

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
Application for Consent)	WT Docket No. 11-65
To Transfer of Control Filed By)	
AT&T Inc. and Deutsche Telekom AG)	DA 11-799
_____)	

COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC

Granite Telecommunications, LLC (“Granite”), pursuant to the Commission’s Public Notice, DA 11-799 (April 28, 2011), respectfully submits these comments concerning the applications of AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“Deutsche Telekom”, and together with AT&T, the “Applicants”) concerning the proposed acquisition of T-Mobile USA (“T-Mobile”) by AT&T.

I. BACKGROUND ON GRANITE

Granite is a nationwide competitive provider of advanced telecommunications services to enterprise subscribers. Granite is the country’s premier provider of nationwide local business telecommunications service for over 1,000,000 phone lines serving multi-location business customers, including over two-thirds of the nation’s Fortune 100 companies, as well as the United States Postal Service and many other governmental entities. Granite serves over 14,000 corporate clients at over 240,000 locations. Many of its customers are national in scope and have locations in almost every region of the country. Granite serves all 10 of America’s 10 largest retailing companies. Granite’s customer retention rate is more than five times the industry average. With scalable solutions and dedication to “live” personalized service, Granite is able to meet the ever changing needs and demands of its multi-location customers.

As a non-facilities-based CLEC, Granite serves its customers predominantly through commercial agreements with the largest incumbent LECs, including AT&T. In fact, Granite is

the nation's largest distributor of incumbent LEC analog services to businesses.

II. THE PROPOSED MERGER, IF APPROVED, WILL INCREASE AT&T'S MARKET POWER IN THE BROADBAND MARKETPLACE

AT&T and T-Mobile are both large, rapidly growing providers of broadband Internet service. While AT&T provides both fixed broadband and wireless broadband, and T-Mobile provides only wireless broadband, the distinctions between fixed and wireless broadband have blurred to the point where they are of relatively little consequence. For example, as reflected in T-Mobile's current promotional literature, attached as Exhibit A, T-Mobile offers an unlimited 4G broadband service that provides for "High-speed Internet . . . for video and music streaming, playing online games, GPS navigation, downloading apps and more." If this service is capable of providing the customer with video streaming, a highly bandwidth-intensive use, it is clearly capable of the most demanding broadband services.

The Applicants' declarations illustrate that T-Mobile's data traffic is expected to grow more than twice as fast as AT&T's between 2010 and 2015.¹ The increased power in the broadband market that AT&T will gain by swallowing up this large and rapidly growing group of T-Mobile broadband customers is of particular significance because of the increased power it will give AT&T to discriminate against those who compete with AT&T in the provision of broadband services, such as DSL. While the Application contains little about AT&T's and T-Mobile's roles as large, growing broadband providers,² some information regarding their provision of broadband is publicly available. AT&T's 2010 Annual Report reflects that AT&T

¹ Compare Larsen Declaration, ¶ 15 ("By 2015, T-Mobile USA expects data traffic on its network to be at least 20 times that of the 2010 level") with Moore Declaration, ¶ 6 ("By 2015, AT&T estimates that mobile data traffic on its network will reach eight to ten times what it was in 2010").

² As the Commission has established, "applicants carry the burden of showing that the proposed merger will not eliminate potentially significant sources of competition that the Communications Act" sought to create, including in related markets. *Merger of NYNEX and Bell Atlantic*, 12 FCC Rcd 19985 (August 14, 1997) at ¶ 3. Applicants' failure to provide data regarding the broadband and wireless data markets leaves the Commission with no way of assuring itself that the merger will not eliminate potentially significant sources of competition in the broadband and wireless data markets.

had 17,755,000 broadband landline connections³ and at least 41.5 million wireless data customers.⁴ The corresponding data are not available in T-Mobile's 2010 Annual Report; however, the Annual Report states that T-Mobile USA derived 16.1 billion Euros in total revenue.⁵ From this data, as well as confidential data provided in ¶ 125 of the Carlton Declaration regarding the percentage of AT&T's and T-Mobile's wireless revenue that is data revenue, as well as the statement in AT&T's 2010 Annual Report that AT&T derived \$18.2 billion in wireless data revenues, one could roughly estimate T-Mobile's data revenues. In any event, it is clear that the merged entity will have power and leverage in the broadband marketplace that significantly exceeds the power and leverage that either AT&T or T-Mobile has today.

III. IMPORTANCE OF BROADBAND DSL SERVICES TO GRANITE AND ITS CUSTOMERS

One of the most important products that Granite and other similarly situated CLECs provides to their customers is broadband DSL. Many of Granite's enterprise customers purchase broadband data services using DSL, which Granite resells from incumbent LECs. These customers rely on this service to communicate among multiple locations, process credit card transactions, share data with other locations, provide interactive services to their customers, and access the Internet. In order for Granite to compete for and win business in the enterprise market, offering competitive voice and data services are critical. AT&T, one of Granite's chief competitors, markets to businesses by providing voice services and DSL over a single line

³ AT&T 2010 Annual Report at 30. This includes in-region DSL, in-region U-Verse, High Speed Internet access lines, satellite broadband, and 3G laptop connect cards.

⁴ AT&T's 2010 Annual Report shows that AT&T had 68,041,000 postpaid wireless customers, of which 61% (or approximately 41,500,000) had data plans. *Id.* at 26, 34. the Annual Report does not disclose how many of AT&T's 11,645,000 reseller wireless customers also had data plans. *See id.* at 34.

⁵ T-Mobile 2010 Annual Report at 89.

(“DSL Line Split”),⁶ and AT&T’s ability to combine these services in the DSL Line Split offering puts competitors at a distinct disadvantage, not only with respect to DSL service, but also with respect to voice service. AT&T’s ability to provide DSL and wireless services free of the regulatory restrictions of Sections 251, 252 and 271 of the Act⁷ that apply to its voice services allows AT&T to offer these products at discounted rates. This, in turn, makes it difficult for competitive wireline carriers such as Granite to compete with AT&T by offering the same package of telecommunications services at a competitive price.

IV. AT&T’S REFUSAL TO OFFER DSL SERVICE

Throughout the country, Granite has been able to obtain DSL for services for resale on a financially viable and competitive basis from local exchange carriers, with the notable exception of AT&T. Indeed, while Verizon and CenturyLink provide viable resale solutions for DSL, AT&T only offers a wholesale stand alone dry loop product that requires a separate cable pair and new installation. Thus, in order for CLECs, like Granite, to purchase AT&T’s wholesale DSL product, they are forced to purchase two lines, one for voice and one for data, as opposed to being able to purchase a single line that provides both voice and data services through the DSL Line Split offering. This makes the competitive wireline carriers combined offering (voice and broadband) uncompetitive from a price and customer convenience perspective when compared to AT&T’s DSL Line Split offering using a single line. In fact, AT&T’s refusal to permit Granite to provide a DSL Line Split offering forces Granite and its customers to add an additional line to every location where a customer wants DSL.

This additional line is not only wasteful and inefficient, but in many instances, it causes additional and unnecessary inconveniences for Granite’s customers, who endure longer

⁶ For example, the following link reflects AT&T’s offering of combined of wireless, DSL, and voice services to small businesses in the former BellSouth region: http://smallbusiness.bellsouth.com/bundles_services.html. AT&T makes similar combined offers to residential and small business customers throughout AT&T’s 22-state wireline territory.

⁷ 47 U.S.C. §§ 251, 252 and 271 (2010).

downtime related to the installation and provisioning of the additional line. Moreover, some customers do not have existing facilities that will permit adding the additional line for DSL services or AT&T is not able to provision the additional line or have the other facilities necessary for the DSL services. As such, if the customer wants to use Granite as its provider for voice and DSL services, additional facilities would need to be constructed for the DSL service. If AT&T were to sell Granite a DSL Line Split offering that included voice and DSL services, the additional lines and facilities would not need to be constructed. Granite faces a similar obstacle when it attempts to win an existing AT&T customer whose service it would convert to Granite. For example, Granite has lost numerous customers because it was unable to provide the same DSL Line Split service that AT&T had been providing to them.

Therefore, AT&T exerts an unfair competitive advantage in that it can offer retail customers combined voice and data service using a single line, but does not make such a service available to competitive carriers. By combining the DSL service with voice services, AT&T has improperly enhanced its substantial market power in the voice market and has significantly impeded Granite's ability to sell voice and data services to business customers. Many businesses need a broadband connection for processing credit card transactions or to transmit data among the business's multiple locations and look for the cost savings that is made possible by a combined voice and DSL through the DSL Line Split product. AT&T's refusal to make its line DSL Line Split offering available via a wholesale agreement not only stifles competition in the wireline voice market, but is also incompatible with the Commission's goal of promoting widespread availability of broadband at affordable prices.

Since AT&T voluntarily sells the DSL Line Split service to its voice customers, it is evident that AT&T earns a profit selling this service. It could earn that same profit by selling the same the DSL Line Split service to end users served by Granite or another CLEC using a single AT&T loop. Further support for the inference that selling the DSL Line Split service is profitable is found in the fact that other incumbent LECs, including Verizon and CenturyLink, sell this

service without voice service.⁸

The fact that AT&T is foregoing this short term profit from selling the DSL Line Split product implies that AT&T expects to recoup this lost short term profit over the long run by driving competitors like Granite out of the business for enterprise customers who desire combined voice and broadband services. In *Covad Communications Co. v. Bell Atlantic Corp.* a federal appellate court noted that allegations that an ILEC's refusal to sell DSL to end users who had orders pending with a CLEC stated a cause of action for monopolization under the antitrust laws.⁹ To prevail on such a claim, a competitor must show that the ILEC's refusal to deal is "irrational in the sense that the defendant sacrificed the opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival."¹⁰ This is precisely the case here. The profits that AT&T makes in selling DSL to end users that purchase voice service from AT&T would not disappear simply because the end user purchases voice service from Granite. It is inescapable that AT&T's refusal to sell the DSL Line Split product sacrifices AT&T's short term profits "because of the adverse impact the refusal would have on a rival," such as Granite. The Commission should not countenance these anticompetitive tactics that are

⁸ Indeed, Verizon offers DSL service to Granite and other wholesale customers to resell on a "White Label" basis. See <http://www.Prnnewswire.com/news-releases/verizon-global-wholesale-expands-high-speedinternet-portfolio-with-white-label-options-98921929.html>. Qwest and Embarq (now CenturyLink) similarly offer CLECs a combined voice and DSL product over a single line. <http://embarq.centurylink.com/Business/BundledServicesBusinessBundle>.

⁹ *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 675 (D.C. Cir. 2005). Courts have recognized that an extensive FCC regulatory framework exists that itself provides oversight functions and remedies for anticompetitive behavior on the part of entities, such as AT&T, subject to FCC jurisdiction. See, e.g., *Verizon v. Trinko*, 540 U.S. 398, 412-413 (2004) (noting that "in certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm," as FCC enforcement powers include "an order that the deficiency be corrected, the imposition of penalties, or the suspension or revocation" of operating authority); *Broadcom v. Qualcomm*, 501 F.3d 297, 316-317 (3rd Cir. 2007). Thus, antitrust courts defer to the Commission in important respects in ensuring that consumers receive the benefits of competition that are contemplated by both the antitrust laws and the Communications Act.

¹⁰ *Covad Communications*, 398 F.3d at 675 (quoting AREEDA & HOVENKAMP, ANTITRUST LAW 1773, at 199 (Supp. 2004)).

designed to impede competition in the market for voice services, particularly in the highly competitive market for voice services to business customers.

V. THE MERGER WILL ENHANCE AT&T'S ABILITY AND INCENTIVE TO DISCRIMINATE

The increased broadband market share that the merged company will have will increase both AT&T's ability and its incentive to exclude competition from the broadband marketplace. Absent the merger, T-Mobile might offer its broadband service on a wholesale basis to Granite and other CLECs in competition with AT&T. If the merger is allowed without conditions, T-Mobile may be expected to follow AT&T's lead, thus supporting AT&T's efforts to withhold broadband from wholesale customers. The merger also increases AT&T's incentive to discriminate against wholesale broadband customers. This is because the broadband customer that Granite gains by wholesale purchase from AT&T may mean a lost broadband customer, not only for AT&T, but also for T-Mobile.

While it is true that as shown above, AT&T is already discriminating against wholesale purchasers of broadband, the Commission has recognized that by providing an increased incentive to discriminate, and merger can increase discrimination because the merging parties:

may not be discriminating to the full extent of their ability. For example, the benefits of increased levels of discrimination may not justify the increased financial costs and corresponding risks of detection and punishment. . . . the merger, by increasing the incentive to discriminate, probably will result in the merged entity further exploiting its ability to discriminate against retail rivals.¹¹

VI. IF THE COMMISSION APPROVES THE TRANSACTION, AT&T MUST BE SUBJECT TO MEANINGFUL CONDITIONS ON THE PROVISION OF DSL SERVICES

As demonstrated herein, if the transaction is approved, AT&T will wield significant

¹¹ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 191 (1999).

power in the broadband marketplace. While the near-term result of the transaction will increase AT&T's power in the wireless broadband marketplace, such distinction is of little import when one considers the ongoing and continued convergence of wireless and wireline data services. As wireless products, such as smart phones and tablets, become more and more ubiquitous, the differences between wireline and wireless broadband is rapidly disappearing. In a converged broadband world, the acquisition of T-Mobile will allow AT&T to dominate the broadband marketplace.

Accordingly, it is critical that carriers, like Granite, continue to be able to compete for broadband services, which provide the important benefit of choice to the enterprise customers that both AT&T and Granite compete to serve. Thus, if the transaction is approved, Granite proposes that such approval include the following conditions related to AT&T's provisions of wholesale DSL services to other carriers, like Granite.

- For a period of 60 months after the closing date, AT&T will be required to offer ADSL transmission services to other carriers that are functionally the same as the services that AT&T offers to its own customers, including any services provided on fiber optic facilities or other technologies.
- The wholesale ADSL services shall include services at the same transmission speeds as the services that AT&T offers to its own customers.
- The wholesale ADSL services shall be offered without any line of business or resale restrictions. Such restrictions include but are not limited to restrictions on the types of customers that may be served (e.g., restrictions requiring service only to residential customers and not to business customers) or types of services that may not be offered (e.g., restriction against offering VoIP services).
- AT&T shall not require that a carrier that wishes to purchase a wholesale ADSL service also purchase circuit switched voice grade telephone service, whether such service is provided on the same line or by requiring the purchasing carrier to purchase two separate lines - one with voice service and one with ADSL service.

- Carriers that purchase a wholesale ADSL service shall be permitted to order a single line with only DSL service provided over that line. For avoidance of doubt, AT&T may not require carriers to purchase a single line with both voice and DSL services.
- AT&T shall permit purchasing carriers to convert existing AT&T customers to become customers of the purchasing carrier using exactly the same configuration of services. For example, if an existing AT&T customer has service which includes 2 voice lines and a third line which includes voice and data capability, AT&T must permit the purchasing carrier to serve that customer using the same exact configuration of lines.
- For a period of 60 months from the closing date, any AT&T wholesale DSL offering shall be at prices comparable to those available in the overall market for similar wholesale broadband services, and in any event less than the rate charged by AT&T to retail customers for functionally similar services, including any promotional rate offered for a period of six months or longer and with discounts that are comparable to the discounts offered by AT&T in other existing wholesale agreements.
- AT&T/T-Mobile will not provide to its wireline affiliates ADSL or functionally similar transmission services that are not available to other similarly situated customers on the same terms and conditions.

VII. CONCLUSION

For the foregoing reasons, Granite requests that, if the Commission approves the transaction between AT&T and T-Mobile, such approval include the conditions discussed herein.

Respectfully submitted,

/s/ Samuel J. Kline

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May 31, 2011

SERVICE LIST

I, M. Renee Britt, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Comments of Granite Telecommunications, LLC to be served, as specified, upon the parties listed below:

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