

**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	)	

**REPLY OF CINCINNATI BELL WIRELESS LLC  
TO JOINT OPPOSITION OF  
AT&T INC. AND CENTENNIAL COMMUNICATIONS CORP.  
TO PETITIONS TO DENY OR CONDITION CONSENT**

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 submits this Reply to the Joint Opposition of AT&T Inc. and Centennial Communications Corp. to Petitions to Deny or to Condition Consent, and Reply to Comments and Petition for Reconsideration (the “Opposition”), filed by AT&T Inc. (“AT&T”) and Centennial Communications Corp. (“Centennial”) (collectively, “Applicants”) in the above-captioned proceeding on January 26, 2009.

In its Petition to Condition Consent or Deny Application (“Petition”), filed on January 15, 2009, Cincinnati Bell demonstrated that grant of the above-captioned applications (“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. Applicants’ Opposition utterly fails to refute the arguments raised in the Petition, and the relief sought by Cincinnati Bell must be granted. In support hereof, Cincinnati Bell shows as follows:

**I. THE APPLICANTS HAVE ENTIRELY FAILED TO REFUTE CINCINNATI BELL’S SHOWING THAT SPECIFIC CONDITIONS ARE NEEDED TO PREVENT AT&T FROM USING THE MERGER TO EXTEND ITS MARKET POWER.**

In its Petition, Cincinnati Bell laid out in detail the competitive harms that would result from an unconditioned merger of AT&T and Centennial. As Cincinnati Bell showed:

Henceforth, if this merger is allowed to proceed without conditions, AT&T will have a free hand – indeed untrammelled 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.<sup>1</sup>

Cincinnati Bell showed that AT&T has a history of engaging in anticompetitive behavior in the wholesale roaming market and that the acquisition of Centennial by AT&T would perpetuate and exacerbate AT&T’s ability to engage in this behavior. The harm shown by Cincinnati Bell is transaction-specific because Centennial serves as virtually the last competitive check on AT&T’s behavior and because the merger would allow AT&T to extend its behavior to Centennial’s territory and relationships.<sup>2</sup> Moreover, with the field cleared by the removal of Centennial as a competitor, AT&T would be freed to extend its anticompetitive behavior in new ways that would further marginalize regional competitors

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<sup>1</sup> Petition at 3.

<sup>2</sup> *Id.* at 9-12.

like Cincinnati Bell.<sup>3</sup> In order to prevent the harms arising from the merger demonstrated by Cincinnati Bell, the Commission must impose the following narrowly-crafted, transaction-specific conditions as part of its consent to the merger:

- 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 fully competing for customers who need to roam nationwide.
- 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.<sup>4</sup>

Other parties in this proceeding agreed that conditions such as the above must be imposed to prevent the merger from harming competition. For example, in comments filed herein, the Rural Cellular Association (“RCA”) urged the Commission to require AT&T post-merger to honor Centennial’s existing roaming agreements; to hold (or lower) rates set forth in all roaming agreements entered into by AT&T or Centennial and extend all such roaming agreements to at least seven years; to provide every carrier that currently has roaming agreements with both AT&T and Centennial the option to select either agreement to govern all roaming traffic between such carrier and post-merger AT&T; and to confirm that once one of the two agreements is selected, the selected agreement will apply to *all* roaming traffic of the requesting carrier throughout all of the combined company's service area, not

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 3.

just to roaming traffic in the areas where AT&T and Centennial have overlapping service. RCA also urged the Commission to require AT&T to “end its practice of entering into exclusive agreements with handset manufacturers that inherently lessen competition, particularly between the largest and smaller wireless providers.”<sup>5</sup>

Similarly, Cellular South, Inc. petitioned the Commission to condition any approval of the merger on a requirement that AT&T “end its practice of entering into exclusive agreements with handset manufacturers that inherently lessen competition, particularly between the largest and smaller wireless providers; and ... negotiate in good faith for automatic roaming and interoperability agreements for voice and data services, on reasonable terms and conditions, when so requested and where implementation of such agreements is technically feasible.”<sup>6</sup>

Applicants make no serious effort to refute the substance of these concerns, relegating such substantive response as they have to footnotes. Instead, they simply assert that the serious concerns raised by commenters are either too broad or too narrow to be considered in this proceeding. For example, on the one hand, Applicants assert that some of these issues – *i.e.*, the proposed conditions that the post-merger AT&T be required to provide automatic data roaming and that it be forbidden from entering into or continuing exclusive arrangements with handset providers – should be dismissed here on the grounds that these issues are industry-wide and are being considered in pending rulemakings.<sup>7</sup> On the other hand, as to the proposed conditions that AT&T be required to honor and extend the Centennial agreements that do not incorporate AT&T’s historic anticompetitive practices,

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<sup>5</sup> Comments of the Rural Cellular Association, WT Docket No. 08-246, filed January 15, 2009 (“RCA Comments”) at i-ii.

<sup>6</sup> Petition to Deny of Cellular South, Inc., WT Docket No. 08-246, filed January 15, 2009 (“Cellular South Petition”) at 2.

<sup>7</sup> Opposition at 4-7.

Applicants argue that these are mere “private disputes,” and must be addressed in complaint proceedings or through similar avenues.<sup>8</sup> In short, according to Applicants, all the issues raised by Cincinnati Bell, RCA, and Cellular South, are either too broad or too narrow; none of them are “just right” for consideration in this proceeding.

Given that Cincinnati Bell, RCA, and Cellular South, went to considerable length to show that the harms complained of are transaction-specific, it is remarkable that Applicants make no factual or analytical showing whatever to the contrary. Instead, they merely assert, without supporting analysis or documentation, that the issues are not transaction-specific. But merely to deny is not to refute and so Applicant’s unsupported denials must be dismissed.

Moreover, even if in some instances the transaction-specific issues raised herein overlap with pending rulemaking proceedings, precedent is clear that the Commission must adjudicate the transaction-specific elements here and cannot push them off to another day. As Cincinnati Bell showed in its Petition, the courts have made it quite clear that “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). As the court in that case also pointed out, the Commission is free to consider more general industry-wide questions in a separate rulemaking, provided that it nevertheless decides the party-specific issue in the adjudication. *Id.*, 978 F.2d at 732. In a footnote,<sup>2</sup> however, Applicants struggle to distinguish the *AT&T* case on the specious ground that it involved a complaint, whereas the present proceeding involves a merger application. Although Applicants acknowledge

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<sup>8</sup> *Id.* at 7-8.

<sup>2</sup> Opposition at 4, note 8.

that a merger proceeding, like a complaint proceeding, is an adjudication, they claim that the court's opinion in *AT&T* applies only to "backward-looking" proceedings, whereas a merger proceeding, according to Applicants, is a "prospective" proceeding. But the court's emphasis on the fact that a rulemaking proceeding is "prospective" is based on the reality that waiting for a rulemaking to conclude would not have remedied the past *and present* harms to AT&T that were accruing from MCI's misconduct; indeed, the court specifically noted that among the relief sought by AT&T in the complaint proceeding was a cease and desist order, which is of course prospective in the same way as the conditions sought by Cincinnati Bell in this proceeding. *Id.* 978 F.2d at 732-33.<sup>10</sup> In the instant merger proceeding, too, waiting for a rulemaking to conclude would do nothing to remedy the transaction-specific harms that would result from the merger prior to such conclusion. Thus, the *AT&T* case clearly requires the Commission to act now rather than wait until the rulemakings come to an end at some unknown future time.

Applicant's efforts to characterize other Cincinnati Bell concerns as mere private contractual disputes also fail. Here, too, Applicants make no effort to show *why* the matters raised by Cincinnati Bell are private contractual disputes, but instead content themselves with simply asserting in conclusory fashion that they are so. Thus, these claims also must fall to the detailed showing in Cincinnati Bell's (and RCA's and Cellular South's) submission that these are not just private disputes but are characteristic of the way AT&T has systematically sought to eliminate competition, and that the merger will free AT&T to engage in ever more

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<sup>10</sup> In fact, the court all but directed the Commission to enter the requested cease and desist order, stating "It would appear that AT&T is entitled promptly to a cease and desist order against MCI" and requiring the Commission on remand to determine finally whether to grant such relief. *Id.*, 978 F.2d at 737. If the court had intended to follow the spurious distinction urged on the Commission by Applicants here, it would have ordered the Commission on remand to consider the damages claim but not the cease and desist order.

far-reaching anticompetitive behavior, unless the Commission takes steps to prevent this outcome.

Because they rely almost entirely on these procedural maneuvers, Applicants provide almost no substantive response to Cincinnati Bell's showing as to the anticompetitive effects of the merger. Indeed, Applicants limit their "factual" response to most of Cincinnati Bell's showing to a single footnote – but this short footnote is replete with misstatements and, even when taken in the light most charitable to Applicants, raises more questions than it answers.

For example, Cincinnati Bell showed in its Petition that AT&T has heretofore required many (if not all) of its roaming partners to agree to make AT&T their "primary carrier," meaning that they must program their handsets to roam on AT&T first rather than on any third party carrier in areas where AT&T provides service.<sup>11</sup> In footnote 16 (at page 7) of the Opposition, Applicants deny this, stating that "contrary to Cincinnati Bell's claims, AT&T does not insist that its roaming partners include 'primary carrier' provisions in roaming agreement with AT&T." Applicants have thus placed into dispute a straightforward issue of fact: has AT&T or has it not required these provisions of its roaming partners? Notably, Applicants have not placed into the record any affidavit or other verification that their factual allegation is true, though the Commission's rules expressly require such verification.<sup>12</sup> But the Commission can readily determine which of these incompatible characterizations of the facts is true by requiring AT&T to produce for the Commission's

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<sup>11</sup> Petition at 7. As the Petition shows, AT&T's use of these provisions is not merely a private contractual harm but is part of an AT&T modus operandi of engaging in various anticompetitive tactics, and AT&T will be strengthened and emboldened in using such tactics by the merger.

<sup>12</sup> 47 C.F.R. § 1.939(f). For this reason alone, Applicants' statement can and should be disregarded.

inspection all of its roaming agreements (including agreements with international carriers) so that the Commission can see for itself whether they contain these provisions.<sup>13</sup>

Applicants also tuck away in the same footnote their response to Cincinnati Bell's showing that AT&T has broadly asserted that Cincinnati Bell is barred outright by its roaming agreement with AT&T from marketing its services to national customers. Here, Applicants seem to be saying that this is all just a misunderstanding, and that AT&T was really saying to Cincinnati Bell was that roaming partners may not use AT&T roaming agreements to engage in simple resale of AT&T services of the kind that is more properly subsumed within an MVNO agreement. Here too Applicants have raised a factual dispute which they have failed to support with an affidavit or other verification, and here too the Commission can see for itself what the truth of the matter is by requiring the production of the relevant contractual documents and related correspondence.<sup>14</sup>

Finally, Applicants have no response on the issue of whether the post-merger AT&T should be foreclosed from entering into new handset exclusivity arrangements or enforcing existing arrangements, other than to assert that this issue should be pushed off into the

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<sup>13</sup> Applicants' use of the present tense in this denial is telling; they say that "AT&T *does* not insist," not that it "*has* not insisted" on these provisions. Opposition at 7, note 16. To the extent that AT&T has already used these provisions to consolidate its market power, it may find that other types of provisions now serve its purposes equally well. Or it may be signaling to the Commission that it has voluntarily ceased using these provisions, or will cease using them going forward. In either case, it would still be appropriate to require a formal commitment by AT&T not to use these provisions going forward – and to forbear from enforcing those already entered into. Without such a formal commitment, AT&T will be free to return to this technique after the merger closes, when the "heat is off" and when its increased power resulting from the merger will make it even easier for AT&T to dictate terms to its roaming partners.

<sup>14</sup> In yet another footnote (Opposition at 5, note 10), Applicants attempt to dispense with Cincinnati Bell's and other parties' request that the post-merger entity be required to provide automatic data roaming. Applicants argue that these carriers will not be "materially impacted" by the merger as to data roaming because their traffic represents a small minority of the roaming traffic on Centennial's network. But this is irrelevant. AT&T and T-Mobile have the great majority of traffic on Centennial because they are much bigger than Cincinnati Bell and the other complaining carriers. Moreover, Cincinnati Bell's and other small carriers' share of traffic on Centennial's network in areas where AT&T too provides service is further depressed by AT&T's imposition of primary carrier requirements. In any event, what matters is not these carriers' share of roaming traffic on Centennial as a percentage of the total roaming traffic on Centennial but rather the impact on these carriers' ability to compete if AT&T is permitted to use the Centennial acquisition as a means of consolidating its power. And as Cincinnati Bell and the other parties have shown, this impact is more than merely material.

“pending” rulemaking and to argue (again without analysis or evidence) that it would be “unfair” to subject AT&T to such a requirement without at the same moment subjecting other industry participants to the same requirement. As noted above, Applicants cannot push off the day of judgment for issues that are squarely before the Commission in this proceeding just by noting that there is a pending rulemaking covering some of the same ground, and it is not “unfair” to decide such issues in an adjudication as to the parties in such adjudication. And Applicants’ stalling tactic is particularly egregious in this instance, because the rulemaking on this issue has not even properly begun. Comments as to whether the Commission should even initiate a rulemaking in response to RCA’s Petition are not due until February 2, 2009 – *i.e.*, the date of this Reply – while reply comments on the RCA petition are due February 20, 2009.<sup>15</sup> Of course, even if the Commission decides to begin a rulemaking, it will be many months before the rulemaking comes to fruition, and meanwhile, AT&T will be locking in its position ever more securely and damaging competition more every day.

As noted in Cincinnati Bell’s Petition, one of the Applicants – Centennial – has agreed with Cincinnati Bell, RCA and Cellular South a few short months ago that addressing the handset exclusivity issue in the context of a merger proceeding is not only appropriate but critical where, as here, the merger threatens to allow a carrier to achieve such monopsony power as to make it essentially unstoppable in demanding these terms from manufacturers.<sup>16</sup> Nothing has changed in these few months except that Centennial has agreed to be acquired

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<sup>15</sup> Petition at 23, note 40; *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.

<sup>16</sup> Petition at 21-22, citing Centennial Communications Corp. Petition to Deny, WT Docket 08-95, filed August 11, 2008, at 9-10.

by AT&T. About this inconvenient truth, Applicants have literally nothing to say, evidently hoping that if they don't mention it, the Commission will forget about it.

## II. CONCLUSION

For the above-stated reasons, Applicants' Opposition utterly fails to refute the showing in Cincinnati Bell's Petition that the merger will cause direct and substantial harm to the public interest unless the specified conditions are imposed. Accordingly, the relief requested by Cincinnati Bell in its Petition must be granted.

Respectfully submitted,

/s/ Jean L. Kiddoo

Christopher J. Wilson  
Vice President & General Counsel  
Cincinnati Bell Inc.  
221 East Fourth Street  
Cincinnati, Ohio 45202

Jean L. Kiddoo  
Patrick J. Whittle  
BINGHAM MCCUTCHEN LLP  
2020 K Street, N.W.  
Washington, DC 20006-1806  
Tel: (202) 373-6034  
Fax: (202) 373-6001  
Email: jean.kiddoo@bingham.com  
Email: patrick.whittle@bingham.com

Counsel for Cincinnati Bell Wireless LLC

Dated: February 2, 2009

## CERTIFICATE OF SERVICE

I, Latonya Y. Ruth, hereby certify that on this 2nd day of February, 2009, I caused copies as indicated below of the Reply of Cincinnati Bell Wireless LLC to Joint Opposition of AT&T Inc. and Centennial Communications Corp. to Petitions to Deny or Condition Consent in WT Docket No. 08-246 by first class mail (or, where indicated, by email) delivery on the following individuals:

Centennial Communications Corp.\*  
ATTN: Tony L. Wolk  
Senior Vice President, General Counsel &  
Secretary  
3349 Route 138, Bldg. A  
Wall, NJ 07719  
[TWolk@centennialcorp.com](mailto:TWolk@centennialcorp.com)

Jonathan V. Cohen\*  
Wilkinson Barker Knauer, LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037  
[Joncohen@wbkllaw.com](mailto:Joncohen@wbkllaw.com)

AT&T Inc.\*  
c/o William R. Drexel  
1010 N. St. Mary's, Room 78215  
San Antonio, TX 78215  
[William.drexel@att.com](mailto:William.drexel@att.com)

Peter J. Schildkraut\*  
Arnold & Porter LLP  
555 12th Street, NW  
Washington, D.C. 20004  
[Peter\\_schildkraut@aporter.com](mailto:Peter_schildkraut@aporter.com)

Russell D. Lukas\*  
David L. Nace  
Todd B. Lantor  
Lukas, Nace, Gutierrez & Sachs, LLP  
1650 Tysons Blvd., Suite 1500  
McLean, VA 22102  
[rlukas@fcclaw.com](mailto:rlukas@fcclaw.com)  
[dnace@fcclaw.com](mailto:dnace@fcclaw.com)  
[tlantor@fcclaw.com](mailto:tlantor@fcclaw.com)

Percy L. Berger, Sr.  
NEATT Wireless, LLC  
101 North Wacker Dr.  
Chicago, IL 60606

Anna M. Gomez\*  
Sprint Nextel  
2001 Edmund Halley Drive  
Reston, VA 20191  
[Anna.M.Gomez@sprint.com](mailto:Anna.M.Gomez@sprint.com)

Commissioner Michael J. Copps\*\*  
Federal Communications Commission  
[Michael.Copps@fcc.gov](mailto:Michael.Copps@fcc.gov)

Commission Jonathan S. Adelstein\*\*  
Federal Communications Commission  
[Jonathan.Adelstein@fcc.gov](mailto:Jonathan.Adelstein@fcc.gov)

Commission Robert M. McDowell\*\*  
Federal Communications Commission  
[Robert.McDowell@fcc.gov](mailto:Robert.McDowell@fcc.gov)

Neil Dellar\*\*  
Office of General Counsel  
Federal Communications Commission  
[Neil.Dellar@fcc.gov](mailto:Neil.Dellar@fcc.gov)

Best Copy and Printing, Inc.\*\*  
Federal Communications Commission  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

Rick C. Chessen\*\*  
Federal Communications Commission  
[Rick.Chessen@fcc.gov](mailto:Rick.Chessen@fcc.gov)

Renee Crittendon\*\*  
Federal Communications Commission  
[Renee.Crittendon@fcc.gov](mailto:Renee.Crittendon@fcc.gov)

Angela E. Giancarlo\*\*  
Federal Communications Commission  
[Angela.Giancarlo@fcc.gov](mailto:Angela.Giancarlo@fcc.gov)

James D. Schlichting\*\*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
[James.Schlichting@fcc.gov](mailto:James.Schlichting@fcc.gov)

Chris Moore\*\*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
[Chris.Moore@fcc.gov](mailto:Chris.Moore@fcc.gov)

Erin McGrath\*\*  
Mobility Division, Wireless Bureau  
Federal Communications Commission  
[Erin.Mcgrath@fcc.gov](mailto:Erin.Mcgrath@fcc.gov)

Susan Singer\*\*  
Spectrum Competition and Policy Division,  
Wireless Bureau  
Federal Communications Commission  
[Susan.Singer@fcc.gov](mailto:Susan.Singer@fcc.gov)

Linda Ray\*\*  
Broadband Division, Wireless Bureau  
Federal Communications Commission  
[Linda.Ray@fcc.gov](mailto:Linda.Ray@fcc.gov)

David Krech\*\*  
Policy Division, International Bureau  
Federal Communications Commission  
[David.Krech@fcc.gov](mailto:David.Krech@fcc.gov)

Jodie May\*\*  
Policy Division, Wireline Competition  
Bureau  
Federal Communications Commission  
[Jodie.May@fcc.gov](mailto:Jodie.May@fcc.gov)

/s/Latonya Y. Ruth  
Latonya Y. Ruth

\* First Class U.S. Mail and Email  
\*\* Email