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August 19, 2011

<u>VIA ECFS</u>

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication: WT Docket 11-65 (AT&T/T-Mobile)
<u>Response to the Applicants' Ex Parte Submission dated July 20, 2011</u>

Dear Ms. Dortch:

MetroPCS Communications, Inc. ("MetroPCS"), by its undersigned counsel, hereby responds to the July 20, 2011 *Ex Parte* submission (the "*July 20 Ex Parte* ") made by AT&T Inc. ("AT&T") and Deutsche Telekom AG ("DT") (collectively, the "Applicants") in the above-referenced proceeding. In summary, the Applicant's *July 20 Ex Parte* is largely irrelevant, misplaced, and nonresponsive to the serious issues raised by MetroPCS.

The *July 20 Ex Parte* purportedly responds to the submissions of "several commenters" – but primarily Sprint – that "argue[] that the four so-called national wireless carriers, AT&T, Verizon, T-Mobile USA and Sprint ('AVTS Carriers') do not compete closely with other wireless carriers, including MetroPCS, Leap (Cricket), U.S. Cellular, and other regional or contract carriers."[1] (Hereinafter, MetroPCS follows AT&T's use of "AVTS Carriers," and MetroPCS and other mid-tier, small and rural carriers are referred to herein collectively as the "MSR Carriers".) According to the Applicants, the *July 20 Ex Parte* "demonstrate[s] that other carriers do in fact compete effectively with the AVTS carriers…." [2] Appended to the *July 20 Ex Parte* are hundreds of pages of advertising and related materials purporting to support this conclusion.

The Applicants' *July 20 Ex Parte* is entirely beside the point. MetroPCS readily agrees that, *at present*, it and other MSR Carriers can and do compete vigorously with the AVTS Carriers. Indeed, MetroPCS takes pride in its status as a smaller, but fierce and innovative, competitor to the AVTS Carriers. What is at stake in this proceeding, though, is not the *current* state of the wireless market, but rather whether MetroPCS and other MSR Carriers will be able to continue to compete vigorously in the *future* if the merger is

[1] *July 20 Ex Parte* at 1.
[2] *July 20 Ex Parte* at 1.

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allowed to be consummated.[3] MetroPCS, unlike many other MSR Carriers in this proceeding, has not opposed this proposed transaction outright. However, this does not change the fact that allowing this merger to proceed without the conditions urged by MetroPCS would represent a tipping point that would severely handicap MetroPCS and other MSR Carriers in their ability to provide consumers with competitive options *in the future* under what would have effectively become a nationwide duopoly. The proposed merger threatens to disturb the very delicate competitive equilibrium that currently exists in the wireless industry by concentrating spectrum, capital, free cash flow, and critical inputs in the hands of a few carriers – primarily AT&T and Verizon, and to a lesser extent, Sprint.[4] The issue for the Commission is what regulatory levers it needs to put in place in a post-merger environment in order to ensure that the marketplace for wireless services remains competitive, with continuing innovation, and consumers reaping the benefits of such competition and innovation.[5] As was amply demonstrated in both the Petition and Reply jointly filed by MetroPCS and NTELOS, Inc., in this proceeding,[6] Verizon and the combined AT&T/T-Mobile will have duopoly market power that will enable them to control the supply of four critical inputs – roaming, spectrum, handsets and tower sites.[7] This will put them in a position to squeeze out the MSR Carriers unless specific and stringent divestiture and conduct remedies are imposed upon this transaction in order to allow the MSR Carriers to continue to provide consumers with competitive options and a competitive wireless marketplace in the future.[8]

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[3] Indeed, the recently issued Antitrust Division Policy Guide to Merger Remedies, issued by the Antitrust Division of the U.S. Department of Justice is very instructive. ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, U.S. Department of Justice, June 2011 ("*Merger Remedies Guide").* The *Merger Remedies Guide* makes clear that the "touchstone principles . . . in analyzing remedies is that a successful merger remedy must preserve competition in the relevant market." *Merger Remedies Guide* at 1.

[4] MetroPCS believes that approval of this transaction will effectively turn the wireless industry into a duopoly consisting of two dominant carriers: AT&T and Verizon. However, even if the Commission were to consider Sprint to be more on a par with AT&T and Verizon than Sprint considers itself to be, the wireless market would be, at best, an oligopoly dominated by three carriers. This too would have significant negative effects on competition and the services that MSR Carriers will be able to provide to consumers, inasmuch as it may alter Sprint's incentives with regard to the MSR Carriers.

[5] As the *Merger Remedies Guide* points out, the key to finding an appropriate remedy is one that works and thereby preserves competition in order to "promote innovation and consumer welfare." *Merger Remedies Guide* at 2.

[6] Petition to Condition Consent, or Deny Application ("*Petition*"), filed May 31, 2011; Reply of MetroPCS Communications, Inc. and NTELOS Inc. to Joint Opposition Of AT&T Inc., Deutsche Telekom AG, And T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments ("*Reply*"), filed June 20, 2011.

[7] The key principles articulated in the *Merger Remedies Guide* are (1) to preserve competition and (2) the remedies should flow from the competitive harm. *Merger Remedies Guide* at 2 and 4. As shown in greater detail below, MetroPCS' proposed conditions meet these key principles.

[8] As is discussed *infra*, these conduct remedies will need to include non-discrimination provisions that ensure "equal access, equal efforts and equal terms" to critical inputs. *Merger Remedies Guide* at 15.

I. THE *JULY 20 EX PARTE* ONLY UNDERSCORES THE NEED TO IMPOSE CONDITIONS ON THE MERGER

The Applicants acknowledge in their *July 20 Ex Parte* that three components are vital to the continuing ability of MetroPCS and the other MSR Carriers to compete effectively with the merged entity (and Verizon): "(1) service offerings; (2) coverage footprint; [and] (3) handsets…." *July 20 Ex Parte* at 1. The Applicants then devote most of the *July 20 Ex Parte* to demonstrating that MetroPCS and other MSR Carriers are able to compete *today* on the basis of these three components. MetroPCS agrees that these components are critical and that, despite its considerable disadvantage in spectrum and financial resources, as well as its inability to obtain from Verizon or AT&T cost-based data roaming agreements (due to AT&T and Verizon's denial of such services), MetroPCS is succeeding *at present* in competing in the current environment in all three of these areas. But, as shown in the *Petition*:

- The ability of MetroPCS' and other MSR Carriers to compete on *service offerings* going forward will depend on their having access to adequate *spectrum* to provide state-of-the art wireless data services to serve the needs of subscribers - who are demanding more and more data and access to other connected devices such as tablets and laptops. This merger will upset the competitive equilibrium and divide the industry starkly into spectrum "haves"[9] and " have-nots"[10] when it comes to providing these services. Allowing the merger to proceed without significant spectrum divestitures in each geographic area to the MSR Carriers will allow post-merger AT&T to solidify its position, along with Verizon and Sprint[11] as one of three carriers which have amassed a sufficiently disproportionate amount of spectrum to make it impossible for MetroPCS and other MSR Carriers to continue to compete effectively. Further, the prospects of these MSR Carriers obtaining other spectrum from the Commission or third-parties in the near (or even medium) term is remote. For example, at the last auction, MetroPCS was only able to secure one 12 MHz spectrum license in Boston, with other MSR Carriers obtaining little or no spectrum due to an auction design that favored the largest nationwide carriers, AT&T and Verizon. MetroPCS also is active in the private market for spectrum and knows that the prospects for significant spectrum acquisitions in the near and medium term through private sales is no better. Thus, the only realistic option to ensure that the MSR Carriers have access to spectrum is for the Commission to require AT&T/T-Mobile to divest it. In order to be relevant, such divestitures must include spectrum in all major metropolitan areas where existing MSR carriers have inadequate spectrum.[12] For example, if MetroPCS does not have adequate spectrum resources in all major metropolitan areas, this will limit its ability to act as an effective competitive check on AT&T/T-Mobile to ensure that

[9] Verizon, AT&T/T-Mobile and Sprint.

[10] Nearly every other MSR Carrier.

[11] For purposes of this *ex parte*, Sprint's spectrum position includes its stake in Clearwire.

[12] As the *Merger Remedies Guide* points out and as discussed *infra*, any divestiture must be "substantial enough to enable the purchaser to effectively preserve competition . . .." *Merger Remedies Guide* at 8.

the promised efficiency gains are delivered to consumers. Accordingly, the Commission must aggressively require spectrum to be divested in each of the top metropolitan areas.

- The ability of MetroPCS and other MSR Carriers to compete on a going forward basis with regard to coverage *footprint* will depend on their having access to the critical input of roaming. This access must include the ability to offer the full range of voice and data services provided by the AVTS Carriers, including most pertinently here the merged AT&T/T-Mobile, on just, reasonable and non-discriminatory terms (not merely "commercially reasonable" terms).[13] In particular, the MSR Carriers must have access to roaming services at rates that are reasonably related to the AVTS Carriers' costs (or an appropriate proxy therefor) and must allow for roaming with 4G and more advanced services.[14] Finally, when Sprint becomes part of an oligopoly as one of the three rather than one of four large nationwide carriers post-transaction, the Commission cannot be assured that Sprint will continue its current pro-voice and data roaming stance. One troubling aspect of the proposed merger is that the roaming market will lose the benefit of T-Mobile's presence as a competing national GSM carrier to AT&T, which was capable of putting some competitive pressure on AT&T in terms of roaming arrangements. Allowing AT&T to continue and no doubt expand its anticompetitive roaming practices post-merger will make it impossible for MSR Carriers to continue to compete with regard to coverage footprint. Further, the Applicants' claim that T-Mobile would not have been a roaming partner for 4G LTE does not hold water. If the merger were not approved, T-Mobile clearly would have adequate spectrum to begin offering 4G LTE – and MetroPCS fully expects that T-Mobile would have done so. Indeed, market forces would make it a virtual certainty that if there were no merger, T-Mobile would have found it necessary to refarm its spectrum and to offer 4G LTE. Thus, the merger must be conditioned on the adoption of stringent measures to assure that the merged entity provides roaming services on just, reasonable and nondiscriminatory rates, terms and conditions (not just "commercially reasonable terms") to the MSR Carriers.[15]

- The ability of the MSR Carriers to compete on coverage also is dependent upon their ability to secure access to critical cell sites. The proliferation of wireless services, along with some alarming developments at the state and local levels regarding siting issues,[16] have made it more and more difficult for the MSR

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[13] *See Merger Remedies Guide* at 14-15.

[14] Indeed, there is troubling evidence that AT&T already is engaged in anticompetitive roaming practices by either denying roaming agreements or charging exorbitant rates for roaming. This in turn gives Verizon more leeway to engage in similar anticompetitive roaming practices. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 at para. 25 (2011) ("*Data Roaming Order*").

[15] The *Merger Remedies Guide* uses the terms "equal access, equal efforts, and equal terms." *Merger Remedies Guide* at 14-15

[16] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that*

Carriers to expand their footprints, to further densify their networks by adding cell sites, or to add additional capacity at existing cell sites, in order to compete with the AVTS Carriers. As several commenters have noted in opposing the merger (and as noted by the FCC's recent information requests regarding tower site access) the number of critical wireless sites that the merged AT&T/T-Mobile entity will control post-merger serves to give it an alarming degree of control over another important critical input.[17]

- The ability of MetroPCS and other MSR Carriers to provide consumers with competitive options on a going forward basis will depend on their having the ability to negotiate fairly with *handset* manufacturers for access to the newest cutting-edge devices. Study after study shows that handsets are key determinants of what service a consumer chooses.[18] Competition for services will suffer if AT&T and Verizon (and to a lesser extent, Sprint), are allowed to continue and extend the use of their oligopoly power to induce manufacturers to enter into exclusive arrangements and other restrictive agreements for handsets that unfairly constrain smaller carriers' ability to obtain cutting-edge devices at competitive prices. Thus, the merger must be conditioned by prohibiting AT&T from entering into *exclusive or restrictive arrangements* with handset manufacturers.[19]

In their *Petition* and *Reply*, MetroPCS and NTELOS spelled out in detail the divestiture and conduct remedies that will be necessary to preserve competition if the Commission decides to approve the merger. Nothing in the Applicants' *July 20 Ex Parte* in any way undercuts the need for such protective conditions. Indeed, by stressing the importance of the above three competitive factors in assessing the ability of MetroPCS and other MSR Carriers to compete effectively, the Applicants only further underscore the critical need for the Commission to assure that meaningful competition will still be possible *after* the merger by including conditions on each of these critical inputs. Ironically, the evidence the Applicants propound regarding the *current* robust state of competition raises grave concerns that *future* competition will be in jeopardy if the merger is not adequately conditioned.

Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, FCC 09-99 (rel. Nov. 18, 2009).

[17] *See* "FCC Asking Questions About Tower Holdings as AT&T/T-Mobile Exam Intensifies," Communications Daily (July 27, 2011).

[18] *See, e.g.*, the Google study described in "Proof That Handset Brands Help Sell Wireless Plans," *Advertising Age*, Oct. 27, 2008, http://adage.com/article/news/proof-handset-brands-sell-wireless-plans/132051/ ; ; "Study finds iPhone owners want to switch to Verizon," Reuters, Sept. 22, 2010, http://www.reuters.com/article/2010/09/22/us-deloitte-media-idUSTRE68L0GO20100922 ; *cf. Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, FCC 10-133, WT Docket No. 11-103 ¶ 142 *et seq.* (2011) *("Wireless Competition Fifteenth Report")* ("A key way in which service providers differentiate themselves from their rivals on the basis of devices is by offering certain smartphone devices on an exclusive basis.")

[19] The *Merger Remedies Guide* points out that certain circumstances may require prohibitions on restrictive contracting practices if they can be used to "block competitor's access to a vital input." *Merger Remedies Guide* at 17.

For example, the Applicants argue that MSR Carriers today offer service plans that compete with the AVTS Carriers with regard to rates and service speed.[20] It is true that, *at present,* MetroPCS is able to compete effectively with many of the AVTS Carriers' service offerings through a variety of innovative measures – including the achievement of spectrum efficiencies far greater than those achieved by AT&T or T-Mobile.[21] But the merger will make successes of this nature far more difficult, if not impossible, in two major respects. First, as to rates, the Applicants emphasize that "MetroPCS and Cricket, for example, both offer unlimited no-contract plans with *nationwide* service for a *lower monthly rate* than either AT&T or T-Mobile USA."[22] That is true. However, in order for MetroPCS and other MSR Carriers to continue to offer nationwide service at competitive rates in the future, they must be assured that Verizon, the merged AT&T/T-Mobile, and Sprint do not use their market power to deny MSR Carriers the full palette of roaming services, and do not charge them roaming rates greatly in excess of their costs. Otherwise, MetroPCS and other MSR Carriers either would be unable to offer nationwide services at all, or will only be able to offer nationwide services at rates that are not attractive or competitive for service outside of the home carrier's licensed service areas.[23] Indeed, therefore, the *July 20 Ex Parte* concedes the public interest benefit of the robust competition brought to the market by the MSR Carriers and the Commission must impose conditions that preserve the consumer benefits provided by such competition if it approves the merger.

The Applicants no doubt will argue that the MSR Carriers need have no fear about the ability of their customers to roam because the Commission's *Voice Roaming Order*[24] recognizes voice roaming as a common carrier service obligation that must be provided on just, reasonable and nondiscriminatory terms, and the *Data Roaming Order*[25] requires carriers to offer data roaming services at "commercially reasonable" rates. But the *Voice Roaming Order* provides no benchmark for what qualifies as a reasonable rate. Similarly, the *Data Roaming Order* offers no guidance as to how a "commercially reasonable" rate would be determined in a duopoly market. And even after the V*oice Roaming Order* has been in place for more than a year, and the *Data Roaming Order* for almost half a year, activities in the market indicate that the largest carriers are not offering cost-based rates.[26] Unfortunately, a bare "commercially reasonable rate" standard is meaningful only if rates

[20] *July 20 Ex Parte* at 5-11.

[21] Because of its lack of spectrum, however, MetroPCS is unable to effectively compete for certain services, such as services to laptop cards and connected devices.

[22] *July 20 Ex Parte* at 5 (emphasis added).

[23] This ability of one competitor to price critical inputs to other competitors makes it essential that the competitor that controls the critical input be required to provide it at just, reasonable and non-discriminatory rates. Otherwise the first competitor can dictate how competition unfolds – meaning that there would really be no competition at all.

[24] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) ("*Voice Roaming Order*")

[25] *See Data Roaming Order.*

[26] Indeed it may very well be that the Big-2 carriers have made the decision that if they offer all carriers the same *high* rates, they will be in compliance with the *Voice Roaming Order* and the *Data Roaming Order*.

are being set in a competitive market and there are sufficient data points from which to discern what is "commercially reasonable."[27] Since the universe of nationwide roaming services is limited to four carriers (reduced to only three if this transaction is approved) it will be difficult, if not impossible, for the Commission to be able to determine what is or is not a commercially reasonable rate for data roaming.[28] Thus, competition (or "commerce") alone would not be sufficient to establish a benchmark for assessing "commercial reasonableness." As a consequence, no counterparty would have the ability to obtain nationwide services on a fully-negotiated, arms'-length basis with equal bargaining power.

The Applicants' emphasis in the *July 20 Ex Parte* on MetroPCS' *current* service offerings also ignores the fact that, because of spectrum constraints and MetroPCS' inability to date to obtain 4G roaming, MetroPCS already is unable to offer certain state-of-the-art services for certain devices such as tablets and laptops, which are becoming increasingly important to consumers.[29] The Applicants' presentation focuses instead on the recent-generation feature- and smartphones available through MetroPCS. This description, while accurate so far as it goes, fails to adequately address MetroPCS' ability to compete as these devices are superseded by technological innovations. Further, the *July 20 Ex Parte* ignores the recurring AT&T observation that customers are demanding more and more data services at an accelerating pace. Although MetroPCS and other MSR Carriers may be able to meet the present demand of their customers for data services, the future is much more cloudy. As data demand increases, the MSR Carriers will need more spectrum – like AT&T – but sooner rather than later.[30] And they will be forced to deal with data shortages well before any Commission auction will occur. The problem is exacerbated by the fact that AT&T and Verizon will have sufficient spectrum resources to weather the upcoming data storm better than the MSR Carriers so they can afford to wait. The only solution is to have AT&T/T-Mobile divest enough spectrum in each major metropolitan area to allow one or more MSR Carriers to have adequate capacity to provide competitive options for all subscribers and in all services.

The lopsided allocation of spectrum that would result from an unconditioned merger would further affect the competitiveness of MSR Carriers' service offerings by undermining their ability to compete on the basis of rates, even within their home areas. Rates are driven by costs, and costs are driven by efficiencies. With great effort and ingenuity, MetroPCS has developed a network design that achieves much greater efficiency in spectrum use than has AT&T. MetroPCS has succeeded in being a low cost carrier with

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[27] Indeed, the whole premise behind the "commercially reasonable" standard was the view that a market exists for data roaming that would give economic signals as to what price is competitive. Without a competitive market, a "commercially reasonable" rate is difficult, if not impossible, to measure.

[28] This is especially true for legacy technology such as CDMA 1xRTT, EDGE, and EVDO where a duopoly for these air interfaces already exists.

[29] *See Petition* at 34; *Reply* at 23.

[30] MetroPCS believes that AT&T could be much more efficient in its use of spectrum and does not need all of the spectrum it is in the process of acquiring. MetroPCS is concerned that if some carriers are allowed to amass considerably more spectrum than others, the value provided to consumers via competition will suffer.

its limited spectrum resources even though, as AT&T recognizes, more spectrum enables carriers to enjoy operating efficiencies that can reduce costs (though AT&T exaggerates the extent of the efficiencies it can achieve through simply adding more spectrum). MetroPCS has achieved these efficiencies despite the fact that it has far smaller financial resources and far fewer employees than AT&T. In its *Petition* and *Reply*, MetroPCS has described in detail the steps it has taken to achieve these efficiencies – steps that AT&T could take even without the merger to free up spectrum within its existing allocation.

MetroPCS is proud of what it has been able to achieve to date. But MetroPCS will soon reach the point where such greater efficiencies simply will not make up for its disadvantage in overall spectrum holdings. Allowing AT&T to amass even more spectrum will exacerbate the competitive imbalance. AT&T will be able to achieve sufficient advantages, in both cost and the ability to offer cutting-edge services to the newest devices, such that MetroPCS and other MSR Carriers will be unable to compete effectively and provide competitive options for consumers. Perversely, AT&T will obtain these advantages, not by innovating and becoming more efficient, which would better serve the public interest, but by sheer size, which serves only the interest of AT&T. With MSR Carriers no longer posing a significant competitive threat, the incentives for AT&T (and Verizon) to achieve greater efficiencies within their existing spectrum holdings would be substantially diminished, and so the result of an unconditioned merger in the long run would be to lessen, not increase, the nation's overall spectrum efficiency.

The Applicants' analysis of coverage footprints is equally overreliant on current conditions, once again ignoring the effect of the merger on the MSR Carriers' ability to continue to compete on this basis. As the Applicants recognize in their discussion of service offerings, and as shown at length in earlier submissions in this proceeding, the ability to offer *nationwide* services at competitive rates is essential even for carriers that do not have their own nationwide networks. Thus, the Applicants emphasize that MetroPCS and Leap are able to compete today because they can offer "*flat-rate nationwide coverage*" without roaming fees.[31] MetroPCS and Leap can only offer the nationwide footprint as a result of certain voice and limited data roaming deals with the Big-3 carriers. The Commission cannot count on the continued availability of such deals in the future or on their extension to 4G services at reasonable rates that allow them to be included in a flat-rate service plan.[32] And again, it is these very MSR Carriers that the Applicants claim will exert sufficient competitive pressure to prevent the merger from being ruinous for the marketplace and consumers.

Just as the merger will adversely affect the MSR Carriers' ability to match service offerings, coverage too will be a severe competitive *disadvantage* for such carriers unless they are guaranteed access to the critical roaming inputs that make these nationwide flat rate plans possible. And for the reasons set forth above and in MetroPCS' *Petition* and

[31] *July 20 Ex Parte* at 11 (emphasis in original).

[32] Interestingly, AT&T and Verizon have both done away with unlimited data plans, and Sprint is the only AVTS Carrier still offering a true unlimited data plan. The effect of AT&T and Verizon's intransigence on 4G roaming is that they will be able to force all other carriers who offer unlimited data services into the same data pricing model as AT&T – to the detriment of consumers.

Reply, only the imposition of adequate roaming conditions upon the merger will assure that these MSR Carriers are able to compete going forward.

As to handsets, the Applicants assert that the Commission can take comfort in the fact that various MSR Carriers "now offer multiple smartphones, including Blackberry and Android devices, and their handset portfolios are expanding by the day."[33] Indeed, the Applicants go into great detail in various exhibits and attachments, amounting to hundreds of pages, as to the particulars of these device portfolios. But the ability to offer multiple smartphones will not in itself allow MSR Carriers to remain strong competitors if AT&T is permitted, post-merger, to maintain and expand anticompetitive practices in handset procurement that result in (1) MSR Carriers only gaining access to new-generation smartphones months or years *after* they are available to AT&T; and (2) MSR Carriers *never* having access to truly game-changing devices (such as the iPhone) at the time when they are defining the market. Once again, the Applicants, like stage magicians, try to distract the Commission's attention by focusing on *current* circumstances rather than circumstances that will exist following the merger. They cannot be allowed to concentrate the market and deny MSR Carriers critical inputs that are necessary for them to provide competitive services to consumers in the future. Unless adequate conditions are imposed relating to such critical inputs,[34] the Applicants will have succeeded in further entrenching their position and keeping any efficiencies that result from the merger without passing any savings on to consumers due to the absence of competitive pressure.

II. THE CONDITIONS SOUGHT BY METROPCS ARE WELL-ESTABLISHED MECHANISMS FOR ASSURING THAT COMPETITION IS NOT HARMED BY MERGERS.

The conditions proposed by MetroPCS and NTELOS are well-reasoned and necessary to ensure that consumers are not injured by the proposed merger. In many respects, conditions such as those supported by MetroPCS are time-honored mechanisms for allowing a merger that offers some benefits to proceed while preventing the merger from causing harm to competition and the public interest that would outweigh those benefits. The Antitrust Division of the Department of Justice recently issued newly-revised merger remedies guide that provides a useful analysis of how such conditions can operate to protect competition while allowing the potential benefits of a merger to be realized. The Antitrust Division states:

> In situations where a merger remedy can protect consumers while otherwise allowing the merger to proceed, appropriate remedies may include a divestiture of assets (to limit the merged firm's ability to use the combined assets to harm competition) or limitations on the firm's conduct (to ensure that consumers will not be harmed by anticompetitive behavior).[35]

[33] *July 20 Ex Parte* at 17.

[34] The *Merger Remedies Guide* defines a critical asset as one that is necessary for the purchaser to compete effectively in the market in question. *Merger Remedies Guide* at 11, n. 23. Spectrum, roaming and handsets are all critical inputs.

[35] *Merger Remedies Guide* at 2.

Further, "[e]ffective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets."[36]

The Antitrust Division notes that, in the case of horizontal mergers, structural remedies, used in conjunction with conduct remedies, often can solve potential competitive problems. In vertical mergers, conduct remedies are more often preferred.[37] Here, the proposed merger is a hybrid consisting of vertical and horizontal components.[38] The proposed merger between the Applicants clearly has horizontal aspects, since both companies compete with each other as providers of retail services to end users. But the merger also has a vertical aspect, because AT&T and T-Mobile are both major upstream suppliers of roaming services to each other today and both provide critical inputs (as noted above) to the MSR Carriers. Thus, both structural (divestiture) remedies and conduct remedies are well within the repertoire of regulators looking to avoid the anticompetitive effects of this merger, if it is allowed to proceed.

A. Directed Divestiture of Spectrum by AT&T is Absolutely Essential to Protect Competition Post-Merger.

The first condition advocated by MetroPCS – the directed divestiture of spectrum prior to the merger – is the most fundamental. As the *Merger Remedies Guide* states:

> The goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to effectively preserve competition. A structural remedy typically requires clear identification of the assets a competitor needs to compete effectively in a timely fashion *and over the long-term*. … The divestiture assets must be substantial enough to enable the purchaser to effectively preserve competition, and should be sufficiently comprehensive that the purchaser *will use them in the relevant market* and be unlikely to liquidate or redeploy them.[39]

As further detailed in the *Petition* and *Reply*, MetroPCS urges the Commission, as a condition of approving the merger, to require AT&T and T-Mobile to divest sufficient spectrum to accord one or more MSR Carriers sufficient spectrum to have a meaningful opportunity to continue to compete for all categories of consumers in all services. This may require material divestitures in each major metropolitan area. MetroPCS has urged the Commission to ensure that these required divestitures accomplish their intended goal by restricting the divestiture in three specific ways – all of which are supported by the analysis set forth in the *Merger Remedies Guide*.

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[36] *Merger Remedies Guide* at 4.

[37] *Merger Remedies Guide* at 2, 4-6.

[38] *Merger Remedies Guide* at 5-6. In case of hybrid mergers, the Antitrust Division notes that "effective remedies in these situations may require a combination of structural and conduct provisions." *Id*. at 6.

[39] *Merger Remedies Guide* at 7-8 (emphasis added).

- First, the spectrum must not go to one of the other Big-3 carriers because such a divestiture would itself raise competitive issues and not preserve competition. If AT&T/T-Mobile is allowed to divest spectrum to Verizon or Sprint, this will not "effectively preserve competition" post-merger, since it will simply shift the strategic asset from one duopolist or oligopolist to another. This limitation finds support in the *Merger Remedies Guide*, which points out that "divestiture assets to the proposed purchaser must not in itself cause competitive harm.[40] The *Merger Remedies Guide* uses an example to illustrate this point and is on all fours with the AT&T/T-Mobile situation:

  > For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might. If the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues.[41]

- Second, the spectrum must be divested, not to speculators or investors, but to entities already operating substantial wireless businesses, since only these entities will "use [the spectrum] in the relevant market and be unlikely to liquidate or redeploy them." The purpose of divestitures should be to enable additional competition and allow consumers the benefits of such competition – and the only viable candidates would be the MSR Carriers. Because, as AT&T stresses, the future of wireless competition depends crucially on the viability of the MSR Carriers, the Commission should assure that these carriers receive the lion's share or all of the divested spectrum. In light of the Applicants' argument that T-Mobile lacks the resources to effectively compete, the goal should be to require AT&T/T-Mobile to shed sufficient spectrum to put another carrier in a better position than T-Mobile is in today.

- Third, the divestitures should, at the purchaser's option, be of bare spectrum, and AT&T/T-Mobile should *not* be permitted to require that the purchaser also buy facilities and other assets that the purchaser will in many cases already possess or otherwise has no need for. This proposal also finds support in the latest *Merger Remedies Guide*, which notes that it makes sense to require "divestiture of less than an existing business entity when certain of the entity's assets are already in the possession of, or readily obtainable … by, the purchaser. For example, if the purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create an unwanted and costly redundancy."[42]

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[40] *Merger Remedies Guide* at 28.

[41] *Merger Remedies Guide* at 28.

[42] *Merger Remedies Guide* at 9-10.

B. Specific and Enforceable Conduct Conditions With Respect to Roaming and Handsets are Also Essential to Protect Competition Post-Merger.

The *Merger Remedies Guide* also provides persuasive guidance regarding what conduct remedies are necessary and appropriate with regard to two other critical inputs the availability of which is jeopardized by the merger: roaming and handsets. The *Merger Remedies Guide* provides that conduct remedies in a vertical merger are appropriate where "the upstream firm will have an incentive to favor the acquired downstream firm by offering less attractive terms to, or refusing to deal with, the acquired firm's competitors"[43] and where "the merged entity will control an input that its competitors must access to remain viable."[44] This is the exact concern in the roaming market. After the merger, the roaming services that AT&T now provides to T-Mobile essentially will be provided *at* cost, and the same will be true of the roaming services that T-Mobile provided to AT&T. Further, to some extent, the current wireless market can be viewed as a dual distribution market where AT&T both competes directly for end-user customers and enables its downstream competitors to compete for such customers by providing roaming. To the extent that the post-merger entity offers roaming to other carriers at rates materially in excess of cost (or refuses to deal with them at all), it will not only have the incentive, but will actually be engaging in discrimination against the other carriers. This is no different than a manufacturer which acquires some of its distributors while continuing to compete with its remaining distribution partners. If the vertical party raises prices to its distribution partners, they will be unable to compete – just as here the MSR Carriers will have difficulty competing with AT&T without cost based roaming. For this anticompetitive effect to be prevented, the accepted prophylactic under the *Merger Remedies Guide* is the imposition of a non-discrimination clause requiring the merged firm to offer the same terms to independent carriers as it offers to itself – namely, the availability of *all* of its services at rates reasonably related to cost.[45]

The *Merger Remedies Guide* stresses that conduct remedies will be effective *only* if they are both specific and enforceable: "remedial provisions that are too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked."[46] It is therefore of paramount importance here that the Commission impose more specific requirements on the merged entity than the "commercially reasonable rates" standard found in the *Data Roaming Order*. In particular, the required standard must be that AT&T/T-Mobile provide equal access to its roaming, on an equal quality and service basis as it provides itself, and on equal terms – *e.g.*, roaming rates be cost-based, for only in this way will the merged entity be prevented from discriminating in its own favor against independent carriers. Of course, the Commission must also assure that AT&T/T-Mobile does not foist "lesser quality product, slower delivery times, reduced service, or unequal access" on its competitors.[47] Further, conduct

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[43] *Merger Remedies Guide* at 15.

[44] *Merger Remedies Guide* at 17.

[45] *Merger Remedies Guide* at 14-15. The *Merger Remedies Guide* posits that these requirements are "equal access, equal efforts and equal terms." *Id.* at 15.

[46] *Merger Remedies Guide* at 13.

[47] *Merger Remedies Guide* at 15.

remedies, such as the conditions relating to roaming and handsets are "necessary to help perfect structural relief" of divesting of spectrum.[48]

The non-discrimination roaming mechanism also must be backed up by a meaningful and readily available enforcement mechanism. In the context of decrees administered by the Antitrust Division, the Division prefers mandatory arbitration in order to avoid being directly involved in the day-to-day resolution of disputes. Because of its regulatory jurisdiction and expertise.[49] the Commission itself is better situated than the Antitrust Division to provide meaningful mechanisms for the resolution of disputes. But, the Commission must assure that these mechanisms provide meaningful relief (*e.g.*, retroactive application or injunctive relief where appropriate) and that the relief is timely so that AT&T/T-Mobile cannot simply run out the clock and exhaust its competitors' resources in seeking redress. The Commission already provides a complaint mechanism for roaming disputes, but should consider improving this process by requiring any roaming dispute arising out of post-merger conduct by AT&T/T-Mobile to be resolved using expedited procedures.

The *Merger Remedies Guide* also stresses the importance of "transparency provisions" in reinforcing conduct remedies – in this context, provisions that assure that the Commission will have adequate information to detect and prevent discrimination.[50] Here, the Commission should proactively require that AT&T/T-Mobile publish all the rates, terms and conditions of its various roaming agreements. In addition, it has been widely reported in the press that, if the merger does not happen, one of the break-up remedies T-Mobile will be entitled to receive from AT&T is a roaming agreement on specified terms and conditions. The Applicants undoubtedly knew there was a material risk that a merger of this unprecedented scope in the wireless industry might not go through. Thus, MetroPCS assumes that these roaming terms and conditions were negotiated at arm's length between two parties with substantial bargaining power. MetroPCS suspects that the AT&T/ T-Mobile roaming rates will cover AT&T's costs of providing roaming while satisfying T-Mobile that it is not being taken advantage of. Accordingly, this roaming agreement provides an important data point for comparison with the rates, terms and conditions that AT&T/T-Mobile might seek to impose on MSR Carriers following a merger.[51] MetroPCS urges the Commission to avail itself of all this information in establishing and enforcing roaming conditions on this merger.[52]

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[48] *Merger Remedies Guide* at 18.

[49] Existing Commission regulation alone is not sufficient. The *Merger Remedies Guide* suggests that "the existence of regulation typically does not eliminate the need for an antitrust remedy to effectively preserve competition." *Merger Remedies Guide* at 20.

[50] *Merger Remedies Guide* at 16.

[51] Indeed, the rates in such agreement should be presumed to be "commercially reasonable" for the services it covers and AT&T/T-Mobile should be compelled to offer these rates for the covered services to the MSR Carriers if the merger is approved.

[52] The Commission can and should also use this information in exploring assertions by Cincinnati Bell and others that AT&T is *already* charging exorbitant rates and imposing anticompetitive conditions on its roaming partners, since if anything the merger will give AT&T even more ability to do so in the future.

As MetroPCS showed in its *Petition* and *Reply*, the MSR Carriers' access to a third critical input – handsets – is also imperiled by the merger and, to prevent this harm, conditions must be imposed prohibiting the merged entity from using exclusive contracts or other restrictive arrangements with handset providers to disadvantage competitors. Here too the latest *Merger Remedies Guide* is directly on point: "[i]n some situations a merged entity might use restrictive or exclusive contracting anticompetitively to block competitors' access to a vital input. … In these types of situations, it may be appropriate to impose limits on the merged entity's ability to enter into restrictive or exclusive contracts."[53] In the context of this merger, the concern is heightened since AT&T already has engaged in this practice by locking up the iPhone and other desirable handsets on an exclusive basis and the merger would solidify its ability and incentives to do so. If this condition is not adopted, the MSR Carriers will be relegated to second class citizens who are unable to provide consumers with the newest game-changing handsets at the very time that AT&T/T-Mobile's increased market power will give it even greater leverage to demand that manufacturers grant it exclusive rights to the latest game-changing handsets.

III. APPLICANTS' ATTEMPT TO MINIMIZE THE COMPETITIVE IMPACT OF THE MERGER BY DENYING THAT T-MOBILE IS A VIABLE COMPETITOR TO AT&T TODAY IS BELIED BY THE REST OF THEIR OWN ARGUMENTS.

Perhaps the most interesting argument made by the Applicants is their assertion – fleshed out further in the *July 20 Ex Parte* – that T-Mobile does not in fact compete meaningfully with AT&T today, and so that the merger will not in fact remove a competitor from the marketplace. For instance, the Applicants claim: "subscriber characteristics are quite different as between AT&T and T-Mobile USA, suggesting that customers do not view these two carriers as close substitutes. Indeed, on a number of metrics, T-Mobile's subscriber base is more similar to that of [MSR Carriers] like MetroPCS and Leap than is true for other [national] carriers."[54] The Applicants made similar claims in their Public Interest Statement and their Opposition to Petitions to Deny in this proceeding. This argument, reduced to its logical essence, is nonsensical. In effect, the Applicants are arguing on the one hand that (1) the MSR Carriers are today and will continue to be strong competitors to AT&T; and (2) T-Mobile competes with the MSR Carriers; but on the other hand that (3) T-Mobile does not and cannot compete with AT&T (even though T-Mobile has significantly more financial resources, spectrum and a much bigger facilities-based footprint than any of the MSR Carriers).[55]

The inherent contradiction in the Applicants' position is obvious. They are trying to have their cake and eat it too by downplaying the competitive significance of the loss of T-Mobile while highlighting the competitive significance of the MSR Carriers. This cannot work. *Either* the market is segmented between the national carriers on the one hand, and

[53] *Merger Remedies Guide* at 17.

[54] *July 20 Ex Parte* at 23-24.

[55] The only way this could be true is if T-Mobile offered a subset of services that the MSR Carriers offer – which is simply not true. T-Mobile provides post-paid and pre-paid services as well as voice and data services. To suggest that it offers a subset of those services offered by the MSR Carriers – which in some cases only offer pay-in-advance services – is disingenuous at best.

the MSR Carriers (lumped together with T-Mobile) on the other (*i.e.*, the Sprint position), *or* MetroPCS and the other MSR carriers (including T-Mobile) *do* compete with the Applicants today and may continue to do so depending upon the outcome of the merger and the conditions imposed.

MetroPCS believes that the latter proposition is correct: T-Mobile *does compete* with AT&T today just as the MSR Carriers do – and, as the fourth largest wireless carrier by a comfortable margin, is a very important competitor. There is no getting around this fact, as well as the fact that the merger will eliminate this key competitor from the market. The competitive void that T-Mobile will be leaving makes it all the more important that the merger be conditioned in a fashion that will enable the MSR Carriers to continue to vigorously compete.

IV. AT&T'S CONTINUING EFFORTS TO DENY THE NATIONAL CHARACTER OF THE MARKET ARE UNAVAILING.

In the *July 20 Ex Parte*, the Applicants continue their attempt to characterize the wireless market as strictly local, thereby attempting to divert the Commission's attention from their *national* advantages in spectrum, footprint, capital and other resources AT&T/T-Mobile will have and enjoy post-merger. The Applicants do not raise any genuinely new arguments here, and MetroPCS thoroughly refuted the Applicants' position in its *Petition* and *Reply*.[56] Indeed, as MetroPCS also noted, AT&T consistently has maintained that the wireless market is national, a position from which it now conveniently departs because it is in its interest to do so. Further, unlike Applicant's arguments, MetroPCS' argument is not contradictory.

However, it bears pointing out that even the factoids newly adduced by the Applicants do not save their argument here. Thus, for example, the Applicants dwell on the notion that consumers assertedly tend to buy devices and shop for services at local locations,[57] and that "AT&T's local managers choose carefully the mix and locations of … retail outlets to optimize their effectiveness in responding to competitive conditions in their areas." The Applicants make similar assertions with regard to T-Mobile and also claim that T-Mobile's regional managers make key decisions regarding "local advertising and promotions, and personnel decisions."[58] But the most important decisions – those that truly drive the customer purchase decision and the business – clearly are made nationally. The rollout of new services, features, and service packages, which markets to enter or leave, the selection and procurement of handsets, the obtaining of additional spectrum, decisions regarding roaming, the raising of capital, the deployment of capital, and the establishment of pricing plans all occur on a national level in response to national conditions, and are

[56] *Petition* at 16-23; *Reply* at 4-5.

[57] That AT&T has exaggerated even this phenomenon can be seen from the fact that Amazon.com (as well as AT&T's and T-Mobile's own websites) is a major supplier of phones for use with both AT&T and T-Mobile plans. Of course, Amazon does not sell through local storefronts. *See, e.g.*, http://www.amazon.com/gp/search/ref=sr_nr_n_1?rh=n%3A2335752011%2Ck%3Aphones%2Cn%3A!2335753011%2Cn%3A2407747011&bbn=2335753011&keywords=phones&ie=UTF8&qid=1312589923&rnid=2335753011.

[58] *July 20 Ex Parte* at 2-3.

generally supported with national advertising. Certainly the Applicants are not suggesting that local managers have the option of setting whole new local service options, establishing their own price points, buying one-off handsets, going out and obtaining their own spectrum, deciding to enter or leave metropolitan areas, negotiating or waiving exclusivity with respect to handsets, or allowing or denying roaming services to the MSR Carriers. The Applicants' presentation here is a mere make-weight that adds nothing to their previously discredited arguments on market definition, and the Commission should disregard them.

Furthermore, notwithstanding whether the retail market for wireless services is local, the critical inputs of roaming and handsets are national and need to be examined on that basis. The larger carriers do not make localized decisions on these critical inputs and thus conditions on such conduct should be imposed nationwide. Finally, although spectrum comes available on a market-by-market basis, if the Commission wants to enable competition nationwide, then the Commission will need to make spectrum available to the MSR Carriers in all major metropolitan areas.[59]

V. EVIDENCE CONTINUES TO ACCUMULATE THAT THE MERGER WOULD BE DISASTROUS FOR COMPETITION UNLESS ADEQUATE CONDITIONS ARE IMPOSED.

Throughout this proceeding, MetroPCS and other parties have drawn the Commission's attention to both compelling empirical evidence and practical considerations for concluding that, in the absence of adequate conditions, this merger would devastate the competitiveness of the wireless industry and thereby harm the public interest. Further studies and evidence continue to surface daily which support this conclusion. Just this month, for example, the Yankee Group released a report (reversing its earlier position) shedding further light on the effects of the merger:

> At the time the merger was announced, Yankee Group thought the combined spectrum made possible by such a merger could bring better coverage and higher performance to customers (*see* the March 2011 Yankee Group Report "AT&T/T-Mobile to Verizon: Can You Hear ME Now?"). However, while a single company with combined spectrum promises better coverage, that technical solution ignores the market effects created by such a merger. This report is intended to raise our concern about the potential market and competitive implications of this merger on the U.S. wireless marketplace.

Since the March announcement, Yankee Group has analyzed its wireless industry and consumer data to understand the effects such a merger would have on the U.S.

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[59] The *Merger Remedies Guide* posits that in some instances it may be insufficient to only divest assets in an existing business. Here, since spectrum nationwide is important to being able to preserve competition nationwide, AT&T/T-Mobile should be required to divest spectrum in all major markets. *Merger Remedies Guide* at 10 ("Where divestiture of an existing business entity is insufficient to resolve the competitive issues raised by the proposed merger, additional assets will need to be included in the divestiture package.").

market, consumers and businesses. These results dash cold water on the merger's promise of benefiting consumers and competition; instead, we see this merger resulting in less choice and higher prices for T-Mobile's consumer and business customers.[60]

In its report, the Yankee Group concludes that the following would be major anticompetitive effects of the merger:

- "[F]or 27 of the most populous CMAs, [t]oday, AT&T has 33 percent or more of the subscribers in nine of those CMAs. The proposed merger would give AT&T more than 33 percent of the market in 20 of those 27 markets. In fact, the merger with T-Mobile would give AT&T a full 50 percent market share or more in five of the most populous CMAs."[61]

- "Using data from our 2010 US Consumer Survey, we computed HHIs for the same largest CMAs listed in Exhibit 2. We find that before the AT&T/T-Mobile merger, only one of the top 27 CMAs is highly concentrated. If the merger proceeds, however, 17 –or 63 percent –of the top 27 markets would be considered highly concentrated …."[62]

- "In these more concentrated markets, consumers and businesses will have fewer choices for wireless carriers. This in turn reduces price competition among wireless carriers, which over time leaves every consumer in these markets with higher prices. This basic dynamic is present in other markets, such as the airlines, where cities served by multiple national carriers offer lower fares than cities served by a single national carrier."[63]

Notably, these anticompetitive effects would arise from the merger *even if* one assumes for the sake of argument that the Applicants were correct to assert that the wireless market is local rather than national. Most importantly, the *Yankee Group Repor*t is concerned about the effect of the transaction on consumers, noting that the type and extent of market concentration post-transaction "will reduce choice for consumers, and, more importantly, leave little incentive for AT&T to offer competitive pricing for unbundled mobile services."[64] This is in addition to noting that the transaction will "extend duopoly-style

[60] Yankee Group, "AT&T/T-Mobile Merger: More Market Concentration, Less Choice, Higher Prices," August 2011 ('*Yankee Group Report*"). This study, unlike many of the others in the record, appears to have been conducted by a third party without any influence by AT&T on the one hand or the protesters on the other. As such, it needs to be given substantial weight by the Commission – especially its conclusions about the effects of the merger and the conditions that the Commission must impose to maintain retail competition for wireless services.

[61] *Yankee Group Report* at 2.

[62] *Yankee Group Report* at 3.

[63] *Yankee Group Report* at 4.

[64] *Yankee Group Report* at 6.

pricing to the national level, resulting in less choice for consumers and limiting competition."[65]

The Yankee Group, however, like MetroPCS, does not recommend an outright rejection of the transaction. Rather, like MetroPCS, the Yankee Group "recommend[s] the FCC not allow this merger to proceed unless it is also prepared to maintain a stronger regulatory stance to avoid domination by the largest two carriers. . ."[66] These recommendations include:

- Thinking creatively about divestiture remedies;[67]
- Enforcing mandatory, reasonable data roaming rates to facilitate competition – The Yankee Group notes that "the FCC must ensure that smaller regional carriers can compete in concentrated areas by enforcing these mandatory reasonable data roaming fees. . .";[68] and
- Regulating unbundled wireless tariffs.[69]

These conditions support MetroPCS' view that appropriate conditions are a necessary precondition to approval of this merger. First, the Yankee Group recognizes the importance of roaming to competitors and its condition is very similar to that proposed by MetroPCS. Second, the view that the Commission should think creatively about divestiture remedies tracks with MetroPCS' view that spectrum divestitures are an essential remedy – especially since the Yankee Group is focusing on making sure consumers are not harmed by the merger by leaving them with fewer choices and higher prices. Third, while the Yankee Group does not explicitly discuss handset remedies, its conditions clearly reflect its agreement that the MSR Carriers must have access to critical inputs to enable them to compete – and the latest handsets are critical inputs just like roaming. Thus, while the conditions requested by the Yankee Group do not conform in every detail with MetroPCS' requested conditions, the crux is clear – without significant conditions to prevent the wireless industry from hardening into a duopoly that will harm the public interest, the FCC should not allow the merger to proceed.

Another recent AT&T *ex parte* submission further reinforces the need for conditions. In an August 8, 2011, letter from Arnold & Porter to the Commission, AT&T recounted an August 4, 2011, meeting with Commission Staff, in which it stressed further (at 4) that the benefits it expects from the merger include "greater scale economies, such as higher volume discounts on handsets and equipment . . . and the expectation of a higher take-rate for AT&T's LTE service [resulting from AT&T's increased 4G LTE footprint]." The first of these stated benefits confirms that AT&T/T-Mobile will have greater leverage than ever over manufacturers, including the ability to insist on exclusivity and other

[65] *Yankee Group Report* at 6.

[66] *Yankee Group Report* at 7.

[67] *Yankee Group Report* at 7.

[68] *Yankee Group Report* at 7.

[69] *Yankee Group Report* at 7.

restrictive arrangements for game-changing handsets – and underscores the need for a condition to prevent such anticompetitive behavior. The second provides further support for MetroPCS' position that without the ability to provide nationwide 4G LTE, there will be less take-up by MetroPCS' customers, which will further hamper MetroPCS' (and other MSR Carriers') ability to provide the vigorous competition to AT&T/T-Mobile that they tout as justifying this deal – unless a stringent condition is attached requiring that AT&T/T-Mobile offer cost-based voice and data-roaming to the MSR Carriers.

VI. CONCLUSION

The Applicants' *July 20 Ex Parte* does nothing to rebut the clear showing by MetroPCS that stringent conditions relating to critical inputs must be imposed to ensure that consumers get the benefit of increased efficiencies of continued competition and innovation, and that such conditions are essential to assuring that the public interest is protected if the merger is permitted to go forward. Indeed, by positing the continued vitality of MSR Carriers as the linchpin of post-merger competition, the Applicants have only reinforced and further underscored the necessity of imposing such conditions to ensure that those carriers have access to the critical inputs they need to compete.

Respectfully submitted,

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