

Before the  
**Federal Communications Commission**  
Washington, DC 20554

In the Matter of )  
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Applications of )  
 )  
AT&T Inc. and ) WT Docket No. 11-65  
Deutsche Telekom AG )  
 )  
For Consent to Assign or Transfer )  
Control of Licenses and Authorizations )

To: The Secretary

**PETITION TO DENY**

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## SUMMARY

The Diogenes Telecommunications Project petitions the FCC to deny AT&T's acquisition of T-Mobile. If approved, the deal would substantially reduce competition in the wireless marketplace to the detriment of the user public. Inevitably, consumers would pay higher prices, have fewer equipment and service choices and be deprived of the benefits of innovation. All this for a set of vague, dubious benefits that AT&T will bestow upon the public, or more likely distance itself from later on when it is no longer under the spotlight. Despite all of the high sounding rhetoric about a glorious wireless broadband future for America, the proposed transaction is little more than a grab for T-Mobile's 34 million customers and has much less to do with spectrum scarcity, network efficiencies, corporate synergies and rural broadband deployment, as the application asserts.

What is truly shocking about the AT&T/T-Mobile application is the extent to which it misrepresents the conditions and capabilities of both companies and their prospects for the future were they to remain independent. Many of the statements and characterizations in the application are contradicted by SEC filings and in public statements made by AT&T and T-Mobile officials that have been widely reported in the media. These mischaracterizations and discrepancies have largely to do with AT&T's linchpin public interest claim, namely that AT&T's acquisition of T-Mobile's spectrum holdings is key to the availability of LTE throughout the country and that T-Mobile, having "no clear path to LTE" is on life support.

Holders of FCC licenses are held to a high standard of qualification. The Petition to Deny documents the companies' mischaracterizations, half-truths and selective omissions of critical facts. The evidence presented here is more than sufficient to

warrant a hearing into the applicants' qualifications under well-established FCC precedent. Even without a hearing, the application for transfer of licenses must be denied for the applicants have not shown that the transaction would serve the public interest.

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**PETITION TO DENY**

The Diogenes Telecommunications Project (DTP), by its attorneys, files this Petition to Deny against the proposed acquisition by AT&T Inc. (AT&T) of the licenses and authorizations of T-Mobile USA, Inc. (T-Mobile), a Deutsche Telekom AG (DT) subsidiary.<sup>1</sup> DTP hereby requests that the Federal Communications Commission (FCC) deny the proposed transaction. Every public interest benefit AT&T claims can be achieved through an acquisition of T-Mobile can likewise be achieved without destroying competition in general, and T-Mobile in particular. AT&T's proposed acquisition of T-Mobile will harm competition, reduce opportunities for competitive entry, and raise costs to consumers. More troubling, in the application, T-Mobile and AT&T have demonstrated a lack of candor and have made material misrepresentations to the FCC, thereby raising the issue of whether they lack the necessary qualifications to remain FCC licensees.

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<sup>1</sup> See *Applications of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc., for Transfer of Control of Licenses and Authorizations*, WT Docket No. 11-65 (filed Apr. 21, 2011).

## STANDING

Scott Karren is a member of DTP and a customer of T-Mobile. Until approximately 2000, he was a customer of AT&T Wireless. Extremely dissatisfied with the customer service provided by AT&T, Scott Karren switched mobile carriers and became a T-Mobile customer. As Scott Karren makes clear in his Declaration (attached hereto), he wants to stay a customer of T-Mobile and does not want to have his mobile phone service account transferred to AT&T.

T-Mobile is a less expensive wireless provider than AT&T. As a T-Mobile subscriber, Scott Karren is concerned that he will be forced to migrate to an AT&T plan, which would result in his having to pay more for what, in his opinion, is a poorer quality of service. AT&T has stated publicly that it does not intend to retain T-Mobile pricing structures for newly acquired customers indefinitely. As a T-Mobile subscriber, Scott Karren will have to either pick a higher priced AT&T plan, or downgrade his plan to a less expensive alternative that will not provide him with the same service as T-Mobile.

## INTRODUCTION

AT&T is a provider of wireless, Wi-Fi, high speed Internet, local and long distance voice, mobile broadband, and advanced TV services. AT&T's wireless network covers 97 percent of the United States' population, with over 300 million people in its footprint.<sup>2</sup> AT&T holds 82 MHz of spectrum on a nationwide average basis.<sup>3</sup> As of December 31, 2010, AT&T served 95.5 million wireless customers.<sup>4</sup> AT&T's wireless operations provided approximately 47% of its

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<sup>2</sup> AT&T television commercial. <http://www.youtube.com/watch?v=toihCy0tjz0>.

<sup>3</sup> *Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Mobile Wireless, Including Commercial Mobile Servs.*, WT Dkt No. 09-66, Fourteenth Report, FCC 10-81, 25 FCC Rcd 11407, 11569 (2010) ("*Fourteenth Competition Report*").

<sup>4</sup> AT&T 2010 SEC Form 10-K, p.2.

2010 operating revenues and 67% of its 2010 income.<sup>5</sup> Wireless is AT&T's fastest-growing revenue stream.<sup>6</sup> AT&T markets its wireless service as the nation's fastest mobile broadband network.<sup>7</sup> Currently, AT&T offers 4G service to areas covering 110 million persons.<sup>8</sup>

T-Mobile offers nationwide wireless voice and data services to residential and business customers. T-Mobile's wireless network covers 96 percent of the United States population, with over 300 million people in its footprint.<sup>9</sup> T-Mobile holds 50.4 MHz of spectrum on a nationwide average basis.<sup>10</sup> T-Mobile has 34 million U.S. customers.<sup>11</sup> Currently, T-Mobile offers its 4G network in 100 metropolitan areas, covering 200 million people across the U.S., which T-Mobile asserts is more population than any other wireless company.<sup>12</sup> In its advertising, T-Mobile states: "Every day we are building new towers in cities from coast to coast, so more and more people will be able to use the power of our network."<sup>13</sup> T-Mobile markets its wireless service as "America's Largest 4G network."

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<sup>5</sup> AT&T 2010 SEC Form 10-K, p.3.

<sup>6</sup> AT&T 2010 Annual Report, p.42.

<sup>7</sup> HTC Inspire 4G Arrives for AT&T Customers on Feb. 13 AT&T 4G Smartphone is the First of Many Planned for the Nation's Fastest Mobile Broadband Network. <http://www.att.com/gen/press-room?pid=18976&cdvn=news&newsarticleid=31537&mapcode=consumer>.

<sup>8</sup> This is a T-Mobile estimate. [http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript\\_20012011.pdf](http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf)

<sup>9</sup> <http://t-mobile-coverage.t-mobile.com/>

<sup>10</sup> *Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Mobile Wireless, Including Commercial Mobile Servs.*, WT Dkt No. 09-66, Fourteenth Report, FCC 10-81, 25 FCC Rcd 11407, 11569 (2010) ("*Fourteenth Competition Report*").

<sup>11</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.9.

<sup>12</sup> <http://t-mobile-coverage.t-mobile.com/>

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

AT&T claims the merger is necessary because “AT&T faces network spectrum and capacity constraints more severe than those of any other wireless provider, and this merger provides by far the surest, fastest, and most efficient solution to that challenge.”<sup>14</sup> AT&T justifies the acquisition of T-Mobile because of its “declining market shares and no clear path to Long Term Evolution (LTE), the gold standard for advanced mobile broadband services.”<sup>15</sup> As a sop to the FCC, AT&T claims that the grant of the proposed transaction will give it the scale, resources, and spectrum it needs to increase its LTE deployment from its current ambiguous plans of 80 percent to 97 percent of the US population.<sup>16</sup> The transaction will not increase the overall supply of spectrum, but AT&T contends that “it will dramatically increase the efficiency of its use, and those efficiency gains are the functional equivalent of creating new spectrum.”<sup>17</sup> In fact, AT&T enthusiastically, if not somewhat hyperbolically, claims “this transaction is the most *pro-consumer* solution to the critical capacity challenges facing these two companies. It is also the most *pro-innovation* and *pro-investment* solution for America.”<sup>18</sup>

In weighing this transaction, the key question for the FCC is, will the claimed public interests outweigh the damage AT&T’s acquisition of T-Mobile will cause to competition in the wireless marketplace? DTP believes that it most certainly will not. The U.S. wireless market is highly concentrated, and has over the past decade transformed from a market dominated at a regional level by multiple carriers, to a market dominated at a national level by just two

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<sup>14</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2.

<sup>15</sup> Id.

<sup>16</sup> *Passim*. See e.g., AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.18-19.

<sup>17</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.7.

<sup>18</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.9.

companies -- AT&T and Verizon Wireless. In 2001, the top two carriers' share of total U.S. wireless subscriptions was 43 percent. By the end of 2010, this two-firm share rose to 65 percent. If the FCC permits AT&T to acquire T-Mobile, then nearly 80 percent of the wireless market will be controlled by two vertically integrated companies, Verizon and AT&T. Their nearest competitor, Sprint Nextel, will have just 16 percent of the market.

One consequence of the merger will be an increase in the price T-Mobile subscribers pay for service. A recent Consumer Reports price analysis survey of voice and data plans found that T-Mobile customers pay between \$15 to \$50 less a month for their plans than they would with comparable plans from AT&T.<sup>19</sup> The finding supports concerns that T-Mobile subscribers who are forced to migrate to AT&T plans would likely pay more for service than they would under a T-Mobile plan—and that T-Mobile's departure from the wireless market would eliminate a relatively low-cost carrier as an option for new customers. AT&T has stated publicly that it does not intend to retain T-Mobile's pricing structure for newly acquired customers indefinitely.<sup>20</sup> Eventually, T-Mobile subscribers will have to either pick the higher priced AT&T plans or downgrade their plan to a less expensive alternative that does not provide them with the same service as T-Mobile. With T-Mobile out of the picture, the remaining national carriers will have fewer reasons to compete on price.

An increase in costs to consumers is just one consequence of AT&T acquisition. DTP believes that the claimed public interests benefits of the merger are illusory. AT&T can

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<sup>19</sup> Blyskal, Jeff (April 8, 2011). *CR analysis: T-Mobile is cheaper than AT&T*. In Consumer Reports. <http://news.consumerreports.org/electronics/2011/04/cr-analysis-t-mobile-is-cheaper-than-att.html>

<sup>20</sup> Kang, Cecilia, (April 12, 2011) *AT&T, T-Mobile file merger application; Q&A with James Cicconi*, *Washington Post*, [http://www.washingtonpost.com/blogs/post-tech/post/atandt-t-mobile-file-merger-application-qanda-with-james-cicconi/2011/04/11/AFhzCTQD\\_blog.html](http://www.washingtonpost.com/blogs/post-tech/post/atandt-t-mobile-file-merger-application-qanda-with-james-cicconi/2011/04/11/AFhzCTQD_blog.html)

accomplish the same goals without swallowing one of its leading competitors. As discussed below, every single public interest benefit AT&T has claimed can be achieved through the acquisition of T-Mobile can be likewise be achieved without destroying a competitor and, most importantly, without the negative consequences -- such as increased prices to consumers.

**I. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT AT&T'S CLAIMS THAT IT FACES NETWORK SPECTRUM AND CAPACITY CONSTRAINTS MORE SEVERE THAN THOSE OF ANY OTHER WIRELESS PROVIDER.**

AT&T claims that it is facing severe capacity constraints and that it requires T-Mobile's spectrum to build out its LTE infrastructure. According to AT&T, T-Mobile has "no clear path to LTE."<sup>21</sup> This is not the first time AT&T has made such claims. On November 21, 2008 AT&T filed an application with the FCC requesting permission to acquire Centennial Communications Corp. ("Centennial"). In the Centennial proceeding, AT&T argued that the acquisition will enable AT&T to provide 4G services to more of Centennial's customers than Centennial could do on its own.<sup>22</sup> In words remarkably similar to those used in the AT&T/T-Mobile application, AT&T states:

The combined company will have enough spectrum to migrate to 4G technology (LTE) without interfering with the quality of service provided to its customers. The combined company would be in a position to dedicate a portion of its spectrum holdings to the LTE conversion while continuing to provide high quality service to its existing customer base. The transition to LTE requires each company to set aside part of its spectrum for conversion while supporting its existing customer base on the remaining spectrum. In some areas served by Centennial, AT&T lacks spectrum to support existing customers while converting to LTE. . . . Centennial would also face difficulties converting its network to LTE with its current spectrum.

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<sup>21</sup> *Passim, see*, Larsen Decl. ¶ 9.

<sup>22</sup> *AT&T and Centennial*, WT Docket No. 08-246 , Decl. Moore pp. 7-8. <http://transition.fcc.gov/transaction/att-centennial.html>.

In addition, Centennial holds spectrum in certain areas where AT&T does not have or has not yet applied for either AWS or 700 MHz spectrum. In certain of these areas, the merger may give AT&T sufficient spectrum to roll out 4G technology. . .

The merger will also enable AT&T to roll out 4G technology faster in the Centennial service areas where AT&T may have or has applied for AWS or 700 MHz spectrum, but does not yet have the towers or infrastructure in place to use the spectrum. In those areas, AT&T will not be delayed by the necessity of obtaining permits and constructing towers.<sup>23</sup>

Two years later, AT&T has made similar claims in its bid to acquire Qualcomm. In December 2010, AT&T agreed to purchase spectrum licenses in the Lower 700 MHz frequency band from Qualcomm Incorporated (Qualcomm) for approximately \$1.9 billion. The spectrum covers more than 300 million people total nationwide, including 12 MHz of 700 MHz D and E block spectrum covering more than 70 million people in 5 of the top 15 metropolitan areas and 6 MHz of 700 MHz D block spectrum covering more than 230 million people across the rest of the U.S.<sup>24</sup> In its application to acquire Qualcomm, AT&T claims it will move aggressively to integrate this spectrum into its LTE network.<sup>25</sup> AT&T again argues that this transaction will be the spectrum fix it needs to rollout LTE.

The Qualcomm Spectrum will enable AT&T to expand capacity on its LTE network and provide a more robust and competitive service. The 6 MHz of Lower 700 MHz D block spectrum nationwide complements AT&T's existing holdings and will provide additional capacity everywhere. In addition, Qualcomm's Lower 700 MHz E block licenses in the New York, Los Angeles, San Francisco, Boston, and Philadelphia Economic Areas will give

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<sup>23</sup> Id. (footnote omitted).

<sup>24</sup> AT&T 2010 SEC FORM 10-K, p.21.

<sup>25</sup> AT&T and Qualcomm WT Docket No. 11-18 , p.7. <http://transition.fcc.gov/transaction/att-qualcomm.html>

AT&T a total of 12 more MHz of capacity in these areas of particularly high demand.

As noted above, AT&T plans to deploy the Qualcomm Spectrum as supplemental downlink, using the carrier aggregation technology, which will be enabled after the LTE Advanced standards are released. Supplemental downlink technology will allow AT&T to add substantial capacity on its LTE network by combining Qualcomm's unpaired 700 MHz spectrum with AT&T's paired spectrum. Supplemental downlink technology permits the bonding of noncontiguous spectrum, including unpaired spectrum, into a single wider channel. In addition, supplemental downlink can be used to provide additional downlink capacity to address the asymmetry of data flow that results from wireless broadband users currently consuming more downlink than uplink capacity. Such asymmetry is caused by, for example, the consumption of video and other data-heavy media content with one-sided data flows.

AT&T and likely other carriers will make significant use of supplemental downlink technology as they strive to meet consumers' seemingly ever-growing appetite for wireless broadband services.<sup>26</sup>

To read AT&T's Qualcomm application is to come to the conclusion that its spectrum woes (real or imagined) will be behind them, if only the FCC grants its application to acquire Qualcomm.

AT&T states that its customers will be able to utilize handsets and other equipment incorporating the Qualcomm spectrum by early 2014.<sup>27</sup>

Yet, the AT&T/T-Mobile application makes almost no mention of the Qualcomm spectrum other than to claim that it will not solve the severe spectrum crunch AT&T is facing. "Nor can AT&T address its short-term capacity challenges with the spectrum it is purchasing

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<sup>26</sup> AT&T and Qualcomm WT Docket No. 11-18 , pp.14-15, footnotes omitted. <http://transition.fcc.gov/transaction/att-qualcomm.html>.

<sup>27</sup> Id. at p. 16.

from Qualcomm. That spectrum is only “unpaired” (one-way)...”<sup>28</sup> As discussed below, AT&T is just starting to rollout its LTE system, far behind its leading competitor, Verizon.

Construction will not be completed until 2016, at least. Why then is spectrum that will be available for use in 2014 not suitable for LTE? Why did AT&T not disclose this material fact to the FCC in the Qualcomm application? Why has AT&T not amended its Qualcomm application to disclose the facts supposedly revealed in the AT&T/T-Mobile application?

AT&T has a duty to maintain the continuing accuracy and completeness of information furnished in a pending application.<sup>29</sup> AT&T is sounding more and more like the boy who cried wolf. In each transaction, Centennial, Qualcomm and now T-Mobile, AT&T has claimed that if only the FCC grants this one application, it will be able to smoothly rollout LTE. In this transaction, AT&T has sunk to a new low. In one pending application it claims it needs the Qualcomm spectrum to immediately rollout LTE; in another pending application it claims that because the spectrum is unpaired it cannot satisfy its requirements for spectrum, and therefore must acquire T-Mobile’s 50.4 MHz of spectrum (and its 34 million customers), or otherwise face a severe “spectrum crunch.” It just doesn’t get any deeper than that.

#### **A. LTE – AT&T’S GOLD STANDARD**

A central tenet of AT&T’s application is that it must acquire T-Mobile because it needs T-Mobile’s spectrum to transition to LTE, “the gold standard for advanced mobile broadband services.”<sup>30</sup> AT&T further contends that T-Mobile has no clear path to LTE, implying that T-

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<sup>28</sup> Moore Decl. ¶ 25.

<sup>29</sup> See 47 C.F.R. § 1.65.

<sup>30</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.1.

Mobile will not be able to survive as a mobile carrier. Nowhere in its application does AT&T explain why LTE is the gold standard, or why other transitory steps to 4G will not work as well, or even better, than LTE.

Despite the confusion in the application, LTE is not a 4G standard. Rather, it is an evolved 3G technology which offers improved speeds and greater spectral efficiency than 3G. LTE and WiMAX are often called 4G, but they are not official 4G standards, according to the ITU.<sup>31</sup> The ITU requires 100 Mbps (mobile) and 1 Gbps (fixed) speeds, among other criteria, to qualify as true 4G. That's about three times the speed of today's LTE.<sup>32</sup>

No doubt LTE is the next step. It has many advantages, for example, LTE is scalable allowing for bandwidths of 20 MHz, 15 MHz, 10 MHz, 5 MHz, 3 MHz and 1.4 MHz. Because it is scalable it is easy to introduce. It can be introduced with a minimum amount of spectrum, and as subscribers migrate to 4G, additional spectrum can be added or repurposed for LTE use. Also, LTE represents a real improvement in speed. LTE will provide for downlink peak data rate of 100Mbps and uplink peak data rate of 50 Mbps. On AT&T's web page in its FAQs section the following question is asked, "Just how fast is AT&T 4G?" Response: "With enhanced backhaul AT&T is seeing network speeds up to approximately 6 Mbps. Actual speeds experienced will vary . . . LTE is expected to deliver even faster speeds."<sup>33</sup> How much faster, will AT&T's LTE serve really be? The application is silent on this point, other than to claim that

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<sup>31</sup> ITU: *The "Official" 4G Standard Approved*, October 21, 2010, <http://www.techalps.com/wireless/itu-the-%E2%80%9Cofficial%E2%80%9D-4g-standard-approved.html>.

<sup>32</sup> Id.

<sup>33</sup> AT&T FAQs [http://www.wireless.att.com/answer-center/main.jsp?t=solutionTab&ft=&ps=solutionPanels&locale=&\\_dyncharset=UTF-8&solutionId=KB115947](http://www.wireless.att.com/answer-center/main.jsp?t=solutionTab&ft=&ps=solutionPanels&locale=&_dyncharset=UTF-8&solutionId=KB115947)

it will be faster than AT&T's current offerings.<sup>34</sup> AT&T is expected to roll out its New York and Los Angeles LTE network in June and July 2011. Reports state that AT&T expects to achieve speeds upwards of 15 Mbps.<sup>35</sup> Such speed, if AT&T can achieve it, is far from a true 4G standard. By way of comparison, T-Mobile's current network provides 21 Mbps to a U.S. population of 200 million. It recently announced that it plans to double the speed of its 4G network in order to bring speeds of up to 42 Mbps to 140 million potential customers by year-end. T-Mobile is building out its network ahead of data demand.<sup>36</sup> T-Mobile does have a clear path to LTE. It has already achieved speeds in excess of AT&T's planned LTE deployment. T-Mobile's actual speeds far exceed AT&T's planned roll out LTE speeds.

LTE is a good standard, it may even be the next step, but it is neither true 4G, nor is it the gold standard. Wireless carriers will be evolving their systems for many years to come. There will be ever increasing speeds to meet increasing data demands. Eventually, true 4G standards will emerge. Then there will be 5G standards and after that uses and demands that cannot be imagined today. What is important is that as these systems evolve there is plenty of healthy competition to spur innovation and to reduce prices to consumers. To kill a competitor who has achieved faster network speeds and greater 4G deployment for the sake of some imagined temporary gain in spectrum efficiency does not serve the public interest.

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<sup>34</sup> See e.g., Hogg Decl. at ¶ 24.

<sup>35</sup> Hamburger, Ellis, (May 11, 2011) *AT&T's REAL 4G Network Could Be Coming June 30*, <http://www.businessinsider.com/atts-real-4g-network-is-coming-june-30th-2011-5>

<sup>36</sup> Tofel, Kevin C., (January 6, 2011) *T-Mobile's HSPA+ Doubling Down on Speeds in 2011*, <http://gigaom.com/broadband/t-mobiles-hspa-doubling-down-on-speeds-in-2011/>.

**B. AT&T IS NOT EXPERIENCING SPECTRUM CRUNCH; IT IS ATTEMPTING TO KILL COMPETITION.**

AT&T claims that it is facing a “spectrum crunch” so severe that its spectrum holdings are insufficient to permit deployment of LTE services. As has been discussed, this is not the first time AT&T has made this claim. In making these representations, AT&T has not been candid with the FCC. By almost any metric, AT&T has more than enough spectrum to launch LTE and maintain its existing services. The issue is not lack of spectrum; the real issue is competition. AT&T is not seeking to acquire additional spectrum *per se*, rather, it is seeking to kill T-Mobile, a leading competitor and acquire its 34 million customers.

The wireless market is saturated. As AT&T admits, in a wireless market place in which wireless subscription penetration surpassed 95% in 2010, there are a limited number of potential new subscribers. “As a result, wireless providers compete not only to retain their existing customer base, but also to attract new customers from each other—consumers we call “switchers.”<sup>37</sup> While AT&T is representing to the FCC that it lacks spectrum, it is representing to the Securities and Exchange Commission (SEC) that a key risk factor for investors is the availability of additional 700 MHz spectrum which will increase competition.

We expect market saturation to continue to cause the wireless industry’s customer growth rate to moderate in comparison with historical growth rates, leading to increased competition for customers. We expect that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition. This competition will continue to put pressure on pricing and margins as companies compete for potential customers.<sup>38</sup>

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<sup>37</sup> Christopher Decl. at ¶ 5.

<sup>38</sup> AT&T 2010 SEC FORM 10-K, p.29. (Emphasis added).

Despite its statements to the SEC, AT&T claims before the FCC that “[s]ignificant quantities of spectrum . . . are not available for acquisition.”<sup>39</sup> Furthermore, should the FCC grant AT&T exclusive rights to T-Mobile’s spectrum, that spectrum will not be available to existing or potential future competitors.

Based on its statements to the SEC in its 10 K as cited above, AT&T’s primary agenda is not to gain additional spectrum, but rather to limit the effectiveness of its competitors and to acquire additional subscribers. Most importantly, AT&T is seeking to maintain high prices and big profit margins by eliminating competition. In a saturated market, it would be difficult, if not impossible, to acquire 34 million new customers simply by improving network quality and customer service. As AT&T states to the SEC, to acquire additional customers, it may be forced to lower prices and cut its profit margins. By acquiring T-Mobile, AT&T accomplishes two key goals. First it gains 34 million new customers without having to discount prices, offer promotions or otherwise compete for new customers. Second and, most importantly, it eliminates a competitor while taking spectrum from other competitors and future would-be competitors.

AT&T claims it requires 20 MHz of spectrum to deploy LTE, and at present it lacks the necessary spectrum.<sup>40</sup> The record evidence suggests that AT&T has sufficient spectrum to build out its LTE system. The FCC has found that Verizon Wireless, AT&T, T-Mobile, as well as Sprint Nextel and Clearwire hold more than 80 percent of the available spectrum, measured on a MHz-POPs basis.<sup>41</sup> AT&T currently holds 82 MHz of spectrum on a nationwide basis, just

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<sup>39</sup> Moore Decl. at ¶ 22.

<sup>40</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.5.

<sup>41</sup> *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993;*

slightly less than its nearest competitor Verizon which hold 87.7 MHz of spectrum.<sup>42</sup> T-Mobile holds 50.4 MHz of nationwide spectrum.<sup>43</sup>

AT&T is rich in spectrum. Much of the spectrum it holds is currently not being used. Nonetheless, it argues that it needs additional spectrum in the 700MHz and AWS bands in order to roll out LTE.<sup>44</sup> Not counting Qualcomm, AT&T has 27.1 MHz of AWS and 700 MHz spectrum.<sup>45</sup> This represents 24.3% of the total available nationwide 700MHz spectrum and 11.2% of the AWS nationwide spectrum.<sup>46</sup> For example, in the top 21 markets AT&T holds more “beachfront” 700 MHz/AWS spectrum than any other carrier.<sup>47</sup> By some estimates, 70 percent to 90 percent of AT&T’s current spectrum capacity is unused.<sup>48</sup> This is before its proposed acquisition of Qualcomm.

Why is it that Verizon, the nation’s largest wireless carrier, shares virtually none of the doomsday network scenarios that AT&T reports in its public interest statement? Fran Shammo, Verizon’s CFO, stated that Verizon has “the spectrum we need, and are in a good position until about the year 2015 at this point.”<sup>49</sup> Verizon has committed to replacing its entire existing

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*Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Mobile Wireless, Including Commercial Mobile Servs.*, WT Dkt No. 09-66, Fourteenth Report, FCC 10-81, 25 FCC Rcd 11407, 11568 (2010) (“*Fourteenth Competition Report*”).

<sup>42</sup> *Fourteenth Competition Report*, Table 25 at p. 11569.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p. 24.

<sup>45</sup> *Fourteenth Competition Report*, Table 26 at p. 11569.

<sup>46</sup> *Fourteenth Competition Report*, Table 25 at p. 11569.

<sup>47</sup> Is AT&T a wireless spectrum hog? April 29, 2011. [http://news.cnet.com/8301-30686\\_3-20058494-266.html](http://news.cnet.com/8301-30686_3-20058494-266.html).

<sup>48</sup> <http://www.dslprime.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused>.

<sup>49</sup> VZ - Q1 2011 Verizon Earnings Conference Call, (April, 21, 2011), p. 17, [http://www22.verizon.com/investor/investor-consump/groups/events/documents/investorrelation/event\\_ucm\\_1\\_trans.pdf](http://www22.verizon.com/investor/investor-consump/groups/events/documents/investorrelation/event_ucm_1_trans.pdf)

nationwide 3G footprint with 4G LTE by the end of 2013, which already satisfies the level of national 4G coverage AT&T commits to with this merger.<sup>50</sup>

The issue is not, as AT&T claims, lack of spectrum. Rather, AT&T's delayed LTE buildout is due to its failure to invest in its network.<sup>51</sup> When AT&T's Chief Technology Officer, John Donovan, was recently asked what is holding back network quality he replied, "a little bit of everything." According to Donovan, the traditional device testing and rollout methods have "broken down," and AT&T suffers from a shortage of components.<sup>52</sup>

Currently, the majority of AT&T cell sites are still served by T-1 lines carrying a capacity of less than 12 Mbps.<sup>53</sup> Until AT&T invests in its network, no amount of additional spectrum will allow it to provide the kind of speed LTE promises. AT&T could double the amount of capacity it supplies simply by investing in more wireless equipment and backhaul.<sup>54</sup>

T-Mobile, having invested in its network, does not have the same problems. T-Mobile's Chief Technology Officer, Neville Ray, has stated, "[t]here is a host of ways to tackle the growth that is coming. It's not just all about spectrum. It's clearly part of the story, but we are less

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<sup>50</sup> <http://network4g.verizonwireless.com/#/coverage>.

<sup>51</sup> "AT&T Addresses 3G Woes With Massive Backhaul Build," Sidecut Reports, <http://www.sidecutreports.com/2010/01/06/att-addresses-3g-woes-with-massive-backhaul-build/>

<sup>52</sup> Ha, Anthony, AT&T CTO: 'We will move heaven and Earth' to improve our network. (July 12, 2010). <http://venturebeat.com/2010/07/12/att-cto-john-donovan/>

<sup>53</sup> <http://www.dslprime.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused>.

<sup>54</sup> "Skepticism Greets AT&T Theory, Telecom Giant Says T-Mobile Deal Will Improve Network Quality, but Experts See Other Options," Wall Street Journal (April 4, 2011) available at <http://online.wsj.com/article/SB10001424052748703806304576236683511907142.html>

worried about that in the near term.”<sup>55</sup> Mr. Ray also noted “[w]e have gone from a world where devices were ahead of the network to a world where the network is ahead of the device.”<sup>56</sup>

AT&T is not experiencing a “spectrum crunch.” Rather, in the short term it has poorly executed the buildout of its network, and in the long term, as it plainly admitted to the SEC, it is concerned that “that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition.” From AT&T’s point of view, the acquisition of T-Mobile will take spectrum away from existing and potential future competitors; permit it to warehouse spectrum for future use; allow it to acquire 34 million subscribers it could never hope to win through fair competition, and most importantly, destroy competition in the provision of wireless services; competition that keeps prices down and quality up. By destroying a key competitor, AT&T seeks to maintain high pricing and high profit margins. Such an outcome is not in the public interest.

**C. AT&T’S PROMISED 97 PERCENT LTE ROLLOUT IS A SHAM DESIGNED TO CURRY FAVOR WITH THE FCC.**

AT&T claims that its current LTE deployment plan, without T-Mobile, would reach approximately 250 million people, or 80% of the U.S. population, by the end of 2013.<sup>57</sup> T-Mobile has no plans to deploy LTE.<sup>58</sup> If the FCC permits AT&T to acquire T-Mobile, then AT&T claims it can expand LTE coverage to 97% of America.<sup>59</sup> According to John Donovan,

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<sup>55</sup> “T-Mobile’s Ray discusses HSPA+ 42, spectrum refarming and backhaul deployment,” Fierce Broadband Wireless (Jan. 18, 2011) available at <http://www.fiercebroadbandwireless.com/story/t-mobiles-ray-discusses-hspa-42-spectrumrefarming-and-backhaul-deployment/2011-01-18>.

<sup>56</sup> Id.

<sup>57</sup> Hogg Decl. at ¶ 27; Moore Decl. at ¶ 5.

<sup>58</sup> Larsen Decl. ¶ 9.

<sup>59</sup> See, e.g. Moore Decl. at ¶ 5.

AT&T's Chief Technology Officer, "AT&T is committed to extending LTE coverage to over 97% of the nation's population, far more than was planned or possible without the transaction."<sup>60</sup>

On the rollout of LTE coverage, AT&T has made so many contradictory statements that it is impossible to determine who to believe or what the FCC or the public can hope to expect. AT&T has come late to the LTE buildout. In 2009, John Donovan, stated that AT&T's initial rollout of LTE would cover 100% of the top 200 markets and 87% of the US population.<sup>61</sup> AT&T CEO Randall Stephenson promised 80% LTE coverage in 2013 and 95% afterwards as encouragement for the T-Mobile deal.<sup>62</sup> To get to 80% coverage, AT&T will be required to upgrade 10,000 or more cell sites. Once again, the delay in LTE rollout is being cause by AT&T's shoddy network structure, poor management and oversight, not by a lack of spectrum. To make matters worse, AT&T is losing customers to Verizon. AT&T is a year behind on the LTE buildout. When the LTE iPhone comes out later this year, Verizon will have LTE in more than half the country and AT&T will be barely beginning. Verizon is going to reach 92% of the US population in 2013, and "all our territory" (95 to 99% of the U.S.) a few years later.<sup>63</sup> Contradicting what it told the FCC, AT&T now says they will cover 95% of the U.S. population by 2016 "or so."<sup>64</sup> Pushing to acquire T-Mobile, Ralph De la Vega, president of AT&T

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<sup>60</sup> Donovan Decl. ¶ 11. (emphasis added).

<sup>61</sup> CTIA: AT&T CTO John Donovan Discusses Its Future LTE Plans, <http://www.youtube.com/watch?v=lPomr3xjocs>

<sup>62</sup> Burnstein, David, AT&T'S Quinn: We May Renege on 80%, 95% LTE Buildout Is This AT&T's Attempt at Satire? (April 26, 2011) <http://www.dslreports.com/shownews/ATTS-Quinn-We-May-Renege-on-80-95-LTE-Buildout-113924>.

<sup>63</sup> Id.; See also, Segan, Sascha, Verizon's LTE Rollout: There's a Big Map for That (March 25, 2010) <http://www.pcmag.com/article2/0,2817,2361799,00.asp>

<sup>64</sup> Id.

Mobility states, “It’s in the public interest to solve the spectrum exhaust problem, and [the T-Mobile spectrum] would help alleviate the exhaust,” De la Vega said. “It would also let us roll out LTE to 95 percent of America,”<sup>65</sup>

AT&T lacks infrastructure, not spectrum. Before it announced its plans to swallow T-Mobile whole, it stated that it was going to roll out LTE in the top 200 markets to 87% of the US population by 2013. Markets below the top 200 are in rural areas where there is no spectrum congestion. The wireless business model is dependent on customer density and the size of the coverage area; the more densely populated and smaller the territory, the more profitable it is to do business. AT&T simply has failed to demonstrate the will or administrative ability to invest in the network infrastructure needed to serve America’s rural areas. No amount of additional spectrum will cure this problem.

## **II. AT&T’S CLAIMS THAT T-MOBILE LACKS A CLEAR PATH TO LTE ARE UNSUBSTANTIATED AND FALSE.**

AT&T contends that T-Mobile is an ailing company, with declining market share and no clear path to LTE.<sup>66</sup> According to AT&T, T-Mobile lacks a “compelling portfolio of smartphone offerings.”<sup>67</sup> Conversely, AT&T claims that T-Mobile is facing imminent spectrum exhaust.<sup>68</sup> In a paradox worthy of Byzantine philosophers, AT&T simultaneously argues that T-Mobile lacks smartphone offerings and is facing spectrum exhaust from its dramatic growth in smartphone usage. As of the end of 2010, T-Mobile’s smartphone customers accounted for 24

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<sup>65</sup> AT&T: T-Mobile’s Spectrum Needed to Future-Proof 4G Networks, March 22, 2011, <http://www.sidecutreports.com /2011/03/22/att-t-mobiles-spectrum-needed-to-future-proof-4g-networks/>

<sup>66</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.2.

<sup>67</sup> Christopher Decl. at ¶36.

<sup>68</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.30.

percent of T-Mobile's customers, about double the 12 percent figure it had by the fourth quarter of 2009.<sup>69</sup> As a result of this "explosive growth in demand," according to AT&T, T-Mobile "faces spectrum exhaust in a number of markets."<sup>70</sup> Therefore, AT&T contends, T-Mobile "does not have the spectrum needed to deploy LTE in an economically and technically sustainable fashion."<sup>71</sup> However, if the FCC permits AT&T to acquire T-Mobile and combine its spectrum with that of T-Mobile's, these problems will evaporate. According to AT&T, "the combined network will far exceed the sum of its parts (i.e. 1+1=3)."<sup>72</sup>

T-Mobile USA's network and spectrum resources will add substantial value to this highly competitive marketplace when they are combined with AT&T's network and spectrum resources to produce the output-enhancing synergies discussed in this submission.<sup>73</sup>

AT&T's statements concerning T-Mobile's imminent spectrum exhaust contradict the statements it made in the Qualcomm application. In that application, AT&T unequivocally stated, "Existing Carriers Have Sufficient Spectrum to Roll Out 4G Service."<sup>74</sup> In fact, AT&T claims that T-Mobile holds proportionally more spectrum than AT&T given T-Mobile's customer base.<sup>75</sup> AT&T, in the instant application, claims that its competitors all have sufficient

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<sup>69</sup> Id. Citing, *T-Mobile USA Reports Fourth Quarter 2010 Results*, at 5 (Feb. 25, 2011), [http://www.tmobile.com/company/InvestorRelations.aspx?tp=Abt\\_Tab\\_InvestorRelations&ViewArchive=Yes](http://www.tmobile.com/company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations&ViewArchive=Yes).

<sup>70</sup> Larsen Decl. ¶ 12.

<sup>71</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.31.

<sup>72</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.34.

<sup>73</sup> AT&T/T-Mobile Public Interest Statement, WT Docket No.11-65, p.13.

<sup>74</sup> AT&T and Qualcomm WT Docket No. 11-18, pp. 30-31. <http://transition.fcc.gov/transaction/att-qualcomm.html>

<sup>75</sup> Id.

spectrum, except now (three months after filing the Qualcomm application) T-Mobile is facing spectrum exhaust.<sup>76</sup> AT&T offers no explanation for its two divergent statements made in pending applications filed just months apart. Nor has AT&T amended the Qualcomm application to reflect the change in T-Mobile's status from an aggressive competitor with ample spectrum, to a failed entity facing spectrum exhaust. AT&T's failure to do so is in violation of Section 1.65 of the FCC's rules.<sup>77</sup> The truth, which AT&T has chosen not to share with the FCC, is that T-Mobile, by its own estimates, is far from a failed company.<sup>78</sup>

Without explaining what it means, AT&T obsessively claims that T-Mobile has no clear path to LTE.<sup>79</sup> AT&T makes much of Deutsche Telekom's CEO, Rene Obermann's statement

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<sup>76</sup> . T-Mobile recently announced that it will move toward tiered data pricing, mimicking AT&T and Verizon. Might these rate structure changes alleviate the "spectrum crunch" by reining in the high volume video usage with price increases? The effect of tiered data pricing on spectrum availability is a glaring omission in AT&T's public interest justification. It repeatedly cites the tiered data plan as evidence of the spectrum shortage, yet conspicuously fails to say to what extent this bandwidth conservation measure will help solve the problem it trumpets so loudly. To be sure, once it has foisted tiered price increases on the consumer, AT&T will never go back to unlimited data plans regardless of how much spectrum it has. <http://www.mobiledia.com/news/91291.html>

<sup>77</sup> See 47 C.F.R. § 1.65. That rule states in pertinent part: "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days..."

<sup>78</sup> AT&T absurdly and disingenuously discounts T-Mobile as a competitor. See interview with Tony Melone, Verizon CTO, May 26, 2011: "Whether we're competing with an AT&T and a T-Mobile separate or an AT&T/T-Mobile combined, I don't think it changes the landscape at all for us." <http://searchtelecom.techtarget.com/news/2240036200/Verizon-LTE-rollout-CTO-talks-outage-ATT-T-Mobile-Wi-Fi-offload>

<sup>79</sup> Larsen Decl. ¶¶ 23-26; Langheim Decl. ¶ 11.

that T-Mobile suffered from its late transition to 3G.<sup>80</sup> Likewise, AT&T stresses Obermann's statement that "[w]e also lack[ed] competitive smart phones."<sup>81</sup> Based on these statements, David Christopher, AT&T's Chief Marketing Officer, in his declaration concludes.

"Accordingly, T-Mobile is not an important factor in AT&T's competitive decision-making."<sup>82</sup>

The Christopher declaration relies on out of context references to the Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts of January 20, 2011.<sup>83</sup> A complete reading of the transcript reveals that AT&T was not candid in its representations and quotations from the Deutsche Telekom transcript. Obermann admits that T-Mobile came late to the 3G spectrum and that it lacked smart phones. However, Obermann made those statements in the past tense. In the next paragraph, Obermann switches to the present tense:

We now have the fastest nationwide 4G network in the US and the handset portfolio has vastly improved, as demonstrated by the rising number of smart phones in our base and as we show here. And we have also seen improving revenue trends.<sup>84</sup>

If fact Obermann goes so far as to say, "Independent field surveys show that real life data transmission speeds on our network are superior to most competitors and they are at least equivalent to LTE."<sup>85</sup> Obermann is absolutely euphoric about T-Mobile's prospects, placing heavy emphasis on T-Mobile's superior 4G network.

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<sup>80</sup> Christopher Decl. at p. 22, citing Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts, (Jan. 20, 2011), p.3. [http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript\\_20012011.pdf](http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf)

<sup>81</sup> Id.

<sup>82</sup> Christopher Decl. at p. 30.

<sup>83</sup> Transcript of Briefing by Deutsche Telekom and T-Mobile to Analysts, (Jan. 20, 2011. P.3. [http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript\\_20012011.pdf](http://www.telekom.com/dtag/cms/contentblob/dt/en/979218/blobBinary/transcript_20012011.pdf)

<sup>84</sup> Id.

<sup>85</sup> Id. at p. 2.

We have the best 4G network in the US. And we have a sufficient spectrum position medium-term. And we have a variety of attractive smart phones on our shelves, including the largest lineup of Android smart phones.

....

At the same time we will continue to improve our 3G, 4G network coverage and increase the transmission speed of our network which will increase from peak rates of 21 megabit today to 42 megabit in 2011, a significant improvement of the performance. And we expect to have this speed of 42 megabits available to 140 million POPs.<sup>86</sup>

Philipp Humm, T-Mobile's CEO, in the same transcript, has this to say about T-Mobile's smartphone lineup:

T-Mobile built the largest and fastest 4G network in the country with 200 million POP coverage and with data speed of 21 megabits and we're currently rolling out 42 megabits in the country. Second, T-Mobile has a superior 4G handset lineup, smart phone lineup with 25 4G devices planned for the year 2011 and 50% of our sales today are already smart phones and 39% of our base is in smart phones. That's quite a lot of potential on the smart phone side.<sup>87</sup>

T-Mobile's Chief Technology Officer Neville Ray at the same analysts meeting had this to say about the prospects of T-Mobile and its all too clear path to LTE:

We are on the GSM 3G path and we migrate from that to HSPA+ to LTE. It's seamless. That's how this technology path was built.

....

We'll deliver 4G services with a broad HSPA+ footprint. At the right point in time when it's needed for us we can roll out LTE more as a capacity overlay because there are awesome benefits and the capacity delivery of LTE in the right spectrum configurations that will drive better economics and better performance for our customers. But when we do that, we don't have to go and touch the

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<sup>86</sup> Id. at p. 3.

<sup>87</sup> Id at p. 5.

lion's share of our cell sites at all. So, you can see our expectation on investment levels around the LTE rollout for T-Mobile USA are more in the \$1 billion to \$2 billion range for that radio infrastructure upgrade depending on how far we go and how deep we go.<sup>88</sup>

The statements of Obermann, Humm and Ray were made on January 20, 2011, just two months before T-Mobile announced it was selling its assets and licenses to AT&T. Neither AT&T nor T-Mobile explains how such divergent statements could be made only two months apart. DTP can only draw one conclusion, the parties to this proceeding have lacked candor and made material misrepresentations to the FCC, their investors and the SEC. As discussed below, the FCC does not tolerate such conduct from its licensees.

To the extent AT&T and T-Mobile can be believed, that T-Mobile lacks a clear path to LTE, there is an easy solution to this problem. T-Mobile states that the cost of its LTE rollout will be in the \$1 billion to \$2 billion range. DTP believes that AT&T and T-Mobile have forfeited their rights to remain FCC licensees. At a minimum, they have failed to carry their burden by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.<sup>89</sup> Assuming the FCC permits them to retain their licenses, the Commission

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<sup>88</sup> Id. at p. 14. (Emphasis added).

<sup>89</sup> There can be little question that combining the 2<sup>nd</sup> and 4<sup>th</sup> largest wireless providers would limit price and service competition, customer choice in handsets and plans and innovation in all of these areas. An early commentary on the announced deal, which counts AT&T and T-Mobile shareholders as the only winners, and consumers, handset makers, network equipment suppliers, Sprint and Google among the losers, still seems apt. <http://gigaom.com/2011/03/20/in-att-t-mobile-merger-everybody-loses/>

AT&T portrays itself as the savior of a T-Mobile that is about to be dashed upon the rocks. It says T-Mobile is irrelevant, having been cast adrift by its foreign parent, wandering aimlessly with “no clear path to LTE,” the constant refrain. The carefully chosen phrase “no clear path to LTE” is a misrepresentation if taken literally, and is grossly deceptive when taken in the broader context, as AT&T intends, to mean that T-Mobile can have no future as an independent wireless provider. It is the FCC’s duty to dispel this smokescreen and carefully examine what is really going on here. For example, if T-Mobile does truly need to be revitalized, it may have other options that do not decimate competition. See <http://gigaom.com/mobile/what-t-mobile-could-do-if-the-att-acquisition-fails-2/>

should deny AT&T's application. The \$6 Billion break-up fee in cash, spectrum and roaming agreements that AT&T would have to pay would endow T-Mobile with a "clear path" to LTE deployment.<sup>90</sup>

## STANDARD OF REVIEW

When evaluating applications for consent to transfer control of licenses and authorizations, Section 310(d) of the Communications Act requires the Commission to determine whether the proposed transaction will serve "the public interest, convenience and necessity."<sup>91</sup> In making this assessment, the FCC first assesses whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules.<sup>92</sup> The Commission weighs any potential public interest harms of the

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Yet another factor the FCC needs to weigh into the balance is the fact that AT&T and T-Mobile have the poorest customer satisfaction ratings among wireless providers. The challenges of integrating the two companies may well result in a further deterioration in quality of service, which is still the ultimate test of the public interest. [http://www.google.com/hostednews/ap/article/ALeqM5hOMfOzLfx\\_5KrDch4bd\\_CPTIAO9A?docId=6a8ed447b0714bdd86f1633a594338dc](http://www.google.com/hostednews/ap/article/ALeqM5hOMfOzLfx_5KrDch4bd_CPTIAO9A?docId=6a8ed447b0714bdd86f1633a594338dc)

<sup>90</sup> AT&T would have to pay T-Mobile's parent company Deutsche Telekom: \$3 billion in cash; \$2 billion worth of spectrum; and a roaming agreement totaling \$1 billion. Deutsche Telekom Chief Financial Officer Timotheus Hoettges said, "The breakup fee was very important to us in the negotiations," <http://www.bloomberg.com/news/2011-03-21/at-t-cash-breakup-fee-were-said-to-clinch-t-mobile-usa-over-sprint-nextel.html>

<sup>91</sup> 47 U.S.C. § 310(d).

<sup>92</sup> Section 310(d), requires that the FCC consider the application as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g. Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, 23 FCC Rcd 12463, 12476-77 (2008) ("*Verizon Wireless-RCC Order*"); Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, 22 FCC Rcd 20295, 20301 (2007) ("*AT&T-Dobson Order*"); AT&T Inc. and BellSouth Corporation Application for Transfer of Control, (2007) ("*AT&T-BellSouth Order*"); Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., 21 FCC Rcd 11526, 11535 (2006) ("*ALLTEL-Midwest Wireless Order*"); Applications of Nextel Communications, Inc. and Sprint Corporation, 20 FCC Rcd 13967, 13976 (2005) ("*Sprint-Nextel Order*"); Applications of Western Wireless Corporation and ALLTEL Corporation, 20 FCC Rcd 13053, 13062 (2005) ("*ALLTEL-Western Wireless Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, 19 FCC Rcd 21522, 21542 (2004) ("*Cingular-AT&T Wireless Order*").

proposed transaction against the potential public interest benefits. The applicants need to show by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.

Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."<sup>93</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications to hold and transfer licenses under Section 310(d) of the Act and the Commission's rules.<sup>94</sup>

In determining whether applicants have the requisite character to be Commission licensees, FCC looks to the Commission's character policy initially developed in the broadcast area as guidance in resolving similar questions in common carrier license transfer proceedings.<sup>95</sup> Under this policy, the Commission has stated that it will review allegations of misconduct directly before it, as well as conduct that takes place outside of the Commission.

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<sup>93</sup> §§ 308, 310(d). See also *Verizon Wireless-RCC Order*, 23 FCC Rcd at 12477-78; *AT&T-Dobson Order*, 22 FCC Rcd at 20302; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536; *Sprint-Nextel Order*, 20 FCC Rcd at 13979; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546.

<sup>94</sup> See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also *Verizon Wireless-RCC Order*, 23 FCC Rcd at 12477-78; *AT&T-Dobson Order*, 22 FCC Rcd at 20302; *Sprint-Nextel Order*, 20 FCC Rcd at 13979; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546.

<sup>95</sup> See, e.g., *WorldCom, Inc.*, 18 FCC Rcd 26484, 26493 P 13 (2003) ("*WorldCom Order*"). See also *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1210-11 (1986) (*Character Policy Statement*), *Memorandum Opinion and Order*, 1 FCC Rcd 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *Memorandum Opinion and Order*, 6 FCC Rcd 3448 (1991), *Memorandum Opinion and Order*, 7 FCC Rcd 6564 (1992). The Commission applies its broadcast character standards to applicants and licensees in the other radio services. See, e.g., *1990 Character Policy Statement*, 5 FCC Rcd at 3253 P 10 (adopting 47 C.F.R. § 1.17 to apply prohibition against misrepresentations and material omissions to applicants, licensees, and permittees in all radio services).

The FCC has consistently found that certain actions by a licensee are so egregious and outside the realm of acceptable conduct that they disqualify it from remaining a FCC licensee. FCC-related misconduct raises the question of “whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission’s Rules and policies.”<sup>96</sup> Where the FCC has found that a licensee has intentionally deceived the FCC or recklessly disregarded the truth, it has disqualified the licensee and revoked its licenses.<sup>97</sup>

AT&T has certainly demonstrated its willingness to intentionally deceive. In its application it claims it is facing an imminent spectrum crunch while at virtually the same time it tells another federal agency, the SEC, “that the availability of additional 700 MHz spectrum could increase competition and the effectiveness of existing competition.” AT&T claims T-Mobile lacks smartphones, is facing spectrum exhaust, and has no clear path to LTE. T-Mobile’s officers, in a report to analysts cited by AT&T in its application, have told investors just the opposite. AT&T has not been forthcoming or candid with its needs for spectrum, or its plans to roll out LTE, thus making it impossible for the FCC to evaluate its application. AT&T and T-Mobile have both dissembled and lacked candor with the FCC in their representations concerning T-Mobile’s LTE rollout, the availability of smartphones and generally about T-Mobile’s ability to continue serving its customer base. These are serious, material misrepresentations, made by the highest officers of both companies. Such statements call into question the qualifications of AT&T and T-Mobile to remain FCC licensees.

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<sup>96</sup> *Character Policy Statement*, 102 F.C.C. 2d 1179, para. 55.

<sup>97</sup> *See, e.g. WOKO v. FCC*, 329 U.S. 223, 226-227 (1946). “The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.”

A licensee's duty of candor to the FCC is absolute. As the United States Court of Appeals has said: "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest . . . . As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *RKO General, Inc. v FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). Since the adoption of *RKO General*, the FCC has issued thousands of mobile wireless licenses. See also, *SBC Communications*, 16 FCC Rcd 19091 (2001) "We consider misrepresentation to be a serious violation, as our entire regulatory scheme rests upon the assumption that applicants will supply [the Commission] with accurate information." In the past, the FCC has not hesitated to revoke a miscreant's licenses.

## CONCLUSION

AT&T and T-Mobile have presented widely divergent facts concerning the state of their respective companies, their alleged spectrum shortages and AT&T's supposed need to acquire T-Mobile. They have made one set of representations to the FCC another set of representations to the companies investors and the SEC. In a strange case of corporate bipolar disease, on the one hand, A&T represents to the FCC that it is facing a spectrum shortage. On the other hand, AT&T has represented to the SEC that it is facing increased competition with downward pressure on pricing as more 700 MHz spectrum becomes available. Which is it? Too much spectrum or not enough spectrum? To read the application is to come to the conclusion that T-Mobile is at the edge of extinction, with "no clear path to LTE." To read T-Mobile's report to analysts is to conclude that it has lower prices, higher quality ample spectrum, an aggressive collection of smartphones, that are ready to take advantage of T-Mobile's superior speeds and

4G network. There is no telling where the truth lies, but it is a safe bet that the truth will not be found within the four corners of the AT&T/T-Mobile application.

The Commission applies a two-step analysis to a petition to deny under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.<sup>98</sup> The first step "is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable fact-finder conclude that the ultimate fact in dispute had been established."<sup>99</sup> If the petition meets this first step, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.<sup>100</sup> As the Court of Appeals has said:

It would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish (in the face of the applicant's contrary affidavit evidence) what it is the very purpose of the hearing to inquire into; and the statutory requirement of a "substantial question" is a particularly inapt choice of language to convey that peculiarity. The statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the possible existence of a fire only when it is shown the existence of a fire.<sup>101</sup>

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<sup>98</sup> 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*").

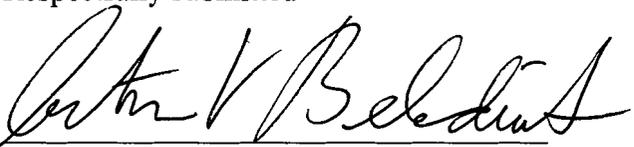
<sup>99</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

<sup>100</sup> *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

<sup>101</sup> *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. 1985).

There is ample black smoke billowing out of AT&T and T-Mobile's application. Neither carrier has been truthful or candid with the FCC. The statements made under penalty of perjury by their top management markedly conflict with statements made by top management to investors and the SEC. Accordingly, the application for assignment of licenses from T-Mobile to AT&T should be designated for hearing to determine whether AT&T and T-Mobile have the necessary character qualifications to remain Commission licensees. Such a designation would be consistent with past FCC practice.<sup>102</sup>

Respectfully submitted

By:   
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May 31, 2011

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<sup>102</sup> See, e.g., *In the Matter of Maritime Communications*, 2011 FCC LEXIS 1623, released April 19, 2011.

## DECLARATION

I, Scott Karren, declare under penalty of perjury, as follows:

I reside in Kingston, Washington and I am a member of The Diogenes Telecommunications Project.

I am a customer of T-Mobile. Until approximately 2000, I was a customer of AT&T Wireless. Extremely dissatisfied with the customer service provided by AT&T, I switched mobile carriers and became a customer VoiceStream, which subsequently became T-Mobile. I wish to stay a customer of T-Mobile. T-Mobile is a less expensive wireless provider than AT&T.

If the application is approved, I am concerned that I will be forced to migrate to an AT&T plan, which would result in my having to pay more for what, in my opinion, is a poorer quality of service. AT&T has stated publicly that it does not intend to retain T-Mobile pricing structures for newly acquired customers indefinitely. As a T-Mobile subscriber, I am concerned that I will have to either pick a higher priced AT&T plan or downgrade my plan to a less expensive alternative that will not provide me with the same service as T-Mobile.

5/27/11  
Date

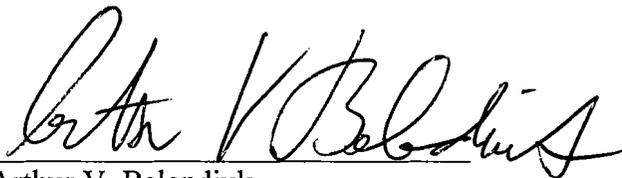
  
\_\_\_\_\_  
Scott Karren  
The Diogenes Telecommunications Project

CERTIFICATE OF SERVICE

I, Arthur V. Belendiuk, do hereby certify that a copy of the foregoing "Petition to Deny" was, this 31<sup>st</sup> day of May, 2011, mailed by First Class U.S. Mail, to the following:

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