

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Applications of AT&T Inc. and)
Deutsche Telekom AG)
For Consent to Assign or Transfer)
Control of Licenses and Authorizations)

WT Docket No. 11-65

Petition to Deny

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May 31, 2011

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Introduction and Summary

New Networks Institute and Teletruth, on behalf of telecommunications consumers, file this Petition to Deny the referenced Application for Transfer of Control.¹ AT&T has not met its burden of showing that the proposed acquisition of T-Mobile would serve the public interest. Therefore its application must be denied. At a minimum a hearing is required before the Commission may credit any of the alleged benefits to the public of this transaction. Approval of this merger would go a long way toward the creation of a behemoth wireless, wireline, broadband and Internet duopoly to the detriment of the American consumer and would leave our country lagging behind the rest of the developed world. AT&T and Verizon already dominate these markets. Regulatory agencies have been unsuccessful in preventing their abuses of market power, including imposing supra competitive rates, terms and conditions on users; excluding competitors and impeding competition; cornering the regulatory and legislative processes by buying up associations, policy groups, experts and acquiring their competitors; and stifling innovation and the deployment of new technologies and service offerings. Economic theory dictates that regulation is necessary to control abuses of market power in a highly concentrated industry. Regulatory agencies have failed to carry out this mission and cannot seriously be expected to do so in the future.

I. The Regulatory Process Is Ill-Equipped to Restrain the Exercise of Market Power by an Increasingly Concentrated Industry

Industry consolidation has gotten completely out of hand and it is time for the Commission finally to assert its authority to block the formation of a burgeoning duopoly in the provision of wireless and wireline services in the United States. Commission approval of the T-Mobile acquisition would set the scene for the remaining piece of the puzzle, Sprint Nextel, to be absorbed by Verizon or AT&T to complete the duopoly. Along the way, AT&T would doubtless scoop up one or two of the pesky “maverick” wireless providers it finds so troublesome.

¹ New Networks Institute, established in 1992, is a telecommunications, broadband and Internet market research and consulting firm.. Teletruth is a nationwide, independent customer advocacy group defending the rights of customers. on phone bill, broadband, Internet, including public policy issues.

If the Commission were to allow AT&T and Verizon to complete their master plan, these giants would have even greater license to gouge the public with unreasonable rates, terms and conditions; eradicate competition; stifle innovation as they milk their legacy networks for the last ounce of value; and deploy new technologies only insofar as these add to their bottom lines. In other words, acting in concert they would wield market power, which the regulators are ill-equipped to hold in check, for corporate rather than public benefit.

Prior to divestiture in 1984, AT&T and the Bell System maintained a stranglehold over entry and innovation, aggressively keeping terminal equipment and service providers out of their private domain. It was not the FCC of that day, which was at best ineffectual and at worst complicit, that stood in the way of the systematic snuffing out of incipient competitors; rather it was the courts in cases like Hush-A-Phone and Execunet that kept open the possibility of market entry in spite of FCC resistance.

AT&T's paeon to wireless competitors in its filing is reminiscent of its symbiotic relationship with the old Western Union, a whipping boy it would regularly trot out to show regulators that it did indeed face competition. Approval of the T-Mobile acquisition would go a long way toward recreating that static, hostile environment, despite the heady pace of technological change that the Commission looks to for salvation from market domination. Then and now these companies are determined to take control of the information age.

For example, the original access charge tariffs filed in 1984 by the newly divested Bell Operating Companies would have imposed exchange access charges on both the fledgling cellular and enhanced services. Had these provisions been implemented, the growth of both wireless services and the Internet would have been severely hampered. James Cicconi of AT&T recently said in an interview, "We enable any platform on devices. We run the highways, and that's what we want to do. People who control the platform have the operating system. Our only interest is that we don't end up with a situation where the network is harmed."² "Harm to the network" was the banner cry of the old AT&T as it furiously fought against interconnection of

² http://www.washingtonpost.com/blogs/post-tech/post/atandt-t-mobile-file-merger-application-qanda-with-james-cicconi/2011/04/11/AFhzCTQD_blog.html

any type of appendage to its “fragile” construct, even covers for the phone book that only it could publish in the day.³

³ See *Jack Faucett Associates v. AT&T*, 744 F.2d 118 (D.C. Cir. 1984), cert. denied, 469 U.S. 1196 (1985); “Prior to 1956, AT&T, through a tariff filed with the FCC, prohibited the attachment of all foreign devices to its telephone network. AT&T justified this prohibition as necessary to ensure the safe and effective operation of the national telephone network. Using the same rationale of operational concerns, the FCC, in 1955, prohibited the use of a sound shield that attached to a telephone's mouthpiece. *Hush-a-Phone Corp.*, 20 F.C.C. 391 (1955). Indicating that actual harm to the network was to be the guiding principle, this court voided that FCC decision, finding the Hush-A-Phone ruling to be neither just nor reasonable. *Hush-A-Phone Corp. v. United States*, 99 U.S. App. D.C. 190, 238 F.2d 266 (D.C. Cir. 1956). This case represented the initial erosion of AT&T's absolute bar against foreign attachments. In *Use of the Carterphone Device in Message Toll Telephone Services*, 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968), the FCC, applied the Hush-A-Phone rationale and declared unlawful the existing foreign attachment prohibition and ordered AT&T to file new tariffs. In response to Carterphone, AT&T filed the so-called interface tariffs... In broad terms, the tariffs permitted the attachment of foreign devices to the telephone network so long as any electrical connections were through a PCA or other interface device provided by AT&T or its subsidiaries. The FCC permitted the tariffs to become effective, but did so without “giving any specific approval to the revised tariffs.” AT&T “Foreign Attachment” Tariff Revisions, 15 F.C.C.2d 605, 610 (1968). For several years thereafter, the necessity of requiring the interface device was studied. In 1969, for example, the FCC convened a panel of the National Academy of Sciences to study the problem. And in May 1971, the FCC formed a “PBX Advisory Committee” to study the feasibility of connections to the network without the interface device. State regulatory commissions also investigated AT&T's interface tariffs. See, e.g., *New York Telephone Co.*, 79 P.U.R.3d 410, 417 (N.Y. Pub. Serv. Comm'n 1969); *Glusing v. C & P Telephone Co.*, 1974 Md. P.S.C. 377 (Md. Pub. Serv. Comm'n).

In 1972, the FCC instituted rulemaking proceedings to address the interconnection issues. During the proceedings the PBX Committee submitted a report that included a model certification program. Under a certification program, terminal equipment that met certain standards could connect to the AT&T network without any interface device. AT&T, whether motivated by a genuine desire to protect its network or by a desire to protect its alleged monopoly, opposed the certification standard by filing comments with the Commission and, allegedly, by taking other steps in opposition. Despite this opposition, the FCC, in late 1975, adopted regulations establishing certification standards. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service*, 56 F.C.C.2d 593, 599-613 (1975). Subsequently, the FCC applied its certification regulations to customer-provided terminal equipment. 58 F.C.C.2d 736 (1976). The Commission's order was affirmed on appeal. *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874, 54 L. Ed. 2d 154, 98 S. Ct. 222 (1977).”

Regulatory agencies do not have a good track record of promoting competition and preventing anti-competitive conduct. Examples abound. The elimination of line sharing and the deregulation of ILEC broadband services decimated the once thriving market of innovative ISPs. Those still in existence are struggling, finding it difficult to access their customers over the deregulated Bell services. If they are able to find a supplier, they pay exorbitant prices to resellers. They are further penalized by the Commission's own rules, which require ISPs to contribute to the Universal Service Fund on services they obtain from resellers, even if they would otherwise be exempt from contribution because of their small size. This problem has been brought to the Commission's attention for years with no aid given. The Commission has never taken seriously its responsibilities under the Regulatory Flexibility Act, the Data Quality Act or the Small Business Regulatory Enforcement Fairness Act, for the most part relying on data that was ancient by information age standards and rarely if ever conducting a legitimate analysis of the impact of its planned actions on small entities.

See also *Litton Systems, Inc. v. AT&T* 700 F.2d 785 (2nd Cir. 1983) "To summarize, the AT & T scenario sketches a hard-fought battle before the FCC with good faith efforts being made to protect the network. AT & T points out that it was not alone in opposing certification standards; several other interested parties--e.g., NARUC, the Joint Board, and several state utility commissions--supported the PCA approach. AT & T relies on this support, and on the fact that it took over four years from the time Litton exited the terminal equipment market for the FCC to establish certification standards, to back up its claim that it was not AT & T's "bad faith" opposition to certification standards that drove Litton from business." ...

"AT & T had no realistic hope that the FCC would approve the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible. AT & T argues that it actually wanted the FCC to approve the interface device and reject certification standards, but as Professor Areeda points out [t]o be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so [is] a sham. P. Areeda, *supra*, at 5. AT & T's conduct was not undertaken in the hope of influencing governmental action, but in the hope of delaying it.³⁹ See *Landmarks Holding Corp. v. Berman*, *supra*. As such, it amounted to the sort of abuse of the administrative process that falls within the Noerr-Pennington sham exception."

The Commission hailed its 1999 order approving the SBC/Ameritech merger as a spur to local competition inasmuch as the company would have to enter thirty major markets as a competitor providing local telephone service or face a hefty \$1.2 billion fine. It was obvious, however, that this condition would not create any significant competition, despite all of the showcasing. All that was necessary for the company to do to comply was to find three customers in each market and continue the farce for a year or so until the condition expired. The regulatory landscape is littered with broken promises by the Bells to spend billions rolling out advanced services, like Project Pronto, in return for deregulation, merger approvals and rate increases. Ratepayers financed these projects yet never got any of the benefits they were promised. The history of the SBC/Ameritech merger shows that conditions having any potency are more honored in the breach than in the observance, leaving the regulators to squabble with the company and fine it a few bucks but in the meantime the competition has been put out of business and the ratepayer has lousy service.

It is a given that AT&T and Verizon have undue influence with the regulatory agencies, as well as federal, state and local legislatures. They control industry trade associations, think-tanks and legions of experts with double-digit resumes. They form and fund so-called public interest policy groups to shill their positions in any forum that matters. The acquisition of T-Mobile would bring into the fold one of the last independent voices in the regulatory arena that has not already been bought and paid for.

As illustrated in the section below on special access, a little discussed benefit for the acquiring Bell companies is that the strident advocacy of the former AT&T and of MCI suddenly vanished from the scene and the balance of power and influence shifted overwhelmingly against the rag tag force of carrier customers who continued to wage the fight for special access reregulation and other reforms and Bell accountability. Greater concentration in the industry means less diversity of viewpoints and input to the Commission's processes and greatly diminished ability of the Commission to take any action counter to Bell objectives. Let us harken back to days past when an AT&T regulatory fleet blanketed the Commission; the attorney, engineer or economist had only to call on his assigned AT&T rep for helpful assistance whenever needed.

Even assuming the best intentions on the part of the Commission to restrain the exercise of market power and promote competition; clearly the task is beyond the capabilities of a regulatory agency. The Commission has been trying to reform the Universal Service Fund and intercarrier compensation arrangements for ten years without any making any significant progress; it simply recycles variations on the same ill-fated proposals in successive NPRMs. The “voluntary” conditions attached to past merger approvals are no more than a small part of the acquisition costs anticipated by AT&T and Verizon. These conditions are soon forgotten as the media moves on to other things and the Commission is left to sort out the complexities of alleged breaches and devise weak enforcement measures. Conditioning mergers on the sale of licenses in certain markets has become nothing more than a swap-meet between Verizon and AT&T, the purchaser of licenses in 79 of the 105 markets Verizon had to sell when it acquired Alltel.

The Commission’s track record inspires little confidence that it can muster the regulatory force to ensure a vibrant competitive industry in the provision of wireless, wireline and broadband services if this merger and the inevitable mergers to follow are approved. Increasing concentration in the industry makes this task near impossible. Acknowledging the incontrovertible history of anticompetitive conduct by the Bells and the failure of regulation to hold their market power in check, the proper course for the Commission is to deny the application and at least preserve the existing marketplace diversity.

II. AT&T’s Alleged Public Benefits of the Merger are Highly Questionable and Require a Hearing to Test Their Validity

AT&T cavalierly dismisses T-Mobile as a competitor. In the words of James Cicconi, “The important thing to remember is that T-Mobile was going to leave the market anyway. It had no path toward LTE and had reportedly been in talks with Sprint Nextel before us.”⁴ T-Mobile is on life support, says AT&T, while at the same time AT&T is facing stiff competition from a revitalized Sprint Nextel. Yet Sprint Nextel was hurting badly before its “turnaround” over the

⁴ Supra.

last two years. AT&T's mantra that T-Mobile "has no clear path to LTE" is no basis for writing off the fourth largest wireless provider as a competitor. That T-Mobile is losing contract customers, while gaining smartphone customers; that it supposedly operates in some mid-market void between the high and low end providers; that its foreign parent has remarked that it is cutting the umbilical cord; and that one analyst has questioned T-Mobile's relevance hardly add up to a case that T-Mobile is not an able competitor or that it will not be able to overcome its challenges, as did Sprint Nextel, if it remains an independent wireless company.⁵

On the other hand, AT&T complains that the voracious smaller providers with their "all you can eat plans" are having their way with the helpless giant. Such assertions are far-fetched and cannot be credited by the Commission. In fact a senior AT&T official recently contradicted the company's own position in its "public interest" filing by discounting Clearwire and LightSquared as wholesale providers and suggesting that these companies get on the merger bandwagon in order to remain viable.⁶

⁵ T-Mobile USA Reports First Quarter 2011 Results BELLEVUE, Wash. -- (Business Wire)-- May 6, 2011 T-Mobile USA, Inc. ("T-Mobile USA") today reported first quarter of 2011 results. In the first quarter of 2011, T-Mobile USA reported service revenues of \$4.63 billion, consistent with the first quarter of 2010, and OIBDA of \$1.19 billion, compared to \$1.39 billion reported in the first quarter of 2010. The number of customers using smartphones continued to increase significantly during the quarter, driving growth in blended data ARPU. Blended data ARPU in the first quarter of 2011 was \$13.10, up more than 20% from the first quarter of 2010. Net customer losses were 99,000 in the first quarter of 2011 compared to 77,000 net customer losses in the first quarter of 2010.

"We continue to drive our strategy and lay the foundation for improved future performance and have seen some positive trends in the quarter as evidenced through data ARPU growth rates," said Philipp Humm, President and CEO of T-Mobile USA. "The success in our data business has been driven by our 4G network message, our compelling 4G device offerings and our attractive data plans; however, we still have challenges facing our business as evidenced by high contract churn and contract customer losses in the first quarter of 2011." "The first quarter shows a mixed picture with positive trends in the development of data ARPU. Our deal with AT&T announced a few weeks ago will not change the focus of our US business. Until the closing of the deal, T-Mobile will continue to challenge its competitors and compete aggressively in the US market," said René Obermann, CEO of Deutsche Telekom.

⁶ AT&T: no room for both Clearwire, LightSquared By Sinead Carew Reuters May 13, 2011 (Reuters) There's not enough room for both Clearwire ([CLWR.O](#)) and Harbinger Capital-backed LightSquared in the U.S. telecommunications market, according to a top AT&T Inc ([T.N](#)) executive, who said they'd be better off consolidating. Clearwire rents network space on a wholesale basis to other wireless services such as Sprint Nextel ([S.N](#)), which uses the space to sell high-speed wireless services. Sprint is a 54 percent owner of Clearwire. LightSquared wants to enter the wholesale wireless market.

Essentially, AT&T public interest justification for this merger is that an integration of the two providers will produce synergies and efficiencies that will redound to the benefit of the American consumer.⁷ This boils down to an argument that bigness is better, the same principle that the pre-divestiture AT&T and Bell System ardently defended until an adverse outcome in the Justice Department's antitrust case was inevitable. For the Commission to credit this position would pave the way for the recreation of the telecommunications monopoly in the United States. Who would remain to buy the thousands of cell towers owned by AT&T that it proposes to decommission and sell? Verizon?

AT&T cautions the Commission against hobbling it with artificial constraints on operating efficiencies, citing several countries in which the top two competitors have 70% or more of the market. It also describes America as the global leader in mobile broadband and

Both have struggled to drum up additional funding needed to either expand or begin building their wireless networks. John Stankey, the head of AT&T's enterprise business, said the best hope for U.S. mobile wholesale providers may be to get swallowed up in a merger as the U.S. market is hardly big enough for one wholesaler, let alone two. Stankey's remark comes as AT&T awaits regulatory approval for its \$39 billion deal to buy T-Mobile USA, a unit of Deutsche Telekom (DTEGn.DE). "We have two people staking out a wholesale play in the market. It's hard in economic theory and it's hard in past practice in telecommunications to ever find a market where two wholesale players ever competed effectively," Stankey told Reuters ahead of the Global Technology Summit. "There really isn't a profitable wholesale model in wireless today," he said. "Do you know one that's making money? Do you know one that's on a trajectory to make money? Do you know of one that's not in jeopardy of running out of money in the next 12 months?" If it is each companies' goal to gain a return on the massive cost of building a network, Stankey said he "could see a case that suggests there would be further benefit to additional consolidation in the wireless marketplace." Analysts have predicted that Sprint will end up buying the portion of Clearwire it does not already own. The thinly veiled dig at Clearwire comes after Clearwire's top executive John Stanton openly attacked the AT&T deal in March, saying it would make it more difficult for smaller companies to compete in the market. "If there's such a credible (wholesale) business model, is there not capital that should be attracted to it?" AT&T's Stankey said.

⁷ http://news.cnet.com/8301-13506_3-20063574-17.html ... the drop in customer-satisfaction scores for AT&T and T-Mobile do not bode well for the possible combined firm. Not only are the companies starting out at a low point, but as ACSI founder Claes Fornell points out, customer satisfaction usually dips after a merger is completed. "It is common to find a reduction in customer satisfaction after mergers, but it is rare for customer satisfaction to drop ahead of a merger," Fornell said in a statement. "Assuming the deal is approved, it remains to be seen if a much larger AT&T can regain the strength of its customer relationships."

AT&T as the leader of that revolution. Is AT&T's self-proclaimed leadership in mobile broadband due to its having been able, because of its sheer size, to negotiate an exclusive arrangement to sell the iPhone? It's hard to find impartial sources who view AT&T as the mobile broadband leader, apart from its iPhone coup, which deprived tens of millions of iPhone consumers their choice of wireless carrier. Maybe it is time also for the Commission to take notice of the buzz on the Internet instead of puzzling over AT&T's half-truths and distortions.⁸

AT&T provides charts showing declining prices and ARPU in the wireless sector. Yet AT&T is the largest wireline and wireless company combined and on the wireline side at least, America is far behind the rest of the developed world in high speed broadband deployment. If the European experience is to be taken into account, how does AT&T reckon its performance

8



T-Mobile USA

Hey AT&T - It is easy for us to be proud when we have the 4G network to back it up. We challenge you to show us any data speeds on an AT&T iPhone that can top the speed on T-Mobile's myTouch 4G. But you don't have to take our word for it. Check out these amazing speed test screenshots from our T-Mobile fans: <http://goo.gl/P0wk3>



AT&T Hey Fans! You may have seen T-Mobile smack talking our network (seriously TMO?) and calling their HSPA+ network "4G" in order to claim they have the largest "4G" network. Not so fast...we have 180 million folks on HSPA+ already...40 million more than they do. They also claim 200 million by year's end, but we'll have it to 250 million this month. So their network isn't any bigger or faster. Just calling 'em as we see 'em.

Seriously, AT&T, seriously? Going onto the [T-Mobile Facebook page](#) and calling them out for their [advertisement](#)? Aside from the obvious humor of this whole thing playing out over Facebook, AT&T really wants to pick a fight. I mean [Sprint had a sense of humor](#) but you're doing it on Facebook? Lame, very lame, even more [lame than your first attempt at calling them out](#). AT&T, believe me when I say that [T-Mobile's advertising](#) is the LEAST of your problems. Life after the iPhone should be your ONLY concern considering your customers will probably be tripping over each other to move away when your iPhone exclusivity is up. They will RUN, not walk, to the next carrier to pick up the iPhone. Your network is a giant pile of suck. So is your Facebook attempt. Stick to doing the things you do right like um...and ummm...oh, yeah, umm...nope sorry can't think of anything. Want to see T-Mobile's response? "*Hey AT&T - It is easy for us to be proud when we have the 4G network to back it up. We challenge you to show us any data speeds on an AT&T iPhone that can top the speed on T-Mobile's myTouch 4G. But you don't have to take our word for it. Check out these amazing speed test screenshots from our T-Mobile fans:* <http://goo.gl/P0wk3> <http://www.tmonews.com/2010/11/att-tells-t-mobile-whats-up-on-facebook-still-cant-connect-a-call/>

with the latest statistics on price declines in services across the board in Europe?

<http://www.itu.int/ITU-D/ict/ipb/> This PBS video on wireline broadband deployment in the UK and Netherlands is instructive on AT&T's selective use of examples abroad.

<http://www.pbs.org/wnet/need-to-know/video/video-high-fiber/9263/>

The crux of AT&T's public interest claim is that it will be able to deploy "next generation Long Term Evolution (LTE)" to 97% of the population, up from its planned 80%, if the acquisition of T-Mobile is approved. AT&T chooses its words very carefully. The 97% figure, which it touts more than 30 times in its "public interest" filing, is described as the LTE coverage AT&T will commit to achieve if it can combine its spectrum and resources with that of T-Mobile. AT&T never says what LTE coverage each company could reach if it and T-Mobile remained separate and each deployed LTE independently. Perhaps the combined coverage would also be 97%, or each would cover 80% and eventually, each would cover 97%. Perhaps it would be a better business plan for T-Mobile to roll out LTE more gradually, as it had said it would do before the announcement.⁹

"But, no," says AT&T. There is no need to take into account what T-Mobile could accomplish on its own because T-Mobile has no "clear path" to LTE. AT&T uses this phrase in

⁹ "The executives said the U.S. unit is "generally strong enough to fund itself and will do this with regard to future investments," and could sell non-core assets, including the U.S. tower portfolio, according to the presentation. For now, the company's network is adequate to meet demand, Humm said, adding there are no announcements imminent on spectrum. Building out an LTE network may cost between \$1 billion and \$2 billion, the company said. Chief Technology Officer Neville Ray said that T-Mobile will need a spectrum partner by 2014 or 2015. "We are not pursuing large-scale cash acquisitions," Obermann said. The company said it will introduce LTE technology "once devices are readily available and once device quality is on par" with its current HSPA+ network "although that will probably not be for a few years." It said the progression from HSPA+ to LTE is "simpler and more cost effective than for competitors who have to re-equip from other technologies." Verizon activated its LTE service last month, while AT&T expects to start selling faster LTE services this year. Humm said today T-Mobile USA's HSPA+ speeds can rival LTE and will this year reach up to 42 megabits per second, up from 21 in 2010. According to Ray, LTE will this year reach speeds of 76 mbits/s." <http://www.bloomberg.com/news/2011-01-20/t-mobile-usa-seeks-3-billion-sales-growth-mulls-partnerships.html>

its filing also more than 30 times. What exactly is the meaning of the phrase? “No clear path” does not mean “no path at all”. It does not even mean that T-Mobile would face an exceedingly difficult path. The dictionary defines the adjective “clear” using such terms as “easily visible,” “capable of sharp discernment,” “unhampered by restriction or limitation,” and “untroubled, serene.” <http://www.merriam-webster.com/dictionary/clear>

In other words what AT&T is saying in its endless repetition of this hollow jargon is that it does not find T-Mobile’s path to LTE deployment to be apparent or obvious. It may well be that if the Commission were to 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.¹⁰ T-Mobile was actively exploring options for financing and deploying LTE, including finding a spectrum partner, which does not equate to being acquired by AT&T.¹¹ Business plans are continually revised in this sector and the hype is enormous. Two things, however, are clear: that AT&T’s speculative assertions are not entitled to be given any significant weight by the Commission; and, that a hearing is needed to probe the true picture behind AT&T’s sloganeering and flag waving.

¹⁰ The break-up fee has been confirmed by the parties after it was revealed by the news media. “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, Reuters is reporting.” “The breakup fee was very important to us in the negotiations,” Deutsche Telekom Chief Financial Officer Timotheus Hoettges said on a conference call today. <http://www.bloomberg.com/news/2011-03-21/at-t-cash-breakup-fee-were-said-to-clinch-t-mobile-usa-over-sprint-nextel.html>

¹¹ “Deutsche Telekom AG, which yesterday said it may sell its U.S. tower assets to fund the purchase of spectrum for its fourth-generation network, may get about \$2 billion for them, a Sanford C. Bernstein & Co. analyst said. Deutsche Telekom’s T-Mobile USA unit, the fourth-largest mobile-phone operator in the U.S. after Verizon Wireless, AT&T Inc. and Sprint Nextel Corp., said yesterday it may sell non-core assets finance the building of a next-generation network using long-term evolution, or LTE. “We have the biggest number of those towers compared to our competitors and that’s not something as an operator you run with utmost efficiency,” Chief Executive Officer Rene Obermann said at a presentation yesterday in New York on the unit’s strategy. “That sale could be significant,” he said, without providing details except to say there’s “no timeframe for selling the towers.” Obermann said the U.S. unit is exploring options to acquire additional spectrum, including entering partnerships. The U.S. unit’s chief technology officer, Neville Ray, said T-Mobile will need a spectrum partner by 2014 or 2015.” <http://www.bloomberg.com/news/2011-01-21/deutsche-telekom-s-sale-of-tower-network-in-u-s-may-fetch-it-2-billion.html>

AT&T's "commitment" to 97% LTE coverage is uncertain and ought not to be credited by the Commission. This is may be yet another in the long line of bait and switch tactics by the company to push through its industry consolidation and profiteering agenda with regulators.¹²

¹² As New Networks Institute reported on October 7, 2010 the broadband con has been played out across the country. In California, Pacific Bell (now part of AT&T) claimed it would spend \$16 billion and have 5.5 million homes wired by 2000. Instead, after a merger with SBC in 1997 (renamed AT&T in 2005), it secured state deregulation and simply stopped building out the fiber-based broadband infrastructure. On the East Coast, things were pretty much the same. Bell Atlantic, which covered New Jersey to Virginia and is now part of Verizon, claimed it would spend \$11 billion and have 8.7 million homes wires by 2000. And in Connecticut, SNET (now also part of AT&T) promised to spend \$4.5 billion and have the entire state rewired by 2007. In the mid-West, the story was similar. Ameritech (now part of AT&T and which controlled five states, including Illinois and Ohio) claimed they would have 6 million homes wired by 2000. For Ohio, Ameritech claimed it would rewire every school, library and hospital with fiber by 2000. None of these promises have been realized.

Over the last two decades, the telcos have engaged in a lot of sleight-of-hand tricks to make Americans believe that broadband was real and their service was the world's best. In 1996 the Internet hit and everyone wanted to go online. This migration to the World Wide Web was led, not by AT&T and Verizon, but by thousands of small and larger ISPs from AOL and Prodigy to over 9,500 small ISPs.

By 1998, not only did the telephone companies mostly stop building out their networks, but instead of rolling out the next-generation "info superhighway," they pulled a bait-and-switch and rolled backward, offering customers ADSL service, a watered-down "broadband" connection that runs on good old copper wire.

Another trick used by telecoms has been to submit to federal and state regulators falsified cost models, often lying to regulators and the public. For example, the great lie was voiced in 1991 when the telecom boldly announced the new broadband age based on technologies that they claimed capable of delivering 45-mbps bi-directional services, but the technologies didn't exist and couldn't work out at the cost models submitted. When pushed, the phone companies presented self-produced, self-funded or self-serving "research" by shill think-tanks to buttress their claim for higher rates.

Now, nearly two decades after Gore announced the Info Superhighway and the telcos secured deregulation to build out the next-generation communications infrastructure, the nation's two largest phone companies, Verizon and AT&T, have begun to seriously deploy fiber services. In 2004 and with much fanfare, Verizon introduced FiOS, a fiber-to-the-home service. Today, it claims only 3.6 million subscribers and new subscriptions have stalled.

For the Commission to approve the merger with a condition that AT&T follow through with its 97 percent solution would be to put itself in the position of having to second guess the company as it continually revises its business plan.

III. AT&T's Persistent Market Abuse of Monopoly Special Access Services Demonstrates that the Merger Would be Contrary to the Public Interest

There can be no serious doubt that the wireline Bell companies continue to dominate the market for special access services on which wireless and other providers are heavily dependent and that for many years they have been taking advantage of their monopoly position to charge excessive prices for these services. Aside from some “voluntary” pricing concessions that AT&T made on a temporary basis for the purpose of winning Commission approval of a prior transaction, the market abuse persists with no end in sight. These unlawful charges are passed on to the consumer, limit competition and hamper innovation and deployment of new services and technologies. Allowing the dominant provider of essential wireline services to acquire the one major purely wireless provider would give AT&T even greater leeway to engage in anticompetitive conduct through cross-subsidization, unreasonable discrimination and withholding of service.

The special access proceedings at the Commission over the last decade are a classic case study of how undue corporate influence neutralizes a regulatory agency and how mergers and acquisitions in the industry have silenced dissenting voices as they are brought into the fold. On October 15, 2002 the pre-acquisition AT&T filed a petition for rulemaking, imploring the Commission to take some action to stem the Bell market abuse in special access services.¹³ As

[http://www.alternet.org/story/148397/how_the_phone_companies_are_screwing_america:_the_\\$320_billions_broadband_rip-off?page=entire](http://www.alternet.org/story/148397/how_the_phone_companies_are_screwing_america:_the_$320_billions_broadband_rip-off?page=entire)

¹³ The strength and urgency of AT&T's plea is shown by the headings in its petition: “The Bell's Special Access Rates Are Grossly Excessive And Unlawful *And* Are Becoming More So; The Bell's Unlawful Special Access Rates *Are* Having Severe *And* Growing Anticompetitive Effects; The Bells' Excessive Special Access Rates Impede The Ability Of CLECs To Self-Deploy Alternative Transmission Facilities; Existing Regulation Permits The Bells To Target Their Market Power; Excessive Special Access Rates

late as December 7, 2004 AT&T was urging the Commission to grant its petition for rulemaking.¹⁴

On January 31, 2005 the Commission finally released an NPRM in Docket No. 05-25, proposing, among other things, to reinstate the X-Factor from the expired CALLS Plan on an interim basis. One day earlier SBC had announced its plans to acquire AT&T. Needless to say the former AT&T's advocacy for special access regulation vanished from the scene.¹⁵

Without the former AT&T leading the charge, the Commission took no further action, not even to grant the proposed interim relief, until two and a half years later when it asked for comments to “refresh the record” based on recent developments.¹⁶ Again the Commission did nothing for more than two years, finally releasing a Public Notice on November 5, 2009 in which it announced that it needed to develop “an analytic framework” to resolve the issues raised” in the NPRM and sought comment thereon. Since that time the Commission has held a workshop

Are Having An Increasingly Anticompetitive Impact On The Long Distance Market; Neither Market Forces Nor The Commission's Existing Special Access Rate Regulation Can Conceivably Address These Market Power Abuses; Market Forces Cannot Constrain Bell Prices, Because IXCs and CLECs Generally Have No Choice But To Purchase Special Access From The Bells; Competitive Carriers Can Self-Supply Or Use Third Party Facilities-Based Special Access Only In Very Unusual Circumstances; Self-Deployment Of Alternative Facilities To Provide Special Access Is Infeasible In Most Cases; The Existing Regime Of Special Access Rate Regulation Is Exacerbating The Problem; The Commission Cannot Lawfully Stand On The Sidelines While The Bells Continue To Exploit Their Market Power Over Special Access.” (numbering omitted) RM-10593

¹⁴ AT&T Ex Parte filed by David L. Lawson of Sidley, Austin, Brown & Wood on December 7, 2004 in RM-10593: ” AT&T Corp. ("AT&T") has thoroughly refuted the Bells' most recent claims in its own filings in the Triennial Review proceeding, and indeed, AT&T's showings in that proceeding simply demonstrate all the more dramatically that AT&T's petition for rulemaking and for interim relief should be granted.”

¹⁵ AT&T did file short tepid comments on the NPRM on June 13, 2005.

¹⁶ FCC 07-123 July 9, 2007 Chief among the developments on which it sought comments was: “the effect of the post *Special Access NPRM* mergers and other industry consolidation on the availability of competitive special access facilities and providers. Parties should also comment on the effect these mergers may have had on scale economies or the profitability of special access services. In addition, since the release of the *Special Access NPRM*, demand for wireless voice and wireless broadband services has increased, and special access has been an important input for these services.⁸ We seek comment on how special access pricing affects the price and availability of wireless services and the investment in and deployment of wireless networks.”

and issued data requests to the industry. At some point the Commission may adopt another NPRM, which likely would take two or more years to complete.

The problem of monopoly pricing of special access services has therefore been allowed to fester for a decade. Among the handful of non-Bell affiliated wireless companies who participate in these proceeding, T-Mobile and Sprint have consistently pressed their position and provided convincing evidence that they have been overpaying for special access services for years to no avail.¹⁷ Yet while AT&T ridicules the call for regulation as old fashioned and outmoded, it resorts to its tried and true regulatory tactics perfected in the monopoly era of inundating the regulator with data and claiming that regulatory reports are distorted and do not mean what they say.¹⁸

The egregious returns on Bell special access services have been well documented in the record in this proceeding. These services have become the main wireline profit centers, long

¹⁷ “T-Mobile and other carriers continue to face extremely high and noncompetitive special access prices, and there still are few meaningful competitive choices among special access suppliers.” Reply Comments in Docket No. 05-25 August 15, 2007; “T-Mobile continues to seek an alternative to subsidizing its two largest competitors, but today, AT&T and Verizon continue to supply the majority of T-Mobile’s backhaul services.” May 6, 2010 Ex Parte in Docket No. 05-25 Kathleen O’Brien Ham May 6, 2010; “Sprint is confident that the Commission’s analysis will lead it to conclude that the current Phase II pricing flexibility triggers allow incumbent LECs to avoid price cap regulation in markets where there is insufficient competition to constrain the incumbents’ ability to exploit their market power over special access. Unfortunately, the FCC will have to devote a great deal of time and significant administrative resources to reach a conclusion that has been widely recognized in the marketplace for years.” Reply Comments in Docket No. 05-25 February 24, 2010

¹⁸ “Over the past several years, Sprint, T-Mobile and other proponents of government-mandated reductions in special access rates have sought to justify their demand for a return to monopoly-era rate-of-return regulation based on the purported dearth of alternatives to incumbent local exchange carrier (“ILEC”) special access services and the inability of competitors to justify investment in competitive facilities and services. While AT&T and others have refuted these claims with extensive evidence of the ready availability of competitive alternatives, these parties have opposed Commission efforts to gather the data needed to evaluate their claims (*i.e.*, data concerning actual and potential competitive alternatives to ILEC special access services), calling instead for the Commission to focus on flawed proxies such as inherently arbitrary regulatory accounting rate-of-return data.” Ex Parte of Christopher Heimann in Docket No. 05-25 April 15, 2010

since eclipsing switched access services. Bringing T-Mobile under the AT&T umbrella would mute one of the few remaining advocates for reregulation. Approval of the merger would only add to the near unfettered ability of AT&T to juggle prices, terms and condition between its wireline and wireless operations strategically to the competitive disadvantage of other users of special access services. It is an inadequate response for the Commission to pass off special access pricing issues to this long and winding rulemaking, as it has done repeatedly, most recently in the CenturyLink-Qwest merger approved this year.¹⁹ Allowing the merger to proceed while the chosen vehicle for addressing these ills languishes for years ignores the past, present and future harm to the American consumer.

The Commission's recommendation on special access in the National Broadband Plan recognized the criticality of special access services to the country's broadband future and once again placed reliance on the establishment of an "analytic framework" for evaluating the pricing practices of the monopoly providers of these services. It would be unconscionable for the Commission to allow a merger to proceed that directly implicates these essential facilities, when it has provided no redress to a problem that began in 1999.²⁰

¹⁹ "As we have found previously, "[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors" using special access inputs, "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing." *AT&T/BellSouth Order*, 22 FCC Rcd at 5695, para. 60." Verizon/Fairpoint MO&O in Docket No. 07-22, released January 9, 2008

²⁰ Recommendation 4.8: **The FCC should ensure that special access rates, terms and conditions are just and reasonable.** Special access circuits are usually sold by incumbent local exchange carriers (LECs) and are used by businesses and competitive providers to connect customer locations and networks with dedicated, high-capacity links.⁷⁹ Special access circuits play a significant role in the availability and pricing of broadband service. For example, a competitive provider with its own fiber optic network in a city will frequently purchase special access connections from the incumbent provider in order to serve customer locations that are "off net."⁸⁰ For many broadband providers, including small incumbent LECs, cable companies and wireless broadband providers, the cost of purchasing these high-capacity circuits is a significant expense of offering broadband service, particularly in small, rural communities.⁸¹ The FCC regulates the rates, terms and conditions of these services primarily through interstate tariffs filed by incumbent LECs. However, the adequacy of the existing regulatory regime in ensuring that rates, terms and conditions for these services be just and reasonable has been subject to much debate.⁸² Much of this criticism has centered on the FCC's decisions to deregulate aspects of these services. In 1999, the FCC began to grant pricing flexibility for special access services in certain metropolitan areas. Since 2006, the FCC has deregulated many of the packet-switched, high-capacity Fast Ethernet and Gigabit Ethernet transport services offered by several incumbent LECs.⁸³ Business customers, community institutions and network providers regard these technologies as the most efficient method for connecting end-user locations and broadband networks to the Internet.⁸⁴ The FCC is currently considering the appropriate analytical

IV. The Commission has failed to Lay the Groundwork for Assessing the Public Interest Implications of this Transaction and a Hearing is Needed to do so.

The Commission cannot legitimately make public interest determinations on the AT&T/T-Mobile application because it has failed to establish a framework from which to evaluate the proposed transaction. At a minimum a hearing is required to sort out the factual and policy considerations that this proposed merger raises.

A. Resolution of Certain Issues and Proceedings is a Prerequisite to Commission Action on AT&T's Application

First, the Commission's Fourteenth Report on competitive market conditions starts out with encouraging words²¹:

"In this Mobile Wireless Competition Report, we present our findings regarding the state of competition in the mobile services marketplace, pursuant to Congress's instruction in section 332(c)(1)(C) of the Communications Act. Promoting competition is a fundamental goal of the Commission's policymaking. Competition has played and must continue to play an essential role in mobile – leading to lower prices and higher quality for American consumers, and producing new waves of innovation and investment in wireless networks, devices, and services."

The Fourteenth Report then disappoints, informing us that it reaches no overall conclusion on whether there is effective competition in the mobile wireless industry. It simply points out that while the Thirteenth Report found effective competition in CMRS, since that time competition "has grown stronger by some of the measures previously considered, but weaker by

framework for its review of these offerings.³⁵ The FCC needs to establish an analytical approach that will resolve these debates comprehensively and ensure that rates, terms and conditions for these services are just and reasonable.

²¹ The quotes and references to the Fourteenth Report will not be specifically cited. Since the reader can easily locate them in the document with a key word search, there is no reason to clutter a pleading with numerous citations in footnotes. http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf

others.” Even though the Commission took comment in 2009 on ways to evaluate the effectiveness of competition in the wireless industry, it came up empty handed in the Fourteenth Report, declaring:

”The mobile wireless ecosystem is sufficiently complex such that no single definition of effective competition adequately encompasses both general indicators of competition and challenges inherent in the mobile wireless industry, such as spectrum availability, network interconnection issues, and network access issues.”

And, the Report also punted on how wireless competition is affected by the monopoly provision of special access services on which wireless providers depend:

“Wireless providers unaffiliated with a wireline provider often must rely on their competitors’ affiliates for access. The Commission is examining the current state of competition for special access services to ensure that rates for these services are just and reasonable.⁷⁸⁶ In light of the growing need for backhaul, cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace.”

The Fourteenth Report is a resounding acknowledgement that there are so many unanswered questions about the competitiveness of the marketplace today that the Commission cannot possibly justify a finding that AT&T’s acquisition of T-Mobile would serve the public interest.

The largest carriers continue to grow larger not only by acquiring their competitors but by masquerading as “small businesses” and “very small businesses” in order to take advantage of steep discounts on spectrum licenses. New Networks Institute and Teletruth estimate that this gaming of the system has allowed the largest carriers to acquire spectrum at a savings of \$8 billion.²² For example the 2002 Cingular annual report states:

“The Company has investments in affiliates for which it does not have a controlling interest that are accounted for under the equity method. The more significant of these investments are GSM

²² Wireless small business spectrum complaint <http://www.teletruth.org/docs/wirelesscomplaintfin.pdf>
How do the big telecoms qualify as small businesses? Harvard Nieman Watchdog, June 23, 2006
http://www.niemanwatchdog.org/index.cfm?fuseaction=Ask_this.view&askthisid=210

Facilities, LLC (Factory), a jointly-controlled infrastructure venture with T-Mobile for networks in the New York City metropolitan area, California and Nevada, and **Salmon, formed to bid as a “very small business” on FCC licenses and build out and operate wireless voice and data communications systems using those licenses.**” (Emphasis added)

These ruses have disadvantaged any actual small business competitors who were out-bid by deep pocketed mega companies. The Commissions acquiescence in these practices also has limited consumer choice in service and service providers, and has harmed innovation, which everyone knows comes from small companies trying to break into the market, not large cumbersome dominant players.

While the Commission gathers much data and produces many reports, we are unaware of it ever having told the public what has happened to the many licenses that were awarded under “small business” and “very small business” designations. Would anyone be shocked or even mildly surprised to learn that the vast majority of these licenses are directly or indirectly part of the AT&T and Verizon wireless networks? So what has the Commission done to preserve small business ownership of the licenses intended for these purposes?

Apparently, any attempt to fix this problem was too hot to handle so the Commission shuffled the issue from Notice to Further Notice to Second Further Notice, allowing the large providers to acquire as much spectrum as possible in the meanwhile under the guise of small businesses. The following passage speaks for itself. It appeared in an order on April 25, 2006 as part of the Regulatory Flexibility Act analysis. Five years hence the Commission has taken no action to protect small business interests, at the same time approving a bunch of megamergers.

“Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered The initial *Further Notice* in this proceeding tentatively concluded that it should restrict the award of designated entity benefits to an otherwise qualified applicant where it has a “material relationship” with a “large in-region incumbent wireless service provider.” The Commission sought comment on how it should define the elements of such a restriction. Based on the Commission’s experience in administering the designated entity program and the record developed in response to the *Further Notice*, this *Second Further Notice* seeks further comment on those issues, including comment to obtain additional economic evidence regarding how and under what circumstances an entity’s size might affect its relationships and agreements with designated entity applicants and licensees. The *Second*

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Further Notice also seeks comment on whether the Commission should adopt additional rule changes that would restrict the award of designated entity benefits under certain circumstances and in connection with relationships with certain types of entities and individuals with high personal net worth, including whether and how in-region relationships and personal net worth should be considered in determining eligibility for designated entity benefits. The *Second Further Notice* seeks guidance from the industry on how it should define the elements of any restrictions it might adopt regarding the award of designated entity benefits. Small entity comments are specifically requested.”²³

When the Commission acknowledges that its rules are not working effectively and starts a formal review with the goal of improving the rules in order to better achieve the underlying policy goals, it is unacceptable for the agency to take actions that continue, even aggravate the untoward effects of this rules while the reform efforts, ignored, are languishing.

B. The Commission Relies on Useless Data that is more than Ten Years Old to assess the Impact of its Spectrum Policy Decisions on Small Businesses.

The Commission routinely includes the following paragraph in the Regulatory Flexibility Act analysis it is required to perform in its rulemaking proceedings to consider the effects of its planned actions on small telecommunications providers and other small businesses:

“Wireless Communications Services This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ‘small business’ is an entity with average gross revenues of \$40 million for each of the three preceding years, and a ‘very small business’ is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards. [1] The Commission auctioned geographic area licenses in the WCS service. **In the auction, held in April 1997**, there were seven winning bidders that qualified as ‘very small business’ entities, and one that qualified as a ‘small business’ entity.” (Emphasis added)

And this paragraph from 1997 joins 50 other market analyses, some from 1999 or 2001 that are supposed to be used for a market analysis in 2011. As the keeper of all U.S. spectrum licenses, the Commission has more current data, but has refused repeatedly to even address this

²³ Second Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 05-211, Appendix C.

issue, much less fix the data to make it relevant and useful²⁴ It is common knowledge that the RegFlex analysis is not taken seriously by the Commission drafters, who habitually insert the same boilerplate recitations in order after order. And when it is called to the Commission's attention in complaints filed pursuant to the Data Quality Act that it is basing its decisions on stale data, the Commission responds in yet more boilerplate:

“We have received your three Data Quality Act complaints submitted electronically on June 29, 2010; July 1, 2010; and July 6, 2010, regarding broadband data collected and used by the FCC. ... With respect all other aspects of your complaints, we find that your allegations lack any specificity concerning issues with the quality, objectivity, utility, or integrity of the broadband data collected and used by the FCC. We find that the associated FCC data are consistent with both OMB and Commission Data Quality Act Guidelines, and that the methods employed by the FCC to collect, analyze and interpret the data are reasonable and consistent with the relevant guidelines.”

Our specific filing (we filed 4 different items), was about wireless spectrum and Internet Provisioning, not broadband. Our analysis, which we presented to the Commission multiple times, shows that the “very small business” spectrum licenses somehow ended up in the hands of the large wireless companies. It appears that the Commission declines to update data from 1997 because to do so would reveal a pattern of harm to small business competition. We have filed over ten times in comments and complaints over clear violations of the Data Quality Act and the Regulatory Flexibility Act.²⁵ Given the Commission's reliance on useless data and its refusal to

²⁴ Letter of Walter Boswell, Associate Managing Director, to Teletruth, December 17, 2010

²⁵ Why does the FCC keep using old data?, Harvard Nieman Watchdog, November 19, 2009 <http://www.niemanwatchdog.org/index.cfm?fuseaction=Background.view&backgroundid=418>
Every FCC National Broadband Proceeding Is Still Using 8-13 Year Old Data, Teletruth News: July 6th, 2010. <http://www.newnetworks.com/FCCDQA.htm>

update same, a hearing is required on AT&T's application to evaluate the fate of small business wireless spectrum, which is germane to the public interest considerations involved here.

V. The Regulatory History Shows a Pattern of Broken Promises on the part of AT&T and Disregard on the part of the FCC and State Commissions.

The merger commitments made by SBC and AT&T were useless and were never seriously enforced, despite the severe harm to competition these mergers caused. New Networks Institute and Teletruth ask the Commission to take official notice of the facts, which are well documented in its records, underlying the following claims and to conduct a hearing into these allegations so that the Commission does not create a wireless duopoly under the pretense that a set of conditions can control the exercise of market power.

- AT&T's past merger commitments have either been phony or were minor concessions to buy off certain industry segments. Most were hype and have never been lived up to or were not of any consequence in the first place.
- There were clear harms to each merger, from the loss of AT&T as a competitor in local and long distance service nationwide with resulting rate hikes and shut downs of broadband deployments that were supposed to rewire entire states, including schools, libraries and hospitals with fiber optic services.
- The Commission does not have the ability to craft and enforce meaningful merger commitments, leaving the remaining competitors prey to lawlessness.

The AT&T Mergers

AT&T = SBC, Pacific Telesis, SNET, Ameritech, BellSouth and the former AT&T.

AT&T now controls 22 states' telecommunications services, or roughly ½ of the US population. SBC, formerly Southwestern Bell, was one of the 7 Regional Bell companies created after the break-up of AT&T in 1984. Starting in 1996, SBC began merging with its siblings and other companies, (including SNET, which was an independent company), claiming that each merger would be in the public interest, and improve service to consumers in the states it was taking over, as well as nationally and restore America's position as a world leader in

telecommunications. The opposite was true and the merger conditions adopted by the regulators to demonstrate their relevance and quell public outrage simply were never met.²⁶

As an inducement to merger approvals the Bells committed to spend over \$36 billion dollars to upgrade their old copper networks to fiber optic services that would serve most of the planned 12.5 million homes by the year 2000.²⁷ Predictably after the mergers the projects in each state were closed down, the Bells giving nonsensical excuses such as “the rapidly shifting telecommunications landscape requires continual revision of business strategies and plans.”²⁸ To boot, the “committed” funds were not spent on upgrading the Public Switched Telephone Network or in bringing competition to the sister Bell territories.

The Broken Promises of the Merging Bell Companies that Recreated AT&T

²⁶ **AT&T and Verizon Mergers and Outcomes**

Teletruth and New Networks Institute has been vocal about the harms the mergers created and the failure of the FCC to be able to create viable merger conditions, much less enforce the commitments once they are agreed to by AT&T and Verizon. This link provides multiple filings since 2000.

<http://www.newnetworks.com/mergersandoutcomes.htm>

AT&T and Verizon Broadband Commitments and Failures

“The History, Financial Commitments and Outcomes of Fiber Optic Broadband Deployment in America: 1990-2004 The Wiring of Homes, Businesses, Schools, Libraries, Hospitals and Government Agencies”, 2009

<http://www.newnetworks.com/FCCCITIBroadband.htm>

Filed with the FCC to enhance Columbia University, CITI Report, 2009---Report outlines the Majority of the US Fiber optic and broadband commitments by state and phone company, as well as the impacts of the mergers.

Teletruth & New Networks Institute Activities, 2004-2010

These are a collection of some of Teletruth and New Networks Institute’s work from 2004-2010.

<http://www.teletruth.com/TELETRUTHNNI2010.htm>

²⁷ Not to mention the many broken promises made over the years to secure rate increases, deregulation, rule changes to stifle competitors, legislation to prohibit municipal wi-fi, and permissions to shift billions of dollars in assets to unregulated operations leaving the ratepayer who paid for them with inferior service.

²⁸ Not attributable. Anyone in the business or a regulatory agency has heard this sort of garbage over and over again from Bell. It is effective because the regulator is cautioned against second guessing the Bell business plans. To do so it is said would be to play dice with customer service and expose the crippled giant to the vagaries of Wall Street.

New Networks Institute

(Sources: Bell Annual Reports)

	Money (billions)	Households	Merger	Shutdown	Cable
Pacific Telesis	\$16.0	5,500,000	1997	1997	0
Ameritech (3states)	\$7.5	6,000,000	1999	2000	304,000
SNET	\$4.5	1,000,000	1998	2000	31,000
SBC, Texas	\$1.5	0			
Pronto	\$6.0				
BellSouth (LA)	\$1.0				
Total	\$36.1	12,500,000			

By 2002 the mega Bell was to have spent over \$36.1 billion for fiber optic cable deployment in over 12.5 million households.

- Pacific Bell promised deployment to 5.5 million households and to spend \$16 billion by 2000 for fiber optic upgrades. This based on alternative regulation to give the Pacific Bell more money to upgrade the plant. After the merger, SBC wrote off whatever had been built and stop upgrading the network, yet the monies were never returned nor the rate increases lowered.
- Ameritech promised 6 million households, as well as wiring most schools, libraries and hospitals, and to spend over \$7.6 billion by 2000 (in just 3 states). In every Ameritech state, including IL, IA, OH, MI and WI, state laws were changed to give the companies more money. Ameritech rolled out some cable services and after the merger this was sold to WOW, a small competitor.
- SNET promised to spent \$4.5 billion on I-SNET for just Connecticut and the completion date of 1 million households was to be 2007. SNET rolled out cable services and that network was closed down post merger.
- Texas, SBC was to commit \$1.5 billion to wire schools, libraries and government agencies with fiber optics, capable of 45mbps in both directions, all by 2000 based on a deregulation plan to give SBC more money for construction. The company never spent the money nor made the services available statewide.

New Networks Institute

The companies also filed "Video Dialtone" applications with the FCC for permanent fiber-optic based upgrades throughout their territories that matched the annual report hype and the state filings.

SBC Territory "Video Dialtone Deployments, Filed with the FCC

Date	Company	Location	Homes	Proposal
12/20/1993	Pacific Bell	Orange Co., CA	210,000	permanent
12/20/1993	Pacific Bell	So. San Francisco Bay, CA	490,000	permanent
12/20/1993	Pacific Bell	Los Angeles, CA	360,000	permanent
12/20/1993	Pacific Bell	San Diego, CA	250,000	permanent
1/31/1994	Ameritech	Detroit, MI	232,000	permanent
1/31/1994	Ameritech	Columbus & Cleveland, OH	262,000	permanent
1/31/1994	Ameritech	Indianapolis, IN	115,000	permanent
1/31/1994	Ameritech	Chicago, IL	501,000	permanent
1/31/1994	Ameritech	Milwaukee, WI	146,000	permanent
6/27/1994	BellSouth	Chamblee & DeKalbs, GA	12,000	technical/market
4/28/1995	SNET	CT	1,000,000	permanent
Total			3,432,000	

New Networks Institute

The SBC-Ameritech merger was ugly and simply harmed the states involved. SBC had made two major commitments:

- Compete in 30 cities outside their territories by 2003 or pay a \$1.9 billion dollar fine,
- Build Project Pronto and spend \$6 billion dollars.

From SBC's Annual Report 2002:

“Broadband Initiative in October 1999: As the first post-Ameritech merger initiative, SBC announced plans to offer broadband services to approximately 80 percent of SBC's United States wireline customers over the next three years (Project Pronto). SBC will invest an estimated \$6 billion in fiber, electronics and other technology for this broadband initiative. The build-out will include moving many customers from the existing copper network to a new fiber network.”

“Out-of-Region Competition: In accordance with this condition, we will offer local exchange services in 30 new markets across the country. We are required by the FCC to enter these 30 markets as a provider of local services to business and residential customers by April 2002. Failure to meet the FCC condition requirement could result in a payment of up to \$40 million for each market.”

The FCC's failure to actually make SBC-AT&T compete was obvious in the paper thin requirements. Here is what SBC filed with the FCC – 3 customers in New York City, 3 in Philadelphia... You can get more people to sign up for competitive facilities-based phone service by offering free beer in a bar.

More importantly, as alleged in our complaint filed October 15th 2003, SBC/Ameritech did not in fact compete out of region because in addition to having three customers it was required to offer service “within the entire service areas to all business and residential customers”, a merger conditions that was never fulfilled or enforced:

“collocating in each of ten wire centers; offering facilities-based service to all business and all residential customers served by each of those ten wire centers; **and offering service, whether by resale, unbundled elements or facilities, to all business and all residential customers within the entire service area of the incumbent RBOC** or Tier 1 incumbent LEC in the market or make voluntary incentive payments to a state-designated fund (or as governed by state law) in the amount of \$110,000 per day for each missed entry requirement, for a total of \$1.1 million per entry requirement per market.” (Emphasis added)

The Commission's giddy declarations that the merger would produce competition nationwide were soon forgotten, as was the vision that the fewer but larger Bell companies would be competing vigorously with one another.

"This will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs."

SBC's Takeover of AT&T and the Addition of BellSouth.

Again, where is the benefit to America? The AT&T-BellSouth merger promised to make sure that 100% of AT&T's territories would have 200Kbps speed in 1 direction, and it also made a commitment to supply \$10.00 DSL or new DSL subscribers—both never happened.

"Promoting Accessibility of Broadband Service

By December 31, 2007, AT&T/BellSouth¹ will offer broadband Internet access service (*i.e.*, Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory.² "

"AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area who have not previously subscribed to AT&T's or BellSouth's ADSL service broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month."

What happened after the merger? In a survey conducted by Teletruth with UCAN, a California Consumer Advocacy group funded by the California Consumer Protection Fund, we found many 'new subscribers' paying full freight; in only one case were we able to track down any special offer, and that was only after speaking to numerous customer service representatives over the phone.

And as of 2011, there is no documented evidence that AT&T reached 100% of its 22 state territories with 200Kbps in at least 1 direction.

And based on our surveys done in 2004 then repeated in 2008 we know that AT&T has been harvesting its long distance customers. AT&T's basic 1 minute interstate rate is now \$.42

and with the additional fees, some made up, low volume customers can pay \$1.00 a minute for long distance.

- a) AT&T has been raising its rates throughout their states on a continuous basis. Our surveys found rate increases on most rates in the 2008-2010 timeframe. And because AT&T never competed out of region for local service, Verizon's local rates have also been increasing.
- b) Finally, the mergers closed down fiber optic deployment in 22 states, some with large plans others more modest. Today, AT&T's U-Verse still goes over the same copper wiring and was not replaced, even though billions per state were collected based on overcharging customers to fund a phantom upgrade of the Public Switched Telephone Networks.

Experience shows that AT&T's past promises have been illusory and that regulators have not held the company accountable, and this at a time when the consolidated company was not nearly as large and powerful as it is today. Given this sorry history, it would be irresponsible for the Commission to accord any significant weight to AT&T's representations in its current application to deploy broadband and other advanced services. A hearing is required to reveal that the latest set of promises is nothing more than a flimsy façade, served up as a palliative to regulators who might harbor a nagging anxiety over caving in under the immense political power brought to bear by AT&T.

Conclusion

New Networks Institute and Teletruth appeal to the Commission to get real and do its duty for the public. Millions of Americans are T-Mobile customers simply because they hate AT&T and Verizon for the way they have been pushed around and cheated by these companies in the past. Make a stand here, Commission. Don't be steamrolled by the AT&T juggernaut. You will have to live with this decision for the rest of your lives and witness America falling further and further behind the rest of the world as these giants hold back progress and pad their bottom lines. If you approve the T-Mobile acquisition, you will not be able to say no when Sprint Nextel is on the merger block.

New Networks Institute

AT&T's public interest justification for removing the fourth largest wireless provider from the market is weak and its representations are suspect. A hearing is necessary to test AT&T's claims before they may be credited. And the Commission has much unfinished business to complete before it can even evaluate the competitive and public interest consequences of approving this transaction. AT&T is no doubt preparing a long list of "voluntary" commitments, which it will expect the Commission to transform into its own harsh sounding set of merger conditions along with the obligatory tough talk about enforcement and fines for noncompliance. This game has worn thin and the public is tired of hearing it time and again as the regulators give away the store.

Respectfully submitted,

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Certificate of Service

I, Bruce Kushnick, do hereby certify that a copy of the foregoing "Petition to Deny" was, this 31st day of May, 2011, mailed by First Class U.S. Mail, to the following:

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