

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Applications of AT&amp;T Inc. and Deutsche Telekom AG</b>	)	<b>WT Docket No. 11-65</b>
	)	
<b>For Consent To Assign Or Transfer Control Of Licenses and Authorizations</b>	)	

**PETITION TO DENY**

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May 31, 2011

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Pursuant to Section 309(d) of the Communications Act, 47 U.S.C. §309(d), COMPTTEL hereby petitions the Commission to deny the above captioned applications of AT&T and Deutsche Telekom to approve AT&T’s acquisition of T-Mobile USA. AT&T and Deutsche Telekom have failed to meet their burden of demonstrating that the proposed acquisition is in the public interest and for this reason, the Commission must deny the applications.

COMPTTEL is the leading industry association representing competitive telecommunications service providers, integrated communications companies and their supplier partners. COMPTTEL members do business with AT&T and T-Mobile on many levels – they compete directly with AT&T and T-Mobile in the provision of mobile service over their own facilities or through resale; they construct and provide backhaul transport facilities for T-Mobile’s network; and they resell T-Mobile’s wireless service throughout the country and AT&T’s wireless service where AT&T makes it available for resale. Because its members are competitors, vendors and customers of AT&T and T-Mobile, COMPTTEL, acting on behalf of its members, is a party in interest with standing to oppose these applications for transfer of control of licenses and authorizations pursuant to Section 309(d).

## **I. INTRODUCTION AND SUMMARY**

AT&T's proposed acquisition of T-Mobile would not serve the public interest, convenience or necessity and for this reason, the Commission must deny the application. The acquisition will create a significant increase in horizontal market concentration in the mobile telephony/broadband services market by reducing the number of national competitors from four to three, increasing AT&T's market share from 32 percent to 43 percent and vesting control of more than 77 percent of the wireless lines in service in two carriers -- AT&T and Verizon Wireless. AT&T has failed to present evidence of the post-acquisition state of competition in any of the CEAs or CMAs where the Herfindahl-Hirschman Index and spectrum screens signal a need for further review, thereby precluding a determination that the acquisition is not likely to cause competitive harm either through unilateral action of AT&T or through coordinated interaction among the duopolists AT&T and Verizon Wireless.

The acquisition will leave AT&T as the sole national provider using Global System for Mobile ("GSM") technology. As a result, all smaller wireless providers using GSM will be dependent on AT&T for roaming arrangements in order to provide their customers with nationwide, seamless connectivity and will be subject to the rates, terms and conditions that AT&T dictates. It is not possible to negotiate "commercially reasonable" terms and conditions in a monopoly environment because there is no basis for comparison.

The vertical effects of the acquisition will also be anticompetitive. AT&T is the largest provider of the special access facilities that all mobile telephony/broadband service providers use for backhaul to carry traffic from cell sites to the public switched telephone network in its 22 state territory. Due to its dominance of the special access market, AT&T is in a position to raise its downstream rivals' costs of providing mobile telephony/broadband service by manipulating

the rates it charges for backhaul. Through its provision of special access services, it is also in a position to exert control over the quality of the service its rivals provide. AT&T's competitors, including T-Mobile, have been complaining to the Commission for years about the exorbitant prices the incumbent LECs charge for special access facilities. In analyzing the public harms that will flow from the acquisition, the Commission cannot ignore AT&T's ability to suppress competition among its remaining rivals in the mobile telephony/broadband services market by exerting its market power in the special access market.

Similarly, AT&T's acquisition of the second largest non-ILEC affiliated buyer of wireless backhaul facilities will have anti-competitive effects in the upstream market. T-Mobile buys approximately 20 percent of its backhaul facilities from competitive special access providers. Because AT&T has indicated that it will move T-Mobile's backhaul traffic onto its own transport network wherever possible, the competitive carriers that currently provide backhaul to T-Mobile or that could vie for T-Mobile's business in the future will be foreclosed from competing for this business in AT&T's 22 state ILEC territory if the transaction is approved. The loss of such a major customer will increase the difficulty for competitive providers to achieve minimum viable scale and will create a serious risk that competitive providers will either exit the special access market altogether or significantly scale back their investments in special access facilities. The anticompetitive effects will be visited not only on competitive providers of backhaul services, but also on both retail and wholesale purchasers of special access services who will be left with fewer choices in services and providers.

The primary public interest benefit AT&T alleges that the acquisition will produce is that it will alleviate both AT&T's and T-Mobile's spectrum capacity constraints and enable the more efficient use of spectrum, which in turn will result in improved and more cost efficient service to

consumers. There is no question that the growing number of consumers using smartphones and the exploding demand for wireless broadband services is increasing the need for spectrum suitable for wireless data services. But, the need for access to additional spectrum is not unique to AT&T. The Commission needs to address the spectrum issues for the industry as a whole, not by approving a transaction that will provide relief for AT&T alone. Until it does so, AT&T can explore less anti-competitive solutions, including leasing unused spectrum from other carriers.

The acquisition will not preserve or enhance competition or promote a diversity of license holdings, but will instead increase and enhance AT&T's dominance in the mobile telephony/broadband market on both the national and local levels and will allow AT&T to exercise its market power in the special access market to suppress competition in both the downstream mobile telephony/broadband services market and the upstream backhaul market. Approval of the acquisition will also interfere with the Commission's statutory objective to promote economic opportunity and competition by avoiding excessive concentration of licenses. Because AT&T and T-Mobile have failed to demonstrate that any public interest benefits from the acquisition will outweigh the significant competitive harms, the Commission must deny AT&T's application to acquire T-Mobile.

## **II. LEGAL STANDARD**

In reviewing AT&T's acquisition of T-Mobile, the Commission must conduct the public interest analysis required by Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a) and 310(d), to determine whether AT&T and T-Mobile have shown that approval of the acquisition would serve the public interest, convenience and necessity. Sections 214 and 310 require the Commission to weigh the potential public interest harms resulting from the proposed acquisition against the potential public interest benefits "to ensure that, on balance, the transfers

of control serve the public interest, convenience and necessity.” *In the Matter of Applications of VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent To Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, Memorandum Opinion and Order, FCC 01-142, 16 FCC Rcd 9770 at ¶17 (2001). AT&T and T-Mobile bear the burden of proving that the benefits of the acquisition outweigh the potential harms and serve the public interest. *In the Matter of Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act*, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279, at ¶48 (1999). They have failed to do so.

The public interest analysis requires the Commission to consider four factors: “(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits.” *Id.* The Commission’s public interest analysis encompasses the broad objectives of the Act, “which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.” *In the Matter of Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No.

09-194, Memorandum Opinion and Order, FCC 10-116, at ¶23 (rel. June 22, 2010) (“*AT&T/Verizon Order*”). Contrary to these objectives, this acquisition will not preserve or enhance competition or promote a diversity of license holdings, but will instead increase and enhance AT&T’s dominance in the mobile telephony/broadband market on both the national and local levels. Approval of the acquisition would also interfere with the statutory objective to promote economic opportunity and competition by avoiding excessive concentration of licenses established by Congress in Section 309(j)(3)(B) of the Act, 47 U.S.C. §309(j)(3)(B).

In considering the potential competitive effects of the acquisition, the Commission must determine whether there would be a significant increase in horizontal market concentration. “Horizontal transactions raise competitive concerns when they reduce the availability of choices to the point where the resulting firm has the incentive and ability either by itself or in coordination with other firms, to raise prices. . . . Absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances market power or facilitates its use is unlikely to serve the public interest.” *Id.* at ¶31.

AT&T’s acquisition of T-Mobile will create a significant increase in horizontal market concentration in the mobile telephony/broadband service market and will reduce the number of national wireless competitors from four to three. AT&T’s share of the mobile lines in service will increase from 97.5 million lines to 129 million lines and from 32 percent of the total lines in service to 42.79 percent.<sup>1</sup> Thus, the acquisition will clearly significantly enhance AT&T’s

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<sup>1</sup> At the end of the first quarter of 2011, AT&T reported having 97.5 million wireless customers. See “10.2 Percent Wireless Revenue Growth, Record Net Adds and Smartphone Sales Highlight AT&T’s First-Quarter Results,” (Apr. 20, 2011) available at <http://www.att.com/gen/press-room?pid=19727&cdvn=news&newsarticleID=31831&mapcode=financial>. T-Mobile reported that at the end of the first quarter of 2011, it served 33.63 million wireless customers. See “T-Mobile USA Reports First Quarter 2011 Results” (May 6, 2011) available at <http://uk.finance.yahoo.com/news/T-Mobile-USA-Reports-First-businesswireuk-3442230141.html?x=o>.

market power. Post acquisition, AT&T and Verizon Wireless, the other dominant carrier in the wireless market,<sup>2</sup> will together control more than 77 percent of the wireless lines in service and essentially become duopolists. AT&T and T-Mobile have failed to demonstrate that any public interest benefits from the acquisition will outweigh the competitive harms stemming from the concentration of market power in the mobile telephony/broadband services market.

Accordingly, the Commission must deny AT&T's application to acquire T-Mobile.

The Commission must also evaluate the vertical aspects of the proposed acquisition and its impact on the closely related market in which many COMPTTEL members, AT&T, and T-Mobile also participate — the upstream market for backhaul facilities that carry wireless calls from cell towers to the public switched telephone landline network. This backhaul is obtained from carriers providing special access services.

The special access market in the 22-state serving territory where AT&T is the incumbent local exchange carrier ("ILEC") is affected by this merger because T-Mobile buys in this market, primarily from AT&T, but also from a number of third party providers. After the acquisition, it is safe to assume that T-Mobile will buy backhaul exclusively from AT&T throughout AT&T's 22-state ILEC territory, thus foreclosing competition for T-Mobile's business. Indeed, AT&T

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<sup>2</sup> As of the end of the first quarter, Verizon reported having 104 million wireless lines in service. See "Verizon Reports Strong Start to 2011 as Wireless, FiOS and Strategic Services Continue To Generate Profitable Growth," (April 21, 2011), available at [http://www22.verizon.com/investor/investor.portal?\\_nfpb=true&\\_windowLabel=CompanyInfoController\\_1&CompanyInfoController\\_1\\_actionOverride=%2Fcom%2Fverizon%2Fvso%2Finvestor%2Fcompanyinfo%2FgetInvNewsSearchResult&CompanyInfoController\\_1dID=6420&CompanyInfoController\\_1xCategory=News&CompanyInfoController\\_1dDocName=NEWS\\_UCM\\_6](http://www22.verizon.com/investor/investor.portal?_nfpb=true&_windowLabel=CompanyInfoController_1&CompanyInfoController_1_actionOverride=%2Fcom%2Fverizon%2Fvso%2Finvestor%2Fcompanyinfo%2FgetInvNewsSearchResult&CompanyInfoController_1dID=6420&CompanyInfoController_1xCategory=News&CompanyInfoController_1dDocName=NEWS_UCM_6) According to CTIA, as of December 2010, there were 302.9 million wireless subscriber connections. See [http://www.ctia.org/consumer\\_info/service/index.cfm/AID/10323](http://www.ctia.org/consumer_info/service/index.cfm/AID/10323). Unfortunately, the most recent data the Commission has on wireless subscribership is only current as of December 2008. See Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service (Sept. 2010) at Table 11.2.

cites the cost savings the combined company will realize “from a reduction in interconnection and toll expenses *as a result of switching to existing AT&T facilities where possible for transport.*”<sup>3</sup>

Because AT&T is acquiring what is clearly the second largest non-ILEC affiliated buyer of wireless backhaul, the Commission must analyze the competitive consequences of the vertical aspects of this transaction. The damage to competition that will result from AT&T’s purchase of a large customer in the special access market where it already controls over 90 percent of the sales is exacerbated by the way in which AT&T achieved that dominant market share — first as a monopolist before the advent of competition and subsequently, after the introduction of competitive facilities-based services, through its practice of requiring customers to enter into lock-up contracts pursuant to which they must purchase virtually all of their special access facilities from AT&T in order to obtain discounts from the grossly inflated rack rates for the service. The small slice of uncommitted business that may be purchased from carriers other than AT&T makes it difficult for competitors to achieve minimum viable scale and provide the benefits of competition to this market. By taking out a large customer that had in fact been purchasing at least some of its special access facilities from competitors, AT&T will make it even more difficult for competitive providers of special access services to achieve minimum viable scale.

The difficulty in achieving minimum viable scale will create a real risk that competitors will either exit the special access market altogether or significantly scale back their investment in competitive special access facilities. As a result, the remaining customers for competitive special access facilities (including the handful of mobile telephony/broadband service providers

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<sup>3</sup> Moore Declaration at ¶35 (emphasis added).

that will divide up the approximately 20 percent of the market not controlled by AT&T and Verizon post-acquisition) will have reduced choices in services and providers and, in AT&T's 22-state territory, will have little alternative to AT&T's monopoly services. As more customers commit more of their special access purchases to lock-up contracts with AT&T, the supply of competitive special access providers and facilities will dry up, furthering the flight of customers into the arms of the monopoly provider, AT&T. In short, this is a classic vertical merger case that has the potential to harm competition by changing the acquired company's incentives for dealing in upstream and downstream markets. Moreover, AT&T's control of the special access market will enable it to raise the costs of its rivals in the mobile telephony/broadband services market.

Given these circumstances, the Commission cannot help but conclude that the acquisition will substantially frustrate and impair its implementation of the Communications Act's broad policy objectives of preserving and enhancing competition and accelerating private sector deployment of advanced services.<sup>4</sup> Accordingly, the Commission must deny AT&T's and T-Mobile's applications.

### **III. AT&T HAS NOT SHOWN THAT THE PROPOSED ACQUISITION WILL NOT ADVERSELY AFFECT COMPETITION IN THE MOBILE TELEPHONY/BROADBAND SERVICES MARKET**

Although the proposed acquisition will make AT&T the nation's largest wireless provider by market share, the Commission must analyze the competitive impact of the acquisition on a much more granular basis. In previous similar transactions, the Commission has determined that the appropriate product market is the mobile telephony/broadband services

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<sup>4</sup> *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4, at ¶ 23 (rel. Jan. 20, 2011) (“*Comcast/NBCU Order*”).

market which is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks.<sup>5</sup> The appropriate geographic market is local and is defined as the Component Economic Area (“CEA”) and/or the Cellular Market Area (“CMA”).<sup>6</sup>

In analyzing whether there will be a significant increase in horizontal market concentration as a result of a transaction, the Commission applies a two-part initial screen. The first part of the screen considers changes in market concentration in the provision of mobile telephony/broadband services after the transaction and is based on the size of the post-transaction Herfindahl-Hirschman Index (“HHI”) and on the change in the HHI.<sup>7</sup> The initial screen is designed “to eliminate from further review those markets in which there is clearly no competitive harm.”<sup>8</sup> A market is subject to further scrutiny if its post-transaction HHI (1) would be both greater than 2800 and increase by 100 or more or (2) would increase by 250 or more.<sup>9</sup> The second part of the screen examines the spectrum available on a market-by-market basis for the

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<sup>5</sup> *AT&T/Verizon Order* at ¶35.

<sup>6</sup> *Id.* at ¶36.

<sup>7</sup> The Department of Justice’s Antitrust Guidelines consider a market to be highly concentrated if the HHI exceeds 1800. See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 1.5. In contrast, the Commission uses a more liberal screen – an HHI of 2800 or greater – to identify markets where competition may be adversely affected by a merger or acquisition. *AT&T/Verizon Order* at ¶42. Post-acquisition, AT&T’s national HHI would exceed 1800 and the post-acquisition national HHIs of AT&T and Verizon Wireless together would exceed 3000 demonstrating that the national mobile telephony/broadband market is highly concentrated even by the Commission’s more liberal standard.

<sup>8</sup> *AT&T/Verizon Order* at ¶33.

<sup>9</sup> *Id.* at ¶42.

provision of mobile telephony/broadband services.<sup>10</sup> A market is subject to heightened scrutiny if post-transaction the surviving firm would have a 10 percent or greater interest in: 95 MHz or more of PCS, SMR and 700 MHz spectrum where neither BRS or AWS-1 spectrum is available; 115 MHz or more of spectrum where BRS spectrum is available but AWS-1 spectrum is not available; 125 MHz or more of spectrum where AWS-1 spectrum is available but BRS spectrum is not available; or 145 MHz or more of spectrum where both AWS-1 and BRS spectrum are available.<sup>11</sup>

The HHI and spectrum screens are designed to flag markets where the acquisition may cause competitive harms either through unilateral action by AT&T or through coordinated interaction among firms competing in the CMAs.<sup>12</sup> Unilateral effects would arise where AT&T would find it profitable after the acquisition to raise prices or suppress output.<sup>13</sup> Coordinated effects would arise in markets where only a few providers account for most of the sales and those providers may be able to exercise market power by either explicitly or tacitly coordinating their actions.<sup>14</sup> AT&T has failed to demonstrate that these initial screens raise no concerns that the acquisition will result in unilateral or coordinated anticompetitive behavior.

While AT&T agrees that competition must be analyzed at the local level,<sup>15</sup> it provides no evidence on the state of competition and no analysis of its own market share in any of the CEAs

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<sup>10</sup> *Id.* at ¶32.

<sup>11</sup> *Id.* at ¶42.

<sup>12</sup> *Id.* at ¶49.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶59.

<sup>15</sup> AT&T/T-Mobile Public Interest Statement at 74.

or CMAs where it provides service, either before or after the acquisition. The Commission needs this information in order to calculate the post-acquisition HHI and the increase in the HHI as a result of the transaction and to identify the CEAs and CMAs that require further review. Nor did AT&T proffer other evidence of market conditions that may affect its ability post-acquisition to engage in unilateral or coordinated activity, such as the number of competitive service providers offering competitive nationwide service plans in each CEA and CMA, the coverage of those providers' networks, and their market shares.<sup>16</sup> Based on the information, or lack thereof, presented by the applicants, the Commission cannot eliminate from further review any local market in which AT&T and T-Mobile provide service because it lacks the data to draw a reasoned conclusion that the acquisition will not cause competitive harm.<sup>17</sup>

The Commission has found that as a general rule, service providers with market shares of less than 30 percent are unlikely to be able to successfully raise prices or otherwise behave unilaterally in an anticompetitive manner.<sup>18</sup> Given AT&T's post-transaction 42.8 percent national market share, there are bound to be a significant number of CEAs and CMAs where AT&T's post-transaction market share will exceed 30 percent and where AT&T would be able to successfully raise prices, restrict output or otherwise behave anticompetitively.<sup>19</sup> AT&T has failed to meet its burden of proving that such competitive harm is not likely to result in any of the local markets impacted by the acquisition. The Commission cannot possibly rule on the

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<sup>16</sup> *AT&T/Verizon Order* at ¶¶58, 62, 63.

<sup>17</sup> AT&T concedes that the HHI screen flags at least some markets, but does not identify which markets those are. See AT&T/T-Mobile Public Interest Statement at 76.

<sup>18</sup> See *AT&T/Verizon Order* at ¶65.

<sup>19</sup> See *United States v. Philadelphia National Bank*, 374 U.S. 321, 364, 371 (1963) (a merger resulting in a single company's control of 30 percent of the market would result in undue concentration and must be enjoined as inherently likely to substantially lessen competition).

proposed acquisition without carefully analyzing the distinct likelihood that it will cause competitive harm in each and every one of the CEAs and CMAs where AT&T's post-acquisition market share will be 30 percent or more, either through the unilateral actions of AT&T or through the possible coordinated activity of AT&T and Verizon.

As the AT&T and T-Mobile application demonstrates, AT&T's spectrum holdings would also exceed the triggers in numerous local markets involved in the acquisition. The spectrum screen identifies 202 CMAs<sup>20</sup> where spectrum aggregation by AT&T may result in competitive harms either through unilateral action by AT&T or through coordinated interaction among firms competing in the CMAs.<sup>21</sup> AT&T's spectrum aggregation chart, however, likely understates the number of CMAs where the spectrum trigger is exceeded and the actual amount of spectrum that AT&T will have if all of its pending acquisitions are approved. For example, although the spectrum that AT&T proposes to acquire from Qualcomm and certain other licensees is included in its chart,<sup>22</sup> the spectrum that it proposes to acquire from Knology of Kansas, Inc., Windstream Iowa Communications and Windstream Lakedale<sup>23</sup> is not included.

AT&T contends that its acquisition of T-Mobile will not result in competitive harm because the mobile telephone/broadband market is intensely competitive and 75 percent of Americans live in areas where they may choose from five different wireless providers.<sup>24</sup> Post-acquisition, however, the number of national providers will drop from four to three, the number

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<sup>20</sup> See AT&T/T-Mobile Public Interest Statement at 76 and Appendix A.

<sup>21</sup> See *AT&T/Verizon Order* at ¶49.

<sup>22</sup> AT&T/T-Mobile Public Interest Statement, Appendix A at 80, n. 1.

<sup>23</sup> See n. 30 below.

<sup>24</sup> AT&T/T-Mobile Public Interest Statement at 70.

of providers in over 150 of the 202 CMAs where AT&T exceeds the spectrum trigger will drop below five and only three providers will remain in 33 CMAs.<sup>25</sup> AT&T's descriptions of its competitors cite the number of customers they serve nationwide or region wide, but provide no information with respect to the number or percentage of customers that they serve in any of the 202 CMAs where AT&T will exceed the spectrum cap post-acquisition or in any of the other local markets where the HHI screen signals the need for further review.<sup>26</sup>

Moreover, contrary to AT&T's assertion, the mobile telephony/broadband market is highly concentrated. According to the Department of Justice's Antitrust Guidelines, a market is highly concentrated if the HHI exceeds 1800.<sup>27</sup> In 2008, the average HHI for the mobile telephony/broadband industry was 2848, an increase of almost 700 points or 30 percent since 2003.<sup>28</sup> The tremendous increase in the HHI is in large part attributable to the consolidation that has occurred in the mobile telephony/broadband industry<sup>29</sup> and the Commission has consistently approved the acquisition of smaller competitors by large national carriers.<sup>30</sup> AT&T's proposed

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<sup>25</sup> AT&T/T-Mobile Public Interest Statement at Appendix C.

<sup>26</sup> Christopher Declaration at ¶¶3, 22, 60-68, 73-75; AT&T/T-Mobile Public Interest Statement at 78-92.

<sup>27</sup> U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 1.5.

<sup>28</sup> Fourteenth Report at ¶51.

<sup>29</sup> Government Accountability Office, Enhanced Data Collection Could Help FCC Better Monitor Competition In The Wireless Industry, Report To Congressional Requesters, GAO-10-779 at 10-11 (July 2010) ("GAO Report").

<sup>30</sup> Among the transactions the Commission has approved in the last ten years are Deutsche Telekom/Voice Stream Wireless, IB Docket No. 00-187 (Apr. 2001); AT&T Wireless/Telecorp PCS, WT Docket No. 01-315 (Feb. 2002); Cingular Wireless/Next Wave, WT Docket No. 03-217 (Feb. 2004); Cingular Wireless/AT&T Wireless, WT Docket No. 04-70 (Oct. 2004); Verizon Wireless/Qwest Wireless, WT Docket No. 04-264 (Dec. 2004); ALLTEL Wireless/Western Wireless, WT Docket No. 05-50 (July 2005); Sprint/Nextel, WT Docket No.

acquisition of T-Mobile is the biggest transaction yet. The industry consolidation and aggregation of spectrum has occurred at the expense of smaller carriers. By virtue of their sheer size, AT&T and Verizon Wireless have been able to exploit their significant economies of scale to dominate the acquisition and retention of customers, the design of network equipment such as chipsets that utilize only their spectrum holdings and the negotiation of exclusive contracts with handset manufacturers for the most advanced devices, that are most appealing to customers,<sup>31</sup> such as the iPhone.

In an attempt to downplay the significance of the loss of T-Mobile as a competitor, AT&T disparages the nature and quality of its service and repeatedly asserts that it does not

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05-63 (Aug. 2005); ALLTEL/Midwest Wireless, WT Docket No. 05-339 (Oct. 2006); AT&T/Dobson, WT Docket No. 07-153 (Nov. 2007); AT&T Mobility/Aloha Spectrum, WT Docket No. 07-265 (Feb. 2008); T-Mobile/SunCom, WT Docket No. 07-237 (Feb. 2008); Verizon Wireless/ALLTEL, WT Docket. 08-95 (Nov. 2008); AT&T/Centennial, WT Docket No. 08-246 (Nov. 2009); and AT&T/Verizon Wireless, WT Docket No. 09-104 (June 2010) involving the ALLTEL licenses Verizon was required to divest. In addition to its application for approval of the acquisition of T-Mobile, AT&T also currently has applications pending for approval to acquire spectrum from Qualcomm, WT Docket No. 11-18; to acquire a 700 MHz license covering one CMA in Massachusetts from 700 MHz LLC, ULS File No. 0004621016; to acquire a 700 MHz license covering one CMA in Kansas from Knology of Kansas, Inc., ULS 0004635440; to acquire 700 MHz licenses covering 17 CMAs in Minnesota and Wisconsin from the Shareholders of Redwood 700 Inc., ULS File No. 0004643747; and to acquire 700 Mhz licenses covering 17 CMAs in Illinois, Iowa and Minnesota from Windstream Iowa Communications, Inc. and Windstream Lakedale, Inc., ULS File Nos. 0004681771 and 0004681773. See Public Notice, “AT&T Mobility Spectrum LLC And 700 MHz LLC Seek FCC Consent To The Assignment Of One Lower 700 MHz Band C Block License,” DA 11-921 (rel. May 19, 2011); Public Notice, “AT&T Mobility Spectrum LLC and Knology of Kansas, Inc. Seek FCC Consent To The Assignment Of One Lower 700 MHz Band B Block License,” DA 11-922 (May 19, 2011); Public Notice, “Shareholders of Redwood 700 Inc. and AT&T, Inc. For Transfer Of Control Of Lower 700 MHz Band B and C Block Licenses Held By Redwood Wireless Corp.,” DA 11-943 (rel. May 24, 2011); Public Notice, “AT&T Mobility LLC and Windstream Iowa Communications, Inc. and Windstream Lakedale, Inc. Seek FCC Consent To The Assignment Of Lower 700 MHz Band B Block and Advanced Wireless Service Licenses, DA 11-955 (rel. May 26, 2011).

<sup>31</sup> GAO Report at 17-22.

closely compete with T-Mobile.<sup>32</sup> The Commission should give AT&T's self-serving assessments of T-Mobile little weight, especially those that are inconsistent with, or totally unsupported by, the facts, a few examples of which are discussed below.

- AT&T contends that wireless providers are vigorously advertising their service improvements to differentiate themselves in the marketplace and win customers and that such advertising evidences the competitiveness of the mobile telephony/broadband market.<sup>33</sup> Among the more memorable advertisements are the T-Mobile myTouch 4G television commercials that tout the benefits of T-Mobile's 4G service over AT&T's 3G service. If, as AT&T argues, a wireless provider's use of advertising to differentiate itself in the marketplace is evidence of competition, T-Mobile's aggressive advertising of the benefits of its 4G network over AT&T's 3G network undermines AT&T's contention that it does not closely compete with T-Mobile.<sup>34</sup>
- AT&T alleges that T-Mobile "has been relatively unsuccessful in attracting data-intensive subscribers."<sup>35</sup> In its first quarter 2011 financial report, T-Mobile stated that data service revenues represented 29 percent of blended ARPU and that "3G/4G smartphone customers now account for 27 percent of total customers."<sup>36</sup> While AT&T

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<sup>32</sup> Carleton Declaration at ¶¶ 121-131, 153-156; Christopher Declaration at ¶¶ 23-27, 32, 35, 46; AT&T/T-Mobile Public Interest Statement at 70, 71, 76, 98, 102.

<sup>33</sup> AT&T/T-Mobile Public Interest Statement at 67-68.

<sup>34</sup> AT&T/T-Mobile Public Interest Statement at 70, 71, 76, 98, 102.

<sup>35</sup> Carleton Declaration at ¶125.

<sup>36</sup> "T-Mobile USA Reports First Quarter 2011 Results" (May 6, 2011) available at <http://uk.finance.yahoo.com/news/T-Mobile-USA-Reports-First-businesswireuk-3442230141.html?x=o>.

describes itself as the “U.S. market leader in wireless data service,”<sup>37</sup> T-Mobile is not that far behind in terms of percentage of wireless data revenues and percentage of smartphone users, especially considering the headstart AT&T was able to achieve due to its exclusive contract for the iPhone. At the end of the first quarter of this year, AT&T reported that its postpaid subscriber ARPU was \$63.39 and postpaid data ARPU was \$23.35,<sup>38</sup> representing about 36.8 percent of the total. AT&T also reported that 46.2 percent of its 68.1 million postpaid subscribers use smartphones,<sup>39</sup> representing approximately 31 million subscribers or 32 percent of its total subscribers. While T-Mobile’s data numbers are somewhat lower than those of the “market leader,” T-Mobile’s performance can hardly be dismissed as unsuccessful.

- AT&T also alleges that T-Mobile “cannot be considered a maverick by virtue of having introduced innovative pricing plans,” and that none of the pricing innovations identified in the Commission’s annual reports summarizing the state of wireless competition were introduced by T-Mobile.<sup>40</sup> AT&T is mistaken. T-Mobile’s pricing innovations have been cited in the Commission’s last three annual reports. The Commission’s Fourteenth Report on the state of wireless competition singled out T-Mobile’s pricing of its unlimited service offerings, which include bundled voice, text and data offerings as well

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<sup>37</sup> See “AT&T Sets The Record Straight On Verizon Ads,” available at <http://www.att.com/gen/press-room?pid=14002>.

<sup>38</sup> “10.2 Percent Wireless Revenue Growth, Record Net Adds and Smartphone Sales Highlight AT&T’s First-Quarter Results,” (Apr. 20, 2011) available at <http://www.att.com/gen/press-room?pid=19727&cdvn=news&newsarticleid=31831&mapcode=financial>.

<sup>39</sup> *Id.*

<sup>40</sup> Carleton Declaration at ¶154.

as an unlimited voice only calling plan, as prompting both Verizon Wireless and AT&T to lower the prices of their unlimited service offerings.<sup>41</sup> The Thirteenth Report cited T-Mobile's unlimited voice and unlimited text messaging plan introduced in 2008 together with its 50 percent discount on additional lines in family plans.<sup>42</sup> And the Twelfth Report cited T-Mobile's myFaves unlimited free calling plan to and from a small number of designated numbers.<sup>43</sup>

AT&T's enthusiastic endorsement of the competitiveness of the mobile telephony/broadband market and its dismissal of T-Mobile as an effective competitor aside, the acquisition will take out a major national competitor and will catapult AT&T into first place among the nation's mobile telephony/broadband providers with a commanding lead over the second place provider in terms of market share. The Commission cannot approve this transaction based on the information provided to date by the applicants.

#### **IV. THE ACQUISITION WILL LEAVE AT&T AS THE SOLE NATIONAL GSM PROVIDER**

Today AT&T and T-Mobile are the only nationwide mobile telephony/broadband service providers using Global System for Mobile ("GSM") technology.<sup>44</sup> If the Commission approves

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<sup>41</sup> *In the Matter of Report and Analysis of Competitive Market Conditions With Respect To Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81 at ¶¶ 91, 92 and Table 10 (rel. May 20, 2010).

<sup>42</sup> *In the Matter of Report and Analysis of Competitive Market Conditions With Respect To Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 08-27, Thirteenth Report, FCC 09-54 at ¶ 112 (rel. Jan. 16, 2009).

<sup>43</sup> *In the Matter of Report and Analysis of Competitive Market Conditions With Respect To Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 07-71, Twelfth Report, FCC 08-28 at ¶ 113 (rel. Feb. 4, 2008).

<sup>44</sup> See AT&T/T-Mobile Public Interest Statement at 7; Testimony of Steven K. Berry, President and Chief Executive Officer, Rural Cellular Association, before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, "How

AT&T's acquisition of T-Mobile, AT&T will be the *sole* nationwide provider of roaming capability to smaller wireless providers using GSM. The acquisition will thereby give AT&T absolute control over the rates, terms and conditions to which its smaller GSM competitors must agree in order to provide their customers nationwide seamless connectivity, an essential attribute to competing effectively in the wireless market.<sup>45</sup> If these smaller carriers are unable to obtain affordable roaming rates, terms and conditions, AT&T's market power in the wireless market as a whole will be further entrenched.

The Commission has licensed smaller, non-national carriers to serve discrete geographic areas. They may build out their entire licensed areas and still not be able to provide nationwide coverage on their own.<sup>46</sup> As a result, smaller competitors that use GSM technology are currently dependent on AT&T or T-Mobile for roaming rights in order to offer their customers the ability to communicate when they travel outside their home networks. The availability of nationwide roaming arrangements is vital to a non-nationwide provider's ability to compete,<sup>47</sup> and provides consumers with a greater competitive choice in providers. If the Commission approves this acquisition, GSM carriers will be at the complete mercy of AT&T.

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Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?" at 8 (May 26, 2011) ("Berry Testimony").

<sup>45</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52, at ¶ 18 (2011) ("Data Roaming Order") citing the Commission's prior finding "that lack of roaming can constitute a significant hurdle to new competition and can delay or deter entry into a market because a provider seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many years."

<sup>46</sup> See Berry Testimony at 3.

<sup>47</sup> Berry Testimony at 8.

In the *Data Roaming Order*, the Commission recognized, that “[c]onsolidation in the mobile wireless industry has reduced the number of potential roaming partners for some of the smaller, regional and rural providers...[and] this consolidation may have simultaneously reduced the incentives of the largest two providers [AT&T and Verizon Wireless] to enter into such arrangements by reducing their need for reciprocal roaming.”<sup>48</sup> The Commission also noted that there is a history of smaller providers having significant difficulties in obtaining data roaming arrangements from AT&T and Verizon Wireless.<sup>49</sup> The data roaming rules that the Commission adopted require facilities-based providers of commercial mobile data services to offer data roaming arrangements to other providers on commercially reasonable terms and conditions (subject to certain limitations).<sup>50</sup> “Commercially reasonable,” however, is undefined in the rules and virtually meaningless in a monopoly situation because there is no point of comparison. As Steven Berry, President and Chief Executive Officer of the Rural Cellular Association, testified before Congress, “even if the combined AT&T/T-Mobile were willing (or required) to negotiate a roaming arrangement, it could charge monopoly rents without fear of price competition.”<sup>51</sup>

And as the sole nationwide provider of wireless GSM services, AT&T will be able to wield tremendous influence over GSM device manufacturers. Indeed, AT&T could exert this influence to ensure that GSM devices are not interoperable on competitive carriers’ networks.

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<sup>48</sup> Data Roaming Order at ¶ 26.

<sup>49</sup> *Id.* at ¶¶ 24-25. *See also* Berry Testimony at 8 (“AT&T has consistently rebuffed our members when they seek to negotiate GSM roaming arrangements on fair and reasonable terms.”)

<sup>50</sup> Data Roaming Order at Appendix A. Verizon has appealed the Commission’s Data Roaming Order to the D.C. Circuit.

<sup>51</sup> Berry Testimony at 8.

Stephen Berry testified that device “interoperability is a prerequisite to a well-functioning wireless marketplace; it encourages innovation, gives consumers more choices, reduces cost to end-users, and enables smaller carriers to provide stronger competition to major carriers like AT&T.”<sup>52</sup> AT&T has been successful in the past “at preventing interoperability for certain devices.”<sup>53</sup> With its increased buying power as the sole national GSM provider, AT&T will have the ability to make it even more difficult “for rural and regional carriers to offer cutting-edge devices, or devices that can roam seamlessly.”<sup>54</sup> Approval of AT&T’s acquisition of T-Mobile will do anything but promote or enhance competition among carriers using GSM technology.

**V. THE VERTICAL EFFECTS OF THE ACQUISITION WILL ALSO BE ANTICOMPETITIVE**

In weighing the public interest harms of AT&T’s acquisition of T-Mobile, the Commission must also analyze the anticompetitive effects that the concentration of market power in AT&T will have as a result of the vertical integration of T-Mobile. These anticompetitive effects will surface in at least three different ways. First, through its control of the special access market, AT&T will be able to raise its rivals’ costs of doing business by raising the rates it charges for backhaul facilities. Second, AT&T will eliminate a large customer for competitive special access facilities, thereby harming the providers of those facilities and the customers that depend on those facilities for competitive pricing. Third, the acquisition will likely intensify the challenges faced by mid-sized and smaller mobile telephony/broadband providers in obtaining access to the handsets most desired by customers.

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<sup>52</sup> Berry Testimony at 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

### **A. AT&T's Ability To Raise Its Remaining Rivals' Costs of Doing Business**

In addition to the likelihood that the post-acquisition AT&T could engage in anticompetitive behavior in the provision of mobile telephony/broadband services at the expense of its rivals, AT&T is also in a position to raise its rivals' costs of providing service as a result of its dominance in the special access market. Mobile telephony/broadband service providers use special access services as backhaul connections that "link [their] cell sites to wireline networks, carrying wireless voice and data traffic for routing and onward transmission."<sup>55</sup> Wireless providers "purchase special access services, including DS1s and DS3s, from third parties for backhaul."<sup>56</sup> Special access connections to cell towers, mobile switching centers, wireless base stations and to the public switched telephone network are thus critical and integral network inputs for all providers of mobile telephony/broadband services. As the Commission has acknowledged, backhaul costs "currently constitute a significant portion of a mobile wireless operator's network operating expense" and "cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace."<sup>57</sup> The rates mobile telephony/broadband providers pay AT&T, Verizon and other incumbent wireline carriers for the special access backhaul facilities they need to connect their networks represent a significant expense for AT&T's wireless competitors.<sup>58</sup> Sprint recently testified that it "must pay more than \$2 billion a year in backhaul fees to its competitors" in the wireless market, AT&T and

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<sup>55</sup> Fourteenth Report at ¶ 293.

<sup>56</sup> *Id.* at ¶ 295.

<sup>57</sup> *Id.* at ¶ 296.

<sup>58</sup> GAO Report at 41.

Verizon.<sup>59</sup> Through its control of the availability and pricing of these critical backhaul facilities throughout its 22 state wireline service territories, AT&T has the ability to raise its rivals' costs of providing mobile telephony/broadband service as well as exert control over the quality of service its rivals provide.

AT&T's competitors, including T-Mobile, have been complaining to the Commission for years about the exorbitant price of special access facilities.<sup>60</sup> Four years ago, T-Mobile argued before the Commission that AT&T had both the ability and the incentive to discriminate against its wireless competitors in favor of its wireless affiliate because of its dominance in the special access marketplace.<sup>61</sup> Last year, the GAO recommended that the Commission collect and analyze more detailed data on special access rates in order to better assess competition in the wireless industry and the extent to which the Commission's deregulation of special access services has favored the large national carriers and hindered their smaller competitors.<sup>62</sup> The GAO stated:

While FCC acknowledges that it has authority to collect special access rate data, it does not regularly monitor and measure the development of competition for special access. However, FCC is examining the current state of competition for special access services to determine the level of competition and ensure that rates for these services are just and reasonable. To the extent rates are not just and reasonable, special access may serve as a barrier to entry and growth for some wireless carriers. . . . [T]he current structure of the market for special access services may have significant negative effect on competition in

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<sup>59</sup> *Written Testimony of Daniel R. Hesse Chief Executive Officer Sprint Nextel Corporation Re: Proposed AT&T/T-Mobile Merger Before The Senate Judiciary Committee, Subcommittee On Antitrust, Competition Policy And Consumer Rights*, at 6 (May 11, 2011).

<sup>60</sup> See Comments, reply comments and ex parte presentations filed in WC Docket No. 05-25 and RM-10593.

<sup>61</sup> Comments of T-Mobile USA, Inc. filed in WC Docket No. 05-25 and RM 10593 on August 8, 2007 at 5.

<sup>62</sup> GAO Report at 26, 40.

the wireless industry. Without data on these rates, it is difficult to assess the extent to which the special access market creates barriers to entry and growth.<sup>63</sup>

In evaluating the potential public interest harms of the T-Mobile acquisition, the Commission must weigh the effect of AT&T's ability to manipulate the special access rates it charges its mobile telephony/broadband service competitors as a means of suppressing competition. Ironically, AT&T points to T-Mobile's lack of access to capital to upgrade its network and deploy LTE technology now that its parent Deutsche Telekom is no longer providing funding as a reason that the proposed acquisition will serve the public interest.<sup>64</sup> T-Mobile might not be faced with such financial challenges if it had not been forced to pay such exorbitant special access rates to AT&T. As T-Mobile has told the Commission, having to expend its "limited resources on exorbitant [special access] fees in lieu of investing in improved services, including wireless broadband, and expanded coverage areas" has hurt consumers.<sup>65</sup> "If more competitive special access rates existed, T-Mobile and other service providers could invest a much higher percentage of their resources in network expansion, new and improved wireless broadband services, and other customer-focused improvements. This is increasingly important as wireless providers deploy 3G and more advanced services, which require substantially more backhaul than earlier generations of wireless services."<sup>66</sup> Just last year, T-Mobile reported that it is forced to purchase "ILEC backhaul in most of its 3G coverage area, which includes about 210 million people that are primarily in cities and suburbs. In the smaller

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<sup>63</sup> GAO Report at 41.

<sup>64</sup> AT&T/T-Mobile Public Interest Statement at 32-33; Langheim Declaration at ¶¶14-15.

<sup>65</sup> Comments of T-Mobile USA, Inc. filed in WC Docket No. 05-25 and RM 10593 on August 8, 2007 at 8.

<sup>66</sup> *Id.*

communities and rural areas that make up the rest of its coverage area, T-Mobile has been unable to secure sufficient reasonably priced backhaul to roll out 3G services.”<sup>67</sup>

Unfortunately, special access rate relief did not come soon enough for T-Mobile, but the candid assessments of one of the parties to this transaction of the negative impact that exorbitant special access rates has had on its ability to invest in and upgrade its network should be given great weight by the Commission. The fact that one of the dominant sellers of those exorbitantly priced special access services is the purchaser in this proposed transaction clearly demonstrates that AT&T has both the incentive and the ability to raise its rivals’ costs of doing business for its own competitive advantage.

#### **B. The Loss Of A Significant Backhaul Customer**

Although AT&T and Verizon continue to supply the majority of T-Mobile’s backhaul, T-Mobile does use competitive transport providers, including COMPTTEL members, for approximately 20 percent of its cell sites.<sup>68</sup> Because AT&T has indicated that it will move T-Mobile’s backhaul traffic on to its own transport network wherever possible,<sup>69</sup> the competitive carriers that currently provide backhaul to T-Mobile or that could vie for T-Mobile’s business in the future will be foreclosed from competing for this business in AT&T’s 22 state ILEC territory if the transaction is approved. The loss of such a major customer will increase the difficulty for competitive providers to achieve minimum viable scale and will create a serious risk that competitive providers will either exit the special access market altogether or significantly scale back their investment in special access facilities. Any such reduction in investment in

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<sup>67</sup> Letter dated May 6, 2010 from Kathleen O’Brien Ham, T-Mobile USA Inc., to Marlene Dortch, FCC, filed in WC Docket No. 05-25.

<sup>68</sup> *Id.*

<sup>69</sup> Moore Declaration at ¶35.

competitive special access facilities will harm not only backhaul purchasers, but all purchasers of special access services who will be left with fewer choices in services and providers.

Where, as here, merging parties buy from or sell to each other, the Commission must analyze the potential competitive harms that may arise from the vertical aspects of the transaction. As a customer of both AT&T and competitive backhaul providers, T-Mobile's acquisition by AT&T will most definitely reduce competition in the backhaul market in AT&T's 22 state ILEC territory by removing one of the largest purchasers. The Commission has recognized that wireless data services continue to increase as a percentage of mobile telephony/broadband service providers' overall traffic, that such services consume vast amounts of bandwidth and that access to sufficient backhaul capacity to support increasing use of wireless data services will become more critical over time.<sup>70</sup> With the growing importance of wireless backhaul and the increased demand for wireless backhaul capacity, mobile telephony/broadband service providers are now the largest purchasers of special access both from AT&T and from competitive providers, and their importance as buyers of special access is growing rapidly, and is expected to continue to grow.<sup>71</sup> T-Mobile states that by 2015, it "expects data traffic on its network to be at least 20 times that of the 2010 level."<sup>72</sup> Consistent with this trend, while "voice minutes have leveled off. . . "this has been offset by rapidly increasing use of wireless data applications including texting, email, and Internet access."<sup>73</sup>

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<sup>70</sup> Fourteenth Report at ¶¶293, 296.

<sup>71</sup> Fourteenth Report at ¶ 296 n. 785 citing Verizon Wireless comments that "the size of the backhaul market will grow from \$3 billion annually to \$8 to \$10 billion in the next three to five years, driven in large part by increases in wireless data traffic.").

<sup>72</sup> Larsen Declaration at ¶13.

<sup>73</sup> Carlton Declaration at ¶14.

The loss of T-Mobile's substantial backhaul business will disproportionately adversely impact competitive suppliers. Because of the ILECs' lock-up contracts that require customers to purchase the vast majority of their special access circuits from the ILECs in order to qualify for discounts, competitive suppliers largely compete for growth in demand that is not covered by the contracts. T-Mobile's anticipated explosive growth in data traffic through 2015 means that it would be in a position over the next few years to purchase significantly more backhaul facilities from competitive providers than it is buying today. Approval of the acquisition will effectively put that business, at least the backhaul business in AT&T's ILEC footprint, out of the reach of competitors.

The loss of T-Mobile's substantial backhaul business will also penalize competitive suppliers to the extent they have invested large amounts of scarce capital in facilities used to serve T-Mobile. In light of AT&T's declared intent to move T-Mobile's special access traffic to its own network wherever possible (and that would include all T-Mobile special access traffic in AT&T's 22 state ILEC region), the incentive of competitive providers to invest in new or additional facilities will be reduced to the extent that they cannot achieve the minimum viable scale to compete. By reducing the volume of potential special access sales available to competitors, AT&T's acquisition of T-Mobile will threaten competition in the upstream backhaul market, thereby diminishing the availability of competitive choice in backhaul facilities for other non-ILEC affiliated mobile telephony/broadband service providers. The disincentives to investment that the loss of T-Mobile's business will create will also adversely impact the availability of competitive choice for all other purchasers of special access facilities, both retail and wholesale.

Approval of the acquisition may also mean that the competitive providers that have invested in facilities to serve T-Mobile will be unable to recoup the costs of those investments. The facilities that competitors have constructed for T-Mobile would not necessarily be adaptable for use by other customers. For example, T-Mobile's cell sites are frequently located in remote areas where there are no other customers at or near the location. Similarly, competitors will have invested capital to build facilities into T-Mobile's switching centers, and those facilities will not be of use to anyone other than T-Mobile and ultimately, AT&T. Thus, competitors that have invested capital to construct facilities for use by T-Mobile may very well find those investments stranded as soon as AT&T can move T-Mobile's traffic onto its own network.

AT&T's proposed acquisition of T-Mobile presents a classic example of a vertical integration that should be denied. The harms resulting from the acquisition will have an adverse impact on the upstream special access market, affecting not only mobile telephony/broadband service providers, but also other buyers of special access. The competitive harms in the special access market will in turn lead to competitive harms in the downstream market of retail mobile telephony/broadband service.

The Department of Justice precisely described the harms that are likely to result from AT&T's acquisition of T-Mobile in its description of vertical mergers in the Comcast/NBC Universal case. DOJ stated that vertical mergers are

those that occur between firms at different stages of the chain of production and distribution. Vertical mergers have the potential to harm competition by changing the merged firm's ability or incentives to deal with upstream or downstream rivals. For example, the merger may give the vertically integrated entity the ability to establish or protect market power in a downstream market by denying or raising the price of an input to downstream rivals that a stand-alone upstream firm otherwise would sell to those downstream firms. The merged firm may find it profitable to

forego the benefits of dealing with its rivals in order to hobble them as competitors to its own downstream operations.<sup>74</sup>

The combination of T-Mobile, a large independent buyer of special access services used for backhaul, with AT&T, the dominant supplier of special access connections in its 22-state ILEC footprint, will have serious adverse consequences for the upstream special access market. Although T-Mobile buys the vast majority of its backhaul facilities from ILECs, it does take advantage of special access offerings from competitive carriers for its remaining special access needs. Post-acquisition AT&T will have no incentive to deal with upstream rivals – competitive special access providers—and has already announced its intention to shift T-Mobile’s non-AT&T special access services in the AT&T ILEC territory to AT&T’s ILEC operations.

In addition to AT&T’s ability to unilaterally hamper competition in the special access market, AT&T and Verizon Wireless will be able to reap the benefits of their duopoly in their roles as the two largest purchasers of backhaul. AT&T and Verizon Wireless will have the ability and the incentive to purchase the vast amounts of backhaul that they use only from one another in each other’s ILEC footprints and in so doing, drive competitive backhaul providers out of the market.

AT&T will also be able to protect its market power in the downstream wireless market by raising the price of a critical input – special access backhaul – to its rivals in the mobile telephony/broadband market. AT&T may find it “profitable to forego the benefits of dealing with its rivals in order to hobble them as competitors to its own downstream operations.” The Commission has shown acute awareness of the threat to competition in the mobile telephony/broadband market that can result from high backhaul costs explaining that “cost-

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<sup>74</sup> *U.S. et al., v. Comcast Corp*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), Competitive Impact Statement at 20.

efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace.”<sup>75</sup>

Elimination of T-Mobile as an independent purchaser of wireless backhaul facilities is also likely to slow innovation and thereby harm consumers. The Commission has noted that wireless carriers are increasingly interested in transitioning from TDM to Ethernet and other packet-based services to address increased demand for backhaul capacity.<sup>76</sup> T-Mobile has sought to obtain Ethernet backhaul to its cell sites wherever it is available.<sup>77</sup> In the absence of T-Mobile as a potential customer, the incentive for competitors to deploy more efficient and economic fiber facilities to meet the increased demand for backhaul capacity will diminish because AT&T will be meeting that demand on its own networks. With reduced competition in the backhaul market, innovation will be delayed and the public interest will be harmed.

### **C. Availability of Handsets To Competitors**

AT&T, Verizon and other mobile telephony/broadband providers sell handsets along with service in their retail stores. In bundling contracts, the wireless handset and the service plan are sold as a single bundled product.<sup>78</sup> Certain carriers have also been able to negotiate exclusive handset arrangements in which a handset manufacturer agrees to sell a particular model to only one service provider for a specified period of time.<sup>79</sup> Obtaining access to the most sought after handsets and devices has proved challenging for smaller carriers. Indeed, AT&T

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<sup>75</sup> Fourteenth Report at ¶ 296.

<sup>76</sup> *Id.* at ¶ 298, n. 789.

<sup>77</sup> Letter dated May 6, 2010 from Kathleen O’Brien Ham, T-Mobile USA Inc., to Marlene Dortch, FCC, filed in WC Docket No. 05-25.

<sup>78</sup> Fourteenth Report at ¶312.

<sup>79</sup> *Id.* at ¶316.

identified one of the public interest benefits of the acquisition the fact that T-Mobile customers will have “access to a broader device portfolio,”<sup>80</sup> a tacit acknowledgement that smaller competitors, including T-Mobile, have been denied such access.

AT&T’s increased market share will allow it to exert even greater control over the marketing and distribution of innovative handsets and other mobile devices, allowing it to pick winners and losers for developments in technology.<sup>81</sup> To the extent that it is able to use its market power to restrict the access of its smaller competitors to the most technologically advanced devices, AT&T can also significantly impair their ability to compete because handsets are playing an increasingly important role for consumers as a basis for choosing a service provider.<sup>82</sup>

## **VI. THE COMMISSION NEEDS TO SOLVE THE SPECTRUM CRISIS FOR ALL CARRIERS**

AT&T repeatedly argues that the acquisition will serve the public interest because it will alleviate both its and T-Mobile’s spectrum capacity constraints and enable the more efficient use of spectrum which will result in improved and more cost efficient service to consumers.<sup>83</sup> There is no question that the growing number of consumers using smartphones and the exploding demand for wireless broadband services is increasing the need for spectrum suitable for wireless data services. Noting that “spectrum is the oxygen of our mobile networks,” Chairman

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<sup>80</sup> AT&T/T-Mobile Public Interest Statement at 9. AT&T also notes that it offers a wide ranging portfolio of mobile broadband devices, including the second-generation iPad. *Id.* at 9.

<sup>81</sup> Transcript of the Hearing of the Intellectual Property, Competition and the Internet Subcommittee of the House Judiciary Committee: “How Will The Proposed Merger Between AT&T And T-Mobile Affect Wireless Telecommunications Competition?” at 19, 53 (May 26, 2011).

<sup>82</sup> Fourteenth Report at ¶299.

<sup>83</sup> AT&T/T-Mobile Public Interest Statement at 25-44.

Genachowski has expressed the belief “that the biggest threat to the future of mobile in America is the looming spectrum crisis.”<sup>84</sup> The need for access to additional spectrum is not unique to AT&T. All competitors in the mobile telephony/broadband service industry face similar challenges in terms of access to additional spectrum<sup>85</sup> and locating new cell sites.<sup>86</sup> The Commission needs to address these issues for the industry as a whole, not by approving a transaction that will provide relief for AT&T alone.<sup>87</sup>

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<sup>84</sup> Prepared Remarks of Chairman Julius Genachowski, “America’s Mobile Broadband Future,” delivered at the International CTIA Wireless I.T. & Entertainment conference October 7, 2009).

<sup>85</sup> The Commission recently reiterated that the “limited supply of wireless spectrum is another factor that could limit the growth of wireless broadband in the U.S.” and that it is “likely to limit competitive entry, raise costs, lower service quality and have other negative impacts on business and consumers.” *In the Matter of Inquiry Concerning The Deployment of Advanced Telecommunications Capacity To All Americans In A Reasonably And Timely Fashion And Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of The Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Gen Docket No. 10-159, Seventh Broadband Progress Report And Order on Reconsideration, FCC 11-78 at ¶166 (rel. May 20, 2011).

<sup>86</sup> AT&T/T-Mobile Public Interest Statement at 45-51.

<sup>87</sup> AT&T’s sudden and immediate need for additional spectrum is highly suspect. Less than a year ago, AT&T’s senior executives assured the public that AT&T had a strong spectrum position with substantial reserves and explained how the company could readily deploy new technology in existing bands to accommodate more traffic. *See, e.g.*, Kevin Fitchard, Connected Planet, *ATT, VZW Respond to Clearwire’s 4G Spectrum Taunts* (Mar. 18, 2010), available at <http://connectedplanetonline.com/3g4g/news/att-vzw-respond-clearwire-spectrum-taunts-0318/>. Not only does AT&T’s application not document a need for additional spectrum unique to AT&T, it has been reported that AT&T today uses only slightly more than half of the spectrum it holds. Specifically, it has been reported that AT&T has not deployed any of its substantial holdings in the 700 MHz, 1.7 GHz/2.1 GHz, or 2.3 GHz bands for mobile broadband. *See* <http://www.dailywireless.org/2011/04/03/att-merger-wheres-the-spectrum/> (citing Mary Meeker and the Wall Street Journal that AT&T has 91 MHz of spectrum, of which 47 MHz is used and 44 MHz is unused). And while AT&T has announced plans to deploy Long Term Evolution technology in its 700 MHz band starting this summer, AT&T’s planned deployment lags the actual deployment of its national competitors Verizon Wireless and Sprint by years. AT&T’s choice to idle entire bands of spectrum, delay investment, and slow-roll the deployment of more efficient, next-generation technology is at odds with a carrier facing immediate spectrum constraints that it cannot accommodate.

AT&T's proposal to resolve its spectrum crunch – the acquisition of the nation's fourth largest carrier – is the most anticompetitive solution to the problem. There are other alternatives available, including entering into commercial agreements to lease unused spectrum held by other carriers. Congress has charged the Commission with promoting competition in the telecommunications market.<sup>88</sup> Further limiting consumer choice by approving an acquisition that will combine the second and fourth largest national competitors, reduce the number of national competitors from four to three and eliminate a large independent purchaser of competitive special access facilities would be the antithesis of promoting competition in the telecommunications market. It is competition, not market concentration, that creates the incentives for providers to lower their prices, innovate in their product offerings and invest in their networks, all of which work to the benefit of consumers.

### **CONCLUSION**

For the forgoing reasons, COMPTTEL respectfully submits that AT&T's acquisition of T-Mobile USA will not serve the public interest and requests that the Commission deny the applications of AT&T and Deutsche Telekom to transfer control of T-Mobile USA to AT&T.

May 31, 2011

Respectfully submitted,

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<sup>88</sup> 47 U.S.C. §1302.