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

JUN 20 2011

Federal Communications Commission
Office of the Secretary

June 20, 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 reply to the oppositions filed by AT&T, Inc. and Deutsche Telekom AG in the above-captioned proceeding. We have also submitted one unredacted copy under separate cover.

Respectfully submitted,

Aparna Sridhar
Policy Counsel
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202-265-1490

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REDACTED FOR PUBLIC INSPECTION

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

FILED/ACCEPTED

JUN 20 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)

REPLY TO OPPOSITION

Matt Wood, Policy Director
Free Press
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June 20, 2011

SUMMARY

Merger applicants AT&T and T-Mobile (together, Applicants) make very clear at the outset of their June 10th Joint Opposition (Opposition) the ethos that guides the companies' push for this blatantly anticompetitive and unlawful merger. They claim, apparently with a straight face but insufficient modesty, that "[o]ne overarching imperative drives this transaction: *giving* AT&T and T-Mobile USA customers the network capacity they need to enjoy the full promise of the mobile broadband revolution."¹ The use of the word "giving" is no accident. AT&T and T-Mobile ask the Commission, in their earlier submissions in this docket and again in the Opposition, simply to *give* the merged entity more spectrum, subscribers, and market power than all other wireless providers in the United States.

AT&T has customers to serve, you see, and those pesky customers actually want to use the smartphones that AT&T sold to them. Neither proper investment in its network nor fair competition in the free market is a substitute, in AT&T's reckoning, for the slanted playing fields and government largesse it seeks in this transaction. The entire Opposition basically boils down to the proposition that "what's good for AT&T is good for the country." That might sound reasonable if one can ignore the clearly stated preference in this country's laws and rules for competition over habitual monopolists' promises to provide service. But even AT&T's promises are hollow: their attainment is not dependent on this merger, and thus their fulfillment could not offset the harms that the merger would cause to competition and consumers.

For instance, AT&T promises it will provide broadband to 97 percent of the country if – and only if – it gets permission for this merger. The claim is anything but accurate, as AT&T's public statements and internal communications tell a very different story about its ability and

¹ Opposition at 1 (emphasis added.)

willingness to cover this same percentage of the nation with wireless broadband service. AT&T also promises increased investment in the documents it submits to this Commission, all the while signaling to investors that expenditures actually would *decrease* post-merger – leading to increased “synergies” and savings that would allow its revenues to continue climbing. AT&T still speculates in the Opposition that the deal would aid the broader economy from the deployment of a redundant LTE network. Yet AT&T dismisses its history of merger-aided job cuts by hiding the truth about overall growth in its total number of customers in the last decade.

Just like its rural deployment promises, AT&T’s claims regarding improved capacity on its already congested networks are either not real, not significant, or not merger-specific. Neither the economic arguments nor the engineering claims it makes about current capacity constraints hold water. The merger’s real benefit to AT&T quite obviously is a reduction in the competition it will face – not the surmounting of any technical constraint nor the realization of any sort of cognizable benefit it cannot obtain absent the merger. AT&T and T-Mobile both have several paths forward to improve their network capacity and coverage, and do not need to merge with one another to share resources with one another or with other competitive providers.

In the end, Applicants have failed to carry their burden of demonstrating that grant of their merger would serve the public interest. They have offered insufficient proof that the transaction and resulting concentration will not harm competition and consumers. Failing to make any credible showing regarding the purported price-reducing incentives from the deal, they must rely on flimsy claims that the merger is necessary for both companies to improve network coverage and capacity in the near term. These claims are patently false, and the Commission must deny the merger if its decision is to be based on the data and the facts before it.

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I. Introduction

Applicants have presented a case that hinges on three basic claims: First, that the transaction will lead to rural deployment that would have not otherwise occurred; second, that the transaction will create capacity benefits in urban areas that could not be achieved without the merger; and third, that the transaction and subsequent concentration of the market to duopoly levels will not harm competition. The second claim regarding capacity and network performance benefits relies in large part on arguments regarding supposed spectral efficiencies claimed as merger benefits too. But the evidence presented by the Applicants fails to adequately support any of these claims. And as we discuss below, AT&T's own internal communications reveal truths not divulged in their original application and subsequent Opposition: All of AT&T's claimed benefits are illusory or non-merger specific, and the costs of this merger to competition far outweigh these supposed benefits.

When all the evidence is considered, particularly AT&T's internal communications, the true motives for the proposed transaction become clear. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL]

INFORMATION] Instead of working to achieve the efficiencies and benefits it attributes incorrectly to the proposed merger, AT&T chose door number #2. It hopes that its massive political power and regulatory influence will bail it out and save it from having to invest and compete fairly for customers.

II. Applicants' Claimed Benefits for Rural America Are Either Non-Existent or Non-Merger Specific. AT&T Plans to Offer 4G HSPA+ Service to 97 Percent of Americans in 2012, and Will Subsequently Match Verizon's Nationwide 4G LTE Deployment Even if the Merger is Not Approved.

At the heart of the Applicant's case for the benefits of the transaction is AT&T's commitment to deploy LTE to 97 percent of the population by 2018, a deployment commitment that AT&T *claims* exceeds its existing plan to make LTE available to 80 percent of Americans.² As we discussed in our Petition to Deny, other publicly available evidence and media reports indicate that AT&T's claim is certainly false, and that it did not intend for its LTE deployment to end at 80 percent without the merger. At the very least, market conditions are such that AT&T would need to match Verizon's plans to deploy LTE to approximately 96-98 percent of the population.³ Indeed, AT&T freely admits that it will deploy "4G" HSPA+ service throughout its entire footprint by the end of 2012, making the subsequent leap to full-LTE coverage a near certainty.⁴

² Opposition at 75. ("AT&T commits that... it will deploy LTE within six years after closing to over 97 percent of Americans—55 million more Americans than AT&T's pre-merger plans.")

³ See Petition to Deny of Free Press at 41-42.

⁴ Opposition at 81. As we discuss below, this is a critical point to the merger analysis. Even if we assume that AT&T would stop its LTE build at 80 percent (which we don't **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]), the hypothetical measured benefit in this case is the value of LTE vs. HSPA+ in the period after AT&T's HSPA+ build is complete, to consumers who will likely be served by one or more other LTE providers. It is likely this incremental value is *de minimus*, given that real world speed tests indicate the difference in downstream speed between HSPA+ and LTE are not that big, and vary considerably by location. See e.g. "Verizon LTE vs T-Mobile

Internal AT&T communications disclosed through the Commission's *Information Request* shed more light on this question. These tens of thousands of pages of candid AT&T planning documents tell a very clear story – one the Commission cannot ignore as it weighs whether AT&T's claimed benefits are merger-specific and cognizable. This information reveals that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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HSPA+ vs Sprint WiMAX," *Phone Arena*, Feb. 4, 2011 (showing test results where Verizon's LTE service performed *worse* than T-Mobile's HSPA+ service). AT&T's own internal communications suggest **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] See ATTF-TMO-00011886. Thus, all of the letters of support from rural parties claiming that this merger will deliver broadband that would not have otherwise existed miss a fundamental point: If you live in an area that supposedly will benefit from AT&T's new LTE promise, then you *already* live in an area that will have access to AT&T's 4G services in the form of HSPA+ by the end of next year; and you'll also be able to purchase Verizon's LTE service by **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**

⁵ See, e.g., ATTF-TMO-00005174; ATTF-TMO-00022971.

⁶ See, e.g., ATTF-TMO-00022971; ATTF-TMO-00011889; ATTF-TMO-00003389 **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]

⁷ See, e.g., ATTF-TMO-00005173 **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

⁹ [END HIGHLY

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This is stunning. AT&T is now promising the country a merger “benefit” of 97 percent LTE deployment by 2018 for a gross cost of \$47 billion,¹⁰ when [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]
ATTF-TMO-00005174 [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]
ATTF-TMO-00011889; ATTF-TMO-00003389 [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]
⁸ See e.g. ATTF-TMO-00011889 [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]

⁹ See e.g. ATTF-TMO-00011888.

¹⁰ Calculated as the \$39 billion merger cost, plus the \$8B in incremental capital expenditures AT&T claims it will spend to upgrade the combined network to 97 percent LTE coverage. See Opposition at 84. As pointed out in our Petition to Deny, this \$8 billion incremental capital expenditure actually represents a \$10 billion net decline in future capital expenditures by the combined company, as stated by AT&T in an earlier investor presentation. See Petition to Deny of Free Press at 33 & n.75.

[END HIGHLY

CONFIDENTIAL INFORMATION] This is unimpeachable evidence that AT&T's rural deployment promise could be fulfilled in the absence of the deal, and thus is non-merger specific (not to mention grossly cynical and misleading). It also proves beyond a shadow of a doubt that AT&T clearly is willing to pay a hefty kill-the-competition premium, choosing to acquire one of its main rivals for a cost that far exceeds the likely price tag for upgrades to its own network.¹¹

In its Opposition, AT&T claims that this incremental investment, which is [BEGIN
HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY
CONFIDENTIAL INFORMATION] the cost of the merger, was not the only factor behind its now-claimed decision to halt the LTE build at 80 percent. It also states that the merger would give the company "additional AWS spectrum that can be used for LTE in the incremental build area." But it's clear that the incremental build is a non-merger specific benefit, because according to internal documents, [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

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13 [END

HIGHLY CONFIDENTIAL INFORMATION] And while applicants state in their Opposition

¹¹ See Petition to Deny of Free Press at 32-33 (estimating the merger premium from public AT&T statements regarding deferred capital expenditures). See also ATTF-TMO-00011888, showing [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]

¹² See, e.g., ATTF-TMO-00011899.

¹³ See, e.g., ATTF-TMO-00011890.

that in [BEGIN CONFIDENTIAL INFORMATION] [END CONFIDENTIAL INFORMATION] CMAAs with about [BEGIN CONFIDENTIAL INFORMATION] [END CONFIDENTIAL INFORMATION] people,”¹⁴ AT&T currently does not have 700 MHz or AWS spectrum but will obtain AWS spectrum from T-Mobile USA, the internal communications reveal that [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

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[END HIGHLY CONFIDENTIAL INFORMATION] But even if AT&T did not have such a clear path to the exact same level of LTE deployment absent the merger, it is clear that the social costs of killing off a competitor and pushing the market into tight duopoly far outweigh the non-merger specific benefit of an AT&T-offered LTE service to [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] Americans living in markets where AT&T will already offer 4G HSPA+ service, and where Verizon and possibly other carriers will offer LTE.

Applicants state in their Opposition that “[a]fter considering the *marketing benefits* of expanded LTE deployment, including *competitive considerations*, as well as the fact that AT&T already will deploy HSPA+ 4G service to 97 percent of the population by the end of 2012, AT&T concluded that an 80 percent [LTE] deployment was as much as could be justified on a

¹⁴ Opposition at 23.

¹⁵ See ATTF-TMO-00011890. [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]

standalone basis.”¹⁶ AT&T’s plan to deploy HSPA+ to 97 of the population belies the claim that it needs this merger to deploy wireless broadband to that same percentage of the population, unless AT&T wishes now to concede that HSPA+ is not “broadband.” But there is no need for the Commission even to consider whether LTE alone suffices as broadband in AT&T’s world, because internal documents show **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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¹⁸ **[END HIGHLY CONFIDENTIAL INFORMATION]**

This evidence is clear and indisputable. AT&T absolutely does not need this merger to move its entire network from HSPA+ 4G to LTE 4G, and it is deeply cynical, if not downright deceptive for it to make claims that this merger will bring “broadband” to those who would otherwise lack it.¹⁹ AT&T has made a business decision to outlay \$39 billion now to purchase T-

¹⁶ Opposition at 80-81 (emphases added).

¹⁷ See ATTF-TMO-00020875 **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]

¹⁸ See, e.g., ATTF-TMO-00022971; ATTF-TMO-00011889; ATTF-TMO-00003389.

¹⁹ See Opposition at 76 (“In this time of severe budget constraints, a privately funded initiative to bring advanced mobile broadband wireless services to tens of millions of Americans who need it most—and who might not otherwise receive it—is an especially significant public interest benefit that weighs heavily in favor of the merger.”). This statement is at best patently misleading if not false, as by AT&T’s own admission in its Opposition, it will bring 4G HSPA+ to these same “tens of millions of Americans” by the end of 2012, and AT&T itself recognizes that Verizon **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] How the

Mobile and then another \$8 billion over six years to upgrade its network from HSPA+ 4G to 4G LTE by 2018, rather than to spend [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION] to fully deploy LTE by [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] AT&T's decision to pursue the merger quite obviously can be understood only in terms of the transaction's anticompetitive and market power-enhancing effects, not any plan to deploy broadband more rapidly and more efficiently in unserved areas.

III. The Capacity Benefits to Urban America Are Vastly Overstated In Part Because AT&T Could Enter Into Network Sharing Arrangements Instead of Spending \$39B to Acquire a Competitor.

The other major benefit Applicants claim is additional capacity for mobile broadband services in urban areas. However, as we detail below, this claimed benefit is non-merger specific and highly speculative, given the myriad of other less-costly methods for increasing local capacity, including the completion of AT&T's currently planned HSPA+ 4G build and the deployment of LTE on AT&T's currently underutilized 700 MHz and AWS spectrum. The *Horizontal Merger Guidelines* state that the "Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."²⁰ One such alternative is mutually beneficial network sharing arrangements. In its Opposition, AT&T flatly

Commission evaluates this claim will be a critical test of its commitment to fact-based decision-making. If it makes the critical error of approving this merger, and it does so because of the claimed benefit of bringing "broadband" to those "who might not otherwise receive it," that decision will be based not on facts but AT&T's word games and politics.

²⁰ See Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" at 30 (2010) (*Horizontal Merger Guidelines*).

rejects the suggestion that such arrangements would work,²¹ but it is clear that the company believes only that such arrangements would not be as beneficial to AT&T as killing off T-Mobile as a competitor. Internal AT&T communications show that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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[END HIGHLY CONFIDENTIAL INFORMATION] it is clear that network sharing is a viable, non-theoretical alternative to merger. It's also clear that many of the reasons AT&T cites for sharing to be non-viable in its Opposition are immaterial, as **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

26 **[END HIGHLY**

CONFIDENTIAL INFORMATION]

IV. T-Mobile is Currently a Viable Competitor to AT&T, and Would Become Even More Viable Over the Next Several Years.

In order to assuage antitrust concerns, AT&T argues that it does not view T-Mobile as a viable competitor and claims that it fears competition from much more spectrally constrained and much smaller regional and pre-paid market carriers, such as MetroPCS. But the facts

²¹ See Opposition at 72.

²² See e.g. ATTF-TMO-00020665; ATTF-TMO-00020658.

²³ See e.g. ATTF-TMO-00020468.

²⁴ See e.g. ATTF-TMO-00048648; ATTF-TMO-00048750.

²⁵ See e.g. ATTF-TMO-00058449; ATTF-TMO-00052030; ATTF-TMO-00052031.

²⁶ See, e.g., ATTF-TMO-00052031.

contradict this assertion, and reveal that T-Mobile could become an even more viable competitor if regulators refuse to bail out AT&T with this transaction and instead let it and other carriers compete fairly in the free market.

First, while AT&T goes to great lengths to dismiss T-Mobile's role as a viable competitor, AT&T's internal communications [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

²⁷ [END

HIGHLY CONFIDENTIAL INFORMATION] And while AT&T asserts that it has "not responded to any of T-Mobile USA's significant national consumer pricing and promotions in at least two years,"²⁸ [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

²⁹ [END HIGHLY CONFIDENTIAL INFORMATION]

Central to AT&T's case for approval is its assertion that it faces spectrum exhaust in certain markets, and that this merger will remedy that problem. But it is important to remember this potential exhaust may indeed disadvantage AT&T, but only *relative* to other competitors like T-Mobile, Sprint and Verizon. Such is the nature of the free market. If AT&T is temporarily disadvantaged, it is possible that T-Mobile could use its superior HSPA+ network to capture share from AT&T, in turn lowering overall market concentration and spurring AT&T to compete

²⁷ See ATTF-TMO-00005195.

²⁸ Opposition at 136.

²⁹ See, e.g., ATTF-TMO-00022407. [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY
CONFIDENTIAL INFORMATION]

harder through accelerated LTE deployments and 2G migration. As AT&T's internal documents reveal, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

³⁰ **[END HIGHLY CONFIDENTIAL INFORMATION]** Yet, instead of redoubling its efforts and making up for past sub-optimal business decisions by competing fairly in the free market, AT&T is going to the FCC with its hand out, asking the FCC to play the role of central planner and distort the free market.³¹ Instead of picking winners and losers, the FCC should step back and allow the forces of the free market work. If the Commission denies this merger and does allow the market to work, we'll see AT&T compete harder and competition in the overall wireless marketplace improve relative to where it stands currently, and certainly relative to the duopoly market that this merger would create if approved.

AT&T also goes to great lengths to paint T-Mobile as fatally disadvantaged because that company's path to LTE is more uncertain than Verizon or AT&T's. In its Opposition AT&T states that T-Mobile **[BEGIN CONFIDENTIAL INFORMATION]**

³² **[END CONFIDENTIAL INFORMATION]** But as we discuss above, by its own admission, AT&T's own prospects over

³⁰ See, e.g., ATTF-TMO-00007171.

³¹ See Opposition at 36-37, where AT&T states that "the Commission's task...is not to assign blame for or second-guess past choices—with the benefit of 20-20 hindsight—but to act in the best interests of consumers going forward by enabling AT&T to address its spectrum and capacity constraints." This is a stunning endorsement of central planning by an organization that has spent so much time extolling the virtues of the free market. The truth is, it most decidedly is *not* the FCC's job to "enable" AT&T's amassing of market power by protecting it from the effects of free market competition. The FCC's job is to promote the public interest, and in this case that means letting the free market work by allowing T-Mobile and other competitors to compete fairly.

³² See Opposition at 40.

the next 3-4 years may be somewhat cloudy in a few markets due to claimed spectrum exhaust issues. Without the merger, AT&T still could – and, to a near certainty, would – work to upgrade and transition its current networks, competing fairly in the market to overcome any such issues. The government should not ride in to rescue AT&T in this deal from any short-term disadvantage AT&T might encounter, and should instead let competitors that planned and invested better benefit from those decisions. In the near term, T-Mobile’s position as a provider of a quality HSPA+ 4G network may be more advantageous relative to AT&T, and offset any temporary disadvantage T-Mobile would face from not having the more advanced LTE technology that Verizon will offer.³³ That may be a problem for AT&T, but it is not a problem for the market. Indeed, that is how the market should work, with the Commission working to remove barriers to entry and growth by competitors – not allowing the most dominant providers to acquire those rivals whose competition might cost the dominant firm some market share.

This is an important point, and the Commission’s job here is not to ensure AT&T’s success, but rather to quantify any *incremental* public or competitive benefits that 4G LTE will have over the next 3-5 years above 4G HSPA+ service. Indeed, while Verizon’s acceleration of its LTE deployment will be beneficial to leading-edge innovation and competition (similar to the manner in which T-Mobile’s early deployment of HSPA+ was), it is unclear how quickly and at

³³ And again, letting this market dynamic play out is the right thing to do from a pro-free market standpoint. Verizon bought the Nationwide C Block license at auction and invested a higher relative level of capital than AT&T did in its wireless network in the years following. T-Mobile was priced out of the auction, but lead the market in fiber-to-the-tower deployments in order to establish an early lead on HSPA+. Sprint too was priced out of the 700 MHz auction, but has invested in Clearwire and was the first to market with a 4G service. Of these four national competitors, AT&T was the one that decided to reduce capex while heavily promoting a wildly successful and exclusive handset. AT&T has a viable path to regain any perceived marketing disadvantages, but it is choosing instead to ask the government to distort the free market and enable its path to the top through regulatory favoritism in the form of approval for a blatantly anticompetitive merger.

what level consumers will demand the incremental benefits of LTE. Indeed, AT&T notes in its Opposition that after marketing 3G services for 5 years, only **[BEGIN CONFIDENTIAL INFORMATION]** **[END CONFIDENTIAL INFORMATION]** of its total customers subscribed to this higher capacity service.³⁴ And it is worth noting that the real world, incremental, consumer-facing capacity benefits of 3G data services in comparison to 2G services are far more pronounced than the improvements of LTE over HSPA+. While LTE no doubt offers consumer-facing benefits, and its spectral efficiencies offer more overall network capacity, it is simply misleading for AT&T to suggest T-Mobile's future is one of failure because it will lag in LTE deployment – especially given T-Mobile's opportunities to capture market share as AT&T grapples with its own approach to its claimed spectrum exhaust issues.

V. The Claimed Expanded Output is Non-Merger Specific and Will Not Lead to Higher Levels of Employment Nor Lower Prices.

Despite Applicants' proclaimed support of labor unions, it is clear that this merger will have a net negative impact on jobs, even if it has a temporary positive impact on union jobs.

First, AT&T's claim that its LTE deployment will have "job-creating ripple effects throughout the economy, particularly in rural areas"³⁵ is highly dubious, given that AT&T itself will already offer 4G HSPA+ service in these areas *alongside* Verizon's 4G LTE service. There is simply no evidence that, nor any theoretical reason to believe that, there will be positive job externalities from the presence of a *second* LTE network in these areas – not to mention that as we illustrated above, AT&T would have deployed LTE to these areas without this merger.

³⁴ See Opposition at 36.

³⁵ See Opposition at 84.

Second, as AT&T openly highlights to investors, this merger will lead to a *net* decline in capital expenditures to the tune of \$10 billion over the next 7-8 years.³⁶ These declining capital expenditures alongside the decommissioning of [BEGIN CONFIDENTIAL INFORMATION]

³⁷ [END CONFIDENTIAL INFORMATION] T-Mobile towers will result in an overall lower level of employment relative to what the two applicants would expend without the merger. This must be the case, unless AT&T is prepared to claim that spending \$10 billion *less* than it planned to spend previously will somehow result in more jobs. That the combined company's capital outlay will be *lower*, not higher, was conveniently ignored in the AT&T-touted EPI study that simply looked at the impact of AT&T's stated promise of \$8 billion in capital expenditures.³⁸

Third, despite Applicants' touting of a narrow and misleading "study" by the industry-funded and intellectually inconsistent Phoenix Center,³⁹ AT&T does have a clear track record of slashing jobs. As AT&T acknowledges, it alone shed over 100,000 jobs during the last decade as it grew its bottom line through mergers.⁴⁰ AT&T's defense against this fact is that it lost 40

³⁶ See AT&T, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband," March 21, 2011, slide 35, available at <http://mobilizeeverything.com/investors.php>. This slide trumpets more than \$10 billion in "Avoided purchases and investments" in "Capital and Spectrum" as one of the benefits of the merger to AT&T shareholders.

³⁷ See Opposition at 67.

³⁸ See *id.* at 85. Following this study's methodology, it is likely that AT&T's promise to its shareholders of \$10 billion in reduced capital outlay alone will result in at least 100,000 *fewer* jobs. This is certainly the case considering that if the merger is not approved, AT&T will [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END

HIGHLY CONFIDENTIAL INFORMATION]

³⁹ See S. Derek Turner, "Telco-Funded Phoenix Center Flip Flops on Net Neutrality," SavetheInternet.com Blog, Oct. 30, 2009.

⁴⁰ See Opposition at 91-92.

million wired telephone lines over that period. But this is highly misleading, as it fails to note that the combined company added nearly 60 million wireless lines and more than 15 million DSL lines during that time, in addition to the 3.2 million video subscribers, and numerous enterprise and special access lines.⁴¹ In sum, during a time of tremendous net growth in the total number of lines in its empire, AT&T still dramatically reduced what the Opposition casually refers to as the company's "overall headcount"⁴² – conveniently obscuring the fact that these weren't cattle, but individuals who depended on those jobs for their livelihoods.

On the alleged benefits for competition and prices, Applicants' case is also particularly weak. They continually point to BEA data claiming a 50 percent inflation-adjusted decline in prices over the last decade, but fail to highlight that this index tracks per minute voice prices. In a market in which voice alone is becoming more competitive (through the availability of non-carrier VoIP alternatives, on wired and wireless networks) and where carriers' operation costs are rapidly declining, this is not a surprising result. Indeed, it's fair to assume if the market were less concentrated that the per minute price would have dropped further.⁴³ The more appropriate metric to investigate is a consumer's total monthly bill, since carriers sell voice minutes in bundles and have gradually increased the size (and total price) of the entry-level offerings. Here BLS data indicates that consumer total expenditures on cellular voice services have risen steadily

⁴¹ Based on estimates from AT&T's annual 10-K and quarterly 8-K reports.

⁴² Opposition at 91.

⁴³ It's also worth noting that according to the BEA data, the bulk of the declines in per-minute voice pricing came prior to the massive wireless industry consolidation that occurred over the last half-decade. Indeed, during the last five years, even as technology costs plummeted and total network output (in terms of bits carried per tower) expanded sharply, per minute prices held relatively constant despite the increasing popularity of free VoIP alternatives, suggesting the presence of carrier market power.

over the last decade.⁴⁴ And with the shift to data connected networks and the recent trend of forced data plans, consumers' bills are on the rise as carriers focus on earning ever-increasing levels of ARPU. AT&T certainly knows this, and could disclose the historical prices of its entry-level packages and most popular offerings. But it does not, as this would undermine its attempts to hide the negative impacts of increased industry consolidation.

Applicants continue to tout the expanded output that supposedly would follow the transaction as a merger-specific benefit that would "create incentives to...lower prices relative to the levels expected in the absence of the transaction."⁴⁵ As we show above, this claim of expanded output is non-merger specific and would occur absent the merger. Furthermore, the incentive to lower prices is weak or non-existent in a market that is not effectively competitive. But setting those problems aside for the moment, it is important to parse exactly the claim AT&T is making here. And it is not that the monthly price paid by consumers will fall, but that the quantity-adjusted price will fall because consumers will use more data. This claim is quite different in the consumer welfare analysis than a claim of declining absolute price. But even *that* claim is dubious. AT&T recently eliminated unlimited service offerings, implementing an effective price increase on a per-MB, quantity-adjusted basis, even as it rolled out the faster and more spectrally efficient HSPA+ technology. And contrary to AT&T's claims that increased capacity leads to increased usage, when combined with the introduction of monthly caps we see that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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⁴⁴ See "Spending on Cell Phone Services Has Exceeded Spending on Residential Phone Service," Bureau of Labor Statistics, Jan. 14, 2009.

⁴⁵ See Opposition at 59.

⁴⁶ See, e.g., ATTF-TMO-00022563.

[END HIGHLY CONFIDENTIAL INFORMATION] So contrary to AT&T's claims, the extra capacity when offered under a capped plan actually leads to a higher, not lower, marginal use cost.

AT&T is not expected to market an unlimited tier even as it rolls out LTE, which is critical, because all of AT&T's claimed increased usage benefits are negated if users who would otherwise be on an unlimited plan are subjected to usage caps and overages. But the big-picture point here is that overall monthly prices are not expected to decline when a carrier deploys a higher capacity technology, and AT&T makes no claim otherwise.

And finally, even if it were true that the merger would lead to expanded output above what would have existed otherwise (which is not the case), AT&T still would need to seamlessly accomplish the integration of T-Mobile USA in order for this output expansion to have a tangible benefit. But AT&T's internal communications indicate **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]

⁴⁷ See ATTF-TMO-00002193.

VI. The Relevant Product Market is the National Post-Paid Smartphone Mobile Service Market, But the Competitive Analysis is Largely Unchanged If the Product Market Is Broadened to Include Prepaid Carriers.

As we argued in our Petition to Deny, the relevant product market for which a hypothetical monopoly provider would be able to profitably impose at least a “small but significant and non-transitory increase in price” (SSNIP) is the national post-paid smartphone mobile service market. Unsurprisingly, Applicants argue that voice- and data-only services should be included in the market, as well as those services offered by pre-paid carriers. We disagree, and believe the available data indicates otherwise, and that a properly conducted SSNIP test will confirm this.

First, it is illogical to suggest that smartphone consumers would find data-only services like those offered by Clearwire as a viable substitute for smartphone services, as they lack a mobile voice component. Second, it is also illogical to suggest that a smartphone user would find a voice-only mobile service as a viable substitute to the data-intensive smartphone product.

As to the question of pre- and post-paid services existing in different markets, evidence in the market affirmatively demonstrates that a SSNIP will not result in a critical level of customers substituting post-paid with pre-paid services. As we noted in our Petition to Deny, 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,⁴⁸ yet post-paid subscriber gains continue to outpace pre-paid gains in absolute terms.⁴⁹ Pre-paid products are not merely differentiated by service or product quality claims.⁵⁰ Instead, they represent fundamentally distinct products that most post-paid consumers

⁴⁸ See Petition to Deny of Free Press at 11n.16.

⁴⁹ See *id.* n.17.

⁵⁰ See *id.* at 12 n.18, citing *United States v. Gillette Co.*, 828 F. Supp. 78, 81 (D.D.C. 1993), where 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

would not likely view as substitutes when faced with small but significant and non-transitory service price increases.

We believe a SSNIP test will confirm this.⁵¹ However, the market shares and competitive potential of the pre-paid carriers is such that their inclusion in the product market will not change the analysis much at all.⁵² While MetroPCS and Leap have much larger reaches than all other regional carriers, they lack the ability to act as “mavericks” and offset coordinated effects. This is because these carriers lack a true facilities-based national footprint (and thus rely heavily on the national carriers for roaming), and they simply lack enough spectrum to deploy adequate 4G (either HSPA+ or LTE) services. Indeed, contrary to Applicants assertions that the pre-paid carriers are in the same product market and are viable competitors, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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).

⁵¹ AT&T states that **[BEGIN CONFIDENTIAL INFORMATION]**

[END CONFIDENTIAL INFORMATION] Opposition at 134. But this is simply a reflection of AT&T seeing a new market develop, and entering that market, while continuing to put much of its focus on the high ARPU, high revenue growth premium post-paid market. *See* Petition to Deny of Free Press at 9 n.9 (quoting AT&T Mobility CEO Ralph de la Vega). We believe a SSNIP test will reflect this market definition.

⁵² While AT&T repeatedly highlights the *number* of competitors available to consumers (notably when they attempt to dispute the notion of a post-merger “duopoly” by giving the most rigid possible dictionary definition of the term, Opposition at 94), it is not the *number* of competitors that matter, but the *share* of the market concentrated between the competitors, the prospect for lesser competitors to gain future share from the merged entity, and the prospect for entry. Indeed, AT&T makes this exact point – which contradicts its own focus on the number of competitors – later in the Opposition while arguing for a local geographic market definition: “The Commission has rightly avoided establishing any categorical minimum number of competitors necessary for effective competition. Instead, the Commission analyzes all factors relevant to the competitive analysis of markets, including not only the number of competitors, but also the current and projected shares of those competitors, prospects for new competitive entry, and the extent of merger-generated efficiencies.” *See* Opposition at 138 n.224.

⁵³ [END HIGHLY

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Similarly, because the product market is so concentrated, it makes little difference if the geographic market is defined at the national or CMA-level. As we discussed in our Petition to Deny, if the market is analyzed at the national level including all pre- and post-paid carriers, the HHI would increase from approximately 2,600 to 3,300 as a result of the merger. But if this same analysis is conducted at the CMA level, the average population-weighted HHI would increase

[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]

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

⁵⁴ **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** However, because this merger will have substantial market impacts at the national level, it is critical that the

⁵³ See ATTF-TMO-00011885.

⁵⁴ AT&T claims that each local market is populated with a wide variety of carriers with “widely varying” market shares, and that this precludes coordinated effects. See Opposition at 138. However, as we noted in our petition, the four national carriers (AT&T, Verizon Wireless, Sprint, and T-Mobile) have a combined market share of greater than 90 percent in CMAs that encompass **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** of the U.S. population. And we also noted that if the merger is permitted, approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population will live in CMAs where the top two firms – in most cases AT&T and Verizon – would control more than 70 percent of subscribers.