Before the
Federal Communications Commission
WASHINGTON, DC 20554

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

REPLY TO OPPOSITION OF CENTER FOR MEDIA JUSTICE, CONSUMERS UNION, MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION, AND WRITERS GUILD OF AMERICA, WEST

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SUMMARY

Applicants' Opposition amounts to little more than a request that the Commission allow the public interest to bear a cost far greater than that which AT&T's shareholders earlier opted not to bear to widen its LTE footprint and market dominance. Applicants essentially state: "Give us everything, and we will mobilize." The Commission must deny that request because its task is not "enabling AT&T," as the Opposition claims. Rather the Commission is tasked with protecting competition and the public interest, in this instance from the harms posed by the proposed acquisition of T-Mobile by AT&T.

Removing one of three direct competitors with AT&T from the nationwide market – and its only competitor in the GSM submarket – would leave a void that no other carrier is capable of filling. In fact, as per every would-be competitors' comments regarding the subject application, this merger would harm their chances of growing to fill the shoes of a T-Mobile, much less expanding any potential LTE footprint to compete with even AT&T's earlier deployment plans. The fact remains that removing T-Mobile, in particular – a consumer-friendly, price-disciplining, maverick provider of low-cost and innovative mobile wireless products in an increasingly consolidated market – implicates the public interest even more palpably.

Amidst all its promises of future benefits that admittedly are in no way unique to this merger, AT&T admits that it seeks this merger because eliminating T-Mobile as a competitor will save AT&T's shareholders money that otherwise they would refuse to spend to improve capacity and deploy LTE, as Verizon Wireless has. In an attempt to convince the Commission of the supposed benefits of the subject acquisition, AT&T tethers its willingness to invest in LTE deployment – and the admittedly "eventual," "potential" benefits of that investment – to the merger's approval. In other words, AT&T will only alter its present plans if the Commission will

ignore legal precedent and the immediate, actual public interest harms that the subject acquisition will inflict. Maximizing AT&T's wealth is not, and never has been, a public interest benefit justifying any merger, much less a legally cognizable merger-efficiency that could justify increasing concentration in an already highly-concentrated industry.

The government has agencies tasked with protecting the public interest and competition, regardless of the fact that a corporation may benefit more otherwise. In this instance, the Commission's analysis must begin from the premise that the public's interest lies in competition and good service at affordable prices. Both are particularly important at a time when traditionally unserved and underserved populations, including members of communities of color, low-income communities, and rural residents, rely to an even greater degree on affordable and innovative wireless broadband service offerings to access the Internet and partake in its benefits. Competition and good service at affordable prices trump Applicants' interest in expanding their current bad service at high prices at the expense of competition. Applicants do not even attempt to suggest that, should they choose to invest in LTE deployment, those service plans will be within the reach of the many Americans who cannot afford AT&T's prices now. They do not because that would contradict AT&T's promise to their shareholders to raise T-Mobile's revenues per user to match AT&T's, and its statement to Congress that the merged entity will not be offering T-Mobile's service plans to AT&T's customers but simply honoring T-Mobile's contracts until they expire or T-Mobile's customers desire an upgrade.

Because the proposed merger will harm competition, concentrate market power in AT&T's hands, remove low-cost pricing plans from the market, require workforce reductions, and close avenues for innovation and narrow consumers' choices, the merger is not the road best traveled to affordable LTE; and the Commission should deny it. As Public Interest Petitioners previously recited – and the Opposition concedes – the public interest is met by protecting competition, not competitors.

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Media Access Project, counsel to the Center for Media Justice, Consumers Union, New America Foundation's Open Technology Initiative, and Writers Guild of America, West (together, "Public Interest Petitioners"), respectfully submit this reply to the opposition of their earlier petition to the Federal Communications Commission to deny the proposed acquisition of T-Mobile USA ("T-Mobile") by AT&T Mobility ("AT&T") (together with T-Mobile, "Applicants"). Applicants' Opposition amounts to little more than a request that the Commission allow the public interest to bear a cost far greater than that which AT&T's shareholders earlier opted not to bear to widen its LTE footprint. The Opposition does not even attempt to address the barrier of affordability confronting many low-income consumers, which prevents them from taking advantage of AT&T's wireless broadband services, and which T-Mobile's acquisition by AT&T would exacerbate. Instead it proposes that the Commission take AT&T's skewed perspective of market realities and deliver to AT&T its competition, which potentially could offset the premium price AT&T is paying to purchase T-Mobile sufficiently to cover AT&T's cost of deploying LTE competitively with Verizon. The Opposition argues that only with this bonus will AT&T revise its business plan, deploy LTE in greater scope and improve the efficiency and capacity of its service. Because this change in plans admittedly is achievable by AT&T with T-Mobile in the market and without this merger's cost to competition and to the public interest, the Commission must deny the subject application.

INTRODUCTION

In opposition to Public Interest Petitioners' facts and law dictating denial of AT&T's proposed acquisition of T-Mobile, Applicants offer rhetoric and promises. In sum and substance, Applicants essentially state: "Give us everything, and we will mobilize." The Opposition would have the Commission overlook the facts and the law disfavoring mergers like this one, because "the Commission's task," per Applicants, is "enabling AT&T."[1] This is not, and never has been, the Commission's task. In an attempt to convince the Commission of the supposed benefits of this acquisition, AT&T tethers its willingness to invest in wider LTE deployment[2] – and the admittedly "eventual," "potential" benefits of that investment – to the merger's approval. In other words, AT&T will only alter its present deployment plans if the Commission ignores legal precedent and the immediate, actual public interest harms that the acquisition will inflict. A corporate attitude shift is not, and never has been, a cognizable efficiency justifying any merger, much less one as seismic as the proposed consolidation of the numbers 2 and 4 out of 4 providers in the increasingly concentrated nationwide wireless market. Thus, like the Application, the Opposition fails to provide any reason why the Commission should hurdle this merger over the public interest barriers before it.

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1 *See* Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (filed June 10, 2011) ("AT&T Opposition"), at 36-37.

2 *See, e.g.*, Hogg Reply Decl. ¶¶40, 46-47.

Hundreds of pages of argument cannot bury the fact that this acquisition is not in the public interest. AT&T already pitched the merger to its investors. It promised them what it will deliver: T-Mobile's customers and infrastructure. It clarified what it will expeditiously reduce – T-Mobile's workforce (through "required force reductions"[3] and "savings in customer-support"[4]), and the handset choices it gave its customers (through "handset consolidation"[5] and raising data ARPU's).[6] These actions will harm the public. The Opposition goes no further than touting the merger's potential to put AT&T in a stronger position to create jobs, and inspire others potentially to create jobs.[7] It is not in the public interest to replace sure jobs that workers currently have with "potential" ones that AT&T may "create" if it chooses to share the wealth of its "stronger position" post-acquisition.

The Opposition's overarching theme is that the Commission must approve this merger because it is the only path to a 97% LTE deployment that AT&T's shareholders would approve. This is legally and factually insufficient to pass public interest muster. Were it not, nevertheless it would be insufficient here because, as Public Interest Petitioners earlier argued with support from legal precedent, T-Mobile acted as a pricing-destabilizing maverick and innovator, and its removal thus is disfavored for tending to increase prices and decrease innovation and choices for consumers.

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3 Public Interest Petitioners' Petition to Deny ("Public Interest Petition") at 38 n. 107, 39, n. 108.

4 Opposition at 74.

5 Public Interest Petition at 29, n. 79.

6 *See* Public Interest Petition at 45-46 (noting that in a presentation to its shareholders regarding the subject proposal, AT&T detailed its plans to increase T-Mobile's data revenues per subscriber (presently $12.80) to match AT&T's (presently $17.50). Part and parcel of these plans is the monetization of data, with "attractive [to AT&T's shareholders, that is] tiered data plans." (citations omitted)).

7 *See* Opposition at 88.

Applicants trumpet the support of various groups and technological innovators, attempting to suggest their assertions alone should lead to a conclusion that the merger will benefit various communities and spur innovation. Applicants dismiss groups opposing the merger (including those constituting the groups represented by Public Interest Petitioners) with *ad hominem* attacks, classifying them as greedy and/or simply unsophisticated, knee-jerk opponents to any industry consolidation no matter how much it may benefit them.

With respect to the claim that this merger has more supporters than concerned citizens, AT&T offers a few hundred individual letters in support of this merger.[8] In actuality, the numbers opposed dwarf that figure by over 25,000 individual comments on the FCC'S documents database, most of which are written by mobile wireless customers. Contrary to AT&T's claim, the opposition to its latest proposed acquisition is not so easily dismissed as "Sprint and the applicants' other wireless competitors, along with the same interest groups that reflexively oppose all significant mergers"[9] but in fact amounts to a public march.

Second, the concerned groups that AT&T would classify as knee-jerk, every-merger-opponents that fail to understand the big picture include the State of New York Department of Public Service, The New Jersey Division of Rate Counsel, and the Computer and Communications Industry Association, an association which membership includes AMD, Dish Network, Google, Oracle, and Yahoo!, among others.[10] In any event, nearly all of the support behind Applicants is for one thing – LTE deployment. This support is not so easily converted into support for the merger because the proposed transaction could potentially slow deployment of LTE services to low-income consumers, who undisputedly cannot afford the only pricing

8 Opposition at 1-3.
9 Opposition at 4.
10 *See* CCIA website, at http://www.ccianet.org/index.asp?bid=11.

plans that AT&T will offer for its LTE – AT&T's present pricing plans, rather than T-Mobile's. There is no indication that these consumers will be able to afford in the future what they cannot afford now.

Beyond not disputing this potential, new digital divide, Applicants suggest that the lower-hanging fruit simply may be grabbed by the smaller, non-nationwide providers that do not require credit checks to offer pre-paid service. With no support, Applicants continue to suggest that this acquisition will actually allow these smaller, non-nationwide providers to better compete with AT&T. In other words, to the extent those providers lack the ability to deploy LTE widely, much less do so while absorbing customers who they somehow manage to snag from AT&T-T-Mobile despite having less attractive handsets, AT&T claims it will be more willing to negotiate and set affordable roaming and special access rates than the current AT&T has been.

At the Application stage, this claim at best was speculative; now it is unsupportable: every single "competing" provider that Applicants claim will step in for T-Mobile in its absence has filed comments explaining to the Commission the various reasons why the shoe does not fit. As Public Interest Petitioners earlier noted, smaller carriers cannot take that wide of a customer-base because they lack the spectrum to absorb them. To the extent this were not so, those providers still would lack the economies of scale to match T-Mobile's handsets and pricing plans to 11% or more of the populace. Those carriers' statements to the same effect are the best – and the only credible – evidence on this point, not the Opposition's unsupportable claims to the opposite effect.

Protecting competition in this instance is not to strengthen AT&T and Verizon's joint position as the dominant nationwide carriers by eliminating the most aggressive and innovative remaining competitors and greatly increasing concentration in a market that already is highly concentrated by any measure. The Opposition's strained argument regarding the powerful strength of smaller, regional competitors amounts to a statement that the Commission was wrong when it failed to conclude that the market was competitive, and discussed how the largest carriers were capable of controlling service inputs, dominating downstream markets and imposing barriers to entry.

The Commission's analysis of the market noted that, as Public Interest Petitioners and the smaller carriers themselves have experienced, T-Mobile may have little impact on how AT&T and Verizon set their prices in the market and several submarkets, but at least there are marked instances in the relevant market and submarkets when it has made an impact. This influence differentiates T-Mobile from the smaller, regional carriers. These smaller carriers lack the economies of scale and the influence of T-Mobile and the other three nationwide carriers when making deals for handsets, and generally depend on the four large providers for essential inputs such as roaming and special access services. Accordingly they tend to adopt an alternate business plan focused on a different base of customers who cannot afford the latest handsets in exchange for long-term contracts with the top four providers. These smaller carriers and the public more largely also benefit from T-Mobile's presence in the market because, unlike AT&T, T-Mobile does not tend to ignore GSM carriers' attempt to negotiate roaming agreements and has opposed AT&T's attempts to raise special access rates. Moreover, T-Mobile has shown itself willing to launch new products (even if, as the Opposition notes, not every innovation turns successful) and allow these providers – and innovators – to benefit from those launches by promoting a culture of open-sourcing. This approach also has benefitted the public interest, and this too Applicants promise to remove from the ecosystem.[11]

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[11] *See* Public Interest Petition at 29, 39, n.108.

Against all the evidence supporting denial of the subject application, the Opposition offers only this argument: though AT&T can deploy LTE and improve its network just as fast without T-Mobile, absorbing a competitor will neutralize the immediate effect that spectrum deployment and improvements could have upon AT&T's bottom line; and otherwise, that bottom line could suffer more now, because AT&T has sufficiently delayed deployment and spectrum improvement measures as to potentially increase the cost of pursuing means other than acquisition. This AT&T-T-Mobile-investor-interest benefit is the only merger-specific benefit that the Application, and the Opposition to Public Interest Petitioners' petition, can offer. The related "efficiency" argument only amounts to what Applicants promise will result from the profits they may achieve by absorbing the competition. Competition poses costs for competitors, for the same reason it benefits consumers – it forces competitors to lower prices, even as it prompts them to invest more in innovation and improvements in quality and efficiency.

To illustrate, a post-merger AT&T/T-Mobile and Verizon could propose to address speculative LTE spectrum constraints by merging, and use this merger as precedent to argue that the joint conglomerate may alleviate constraints and save sufficient funds from customer-acquisition costs, shared infrastructure, and force reductions – and "market power pooling" by another name – that it could invest in establishing an LTE footprint in ***100%*** of the United States. Yet that would not make that merger any less harmful to the public interest in competition, low prices and innovation. In any event, as Public Interest Petitioners earlier noted, it is black letter law that promises are not cognizable merger-specific efficiencies.[12] Much less so are unenforceable promises that by the promisor's own admission depend on ever-variable analyses and consensus-based investment calculi, and which may take a decade at least to fully realize.

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[12] *See infra* n. 59.

The Opposition concedes as much by offering not one citation to support its argument that profiteering, coupled with promises of trickle-down effects, may neutralize any merger's costs to competition.

It may be the case that AT&T's business plan cannot support wider LTE deployment unless AT&T saves the costs of competing for T-Mobile's customers and infrastructure. However, the Commission is tasked with protecting the public interest, and competition, regardless of the fact that a corporation's bottom line may benefit more otherwise. In this instance, the Commission's analysis must begin from the premise that public's interest lies in competition and good service at affordable prices trump Applicants' interest in expanding their bad service at high prices at the expense of competition. This is particularly true at a time when traditionally unserved and underserved populations, including members of communities of color and rural residents, rely to an even greater degree on affordable and innovative wireless broadband service offerings to access the Internet and partake in its benefits.

Denial of the proposed acquisition is also the best way of protecting new avenues for creative expression from independent creators, who increasingly use mobile wireless broadband to create and distribute all manner of video programming and other types of artistic works and political expression. Applicants' only argument to the opposite effect is that potentially the merger's proposed, eventual deployment of LTE also may benefit creators; yet, as Public Interest Petitioners earlier argued – and the Opposition concedes – current deployment is equally possible. Thus, because the subject acquisition will harm competition and innovation, concentrate market power, remove low-cost pricing plans from the market, require workforce reductions and narrow consumers' choices, and is not the road best traveled to LTE, the Commission should deny it.

DISCUSSION

I. THE OPPOSITION FAILS TO REBUT THE FACT THAT REDUCING T-MOBILE TO AN AT&T ASSET WOULD HARM COMPETITION AND THE PUBLIC INTEREST.

The proposed acquisition would harm the public's interest in high-quality, low-price mobile wireless service in the following ways, each of which Applicants fail to rebut in their Opposition:

A. AT&T would remove from the market "a 'maverick' firm, *i.e.* a firm that plays a disruptive role in the market to the benefit of customers."[13]

The 2010 Guidelines indicate a particular concern with mergers where "one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices," "may discipline prices based on its ability and incentive to expand production rapidly using available capacity," or has a history of resisting setting its prices alongside that of more dominant firms.[14] The Opposition cannot dispute that T-Mobile has continually provided a lower-cost, well-serviced alternative to AT&T.[15] Thus, it opts to claim that T-Mobile cannot be classified as a maverick because it lost market share last year, despite retaining 11% of that market[16] and remaining in the top-tier of wireless providers behind only Verizon, AT&T and (to a lesser extent) Sprint, even taking into account every single actual and potential future provider that the petition suggests are competitively relevant.

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13 *See* DOJ and FTC *Horizontal Merger Guidelines*, §2.1.5, p. 3 (2010) ("2010 Guidelines").

14 2010 Guidelines §2.1.5, p. 4.

15 *See generally* Public Interest Petition at 43-47 (comparing T-Mobile's offerings to AT&T's).

16 *See, e.g.*, Opposition at 97.

That is not the law. As one court recently put it, when rejecting the claim that a competitor whose acquisition was proposed had dim prospects for future success and therefore was no longer meaningful to the relevant market,

> Since weak firms are not in grave danger of failure…it is not certain that their weakness will cause a loss in market share beyond what has been suffered in the past, or that such weakness cannot be resolved through new financing or acquisition by other than a leading competitor. Moreover, the acquisition of a financially weak company in effect hands over its customers to the financially strong, thereby deterring competition by preventing others from acquiring those customers, making entry into the market more difficult. History records and common sense indicates that the creation of monopoly and the loss of competition involve the acquisition of the small and the weak by the big and the strong.[17]

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[17] *F.T.C. v. University Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir. 1991) (internal quotations and citations omitted). The Opposition continues to attempt to analogize the present with *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 146-147 (D.C. Cir. 2004). Yet Triton, whose acquisition the FTC then challenged had never been a maverick and "particularly not in the last 2 to 3 years" when it finished "dead last" in terms of competitiveness. Further unlike T-Mobile, which remains in the top four and competes directly with AT&T for business in the national market and several submarkets, Triton's business plan was "not to increase its market share by pricing under its competitors," but simply to try to win just enough business to cover debt obligations as they came due. Triton did not "lead or even influence pricing in the market, [did] not compete aggressively, and [did] not have a history of [competing on price] consistent with the behavior of a maverick." *Id*. at 147.

The Commission already has observed T-Mobile's influence on pricing. *See* 2010 Wireless Competition Report ¶ 92 ("T-Mobile's price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings."), ¶ 90 (noting that AT&T's "A-List" calling feature in 1999, which allowed unlimited mobile calling to and from any five "VIP" domestic phone numbers for individual plans, and any ten numbers for family plans and was designed to compete with T-Mobile's preceding MyFaves option). In fact as noted by another petition to deny this merger, T-Mobile's innovative pricing has been cited by the Commission's last three annual reports. *See* CompTel Petition to Deny, at 17. The Opposition protests that T-Mobile would have been incapable of continuing this trend, and yet as Public Interest Petitioners earlier showed, T-Mobile's business plan for 2011 highlighted its continuing intent to differentiate itself with aggressive pricing and lack of concern with its intent not to deploy LTE. The Opposition does not suggest that plan is untenable, but on the contrary claims the true "mavericks" in the industry are several companies, the LTE deployment hopes of which are either nonexistent or similarly constrained. The analogue to *Arch Coal* where the dispositive factors are concerned is not T-Mobile but the smaller, regional carriers that AT&T would term "mavericky." Those carriers have not influenced AT&T's pricing at all and have

In any event, recently T-Mobile's CEO confirmed earlier claims to shareholders that T-Mobile intends to reverse its fortunes and exploit its own sizable assets should the merger be denied.[18] That this turnaround is eminently possible is made plain by Applicant's own arguments regarding Sprint's dominance. While arguing T-Mobile's fate is sealed, Applicants point to Sprint as a dominant, growing company, despite its comparatively lower market share against Verizon's and AT&T's. Sprint's turnaround is notable, but for a different reason: just two years ago, Deutsche Telekom reportedly was looking into submitting a bid for Sprint, then (as now) the third largest U.S. carrier, "for a market valuation of $10.6 billion."[19] The difference in price-tag alone strongly suggests that Applicants are paying a "kill off the competition" premium for the subject acquisition.[20]

The Opposition's argument that T-Mobile is not an innovator because some of its innovations have been less successful than others is even less tenable. Alexander Graham Bell

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finished far below T-Mobile, consistently. Moreover, *Arch Coal* already was distinguished in a situation like this one, where the HHI increase is significant. *See F.T.C. v. ProMedica Health System, Inc.*, 2011 WL 1219281, *58 (N.D. Ohio Mar. 29, 2011).

18 *See, e.g.*, Public Interest Petition at 23, n. 54; Leap Wireless, Inc. and Cricket Communications, Inc. Petition to Deny at 32 (noting that to the extent T-Mobile's future as a competitor is threatened by its alleged "lack of clear path to LTE," not only is this inconsistent with what T-Mobile is telling its investors and customers, but that "clear path" is as simple as partnering with wholesale providers.); Clearwire Comments at 5-6 (observing that "an independent T-Mobile has been widely perceived as the most logical customer for wholesale 4G network capacity," such that "the proposed merger threatens in a single stroke to both remove the strongest retail price competition in the marketplace and further contract the shrinking addressable market for wholesale providers like Clearwire.") *See also* Roger Cheng, "T-Mobile CEO: Will Continue to Compete Despite Looming Takeover," Wall St. J., Apr. 19, 2011 at http://online.wsj.com/article/BT-CO-20110419-711466.html (Humm states T-Mobile was making progress on its "turnaround plan laid-out in January," and adds "We don't see ourselves as lame ducks. T-Mobile is as aggressive as ever.").

19 Daniel Ionescu, "T-Mobile May Buy Sprint to Create Market Giant," PC World, Sept. 14, 2009, at http://tinyurl.com/r6t3sq.

20 *See* 2010 Guidelines §2.2.1, p. 4; *see also* U.S. Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), at § 4 (E).

may have failed 31 times, but he invented the telephone.[21] Yet, per Applicants, he could not be termed an innovator. History – not to mention common sense – shows that innovation requires willingness to make mistakes and sometimes fail, which encourages ideas, which in turn can take technology to new heights. One cannot be a maverick if one never takes risks. Perhaps it is unsurprising, given AT&T's practice of acquiring companies rather than innovating around challenges, that its Opposition would make this argument when faced with T-Mobile's continual willingness to open its doors to new creations. But in so doing, AT&T only confirms that its culture is anathema to T-Mobile's innovation-encouraging, open-source one.

B. AT&T would remove a direct competitor, leaving a void that no other carrier is positioned to fill.

The Opposition repeatedly claims that T-Mobile will not be a direct competitor to AT&T, even if it has been in the past, because it "has no clear path to LTE"[22] and is losing "contract customers."[23] Alternatively, the Opposition proposes, "any competitive gap T-Mobile USA leaves upon completion of [the merger] transaction," will "rapidly" be filled by smaller providers, such as MetroPCS, Leap, Cincinnati Bell, "U.S. Cellular, Cellular South, and a host of [unnamed] others."[24] MetroPCS and Leap, as the Opposition concedes, are "no-contract" providers, thus either carriers' potential to compete for higher-tier "contract customers" is dimmer than T-Mobile's.

In any event, the Opposition agrees with Public Interest Petitioners that market definition may be immaterial, and further recommends that the Commission focus instead upon "the

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21 Answers.com, at http://wiki.answers.com/Q/How_many_times_did_Alexander_Graham_Bell_fail.

22 *See, e.g.*, Opposition at 97.

23 *See, e.g.*, Opposition at 131.

24 Opposition at 131.

competitive pressures exerted by no-contract and regional providers."[25] As Public Interest Petitioners argued, the Commission's focus upon these providers only can lead to one conclusion: the merger would impose incurable harm to competition in part by reducing all carriers' ability to compete with AT&T and Verizon.[26] To aid the Commission in its assessment, each of the no-contract and regional providers have filed comments in this matter explaining how, as Public Interest Petitioners noted, their exertion is not susceptible to characterization as "competitive pressure" upon AT&T, much less the would-be AT&T/T-Mobile:

a. MetroPCS and Leap are dependent on larger carriers to provide nationwide coverage, and should AT&T's power increase with the absorption of T-Mobile, its leverage over roaming negotiations would only further constrain their competitive potentials.[27]

b. MetroPCS and Leap's ability to compete also is limited by how much spectrum they have compared to AT&T, and permitting this merger only would exacerbate this limitation.[28]

c. Cincinnati Bell Wireless (CBW), lending further support to Public Interest Petitioners' argument that regional companies cannot compete as T-Mobile did and depended on T-Mobile to provide reasonable roaming, filed a petition in this proceeding giving evidence

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[25] *See, e.g.*, Opposition at 112.

[26] *See* Public Interest Petition at 9-13.

[27] MetroPCS Communications, Inc. And NTELOS Inc. Petition at 11. ("The rates for broadband data from those carriers willing to offer it are at rates that make offering 3G data prohibitive."); *see also* Leap Wireless, Inc. and Cricket Communications, Inc. Petition at 21. ("Leap has no alternative...there is no longer a feasible way to assemble the nationwide coverage that consumers demand through piecemeal roaming arrangements...the greater its [AT&T's] nationwide coverage, the less incentive it has to reach agreements with other carriers and the greater leverage it has to withhold or delay such agreements.").

[28] *Id.* at 19. (If AT&T raised its prices, Leap and other carriers' spectrum constraints would sharply diminish their ability to respond competitively to AT&T's actions or to provide any meaningful discipline on AT&T's pricing.) *See also* MetroPCS Communications, Inc. and NTELOS Inc. Petition at 29. ("In this scenario, technological developments would have to be driven by the carriers which face the greatest resource constraints, the mid-tier, regional and rural carriers. For example, 4G might not be a reality without the current competitive environment.")

that the rates for AT&T's 2G and 3G roaming proposal to CBW were nearly double those of T-Mobile and included unreasonable restrictions on the use of roaming to compete with AT&T.[29] CBW's experience alone would suffice to rebut AT&T's unsupportable claim that AT&T is neither capable nor willing, now or later, to curb competition by using its market power and the roaming needs of smaller, regional carriers; but Leap and Cricket's experience has been the same.[30]

d. Cellular South's CEO testified before Congress that, even with T-Mobile in the marketplace, AT&T has refused roaming agreements and otherwise gamed the special access market so as to constrain the very potential competition that the Application claims to be actualized.[31]

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[29] Cincinnati Bell Wireless Petition at 17-18. ("AT&T also prohibits the use of its roaming services to provide service to enterprise customers (in competition with AT&T) outside the roaming carrier's home market, thereby severely limiting the ability of non-nationwide carriers to compete for enterprise customers. While it may permit the provision of such services using a mobile virtual network operator (MVNO) agreement, such an arrangement would only increase the roaming carrier's costs and complicate its operations while providing exactly the same services as roaming.") And only recently did AT&T stop insisting that CBW agree to a "primary carrier" provision in the AT&T-CBW roaming agreement that gave AT&T's network (and higher priced roaming services) priority for all roaming traffic. *Id*. at 16, n.30.

[30] *See* Leap Wireless, Inc. and Cricket Communications, Inc. Petition at 20-21 ("T-Mobile itself acknowledged that…existing industry consolidation had led to conditions in which AT&T, the dominant provider of roaming services for the GSM technology platform, now has the incentive and the ability to resist entering into reasonable data roaming agreements.'" (*citing* T-Mobile USA, Inc., Notice of Ex Parte, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at 4 (filed Mar. 10, 2011))). Both T-Mobile and the Commission have also confirmed this point. *Id*. at 20. ("As an initial matter, the Commission found…that AT&T already exercises market power and engages in exclusionary conduct with regard to reaching data roaming agreements. The Commission observed that 'AT&T has largely refused to negotiate domestic 3G roaming arrangements,' and noted that AT&T did not enter into a *single* 3G roaming agreement until March 2011." "The Commission also found that it was 'unlikely' that AT&T (or Verizon) would be willing to offer roaming arrangements for 4G LTE networks 'at any time in the near future.'").

[31] Testimony of Victor H. Meena, President and CEO Cellular South, Inc., before the Sen. Jud. Subcommittee on Antitrust, Competition Policy and Consumer Rights regarding "The

As for the "host of others" that the Opposition cites without identification, "apparitions" of competition are irrelevant.[32] Moreover, as if to confirm economic studies demonstrating why entry by other non-major carriers is generally discouraged by the prospective entrant's reasonable expectation of an aggressive competitive response by incumbents,[33] AT&T has already constrained Clearwire by restricting handsets.[34] To the extent that small carriers could in the future look to Clearwire and LightSquared to deploy a new generation of service over a new generation of handsets, that becomes far less likely if the merger is approved.[35]

C. AT&T would have a monopoly over the GSM submarket.

In petitioning to deny, Public Interest Petitioners applied the term "economic gerrymandering" to AT&T's situational definition of the market as national or local based solely upon what it sought to acquire on any given day before the Commission.[36] Never has that term's

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AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" at 10 (May 11, 2011) (noting that AT&T already has marginalized regional GSM carriers by withholding roaming agreements, in marked contrast to T-Mobile, which generally "allows users to roam freely among markets."). U.S. Cellular also contradicts AT&T's claims regarding its ability to compete, noting its potential already is curbed by AT&T's actions in the special access market. *See* US Cellular Petition at 3.

[32] As the 2010 Guidelines prescribe, "[a]lthough excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market." 2010 Guidelines §4, at 7.

[33] *See* Patrick Bolton *et al.*, Predatory Pricing: Strategic Theory and Legal Policy, 88 Geo. L.J. 2239, 2261-62 (2000) (discussing locally dominant airlines' predatory pricing strategies in response to new entry of independent carriers); Scott McCartney, "Upstart's Tactics Allow It to Fly in Friendly Skies of a Big Rival," WALL ST. J., June 23, 1999, at B1 (reporting that aggressive competition by small carrier was discouraged by dominant carrier's pricing strategy).

[34] *See, e.g.*, Clearwire Petition at 10 ("Just as Clearwire announced a large expansion of its WiMAX 4G network, representatives from AT&T and Verizon Wireless announced plans to launch services using the competing LTE standard for 4G.. Shortly thereafter, in what appeared to be a response to coordinated pressure from LTE advocates, vendors announced plans to stop producing WiMAX- compatible handsets and start producing LTE phones.").

[35] *Id*. at 12.

[36] *See* Public Interest Petition at 15, n.38.

application been more apt than with respect to the Opposition, which can only propose a "*global*" market in response to the fact that T-Mobile's acquisition would create a GSM monopoly, further implicating the ability of other carriers to compete and accordingly harming the public interest.[37] As Public Interest Petitioners noted, this submarket effect is independent from that caused by the further entrenchment of the nationwide wireless duopoly that an AT&T/T-Mobile implicates.

The Opposition insists on a local market definition and generally fails to acknowledge that product submarkets exist and must be analyzed in any event.[38] Going further, the Opposition suggests that the Commission may *only* view the subject acquisition as harmful to competition *if* it analyzes market impact on a national basis.[39] Were defining the market nationally the only way harms to competition could be identified, that certainly would be the way to define it under the laws protecting the national public's interest in competition. Consistent with this principle, the Commission has acknowledged that its concern when avoiding a national outlook in earlier proceedings where local acquisitions were implicated was that "[a]ssessing competition in mobile wireless services at the national level could ***overstate*** the level of competition…."[40] In this instance, AT&T's fictional assessment of "competition" locally overstates the level and nature of competition, as is made plain by a national review of the market and the comments filed in this proceeding by each of the smaller, regional carriers, which note the harms to competition that AT&T's proposed acquisition would inflict upon them. Notably, Applicants tout COMPTEL for agreeing upon a local market definition[41] without

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37 *See*, *e.g.*, Opposition at 149 (emphasis in original).
38 *See* Opposition at 105.
39 *See* Opposition at 105-106.
40 *See* 2010 Wireless Competition Report ¶ 24 (emphasis added).
41 Opposition at 106, n. 152.

addressing that COMPTEL agreed upon that definition in the context of its "Petition to Deny," which, like Public Interest Petitioners', argues that even a local market definition could only justify this merger's denial. The Opposition fails entirely to address the many regions in which this merger would be proscribed were such a local analysis conducted. It is not the case that, as the Opposition's approach thus suggests, this merger would only be harmful to the public interest if every single person in every single region would be negatively impacted. Beyond economic gerrymandering, such a suggestion is tantamount to burden-shifting – the burden is on the Applicants to establish that grant of the subject application is in the public interest, not on every single member of the public to prove that its grant will negatively impact his or her interests.

Moreover, Applicants' burden-shifting argument is inconsistent with the spirit of the antitrust laws. Section 7 of the Clayton Act, the primary federal merger statute, prohibits asset acquisition when "in *any* line of commerce or any activity affecting commerce in *any* section of the country, the effect of such acquisition *may be* substantially to lessen competition, *or tend to* create monopoly."[42] Public Interest Petitioners, among many others, identified there are *many* lines of commerce in *many* sections of the country in which this merger could substantially lessen competition or create a monopoly.[43]

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[42] *See also Brown Shoe*, 370 U.S. 294, 315-23 (1962) (reviewing same legislative history) (emphasis added); *see also id*. at 337 ("The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of s 7.").

[43] *See, e.g.*, Public Interest Petition at 3, n.7 (identifying GSM carrier and customer submarkets); *id*. at 5 and n.10 (identifying prepaid and postpaid submarkets); *id*. at 5-6 and n.11, 11 and n.28 (identifying smartphone and iPhone submarkets); *id*. at 17 (listing several submarkets); *id*. at 19 (identifying local submarkets of significantly or highly concentrated service on a chart from Spencer E. Ante & Roger Chang, "Wireless Deal Dials Up Worries," WALL ST. J., Mar. 22, 2011, at B4); *id*. at 48 and n. 140 (identifying business traveler submarket).

In this instance, GSM providers are recognized as a separate economic entity by their customer base and business travelers who are drawn to its peculiar international adaptability. GSM providers cannot substitute their service and still serve their customer base, which relies upon continuing their existing GSM service. Switching to CDMA is not an option.[44] AT&T conceded as much by relying upon the uniqueness of the GSM devices and their service providers to note its unique synergy with T-Mobile. Furthermore, GSM is unique for business consumers, who require nationwide coverage and the interoperability of the GSM technology for international travel, and for Smart Car drivers who rely on GSM technology to immobilize their cars and prevent theft.[45]

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44 *See, e.g.*, Testimony of Steven K. Berry, President and CEO, Rural Cellular Association, before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, "How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition," ("Berry Testimony"), May 26, 2011, at 3 (noting that the members of the Rural Cellular Association depend on roaming from at least one nationwide carrier – "AT&T or T-Mobile, for GSM carriers, and Verizon or Sprint, for CDMA carriers – if they are to give consumers the network coverage they demand as consumers travel outside their home networks," and citing FCC Chairman Julius Genachowski's recent statement that "smaller carriers need to be able to offer national service 'to have any chance of competition in today's market.'").

45 *See* "Smart Cars Hit the Streets, GSM on the Rise," Taiwan Trade, Apr. 21, 2011, at http://tinyurl.com/3wqs6fx (noting that "nowadays more and more cars are being fitted with GSM (Global System for Mobile Communications) modules. In Europe and the U.S. GSM modules are mainly used in immobilizers. GSM systems have greater communication distances thus enabling SMS messages to be sent to car owners' phones when their cars are being breached."). The Opposition takes great pains to explain why various other petitioners are wrong to argue that the product market is post-paid, or smartphone, or GSM carrier, or value-conscious, *see* Opposition at 115, without dealing with Public Interest Petitioners' related argument that these nevertheless are cognizable submarkets by the public and for antitrust purposes, which concentration would increase even further. The law is clear that "[i]f, upon examination of the submarket, there is a reasonable probability that the merger will substantially lessen competition in that submarket, the merger is proscribed," and submarkets are defined by "peculiar characteristics and uses," "distinct customers," and "specialized vendors." *See, e.g.*, *FTC v. Staples and Office Depot*, 970 F. Supp. 1066, 1075 (D.C. Cir. 1997), *citing Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962).

Were the Commission to adopt a "global" analysis here, it nevertheless would find against Applicants on this point. Per the Opposition itself, the merger between the two U.S. GSM providers would be just as harmful to the *global* public's interest in low prices. Elsewhere in their Opposition, Applicants observe that international GSM providers in fact tend to ***raise*** their rates as needed to match those of U.S. carriers.[46] If international providers tend to follow U.S. carriers' rates, then the consideration of *global* GSM competition can only lead to the same result as the *national* analysis of this merger's impact on pricing in the GSM market – it is likely to raise prices for consumers.

The proposed acquisition's creation of a GSM monopoly will harm the public interest because determination of "reasonable rates" without competitive bids is unreliable, and all GSM carriers would depend upon the AT&T/T-Mobile GSM monopoly's willingness to be "reasonable" post-merger. AT&T claims that its own roaming needs will dictate its reasonableness, without addressing the fact that its entire argument in favor of this acquisition is that it will have a far wider footprint once it absorbs T-Mobile.

Finally, even if other carriers' GSM customers would, as AT&T proposes, choose to leave their contracts and their GSM handsets should rates become unreasonable, GSM carriers cannot similarly protest with their feet by walking out on GSM to another wireless technology. Their other option would be turning to the Commission, should data-roaming regulation withstand challenges. In that instance, the Commission could find itself incapable of determining the monopoly's rates to be unreasonable, given the lack of T-Mobile's rates as evidence of reasonableness.

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[46] Opposition at 161.

D. AT&T would reduce choices for innovators and negatively impact mobile wireless broadband delivery of video programming and other forms of expression.

The Opposition claims that the subject acquisition would not impact the "dozens of manufacturers worldwide," for every handset manufacturer "has strong incentives to sell its devices to as many customers as possible."[47] As Public Interest Petitioners noted, that incentive is precisely why in exchange for access to its present customer base, which is smaller than a consolidated post-acquisition base would be by 33.6 million,[48] AT&T has been able to constrain handset innovation by demanding and obtaining from those manufacturers both exclusivity and controls over handset operability.

The Opposition actually cites the successful launch and growth of the Android smartphone platform as an example of AT&T's failure to strong-arm handset manufacturers, omitting the obvious fact that T-Mobile's presence in the marketplace is what facilitated the Android platform's launch.[49] As Public Interest Petitioners earlier noted, in 2008, T-Mobile unveiled its G1, the first ever Android device,[50] and more recently was first to market with an Android 3.0 4G tablet, the LG G-Slate.[51] Because the Android platform is an open-source product and not as easily made subject to the restrictions of the OS operator, unlike Apple iOS

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[47] Opposition at 13.

[48] T-Mobile, T-Mobile USA Reports First Quarter 2011 Results, at http://tinyurl.com/3vu4xag.

[49] Opposition at 14.

[50] *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 08-27, *Thirteenth Report*, 24 FCC Rcd 6185, ¶174 (2009) ("2009 Mobile Competition Report").

[51] *See* "T-mobile G-Slate: the first 4G Android 3.0 Honeycomb tablet," Jan. 6, 2011, http://tinyurl.com/3knaswq ("The T-mobile G-Slate will beat the Verizon Wireless Motorola XOOM tablet in the race to be the first Android 3.0 Honeycomb tablet running on top a 4G network.").

and other closed operating systems, it has offered consumers not simply more handset choices, but new and different apps, which production it spurred. Android also accelerated the trend towards development of tablets and other devices, as it was not designed exclusively for phones.[52] These reverberations of a handset's launch to other markets demonstrate just how crucial the difference is between T-Mobile's open-source culture and AT&T's restrictive-covenant approach. Each of these innovations did not occur without T-Mobile in the market; in fact they occurred *because* T-Mobile was in the market, and the Opposition cannot revise history to claim otherwise.

Applicants similarly attempt to oppose arguments noting potential harm to application developers with the claim that a successful developer does what it takes "to sell its application as widely as possible,"[53] and thus T-Mobile's removal from the marketplace and AT&T's absorption of its customers will have no impact. Again, that argument only supports the generally accepted principle that with more market power comes more power to dictate product availability and the pace of innovation. AT&T claims that if it impairs its customers' ability to access applications, then they will switch providers, but it can provide no evidence in support of this assertion. On the contrary, as Public Interest Petitioners earlier noted, while AT&T's market share has grown, AT&T continues to block applications, most recently blocking the most anticipated application for the PlayBook, BlackBerry Bridge.[54] Moreover, significant consumer demand was powerless

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52 Chris Simmonds, "What Else Can You Do With Android? Inside Android" at 8 (Oct. 19, 2010), http://tinyurl.com/3aujw3l.

53 Opposition at 178.

54 *See* Chris Davies, "AT&T blocks BlackBerry Bridge app for PlayBook," *Slashgear*, Apr. 19, 2011, http://tinyurl.com/3uk5t8f.

to motivate AT&T to allow Skype and Google Voice on its platform – regulators had to compel AT&T to carry these popular services or face an investigation into its competitive practices.[55]

Also unlike AT&T, which blocked the innovative Slingbox video technology from its cellular network,[56] T-Mobile allowed its use from the moment it became available.[57] So, too, T-Mobile apparently has not engaged in blocking of third-party VoIP services on its smartphones, as AT&T long did.[58] The Opposition opts not to address at all Petitioners' notice that, by promising its investors to raise T-Mobile's data ARPU to match AT&T's,[59] AT&T promised effectively to "block" applications from consumers – particularly income-conscious consumers – by erecting an economic barrier that will force consideration of a novel application's data consumption needs before its download. The Opposition opts not to address this point because it cannot. It is no rebuttal to state that only raised rates can finance a 17% greater deployment of AT&T LTE, and this assertion is the only argument that Applicants have in favor of this merger.

Public Interest Petitioners observed that a merged AT&T/T-Mobile would essentially face only one competitor in this space (Verizon), reducing incentives to develop robust video content offerings to consumers or offer video programming at reasonable prices. In Opposition, AT&T

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55 Clearwire Comments at 12, n. 32.

56 *See* Chris Foresman, "AT&T's move to block iPhone SlingPlayer from 3G is poppycock," *Ars Technica*, May 13, 2009, http://tinyurl.com/qtndz3.

57 *See* James Kim, "Slingbox Friendly Handhelds," *CNet*, Mar. 28, 2006, http://tinyurl.com/3rvly3x.

58 *See* Public Interest Petition at 26-27.

59 *See* Public Interest Petition at 45-46 (noting that in a presentation to its shareholders regarding the subject proposal, AT&T detailed its plans to increase T-Mobile's data revenues per subscriber (presently $12.80) to match AT&T's (presently $17.50). Part and parcel of these plans is the monetization of data, with "attractive [to AT&T's shareholders, that is] tiered data plans." (citations omitted)); *see also id*. at 46 (Verizon and AT&T charge extraordinarily high overage fees for data usage; T-Mobile, on the other hand, took the lead in affordable data services, and aspired to go even further to address industry-wide "billshock" concerns.); Om Malik, "What AT&T and T-Mobile Merger Means for Innovation," *GigaOm*, Mar. 21, 2011, http://tinyurl.com/67e2jza; Claire Cain Miller & Brad Stone, "App Makers Worry as Data Plans Are Capped," N.Y. TIMES, June 6, 2010, http://tinyurl.com/39zsb4r.

dismisses this concern simply by noting that competition exists, without even bothering to address the fact that content creators would have little power in negotiations with AT&T, as the company's control of almost half of the wireless market would necessitate acceptance of AT&T's terms in order to reach its consumers.[60] There is no evidence to contradict the presumption that what a pre-merger AT&T did with respect to wireless video programming, the post-merger AT&T will do, and this includes forcing the hand of content creators. As for the post-merger T-Mobile, AT&T promises to charge those customers higher prices for increasingly limited data use.[61] Thus, the merger necessarily will harm the ability of a majority of consumers to enjoy the fruits of competition – should there still be some – in the nascent market for wireless delivery of video programming.

II. THE OPPOSITION CONFIRMS THAT REDUCING T-MOBILE TO AN AT&T ASSET PRODUCES NO COGNIZABLE, MERGER-SPECIFIC PUBLIC INTEREST BENEFIT, MUCH LESS EFFICIENCIES SUFFICIENT TO JUSTIFY THE RELATED PUBLIC INTEREST HARMS.

The Opposition concedes: (1) AT&T could lease T-Mobile's infrastructure from T-Mobile, which might resolve its spectrum and capacity constraints at a similar pace, even if it would not get the competitive benefits of acquiring the company;[62] (2) it may be the case that AT&T could enter into the type of commercial arrangements that constitute the only choice for its "competitors" to address constraints, including network sharing, but "close intertwining of two networks would raise complex governance and network-planning issues," particularly if T-Mobile lowered its prices and attracted more customers, which could burden the "shared" network;[63] (3) another "potential solution" is spectrum on the secondary market, or investment in T-

[60] *See* Opposition at 202.
[61] *See* Public Interest Petition at 45-46.
[62] *See* Opposition at 64.
[63] *See* Opposition at 72.

spectrum auction bidding, or leasing spectrum from providers in areas where Applicants face capacity challenges; but Applicants have not yet done the work of surveying their needs yet and thus only can say that spectrum "may or may not be where AT&T needs spectrum;"[64] and (4) while universal funding support or other public subsidy could prove persuasive in convincing AT&T to change its mind and deploy more broadly, only absorbing T-Mobile justifies investment from private capital.[65]

In sum, the Opposition only confirms that many more innovative options have been and continue to be available to AT&T. AT&T's dilatory spectrum efficiency and capacity development tactics, together with its successful 4-year-long iPhone exclusivity demand, may have increased the price-tag of exercising these options even faster than with an earlier start – notably, it remains unclear whether that price tag exceeds the nearly $50 billion[66] estimated costs of purchasing then integrating T-Mobile. But it is not the Commission's job to bail out AT&T. The Opposition is simply wrong on the law when aggressively pleading to the Commission that it must "not assign blame for or second-guess" AT&T's failure to make better "investment decisions, technology choices, and operations," but rather help AT&T avoid the foreseeable

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64 *See* Opposition at 73.

65 *See* Opposition at 76.

66 *See* Opposition at 84 (indicating AT&T will need to invest more than $8 billion atop T-Mobile's price-tag to integrate the two networks). The Opposition retained the Application's insistence – against all evidence, including its history of migrating customers when finding it expedient – that AT&T could not possibly convince its customers to part with their old handsets so it will not try to subsidize that migration, which would both relieve capacity and speed LTE deployment. Because the Commission has acknowledged, and Applicants admit, the growing popularity of the iPhone (see Public Interest Petition at 5, n. 11), Petitioners added it up: AT&T currently has 68.0 million (68,041,000) contract wireless subscribers in service. (AT&T 4Q 2010 Investor Briefing, (Jan. 27, 2011), http://www.att.com/Investor/Financial/Earning_Info/docs/4Q_10_IB_FINAL.pdf). And of these, 61% are using integrated devices (41,505,010). Assuming ***all*** of those devices are GSM, which is unlikely, then it would only cost AT&T $ 20.7 billion to provide every single subscriber with a brand new iPhone at full retail price, in exchange for which certainly they would happily migrate, relieving AT&T of its "inefficient technology support" shield to LTE deployment.

consequences of its decision not to match Verizon's pace of LTE deployment or its improvements in spectrum capacity and efficiency.[67] In *FTC v. H.J. Heinz Co*., 246 F. 3d 708 (D.C. Cir. 2001), the court reversed the lower court's decision and awarded the FTC a preliminary injunction to block a proposed acquisition after weighing the harms posed by a consolidation of two of the market's national competitors, despite their concentration in different regional areas. When addressing Heinz's competitive options, the court noted that Heinz had chosen acquisition – "***the third, and least pro-competitive, of the options***" – when it could have taken "innovative measures" to better its position instead.[68] In this case, the direct example of Verizon confirms that, to the extent Applicants properly represent AT&T's ability to compete with its present spectrum cornucopia, AT&T could have taken innovative measures to the opposite effect, and anytime it wants to change its mind it still can.

The benefit AT&T seeks through this acquisition is the benefit of removing T-Mobile from the market as a competitor and "a pest who keeps downward pressure on pricing and service requirements."[69] Were it not, that removal nevertheless would be proscribed. The "promise" of LTE is insufficient to justify approval of T-Mobile's acquisition by AT&T.[70] This is

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67 *See* Opposition at 36-37.

68 *See Heinz*, 246 F. 3d at 717 (emphasis added).

69 Milton Mueller, "Why I Fear the AT&T-T-Mobile Merger," The Technology Liberation Front, Apr. 18, 2011, at http://techliberation.com/2011/04/18/why-i-fear-the-att-t-mobile-merger/.

70 *See FTC v. H.J. Heinz Co*., 246 F.3d at 720 ("[G]iven the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent ***more than mere speculation and promises about post-merger behavior***.") (emphasis added). Per the Guidelines, "Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict." Merger Guidelines, U.S. Dept. of Justice and Federal Trade Comm., at 31, §10, fn. 15 (Aug. 19, 2010).] *See also id*. § 10, p. 29 ("Projections of efficiencies may be viewed with skepticism."). In this instance not only are the promised benefits of the proposed acquisition subject to far more delay than its immediate harms, but they involve hypothesis after hypothesis as to who will have LTE, when, and what businesses they may start or invent with it.

particularly the case when that promise, if ever realized, will benefit only those who can afford AT&T's handsets and service offerings and care little about open sourcing or high data rates to accompany low data caps. T-Mobile's customers will lose their low-cost alternatives and have no LTE choice but Verizon. Certainly MetroPCS cannot be seen as an equivalent option, both because of its substantially smaller spectrum holdings and because most of its low-cost LTE plans block the use of internet phone-calling applications for all plans and video streaming.[71]

Access without affordability is no access at all for the majority of Americans. Cable broadband, for instance, is everywhere, but low-income consumers nevertheless cannot afford it, which prompts their exceeding reliance upon wireless. Thus, expanded AT&T LTE deployment is in no way guaranteed to benefit low-income consumers, but rather may perpetuate a digital divide, given their inability to afford the high price of mobile broadband service from AT&T. It is that divide which T-Mobile's aggressive activity in the market has helped to lessen. Whether or not AT&T makes good on its promise to deploy LTE, T-Mobile's removal from the market through acquisition by AT&T would only serve to marginalize more of this segment of the public, and in no way is this marginalization in the public's interest.

CONCLUSION

For the foregoing reasons, the Public Interest Petitioners respectfully submit that the Commission should not grant the applications in this docket. This acquisition, if permitted, would enable AT&T to stifle innovation, increase prices, and decrease choices for wireless customers – especially wireless broadband users – by removing T-Mobile's innovative and aggressive pricing competition from the marketplace. The merger likely would broaden the divide between tech-savvy elites and traditionally unserved and underserved populations,

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[71] *See, e.g.*, Ryan Singel, MetroPCS 4-G Data-Blocking Plans May Violate Net Neutrality, Wired, Jan. 7, 2011, at http://www.wired.com/epicenter/2011/01/metropcs-net-neutrality/.

including members of communities of color and rural residents, and would interfere with the development of mobile wireless platforms used to create and distribute all manner of video programming and other types of artistic works and political expression.

WHEREFORE, the Public Interest Petitioners ask that the Commission dismiss the applications or designate them for hearing, and grant all such other relief as may be just and proper.

Respectfully submitted,
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