. The Commission has already recognized this market transformation: in the context of recent mergers, it has described a “mobile telephony/broadband” product market, and shied away from considering “the traditional wireless services identified in older transactions.”<sup>24</sup>

As consumers increasingly adopt telephony service plans with mandatory data service in place of traditional voice/text plans, the Commission must further refine the “mobile telephony/broadband” definition and consider smartphone service as a separate product. When defining the boundaries of the relevant product market, the DOJ and Commission must investigate how and to what extent consumers can and would substitute other products in response to price increases in the candidate market.<sup>25</sup> For smartphone consumers, there are no viable substitutes for all-in-one mobile telephony and computing. A smartphone consumer facing sustained price increases in the market controlled by a hypothetical monopolist has no choice but to pay the increased rate or exit the market to a variety of unsatisfactory options, including (1) relying on voice-only services and PC-facilitated computing via fixed telecommunications networks (thereby sacrificing mobile data connectivity) or (2) paying for two separate

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expect smartphones to be in use by 93% of the retail subscriber base by the end of this decade.”).

<sup>23</sup> *Infra note 32.*

<sup>24</sup> *See e.g., Verizon-AT&T Centennial Divestiture Order.*

<sup>25</sup> *See Horizontal Merger Guidelines* at 11 (“In considering customers’ likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to: . . . objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market. . .”).

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connections, one for mobile voice and one for mobile data via a MiFi card or similar device, which would likely cost more than the increased rate for smartphone service. Neither option seems preferable to simply paying higher prices for smartphone service. The ability for the hypothetical monopolist to target the post-paid smartphone subset of customers and impose a SSNIP means that the relevant product market definition is narrower than the broader “mobile telephony” market.<sup>26</sup>

### iii. National and regional services exist in separate product markets.

Evidence demonstrates that the services offered by carriers with a national footprint exist in a separate and distinct *product* market from those offered by regional carriers, and these distinctions will become more apparent as smartphones utilizing so-called 4G network technologies become the dominant cellular product.

The U.S. market currently has four facilities-based carriers with national footprints — Verizon Wireless, AT&T, Sprint, and T-Mobile — who control approximately 97 percent of the post-paid market.<sup>27</sup> These carriers all establish prices and service offerings nationally and do not

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<sup>26</sup> See *Horizontal Merger Guidelines* at 12 (“If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.”).

<sup>27</sup> See SNL Kagan, *Wireless Industry Benchmarks*. SNL Kagan’s data encompass data from publicly traded companies and estimates from select private companies. According to this information, the four national carriers controlled 93 percent of the entire national and regional post- and pre-paid subscriptions at the end of 2010. However, these data exclude many extremely small regional post-paid carriers. Our preliminary analysis of the June 2010 Numbering Resource Utilization/Forecast (NRIU/F) data indicates the four national carriers

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alter prices based on the offerings of the much smaller regional providers. From their perspective, the market is national. For example, AT&T has declared to the Commission that it “establishes its rate plans and pricing on a national basis, without reference to market structure at the CMA level.”<sup>28</sup> It has also noted that one of its “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 other national carriers.”<sup>29</sup> AT&T has repeatedly told the Commission that “the predominant forces driving competition among wireless carriers operate at the national level.”<sup>30</sup> Verizon and Sprint agree.<sup>31</sup>

From the consumer perspective, the *product* market is also national. Though consumers primarily use their smartphones where they live and work, data clearly indicate that consumers view national offerings as functionally different and superior to regional or local services. The top four carriers (Verizon, AT&T, Sprint, and T-Mobile) are the *only* post-paid providers

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<sup>28</sup> See *Applications of AT&T Inc. and Centennial Communications Corp.*, WT-Docket No. 08-246, Description of Transaction, Public Interest Showing and Related Demonstrations, Nov. 21, 2008 (*AT&T-Centennial Application*).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see also *Applications of AT&T Inc. and Dobson Communications Corporation*, WT Docket No. 07-153, Description of Transaction, Public Interest Showing and Related Demonstrations, July 13, 2007 (*AT&T-Dobson Application*); *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless*, WT Docket No. 09-104, Description of Transaction, Public Interest Showing and Related Demonstrations, May 22, 2009 (*AT&T-Verizon Alltel Divestiture Application*); Testimony of Dan Hesse, CEO, Sprint-Nextel, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, Regarding “The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?” May 11, 2011 (*Hesse Testimony*).

<sup>31</sup> “While a national geographic scope has been rejected in certain prior merger proceedings, growing national forces — such as the increasing reliance on national rate plans — argue more and more for redefining how the Commission judges the competitive effects of transactions.” *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Description of Transaction, Public Interest Showing and Related Demonstrations, June 13, 2008 (*Verizon-Alltel Application*).



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currently widely offering post-3G quality data services (HSPA+, LTE, or WiMax), and the depth and quality of their smartphone portfolios are far superior to those of the regional carriers. Indeed, these four carriers controlled 94 percent of all cellular market revenues in 2010, and their share of smartphone revenues is likely higher.<sup>32</sup>

This trend is expected to continue, particularly concentrating subscribers and revenues at the very top between AT&T and Verizon. If past is prologue, the experience of 2010 provides a cautionary tale. During a period when both AT&T and Verizon Wireless raised prices and reduced choice for consumers,<sup>33</sup> they still managed to increase their subscriber totals while most other post-paid carriers, regional and national, lost subscribers.<sup>34</sup>

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<sup>32</sup> See SNL Kagan, *Wireless Industry Benchmarks*.

<sup>33</sup> In early 2010, Verizon implemented an effective price increase by forcing all customers of feature and smartphones to purchase a data plan. AT&T shortly followed suit. Also in 2010, AT&T eliminated its unlimited data plan for smartphones, forcing new customers into capped plans with overage charges. See e.g., Karl Bode, "Verizon Announces Wireless Pricing Changes," *DSLReports*, Jan. 15, 2010 ("The biggest news of course is that Verizon's 25 megabyte for \$9.99 per month plan (the one we're sure Verizon makes the most money from) is now mandatory for all of Verizon's '3G Multimedia' phones."). See also, e.g., Marguerite Reardon, "AT&T-Verizon price war debunked (FAQ)," *CNET News*, Jan. 20, 2010 ("In fact, both AT&T and Verizon Wireless are extending data plans to a whole slew of customers who formerly were not subscribing to any data plans. And it is likely these are the customers who will see a bigger phone bill when they upgrade their phones or renew their contracts."); Jeffrey Bartash, "AT&T to end unlimited plans for wireless data," *MarketWatch*, June 2, 2010.

<sup>34</sup> In 2010, Verizon Wireless added 2.6 million post-paid subscribers while AT&T added 3.4 million. However, regional carrier Cincinnati Bell lost 28,000 post-paid subscribers, and other major regional carriers NTELOS and Atlantic-TeleNetwork saw no growth or end-of-year subscriber losses. US Cellular, a post-paid carrier that uses roaming agreements to offer national coverage, lost 66,000 subscribers. In 2010, Sprint lost 855,000 subscribers, and T-Mobile lost 390,000. See SNL Kagan, *Wireless Industry Benchmarks*.

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While the regional carriers had more consumer relevance a decade ago, it is clear that today's market is a national market.<sup>35</sup> Market share for the regional carriers is in decline as a direct consequence of the market shift from voice to smartphone service, and AT&T and Verizon's control of the national market for handsets, backhaul, and data roaming. And the lack of interoperability in the highly valuable 700 MHz spectrum band will further reduce the competitive threat from the few regional carriers who did secure some of that spectrum at auction. There is simply no evidence to suggest that when faced with a small but significant and non-transitory price increase, a meaningful number of smartphone customers of the national carriers would switch to a regional provider.

**iv. Regardless of the definition of the geographic market, the merger will cause harms at the national level.**

Though there is ample evidence that the relevant *product* market is national, the Department and the Commission must also define the relevant *geographic* market. But the definition of the geographic market matters little: the harms associated with this merger will be felt nationally because the wireless market has shifted from a regional to national carrier market, and this current transaction proposes to combine two of the four national carriers.

Certainly consumers' buying decisions in this market are influenced by what services are available in the geographic area where they live and work, but supplier behavior is determined solely at the national level. Indeed, the DOJ has recognized the difference in local purchasing markets and the impact of mergers in broader markets, explicitly acknowledging that "[t]he

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<sup>35</sup> In 2001, most of the wireless market consisted of regional carriers that in some cases offered nationwide service through roaming agreements. Since then, the major national carriers have gone on a buying spree, building a nationwide footprint through mergers and acquisitions and turning the market from regional to national. In 2001, the top two cellular providers controlled 43 percent of all subscriptions, compared with 65 percent at the end of 2010.

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existence of local markets does not preclude the possibility of competitive effects in a broader geographic area, such as a regional or national area. . . .”<sup>36</sup>

As discussed above, data plans are priced nationally regardless of the level of local competition. The competitive forces that will constrain AT&T post-merger operate at the national level, as AT&T has repeatedly told the Commission.<sup>37</sup>

Further, smartphone devices are procured and introduced to the national market, not regionally.<sup>38</sup> And there is no geographic characteristic to innovation in the wireless market; the harms to innovation from unilateral and coordinated effects will be felt nationally, regardless of what individual carrier choices a consumer has in a given local market.

In this merger between two of the four national carriers, AT&T argues against a national geographic (and product) market. But these arguments contradict numerous declarations AT&T has made before the Commission in transactions where it sought to acquire smaller regional carriers.<sup>39</sup> The company’s prior statements about the national product market apply with

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<sup>36</sup> See *United States, State of Alabama, State of California, State of Iowa, State of Kansas, State of Minnesota, State of North Dakota, and State of South Dakota v. Verizon Communications Inc. and Alltel Corp.*, Competitive Impact Statement, Oct. 30, 2008.

<sup>37</sup> *AT&T-Centennial Application* at 28-29 (“Nonetheless, the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level. Therefore, examining market structure in areas as small as CMAs or CEAs does not accurately account for the competitive forces that will constrain the behavior of the merged firm and assure continued intense competition in all the local areas affected by the merger. As the Commission has recognized, rate plans of national scope, offering nationwide service at a single price without roaming charges, have become the standard in the wireless industry.”); see also *AT&T-Dobson Application* at 18-19.

<sup>38</sup> See *Hesse Testimony*.

<sup>39</sup> For example, in this transaction, AT&T’s Chief Marketing Officer David A. Christopher stated, “AT&T’s sales organization is designed in large part to respond to the reality that consumers make their wireless purchasing decisions at the local level—where they can see the devices, speak with sales representatives about the products and services, and comparison shop among competitors.” See *Applications of AT&T Inc. and Deutsche*

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particular force to this current transaction. Antitrust analysis focuses on geographic market definition in addition to product market definition because “competition affected by the merger may be geographically bounded if geography limits some customers’ willingness or ability to substitute to some products, or some suppliers’ willingness or ability to serve some customers.”<sup>40</sup> While it is true that a mobile service provider has to actually offer service in the area where customers primarily use their service, all the available evidence indicates that the presence of regional carriers has no impact on the supply decisions of the national carriers.<sup>41</sup>

Change in subscriber figures for the regional “competitors” cited in AT&T’s application further demonstrate that regional and national carriers operate in distinct markets. Over the past two years, Cincinnati Bell’s post-paid subscriber base declined by 13 percent.<sup>42</sup> U.S. Cellular’s also declined. Furthermore, regional carriers enjoy little market share even at the local level.

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*Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations, Apr. 21, 2011 (*AT&T-T-Mobile Application*), Christopher Declaration, ¶ 12. However, in his declaration for the AT&T-Centennial acquisition, Mr. Christopher said, “Within the continental United States, excluding Puerto Rico and the U.S. Virgin Islands, AT&T makes nearly all competitive decisions in response to national competition. AT&T offers national plans that give subscribers a consistent number of minutes of service for a single monthly price, with no roaming charges, and does not provide regional or local plans that vary depending on subscriber location.” See *AT&T-Centennial Application*, Christopher Declaration, ¶ 3.

<sup>40</sup> See *Horizontal Merger Guidelines* at 13.

<sup>41</sup> See *AT&T-Dobson Application*, Roth Declaration, ¶ 5 (“AT&T Mobility develops its rate plans, features, and prices in response to competitive conditions and offerings at the national level—primarily the plans offered by the other national carriers. In particular, AT&T Mobility does not view Dobson as a competitor to which it must respond in developing or modifying its rate plans and service offerings, or to which it must respond with competitive local promotions. It does not view Dobson as a price leader. Accordingly, Dobson plays an insignificant role in AT&T Mobility’s pricing decisions. In fact, I am unaware of any particular instance in which AT&T Mobility has reduced pricing or otherwise responded to plans offered by Dobson nationally or in any local area.”).

<sup>42</sup> See SNL Kagan, *Wireless Industry Benchmarks* (data for year-end 2008 to year-end 2010).

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According to our preliminary analysis of the June 2010 Number Resource Utilization/Forecast (NRUF) data, the four national carriers (AT&T, Verizon Wireless, Sprint, and T-Mobile) have a combined market share of greater than 90 percent in Cellular Market Areas (CMAs) that encompass **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

**[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** of the U.S. population.<sup>43</sup>

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<sup>43</sup> **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

**[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

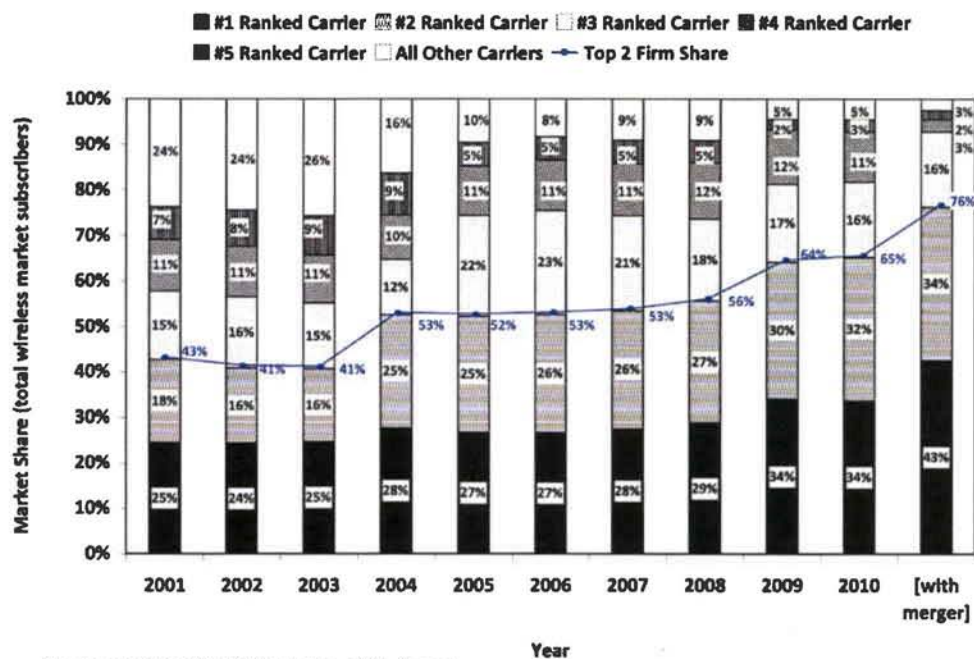
**B. The Relevant Product Market is Already Highly Concentrated, and AT&T's Proposed Acquisition of T-Mobile Would Result In the Re-Formation of a Tight Duopoly in Wireless Service.**

With the relevant product market appropriately defined as the nationwide post-paid smartphone cellular service market, the harms of this merger will be impossible to ignore. However, though there is ample evidence to define the market as the nationwide post-paid smartphone cellular service market, the domination of the top four carriers of the overall cellular market is so extensive that including pre-paid carriers and all subscriptions from both national and regional carriers into the antitrust analysis would not impact the conclusions about harmful unilateral effects and coordinated behavior.

**i. The merger will result in alarming increases in market concentration, regardless of how the product or geographic markets are defined.**

The U.S. wireless market is already highly concentrated. Over the past decade, it has transformed from a market dominated at a regional level by a handful of carriers to a market dominated at a national level by just two companies — AT&T and Verizon Wireless. In 2001, the top two carriers' share of total U.S. wireless subscriptions was 43 percent. By the end of 2010, this two-firm share rose to 65 percent. And the two-firm share and will be close to 80 percent if AT&T is allowed to take over T-Mobile (see Figure 2). During this same period, as the large national carriers began creating a true national footprint through mergers and acquisitions of smaller regional companies, the share of subscriptions outside the top five carriers shrunk from 24 percent to 5 percent (see Figure 2).

**Figure 2:**  
**The Emerging Wireless Duopoly:**  
**U.S. Wireless Market 2001-2010**  
 Includes all pre- and post-paid cellular subscriptions



Source: FCC CMRS Reports; SNL Kagan

This merger raises competitive concerns no matter which product or geographic market the FCC chooses.<sup>44</sup> The DOJ’s *Horizontal Merger Guidelines* specify that where the post-merger Herfindahl-Hirschman Index<sup>45</sup> (“HHI”) will increase by more than 100 points and will exceed 1500, a transaction “potentially raise[s] significant competitive concerns and often warrant[s] scrutiny.<sup>46</sup> Mergers that increase HHI by 200 or more points and result in a post-merger HHI of

<sup>44</sup> The exact HHI values will depend on how the product and geographic market is defined, whether subscribers or revenues are considered, and the available data.

<sup>45</sup> The HHI is calculated by summing the squares of each firm’s market share. This gives greater proportional weight to larger market shares. A market with 10 equal sized competitors has an HHI of 1,000, while a monopoly has the maximum HHI of 10,000.

<sup>46</sup> See *Horizontal Merger Guidelines* at 19.

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2,500 or greater “will be presumed to be likely to enhance market power.”<sup>47</sup> If the market is restricted to carriers that have a national footprint (through self-provisioning and/or roaming, including pre- and post-paid carriers), the HHI would increase from approximately 2,600 to 3,300 as a result of the merger.<sup>48</sup> If the analysis is restricted to post-paid carriers with national footprints, then the HHI would increase from 2,900 to 3,600.<sup>49</sup>

If the market is analyzed at the CMA level,<sup>50</sup> the average population-weighted<sup>51</sup> HHI would increase [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] Post-merger, the top firm in each CMA will have an average population-weighted share of [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]; the 2-firm share

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

<sup>48</sup> See SNL Kagan, *Wireless Industry Benchmarks*.

<sup>49</sup> *Id.*

<sup>50</sup> We strongly feel that the relevant *product* market is one of national service plans and that the substantial competitive impacts of this merger at the national level render geographic considerations largely irrelevant. However, it should be noted that if the agencies ultimately choose to analyze the transaction at the local level, that the CMA/CEA geographic boundary may actually *overstate* the level of “local” competition. Our preliminary analysis of the NRUF data indicates that [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

<sup>51</sup> When describing the average concentration of CMAs, it is necessary to weigh the observation by population count because CMAs range in size from near 10,000 to near 20 million persons. For example, consider a hypothetical market with just two areas; Area A has an HHI of 10,000 and a population of 9900, while Area B has an HHI of 1,000 and a population of 100. Simply averaging the two HHIs and describing the result (5,500) as the “average Area” HHI would vastly understate the level of competition available to the average consumer. Weighting by population produces an accurate representation of the competition in the market of the average consumer (HHI = 9,910).



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will be [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]  
[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]; the 3-firm share will be  
[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END  
HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]; and the 4-firm share will be  
[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END  
HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

Consumers all across the country will directly feel the effects of this transaction. At the CMA level, [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] percent of the U.S. population lives in areas impacted by the merger.<sup>52</sup>

We analyze the DOJ thresholds for consolidation first. A full [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] percent of the U.S. population lives in CMAs where the post-merger HHI will increase by more than 100 points and will exceed 1500, the level that according to the *Horizontal Merger Guidelines* “potentially raise[s] significant competitive concerns and often warrant[s] scrutiny.<sup>53</sup> According to our preliminary analysis of the LNP/NRUF data, [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] percent of the U.S. population live in CMAs where DOJ’s guidelines presume that the merger “will . . . likely . . .

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<sup>52</sup> [BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

<sup>53</sup> See *Horizontal Merger Guidelines* at 19.