Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
CENTENNIAL COMMUNICATIONS CORP.,	)	
Transferor,	)	
	)	
and	)	WT Docket No. 08-246
	)	
AT&T INC., Transferee	)	
	)	
for Consent to the Transfer of Control of	)	
Commission Licenses, Leasing Arrangements	)	
and Authorizations Pursuant to Sections 214	)	
and 310(d) of the Communications Act	)	

PETITION OF CINCINNATI BELL WIRELESS LLC TO CONDITION CONSENT OR DENY APPLICATION

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Dated: January 15, 2009

SUMMARY

The march of consolidation continues in the wireless industry. While the cosmetic focus of the public interest showing in the Applications is on the purported competitiveness of the retail CMRS marketplace by virtue of the presence of multiple carriers, this hides the fact that the evolution of AT&T into a national carrier through multiple mergers and spectrum acquisitions has created a fundamental problem in the wholesale roaming market that manifests itself in the inability of other carriers to compete in the local retail market by offering national voice and data plans to subscribers.

The wholesale roaming market is fundamentally different from the retail market. Because it is technologically delimited, so that GSM carriers cannot practically offer their customers roaming onto CDMA systems, products and competitors that are substitutes at the retail level are not substitutes at the wholesale level. For this reason, the Commission must be particularly vigilant to assure that mergers in the wireless industry do not harm competition in the wholesale roaming market. For if competition in the wholesale roaming market is allowed to languish, the ultimate result will be to drive out or marginalize smaller competitors and thereby undo the years of Commission effort to emerge from the duopoly wireless market of the 1980s and all of the consumer benefits that have developed as a result.

This proposed merger poses just such a danger. AT&T, which has progressively acquired a number of its smaller competitors in the GSM segment of the market, has taken the next step in this march of consolidation by proposing to acquire Centennial. Centennial is the last remaining GSM carrier to have an appreciable facility footprint that

AT&T does not cover, and so it is the last GSM roaming partner with which AT&T has had to deal from a position of anything approaching reciprocity. Henceforth, if this merger is allowed to proceed without conditions, AT&T will have a free hand – indeed untrammeled market power – to dictate terms and prices to its remaining roaming partners in a manner that will not increase efficiency, drive innovation or lower costs, but will merely reduce (or even eliminate) its smaller competitors' ability to compete. The harm the merger threatens to the public interest is therefore clear.

The Commission can – indeed must – assure that the merger does not have these harmful effects. It must impose specific conditions on its consent to the merger to forestall AT&T from using it as a path to complete market power. Specifically, the Commission must:

- Require AT&T to continue to honor the terms of existing Centennial agreements for an additional period of at least seven years following the consummation of the merger. In addition, the Commission should require AT&T to permit its roaming partners to elect to have all terms of the Centennial agreement apply to all services received from the merged entity throughout the post-merger AT&T territory, not just within legacy Centennial territory. Finally, the Commission should forbid AT&T to enforce any "primary carrier" requirement for carriers who elect to remain in their AT&T agreements, or to attempt to prevent such carriers from competing for nationwide customers.

- Require AT&T to provide automatic data roaming on reasonable terms for the same seven-year period as discussed above. This obligation too should extend throughout AT&T's service area rather than just to legacy Centennial territory and should extend to all new data services as they are rolled out.

- Prohibit AT&T from continuing any exclusive arrangements it has with handset manufacturers and from entering into new ones.

If the Commission is unable or unwilling to impose these conditions, it must deny the Applications as contrary to the public interest.

TABLE OF CONTENTS

Before the
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In re Applications of	)	
	)	
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Transferor,	)	
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TO CONDITION CONSENT OR DENY APPLICATION

Cincinnati Bell Wireless LLC ("Cincinnati Bell"), by its undersigned counsel, pursuant to the Federal Communications Commission's ("Commission") December 16, 2008 Public Notice in the above-captioned proceeding, hereby petitions the Commission to condition consent to the above-captioned applications (the "Applications") of AT&T Inc. ("AT&T") and Centennial Communications Corp. ("Centennial") (collectively, the "Applicants") as set forth herein, or in the alternative to deny such applications. Grant of the Applications without conditions would severely harm competition in wholesale roaming services in the market for Commercial Mobile Radio Services ("CMRS"), and accordingly the Commission must either deny the Applications or condition them so as to prevent such competitive harm. In support hereof, the following is respectfully shown:

I. INTRODUCTION

The march of consolidation continues in the wireless industry. While the cosmetic focus of the public interest showing in the Applications is on the purported competitiveness of the retail CMRS marketplace by virtue of the presence of multiple carriers, this hides the fact that the evolution of AT&T into a national carrier through multiple mergers and spectrum acquisitions has created a fundamental problem in the wholesale roaming market that manifests itself in the inability of other carriers to compete in the local retail market by offering national voice and data plans to subscribers.

The wholesale roaming market is fundamentally different from the retail market. Because it is technologically delimited, so that GSM carriers cannot practically offer their customers roaming onto CDMA systems, products and competitors that are substitutes at the retail level are not substitutes at the wholesale level. For this reason, the Commission must be particularly vigilant to assure that mergers in the wireless industry do not harm competition in the wholesale roaming market. For if competition in the wholesale roaming market is allowed to languish, the ultimate result will be to drive out or marginalize smaller competitors and thereby undo the years of Commission effort to emerge from the duopoly wireless market of the 1980s and all of the consumer benefits that have developed as a result.

This proposed merger poses just such a danger. AT&T, which has progressively acquired a number of its smaller competitors in the GSM segment of the market, has taken the next step in this march of consolidation by proposing to acquire Centennial. Centennial is the last remaining GSM carrier to have an appreciable facility footprint that AT&T does not cover, and so it is the last GSM roaming partner with which AT&T has

had to deal from a position of anything approaching reciprocity. Henceforth, if this merger is allowed to proceed without conditions, AT&T will have a free hand – indeed untrammeled market power – to dictate terms and prices to its remaining roaming partners in a manner that will not increase efficiency, drive innovation or lower costs, but will merely reduce (or even eliminate) its smaller competitors' ability to compete. The harm the merger threatens to the public interest is therefore clear.

The Commission can – indeed must – assure that the merger does not have these harmful effects. It must impose specific conditions on its consent to the merger to forestall AT&T from using it as a path to complete market power. Specifically, the Commission must:

- Require AT&T to continue to honor the terms of existing Centennial agreements for an additional period of at least seven years following the consummation of the merger. In addition, the Commission should require AT&T to permit its roaming partners to elect to have all terms of the Centennial agreement apply to all services received from the merged entity throughout the post-merger AT&T territory, not just within legacy Centennial territory. Finally, the Commission should forbid AT&T to enforce any "primary carrier" requirement for carriers who elect to remain in their AT&T agreements, or to attempt to prevent such carriers from competing for nationwide customers.

- Require AT&T to provide automatic data roaming on reasonable terms for the same seven-year period as discussed above. This obligation too should extend throughout AT&T's service area rather than just to legacy Centennial territory and should extend to all new data services as they are rolled out.

- Prohibit AT&T from continuing any exclusive arrangements it has with handset manufacturers and from entering into new ones.

If the Commission is unable or unwilling to impose these conditions, it must deny the Applications as contrary to the public interest.

II. STATEMENT OF INTEREST

Cincinnati Bell Wireless LLC is a subsidiary of Cincinnati Bell Inc., an Ohio corporation which also owns incumbent local exchange carrier Cincinnati Bell Telephone Company LLC, competitive local exchange carrier Cincinnati Bell Extended Territories LLC, and interexchange carrier Cincinnati Bell Any Distance Inc. Cincinnati Bell Wireless holds Broadband PCS, AWS and 700 MHz services licenses covering the greater Cincinnati and Dayton metropolitan areas as well as several counties in northern Kentucky and portions of Indiana. It currently serves over 500,000 subscribers using GSM and 3G technology and offers both national and international voice and data roaming to these subscribers.

As such, Cincinnati Bell is both a competitor and a wholesale roaming customer of AT&T, Cincinnati Bell roams with Centennial and often partners with Centennial on handset arrangements. It is a competitor of AT&T because it competes for the wireless business of many of the same retail customers as AT&T (although as will be discussed below AT&T has already attempted to foreclose Cincinnati Bell completely from competing for certain customers). In order for Cincinnati Bell to compete, it must offer its retail customers nationwide voice and data roaming that is seamless, high-quality and competitively priced. In order to do this, it must obtain automatic roaming services from other carriers, and from AT&T in particular. If AT&T is free to impose anticompetitive terms on Cincinnati Bell (and other small carriers), AT&T itself can determine the extent to which Cincinnati Bell and other small carriers can compete with it.

Thus, both Cincinnati Bell and its customers have a direct and personal interest in whether the proposed merger will be approved unconditionally as requested by Applicants – which would allow AT&T to expand its already dominant market position

into one of unbridled market power – or whether the Commission will impose conditions of the types described in this Petition – which are the bare minimum needed to protect competition and consumers from the anticompetitive effects of the merger.

III. AT&T MUST BE PREVENTED FROM USING THE MERGER TO EXTEND ITS MARKET POWER, BY REQUIRING IT TO HONOR THE CENTENNIAL AGREEMENTS THROUGHOUT POST-MERGER AT&T TERRITORY FOR A PERIOD OF AT LEAST SEVEN YEARS.

As the Commission has clearly recognized in its docket on automatic roaming,[1] a competitive wholesale market for roaming services is critical to the competitiveness of the retail market for CMRS. The proposed transaction would harm competition in the wholesale roaming market, and accordingly it would harm the welfare of consumers and the public interest as well. The Commission must therefore insist upon constraints on the merged entity's behavior that will protect the public interest from this harm, and if such constraints cannot be identified and imposed, the Commission must deny the Applications.

In the *Automatic Roaming Order*, the Commission has acknowledged the importance of roaming and the clear need to "safeguard wireless consumers' reasonable expectations of receiving seamless nationwide commercial wireless telephone services through roaming."[2] The Commission has also recognized that CMRS providers must offer their subscribers nationwide service in order to effectively compete in the marketplace.[3] Moreover, it has explicitly recognized that roaming services in general,

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[1] *In the Matter of Roaming Obligations of Commercial Mobile Radio Service Providers ,Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, August 16, 2007 ("*Automatic Roaming Order*").

[2] *Id.* at ¶ 4.

[3] *Automatic Roaming Order* at paras. 3, 27-28; *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market*

and automatic roaming in particular, are common carrier services, and accordingly that carriers have an obligation under Section 201(a) of the Act to provide automatic roaming upon reasonable request.[4] The Commission is correct that roaming services are vital to the health of the wireless market, and that Section 201(a) of the Act obligates carriers to provide automatic roaming upon reasonable request.[5]

AT&T and Centennial have engaged in widely divergent courses of action regarding the terms and conditions upon which they offer roaming, and these contrasting courses clearly illustrate both AT&T's burgeoning market power – even before this transaction – in the GSM market, and the serious damage to competition that would be posed by an unconditioned combination of the two. As a regional carrier, Centennial has considerable incentive to enter into roaming arrangements with other regional carriers that generally provide reciprocity of terms and conditions. AT&T, on the other hand, has an incentive to enter into such agreements only with carriers whose footprints cover significant territory that AT&T's does not (and there are few of these carriers remaining other than Centennial). The details of Cincinnati Bell's arrangements with AT&T (and with Centennial) are confidential,[6] but, generally speaking, AT&T has insisted on a number of non-price terms and conditions that are clearly intended to further consolidate

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Conditions With Respect To Commercial Mobile Services, Twelfth Report, WY Docket No. 07-71, FCC 08-28, Feb. 4, 2008 ("*Wireless Competition Twelfth Report*") at ¶ 18.

[4] *Automatic Roaming Order* at ¶¶ 23-28.

[5] However, the Commission determined not to extend the obligation to data services other than SMS at this time, deferring the decision whether to ultimately do so to the Further Notice of Proposed Rulemaking ("*Roaming Further Notice*"), issued as part of the *Automatic Roaming Order*. *Automatic Roaming Order* at ¶ 60.

[6] Accordingly, Cincinnati Bell is unable to provide these agreements to the Commission without a specific Commission requirement that they be provided.

AT&T's market power.[7] Because it is simply not possible for a GSM-based provider to provide automatic roaming to its customers without an agreement with AT&T, AT&T essentially has the ability to dictate these terms. These terms already limit competition in a number of ways, and their detrimental effect would only be compounded by the consummation of the merger – unless the Commission takes concrete steps to prevent this harm.

First, on information and belief, existing AT&T arrangements typically impose several requirements on its roaming partners which make it more difficult – if not impossible – for Cincinnati Bell and similarly situated customers to roam on carriers other than AT&T in areas where AT&T provides service. By insisting on these "primary carrier" provisions, AT&T has made it impossible for smaller carriers such as Cincinnati Bell to engage in least-cost routing for their roaming customers in this overlap area. Put another way, other carriers are simply foreclosed from competing to carry Cincinnati Bell's roaming traffic (and Cincinnati Bell is foreclosed from competing for theirs) in AT&T's service area. Since roaming on AT&T is a one-way proposition for Cincinnati Bell and most remaining small, rural and regional carriers who receive no reciprocal roaming traffic from AT&T, this forecloses any meaningful roaming revenue for both Cincinnati Bell and the other smaller carriers, and since roaming revenues have been a

[7] For example, in negotiating reciprocal agreements among themselves, regional carriers are unable to commit to exchanging any significant levels of roaming traffic with each other, which can only be because AT&T – the one national GSM carrier and therefore essential to every other GSM carriers' ability to roam – has broadly insisted as a condition of entering into its roaming agreements that its roaming partners use AT&T as their roaming provider to the exclusion of other providers where service is available from AT&T. It should be noted, therefore, that to the extent that Centennial itself has been subject to anticompetitive restrictions like those AT&T has imposed on other carriers, such as this restriction and others discussed below, those restrictions have by their nature affected the competitiveness of the terms – and especially the rates – upon which Centennial has provided roaming services to Cincinnati Bell. As a result, while Centennial has not sought to impose on its partners anticompetitive non-price terms, its wholesale roaming prices are in many instances significantly higher than Centennial would have charged had it been fully free to compete.

substantial part of most small carriers' business plans, puts their viability in doubt.[8] If the merger is consummated, the area in which such competition is shut down will grow.

Second, these same restrictions make it virtually impossible for Cincinnati Bell and other carriers to negotiate favorable reciprocal rates among themselves. Since small carriers are foreclosed from routing roaming traffic to each other in AT&T service areas, the volume of traffic and associated economies of scale and scope that would incent other roaming partners to make reasonable deals are not present. The merger, if consummated, would cause even this limited incentive to dwindle, and again would harm competition and the public interest.

Third, AT&T has recently threatened to terminate its existing roaming agreement with Cincinnati Bell on the ground that it prohibits Cincinnati Bell from marketing its wireless services to nationwide customers. AT&T's position (with which Cincinnati Bell disagrees) gives Cincinnati Bell the Hobson's choice of either doing without AT&T's roaming services – patently impossible – or renouncing any possibility of serving business customers with more than a regional presence.

AT&T's overreaching attempt to enforce its roaming agreement in a manner that flatly forbids Cincinnati Bell from doing business with national accounts is flagrantly anticompetitive. It clearly is an attempt by AT&T to use its roaming agreement to stifle Cincinnati Bell from growing into a greater competitive threat to AT&T. The merger would exacerbate and perpetuate both AT&T's ability and its incentives to engage in such behavior. This is particularly galling given that AT&T trumpets in the Application (at 12-13) that among the chief alleged "benefits" of the merger is that it will improve

[8] It also depresses the acquisition price for small carriers, so that where it fits AT&T's business plan to acquire them (as it has for Centennial), they are cheaper to buy, and so results in a win/win for AT&T, who can then acquire them and further its national expansion plans at a lower cost.

both AT&T's and Centennial's ability to serve the very same national accounts that it fights to keep Cincinnati Bell from serving.[9]

As shown below, the presence of Centennial in the market, while hardly sufficient to make AT&T behave completely competitively in the ways described, nevertheless has acted as an indirect check on AT&T's unbridled exercise of market power. The merger will remove this check, free AT&T to impose ever more anti-competitive conditions on its remaining regional competitors, and thereby harm the public interest.

Unsurprisingly, Centennial's roaming agreement with Cincinnati Bell, like other agreements between carriers which lack market power, is free from the anticompetitive features that AT&T has imposed on Cincinnati Bell. None of the above-described terms and conditions can be found in the Centennial-Cincinnati Bell contract, which is essentially the standard reciprocal roaming agreement used by virtually all GSM carriers other than AT&T. This gross disparity is ample *prima facie* evidence that AT&T's roaming terms and conditions are much more one-sided than competitive terms would be. And this one-sidedness is leveraged by AT&T to harm not only Cincinnati Bell, but also wholesale roaming competition in the GSM market generally, for the reasons set forth above.

The explanation for this disparity in contractual terms is straightforward: AT&T has – and knows full well that it has – market power in the GSM roaming arena. The roaming marketplace is inherently technology-delimited since a subscriber with a handset provided by a GSM-based carrier cannot generally obtain roaming services from a non-

[9] Cincinnati Bell believes that it is unlikely that Cincinnati Bell is the only carrier as to which AT&T has taken this position, and if this is correct, AT&T's objective is obviously to suppress an entire segment of its potential competition. Of course, if this surmise is incorrect and AT&T does not take the same position as to its other roaming partners then AT&T is unlawfully discriminating against Cincinnati Bell.

GSM carrier.[10] Because of this, GSM and CDMA are not substitutes for each other in the wholesale roaming market. Only two (AT&T and T-Mobile) of the four national wireless carriers are GSM-based, and T-Mobile's coverage area is significantly less than that of AT&T.[11] Thus, the Commission's findings in the *Automatic Roaming Order* and the *Wireless Competition Twelfth Report*[12] as to the overall competitiveness of the wireless consumer *retail* market – heavily touted by Applicants as supporting their Applications[13] – simply do not apply to the *wholesale* roaming market, which in turn has huge ramifications for the local retail market for national plans. AT&T is free to engage in duopolistic practices in the wholesale roaming marketplace and it has not hesitated to do so.

AT&T will cement its market power even further by acquiring Centennial. AT&T's acquisition of Centennial will not merely result in the gain of market share (though this in itself would increase AT&T's market power) but will be leveraged further by the nature of the competition that Centennial represents. Applicants make much of the fact that the merger will bring network to AT&T in "numerous areas where it does not currently have facilities."[14] As a sizable regional carrier whose footprint has by and large been complementary of, rather than overlapping, AT&T's footprint (particularly in

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[10] *Automatic Roaming Order* at ¶ 72. The sole exception is when a subscriber has a handset that can use more than one technology. But of course these handsets represent a small minority of the handsets deployed in the US market today.

[11] *Compare* T-Mobile voice and data coverage maps at http://coverage.t-mobile.com/default.aspx?pageType=idealer with AT&T coverage maps at http://www.wireless.att.com/coverageviewer/. Note that the maps show that in many areas the competitive disparity is compounded by the fact that T-Mobile's signal strength is not strong.

[12] *See Automatic Roaming Order* at ¶¶ 37-40; *Wireless Competition Twelfth Report, passim*.

[13] Public Interest Statement at 30-42.

[14] *See, e.g.*, Application, Declaration of Rick L. Moore, Senior Vice President of AT&T, Inc., at 2 ("Moore Declaration").

Puerto Rico, but also elsewhere), Centennial has exerted a constraining influence (albeit far from perfect) on AT&T's behavior greatly in excess of what it would be expected to have if market share alone were taken into account. This is because AT&T has at least had an incentive to enter into arrangements with Centennial that are more truly reciprocal and reasonable in character than those it has entered into with Cincinnati Bell and other regional carriers with greater overlap.[15] As Applicants admit, "AT&T and Centennial each rely significantly on the other to provide roaming services to its customers, and have had roaming agreements in place for many years."[16] Therefore, unlike many small, rural and regional carriers, whose bargaining power with AT&T for reciprocal roaming arrangements has progressively been stripped away by AT&T's acquisition of competitors or new spectrum in their services areas, Centennial is one of the few remaining independent carriers of any significant size whom AT&T still needs as a two-way roaming partner. As a result, Centennial is in a somewhat better position to negotiate reasonable roaming agreements with AT&T, which redounds to the benefit of other carriers who do not have similar bargaining leverage. Simply put, AT&T currently needs Centennial to complete its nationwide footprint – and this very need, according to the Applicants' own Public Interest Statement, is a driving motivation of the acquisition.[17]

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[15] These arrangements too are confidential and as noted above it may well be that notwithstanding these incentives, AT&T may have succeeded in imposing at least some of its anticompetitive restrictions on Centennial notwithstanding Centennial's more advantageous negotiating posture. Petitioners urge the Commission to require the filing of AT&T's agreements with Centennial so that interested parties can more readily determine the effect of these agreements on competition prior to the acquisition of Centennial by AT&T – and therefore the loss to competition when these arrangements go in-house after the acquisition.

[16] Moore Declaration at 2.

[17] Public Interest Statement at 18-19. Similarly, AT&T touts the fact that the merger will substantially increase the wireless network coverage available to Centennial's customers. *Id.* But this is ironic to say the least, since it is in large part AT&T's anticompetitive behavior that has stunted the growth

The Commission has stated repeatedly that wireless carriers are bound by the non-discrimination obligation of the Communications Act (as indeed they are as a matter of law), and stated that its complaint proceedings are open to those who believe they have been the victims of unlawful discrimination. To be sure, the Commission has declined to require public filing of roaming rates to permit carriers access to a mechanism to detect discrimination by the providers of such services and to assess whether it is just and reasonable. Nevertheless, assuming that the statutory barrier against discrimination has an effect, it can be expected that AT&T's terms and conditions are better than they would be were it not for Centennial's presence even though, as shown above, they are still far from what would be expected if AT&T were currently behaving like a true competitor. With Centennial gone, AT&T would have both the power and the incentive to impose even more anticompetitive practices and terms on its roaming partners, since AT&T will no longer require the services of these remaining carriers to complete its nationwide footprint. Thus, it is vitally important to preserve at least the current state of affairs in the wholesale roaming market by requiring several things of AT&T post-acquisition.

First, AT&T must at the threshold continue to honor the terms of Centennial's roaming agreements so that the benefits of Centennial's more competitive practices and conditions remain available to the marketplace following the merger. It is instructive that, unlike the commitment initially proposed by Verizon in its recent application to merge with Alltel,[18] AT&T has conspicuously *not* said it will honor Centennial's existing

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of small carriers like Centennial, leaving being acquired as the only way for such carriers' customers to gain access to a larger network.

[18] *See* Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95, filed June 13, 2008 Exhibit 1 ("Verizon-Alltel Public Interest Statement") at 17. This initial commitment was later expanded by Verizon as commenters in that proceeding made their case that more significant measures were necessary to safeguard competition.

agreements for the time and in the service areas in which they would otherwise apply. Thus the merger would, unless the Commission prevents it, potentially have the immediate anticompetitive outcome of causing Centennial's competitive terms and conditions to be replaced with AT&T's anticompetitive ones in the very near term.[19] In particular, AT&T would be free both to enforce its anticompetitive primary-carrier restriction everywhere and to attempt to impose its even more flagrantly anticompetitive interpretation of its agreements as completely foreclosing competition for nationwide accounts. The Commission cannot permit this outcome.

Second, many Centennial agreements are likely to be expiring soon. Absent the merger, these agreements could be expected to be extended or renewed in the ordinary course, since Centennial, unlike AT&T, would still be in need of receiving roaming services from other regional carriers. Accordingly, the Commission should require AT&T to continue to honor the terms of the Centennial agreements for an additional period of at least seven years.[20] There is ample precedent for such a requirement. In the *Verizon/Alltel Order*, the Commission conditioned its approval of the Verizon-Alltel merger on Verizon's voluntary commitment to retain in place the Alltel agreements for a period of four years following consummation of the merger.[21] Here, because of the

[19] Again, this should not be taken as an endorsement of Centennial's rates, which as set forth above often exceed truly competitive levels because of the flow-down effects of AT&T's anticompetitive practices.

[20] In the AT&T-BellSouth merger proceeding, the Commission premised its approval in part on a voluntary commitment by AT&T to allow carriers to extend their interconnection agreements by three years, whether or not they had expired. *See In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order,* FCC 05-183, WC Docket No. 05-65, Nov. 17, 2005, at Appendix F.

[21] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC,* WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258, released November 10, 2008 ("*Verizon-Alltel Order")* at ¶ 178. During the reconsideration phase following the issuance of the *Verizon-Alltel Order*, Verizon has taken the position that its commitment was only to extend the rates in the Alltel agreements for the four-year period, while other parties have argued that the

stranglehold AT&T will have on the roaming market following the merger, as well as its track record of employing anticompetitive tactics wherever it has the opportunity to do so, a longer period is warranted – and should last at least until AT&T's market ability to reinstate its anticompetitive tactics is fully abated. As of now, the only prospect for loosening AT&T's grip is the full deployment of Long Term Evolution ("LTE") by multiple carriers throughout substantially all of the country, which if successful will eliminate the technology-delimited character of the roaming marketplace. Now that Centennial is poised to exit the market, only such deployment of LTE will allow smaller carriers a reasonable chance to find roaming alternatives sufficient to induce AT&T to behave like a competitor in the wholesale roaming marketplace rather than a monopolist.

Third, requiring AT&T to honor the Centennial agreements will not preserve the impact exerted by Centennial's presence on AT&T's practices outside the Centennial territory. The Commission again faced a similar problem on the Verizon-Alltel merger, and it resolved the problem by conditioning its approval on Verizon's commitment to honor the Alltel agreements for all roaming traffic throughout the post-acquisition Verizon territory, not just in the legacy Alltel markets.[22] The problem should be resolved the same way here to prevent AT&T from spreading its anticompetitive practices to new territories and using the merger to further cement its market power. The Commission should condition consent on AT&T's commitment to allow its roaming partners to elect whether they will use the Centennial agreements or the AT&T agreements throughout the

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Commission clearly intended that the commitment covered non-price terms as well, and that it should be extended to seven years. Whatever the outcome of the Verizon-Alltel dispute on this issue, it is clear that in *this* proceeding the Commission should insist that such a condition encompass non-price terms, since it is in those terms rather than rates that AT&T has flexed its market muscle in anticompetitive ways and will be freed to do so ever more vigorously.

[22] *Id.*

combined service area of the post-merger AT&T. In addition, the Commission should remind carriers, as it did in the *Verizon-Alltel Order*, that "roaming is a common carrier service subject to the protections afforded by Sections 201, 202, and 208 of the Communications Act,"[23] and that accordingly roaming partners are entitled to avail themselves of the justness and reasonableness, nondiscrimination and complaint protections of those statutory provisions.

Finally, the Commission should condition its approval on AT&T's agreement to free *all* its roaming partners – not just those electing to use the Centennial agreements – from any requirement that they use AT&T as their primary roaming carrier, and should require that AT&T stand down from any attempts to use its agreements as a bludgeon to prevent competition for nationwide customers. Even if Cincinnati Bell and others elect to use the Centennial agreement, if AT&T can induce still other carriers to remain in their AT&T agreements and thereby subject to the primary roamer term, those carriers will be unable to route their customers' handsets to roam on Cincinnati Bell's network and thereby will deny Cincinnati Bell and other small carriers a fair competitive opportunity to carry such traffic and therefore to negotiate mutually beneficial terms among themselves and thereby lessen to some degree AT&T's stranglehold on all GSM roaming. Similarly, allowing AT&T to expand its efforts to lock out competition for nationwide accounts by making such a lockout a condition on its continuing provision of service under its own agreements would also patently harm the public interest.

[23] *Verizon-Alltel Order* at ¶ 178.

IV. AT&T MUST BE PREVENTED FROM USING THE MERGER TO EXTEND ITS MARKET POWER, BY REQUIRING IT TO PROVIDE AUTOMATIC DATA ROAMING SERVICES.

No less problematic for the future of wireless competition is the fact that AT&T has been unwilling to offer Cincinnati Bell automatic 3G roaming for data services. Retail wireless consumers insist upon seamless access to data services, just as they have with voice services, both within and outside their carrier's territory. The Commission itself has stressed the growing competitive importance of data services in today's evolving marketplace,[24] and has found that "EV-DO/EV-DO Rev. A networks cover 82 percent of the U.S. population, based on census blocks, and WCDMA/HSDPA networks cover 43 percent. As of December 31, 2006, 21.9 million mobile wireless devices capable of accessing the Internet at broadband speeds were in use in the United States, versus 3.1 million at the end of 2005."[25] Penetration has only grown in the succeeding two years and continues to grow rapidly.[26]

The fundamental policy goal of the Communications Act – "to make available, so far as possible, to all the people of the United States… a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"[27] – extends to *all* wire and radio communication services. The policy applies whether services are classified as CMRS, telecommunications service or information service, regardless of the speed, technology, or platform with which the services are provided, and whether or not the services are interconnected. To compete in

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[24] *Wireless Competition Twelfth Report* at ¶¶ 2133-51.

[25] *Id.* at ¶ 2.

[26] *See, e.g.*, Infomobile, "US 3G market penetration out paces Europe," September 4, 2008, http://www.intomobile.com/2008/09/04/us-3g-market-penetration-out-paces-europe.html

[27] 47 U.S.C. at § 151.

the retail wireless marketplace, Cincinnati Bell *must* be able to assure its customers that they can receive data services – just like voice and SMS – anywhere in the country. This assurance must extend to new technologies such as 3G and LTE and must not be subject to the same anticompetitive terms with which AT&T has surrounded its other roaming services.

In light of the explosive growth and importance of high-speed data applications, the lack of automatic data roaming has emboldened some carriers with market power – such as Verizon – to cripple their competition by simply refusing to offer EV-DO roaming.[28] Similarly, while AT&T offers some data roaming services today, it has *not* agreed to provide 3G.[29] Its ability to lock in its market power by acquiring Centennial means that the consummation of the merger will make it less likely that AT&T will come to terms on data roaming. AT&T's track record with regard to its roaming agreements for other services shows that even if it can be induced nominally to offer 3G, it will likely surround such offering with draconian and anticompetitive conditions and the merger will further empower it to dig in its heels on these issues.[30]

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[28] *See, e.g.*, Petition of MetroPCS Communications, Inc. and NTELOS Inc. To Condition Consent Or Deny Application, WT Docket No. 08-95, filed August 11, 2008.

[29] AT&T's ability to obtain exclusivity arrangements from manufacturers – which, as discussed below, will be increased to truly dangerous levels by this merger – exacerbates the situation with regard to 3G. Even if AT&T made the transmission service available, the lack of handset availability to competitors could easily make the transmission service unusable in practice. This is especially true for carriers, like Cincinnati Bell, who have spectrum in different bands from that in which AT&T's 3G service resides. These carriers' subscribers would have to use multi-mode handsets to roam in AT&T service areas. As AT&T and the other largest carriers tighten their grip on the manufacturers, these handsets will become more expensive and more difficult (if not impossible) for smaller carriers to obtain.

[30] International carriers also demand the availability of 3G as a precondition to entering into reciprocal roaming arrangements. AT&T has used its sheer size, as well as its ability to cut its US competitors off from 3G as a way to induce international carriers to enter into such relationships only with AT&T, to the exclusion of other carriers such as Cincinnati Bell.

In the similar context of the Verizon-Alltel merger, Centennial itself emphasized the extreme importance of data roaming in today's wireless market:

> [T]he passage of time only confirms the increasingly essential nature of wireless data services to American consumers. Indeed, in Centennial's experience, the ability to offer consumers robust mobile data services is increasingly critical to success in the retail marketplace. Consumers are rapidly insisting on such capabilities from their wireless providers. This creates the same consumer demand for roaming capabilities in connection with data services that exists with respect to voice services.[31]

Centennial therefore urged the Commission to require Verizon, as a condition to consenting to the merger, to "negotiate data services roaming agreements in a timely manner and on reasonable terms, with technically compatible systems that also have (or establish) automatic voice roaming arrangements with Verizon."[32] Cincinnati Bell agrees with Centennial's position on the importance of data roaming and the need to protect it from the anticompetitive behavior that is facilitated by the latest round of mergers.

Accordingly, the Commission should prevent AT&T from taking advantage of the enhanced market power it will gain from the merger, by requiring AT&T to provide automatic data roaming on reasonable terms[33] for the same seven-year period as discussed above. As with voice roaming, this obligation should extend throughout AT&T's service area rather than just to legacy Centennial territory and should extend to all new data services as they are rolled out. And because of the nascency of data

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[31] Centennial Communications Corp. Petition to Deny, WT Docket 08-95, filed August 11, 2008 ("Centennial Verizon Petition"), at 6 (footnotes omitted).

[32] *Id*. at 5.

[33] While Cincinnati Bell is not asking the Commission to impose direct rate regulation on AT&T, the Commission should nevertheless make clear that AT&T cannot get around the obligation to provide 3G service sought herein by agreeing to provide it only at a facially unreasonable price. For example, if AT&T tried to price 3G services at a level that was simply the equivalent on a "per-bit" basis of 2G pricing, the result would be grotesquely unreasonable, since on a per-bit basis, historic 2G pricing would be literally hundreds of times higher than market-level 3G pricing, because 3G by its nature is far more efficient on a per-bit basis.

roaming, the Commission should make clear that carriers who have not yet entered into agreements with AT&T covering data services are entitled to obtain them on the same terms and conditions.

V. AT&T MUST BE PREVENTED FROM USING THE MERGER TO EXTEND ITS MARKET POWER, BY PROHIBITING IT FROM ENTERING INTO EXCLUSIVE ARRANGEMENTS WITH HANDSET MANUFACTURERS.

As the wireless marketplace has consolidated and has begun to be dominated by a few very large national carriers, an additional avenue has opened to these large carriers to further stifle their smaller rural and regional competitors. If the large carriers can use their enormous buying power to induce handset manufacturers to enter into exclusive arrangements with them, they can corner the market on the newest cutting-edge technologies, relegating smaller competitors to the out-of-date and the second-rate. Needless to say, over time this will lead more and more retail customers to favor the larger carriers as they buy their first wireless phone or device, or the time comes to upgrade. The disparity in size and bargaining power among competitors will grow, and in the next cycle of carrier-manufacturer negotiations the large carriers will have even more leverage to force manufacturers to agree to these arrangements. Thus, exclusivity arrangements allow very large carriers to ratchet their market power always up and never down. And this advantage comes purely from their size as buyers, not from greater efficiencies, true cost savings or innovations.

Cincinnati Bell submits that AT&T is at a "tipping point." It has already been able to leverage its size to induce even a manufacturer as potent as Apple to enter into an

exclusive arrangement for the iPhone.[34] As noted above, it has also been able to use size to force its competitors to agree to anticompetitive roaming terms or to interpret its roaming agreements in anticompetitive ways. The merger with Centennial will, unless steps are taken to avoid this result, push the situation past the point of no return, making it more and more likely that AT&T can use these arrangements to force smaller carriers to exit the business. At the present stage the situation has ceased to be merely alarming – if the merger is allowed to proceed without conditions, will become potentially a matter of life and death for the remaining smaller carriers. This outcome would clearly disserve the public interest, and the Commission must therefore condition any approval of this consent on a prohibition against AT&T continuing in these exclusive handset arrangements or entering into new ones.

AT&T's acquisition of Centennial will reduce smaller carriers' ability to compete in purchasing handsets in another, complementary way as well – it will deprive smaller carriers of an ally and consortium partner in buying arrangements. Recently, Cincinnati Bell has found that the only way for it to achieve relatively competitive prices and terms from a number of handset providers is to join forces with two other small carriers – one of them being Centennial itself – in a buying consortium. By combining their purchases, the consortium has been able to offer larger volumes of purchases, and in at least one case, negotiations were getting nowhere until Centennial's volume requirements were added to the deal. Thus, AT&T's merger with Centennial will exacerbate the inequality in bargaining positions and make it even easier for AT&T to impose exclusivity requirements on handset manufacturers.

[34] "Apple Chooses Cingular as Exclusive U.S. Carrier for Its Revolutionary iPhone," Press release, January 9, 2007, http://att.centralcast.net/cingularnewsarchive/Release.aspx?ID=4200.

Again, Centennial itself has expressed the seriousness of this concern in no uncertain terms. In the Verizon-Alltel proceeding, it joined a number of other parties[35] in requesting that the Commission condition the Verizon-Alltel mergers on prophylactic conditions to prevent this sort of anticompetitive behavior by the merged companies. Centennial succinctly outlined the dramatic recent growth in exclusive handset arrangements, as the largest carriers have continued to consolidate their market power:

> Significant exclusivity provisions in wireless carriers' arrangements with handset manufacturers are a relatively new phenomenon in the industry. Until the last few years, from Centennial's perspective, the balance of bargaining power, so to speak, seemed to favor the handset makers over any particular wireless network provider. As a result, to the extent that a carrier might try to obtain an "exclusive" deal on handsets, the manufacturers could, and did, make relatively modest modifications to an existing phone and treat it as a new model not subject to exclusivity. In contrast, from Centennial's perspective, it appears that some market "tipping point" has been crossed, such that the very largest national carriers (Verizon, AT&T, and Sprint) command a sufficient customer base that the handset manufacturers are willing to offer more serious "exclusivity" to those carriers.
>
> This reflects, in some respects, the evolution of the wireless market from one in which the key sales point was simply price, and the availability and basic features of the service – a mobile phone that works – into one in which consumers are being wooed on the basis of the "style" or "coolness" of particular phones. Wireless phones have become – among other things – a fashion accessory, and it is understandable that a national carrier such as AT&T would want to distinguish itself by having exclusive rights to the "coolest" phone available, such as the iPhone, and that other national carriers, such as Sprint, would seek to respond by obtaining exclusive rights to an even cooler phone available, such as the Instinct. But this is a game in which the overwhelming majority of wireless carriers simply cannot ever play, because it is simply not possible for more than the few very largest carriers to amass a sufficiently large customer base to obtain the leverage needed over handset manufacturers to extract exclusivity arrangements.[36]

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[35] Centennial Verizon Petition at 8-12; *see also* Leap Wireless International, Inc., Petition for Clarification or Reconsideration, WT Docket No. 08-95, filed December 10, 2008 at 2-4; Petition for Reconsideration of The Rural Telecommunications Group, Inc., WT Docket No. 08-95, filed December 10, 2008 at 8-12; MetroPCS Communications, Inc. and NTELOS Holdings Corp. Reply To Joint Opposition To Petitions For Reconsideration, WT Docket No. 08-95, filed January 6, 2009, at 8-9.

[36] Centennial Verizon Petition at 9-10 (footnotes omitted).

As Centennial went on to explain, these exclusivity arrangements not only are anticompetitive in themselves, but they are also signs of the increasing market power of the carriers at the top:

> Handset manufacturers, left to their own devices, would have no reason to enter into exclusivity arrangements with any carrier. Instead, they will simply want to sell as many handsets as they can. That is why it is only recently, with the increasing market presence of the largest carriers, that meaningful exclusivity arrangements have begun to occur. On the one hand, this development results in peculiar situations of the sort identified by the Rural Cellular Association in which, for example, no citizen of Alaska or Vermont could "legally" obtain a wireless service using the iPhone. On the other hand, the fact that such exclusive arrangements can be extracted from handset manufacturers indicates, as noted above, that at least the national carriers have crossed some tipping point, in terms of sheer size, that has precipitated a qualitative change in the nature of competition in the marketplace that could reasonably cause the Commission concern.[37]

In the Verizon-Alltel proceeding, the Commission determined not to impose conditions prohibiting Verizon from entering into exclusive handset arrangements, noting the pendency of a petition for rulemaking on the same issue and finding that petitioners had not sufficiently shown that the harm complained of was transaction-specific.[38] This finding is currently the subject of several petitions for reconsideration. But whatever the outcome of such reconsideration, Cincinnati Bell submits that such conditions are appropriate here because of the transaction-specific harm the merger threatens: to push AT&T so far past the "tipping point" described by Centennial that it obtains an insurmountable head-start by locking in new technologies for many years to come. Already, AT&T has succeeded in locking in the iPhone, a phenomenal success manufactured by a company with a track record of phenomenal successes, for a reported

[37] Centennial Verizon Petition at 10-11 (footnotes omitted).

[38] *Verizon Alltel Order* at ¶ 185.

five years[39] – which in the wireless industry might as well be a lifetime. (Indeed, five years will be *more* than a lifetime for many smaller carriers if AT&T is permitted to keep using these tactics to expand its dominance.)

This merger will free AT&T's hand to do more and more of this empire-building. Waiting for a rulemaking (which has not even begun[40]) to finish before taking steps to prevent this harm would be regulatory folly. Indeed, such a postponement would simply duck the Commission's responsibility – which is to prevent the harms arising from *this* transaction even if it does so before it addresses similar harms elsewhere in the industry. As the United States Court of Appeals for the District of Columbia Circuit has made clear: "Agencies … cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively." *American Telephone & Telegraph Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), *cert. denied,* 509 U.S. 913 (1993). Here, the Commission must adjudicate whether this transaction is in the public interest, and the Commission has squarely before it the danger that this transaction will harm the public interest in a concrete, transaction-specific way.

For these reasons, the Commission should prevent AT&T from using the increased market power that will accrue to it after the merger to further squeeze its competitors by denying them access to cutting-edge handsets. The Commission should

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[39] USA Today, "AT&T eager to wield its iWeapon," May 23, 2007, http://www.usatoday.com/tech/wireless/2007-05-21-at&t-iphone_N.htm

[40] The Rural Carriers Association ("RCA") filed its "Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers" on May 20, 2008. The Commission placed it on public notice in October 2008 (*Wireless Telecommunications Bureau Seeks Comment On Petition For Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers And Handset Manufacturers*, Public Notice, DA 08-2278 (Oct. 10, 2008)); and comments as to whether the Commission should even initiate a rulemaking in response to RCA's .Petition are not due until February 2, 2009 (*In the Matter of Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Order, RM-11497, rel'd Nov. 26, 2008.

condition approval of the merger on a prohibition against AT&T continuing with existing handset exclusivity arrangements with manufacturers or entering into new ones.

VI. CONCLUSION

If allowed to proceed without appropriate conditions, the proposed merger will cause substantial and irreversible harm to competition in the wireless market and to the public interest. The Commission must impose conditions on any consent to the merger that would prevent these harms. Specifically, the Commission should:

- Require AT&T to continue to honor the terms of existing Centennial agreements for an additional period of at least seven years following the consummation of the merger. In addition, the Commission should require AT&T to permit its roaming partners to elect to have all terms of the Centennial agreement apply to all services received from the merged entity throughout the post-merger AT&T territory, not just within legacy Centennial territory. Finally, the Commission should forbid AT&T to enforce any "primary carrier" requirement for carriers who elect to remain in their AT&T agreements, or to attempt to prevent such carriers from competing for nationwide customers.

- Require AT&T to provide automatic data roaming on reasonable terms for the same seven-year period as discussed above. This obligation too should extend throughout AT&T's service area rather than just to legacy Centennial territory and should extend to all new data services as they are rolled out.

- Prohibit AT&T from continuing any exclusive arrangements it has with handset manufacturers and from entering into new ones.

If the Commission does not, or cannot, impose these conditions, it should deny the Applications as contrary to the public interest.

Respectfully submitted,

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Counsel for Cincinnati Bell Wireless LLC

Dated: January 15, 2009

VERIFICATION

I, Susan J. Maggard, am Vice President and General Manager of Carrier Services for Cincinnati Bell Telephone Company LLC. In this capacity, I am responsible for the implementation of all roaming agreements on behalf of Cincinnati Bell Telephone Company's affiliate Cincinnati Bell Wireless LLC. I am a resident of the State of Ohio, over the age of 18, and competent to make this verification in support of the foregoing Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Application ("Petition").

I hereby verify under penalty of perjury that I have read the foregoing Petition, and that the statements contained therein are true, complete, and correct to the best of my knowledge, information and belief.

Executed on January 15, 2009

/s/ Susan J. Maggard
Susan J. Maggard

CERTIFICATE OF SERVICE

I, Carolyn L. Washington, hereby certify that on this 15th day of January, 2009, I caused copies as indicated below of the Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Application in WT Docket No. 08-246 by first class mail (or, where indicated, by email) delivery on the following individuals:

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