

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

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

**REPLY COMMENTS OF JAPAN COMMUNICATIONS INC. AND
COMMUNICATIONS SECURITY & COMPLIANCE TECHNOLOGIES, INC.**

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. DAMAGE TO THE WHOLESALE MARKET THREATENS INNOVATION.....	4
II. THIS TRANSACTION WOULD CAUSE GRAVE DAMAGE TO THE WHOLESALE MARKET.	5
A. T-Mobile Is An Important Source Of Wholesale Access.	6
B. AT&T Is Incorrect That Other Providers Of Wholesale Access Would Fully Substitute For T-Mobile.	7
C. The Transaction Would Anticompetitively Make AT&T The Only National GSM-Based Carrier.....	8
III. THE TRANSACTION WOULD INCREASE AT&T's ABILITY TO ENGAGE IN DISCRIMINATORY ROAMING PRACTICES.	10
IV. ANY APPROVAL OF THE PROPOSED MERGER MUST BE ACCOMPANIED BY ENFORCEABLE CONDITIONS TO PRESERVE WHOLESALE COMPETITION.....	11
CONCLUSION.....	14

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Japan Communications Inc. (“JCI”) and Communications Security & Compliance Technologies, Inc. (“CSCT”), by their counsel, hereby submit reply comments on the applications filed by AT&T Inc. and Deutsche Telekom AG (together “AT&T” or the “Applicants”) for consent to assign or transfer control of certain licenses and authorizations, which are the subject of the above-captioned docket.

INTRODUCTION AND SUMMARY

As explained in JCI and CSCT’s initial comments, the proposed transaction threatens grave damage to the already fragile market for wholesale facilities in the United States, which would inhibit innovation and harm consumers. Providers like JCI and its United States subsidiary CSCT provide unique, differentiated products and services by combining their own facilities with leased access to the incumbents’ last-mile wireless facilities. This transaction would remove one of only two national providers that are willing to make such facilities available on a meaningful basis – that is, in a manner that allows the lessee of the facilities to offer products and services that differ from those sold by the incumbents at a rate that makes entry economic – and would remove the only such carrier using the GSM-based standard

followed by most of the rest of the world. The transaction would thus make it virtually impossible for providers like CSCT to secure facilities and provide innovative products and services in the retail market, thereby compounding the significant direct harm numerous commenters have shown the transaction would cause to retail consumers.

AT&T's claims that the proposed transaction would not harm the wholesale market do not withstand scrutiny. The assertion that T-Mobile is not a meaningful source of wholesale access is demonstrably false, and undermined by AT&T's acknowledgment that T-Mobile has been rapidly adding wholesale customers to replace a declining retail business. Likewise, AT&T's claim that numerous other options for wholesale access could replace T-Mobile is not based in reality, and is contradicted by the fact that none of these other options were adequate to serve AT&T's or T-Mobile's own capacity needs.

AT&T also wrongly claims that allowing it to obtain a GSM-based monopoly would have little impact on competition, as that would leave no nationwide GSM-based provider willing to provide meaningful wholesale access. Nor would the transition to LTE mitigate that problem, as that transition is likely to take many years, and, as AT&T emphasizes, GSM-based networks are likely to remain in use even after LTE is widely deployed.

In the same vein, AT&T offers a weak defense to the damage this transaction would cause to the market for roaming – access to which is crucial for providers like CSCT that use regional carriers' wholesale facilities and offer services requiring access to redundant network connections. AT&T's lengthy claims about its incentives to offer roaming on reasonable terms fly in the face of the Commission's own findings earlier this year that AT&T's practice has been generally to exclude competitors from data roaming altogether. This transaction would increase AT&T's market power and hence its ability to engage in such exclusionary conduct. And

contrary to AT&T's claims, the limited rules the Commission adopted in the *Data Roaming Order* – which contemplated a more robustly competitive market – will be insufficient to rein in AT&T's behavior after it swallows T-Mobile.¹

Accordingly, as JCI and CSCT have explained, if the Commission approves this transaction, it should put in place rigorous, enforceable conditions that require the merged company to preserve some level of wholesale competition. At a minimum, AT&T should be required to offer wholesale access to, as well as roaming on, its most advanced data facilities at cost-based rates and without onerous carrier-specific device certification or other discriminatory requirements. Such conditions are specifically designed to facilitate wholesale entry and thereby mitigate the damage this transaction would cause to the wholesale market – not to satisfy any sort of regulatory “wish-list,” as AT&T suggests.² AT&T's other arguments against such conditions are similarly meritless.

If the merger is approved without these kinds of conditions, the wholesale market will be dramatically diminished, and the innovation that providers using wholesale entry bring will be lost. The United States already lags behind Japan – a country that guarantees wholesale access – in terms of the breadth and depth of the wireless products and services available. Absent enforceable protections for wholesale access, this transaction's harm to the wholesale market will make the United States fall even further behind, causing it to lose the battle for jobs and new technologies to support the next generation of wireless networks.

¹ See generally *In re Examination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Radio Services*, Second Report and Order, 26 FCC Rcd 5411 (2011) (“*Data Roaming Order*”).

² Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments (“AT&T Opp.”), at 18.

I. DAMAGE TO THE WHOLESALE MARKET THREATENS INNOVATION.

As an initial matter, AT&T fundamentally misunderstands what is at stake for the wholesale market in this transaction. While acknowledging that MVNOs and other providers relying on wholesale access can bring price competition to the retail market,³ AT&T fails to appreciate their role in bringing innovation. AT&T refers generally to competitors using wholesale facilities as “resellers,” who, in AT&T’s view, can resell any one carrier’s services as well as any other’s.⁴ At the same time, AT&T rejects out of hand the notion that this transaction may “stifle innovation,” because it will enable *AT&T* to provide innovative services.⁵

But as Japan recognized years ago, much of the future of wireless innovation will come from MVNOs and others relying on wholesale facilities.⁶ There are relatively few facilities-based carriers, and they are generally driven by significant build-out costs to create scalable products with only limited differentiation for different customers. Providers like JCI and CSCT, on the other hand, combine their own facilities with leased access to incumbent networks to offer unique, differentiated services and target customer segments that are not adequately served by incumbent carriers like AT&T. Thus, in Japan, JCI provides a range of services to consumers and businesses that were not offered anywhere in the marketplace. And JCI provides no-contract pricing options – such as pricing by duration of use, connection speed, or volume of data – that consumers desire but cannot obtain from others.⁷ Likewise, in the United States, CSCT provides a range of services – including machine-to-machine (“M2M”) applications for ATMs, kiosks,

³ AT&T Opp. at 132.

⁴ *See id.* at 215.

⁵ *Id.* at 103.

⁶ Comments of Japan Communications Inc. and Communications Security & Compliance Technologies, Inc. (“JCI/CSCT Comments”), at 5-6.

⁷ *Id.* at 3-4.

and point-of-sale systems – and pricing models not found elsewhere in the marketplace.⁸

Numerous commenters have thus recognized the importance of the wholesale market to bringing innovation.⁹

In short, the harm this transaction would cause to the wholesale market will affect not only the prices consumers will pay for their wireless services, but also what those very services will be.

II. THIS TRANSACTION WOULD CAUSE GRAVE DAMAGE TO THE WHOLESALE MARKET.

As JCI and CSCT explained in their initial comments, the market for wholesale access to incumbent wireless facilities would be gravely injured by this transaction, exacerbating the damage the transaction would do directly to the retail market. Of the four national carriers, AT&T and Verizon have both been unwilling to provide meaningful wholesale access to their facilities to provide data services.¹⁰ These carriers are the market leaders in a highly-concentrated market, and it is not in their interest to offer wholesale facilities on reasonable terms, since this would help rivals overcome what could otherwise be significant barriers to entry. These circumstances are not likely to change if this transaction is approved, as the dominant incumbents' control of the market would be considerably strengthened.

AT&T does not dispute these points, essentially conceding that it has no interest in providing meaningful wholesale access. AT&T instead defends the transaction's impact on the

⁸ *Id.* at 7.

⁹ *See, e.g.*, Comments of Clearwire Corporation (“Clearwire Comments”), at 2-3; Comments of Consumer Electronics Retailers Coalition (“Consumer Electronics Retailers Comments”), at 27-28; Comments of Cablevision Systems Corporation (“Cablevision Comments”), at 5-8; Petition of Cox Communications Inc. to Condition Consent (“Cox Petition”), at 6-7; Petition to Deny of EarthLink, Inc., at 2-3.

¹⁰ JCI/CSCT Comments at 12.

wholesale market by arguing that T-Mobile – the only GSM-based national carrier committed to wholesale – is not a meaningful source of such access, and by claiming that ample alternative sources of wholesale access would remain if T-Mobile disappeared. Both of these claims are without merit.

A. T-Mobile Is An Important Source Of Wholesale Access.

AT&T's claim that T-Mobile is not a "significant" source of wholesale access is baseless.¹¹ As JCI and CSCT noted in their opening comments, T-Mobile is one of only two national carriers willing to provide meaningful wholesale access to retail competitors.¹² Given the limited other options available for wholesale access, AT&T's claim that T-Mobile's disappearance will not harm that market defies reason.

More importantly, regardless of what T-Mobile has done in the past with respect to wholesale, it will necessarily have increasing incentives to grow its wholesale business going forward. As AT&T takes great pains to note, T-Mobile is losing retail customers.¹³ And because it is not a retail market leader, T-Mobile must find other ways to keep its business profitable (as it has many times in the past).¹⁴ Thus T-Mobile's best strategy – and one it has already begun pursuing – is to market wholesale services aggressively. Indeed, AT&T itself points out that T-Mobile gained hundreds of thousands of customers from MVNOs using T-Mobile's network on a wholesale basis in the first quarter of this year alone.¹⁵

¹¹ AT&T Opp. at 214-15.

¹² See JCI/CSCT Comments at 2; *accord* IDIT Domestic Telecom Petition to Deny Application, at 2-3.

¹³ AT&T Opp. at 13.

¹⁴ See, e.g., Joint Petition to Deny of Center for Media Justice, et al., at 24-26 (noting T-Mobile's history of developing new innovative products and services).

¹⁵ See AT&T Opp. at 136.

B. AT&T Is Incorrect That Other Providers Of Wholesale Access Would Fully Substitute For T-Mobile.

As JCI, CSCT and numerous other commenters have explained, without T-Mobile, the U.S. wholesale market may not survive.¹⁶ Only one national provider willing to provide meaningful wholesale access, Sprint, would remain – and the merger places Sprint’s own long-term viability in question.¹⁷ AT&T’s claims that there are numerous other viable sources of wholesale access apart from T-Mobile and Sprint are meritless,¹⁸ as illustrated by the fact that neither AT&T nor T-Mobile apparently found any of these other potential options adequate for their own allegedly crucial capacity needs.

AT&T nevertheless continues to press the argument that Clearwire and LightSquared can fully make up for the loss of an independent T-Mobile.¹⁹ As JCI and CSCT have previously explained, however, these companies face significant challenges, including access to sufficient financing, and, in LightSquared’s case, vocal claims that its service interferes with GPS-based services.²⁰ Just last week, for example, the National Public Safety Telecommunications Council (NPSTC) complained that test results confirm that public safety facilities and enhanced 911 services would experience harmful interference from LightSquared’s system.²¹ And Clearwire’s

¹⁶ JCI/CSCT Comments at 13-14; Cablevision Comments at 11-13; Cox Petition at 11-12.

¹⁷ Petition to Deny of Sprint Nextel Corporation (“Sprint Petition”), at 7-11.

¹⁸ AT&T Opp. at 214.

¹⁹ *See id.* at 215-16.

²⁰ *See In re Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz, and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz*, Report and Order, 26 FCC Rcd 5710 (2011); Marguerite Reardon, *LightSquared: The Answer to U.S. Wireless Competition?*, CNET (April 21, 2011), http://news.cnet.com/8301-30686_3-20055922-266.html.

²¹ Letter from Ralph Haller, National Public Safety Telecommunications Council to Hon. Julius Genachowski, Chairman, FCC (June 15, 2011), *available at* licensing.fcc.gov/myibfs/download.do?attachment_key=894013.

comments in this proceeding emphasize that the loss of T-Mobile as a potential purchaser of wholesale access may fundamentally alter Clearwire's business: "By removing T-Mobile, perhaps the largest prospective customer for wholesale wireless broadband network capacity, this deal would potentially decimate the wholesale market and may threaten the ability of wholesale carriers such as Clearwire to disrupt and discipline the market."²²

C. The Transaction Would Anticompetitively Make AT&T The Only National GSM-Based Carrier.

Nor does AT&T offer any real response to the fact that, if it absorbs T-Mobile, AT&T would be the *only* national GSM-based provider in the United States. The proposed transaction would leave only one option for companies that need or desire a GSM-based network for wholesale access – and that option is no option at all, because, as previously discussed, AT&T is not interested in providing such access.

AT&T claims that, with respect to M2M providers like CSCT, it would not have a monopoly because M2M providers are equally free to rely on CDMA-based networks.²³ However, as JCI and CSCT previously explained, GSM-based technology is generally cheaper to deploy, both because GSM-based technology is the worldwide standard and because CDMA-based networks use proprietary technology owned by Qualcomm, which charges substantial licensing fees for its use.²⁴ This cost discrepancy gives GSM-based technology an edge for certain M2M services that have low monthly fees, such as remote meter reading.²⁵ This point is illustrated by AT&T's own example of the ease with which M2M providers can allegedly freely substitute CDMA and GSM-based networks. The smart grid provider AT&T relies on to support

²² See Clearwire Comments at 2.

²³ AT&T Opp. at 199 n.387.

²⁴ JCI/CSCT Comments at 14-15.

²⁵ See *id.*

its argument provides GSM-based service as a standard feature, while the provider's devices "may be equipped" to use CDMA-based networks.²⁶ AT&T likewise ignores the fact that, for certain M2M applications where redundancy is crucial, it may be necessary to have access to *both* GSM- and CDMA-based networks.

AT&T also argues that its GSM-based network and T-Mobile's are not complete substitutes because they use different frequencies.²⁷ Leaving aside the fact that this claim applies only to the Applicants' 3G networks – and not the legacy networks that AT&T acknowledges must be operated for years to come – providers like CSCT that procure their own equipment have some flexibility to choose the frequencies on which their devices will operate. In many cases, such providers can choose to use either AT&T's or T-Mobile's network for wholesale access. In any event, as discussed above, because AT&T does not offer meaningful wholesale access to its network, its absorption of T-Mobile would leave MVNOs and other providers relying on wholesale access with *no* GSM-based avenue for entry.²⁸

Finally, it is no answer to claim, as AT&T does, that a market-wide transition to LTE would address harm caused by its maintaining a GSM-based monopoly. The transition to LTE is likely to take years, as even AT&T claims it will not be able to finish its LTE build out until six years from closing.²⁹ At the same time, legacy networks are likely to co-exist with LTE for many years even after LTE networks are fully built out – that is AT&T's purported reason that it

²⁶ See SmartSynch » Why Cellular? » Network Options, <http://www.smartsynch.com/whycellular/networks.php>; AT&T Opp. at 199 & n.387.

²⁷ AT&T Opp. at 158-59.

²⁸ Even where CDMA-based networks are a viable substitute, AT&T's absorption of T-Mobile would leave Sprint as the only national CDMA-based carrier willing to provide meaningful wholesale access.

²⁹ AT&T Opp. at 75.

cannot simply use much of its current spectrum to provide LTE.³⁰ Moreover, even in an all-LTE world, it is at best unclear whether CDMA-based implementations of LTE will be compatible with GSM-based LTE implementations for roaming and other purposes.³¹

III. THE TRANSACTION WOULD INCREASE AT&T'S ABILITY TO ENGAGE IN DISCRIMINATORY ROAMING PRACTICES.

In addition to the transaction's impact on wholesale access, the proposed merger would also do serious harm to the related market for roaming. Providers like CSCT need roaming for a number of reasons, including using wholesale arrangements with a regional carrier to serve an area broader than the regional carrier's territory, and ensuring that critical M2M security services have the ability to roam on another network when a dead spot is encountered.³² Securing access to reasonable data roaming arrangements, however, is already difficult. Data roaming rates are set at extremely high levels (typically at an exponential increase over cost), carriers maintain onerous carrier-specific device certification requirements, and many carriers, including AT&T, prohibit long-term roaming on their networks.³³ As JCI and CSCT explained in their initial comments, these practices are likely to get considerably worse if this transaction is approved, because AT&T would have increased market power.³⁴

AT&T's arguments to the contrary are unavailing. As numerous commenters have highlighted, AT&T has a long history of engaging in exclusionary conduct with respect to

³⁰ *Id.* at 31-32.

³¹ *See, e.g.*, <http://www.fiercewireless.com/story/ts-first-lte-capable-device-wont-roam-verizons-lte-network/2010-10-26>.

³² JCI/CSCT Comments at 8-9.

³³ *Id.* at 8-10; *see also* Reply Declaration of William W. Hague ("Hague Reply Decl.") (attached to AT&T Opp.), ¶ 18 (acknowledging AT&T's use of roaming agreement provision that disallows roaming to serve customers outside of other carrier's home market).

³⁴ JCI/CSCT Comments at 10.

roaming.³⁵ The Commission itself recently came to that conclusion in the *Data Roaming Order*, where it found that AT&T had largely refused to negotiate roaming agreements on its 3G network.³⁶ Such problems would only worsen if AT&T gains increased market power by absorbing T-Mobile, as numerous other commenters have emphasized.³⁷ Indeed, AT&T openly acknowledges in its Opposition that it has no intention of allowing the use of roaming for wholesale access.³⁸

Nor, contrary to AT&T's assertions, would the Commission's data roaming rules adequately limit AT&T's conduct.³⁹ Among other things, those rules do not require the high prices for data roaming to be lowered, and do not appear to protect providers using wholesale access.⁴⁰ While the limited rules the Commission adopted may have made sense for a market with more intense facilities-based competition, they are plainly inadequate if this transaction is approved.

IV. ANY APPROVAL OF THE PROPOSED MERGER MUST BE ACCOMPANIED BY ENFORCEABLE CONDITIONS TO PRESERVE WHOLESALE COMPETITION.

As explained in JCI and CSCT's initial comments, the proposed merger would inflict significant harm on the wholesale market if it is approved without adequate conditions designed to preserve competition. At a minimum, conditions must include requirements that AT&T offer

³⁵ See, e.g., Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications ("Cincinnati Bell Petition"), at 10-11; Joint Petition to Deny of Center for Media Justice, et al., at 47-48; Petition of MetroPCS Communications Inc. and NTELOS Inc. to Condition Consent or Deny Application, at 45.

³⁶ *Data Roaming Order*, 26 FCC Rcd at 5424-25, ¶ 25.

³⁷ See, e.g., Cincinnati Bell Petition at 15-16; Sprint Petition at 43.

³⁸ AT&T Opp. at 72-73, 157-162; Hague Reply Decl., ¶¶ 17-20.

³⁹ See AT&T Opp. at 159.

⁴⁰ See *Data Roaming Order*, 26 FCC Rcd at 5423, 5429-32, 5453, ¶¶ 21, 34, 38 & n.116, 41 & n.122, 88.

wholesale access to, as well as roaming on, its most advanced data facilities at cost-based rates and without onerous device certification or other discriminatory requirements.⁴¹ As JCI and CSCT explained, these requirements should be modeled on Japan’s successful regulatory approach.⁴²

AT&T’s suggestion that such conditions are not tied to harms caused by the merger is baseless.⁴³ These conditions are narrowly tailored to replace some of the meaningful wholesale access that would be lost if T-Mobile – one of only two national firms providing such access and the only one operating a GSM-based network – were to disappear. The wholesale access requirement would ensure that AT&T provides some of the wholesale access previously provided by T-Mobile, and the roaming requirement would enable providers to obtain wholesale access from other carriers and roam on a national GSM-based network. While these requirements cannot replace an independent T-Mobile, they do mitigate some of the damage its disappearance would cause.

AT&T’s remaining arguments against these kinds of conditions fare no better. AT&T’s pejorative claim that these conditions amount to a “resale” requirement, which it argues has already been rejected by the Commission, is off the mark.⁴⁴ These conditions are not aimed at promoting resale of rebranded incumbent services, but at enabling providers to offer differentiated, innovative services by using their own facilities in combination with AT&T’s. Moreover, to the extent the Commission’s decision to sunset the resale requirement for CMRS providers has any relevance, that decision was premised on the existence of vigorous facilities-

⁴¹ *See, also, e.g.*, Cablevision Comments at 15-18; Cincinnati Bell Petition at 5; Consumer Electronics Retailers Comments at 33-35 (all proposing similar conditions).

⁴² JCI/CSCT Comments at 15-16.

⁴³ AT&T Opp. at 209-11.

⁴⁴ *Id.* at 211.

based competition.⁴⁵ However tenuous that premise was prior to this transaction, it is impossible to maintain if the transaction is approved.

Similarly, AT&T's argument that requiring it to offer access at cost-based rates would embroil the Commission in "complex ratemaking proceedings"⁴⁶ ignores JCI and CSCT's actual proposal. As JCI and CSCT explained, providers should be able to negotiate rates with AT&T, with Commission enforcement actions and complaint proceedings as a backstop. The Commission should make clear however, that wholesale interconnection prices for access to AT&T's data network that are higher than AT&T's retail rates for data service would be per se unreasonable, as would rates above what AT&T charges for comparable bandwidth for voice services.

⁴⁵ E.g., *In re Interconnection and Resale Obligations Pertain to Commercial Mobile Radio Service*, First Report and Order, 11 FCC Rcd 18,455, 18,468-69, ¶ 24 (1996).

⁴⁶ AT&T Opp. at 160.

CONCLUSION

As discussed above and in JCI and CSCT's initial comments, JCI and CSCT respectfully request the Commission to consider carefully the adverse affects on the wholesale market that would be caused by the proposed merger and approve the merger only if accompanied by enforceable conditions adequate to ensure that market's continued viability. At minimum, the Commission should require AT&T to provide cost-based wholesale and roaming access to its facilities and prohibit AT&T from enforcing carrier-specific device certification or other discriminatory requirements.

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Certificate of Service

I hereby certify that on this 20th day of June, 2011, I caused true and correct copies of the foregoing Reply Comments to be served by hand on:

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