

Before the
Federal Communications Commission
WASHINGTON, DC 20554

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

**JOINT PETITION TO DENY OF CENTER FOR MEDIA JUSTICE,
CONSUMERS UNION, MEDIA ACCESS PROJECT,
NEW AMERICA FOUNDATION, AND WRITERS GUILD OF AMERICA, WEST**

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TABLE OF CONTENTS

SUMMARY iii

INTRODUCTION..... 2

DISCUSSION 7

I. No Matter the Market Analysis Metric Utilized by the Commission, the Proposed Merger Would Decrease Competition and Would Not Serve the Public Interest..... 7

A. The Merger Would Work Incurable Harm to Competition in the National Market for Mobile Wireless Communications Services, and Would Reduce All Carriers’ Ability to Compete with the Post-Merger Duopoly 9

B. The Commission Cannot Ignore Relevant Market Effects from This Proposed Transaction, Nor Overlook Harm to the Public Interest in All Relevant Markets..... 14

II. Elimination of T-Mobile as a Competitor Would Eliminate an Innovative “Maverick” in the Marketplace for Wireless Services 19

A. T-Mobile Has a History of Exerting Downward Pressure on Prices 19

B. T-Mobile Has a History of Positive and Disruptive Behavior in the Marketplace 22

C. Approval of the Merger and Elimination of T-Mobile Would Stifle Innovation 28

D. The Merger Also Would Constrict Choice and Negatively Impact Mobile Wireless Broadband Delivery of Video Programming and Other Forms of Expression 30

III. The Deal’s Purported Efficiencies Are Speculative, Unproven, or Not Merger Specific, but in any Event Would Not Offset the Public Interest Harms..... 31

A. AT&T’s Spectrum Efficiency and Coverage Claims Are Speculative, and to the Extent They Have Any Merit, Serve Only to Highlight Its Past Failure to Invest 32

B. AT&T More Readily Could Expand Capacity by Investing in Its Own Network, Without the Merger’s Harm to Competition and Innovation..... 36

IV. Approval of the Merger Would Increase Prices Paid by, and Decrease Innovative Service Offerings Available to, Mobile Wireless Customers..... 39

A. The Largest Nationwide Providers Already Engage in Parallel Pricing and Conduct – a Problem That Merger Approval Would Exacerbate 39

B. The Elimination of T-Mobile Would Mean the Elimination of Innovative, and Relatively Low-Cost Nationwide Carrier, All to the Detriment of Consumers, Especially Underserved Populations and Regions..... 43

CONCLUSION 51

SUMMARY

AT&T seeks approval of a transaction that effectively would create a duopoly in the mobile wireless market. Removing T-Mobile, the most aggressive and feisty of the four nationwide carriers, as a competitor, would enable AT&T to stifle innovation, increase prices, and decrease choices for wireless customers – especially wireless broadband users. These negative impacts of the proposed acquisition would harm all consumers and harm the public interest in general.

Moreover, the merger likely would cause the most harm to traditionally unserved and underserved populations, including members of communities of color and rural residents, who rely to an even greater degree on affordable and innovative wireless broadband service offerings to access the Internet and partake in its benefits. It also would interfere with the development of new avenues for creative expression. This would be especially harmful to independent creators and others who use the Internet – and increasingly use mobile wireless broadband access thereto – to create and distribute all manner of video programming and other types of artistic works and political expression.

T-Mobile is a direct competitor to AT&T. Its ads directly and forcefully challenge AT&T by name. Moreover, T-Mobile is a classic example of a “maverick firm.” It has been a technological innovator, introducing breakthrough products like the Sidekick. It was the first adopter of the Android operating system. It is, by far, the pricing leader among the four national wireless companies. Antitrust law recognizes that such “maverick firms” are disproportionately important in highly concentrated markets because they have strong incentives not to model their business practices on those of the dominant companies. Thus, eliminating T-Mobile would be particularly valuable to AT&T and Verizon.

AT&T and Verizon are the two nationwide carriers that increasingly dominate the market for mobile wireless services. This emerging duopoly already exercises strong market power over voice and text messaging services, and holds an especially strong grip in the markets for mobile broadband data services and smartphones. T-Mobile and Sprint are the only other two remaining nationwide firms, and these two are no longer anywhere near the size of the big two carriers.

Approval of the transactions proposed in this docket would cement the AT&T/Verizon duopoly into place by eliminating the most aggressive and innovative remaining competitors – greatly increasing concentration in a market that already is highly concentrated by any measure. The heretofore inexorable trend towards industry-wide concentration contributes to an utter lack of effective competition in the mobile wireless space, with the largest carriers capable of controlling service inputs, dominating downstream markets, and preventing competitive entry. The Commission should not allow the unlawful, four-to-three horizontal merger proposed by the applicants here. The transaction would decrease competition further, and likewise decrease innovative offerings and outlets available to all users of wireless services – consumers, as well as those who rely on mobile wireless platforms to conduct their own businesses.

The four nationwide providers are the only ones that can serve residential and business customers who seek mobile access on a nationwide basis. Regional and smaller carriers exist but for several reasons are not substitutes for the four nationwide providers. These other carriers lack the economies of scale and the influence of the nationwide carriers when making deals for handsets, meaning that their offerings in that are inadequate substitutes for the four nationwide providers' offerings.

Regional carriers also lose out to nationwide providers, and especially to the big two, because of their literal dependence on these large providers for essential inputs such as roaming

and special access services. AT&T and Verizon are far away the largest wireless carriers, and also benefit from their affiliation with their respective landline affiliates – the dominant providers of special access services throughout much of the United States.

In recognition of all these limitations, smaller carriers often focus on the pre-paid submarket, unlike the top four providers that focus on their postpaid base. Therefore, the smaller carriers' distinct business model alone renders them incapable of imposing a competitive constraint upon the four nationwide providers. Since 2008, all the nationwide operators have launched unlimited national flat-rate calling plans, to which consumers increasingly have shifted, leaving behind restricted plans that included separate roaming charges. Pricing is now set nationally by the four nationwide providers, and regional and local carriers cannot constrain these four firms' pricing behavior.

For all these reasons, the Commission should view with great skepticism the applicants' claims about the level of competition they supposedly face from non-nationwide carriers. In the end, the Commission can and should deny the applications, which would not serve public interest, nor enhance competition, nor preserve the value of having an innovative firm such as T-Mobile competing for customers' business.

The consequences of AT&T's \$39 billion dollar purchase of T-Mobile are clear. The transaction would remove an innovator and price-destabilizing maverick from the competitive landscape. It would significantly hinder AT&T's only other potentially destabilizing competitor, Sprint. Finally, it would present an easy route – but by no means the only route or the best one, from the standpoint of competition and consumer benefit – for AT&T to overcome its prior under-investment in its own network, and contemporaneous failure to deploy its already substantial spectrum portfolio.

In sum, a combined AT&T/T-Mobile would hold duopoly control of the relevant national market, in tandem with Verizon. This would undermine innovation and increase the likelihood of collusive pricing, neither of which would serve the public interest. The merger is likely to intensify market power, raise prices, reduce innovation, and narrow consumers' choices. The claimed efficiencies with which AT&T seeks to offset the anticompetitive nature of its merger proposal are speculative, overstated, or inaccurate, and in any event neither specific to the merger nor capable of offsetting its anticompetitive impact.

The Commission therefore should deny the applicants' request.

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Media Access Project (“MAP”), counsel to the Center for Media Justice (“CMJ”), Consumers Union (“CU”), New America Foundation’s Open Technology Initiative (“OTI”), and Writers Guild of America, West (“WGAW”) (together, “Public Interest Petitioners”), respectfully petitions the Federal Communications Commission to deny the proposed acquisition of T-Mobile USA (“T-Mobile”) by AT&T Mobility (“AT&T”) (together with T-Mobile, “Applicants”).¹ AT&T has agreed to acquire all of the stock of T-Mobile and accordingly has filed, with T-Mobile’s present owner Deutsche Telekom AG (“Deutsche Telekom”), applications² pursuant to §§ 214 and 310(d) of the Communications Act of 1934, as amended,³ seeking Commission consent to the transfer of control to AT&T of the licenses and authorizations held by T-Mobile and its wholly-owned, majority-owned, and controlled subsidiaries. Because the acquisition is

¹ Attachment A hereto contains declarations from the Public Interest Petitioners in support of this Petition.

² See Acquisition of T-Mobile USA, Inc. By AT&T, Inc., Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 11-65 (filed April 21, 2011) (“AT&T/T-Mobile Application”).

³ 47 U.S.C. §§ 214, 310(d).

anticompetitive and not in the public interest, the Commission must deny consent to the transfer of control, a transaction that, if approved, would allow AT&T to eliminate one of its only three competitors in the national mobile wireless communications market.

INTRODUCTION

Verizon Wireless (“Verizon”), AT&T, Sprint-Nextel (“Sprint”) and T-Mobile are the four firms that dominate the U.S. mobile wireless communications market.⁴ These four are the only carriers that can serve residential and business customers who seek mobile access on a nationwide basis. Regional and smaller carriers exist but for several reasons are not substitutes for the four nationwide providers. For one, such smaller carriers lack the economies of scale and the influence of the nationwide carriers when making deals for handsets; as a result, their handset offerings are inadequate substitutes for the four nationwide providers’ offerings.⁵ Moreover, the industry has evolved such that there is no effective regional mobile wireless communications market at present: since 2008, all the nationwide operators have launched unlimited national flat-rate calling plans, to which consumers increasingly have shifted, leaving behind restricted plans that included separate roaming charges.⁶ As a result, and as discussed in further detail herein, pricing is now set nationally by the four nationwide providers, and regional and local carriers cannot constrain these four firms’ pricing behavior.

⁴ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, *Fourteenth Report*, 25 FCC Rcd 11407, ¶ 27 & n.46 (2010)(“2010 Wireless Competition Report”).

⁵ See *id.* ¶299 (citing Consumers Union report noting increasing proclivity of consumers to switch to new wireless service providers only in order to obtain their choice of handset, and “analyst reports [that] also identify access to handsets as an increasing challenge faced by mid-sized and small providers.”).

⁶ *Id.* ¶¶ 88, 90-91.

Regional carriers depend on the four nationwide providers for the essential components of their business. First, they pay roaming access fees to the nationwide providers so that their customers are able to communicate no matter where they may travel.⁷ Second, they rely especially upon AT&T and Verizon to purchase another key input to wireless broadband service:

⁷ *Id.* ¶125 n. 377 (“[R]oaming can be particularly important for small and regional providers with limited network population coverage to remain competitive by meeting their customers’ expectations of nationwide service. Similarly, roaming may be important to new entrants who wish to begin offering service before they have fully built out their networks.” (citing, *inter alia*, RCA comments stating that smaller rural and regional carriers “must be in a position to meet their customers’ expectations,” which “increasingly include the provision of a nationwide footprint,” and SouthernLINC’s statement that “[c]onsumers expect to be able to use their wireless handsets when they travel outside their local areas”)).

Public Interest Petitioners note that if the Commission were to grant the acquisition, regional GSM providers, for example, would face an actual monopoly setting their roaming access rates. AT&T and T-Mobile are the only nationwide GSM carriers. If the Commission opts to look only at regional effects, the creation of a monopoly in the GSM provider and customer (sub)markets (or, as the case may be, the two-sided GSM submarket, *see infra* n. 8 discussion regarding two-sided market analyses) alone could justify denial of the subject application. *See, e.g., FTC v. Staples and Office Depot*, 970 F. Supp. 1066, 1075 (D.C. Cir. 1997) (“If, upon examination of the submarket, there is a reasonable probability that the merger will substantially lessen competition in that submarket, the merger is proscribed. Indicia of a submarket include ‘industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.’” (citing *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962))). In this instance, GSM providers may be recognized as a separate economic entity by their customer base and business travelers who are drawn to its peculiar international adaptability. GSM providers cannot substitute their service and still serve their customer base, which relies upon continuing their existing GSM service. Switching to CDMA is not an option. *See also* Testimony of Steven K. Berry, President and CEO, Rural Cellular Association, before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, “How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition,” (“Berry Testimony”), May 26, 2011, at 3 (noting that the members of the Rural Cellular Association depend on roaming from at least one nationwide carrier – “AT&T or T-Mobile, for GSM carriers, and Verizon or Sprint, for CDMA carriers – if they are to give consumers the network coverage they demand as consumers travel outside their home networks,” and citing FCC Chairman Julius Genachowski’s recent statement that “smaller carriers need to be able to offer national service ‘to have any chance of competition in today’s market.’”). AT&T does not contest the uniqueness of the GSM devices but rather relies upon it to note its unique synergy with T-Mobile.

special access.⁸ AT&T and Verizon are far away the largest wireless carriers, and also benefit from their affiliation with their respective landline affiliates – the dominant providers of special access services throughout much of the United States.⁹

⁸ To the extent T-Mobile’s ability to compete is compromised, arguably AT&T is to blame, given that it is among the companies that charges T-Mobile and others non-competitive rates in the special access market. Just last year T-Mobile itself asked the Commission to scrutinize AT&T’s data as it developed its special access policies. See T-Mobile Notice of Ex Parte Communication, WC Docket No. 05-25 (filed May 6, 2010) (“T-Mobile *Ex Parte*”); see also Berry Testimony at 3 (“Our members must also turn to AT&T and Verizon, as the two largest *wireline* providers, to purchase backhaul or ‘special access’ services to connect their cell towers to the public switched telephone network.”).

These interdependencies suggest an argument for classifying the national special access market itself as a separate market of customers affected by the increased market concentration proposed by the subject acquisition. The most commonly used (and accepted) procedure to determine a set of products or services over which a monopolist or dominant firm could exercise market power is the “hypothetical monopolist” test in the Merger Guidelines. That test takes the smallest possible group of competing products and asks whether a hypothetical monopolist that sells those products could profitably impose a small (5-10 percent) but significant and nontransitory price increase, commonly referred to as a SSNIP. If, in response to a SSNIP for a given product, enough buyers could turn to another product, making the price increase unprofitable, then the product market is expanded to include additional products until a hypothetical monopolist controlling the expanded grouping of products could profitably impose a SSNIP. See DOJ and FTC *Horizontal Merger Guidelines*, §4.1, pp. 8-13 (2010) (“2010 Guidelines”); see also Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 254 (2003) (providing a comprehensive discussion of the prevalence of the use of the hypothetical monopolist test in the United States and by foreign competition authorities). Such a two-sided market evaluation between interdependent customers is not without precedent, and has been proposed as the proper way to evaluate mergers involving the electronic payment network industry. See generally Renata B. Hesse & Joshua H. Soven, *Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases*, 73 ANTITRUST L.J. 709 (2006) (surveying relevant holdings and arguing that when properly applied in a manner that accounts for the fact that the market in the electronic payment network industry is two-sided – comprised of both card issuers and merchants – the Merger Guidelines’ hypothetical monopolist test is the appropriate method for defining product markets in the electronic payment network industry); see also *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003) (finding that “merchant consumers exhibit little price sensitivity” where “the networks provide core services that cannot reasonably be replaced by other sources,” 163 F. Supp. 2d at 338). Special access is a core service that AT&T and Verizon’s actual duopoly uniquely provides, and for which T-Mobile currently is a large customer. As more service providers are removed, the Commission will have greater difficulty reviewing the “reasonableness” of rates. This inefficiency is merger-specific, with effects on competitive carriers *and* their customers.

Furthermore, in recognition of their limitations, these smaller carriers often focus on the pre-paid submarket, unlike the top four, which focus on their “postpaid base.” Therefore, the smaller carriers’ distinct business model alone renders them incapable of imposing a competitive constraint upon the four nationwide providers.¹⁰ Finally their customers and the Commission also have acknowledged the inability of smaller carriers to compete in arguably two related submarkets: smartphones and, within them, iPhones¹¹ – thanks in no small part to the exclusivities that the largest nationwide carriers can demand for the most popular devices.

⁹ See Berry Testimony at 3; see also T-Mobile *Ex Parte* at 1 (“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.”).

¹⁰ Regardless of what it may claim now, AT&T previously has suggested that the pre-paid market imposes no significant constraint upon its post-paid market because of superior revenue potential in the post-paid business, regardless of how much lower pre-paid prices may be. See Transcript of AT&T Inc.’s Q2 2009 Earnings Call (July 23, 2009) (“[O]ne thing that I think we feel is important is we’re not going to put offers in the market that we don’t feel will be profitable or earn a reasonable return. And we won’t do anything obviously that would impact or cannibalize our postpaid base.”); see also Transcript of AT&T Inc.’s J.P. Morgan Global Technology, Media and Telecom Conference (May 19, 2010) (“If you take a look at the EBITDA growth of AT&T year-over-year and compare that to the EBITDA growth of the entire prepaid industry, the entire prepaid industry, we grew 4 times the EBITDA that the entire prepaid industry grew year-over-year”). Concluding the answer given during the May 2010 conference, the AT&T executive comparing pre-paid to post-paid performance concluded, “[W]e go after where the revenue is. We go where the margin growth is. And it is unquestionable to me that this growth is in postpaid. It is in data.” *Id.*

¹¹ The Commission identified the smartphone’s emergence as a notable shift in the ecosystem, in manner that suggests close scrutiny of the nationwide impact of this merger is necessary. See 2010 Wireless Competition Report ¶135 (“The emergence of a handful of smartphone operating systems – Apple, Android, BlackBerry, Palm, and Windows Mobile – represents a shift in the mobile wireless ecosystem and one that is affecting the ability of mobile wireless service providers to differentiate themselves based on handsets and devices.”). As part of the same report, the Commission charted smartphone launches nationwide, and notably missing from its chart are all carriers but the four nationwide providers. See *id.* Chart 8. Elsewhere in the same report, the Commission noted: “As a sign that certain mobile consumers have switched to AT&T primarily to access an iPhone, AT&T reports that 40 percent of its iPhone customers switched to AT&T from another service provider.” *Id.* ¶138 (citations omitted). Now, AT&T and Verizon exclusively offer Apple’s iPhone, which grows increasingly popular. See, e.g., Sylvie Barak, “Minorities Drive Mobile Web; Hispanics Heart Apple,” RCRW Unplugged, Jul. 9, 2010, at <http://tinyurl.com/3rxbzc7> (discussing results of Pew

For all these reasons, the Commission should view with great skepticism Applicants' claims about the level of competition they supposedly face from non-nationwide carriers.¹² AT&T quite obviously seeks to effect a four-to-three firm market consolidation by its proposed acquisition of T-Mobile. To that end, the subject application must pass muster under the FCC's public interest evaluation, which "necessarily encompasses...a deeply rooted preference for preserving and enhancing competition."¹³ Because grant of the subject application would fail both to preserve and enhance competition, it must be denied.

The consequences of AT&T's \$39 billion dollar payment to Deutsche Telekom for T-Mobile are clear: the removal of an innovator and pricing-destabilizing maverick from the competitive landscape; the significant crippling of its only other potentially destabilizing competitor, Sprint; and an undue reward in the form of spectrum to AT&T for its decision to under-invest in its own substantial spectrum holdings – unlike its chief rival, Verizon Wireless, which has been on pace in a competitive landscape to achieve the coverage AT&T promises

Research Center's report on race and ethnicity and the mobile web, noting that "Latinos seem to have a strong affinity for Apple's iPhone, with around 10% of their total mobile population owning one."). And AT&T further forecloses smaller carriers from competing for its iPhone business by imposing a switching cost that T-Mobile does not. As the Commission explained, "Locking can prevent a consumer from taking a handset from one service provider to another, unless the handset is reprogrammed. The ability of a consumer to unlock a handset varies depending on the service provider. For example, GSM operators have different policies regarding handset unlocking. Whereas T-Mobile will provide an "unlock code" after the subscriber account has been active at least 90 days so that the same handset can be used on another operator's GSM network, AT&T only releases unlock codes to subscribers under certain circumstances, and will not do so at all for iPhones." 2010 Wireless Competition Report ¶240 (citations omitted). The emergence of smartphones and iPhones thus should prompt the Commission to analyze the national market effects of this merger, or at least the potential effects of this merger on the smartphone and iPhone submarkets, separately. *See supra* n. 7 (discussing submarket identification).

¹² See AT&T/T-Mobile Public Interest Statement at 13-14.

¹³ Applications Filed by Qwest Communications International, Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer of Control, WC Docket No. 10-110, *Memorandum Opinion and Order*, 26 FCC Rcd 4194 (2011) ("CenturyLink-Qwest Merger Order").

eventually only *if* given T-Mobile. Verizon and a combined AT&T/T-Mobile would hold duopoly control of the relevant national market, and the special access and data roaming services their competitors require. This would undermine innovation and increase the likelihood of collusive pricing, neither of which would serve the public interest. The merger is likely to intensify market power, raise prices, reduce innovation, and narrow consumers' choices. The claimed efficiencies with which AT&T seeks to offset the anticompetitive nature of its merger proposal are speculative, overstated, or inaccurate, and in any event neither specific to the merger nor capable offsetting of its anticompetitive impact.

For the foregoing reasons, and as explained in greater detail in this Petition, the Commission should deny the Applicants' request. The merger would stifle innovation, increase prices, and decrease choices for wireless customers – especially wireless broadband users. These negative impacts of the proposed acquisition would harm all consumers and harm the public interest in general. Yet, the pernicious effects of the merger would especially harm traditionally unserved and underserved populations, including members of communities of color and rural residents, who rely to an even greater degree on affordable and innovative wireless broadband service offerings to access the Internet and partake in its benefits. It also would be especially harmful to independent creators and others who use the Internet, and increasingly, use mobile wireless broadband access thereto, to create and distribute all manner of video programming and other types of artistic works and political expression.

DISCUSSION

I. No Matter the Market Analysis Metric Utilized by the Commission, the Proposed Merger Would Decrease Competition and Would Not Serve the Public Interest.

While the Commission and the Department of Justice's Antitrust Division have concurrent authority to review telecommunications mergers, the Commission's inquiry takes a

broader approach than the DOJ's, focusing primarily on whether the merger serves the "public interest" rather than focusing exclusively on the competitive implications.¹⁴ The Commission also takes a broad approach where gauging effects on competition is concerned:

In addition to considering whether the [acquisition] will reduce existing competition, we must also consider whether [it] will accelerate the decline of market power by dominant firms in the relevant communications market, and [its] effect on future competition.... For instance, combining assets may allow the merged entity to...create market power, create or enhance barriers to entry by potential competitors, and increase opportunities to disadvantage rivals in anticompetitive ways.¹⁵

Previously the Commission has made clear that it will approve a transaction only if it is "convinced that [it] will enhance competition."¹⁶ In this instance, the transaction must be disapproved because it in no way enhances competition. It will consolidate market power in the hands of two competitors – AT&T/T-Mobile and Verizon – in manner discouraging entry by potential competitors and increasing the duopolists' opportunities to disadvantage potential rivals anti-competitively.

¹⁴ See James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMM. LAW CONSPECTUS 195, 198 (1998) (noting that the public interest analysis is intended to carry out the goals of the Communications Act, which include not only competitive considerations, but also such factors as "spectrum efficiency [and] technological innovation").

¹⁵ Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, ¶ 13 (2007) ("AT&T-Dobson Merger Order").

¹⁶ See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, ¶ 49 (1999) ("SBC-Ameritech Order") (internal quotations and citations omitted).

A. *The Merger Would Work Incurable Harm to Competition in the National Market for Mobile Wireless Communications Services, and Would Reduce All Carriers' Ability to Compete with the Post-Merger Duopoly.*

In the national market for mobile wireless communications services, the proposed merger would result in about a 45 percent market share¹⁷ for the combined AT&T and T-Mobile, impermissibly increasing concentration in a highly concentrated market. As of 2008, the FCC estimated the industry's HHI to be 2,848,¹⁸ which already exceeds both the DOJ (2,500 HHI) and FCC (2,800 HHI) definition of a heavily concentrated market. According to the DOJ, if an acquisition creates a highly concentrated market and if the HHI is increased by over 100 points, the acquisition will raise significant competitive concerns that warrant scrutiny.¹⁹ The proposed acquisition, if approved, would increase the national HHI by an additional 650-700 points,²⁰ with AT&T, Sprint, and Verizon controlling 85-90% of the wireless market. AT&T and Verizon alone would control close to that figure, cementing the emerging duopoly enjoyed by these two providers, especially in the markets for wireless broadband services and smartphones.²¹

¹⁷ See Corporate Crime Reporter, "Antitrust Institute Says T-Mobile AT&T Merger Appears to be Anti-Competitive," Apr. 1, 2001, <http://tinyurl.com/3hvemg7>.

¹⁸ See 2010 Wireless Competition Report ¶ 51.

¹⁹ See 2010 Guidelines § 5.3, p. 19.

²⁰ See Stacey Higginbotham, "AT&T, T-Mobile Merger: A Regulatory Quagmire?," *GigaOM*, Mar. 20, 2011, <http://gigaom.com/2011/03/20/att-tmobile-regulators/>; Stifel Nicolaus, "AT&T/T-Mo: Data Point to Coming Brawl, Risk; Deal Still Looks Doable," *Washington Telecom, Media, and Tech Insider*, Mar. 29, 2011.

²¹ See Government Accountability Office (GAO), "Report to Congressional Requesters: Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry" ("GAO Wireless Competition Report"), Jul. 2010, at 13, at <http://www.gao.gov/new.items/d10779.pdf> (adding together market share from Figure 3 with 2009 data, one derives over 90% market share for the four nationwide providers, and using the same process one derives 73.5% for AT&T and Verizon's market share if the proposed acquisition is granted); Quentin Fotrell, "AT&T, T-Mobile Merger Signals Higher Prices," *Wall St. J. Smart Money*, Mar. 21, 2011 ("The merged AT&T/T-Mobile entity would have 130 million users, giving the all-new AT&T and Verizon nearly 85% of the country's cell phone market. A depressing aside for consumers from Bernstein Research senior analyst Craig Moffett: "The wireless industry is arguably *already* a duopoly in the United States...And it is growing more

The DOJ/Federal Trade Commission (FTC)'s revised Horizontal Merger Guidelines (the "2010 Guidelines") presume that such a merger is likely to enhance market power absent "persuasive evidence" otherwise.²² "Based in large part on its extensive experience in evaluating horizontal mergers, the Department starts from the presumption that in highly concentrated markets consumers can be significantly harmed when the number of strong competitors declines from four to three, or three to two."²³ At issue in the proposed transaction is the decline from four to three competitors in a highly concentrated market. In an attempt to mask its anticompetitive nature, the Applicants seek to define the market differently. Yet they provide no evidence, much less persuasive evidence, even to suggest that firms presently not able to constrain the largest carriers will be able to do so if the transaction is approved. As per the Guidelines, the arena of competition affected by the merger is defined based on "customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers."²⁴ In this case, no matter the price differential, the customer base of the four nationwide carriers has proven unwilling or unable to switch to the smaller regional carriers, who in any event are incapable of serving the same customers.

GAO specifically noted that while the economies of scale of the large, national carriers "can facilitate the continued growth of the top carriers, they can also create challenges to the

concentrated at a rapid pace.""); *see also* Comments of Free Press and Media Access Project, WT Docket No. 10-133, at 12-14 (filed July 30, 2010) (noting that industry concentration already had led, prior to the Applicants' announcement, to a near-duopoly, especially for mobile wireless broadband services and smartphones); Jim Patterson, "Reality Check: Verizon and AT&T Earnings: Have We Touched Bottom?", *RCR Wireless*, July 27, 2010, <http://tinyurl.com/3vmv5sm> ("Between AT&T and Verizon, they now control just over 182 million wireless connections.... It's not quite a duopoly yet, but with the vast majority of growth going to two companies, it's close.").

²² *See* 2010 Guidelines § 5.3, p. 19.

²³ United States Department of Justice *Ex Parte* Submission, GN Docket. No. 09-51, at 15 (filed Jan. 4, 2010).

²⁴ 2010 Guidelines §4.2, p. 13.

growth and competitiveness of small and regional carriers.”²⁵ Furthermore, the GAO report cited the trouble experienced by small and regional carriers in “securing subscribers, network investments . . . and handsets.”²⁶ These smaller carriers’ growing pains are underscored by the GAO data showing that, while a few regional carriers have experienced growth in their comparatively small customer bases, it is the top national carriers that have been able to add the largest number of net subscribers annually while maintaining their revenue growth advantages.²⁷ The GAO observes that part of the national carriers’ advantage over the small and regional carriers is that small and regional carriers have a difficult time retaining their current customers. Smaller carriers’ inability to gain or retain subscribers stems in part from incapacity to offer the newest and latest advanced handsets because of the exclusivity agreements that top national carriers typically extract from device manufacturers. The GAO reports that stakeholders have “consistently noted that consumers are increasingly basing their wireless decisions on the availability of particular advanced handsets.”²⁸ According to one stakeholder, “some consumers do not consider these small and regional carriers as options because”²⁹ the small and regional carriers do not have access to the newest advanced handsets.

²⁵ GAO Wireless Competition Report at 17.

²⁶ *Id.*

²⁷ *Id.* at 18; *see also supra* n. 10; SNL Kagan, *Wireless Industry Benchmarks*, cited in Letter from Derek Turner, Research Director, Free Press, to Hon. Herb Kohl, Chairman, and Hon. Mike Lee, Ranking Member, U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, at 3 n.8 (May 10, 2011), http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf (“Free Press Letter”) (finding that in 2010 U.S. postpaid subscriptions increased by 4.71 million, nearly 1 million greater than the increase in pre-paid subscriptions, 3.88 million).

²⁸ *Id.* at 23. Again, this supports the identification of smartphones and iPhones, at the very least, as submarkets of the nationwide mobile wireless market, in which the proposed acquisition will compromise competition.

²⁹ *Id.*

The only persuasive evidence shows that smaller and regional carriers are not on equal footing with the larger, national carriers and cannot compete at their same level, and thus a hypothetical monopolist would impose at least a small but significant and nontransitory increase in the price of mobile wireless communications services nationwide. The sales figures of smaller carriers, for which prices are significantly lower than they are for the four nationwide providers, further support that view: according to first quarter 2011 subscriber numbers released, together MetroPCS, US Cellular, and Cricket/Leap still would constitute less than seven percent of the entire wireless market, including wholesale and retail customers.³⁰ Even if Clearwire is included in the mix, those four providers still control less than 9 percent of the market.³¹ Were they capable of enticing the data-intensive smartphone market's customers away from AT&T or Verizon and to their limited networks,³² small and regional carriers nevertheless could not absorb

³⁰ Fierce Wireless, "Grading the top 10 U.S. carriers in the first quarter of 2011," at <http://tinyurl.com/3wdpb2o>.

³¹ *See id.* Clearwire's CEO disagrees with the proposition that the subject acquisition will improve competition. *See* Roger Cheng and Shayndi Raice, "Clearwire CEO Expresses Concerns With AT&T Deal," WALL ST. J., Mar. 24, 2011, at <http://tinyurl.com/6g7tdyk> (reporting that "John Stanton, the founder of T-Mobile USA's predecessor and chief executive of Clearwire Corp., criticized AT&T Inc.'s proposed deal to buy T-Mobile USA, calling it a 'huge challenge to competition in the industry.'"). *See also* Tracy Ford, "Leap on record opposing AT&T buy of T-Mobile USA," RCR Wireless News, May 24, 2011, at <http://tinyurl.com/3ropcd6> ("We oppose the proposed acquisition. A competitive marketplace is critical to wireless innovation -- and small and mid-sized carriers such as Cricket are driving that innovation," said Leap President and CEO Doug Hutcheson. "The proposed acquisition would eliminate T-Mobile as an important nationwide competitor in the industry. It also raises problems of spectrum concentration and impaired access to spectrum by competitive carriers; undercuts access to wholesale voice and data roaming services; and threatens to foster reduced device availability and reduced interoperability of wireless networks and devices, among many other issues. Those results are not in the public interest.").

³² Jeff Blyskal, "Exclusive: iPhones hog much more data than other smart phones," CONSUMER REPORTS, Feb. 10, 2010, at <http://tinyurl.com/43un3xf> (reporting on study finding at the time of its release that "on average, iPhone users consume 273 MBs of data per month. That compares with 54 MBs for consumer users of Blackberrys and 150 MBs for consumers who use other brands of smart phones."). Users of other types of smartphones typically may consume even more data than users of iPhones, so AT&T certainly is not unique in its experience of

that many. This is because such carriers have fewer funds to acquire spectrum and invest in infrastructure, making it more difficult to expand and improve upon their networks.³³ To put it differently, if AT&T's failure adequately to invest in its sizable spectrum holdings has limited its future growth, imagine the barriers before those firms without its assets.³⁴

Further consolidation in the market will only make it more difficult for the remaining carriers to compete with the emerging duopoly. The nationwide providers are able to realize the efficiencies of national advertising, and to spread costs for marketing, retailing, innovation and hardware over a national footprint. Pricing, marketing, advertising, retailing, innovation, and handset procurement all are accomplished by the nationwide carriers on a national basis, such that regional and local competitors cannot be an effective constraint.³⁵ Accepting AT&T's recent claim that not even T-Mobile exerts competitive influence – particularly dubious given T-Mobile's nationwide advertising campaigns against AT&T, and AT&T's claimed “customer

increased demand for bandwidth; but it is uniquely well suited, along with Verizon, to meet that demand with its current spectrum portfolio and capital reserves. *See infra* Part III.

³³ GAO Wireless Competition Report at 21.

³⁴ *See* Berry Testimony at 2 (“[S]mall providers must contend with the [four nationwide providers] in bidding on spectrum at auction, in purchasing devices that consumers desire, and in attempting to attract capital from investors. Obviously, these inputs are vital to our members’ abilities to build out their networks and to satisfy consumers’ demands.”). Berry further comments on the vicious cycle that AT&T’s continuing spectrum-acquisition binge creates: “Because of the substantial cost of obtaining spectrum and of building out networks, and given the massive resource advantages of the existing national carriers, RCA’s members cannot realistically expect to offer nationwide coverage on their own.” *Id.* at 3. “Spectrum that AT&T amasses for itself is spectrum that smaller rivals cannot use to compete.... As AT&T raises prices, RCA’s members would face significant spectrum limitations when trying to expand service offerings to recruit AT&T customers. And as smaller carriers become less effective competitors, they become less able to retain subscribers, less able to maintain a consistent revenue stream, and less able to attract sufficient capital to invest in infrastructure, devices, and service quality.” *Id.* at 7-8.

³⁵ *See* Testimony of Victor H. Meena, President and CEO Cellular South, Inc., before the Sen. Jud. Subcommittee on Antitrust, Competition Policy and Consumer Rights regarding “The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?” at 6 (May 11, 2011) (“Meena Testimony”).

acquisition cost” merger savings³⁶ – can only serve to emphasize how high the competitive barriers are for established competitors in the nationwide market. Such barriers are even higher for those seeking to enter that market by sufficiently expanding their regional footprint to leverage it nationwide. LightSquared’s recent struggles against GPS-interference claims to retain its waiver and realize its vision also may serve to show how quickly barriers arise anytime a potential new entrant seeks a toehold, and how many obstacles it must surmount before it can commence service and plausibly be depicted as a competitor.³⁷

B. The Commission Cannot Ignore Relevant Market Effects from This Proposed Transaction, Nor Overlook Harm to the Public Interest in All Relevant Markets.

The Applicants also suggest incorrectly that earlier government reviews of AT&T’s acquisitions of smaller, regional carriers dictate the market analysis for this proposed transaction. For prior mergers, reviewing agencies showed sensitivity to potentially disparately impacted local markets. Such judgments in those earlier proceedings do not mean that the Commission is

³⁶ AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband, Mar. 21, 2011 (“AT&T Shareholder Presentation”), at 29, at <http://tinyurl.com/3sfvka3>.

³⁷ AT&T cites LightSquared as though its entry were not presently encumbered by GPS and other interference concerns, as well as legal and political obstacles. Indeed, on May 26, 2011, the House of Representatives passed the 2012 Defense Authorization bill, which contains a provision that prohibits the FCC from allowing LightSquared to proceed until such time as alleged interference issues with military equipment are resolved. Dee Ann Divis, “Congress Moves to Protect GPS Users from LightSquared Interference,” *Inside GNSS*, May 27, 2011, at <http://www.insidegnss.com/node/2629>. But as the 2010 Guidelines prescribe, “[a]lthough excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.” 2010 Guidelines §4, p. 7. Moreover, entry by other non-major carriers is generally discouraged by the prospective entrant’s reasonable expectation of an aggressive competitive response by incumbents, and a merger of this scope only will increase that disincentive. *See* Patrick Bolton *et al.*, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *GEO. L.J.* 2239, 2261-62 (2000) (discussing locally dominant airlines’ predatory pricing strategies in response to new entry of independent carriers); Scott McCartney, “Upstart's Tactics Allow It to Fly in Friendly Skies of a Big Rival,” *WALL ST. J.*, June 23, 1999, at B1 (reporting that aggressive competition by small carrier was discouraged by dominant carrier’s pricing strategy).

handcuffed into applying the same market analysis to this acquisition.³⁸ As befits its argument, AT&T omits the Commission’s rationale for adopting a “local” outlook in those earlier reviews. The Commission makes it clear in its *2010 Wireless Competition Report* that its concern is that looking merely at national effects would deny competition protections to local providers, for “[a]ssessing competition in mobile wireless services at the national level could *overstate* the level of competition....”³⁹ Specifically in the context of pricing, when responding to petitions from AT&T among others, the Commission acknowledged that a uniform, nationwide approach was necessary to limit the states’ potential to enact regulation “making *nationwide* service more expensive for carriers to provide and raising the cost of service to consumers.”⁴⁰ Consistent with the Commission’s nuanced approach to market outlook, depending on how best befits the public interest, it should analyze the *national* affect of a merger between two *national* competitors, which increases *national* market concentration to a troubling degree.

Moreover, the argument that the Commission essentially should overlook the troubling specifics of this national-in-scope, industry transformative, proposed consolidation simply

³⁸ AT&T itself long has argued that “the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level,” and admitted it develops “its rate plans, features, and prices in response to competitive conditions and offerings at the national levels.” *See* Merger of AT&T Inc. and Centennial Communications Corp., Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 08-246, at 28-29 (filed Nov. 21, 2008), ; *see also* Cingular & AT&T Wireless Public Interest Statement, WT Docket No. 04-70, at 30-34, (Mar. 2004) (arguing same); *see also infra* n. 114 (AT&T attested in written testimony in 2009 that the market is national when seeking to limit states’ ability to enact “terms and conditions” legislation). AT&T’s situational market definition calls to mind a Nobel laureate’s criticism of form over substance in market definitions: “Consider the problem of defining a market within which the existence of competition or some form of monopoly is to be determined. The typical antitrust case is an almost impudent exercise in economic gerrymandering.” G.J. Stigler, “The Economists and the Problem of Monopoly,” in *The Economist as Preacher and Other Essays* (Chicago: University of Chicago Press, 1982), 38, 51.

³⁹ *See* 2010 Wireless Competition Report ¶ 24 (emphasis added).

⁴⁰ *See* In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170, CG Docket No. 04-208, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, ¶ 52 (2005) (emphasis added).

because it conditionally approved others misconceives the purpose of the antitrust laws, which in any event are not binding upon the Commission in making its public interest determination.⁴¹

“Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both ‘correspond to the commercial realities’ of the industry and be economically significant. Thus, [] the geographic market in some instances may encompass the entire Nation...”⁴² The Court further addressed the impact of approving a merger by a large national chain, even if its result on a particular market may be small:

If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by [other industry] competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories....***It is competition, not competitors, which the Act protects....Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.***⁴³

⁴¹ The burden is on the Applicants here to establish that the grant of the subject application is in the public interest. This is a burden they uniquely have before the Commission. As discussed herein, Applicants’ attempt to saddle the Commission with its earlier, distinguishable merger precedents is also inconsistent with the Commission’s mandate and with the spirit of the antitrust laws.

⁴² *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 337 (1962).

⁴³ *Brown Shoe*, 370 U.S. at 344 (emphasis added). While courts remain sensitive to local, regional market classification, mergers raising national concentration concerns are hardly immune from scrutiny of such effects. See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir.

As the D.C. Circuit recently acknowledged, the protection of competition is an end to which market definition is simply one of the means. “[A] district court’s assessment of the [Agency’s] chances will not depend, in every case, on a threshold matter of market definition...For example, a merger between two close competitors can sometimes raise antitrust concerns due to unilateral effects in highly concentrated markets. [] In such a situation, it might not be necessary to understand the market definition to conclude a preliminary injunction should issue.”⁴⁴ The elimination of one of AT&T’s three closest competitors alone raises antitrust concerns due to coordinated and unilateral effects on consumers, particularly here when near duopolies or monopolies will form in several submarkets, *e.g.* post-paid, smartphone, iPhone, business travelers, GSM carriers, and their customers.⁴⁵

2001) (defining the product market as jarred baby food and the geographic market as the United States). In *Heinz*, the court reversed the lower court’s decision and awarded the FTC a preliminary injunction to block the merger after weighing the harms posed by a consolidation of two of the market’s national competitors despite their concentration in different regional areas. When addressing Heinz’s competitive options, the court noted that Heinz had chosen acquisition – “the third, and least pro-competitive, of the options” – when it could have taken “innovative measures” to better its position instead. *Id.* at 717. Similarly here, AT&T had the option to take innovative measures to deploy its spectrum and cover a broader swath more efficiently as Verizon, for one, has done, and instead it has purportedly placed all its eggs in the merger basket.

⁴⁴ *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008) (citations omitted).

⁴⁵ As the court explained in *Whole Foods Market*, 548 F.3d at 1038-1039 (internal quotations and citations omitted):

In appropriate circumstances, core customers can be a proper subject of antitrust concern. In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom only that package will do. What motivates antitrust concern for such customers is the possibility that fringe competition for individual products within a package may not protect customers who need the whole package from market power exercised by a sole supplier of the package.

Such customers may be captive to the sole supplier, which can then, by means of price discrimination, extract monopoly

Slicing and dicing the market as AT&T proposes does not significantly alter the statistical analysis. Even if the relevant geographic markets are found to be local, the product AT&T and T-Mobile provide is national and international in nature, and by its very nature differs from that offered by smaller rivals. Those smaller rivals cannot even offer their inadequate substitute service without relying on AT&T and T-Mobile, and so in turn the customers of these competitive carriers must rely on the larger carriers too, to a large extent. Relying on data from the Federal Trade Commission, the Wall Street Journal recently identified many of the leading local areas of service that are significantly or highly concentrated, as follows⁴⁶:

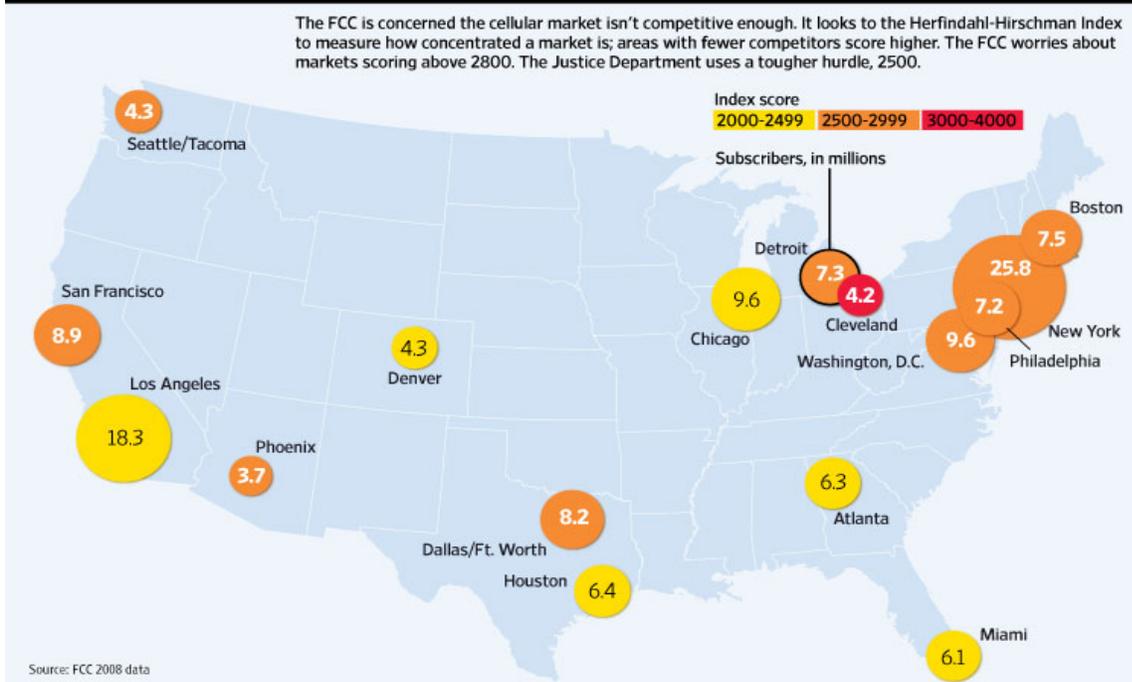
profits from them while competing for the business of marginal customers.... Sometimes, for some customers a package provides access to certain products or services that would otherwise be unavailable to them. Because the core customers require the whole package, they respond differently to price increases from marginal customers who may obtain portions of the package elsewhere. Of course, core customers may constitute a submarket even without such an extreme difference in demand elasticity. After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by settled consumer preference.

In short, a core group of particularly dedicated, distinct customers, paying distinct prices, may constitute a recognizable submarket whether they are dedicated because they need a complete cluster of products, because their particular circumstances dictate that a product is the only realistic choice, or because they find a particular product uniquely attractive.... As always in defining a market, we must take into account the realities of competition.

See also supra n. 7 (discussing submarket identification).

⁴⁶ See Spencer E. Ante & Roger Chang, Wireless Deal Dials Up Worries, WALL ST. J., Mar. 22, 2011, at B4.

Antitrust Test | A look at wireless competition in select markets



Thus, even taking the most generous of approaches to the subject acquisition the same result is reached: it must be denied if the public interest in competition is to be upheld.

II. Elimination of T-Mobile as a Competitor Would Eliminate an Innovative “Maverick” in the Marketplace for Wireless Services.

A. *T-Mobile Has a History of Exerting Downward Pressure on Prices.*

In addition to giving weight to the merging parties’ market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger, the Commission must consider “whether the merger may lessen competition by eliminating a ‘maverick’ firm, *i.e.* a firm that plays a disruptive role in the market to the benefit of customers.”⁴⁷ The 2010 Guidelines indicate a particular concern with mergers where “one of the

⁴⁷ 2010 Guidelines §2.1.5, p. 3; *see also United States v. ALCOA*, 377 U.S. 271, 280-81 (1964) (upholding challenge to loss of small “aggressive competitor” in market dominated by three large firms; finding that preservation of “an aggressive competitor” and industry “pioneer,” with a notably “active and efficient research and sales organization,” “rather than its absorption by one of the giants, will keep it as an important competitive factor....” “[Such a competitor]

merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices,” “may discipline prices based on its ability and

seems to us the prototype of the small independent that Congress aimed to preserve by s 7.” (citations omitted); *B.F. Goodrich Co.*, 110 F.T.C. 207, 329-38 (1988) (prohibiting merger involving firm with incentive to deviate from upstream coordination as result of asymmetric vertical integration relative to its rivals); *United States v. Premdor Inc.*, 66 Fed. Reg. 45,326, 45,336-37 (Aug. 28, 2001) (competitive impact statement) (alleging harm to competition from merger involving firm with incentive to deviate from downstream coordination as result of asymmetric vertical integration relative to its rivals); *Mahle GmbH*, 62 Fed. Reg. 10,566, 10,567 (FTC Mar. 7, 1997) (analysis to aid public comment on proposed consent agreement) (finding that merger substantially lessened competition in four-firm market by giving control of “an aggressive and innovative competitor” to “one of only two firms that together have dominated the market”). The Applicants’ public interest filing suggests the intent to analogize their case to *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 146-147 (D.C. Cir. 2004). The analogy holds no water: Triton, whose acquisition the FTC then challenged had never been a maverick and “particularly not in the last 2 to 3 years” when it finished “dead last” in terms of competitiveness. Further unlike T-Mobile, which remains in the top four and competes directly with AT&T for business in the national market and several submarkets, Triton’s business plan was “not to increase its market share by pricing under its competitors,” but simply to try to win just enough business to cover debt obligations as they came due. Triton did not “lead or even influence pricing in the market, [did] not compete aggressively, and [did] not have a history of [competing on price] consistent with the behavior of a maverick.” *Id.* at 147. Moreover, *Arch Coal* already was distinguished in a situation like this one, where the HHI increase is significant. See *F.T.C. v. ProMedica Health System, Inc.*, 2011 WL 1219281, *58 (N.D. Ohio Mar. 29, 2011) (“In *Arch Coal*, the FTC just barely raised competitive concerns with an increase in HHI of only 49. The court noted that less of a showing was required from the defendant to rebut the less-than-compelling *prima facie* case and further cautioned that it was important to note that this case is *not* one in which the post-merger increase in [concentration] produces an overwhelming statistical case.”) (internal citations and quotations omitted). See also *F.T.C. v. University Health, Inc.*, 938 F.2d 1206, 1220 (11th Cir. 1991) (rejecting appellees’ claim that competitor whom it proposed to acquire had dim prospects for future success, and thus despite its present market share was not, and would not be, a meaningful competitor in the relevant market, and adding that: “Since weak firms are not in grave danger of failure...it is not certain that their weakness will cause a loss in market share beyond what has been suffered in the past, or that such weakness cannot be resolved through new financing or acquisition by other than a leading competitor. Moreover, the acquisition of a financially weak company in effect hands over its customers to the financially strong, thereby deterring competition by preventing others from acquiring those customers, making entry into the market more difficult. History records and common sense indicates that the creation of monopoly and the loss of competition involve the acquisition of the small and the weak by the big and the strong.” *Id.* at 1221 (internal quotations and citations omitted)).

incentive to expand production rapidly using available capacity,” or has a history of resisting setting its prices alongside that of more dominant firms.⁴⁸ This would be such a merger.

Testifying on behalf of the Rural Cellular Association, Steve Berry expressed concern with AT&T’s decision “[r]ather than responding to competitive pressures by providing high-quality, low-priced services, [to] dramatically diminish those pressures by buying a key competitor – indeed *the* rival that offers the lowest prices among the four nationwide providers.”⁴⁹ As Dr. Milton Mueller, Professor at Syracuse University School of Information Studies, put it:

AT&T seems to be driven by the following calculus. It can either grow its services and its network under the harsh constraints of market pricing and competition, or it can attempt to reduce the field to an oligopoly with tacit price controls by using its size and financial bulk to eliminate *a pest who keeps downward pressure on pricing and service requirements*. I think it is rational for AT&T to try to get away with the latter. I think it’s insane for free market oriented thinkers to support it.⁵⁰

T-Mobile is considered the low-cost competitor to AT&T, and tends to keep its prices lower regardless of what AT&T and Verizon do. Without T-Mobile, AT&T will have greater incentive and ability to avoid dealing with the regional carriers it now claims as “competition.”⁵¹

⁴⁸ 2010 Guidelines §2.1.5, p. 4.

⁴⁹ Berry Testimony at 2 (emphasis added).

⁵⁰ Milton Mueller, “Why I Fear the AT&T-T-Mobile Merger,” The Technology Liberation Front, Apr. 18, 2011, at <http://techliberation.com/2011/04/18/why-i-fear-the-att-t-mobile-merger/> (emphasis added).

⁵¹ Accordingly, the Rural Cellular Association (“RCA”) and the Rural Telecommunications Group (“RTG”) oppose the subject acquisition. See RCA Opposes AT&T Acquisition of T-Mobile, Apr. 21, 2011, at <http://tinyurl.com/4xc7apk> (Statement of RCA President & CEO Steven K. Berry: “We do not view this merger as beneficial to consumers or to the wireless market in the United States. As proposed, it is a horizontal merger that will significantly reduce consumer choices and provide fewer partnering options for smaller carriers, and will strike a devastating blow to an already increasingly consolidated industry that competition may never recover from. This is a seminal moment for the concept of wireless competition. This will mean higher prices and fewer choices for consumers, job losses in the industry, and for many smaller

As such, this is the prototypical case under the 2010 Guidelines stating that a merger that “substantially reduces competition by bringing two close substitute products under common ownership” may be said to have anticompetitive effect, regardless of whether there is a price increase.⁵²

B. T-Mobile Has a History of Positive and Disruptive Behavior in the Marketplace.

The loss of T-Mobile also would mean a loss to potential innovation, which is a separate consideration upon merger review. The 2010 Guidelines explain that because “[c]ompetition often spurs firms to innovate[,] [t]he Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.”⁵³

T-Mobile’s size in the competitive market has led it to innovate in an effort to attract customers away from its three other nationwide competitors. To differentiate itself from the

GSM carriers it could mean extinction. This clearly moves to a monopoly if you are a GSM provider.”); RTC Urges FCC, DOJ to Block AT&T’s Acquisition of T-Mobile, Apr. 21, 2011, at <http://tinyurl.com/3h3fbk9> (“The loss of T-Mobile as an independent mobile wireless provider will decrease the number of market entrants nationwide in all markets, urban and rural, and further reduce consumer choice. Fewer choices inevitably results in higher prices. Rural consumers will be especially harmed because they have historically received lower pricing on roaming services from T-Mobile when they travel to urban areas. AT&T’s charges to other carriers to allow those carriers’ customers to roam on AT&T are significantly higher than the charges levied by T-Mobile for the same roaming services.”).

⁵² See Guidelines §6.4, p. 24.

⁵³ Guidelines §6.4, p. 23. The Guidelines continue, noting that “[t]he first of these effects is more likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm....An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner.” *Id.* In this case, the merger appears to directly impact T-Mobile’s plans to expand its offerings with additional low-cost smartphone handsets in 2011, as AT&T has announced no such plans. See *infra* at “Pricing,” n. 124 and accompanying text.

other three nationwide carriers, T-Mobile invested early in developing “a cost-effective and technically flexible path to LTE,” its HSPA+ network. Taking that step ushered in an early debut to 4G, which the Financial Times labeled “blazingly fast” and the Wall Street Journal noted “[i]n all the tests, [T-Mobile] beat the competition in download speeds.”⁵⁴ As T-Mobile presented to its investors, its “HSPA+ is competitive with LTE 4G technology and is superior over the next years due to handset ecosystem.”⁵⁵

T-Mobile has repeatedly invigorated the wireless market with important and often disruptive service and technological innovations. There are numerous examples of T-Mobile’s pattern of bringing new hardware to consumers ahead of the competition. Where handsets are concerned, in 2008, T-Mobile unveiled its G1, the first ever Android device.⁵⁶ More recently, it

⁵⁴ Rene Obermann, T-Mobile USA Investor Day, Jan. 20, 2011, at 39, 32, at <http://tinyurl.com/448n97n>. (“T-Mobile Investor Report”); *see also id.* at 35 (“HSPA+ provides the best speeds today.”). In this presentation to T-Mobile USA’s shareholders made precisely two months before the merger announcement, T-Mobile further noted that its U.S. growth was on pace to exceed its European growth, *id.* at 4; its top-line trends were improving, *id.* at 16; and that while it had not solved its churn problems (*id.* at 23-25), nevertheless “[c]ash flow has been stable, even with significant investments in network and distribution,” *id.* at 26. T-Mobile alone planned on covering much of America with 3G and 4G wireless broadband services by 2013 (*id.* at 41-42) and intended to participate in incentive auctions as a longer-term option, though in the short- to medium-term its spectrum sufficed to meet demands. *Id.* at 45. In other words, unless T-Mobile was misleading its investors, the recent report of its imminent death was an exaggeration. More importantly, T-Mobile’s planned “three-pronged approach to coverage” (*id.* at 41-43) will come to an abrupt stop, given it will no longer be competing against AT&T. Finally, where LTE is concerned, the subject application fails to explain why, if data roaming is good enough for small regional competitors – whose viability and potential for growth AT&T touts despite their lack of path to LTE – such roaming cannot be good enough for T-Mobile in the future.

⁵⁵ *Id.* at 38.

⁵⁶ *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 08-27, *Thirteenth Report*, 24 FCC Rcd 6185, ¶174 (2009) (“2009 Mobile Competition Report”).

has been the first to market with an Android 3.0 4G tablet, the LG G-Slate.⁵⁷ Development and use of the Android platform has been extremely important because it is an open source product, which has stimulated production of new and different apps, and is not as easily made subject to the restrictions of the OS operator as is the case with the Apple iOS and other closed operating systems. Moreover, Android accelerated the trend towards development of tablets and other devices, as it was not designed exclusively for phones.⁵⁸

T-Mobile's early adoption of Android is only a recent instance of a long-established pattern of firsts for T-Mobile. In 2002, it introduced the first Blackberry smartphone.⁵⁹ The same year, it brought out the Sidekick, an "innovative, swiveling device [that] helped popularize the Qwerty keyboard format for mobile phones..." and had a major influence in smartphone functionality and design that continues to this day.⁶⁰ In April 2009, T-Mobile announced that it was selling the first embedded SIM card for Machine-to-Machine ("M2M") uses. According to a report at the time,

The embedded SIM preserves many of the benefits of a GSM-based SIM solution (authentication, encryption and storage), but at a fraction the size of the traditional SIM you'd find in a mobile phone. In addition to the much smaller size, the embedded SIM differs from today's SIMs in that it's built from silicon - not plastic. The embedded SIM is designed to be hard-mounted onto M2m modules, accelerating deployment by allowing customers to

⁵⁷ See "T-mobile G-Slate: the first 4G Android 3.0 Honeycomb tablet," Jan. 6, 2011, <http://tinyurl.com/3knaswq> ("The T-mobile G-Slate will beat the Verizon Wireless Motorola XOOM tablet in the race to be the first Android 3.0 Honeycomb tablet running on top a 4G network.").

⁵⁸ Chris Simmonds, "What Else Can You Do With Android? Inside Android" at 8 (Oct. 19, 2010), <http://tinyurl.com/3aujw3l>.

⁵⁹ T-Mobile Press Release, "VoiceStream Announces Voice Enabled Blackberry and PC Data Card Available," Mar. 4, 2002, <http://tinyurl.com/3qs2xxj>.

⁶⁰ Phil Goldstein, "T-Mobile to halt Sidekick sales, promises 'new and fresh experience,'" *FierceWireless*, July 1, 2010, <http://tinyurl.com/3cd37yf>.

go directly from the factory to the field without having to provision and manually insert a SIM card.⁶¹

Another important example of T-Mobile's willingness to experiment was its partnership with Google and HTC in introducing Google's Nexus One phone at a subsidized price of \$179. The phone, which became available in January, 2010, was sold in an unlocked format and featured innovative voice to text technology, strong Flash support, and GPS capabilities far beyond those in other devices then available.⁶²

T-Mobile has also led the way in other aspects of technological advance. It broke new ground in its introduction of the Hotspot@Home UMA (unlicensed mobile access) service, which allowed customers at that time to use their home WiFi systems for completing calls, thus enabling them to have essentially unlimited calls and data access at home for an additional service package costing less than \$20 per month.⁶³ T-Mobile contemporaneously expanded WiFi calling to all trusted wireless hotspots with its WiFi Calling service.⁶⁴ Later, it expanded the service to the enterprise market, including connectivity to PBX systems, with a service called Wi-Fi Calling with MobileOffice.⁶⁵

These innovative tendencies have continued even in the wake of the merger

⁶¹ "T-Mobile Develops Tiny Embedded SIM Card," *Cellular-News*, April 23, 2009, <http://tinyurl.com/c76ask>.

⁶² Joshua Topolsky, "Nexus One Review," *Engadget*, Jan. 4, 2010, <http://tinyurl.com/yaj8cw8>; Thomas Ricker, "Nexus One Previewed with Flash 10.1 beta," *Engadget*, Jan. 5, 2010, <http://tinyurl.com/ydf2omd>.

⁶³ Joel Johnson and Brian Copeland, "T-Mobile Hotspot@Home Six Month Review (Verdict: Works a Treat)," *Boing Boing Gadgets*, Jan. 11, 2008, <http://tinyurl.com/3bzghlw>.

⁶⁴ "The advantage of UMA is typically twofold: it infills areas that have poor coverage, such as inside buildings and homes, by using Wi-Fi as it's intended to work, covering interior spaces; and it's cheaper to carry service over Wi-Fi and consequently the Internet than it is to shuttle voice calls over a cell network." "T-Mobile Takes Cell/Wi-Fi Calling National," *Wi-Fi Net News*, June 26, 2007, <http://tinyurl.com/4xztaeb>.

⁶⁵ Joanie Wexler, "Mobile WAN operators raise 'openness' bar," *Network World*, Oct. 9, 2009, <http://tinyurl.com/3ojoua8>.

announcement, as T-Mobile continues to up the technological ante for its competitors. In the week prior to the filing of this petition, T-Mobile unveiled doubled 4G speeds in a number of markets,⁶⁶ along with its T-Mobile Rocket 3.0 USB dongle that allows existing devices to obtain speeds as high as 42 Mbps.⁶⁷

T-Mobile's acceptance of the Android platform exemplifies its aggressive advocacy of open systems and openness generally in wireless technology. Thus, T-Mobile has been willing to assist customers in unlocking phones, something that its competitors long resisted.⁶⁸ In using the Android system for its smartphones, T-Mobile has shown more willingness not to block or review applications, generally allowing much greater freedom to deploy applications of their choice. Thus, unlike AT&T, which blocked the innovative Slingbox video technology from its cellular network,⁶⁹ T-Mobile allowed its use from the moment it became available.⁷⁰ So, too, T-Mobile apparently has not engaged in blocking of third-party VoIP services on its smartphones,

⁶⁶ Bonnie Cha, "T-Mobile doubles 4G speeds in 50 markets," *C-Net*, May 23, 2011, http://www.cnet.com/8301-17918_1-20065505-85.html ("Back at CES 2011, T-Mobile outlined its plans to double the speed of its 4G HSPA+ network and said it expected to roll out its upgraded network to 25 metro markets by mid-year. However, it looks like the carrier is actually ahead of schedule."); *see also* "T-Mobile Lights Up HSPA+ 42 Mbps In Las Vegas, New York and Orlando," *TMo News*, Mar. 21, 2011, <http://tinyurl.com/3z2rzn>.

⁶⁷ "T-Mobile says its 4G network in L.A. is twice as fast as before, theoretically," *L.A. TIMES*, May 24, 2011, <http://tinyurl.com/3ku362m>.

⁶⁸ *See* T-Mobile Support "SIM Unlock Code," <http://support.t-mobile.com/doc/tm51885.xml> (last visited May 29, 2011). As one blog commenter related, "[T]-mobile will unlock your phone for you because it demonstrate[s] that unlike AT&T and [its] ilk, it is their policy to help and work with people using unlocked phones, and not try to lock them in." *See* Discussion Topic, "Recommendations for an iPhone replacement?" *Ask MetaFilter.com* Nov. 4, 2010, <http://tinyurl.com/3co9oc2>.

⁶⁹ *See* Chris Foresman, "AT&T's move to block iPhone SlingPlayer from 3G is poppycock," *Ars Technica*, May 13, 2009, <http://tinyurl.com/qtndz3>.

⁷⁰ *See* James Kim, "Slingbox Friendly Handhelds," *CNet*, Mar. 28, 2006, <http://tinyurl.com/3rvly3x>.

as AT&T long did.⁷¹

T-Mobile also has been an innovator in designing its customer offerings. For instance, T-Mobile recently ran a two day promotion in which thirty different phone models were given away free of charge to new customers.⁷² Its leadership in price plans is discussed more fully elsewhere in this petition. Yet, Public Interest Petitioners note that at this time, T-Mobile offers a \$79.99 unlimited voice, text and data plan that is far more attractive than plans sold by the other three nationwide carriers.⁷³ These are but the most recent instances of T-Mobile's service plan and pricing leadership. For example, its MyFaves option, introduced in 2006, allowed unlimited calling to five numbers. Eventually, AT&T and Verizon were forced to develop competing services.⁷⁴ T-Mobile also has not required that service offerings be bundled with handsets.⁷⁵

Beyond the first-to-market technical advances and service plan innovations described above, T-Mobile has innovated in other ways as well. For example, its Android devices facilitate parenting with T-Mobile FamilyWhere, which allows parents to track the location of their kids

⁷¹ See Wexler, supra n. 65.

⁷² Julia Scott, "Free Phones at T-Mobile Stores February 11 and 12," *WalletPop.com*, Feb. 10, 2011, <http://tinyurl.com/44mebwv>.

⁷³ To be fair, the "unlimited" data offering provides full speed only through 2 GB per month. "T-Mobile Launches \$79.99 Unlimited Talk, Text, 'Data' Plan," *TMO News*, April 13, 2011, <http://tinyurl.com/3fvxxcp>.

⁷⁴ "T-Mobile Hangs Up On MyFaves," *Phone Scoop*, Nov. 9, 2009, <http://tinyurl.com/3s3vzpa> (explaining that the option had been phased out because of the availability of unlimited calling to all numbers on newer plans).

⁷⁵ As noted tech writer Dan Gillmor explained in *Salon*, "More important, T-Mobile has offered competitive service plans including my ability to bring my own phone and get a discounted monthly rate. All of the other carriers force customers to pay the same rate whether they buy a supposedly subsidized phone or bring their own..." Dan Gillmor, "Why the AT&T-T-Mobile merger must be stopped," *Salon*, Mar. 21, 2011, <http://tinyurl.com/42zm4hj>.

via their phone or computer. T-Mobile's WiFi calling application prompted Gadling, the world's top travel blog, to declare its Android GSM phones "the best choice for travel."⁷⁶

C. Approval of the Merger and Elimination of T-Mobile Would Stifle Innovation.

With a merged AT&T/T-Mobile and Verizon controlling nearly all of the relevant market, the success of handset makers and application developers will be determined by those two post-merger entities, both of which already have proven willing to exert their market power in dealings with device manufacturers and application developers. In 2007, Verizon passed on the chance to be the exclusive distributor of the Apple iPhone because it did not approve of the financial terms Apple was seeking. Some of the terms that Verizon refused were allowing Apple to share in monthly fees, allowing Apple to determine how and where iPhones could be sold, and allowing Apple to continue a relationship with iPhone customers.⁷⁷ This is an example of the kind of market power the two large wireless companies have over device manufacturers, even those manufacturers that are considered heavyweights like Apple. Apple was able to secure a better deal with AT&T, but Apple still compromised its device to comply with AT&T's terms.

In a market even more dominated by AT&T and Verizon, the two will be able to dictate which devices they will allow to attach to the network and the level of control device manufacturers may have over their own technology. This consolidated control has the potential to greatly stifle innovation as device manufacturers would have even greater incentives to develop devices that will meet carrier expectations rather than trying to create the most innovative product available. As NYU Law Professor Harry First recently noted "The last time that AT&T controlled handsets (through its ownership of Western Electric) all we had were black

⁷⁶ See T-Mobile Investor Report at 54.

⁷⁷ Leslie Cauley, "Verizon Rejected Apple iPhone Deal," USA TODAY, Jan. 29, 2007, http://www.usatoday.com/tech/news/2007-01-28-verizon-iphone_x.htm.

rotary-dial phones. A turquoise Princess phone was considered an innovation. We really can't have a 21st Century version of this type of market control."⁷⁸ AT&T has already bragged to Wall Street that it intends to improve T-Mobile's margins through "device portfolio rationalization,"⁷⁹ i.e. *limiting* the number of devices available to consumers and thus the number of device manufacturers who can bring their product to market.

Application developers will face similar obstacles as a result of AT&T's and Verizon's market power. The top national carriers already leverage their market power to stifle application makers' ability to offer innovative tools and products. For example, RIM recently introduced its new PlayBook tablet, and it offers some free applications designed to interact with other RIM BlackBerry devices. However, AT&T has blocked the most anticipated application for the PlayBook, BlackBerry Bridge.⁸⁰ BlackBerry Bridge allows email, contacts, calendar, and other applications to be accessed on the PlayBook via other BlackBerry devices. Of course, another service that allows devices to communicate and network more efficiently is tethering – which AT&T offers solely as a paid monthly service, and which it actively blocks and prohibits absent additional subscriber payments of as much as \$45 per month.⁸¹ Post-merger, one industry analyst commented that an alternative to application blocking will be AT&T-T-Mobile's using its

⁷⁸ Harry First, Four Things for Antitrust Enforcers to Keep in Mind For the AT&T/T-Mobile Merger, Antitrust & Competition Policy Blog, May 23, 2011, at <http://tinyurl.com/7xz8h>.

⁷⁹ See AT&T Shareholder Presentation at 29.

⁸⁰ See Chris Davies, "AT&T blocks BlackBerry Bridge app for PlayBook," *Slashgear*, Apr. 19, 2011, <http://tinyurl.com/3uk5t8f>.

⁸¹ See, e.g., "AT&T cracking down unofficial tethering apps like MyWi," *IntoMobile*, Mar. 18, 2011, <http://tinyurl.com/6js39sf>. For a description of T-Mobile's more lenient (but admittedly less clear) approach, see Karl Bode, "T-Mobile Won't Talk About Tethering," *DSLReports*, Dec. 3, 2009, <http://tinyurl.com/yed72yo>.

market power to raise data prices or begin lowering data caps,⁸² such that they would extract payments for use of applications in another way. This effectively would “block” applications by erecting an economic barrier before consumers, who will be forced to consider the data consumption a novel application may require before downloading it.

D. The Merger Also Would Constrict Choice and Negatively Impact Mobile Wireless Broadband Delivery of Video Programming and Other Forms of Expression.

The proposed merger also would, if approved, have a detrimental impact on the nascent market for wireless delivery of video programming. The growth of wireless devices such as smartphones and tablet computers has made mobile video viewing attractive to consumers. iPad’s immediate popularity has spawned numerous imitators. While tablets only reached 4 percent penetration in 2010, they are poised to grow rapidly.⁸³ Forrester Research estimates that 20.4 million tablets will be sold in the U.S. by 2015, and that tablets will constitute 23% of the U.S. personal computer market.⁸⁴ The development of a competitive wireless market for video distribution would be beneficial to both consumers and content creators, but this merger jeopardizes that development.

While the opportunity to make and view independently-produced content in traditional media has essentially disappeared due to deregulation and media consolidation, the growth in distribution options represented by the wireless market offers a path to reintroduce such content. However, approval of this merger would prevent the development of a competitive and innovative market for video distribution. A merged AT&T/T-Mobile would essentially face only

⁸² See Om Malik, “What AT&T and T-Mobile Merger Means for Innovation,” *GigaOm*, Mar. 21, 2011, <http://tinyurl.com/67e2jza>; Claire Cain Miller & Brad Stone, “App Makers Worry as Data Plans Are Capped,” *N.Y. TIMES*, June 6, 2010, <http://tinyurl.com/39zsb4r>.

⁸³ Nielsen, “The Increasingly Connected Consumer: Connected Devices,” at 1, Oct. 2010, <http://tinyurl.com/33kwnfp>.

⁸⁴ Jason Nottle, “5 Technologies CES Threw Away,” *TheStreet.com*, Jan. 11, 2011, <http://www.thestreet.com/story/10969190/2/5-technologies-ces-threw-away.html>.

one competitor in this space (Verizon), reducing incentives to develop robust video content offerings to consumers or offer video programming at reasonable prices. As the largest wireless distributor with 45 percent of the market, AT&T would possess significant market power over content creators seeking wireless distribution. Content creators would have little power in negotiations with AT&T, as the company's control of almost half of the wireless market would necessitate acceptance of AT&T's terms in order to reach consumers.

III. The Deal's Purported Efficiencies Are Speculative, Unproven, or Not Merger-Specific, but in any Event Would Not Offset the Public Interest Harms.

In cases like this, which propose significantly higher concentration in an already highly concentrated market, the applicants must provide "proof of extraordinary efficiencies."⁸⁵ Here they have provided no convincing proof. The subject application's efficiencies argument may be summarized as follows: (1) AT&T purportedly needs T-Mobile's spectrum to relieve congestion on its UMTS network, and (2) AT&T purportedly needs T-Mobile's spectrum, and *vice-versa*, to expand geographic coverage of LTE. AT&T does not claim it has no other alternatives to merger, and does not quantify the difference between the alternatives and the merger. Thus, given that the burden is on the subject application to proffer persuasive evidence of these efficiencies, and it proffers none, this alone negates them. But in any event, like Wordsworth's prison, the spectrum emergency into which AT&T doomed itself no emergency is.

As the DOJ recognized when revising the 2010 Guidelines, "[t]he Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."⁸⁶ Accordingly, any vague, speculative, or otherwise unverified

⁸⁵ *FTC v. H.J. Heinz Co.*, 246 F.3d at 720.

⁸⁶ 2010 Guidelines § 10, p. 29.

efficiencies claims are not cognizable, and “[p]rojections of efficiencies may be viewed with skepticism.”⁸⁷ Particularly here, where AT&T seeks to use speculative efficiencies to justify a merger to monopoly or near-monopoly in several relevant markets, with likely adverse competitive effects upon every relevant market, the efficiencies are unlikely to make a difference in merger analysis.⁸⁸ As the 2010 Guidelines suggest, “[w]hen the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”⁸⁹

The proposed transaction presents just such an instance of substantial adverse effect on competition without any “extraordinarily great” efficiencies. The Commission should deny the transaction. As DOJ does when enforcing the antitrust laws, the Commission should base its analysis here on the proposition that in the present landscape, “competition, not internal operational efficiency”⁹⁰ more readily protects and benefits consumers.

A. *AT&T’s Spectrum Efficiency and Coverage Claims Are Speculative, and to the Extent They Have Any Merit, Serve Only to Highlight Its Past Failure to Invest.*

AT&T has no unique need for a spectrum bailout in the form of merger. Expansion of LTE is a promise AT&T made long ago, based on its then-existing holdings.⁹¹ The Commission observed in its 2010 Wireless Competition Report that AT&T “plan[ned] to begin LTE trials in 2010 and LTE deployment in 2011 using its 700 MHz band and AWS spectrum.”⁹² The most

⁸⁷ *Id.*; see also *FTC v. H.J. Heinz Co.*, 246 F.3d at 720 (“[G]iven the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent *more than mere speculation and promises about post-merger behavior.*”) (emphasis added).

⁸⁸ See 2010 Guidelines §10, p. 30.

⁸⁹ *Id.* §10, p. 31.

⁹⁰ *Id.*

⁹¹ See, e.g., 2010 Wireless Competition Report ¶ 115 n. 345.

⁹² *Id.* ¶ 115.

charitable inference, from comparing that promise then against AT&T's recent representation that it needs T-Mobile to fulfill it, is that AT&T's ability to prognosticate its LTE deployment is unreliable.

Contrary to the latest version of this story in the instant application, AT&T has spectrum it can develop better than T-Mobile's, which is less desirable than AT&T's from a deployment standpoint,⁹³ and also would appear to be largely duplicative of AT&T's holdings when it comes to geographic coverage.⁹⁴ The claim in the application that AT&T needs 20 MHz of spectrally contiguous licenses in order to deploy LTE with "improved speed and spectral efficiency" deserves the Commission's scrutiny, particularly in light of the instructive pronouncements regarding efficiencies in the 2010 Guidelines and the cases cited above. In no event, however, can such claims serve as excuses for AT&T's previous failure and apparent lack of will even today (absent grant of this merger) to deploy advanced services in rural America. Any argument

⁹³ SNL Kagan, "Contrary to Media Buzz, SNL Kagan Says AT&T and T-Mobile USA Deal is Less About Spectrum, More about Margins," Mar. 22, 2011, <http://tinyurl.com/3onenqt> ("While rhetoric has focused on the benefit to AT&T of acquiring more spectrum from the deal to alleviate its notorious network constraints, we think this is largely smoke and mirrors considering T-Mobile USA's spectrum holdings are in the less valuable higher frequencies of 1.8GHz or higher. AT&T Mobility already has 21% of its MHz Pops covered by lower spectrum and more efficient 700MHz which it has yet to utilize but is expected to for its upcoming LTE 4G service."); *see also* Allen P. Grunes & Maurice E. Stucke, "Antitrust Review of the AT&T/T-Mobile Transaction," Antitrust & Competition Policy Blog, at 13, <http://tinyurl.com/3qgtvfm> ("T-Mobile's spectrum holdings are almost entirely above 1 GHz. This suggests, at a minimum, that AT&T's commitment to build out its network in rural areas is largely independent of anything it is getting in the acquisition); *see also id.* ("T-Mobile's spectrum holdings are not well-suited for rural build-outs. Rather, this promise seems to be politically driven and aimed at Senators and Representatives from largely rural states.").

⁹⁴ American Roamer released several maps shortly after Applicants announced the proposed merger. One such map depicts overlapping spectrum holdings in addition to unique spectrum holdings of the two carriers. *See* American Roamer, "AT&T and T-Mobile Overlap" (Mar. 24, 2011), <http://tinyurl.com/4dn9lmx>. This map does not quantify the T-Mobile unique coverage area as a percentage increase over AT&T's current license coverage, but to the extent that the American Roamer data is accurate, it does illustrate the minimal gain in terms of territorial expansion that AT&T would realize from buying T-Mobile.

that AT&T could make regarding inability to deploy in such communities is belied by the fact that carriers face no spectrum shortage in rural areas.⁹⁵ At worst, they appear to face a “profit shortage,” at least if various responses given by AT&T executives during testimony before Congressional antitrust subcommittees are to be believed.⁹⁶

As for more densely populated areas, in which its claimed capacity constraints may be somewhat more plausible, many of AT&T’s problems stem from its own procrastination. Like the fabled grasshopper, AT&T opted to sing with the iPhone without developing its spectrum stores to meet the needy season that inevitably would follow. AT&T demanded a 4-year, exclusive deal from Apple, freezing out its lower-share competitors from offering the iPhone, and now demands to lessen competition further by merging with one smaller nationwide and significantly marginalizing the other to a distant-third. As certain of the Public Interest Petitioners demonstrated with a filing in the Commission’s mobile wireless competition docket nearly two years ago, AT&T has a long history of under-investing in its network. The carrier “failed to invest in its network sufficiently – despite signing up many [iPhone] customers and

⁹⁵ See, e.g., Testimony of Gigi B. Sohn, President, Public Knowledge, before the Sen. Jud. Subcommittee on Antitrust, Competition Policy and Consumer Rights regarding “The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?” at 19 (May 11, 2011) (urging regulators to ignore “the claim that merging with T-Mobile will allow AT&T to suddenly deploy in rural areas where it already owns vast swathes of unused spectrum,” because “[r]ural America has never had a spectrum congestion problem and it never will have a spectrum congestion problem. Rural America simply has an infrastructure and investment problem”).

⁹⁶ See also Gregory Rose, *Wireless Broadband and the Redlining of Rural America*, New America Foundation, Wireless Future Program, April 2010. The study examines 80 counties in 29 states. In each state, it pairs counties with the highest rate of 3G and 4G wireless broadband coverage and counties with the lowest rate of such coverage. Its primary finding is that more than 70% of the variation in wireless broadband deployment in those counties is accounted for by five variables, including population density, median household income and levels of commercial activity. In rural counties without 3G coverage, the study found that the primary obstacle to commercial buildout is not spectrum supply, but the inability to efficiently aggregate demand and higher costs in geographic areas remote from backhaul and other primary infrastructure.

recognizing the popularity of the device, and despite advertising its data and web surfing capabilities – and instead used its substantial revenue to report high operating margins.”⁹⁷

Contrast its actions with that of its competitor Verizon Wireless, which has less spectrum than AT&T *and* now has the iPhone and yet makes no such claims regarding the necessity of a merger, and it becomes clear that what AT&T proposes as a merger efficiency can be accomplished in the present competitive landscape without the proposed acquisition. AT&T touted its superiority in October 2010 when confronted with Verizon’s deployment, issuing what PC World called “a smackdown” to the effect that Verizon needed to move fast because its 3G network was slower than AT&T’s: “We don’t have the technical limitations of the CDMA network, so our path to LTE isn’t ‘delayed.’”⁹⁸

What was true then remains the case now. There are few if any limitations upon AT&T’s deployment, other than its own unwillingness to invest and its ability to retain market-share and profit through anti-competitive means. For \$39 billion, AT&T could invest to use its own spectrum far more efficiently and expand its capacity. The subject application reveals that in the past *three* years, AT&T has invested \$21.1 billion to that effect. Notably in 2009, while Verizon increased its wireless capital expenditures by 10%, AT&T only increased its own by 1%.⁹⁹ To

⁹⁷ See, e.g., Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 19 (filed Oct. 22, 2009).

⁹⁸ See Paul Suarez, “AT&T Claims a Comeback in LTE Wars,” *PC World*, Oct. 9, 2010, <http://tinyurl.com/4xj8rnt>. AT&T’s bravado just five months prior to the merger announcement stands in marked contrast to its excuses in the application, as it did not hesitate to make such LTE claims based on any supposed need for 20 MHz contiguous spectrum blocks to deploy LTE. In any case, as Verizon remains on track to meet the President’s wireless broadband mandate, it is inconceivable that if the proposed acquisition is denied, AT&T will choose not to compete as some sort of retaliation against America. More likely, as it time and again has done, it will apply its resources to meeting Verizon’s competition.

⁹⁹ Marguerite Reardon, “Is AT&T a wireless spectrum hog?,” *CNet News*, Apr. 29, 2011, http://news.cnet.com/8301-30686_3-20058494-266.html. The article also reveals that “In San

the extent that AT&T's present spectrum reserves and customer-base proved to be of no encouragement to invest in capacity and efficiency, there is no evidence that a merger with T-Mobile will. In fact, recently AT&T revealed that its plan B (with this merger as plan A) also would avoid development of its spectrum holdings in favor of acquisitions.¹⁰⁰

B. AT&T More Readily Could Expand Capacity by Investing in Its Own Network, Without the Merger's Harm to Competition and Innovation.

AT&T could “mobilize everything” by investing \$39 billion in its own network to provide better coverage throughout the United States, rather than using those funds to eliminate a competitor and assist Deutsche Telekom in paying off that company's debts and costs for network deployment outside the U.S.¹⁰¹ In fact, AT&T's stated intention to realize synergies and *reduce* capital expenditures by acquiring T-Mobile¹⁰² is a separate harm recognized by DOJ in the form of an “action to refrain from building or buying capacity that would have otherwise been obtained.”¹⁰³

Francisco, where it's been well-publicized that AT&T has struggled to keep up with mobile data demand for its smartphones, particularly the iPhone, AT&T has about 30 MHz more 3G spectrum than Verizon Wireless. This 3G spectrum consists of spectrum in both the 850MHz band as well as the PCS band of spectrum,” and adds: “The company hasn't even touched about 832 MHz of new wireless spectrum in the top 21 markets.” In contrast, the article reports that Verizon, despite its smaller holdings, “launched its 4G wireless service in December [2010], and it expects to serve 200 million people with the service this year. And by the end of 2013 it will be available to more than 285 million potential customers.”

¹⁰⁰ Cecilia Kang, “AT&T, T-Mobile file merger application; Q&A with James Cicconi,” WASH. POST, Apr. 12, 2011, <http://tinyurl.com/6ar8x8n>. Asked about AT&T's plans to deal with its spectrum needs pre-merger, Cicconi answers: “We had to find more spectrum through spectrum swaps or secondary markets.” *Id.* He provides no indication of why the merger is necessary, if these spectrum swaps and secondary markets are out there to meet the same efficiencies the merger seeks.

¹⁰¹ Paul Rasmussen, “After AT&T Deal, Deutsche Telekom to refocus on Europe,” Fierce Wireless Europe, Mar. 21, 2011, at <http://tinyurl.com/44skjbo>.

¹⁰² See AT&T/T-Mobile Application at 52.

¹⁰³ Free Press Letter at 8 & n.32 (quoting 2010 Guidelines).

Separate and apart from the apparent diminution in total expenditures that the application suggests, there are additional problems with AT&T's plans. For instance, AT&T attempts to differentiate itself from T-Mobile by diverting attention to the greater efficiency of LTE. Yet, AT&T provides no satisfactory answers to the obvious question of why it has yet to roll out the allegedly 30-40% more efficient network when Verizon launched its LTE service in December 2010. Even post-merger, AT&T's promise remains that it will force T-Mobile's subscribers "eventually" to move to AT&T's UMTS network. Faced with the obvious choice of moving its spectrally inefficient GSM subscribers to the more spectrally efficient UMTS network through promotions and other incentives, AT&T declined it because of the expense that would entail.¹⁰⁴ There is no evidence that this expense would exceed the costs of acquiring T-Mobile, nor justify approval of an anticompetitive and unlawful acquisition that would grant AT&T a 60% spectrum holdings advantage over Verizon, AT&T's only real competition if the proposed acquisition is approved.¹⁰⁵ In any event, if the merger is approved, AT&T will be down \$39 billion and nevertheless will have to subsidize handsets to move its base to LTE in the timeframes it describes. The only reasonable inference from the evidence at hand is that what was too expensive to AT&T pre-merger will remain too expensive post-merger, and AT&T's "if T-Mobile comes, we will build it" promise is simply lip-service.

¹⁰⁴ Buried within its description of the transaction is AT&T's admission that, even with T-Mobile, it will not upgrade its subscribers for another decade. *See* AT&T/T-Mobile Application, Hogg Declaration, at 3 ("AT&T's subscribers – continue to rely solely on AT&T's earlier generation Global System for Mobile Communications ('GSM') network for their wireless communications needs. Although those customers will migrate over time to more spectrally efficient UMTS and/or LTE services, AT&T must continue to provide sufficient GSM capacity *well into this decade* to ensure that those customers are able to receive quality service in the interim.").

¹⁰⁵ Martin Peers, "Spectrum of Choices Confront AT&T Review," *WSJ Heard on The Street*, Apr. 29, 2011, at <http://tinyurl.com/3qyhe2b>.

This merger is not necessary to carry out the President’s mandate for broader coverage. Again, Verizon is on pace to achieve that coverage without merging with T-Mobile, and to the extent AT&T is not, this has been its plan.¹⁰⁶ If competition did not incentivize AT&T to cover rural and other areas (areas, in any event, in which T-Mobile spectrum licenses generally overlap with AT&T’s), less competition certainly will not do so. To the extent AT&T’s spectrum crunch is more than conjectural, disapproval of this merger – rather than the grant that Applicants seek – would provide it with better incentives to innovate, extend, and improve its coverage. In any event, the best path to broader coverage throughout the nation (and, for that matter, to incentive auctions capable of generating the revenue that proponents of such auctions expect¹⁰⁷) is to deny the merger – not to grant it and bless a duopoly structure, leaving Sprint and all other smaller carriers as increasingly marginalized, would-be competitors unable to obtain new spectrum or deploy service on competitive terms.

¹⁰⁶ Verizon recently stated its commitment to satisfying the level of national 4G coverage AT&T claims it reach only if given T-Mobile. *See* Final Transcript Q1 2011 Verizon Earnings Conference Call, at <http://tinyurl.com/3eufgck>. Part of Verizon’s earnings report revealed that “With regard to the further expansion of our LTE footprint, [Verizon] announced 38 markets in our initial launch in December, covering about 110 million POPs. Since then, we’ve announced more than 100 additional markets in places like Detroit, Memphis, Milwaukee, Louisville, Indianapolis, Sacramento, and Honolulu, to name just a few. By the end of the year, [Verizon] plan[s] to be in about 175 markets covering more than 185 million POPs.” *Id.* at 5. Verizon credits its progress with its continuing choice to invest in development: “While we expect overall capital spending in 2011 to be essentially flat compared to 2010, we have started the year more aggressively in wireless, spending a bit more early in the year on 4G LTE, consistent with our overall deployment plans and continuing to add growth capacity to our 3G network. Looking forward, we will continue to expand our 4G LTE footprint and invest the necessary capital in 3G to stay ahead of the data demand curve.” *Id.* at 3.

¹⁰⁷ As explained by AT&T’s CFO on a conference call held by the Applicants to explain their proposal, among the “savings” that AT&T looks to generate to make the acquisition pay off are “\$10 billion from avoiding future purchases of spectrum from the government.” *See* WSJ Online, Live Blog: AT&T to Buy T-Mobile, Mar. 21, 2011, at <http://tinyurl.com/45xcsdg>. On the same call, AT&T further revealed that it planned to achieve the same amount of savings from “mashing together call centers, billing systems and back-office operations” – suggesting that the “required” force reductions (*see infra* n.108) that AT&T presented as largely “attrition”-based will be significant.

In sum, the efficiencies claimed do not offset impact of removing T-Mobile as a pricing and innovation maverick and moreover are not merger-specific,¹⁰⁸ to the extent the merger could achieve them rather than hamper their achievement.

IV. Approval of the Merger Would Increase Prices Paid by, and Decrease Innovative Service Offerings Available to, Mobile Wireless Customers.

A. The Largest Nationwide Providers Already Engage in Parallel Pricing and Conduct – a Problem That Merger Approval Would Exacerbate.

The absence of T-Mobile will adversely affect all consumers by removing a “maverick” that had destabilizing effects upon the national duopoly that, to an alarming degree, Verizon and AT&T already share. By reducing the number of competitors serving the market and eliminating an aggressive competitor, the acquisition would enable the emerging duopolists to coordinate with one another even better than they already do.¹⁰⁹ As one antitrust expert summarized in testimony regarding this proposed transaction before the House of Representatives, “A merger can be anticompetitive because it makes it easier for all of the firms in an industry to coordinate their pricing or other competitive behavior (‘coordinated effects’), because it permits the merged firm alone profitably to raise price or otherwise restrict competition (‘unilateral effects’), or

¹⁰⁸ AT&T also claims it will adopt the far better regarded customer service practices of T-Mobile. This is obviously something AT&T can – and should have – adopted without the merger. Moreover, AT&T’s stated intent to “Improve T-Mobile’s Margins” via “retail store rationalization,” *i.e.* closed stores, and “**required** force reductions” (emphasis added), *i.e.* employee layoffs, and “device portfolio rationalization,” *i.e.* decreased customer choices among handsets, make clear its lack of intent to retain the backbone of T-Mobile’s customer service practices: its stores and workforce and the freedom of choice it gives its customers. *See* AT&T Shareholder Presentation at 29.

¹⁰⁹ *See, e.g.,* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 10-12 (filed Sept. 30, 2009) (detailing parallel conduct of nationwide providers in the setting of voice service prices, text messaging service prices, and non-price limitations on service); *see also* 2010 Wireless Competition Report ¶ 92 & tbl. 10 (illustrating parallel, precisely matched pricing levels for comparable AT&T and Verizon plans offering unlimited voice; unlimited voice plus text; unlimited voice, text, and basic data; and unlimited voice, text, and smartphone data).

because it makes it profitable for the merged firm or other firms to impair the opportunities of rivals to compete on the merits (‘exclusionary effects’).”¹¹⁰

In a market where T-Mobile has been an aggressive competitor on price and quality, AT&T and Verizon’s pricing already suggests their coordination. With the emergence of Sprint, T-Mobile’s predecessors, and other new entrants after Congress authorized the FCC to auction additional spectrum for terrestrial personal communication services (“PCS”), the average monthly billing charge for cellular services dropped from \$97 to \$39.¹¹¹ Recently, however, lower-cost offerings from Sprint and T-Mobile have constrained AT&T and Verizon to a lesser degree.¹¹² In its recent wireless competition report, the FCC detailed T-Mobile’s unique role in destabilizing pricing:

Even before T-Mobile launched its new pricing plans, Verizon Wireless and AT&T priced their postpaid service offerings at a premium relative to those of T-Mobile and Sprint Nextel. According to analysts, this premium reflected the willingness of consumers to pay higher prices for access to preferred handsets and data offerings, and in Verizon Wireless’s case, positive perceptions of its network. ***T-Mobile’s price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings.*** In January 2010, Verizon Wireless reduced the prices of its unlimited voice plans for both individual and shared family offerings. Later the same day, AT&T responded to Verizon Wireless’s changes with matching price reductions on its unlimited voice plans. ***While Verizon Wireless’s and AT&T’s unlimited plan price cuts were significant, their postpaid service offerings remained the most expensive in***

¹¹⁰ Andrew I. Gavil, Written Statement Before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition, and the Internet, Hearing on “How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?,” May 26, 2011, at 5.

¹¹¹ See Written Testimony of Daniel R. Hesse, CEO Sprint Nextel Corporation re: Proposed AT&T/T-Mobile Merger Before the Senate Jud. Comm’t, Subcomm’t on Antitrust, Competition Policy and Consumer Rights, at 8 (May 11, 2011) (“Hesse Testimony”).

¹¹² See SNL Kagan, *Wireless Industry Benchmarks*, cited in Free Press Letter at 5 n.16 (detailing that in 2010, AT&T added 3.4 million customers in the relevant market, while Verizon added 2.6 million, yet Sprint and T-Mobile lost 855,000 and 390,000 subscribers, respectively).

*the industry, even following these price changes, as the prices of Sprint Nextel's and T-Mobile's equivalent or comparable unlimited plans had already declined sharply.*¹¹³

Given the difficulties even Sprint and T-Mobile jointly have had in curbing AT&T's and Verizon's high prices, it is inconceivable that the elimination of T-Mobile as a low-cost nationwide carrier will not eliminate what little restraint there is on the two largest carriers, which would control an overwhelming percentage of all relevant geographic and product markets.

¹¹³ See 2010 Wireless Competition Report ¶ 92. Elsewhere in the Report, the Commission notes that AT&T followed the leader when introducing its similar "A-List" calling feature in 1999, which allowed unlimited mobile calling to and from any five "VIP" domestic phone numbers for individual plans, and any ten numbers for family plans and was "designed to compete with earlier unlimited 'calling circle' options, such as T-Mobile's myFaves and Verizon Wireless's Friends and Family options." See 2010 Wireless Competition Report ¶ 90. News reports after the merger announcement noted that T-Mobile's business plan for 2011 highlighted its continuing intent to differentiate itself with aggressive pricing: "One way T-Mobile has sought to distinguish itself is on price. In a January slide presentation to investors, Deutsche Telekom Chief Executive Officer Rene Obermann highlighted T-Mobile's effort to offer the most inexpensive data services. In one graphic, Obermann claimed T-Mobile could save a family of five more than \$400 compared with AT&T, Verizon and Sprint." See Jeff Bliss, "AT&T's Purchase of T-Mobile Questioned on Prices by FCC Official," BLOOMBERG NEWS, Apr. 12, 2011, at <http://tinyurl.com/6dygtf2>; see also Ante & Chang, *supra* n. 46 (The *Wall Street Journal* identified T-Mobile and Sprint, for which viability and ability to discount will be compromised by AT&T's acquisition of T-Mobile, as "the most aggressive discounters."). T-Mobile's recent inability, in a bad economy, to single-handedly restrain AT&T's growth (much of which by AT&T's own reckoning is attributable to the iPhone) does not alter its character as a "maverick," because that concept "also encompasses firms that constrain coordination from becoming more likely or more effective without necessarily starting price wars or otherwise appearing observably disruptive." Joshua B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 140 (Apr. 2002) (reprinted in *Economics of Antitrust Law*, 470-538, Benjamin Klein & Andres V. Lerner, eds. (Edward Elgar, 2008)). To the extent T-Mobile's increasing struggles to constrain AT&T and Verizon would strip it of its "maverick" status, certainly the mantle would not fall on the smaller by economies of scale and greatly constrained MetroPCS and Leap, but rather on Sprint, which the merger would marginalize and, unfortunately, strengthen the precedent for its acquisition by Verizon. See also *supra* n. 47 and accompanying discussion regarding the industry maverick standard.

The carriers with the most influence, AT&T and Verizon, tend to set the pricing scheme for the entire industry, already to troubling results. As former Consumers Union Counsel Chris Murray previously testified, “[t]he way carriers continue to raise prices on text messaging services is a clear example of the negative ramifications of market power in this industry.”¹¹⁴ Murray noted that text messaging rates had increased 150% in a four-year period, solely because the major players figured out that they could inflate such prices for a service that costs them relatively little to provide and reap huge profit benefits.¹¹⁵ Early termination fees (“ETFs”) for smartphones also are symptomatic of increased concentration in the nationwide mobile wireless market. In 2009, Verizon increased its ETFs for smartphones to \$350. Less than a year later, AT&T followed suit and more than doubled its ETFs to \$325.¹¹⁶ The two companies also charge extraordinarily high overage fees for data usage.¹¹⁷ T-Mobile, on the other hand, took the lead in

¹¹⁴ Chris Murray, “Competition in the Wireless Industry,” Before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet, Committee on Energy and Commerce, at 2, May 7, 2009. Remarkably in the same hearing where Murray testified, AT&T touted the national nature of the market when asking for Congress to enact rules preventing the states from enforcing “terms and conditions” regulation, which AT&T feared to would “force[] wireless carriers to abandon *a single, integrated service* and instead tailor particular service offerings to particular local jurisdictions...” See Written Statement of AT&T, Inc., May 7, 2009, at 9, at <http://tinyurl.com/3uvtrmw> (emphasis added). Accord Written Submission of Verizon Wireless, May 21, 2009, at 10, at <http://tinyurl.com/44jh4n7> (arguing similarly based on the fact that “*wireless services are increasingly nationwide, and allow customers to benefit from national rate plans that offer the same prices and services across state boundaries.*”) (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ Michelle Maisto, “Following AT&T, Verizon ETF Hikes, Sen. Klobuchar Pushes FCC,” *eWeekMobile*, May 27, 2010, <http://tinyurl.com/3bn3ux8>.

¹¹⁷ Lisa Myers (reporter), “Is AT&T fleecing iPad, iPhone users?” *Today Show*, <http://www.msnbc.msn.com/id/21134540/vp/43090699#43090699>. Video last viewed on May 19, 2011. See also Jorgen Wouters, “Lawsuit Accuses AT&T of iPhone and iPad Overcharges,” *Wallet Pop*, Feb. 2, 2011, <http://tinyurl.com/3qyg5o3>. Last viewed on May 31, 2011.

affordable data services, and aspired to go even further to address industry-wide “billshock” concerns.¹¹⁸

B. The Elimination of T-Mobile Would Mean the Elimination of Innovative, and Relatively Low-Cost Nationwide Carrier, All to the Detriment of Consumers, Especially Underserved Populations and Regions.

To the extent any discipline is exercised over the emerging duopoly, the presence of T-Mobile deserves credit. Where the two largest companies already tend to move in lockstep to raise prices on services, AT&T’s acquisition of the fourth largest provider and the resultant crippling of the third can only exacerbate the negative impacts of market concentration upon consumers. Indeed, recently the 7th Circuit reasoned that even where *four* companies control of 90% of a national market such as the text messaging market, “it would not be difficult for such a small group to agree on prices and to be able to detect ‘cheating’ (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities.”¹¹⁹

T-Mobile continually offers consumers a unique alternative to AT&T’s and Verizon’s offerings. For example, in 2010, T-Mobile launched a family-friendly \$5 add-a-line offer.¹²⁰ That same year T-Mobile expanded its low-cost wireless services subsidized by Lifeline dollars over several states.¹²¹ This year T-Mobile offered consumers deals such as a \$10 entry-level

¹¹⁸ T-Mobile Investor Report at 51, 57.

¹¹⁹ *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 628 (7th Cir. 2010).

¹²⁰ T-Mo News, “Family Talk \$5 Add-a-Line Available in Retail Stores,” Mar. 30, 2010, <http://www.tmonews.com/2010/03/family-talk-5-add-a-line-available-in-retail-stores/>.

¹²¹ Susan Salisbury, “T-Mobile to offer discount service for low-income Floridians,” THE PALM BEACH POST, <http://tinyurl.com/3nvp8d7>; *see also* Mike Dano, “T-Mobile, with eye on USF money, expands Lifeline offerings,” Fierce Wireless, Oct. 26, 2010, at <http://tinyurl.com/3jgtyxa>.

smartphone data plan¹²² and a low-cost international roaming plan for business travelers.¹²³ Just prior to the merger, while the other three nationwide competitors planned price increases, T-Mobile had planned a rollout of low-cost Android devices, according to the comments of its CEO to the *Wall Street Journal*.¹²⁴

T-Mobile's aggressive pricing has not gone unnoticed by consumers and bodes well for its future competitiveness. "Compared to its main competitors," T-Mobile has been "dominating the Hispanic share of the wireless business,"¹²⁵ for example. According to multiple data sets, 21-25% of T-Mobile's 34 million customers are Latino, as opposed to 16% of Sprint customers, 12% of AT&T customers and 9-10% of Verizon customers.¹²⁶ T-Mobile's domination of the Latino market is particularly significant because the Latino market is a growing market. From 2009 to 2010, the percentage of English-speaking Latinos who used their cell phones to access

¹²² Dan Costa, "AT&T's T-Mobile Purchase is a Bad Call, The 750 Palm by Treo, Mar. 23, 2011, <http://www.palmtreeo750.org/atts-t-mobile-purchase-is-a-bad-call-2/>.

¹²³ The Cell Phone Junkie, "T-Mobile adjusts roaming plans for business," Feb. 2, 2011, <http://thecellphonejunkie.com/2011/02/02/t-mobile-adjusts-roaming-plans-for-business/>.

¹²⁴ Ina Fried, "Interview: T-Mobile CEO Philip Humm Embraces Role as Challenger to Verizon, Sprint and ATT," WALL ST. J., Jan. 31, 2011, at <http://tinyurl.com/44hnlav>. The article further notes that at that time "[w]hile Verizon and AT&T are shifting away from unlimited plans and Sprint is hiking the cost for smartphone data rates," T-Mobile uniquely planned to offer lower rates. This is precisely the sort of behavior that defines a maverick for purposes of antitrust review. *See, e.g.*, 2010 Guidelines §2.1.5, p. 3.

¹²⁵ Brand Profile, T-Mobile Reaches the Hispanic Market, SME Branding, Sep. 20, 2010, at <http://tinyurl.com/3fvmez7>. *See also* Jerry Rocha, Nielsen, "Hispanic Mobile and Social Networking for adtech," Slide 5, at <http://tinyurl.com/3bunphy> ("Nielsen PPT") (note that T-Mobile's share of the African-American community (14%) also exceeds AT&T's (8%).) Nielsen's research also found that Latinos pay the highest rates on AT&T, averaging \$120 per month, and the lowest on T-Mobile, averaging \$102 per month. Verizon's Latino customers pay an average of \$115 per month, and Sprint's pay \$117. *Id.* at 4. These prices affect a growing percentage of the population, as just last year mobile phone penetration in the Latino community hit 91%. *Id.* at 8. Moreover Nielsen also found that Whites, African-Americans, and Asians and Pacific Islanders all pay less on T-Mobile. *Id.* at 4.

¹²⁶ Michaela Mora, "T-Mobile Is Popular Among Hispanics," Relevant Insights, Jul. 1, 2010, at <http://relevantinsights.com/hispanics-and-tmobile/>; *see also* Nielsen PPT, Slide 5.

the internet grew from 40 to 51%.¹²⁷ Latinos, many of whom rely exclusively on mobile phones to access the internet,¹²⁸ use text messaging, mobile video and mobile internet more than any other demographic group,¹²⁹ not simply for business and personal matters but for civic participation.¹³⁰ All of these activities stand to be compromised by AT&T's plans to improve T-Mobile's margins in part by capping and tiering data. For these reasons, the potential for higher prices and fewer choices would hurt all wireless users, but would have an especially devastating impact on traditionally underserved and marginalized communities making use of T-Mobile wireless broadband service to bridge persistent digital divides.

A recent Consumer Reports price analysis revealed that T-Mobile pricing plans are typically between \$15 and \$50 cheaper than AT&T's comparable plans.¹³¹ Moreover, presently T-Mobile's customers have the option of unlimited data plans, which AT&T's customers do not. AT&T has made it clear that it will not extend this benefit enjoyed by T-Mobile's customers if the merger is approved. In a presentation to its shareholders regarding the subject proposal,

¹²⁷ Compare Aaron Smith, "Mobile Access 2010," Pew Internet & American Life Project (Jul. 7, 2010), at 4, *at* <http://tinyurl.com/43q7pjq> ("Mobile Access 2010") *with* John Horrigan, "Wireless Internet Use," Pew Internet & American Life Project (Jul. 2009), at 28, *at* <http://tinyurl.com/3b7j7uy> ("Wireless Internet Use 2009").

¹²⁸ Kristin Purcell, Roger Entner & Nichole Henderson, "The Rise of Apps Culture," Pew Internet & American Life Project & The Nielsen Company (2010), at 19, *at* <http://tinyurl.com/2wzlgyk> ("As cell phone use in general increases, wireless internet use is also on the rise, particularly among Hispanic and African-American adults."); *see also* Mobile Access 2010, at 4.

¹²⁹ Nielsen PPP at Slide 13; Mobile Access 2010, at 4; Wireless Internet Use 2009, at 28; The Nielsen Company, "A Snapshot of Hispanic Media Usage in the U.S." (2010), at 3, *at* <http://tinyurl.com/4rrguhj>.

¹³⁰ *See* Official Statement: Voto Latino Supports Net Neutrality, Jan. 15, 2010, *at* <http://tinyurl.com/3o3h6l4> (Voto Latino, a non-profit, non-partisan organization, launched the "Text2Represent" campaign to facilitate voter registration and civic discourse amongst Latinos all over the country through the use of text message alerts and reminders.)

¹³¹ Jeff Blyskal, "CR Analysis: T-Mobile is Cheaper Than AT&T," (hereinafter "CR Comparative Pricing Analysis"), CONSUMER REPORTS, Apr. 8, 2011, *at* <http://tinyurl.com/3d6swaz>.

AT&T detailed its plans to increase T-Mobile's data revenues per subscriber (presently \$12.80) to match AT&T's (presently \$17.50). Part and parcel of these plans is the monetization of data, with "attractive [to AT&T's shareholders, that is] tiered data plans."¹³² As a further example of AT&T and Verizon's tendencies to follow each other's pricing moves, unconstrained by the smaller carriers AT&T claims are its competitors for merger evaluation purposes, soon after the merger announcement reports indicated that Verizon also intends a transition to tiered and capped data plans.¹³³

Data usage fees are a major concern, but not the only area in which AT&T's prices are higher. T-Mobile's customers will face significant price hikes across the board if AT&T is to satisfy its promises to investors and increase ARPU for T-Mobile customers post-acquisition.¹³⁴ On voice plans, for example, T-Mobile charges \$50 per month for its basic 1,000-minute individual "Even More Talk" two-year contract plan, while AT&T charges \$60 per month for its nearest equivalent "Nation" contract plan, which includes only 900 minutes. When adjusted for the difference in voice minutes, AT&T costs \$16.67 more per month or \$200 more per year for a comparable monthly allocation of minutes. Additionally, T-Mobile's two-line, 3,000-minute "Even More Talk + Text" (unlimited messaging) + 200MB data two-year contract plan for smart phones costs \$140 per month. The closest AT&T "Family Talk Nation" plan costs \$170 per month, after you add data and messaging to the base price, but delivers only 2,100 voice minutes. Adjusted for the 900-voice-minute shortchange, this AT&T plan costs \$50 more per month or \$600 more per year.¹³⁵

¹³² AT&T Shareholder Presentation at 26.

¹³³ Matt Hamblen, "Verizon data caps coming, probably by mid-summer," *ComputerWorld*, Mar. 1, 2011, at <http://tinyurl.com/3k2dnj2>.

¹³⁴ See AT&T Shareholder Presentation at 34.

¹³⁵ CR Comparative Pricing Analysis, *supra* n. 131.

Although AT&T minutes not used during one month can be used in the subsequent 12 months and subscribers can also place unlimited mobile-to-mobile voice calls free to any network when they add unlimited messaging to their individual or family plan, for \$20 or \$30 a month, respectively, it is worth noting that AT&T customers get less in some ways. A family can upgrade the above T-Mobile plan to include unlimited data for a total cost of \$150 per month. But the closest plan from AT&T has a cap on data downloads (of 2GB per month) and a higher cost (\$190 per month, plus \$10 per additional gigabyte of data if you exceed the 2GB limit).¹³⁶ Thus, current T-Mobile customers are not only paying less for voice, but also for data, and stand to pay more for both if this deal were approved. Although AT&T said it would honor T-Mobile's current contracts, those will likely end after two or fewer years.¹³⁷ Presumably, those customers will either have to enter into a contract with AT&T or find a new carrier. If the customer decides to stay with AT&T after her T-Mobile contract ends, she likely will need to purchase a new phone, as well as pay more per month for a similar or worse plan to the legacy T-Mobile offer.

The acquisition of T-Mobile also would reverberate beyond its own customers to those of carriers in rural areas, for example, because prices for their providers that rely on a GSM network for roaming coverage will increase under an AT&T/T-Mobile GSM monopoly.¹³⁸ T-Mobile is the only nationwide GSM provider other than AT&T, and the merger would eliminate that head-to-head competition for smaller GSM carriers and their customers entirely. AT&T already has marginalized regional GSM carriers by withholding roaming agreements, in marked

¹³⁶ *Id.*

¹³⁷ See Cecilia Kang, "AT&T, T-Mobile file merger application; Q&A with James Cicconi," WASH. POST, Apr. 12, 2011, at <http://tinyurl.com/6ar8x8n>.

¹³⁸ See Rural Cellular Association, "RCA Opposes AT&T Acquisition of T-Mobile," at <http://tinyurl.com/4xc7apk>. See also *supra* n. 7.

contrast to T-Mobile, which generally “allows users to roam freely among markets.”¹³⁹ Businesspersons who require nationwide coverage and the interoperability of the GSM technology for international travel would be serviced by only one, monopolist carrier.¹⁴⁰ So will Smart Car drivers who rely on GSM technology to immobilize their cars and prevent theft.¹⁴¹

A recent economic study on effect of a second entrant in previous GSM monopolies overseas confirmed the premise of antitrust laws against monopolies – competition makes a difference: “After the first year of operations, the second entrants had gained on average 22% market share and 42% after five years of operations.”¹⁴² A comparison to oil prices also may be instructive. In 2004, the GAO assessed the effects of mergers and market concentration in the U.S. Petroleum Industry, and found that “mergers and increased market concentration generally led to higher wholesale gasoline prices in the United States from the mid-1990s through 2000.... [and] that increased market concentration, which reflects the cumulative effects of mergers and other competitive factors, also led to increased prices. For conventional gasoline, the predominant type used in the country, the change in wholesale price due to increased market

¹³⁹ See Meena Testimony at 10.

¹⁴⁰ In early 2011, T-Mobile introduced its Global for Business plan, priced at \$9.99 per month and providing lower per-minute rates for calls placed during international travel. T-Mobile Release: Latest News: T-Mobile Launches Global for Business Plan as Next Step to Address International Mobility Costs for Multinational Corporations, Feb. 1, 2011, at <http://tinyurl.com/3bts96o>. T-Mobile earlier launched its \$5 unlimited international texting add-on plan. See Slick Deals, “T-mobile Unlimited Domestic and International Texting for Postpaid customers \$5 individual \$10 family on top of domestic price,” Oct. 26, 2010, at <http://tinyurl.com/4x4kbgn>.

¹⁴¹ See “Smart Cars Hit the Streets, GSM on the Rise,” Taiwan Trade, Apr. 21, 2011, at <http://tinyurl.com/3wqs6fx> (noting that “nowadays more and more cars are being fitted with GSM (Global System for Mobile Communications) modules. In Europe and the U.S. GSM modules are mainly used in immobilizers. GSM systems have greater communication distances thus enabling SMS messages to be sent to car owners’ phones when their cars are being breached.”).

¹⁴² See A.R. Yari and M.R. Sadri, Effects of the Second Entrant in GSM Telecommunication Market in MENA Region, 24 World Academy of Science, Engineering and Technology (2006), at 34-36, at <http://www.waset.org/journals/waset/v24/v24-7.pdf>.

concentration ranged from a decrease of about 1 cent per gallon to an increase of about 5 cents per gallon. For boutique fuels sold in the East Coast and Gulf Coast regions, wholesale prices increased by about 1 cent per gallon, while prices for boutique fuels sold in California increased by over 7 cents per gallon.”¹⁴³

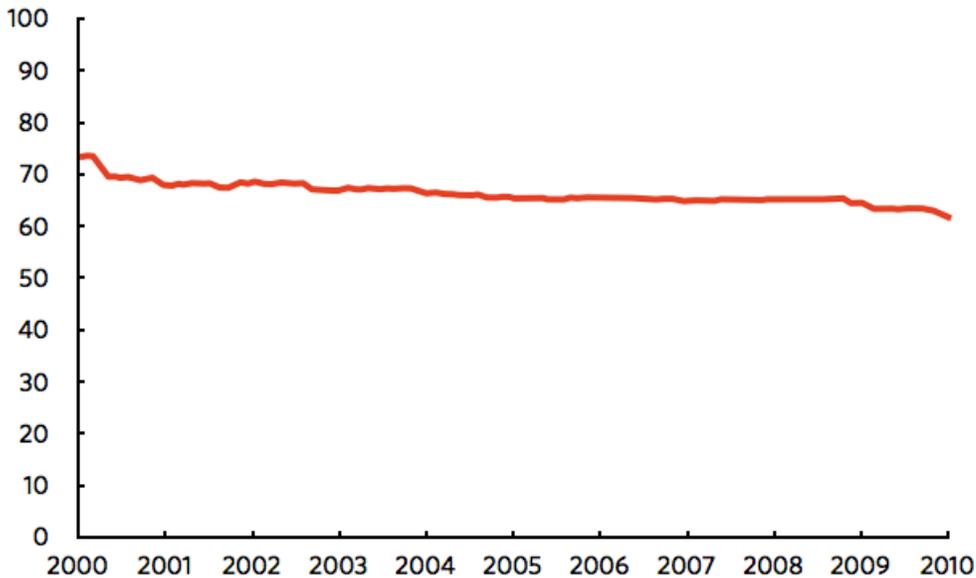
While increases in innovation always will drive prices down in the mobile market, it is competition that allows consumers to benefit from innovation. With *less* competition, prices still may drop as technology becomes cheaper or obsolescent but they will drop far *less*. The Applicants, for example, tout the fact that the average revenue per voice minute has fallen in the past fourteen years, but they obscure the fuller picture. As the *New York Times* identified, when asking “Is There a Method in Cellphone Madness?”: “Revenue from voice plans has fallen 31 percent since peaking in 2003, [but] [t]o fill that hole, the carriers raised the price of a text message from 10 cents to 15 cents, and later to 20 cents. These fees provided nice cash, but as with the voice charges, the main purpose was to persuade customers to subscribe to text-message plans that cost up to \$20 a month for unlimited texting on AT&T and Verizon and \$10 a month on Sprint and T-Mobile... Fewer people are running up big bills from 20-cent text messages, but the company’s ARPU has gone up anyway because so many customers signed up for unlimited text plans.”¹⁴⁴

¹⁴³ General Accounting Office, Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Government Affairs, U.S. Senate, 04-96 (May 2004), “What GAO Found,” at <http://www.gao.gov/new.items/d0496.pdf>.

¹⁴⁴ Saul Hansell, “Looking for a Method in Cellphone Price Madness, N.Y. TIMES, Business, Nov. 15, 2009, at <http://tinyurl.com/ygkdgaw> (observing how the industry has consistently raised its revenues through complex pricing schemes, and reporting in 2009 that “in fact, over the last decade, total ARPU has been declining slightly, a result of competition. But unlike the airlines, the two largest cellphone carriers — Verizon Wireless and AT&T — have healthy profit margins. The distant third and fourth — Sprint and T-Mobile — have had a harder time keeping up.” Hansell added that “[t]he growth of smartphones has especially benefited AT&T, which has the iPhone, and Verizon, which is seen as having the best network. Sprint, at No. 3, has been losing

Stripped of AT&T's gloss, the price drop is not that steep.

Mergers and wireless prices Indexed



But any way you look at it, as one analyst observed, “[T]his doesn’t tell us much – wouldn’t you *expect* wireless service to cost far less after a decade of tower building, cheaper electronics, and the plummeting costs of data backhaul?”¹⁴⁵

To the extent that consumers may have seen some decreases in wireless prices, this has been due to innovation, despite increasing market concentration – and over a period of time during which T-Mobile has been an aggressive pricing maverick. In other words, AT&T’s “evidence” of price drops, at best, weighs in favor of maintaining the status quo, and in no way suggests an argument for removing T-Mobile from the marketplace.

customers for several years...[but] has started several pricing changes to try to stem the losses.” Note that AT&T now touts Sprint’s recent emergence, and provides no reason why T-Mobile will not follow its trajectory in the future, particularly with the monetary and spectrum boon T-Mobile will receive if this merger is disapproved.).

¹⁴⁵ Nate Anderson, “Analysis: higher prices, fewer choices if AT&T swallows T-Mobile,” *Ars Technica*, Mar. 21, 2011, <http://tinyurl.com/4lcde59>.

CONCLUSION

For the foregoing reasons, the Public Interest Petitioners respectfully submit that the Commission should not grant the applications in this docket. Approval of the merger would solidify the emerging duopoly in the mobile wireless market, and cause additional harm by removing T-Mobile's innovative and aggressive competition from the marketplace. This acquisition, if permitted, would enable AT&T to stifle innovation, increase prices, and decrease choices for wireless customers – especially wireless broadband users. The merger likely would cause the most harm to traditionally unserved and underserved populations, including members of communities of color and rural residents, and would interfere with the development of mobile wireless platforms used to create and distribute all manner of video programming and other types of artistic works and political expression.

WHEREFORE, the Public Interest Petitioners ask that the Commission dismiss the applications or designate them for hearing, and grant all such other relief as may be just and proper.

Respectfully submitted,

/s/ Chrystiane Pereira

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*Counsel for Center for Media Justice,
Consumers Union, New America Foundation
and Writers Guild of America, West*

May 31, 2011

ATTACHMENT A

Declaration of Parul P. Desai

I am Policy Counsel at Consumers Union.

This declaration is submitted in support of the *Petition to Deny* applications in FCC Docket Number WT-11-65.

Members of Consumers Union are customers of each of the applicants and of many competing wireless providers, and will be adversely affected if the pending applications in this Docket are granted.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 31, 2011



Parul P. Desai

Declaration of Amalia Deloney

I am Amalia Deloney, Grassroots Policy Director of the Center for Media Justice (“CMJ”).

This declaration is submitted in support of the *Petition to Deny* applications in FCC Docket Number WT 11-65.

CMJ is a communications strategy and media policy resource for grassroots organizations serving communities of color and America’s poor. It provides training, resources, and support to grassroots community organizing groups across the country to develop creative, effective, and participatory communications and media activism strategies that support the fight for racial justice, economic equity, and human rights. In addition to conducting advocacy about the importance of affordable and open mobile wireless services in the accomplishment of these goals, CMJ itself relies on mobile wireless voice and data services to coordinate and conduct its campaigns. As a result, CMJ and members of the grassroots advocacy network that it coordinates will be adversely affected if the pending applications in this Docket are granted.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 31, 2011

A handwritten signature in black ink, consisting of a stylized 'A' followed by a series of loops and a long horizontal stroke extending to the right.

Amalia Deloney

Declaration of Sascha Meinrath

I am Sascha Meinrath, Director of the New America Foundation's Open Technology Initiative ("OTI").

This declaration is submitted in support of the *Petition to Deny* applications in FCC Docket Number WT 11-65.

OTI conducts technical research on wireless networks in its efforts to aid various not-for-profit entities in the construction of community broadband networks. In addition, our recent work for the State Department requires extensive development of GSM-based emergency communications infrastructure. OTI and its staff members depend on wireless services and use the services of many competing wireless providers; in some cases, they are customers of the applicants. I myself am a T-Mobile customer and use this service in connection with my work. As a result, OTI will be adversely affected if the pending applications in this Docket are granted.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 27, 2011



Sascha Meinrath

Declaration of David J. Young

I am David J. Young, Executive Director of Writers Guild of America, West, Inc (“WGAW”).

This declaration is submitted in support of the *Petition to Deny* applications in FCC Docket Number WT 11-65.

WGAW is a labor union representing more than 8,000 writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Our members are the creators of dramatic and comedic entertainment content that is shown on television, in theaters, and increasingly, on the Internet. The merger proposed by the applications materially would decrease the number of available outlets for WGAW members’ works and inhibit the development of a competitive market for mobile distribution of video content. As a result, WGAW members will be adversely affected if the pending applications in this Docket are granted.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 31, 2011

A handwritten signature in black ink that reads "David J. Young". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

David J. Young