Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
AT&T Inc.	)	
	)	
and	)	
	)	
Deutsche Telekom AG	)	WT Docket No. 11-65
	)	File Nos. 0004669383, *et al.*
for Consent to the Transfer of Control	)	
of the Licenses and Authorizations Held by	)	
T-Mobile USA, Inc. and its	)	
Subsidiaries to AT&T Inc.	)	

PETITION TO DENY OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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Attachment A Declaration of Susan M. Baldwin

EXECUTIVE SUMMARY

The Federal Communications Commission ("FCC" or "Commission") should deny the application of AT&T Inc. ("AT&T) to acquire T-Mobile USA's ("T-Mobile's) assets and operations from Deutsche Telekom AG ("Deutsche Telekom") because the proposed transaction is not in the public interest. The proposed merger would eliminate an actual and potential competitor that serves relevant wireless markets throughout the United States, lead to excessive and harmful market concentration in wireless markets, and create significant pressure for Sprint Nextel Corporation ("Sprint"), as the distant third national wireless carrier, to merge with another carrier.

As of year-end 2010, AT&T served more than 43.7 million wireline access lines and approximately 17.8 million broadband connections nationwide.[1] As of year-end 2010, Verizon served more than 26 million wireline access lines and approximately 8.4 million broadband connections nationwide.[2] Together, post-merger, they would serve 46% of the nation's wirelines, 32% of the fixed broadband subscribers, and 66% of the nation's wireless subscribers.[3]

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[1] / *Id*, at 30.

[2] / Verizon Communications 2010 Annual Report, at 25.

[3] / This analysis compares data from Verizon's and AT&T's Annual Report (*i.e.*, year end 2010) with the FCC's latest publically available data, which is as of June 30, 2010. According to the FCC there were 81.7 million fixed broadband connections (over 200 kbps in at least one direction) in service as of June 30, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Internet Access Services: Status as of June 30, 2010,* rel. March 2011, at Table 1. There were 151 million wireline retail local telephone service connections (including switched access lines and interconnected VoIP) as of June 30, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2010*, rel. March 2011, at Figure 2. There were 122 million end-user switched access lines in service. *Id.*, at 1. As of June 30, 2010, there were 279 million mobile telephony subscribers nationwide. *Id.*, at Table 17. For the purpose of this calculation, Rate Counsel used year end 2010 wireless subscription data from the carrier's annual reports: approximately 88 million retail wireless subscriptions

The FCC should deny the proposed transaction so that the AT&T-Verizon duopoly is not further entrenched.

The proposed transaction would harm competition and reduce consumer choice. As a result, consumers of wireless services throughout the country, whether served by AT&T or by other carriers, likely would pay higher rates and receive worse service quality. If the merger is approved, AT&T and Verizon would control the vast majority of the nation's access to the public switched network, including wireline and wireless access. Duopolistic control of consumers' access to voice and broadband is antithetical to the public interest. Furthermore, the FCC's exemption of the wireless industry from an important component of its recently issued net neutrality rules heightens the risks of this proposed market concentration for consumers' non-discriminatory and open access to the network.

Furthermore, AT&T has failed to demonstrate that the transaction is essential to its ability to innovate. AT&T apparently has $25 billion to spend, and could certainly find less anticompetitive ways to achieve the same benefits of serving rural parts of the nation and continuing to innovate. The proposed transaction would also further jeopardize the minor inroads that competitive local exchange carriers have been able to make in special access markets as well as silence an active participant in the special access regulatory arena. Furthermore, the transaction could stymie innovation in the handset industry. Rate Counsel demonstrates in this Petition that the FCC should deny the proposed transaction because the

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for Verizon (Verizon Communications 2010 Annual Report, at 22) and 95 million subscriptions for AT&T (AT&T Annual Report, at 30).

Applicants have failed to demonstrate that the merger would, on balance, be in the public interest.

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PETITION TO DENY OF
THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION

Pursuant to the pleading cycle established by the Federal Communications Commission ("FCC" or "Commission"),[4] the New Jersey Division of Rate Counsel ("Rate Counsel"), an agency representing New Jersey consumers,[5] files this Petition to Deny ("Petition") the above-

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[4] / FCC Public Notice DA 11-799, "AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc., Pleading Cycle Established," WT Docket No. 11-65, released April 28, 2011. Oppositions to petitions to deny are due June 10, 2011, and replies to the oppositions are due June 20, 2011. *Id.*

[5]/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly

referenced applications ("Application") for transfer of control of certain licenses and authorizations.[6] The proposed transfer of control would jeopardize the price, quality, and availability of wireless services offered to consumers throughout the country.

The proposed acquisition by AT&T of T-Mobile, a current subsidiary of Deutsche Telekom, would harm competition, by inter alia jeopardizing the ability of regional and all-you-can-eat ("AYCE") carriers to compete; likely creating more pressure for yet further concentration in the wireless industry; potentially denying consumers' access to low-priced wireless offerings; diminishing the fragile and limited competition that now exists in the special access services market; and further entrenching AT&T's "gatekeeper" role in telecommunications and adjacent markets. The transaction would generally not be in the public interest. Furthermore, the transaction seeks to solve problems that may not exist (such as AT&T's purported spectrum shortage, AT&T's ability to innovate and the ability of United States companies to compete globally), and the Applicants claim benefits that are entirely speculative and probably not enforceable (*e.g.*, roll-out of mobile broadband to unserved areas, faster innovation, and fewer dropped calls). The Applicants' starting premise of effectively competitive wireless markets is flawed, and therefore much of its analysis of the impact of the proposed transaction on competition is misguided.

The FCC should not rush through deliberations regarding a transaction of this magnitude and one that has such far-reaching repercussions for consumers and for the future of the wireless industry. The Applicants have failed to demonstrate that the proposed transaction is in the public

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known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. N.J.S.A. §§ 52:27EE-1 *et seq.*

[6] / Throughout this Petition, reference to "Application" is intended to refer to all applications in the above-captioned proceeding.

interest. Based on the information submitted thus far, the FCC should simply deny the petition, or, in the alternative, the FCC should seek far more detailed and comprehensive data and information from the Applicants.[7]

Rate Counsel raises numerous concerns about the potentially devastating impact of the proposed transaction on consumers, and intends to explore these issues more fully as additional information becomes available in this proceeding. Based upon the Application as filed, and absent more compelling evidence from the Applicants, the FCC should grant Rate Counsel's Petition and deny the Application.

II. SUMMARY OF TRANSACTION

On March 20, 2011, AT&T announced its plan to acquire Seattle-based T-Mobile from Deutsche Telekom, a leading worldwide provider of telecommunications services, for $39 billion.[8] Twenty-five billion dollars of the transaction price would be paid in cash, the remainder in AT&T stock. (Rate Counsel observes that, if not spent on this transaction, that $25 billion would fund broadband to all unserved households in the United States and would give AT&T a potential 20 million in additional customers.[9]) After conclusion of the transaction, Deutsche Telekom would own between 5 and 8 percent of AT&T stock.[10] AT&T would assume no debt

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[7] / On May 27, 2011, the FCC issued detailed information requests to AT&T and to Deutsche Telekom.

[8] / AT&T press release "AT&T to acquire T-Mobile USA from Deutsche Telekom," March 20, 2011.

[9] / Federal Communications Commission, *Connecting America: The National Broadband Plan*, report submitted to the U.S. Congress, March 17, 2010 ("National Broadband Plan), Chapter 8, Section 8.1.

[10] / AT&T, Description of Transaction, Public Interest Showing and Related Demonstrations (redacted), filed with the Federal Communications Commission April 21, 2011 ("AT&T Public Interest Statement"), at 16. The exact amount of stock included in the transaction will be determined during the 30-day trading period prior to the closing. *Id.*

from T-Mobile, but would finance the transaction by issuing its own new debt.[11] AT&T says it has guarantees from several banks for bridge financing totaling $20 billion. Deutsche Telekom would have the right to nominate one director to AT&T's Board of Directors as long as it holds at least 5% of AT&T's voting stock.[12] Other provisions of the transaction prevent Deutsche Telekom from selling AT&T stock within one year of the transaction closing, and from acquiring additional AT&T stock.[13]

On April 21, 2011, AT&T and Deutsche Telecom submitted an application to the FCC including a public interest statement, three appendices[14] and seven declarations.[15] The application is also pending review by the Department of Justice ("DOJ").[16]

AT&T asserts that it seeks to acquire T-Mobile in order to address spectrum shortages. According to Declarant Rick L. Moore, Senior Vice President of Corporate Development for AT&T, although AT&T's current long term evolution ("LTE") deployment plan reaches only 80% of the US population, the combined company will reach 97% of customers, or

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[11] / AT&T Public Interest Statement, at 16.

[12] / *Id.*, at 17.

[13] / *Id.*, at 17.

[14] / Appendix A includes a spectrum aggregation chart; Appendix B includes a "competitor chart" and Appendix C identifies competitors in CMAs in which the spectrum screen is reached.

[15] / Declaration of David Christopher (AT&T) ("Christopher Declaration"); Declaration of John Donovan (AT&T) ("Donovan Declaration"); Declaration of William Hogg (AT&T) ("Hogg Declaration"); Declaration of Rick L. Moore (AT&T) ("Moore Declaration"); Declaration of Dennis W. Carlton, Allan Shampine, and Hal Sider (on behalf of AT&T) ("Carlton/Shampine/Sider Declaration"); Declaration of Thorsten Langheim (Deutsche Telekom AG) ("Langheim Declaration"); and Declaration of Dr. Kim Kyllesbech Larsen (Deutsche Telekom AG) ("Larsen Declaration").

[16] / The DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition. 15 U.S.C. § 18. Unlike the FCC's broader review, which encompasses public interest considerations, the Antitrust Division's review is limited solely to an examination of the competitive effects of the proposed transaction. The DOJ's review could, for example, lead to the divesture of assets in certain markets.

approximately 55 million additional people.[17] According to AT&T, other available options to increase capacity are "high-cost, limited in scope, and interim measures with relatively protracted timelines."[18] Moore predicts substantial synergies from the proposed transaction, and states that AT&T estimates a net present value of the synergies expected from the proposed transaction of "in excess" of $39 billion.[19] According to AT&T, "billions of dollars" would be required to increase LTE deployment on its own, and AT&T could not justify that amount to stock holders.[20] Moore explains further: "When AT&T looks at the acquisition of a business like T-Mobile USA, the analysis is different than the analysis of making annual capital expenditures. Acquiring a going concern like T-Mobile USA brings spectrum plus immediate revenue and cash flow, as well as network infrastructure and near term synergies that are not present in a spectrum purchase or tower build. The return on investment analysis therefore is entirely different, and the two types of investments are not directly comparable."[21]

AT&T contends that because spectrum auctions may take years to come to fruition and years more to "clear" the spectrum for use,[22] the proposed transaction is best way to meet spectrum needs.[23] AT&T asserts that it has a good track record of acquiring companies, having

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[17] / Moore Declaration, at para. 5.

[18] / *Id.*, at para. 7.

[19] / *Id.*, at para. 9. An annual run rate of $3 billion in synergies is expected to start in year three. The savings accrue from reduced expenditures on network infrastructure and spectrum in the near term, support and marketing, and network efficiencies and the estimate uses the same methodology that AT&T has used in prior transactions. *Id.*

[20] / *Id.*, at para. 13.

[21] / *Id.*, at footnote 4.

[22] / *Id.*, at para. 23.

[23] / *Id.*, at para. 27.

integrated three wireless companies and two wireline/broadband companies since 2004.[24] In Rate Counsel's view, the fact that AT&T has such an enormous amount of experience acquiring competitive companies does not bode well for consumers.

Moore touts the fact that the merger "will bring a foreign-owned U.S. telecom company under U.S. ownership" and that AT&T employs the largest number of full time union members in the private sector.[25] These benefits are not sufficient to justify the substantial potential harm to consumers that the proposed transaction would pose.

Thorsten Langheim, Senior Vice President Mergers & Acquisitions of Deutsche Telekom AG, describes three expected outcomes of the proposed transaction. According to Langheim, the transaction will resolve T-Mobile's challenges related to LTE deployment, benefit T-Mobile's customers through better coverage and service quality as well as giving them access to AT&T's devices and services, and advance broadband deployment goals.[26]

Langheim states that by selling T-Mobile, Deutsche Telekom would acquire capital to focus on its core European business.[27] This rationale seems to reflect a shift in the parent company's focus rather than a necessary business decision made by a "struggling" T-Mobile. According to T-Mobile, the goal of the transaction is to "strengthen [Deutsche Telekom's] balance sheet"[28] and shift its focus to "modernizing and upgrading its networks in Deutsche

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[24] / *Id.*, at para. 38.

[25] / *Id.*, at para. 43.

[26] / Langheim Declaration, at para. 3.

[27] / *Id.*

[28] / *Id.*, at para. 6.

Telekom's core businesses in Europe."[29] T-Mobile also identifies as a bonus the fact that Deutsche Telekom could gain financial benefits from the U.S. wireless market from its stake in AT&T.[30] Also, Langheim states that T-Mobile seeks to merge with AT&T because it faced spectrum shortages.[31] The proposed transaction would address challenges facing T-Mobile: the companies have "complementary" spectrum and networks; capital resources; and both companies use GSM/HSPA+ technologies.[32]

Dr. Kim Kyllesbech Larsen, Senior Vice President, Technology Service and International Network Economics at Deutsche Telekom,[33] asserts that the proposed transaction would result in "significant" efficiencies through the elimination of redundant GSM control channels and complementary infrastructure grids.[34] Dr. Larsen contends that call quality improvement will be "significant" and that subscribers will benefit from the proposed transaction.[35] In addition, Dr. Larsen repeats the justification that T-Mobile was reaching a critical spectrum shortage because of incredible growth of wireless data usage (which, of course, all carriers are facing) and expects to see data traffic grow to 20 times its 2010 level by 2015.[36] Dr. Larsen states that analysts are

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29 / *Id.*, at para. 7.

30 / *Id.*

31 / *Id.*, at para. 12.

32 / *Id.*, at para. 15.

33 / Dr. Larsen's Declaration is submitted to confirm the Declaration of Mr. Hogg, who is Senior Vice President of Network Planning and Engineering for AT&T, specifically Hogg's conclusions regarding the challenges faced by wireless companies with respect to technology and the technical efficiencies that AT&T and T-Mobile will gain as a result of the proposed transaction. Larsen Declaration, at paras. 5-6.

34 / *Id.*, at para. 7.

35 / *Id.*, at para. 8.

36 / *Id.*, at paras. 12-13. Mr. Moore estimates that AT&T's traffic will increase eight to ten fold from 2010 to 2015. Moore Declaration, at para. 6.

predicting 80% smartphone penetration for U.S. wireless carriers by 2015, but does not explain why this is a unique problem for T-Mobile (other than its purported lack of an LTE strategy).[37]

Dr. Larsen asserts that T-Mobile has to act in the near term to address its spectrum exhaust issues and that the Commission's auctions remain uncertain as to timing and availability.[38] Dr. Larsen also discusses why, in his opinion, T-Mobile has no options for "effective, economical deployment of LTE" [39] and that merging with AT&T is the better option.[40]

III. STANDARD OF REVIEW

Pursuant to sections 214(a), 310(b)(4), and 310(d) of the Communications Act, the FCC must determine whether the proposed transaction would serve the public interest, convenience and necessity.[41] Mergers that harm competition cannot serve the public interest, convenience and necessity. The FCC has previously applied an initial screen to wireless mergers to identify those markets in which there clearly is no competitive harm.[42] Also, in assessing competitive harm, the FCC has previously considered whether other service providers "would be an effective

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[37] / Larsen Declaration, at para. 14.

[38] / *Id.*, at para. 21.

[39] / *Id.*, at paras. 23-35.

[40] / *Id.*, at paras. 36-40.

[41] / In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manger and *De Facto* Transfer Leasing Arrangements, WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.*, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, File No. ISP-PDR-20080613-00012, *Memorandum Opinion and Order and Declaratory Ruling* (rel. November 10, 2008) ("Verizon/AllTel Order").

[42] / *Id.*, at para. 3.

competitive constraint on the behavior of the merged entity."[43] In the context of the recent Verizon/AllTel wireless merger, the FCC also addressed concerns regarding roaming, Universal Service Fund receipts, and E911 location accuracy.[44]

Among other things, in determining whether a proposed transaction will serve the public interest, the Commission considers whether the transaction will "substantially frustrat[e] or impair[] the objectives or implementation of the Communication Act or related statutes."[45] The Commission balances potential public interest harms of the proposed transaction against potential public interest benefits.[46]

The FCC's evaluation also includes a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest."[47] As this Petition demonstrates, the proposed transaction would thwart competition and would not result in the management of the spectrum in the public interest, and therefore should be denied.

The FCC's competitive analysis of the proposed transaction is broader than that conducted by the DOJ, and, among other things, considers "whether a transaction will enhance, rather than merely preserve, existing competition."[48] The proposed transaction would neither

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43 / *Id.*

44 / *Id.*, at para. 4.

45 / *Id.*, at para. 26, cite omitted.

46 / *Id.*

47 / *Id.*, at para. 27, cite omitted.

48 / *Id.*, at para. 28, cite omitted.

preserve nor enhance existing competition, but instead would reduce competition in relevant markets.

Finally, the Applicants bear the burden of proof that the proposed transaction, on balance, will serve the public interest.[49] As this Petition demonstrates, the Applicants have failed to meet this burden.

Rate Counsel certainly welcomes innovation, and faster and more reliable data services,[50] but the potential harms associated with, among other things, the loss of an actual and potential national wireless competitor from this merger are not offset by the Applicants' promise of purportedly greater innovation[51] coupled with lower prices.[52] The FCC's assessment of benefits considers whether they are "verifiable, transaction-specific public interest benefits."[53] Applicants have failed to demonstrate that the purported benefits are verifiable and specific to the transaction, and moreover, have failed to demonstrate that those benefits outweigh potential competitive harms. Therefore the FCC should deny the proposed transaction. Rate Counsel demonstrates throughout this Petition to Deny why the purported benefits do not make the proposed transaction in the public interest and Rate Counsel's Petition to Deny should be granted.

IV. SPECTRUM AND INNOVATION

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49 / *Id.*

50 / Hogg Declaration, at paras. 11 and 38; Christopher Declaration, at para. 4.

51 / AT&T Public Interest Statement, at 63.

52 / *Id.*, at 18; Carlton/Shampine/Sider Declaration, at para. 134.

53 / *Verizon/AllTel Order*, at para. 114. *See also, id.*, at para. 117, which states that "[b]ecause much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit."

AT&T's press release announcing the proposed acquisition reveals the bottom-line purpose of the transaction – the acquisition of "scarce" spectrum: The merger "[p]rovides fast, efficient and certain solution to impending spectrum exhaust challenges facing AT&T and T-Mobile USA in key markets due to explosive demand for mobile broadband" and "[e]nhances network capacity, output and quality in near term for both companies' customers."[54]

In assessing the merits of the proposed transaction, it is essential to recognize that spectrum is a public good of substantial value and is a limited resource. It is contrary to the public interest for a few companies to consolidate their control of this valuable, limited public good, and AT&T has failed to justify its attempt to acquire control of vast new amounts of spectrum through its proposed purchase of T-Mobile.

The rapidly increasing demand for wireless traffic and AT&T's purported capacity constraints do not justify a hurried review of the transaction.

Applicants describe the rapid growth in demand for mobile wireless service and the growth in the availability of mobile applications.[55] AT&T contends that its "network has been uniquely strained by the exponential growth in data traffic" and that it "need[s] to act immediately in light of the lead time needed to address such spectrum and capacity issues."[56] Yet the urgency that the Applicants express does not justify a hurried analysis by the Commission of the significant implications of the proposed transaction for consumers and the

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[54] / AT&T press release "AT&T to acquire T-Mobile USA from Deutsche Telekom," March 20, 2011.

[55] / *See e.g.*, Hogg Declaration, at para. 3.

[56] / Hogg Declaration, at para. 4. *See also, id.*., at para. 5 discussing AT&T's allocation of spectrum and resources among three different technologies (Global System for Mobile Communications ("GSM"), universal mobile telecommunications services ("UMTS"), and long term evolution ("LTE") networks).

future of the nation's wireless industry. AT&T predicts that it will lack adequate capacity by 2013 in certain cellular market areas ("CMAs") in urban and rural areas.[57] According to AT&T, the solutions that it has been pursuing are "ultimately insufficient to broadly address the growing capacity challenges" that it confronts[58] and the synergies from the transaction would yield significantly more capacity.[59]

AT&T's assertion that it "has aggressively pursued every means reasonably available to it to address capacity concerns and to attempt to meet projected demand in each of the areas it serves,"[60] lacks supports and should be rejected. According to AT&T, although it currently plans to deploy LTE to reach 70 million people by the end of 2011, and to a total of approximately 250 million people by the end of 2013, AT&T will not realize efficiency and capacity gains from the transition to LTE for many years because it projects that it will need to continue to utilize spectrum to serve Global System for Mobile Communications ("GSM") and Universal Mobile Telecommunications System ("UMTS") customers.[61]

AT&T has simply failed to show that the proposed transaction will solve AT&T's network and strategic challenges, and the underlying competition issues demonstrate the harm to the public interest if the Application is approved. Moreover, even if it could be shown that the transaction would solve AT&T's network and strategic challenges, such a showing would not justify the substantial harms that would ensue.

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57 / *Id.*, at para. 7.

58 / *Id.*, at paras. 9, 65-74.

59 / *Id.*, at para. 10

60 / *Id.*, at para. 31.

61 / *Id.*, at para. 40.

The Applicants' claims regarding the beneficial impact of the transaction on innovation are not persuasive.

According to the Applicants, the transaction will have a "positive impact" on innovation in the "wireless ecosystem."[62] If, as the Applicants assert, imminent advances "will weave wireless communications even more tightly into the fabric of our economy and daily lives,"[63] the stakes become yet higher for ensuring that such increasingly integrated services not be controlled by a few powerful gatekeepers. Rate Counsel concurs with Commissioner Copps' December 2010 statement:

> Individual gatekeepers may change over time—tomorrow's might not be today's—but somehow the urge to be the keeper of the keys seems always to survive through generations of technology change. So it happened, as the doors were opened to the seemingly limitless prospects of the new media age, that public policy-makers once again became the willing accomplices of special interests. Indeed, the FCC spent the first eight years of the new century removing broadband from any meaningful public policy oversight, deregulating the telecom/cable duopoly, and blessing evermore competition-killing consolidations that narrowed consumer choice and inflated consumer bills.[64]

Rate Counsel certainly welcomes continuing innovation,[65] but Applicants have not offered adequate evidence to show that the promised innovation would occur **directly as a result of** the proposed transaction or that such innovation **could not occur** if this transaction is rejected.

The Applicants assert that AT&T "is committed to extending LTE coverage to over 97% of the nation's population, far more than was planned or possible without the transaction."[66] They further provide examples of how new mobile network technologies could narrow the

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62 / Donovan Declaration, at para. 2.

63 / *Id.*, at para. 2.

64 / "Getting Media Right: A Call to Action," Commissioner Michael J. Copps, Columbia University School of Journalism, New York City, December 2, 2010, at 2.

65 / *See e.g.*, Donovan Declaration and Hogg Declaration.

66 / Donovan Declaration, at para. 11.

urban/rural digital divide,[67] but fail to explain why AT&T could not (or would not) deliver these benefits today. Conversely, if it is not currently profitable for AT&T to deploy LTE coverage to rural areas, it is highly unlikely that the proposed transaction would alter the costs and benefits of serving these same rural areas. If AT&T lacks the economic incentive to serve unserved areas today, post-merger, when it is under pressure to achieve $39 billion in merger synergies, it is actually far less likely to find it profitable to serve these areas.[68] AT&T's passing "promise" to deploy LTE services "including in areas that might not otherwise have wireless broadband alternatives"[69] is simply too vague to warrant credibility. AT&T has failed to provide cost, revenue, and deployment data to demonstrate how the merger will transform the financial characteristics of serving rural areas. Therefore, Rate Counsel submits that the Commission should reject the Application and not be swayed by unenforceable generalities and promises.

AT&T asserts that it "is positioned to remain a major contributing force in driving wireless innovation forward, assuming that it has the network and spectrum assets necessary to meet consumers' soaring demand for mobile broadband."[70] Rate Counsel submits that an inadequate showing has been made, and the Commission should seek detailed information from AT&T demonstrating that it truly lacks the necessary spectrum to continue down the innovative path that it depicts.[71] The FCC recently issued detailed information and data requests.[72]

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[67] / *Id.*, at para. 38.

[68] / The Applicants project to achieve over $39 billion cost savings and other synergies. The projections include an annual run rate of over $3 billion in year 3 and beyond. AT&T Public Interest Statement, at 51; Moore Declaration, at para. 32.

[69] / Donovan Declaration, at para. 43.

[70] / Donovan Declaration, at para. 15.

[71] / *See, e.g.,* Donovan Declaration, at paras. 12-27.

An unsubstantiated claim of insufficient spectrum is pervasive in the Application and supporting declarations.[73] AT&T's innovation path has not been shown, based upon this record and without further support, to have been thwarted by a lack of spectrum. This claim should, therefore, be rejected by the FCC.

Some of AT&T's references could be read to be simple theoretical observations, such as "capacity constraints would reduce AT&T's own ability to develop and deploy innovative services."[74] The fact that an empty gas tank would constrain a car from driving down the highway does not mean that the gas tank is empty. Similarly, Rate Counsel does believe that capacity constraints – **if they existed** – could reduce AT&T's ability to innovate. Raising this theoretical constraint, however, is a far cry from proving that the constraint actually exists. This is a major flaw in the Application, which warrants rejecting the Application absent more compelling evidence.

Also, AT&T presumably, with its self-claimed long track record of innovation[75] could explore other ways to resolve its spectrum challenge. Indeed, until the Applicants demonstrate with detailed information to the contrary, the FCC should assume that AT&T does not lack the

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72 / *See* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to William R. Drexel, AT&T Inc., Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011; Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to Dan Menser, T-Mobile License LLC, Deutsche Telekom AG, Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011. The Commission seeks responses to its requests no later than June 10, 2011.

73 / *See, e.g.*, Donovan Declaration at para. 16 (re spectrum constraints posing "a major threat to continued innovation"), para. 40 ("the cycle of innovation … depends on the availability of spectrum and network resources"), para. 45 ("capacity constraints would reduce AT&T's own ability to develop and deploy innovative services"), and para. 48 (capacity constraints create disincentives for innovation").

74 / Donovan Declaration, at para. 45.

75 / *See id.*, at paras. 3-5, 12-13, and 17-27.

ability to resolve its spectrum problems, and thereby to meet increasing demand and offer innovative services.

Rate Counsel does not disagree with the truism that services depend on spectrum and network resources,[76] but the assertion that "AT&T faces severe spectrum and network capacity constraints in certain markets today and projects that the occurrence of such constraints will increase and expand to many other areas throughout the country over the next several years"[77] should be amply documented and demonstrated as an insurmountable obstacle by AT&T before being accepted by the Commission. *Furthermore, even if AT&T lacks as much spectrum as it would like to control, this situation would not in and of itself justify the merger.*

The Applicants extol the benefits of LTE,[78] but fail to demonstrate that they will not or could not deploy LTE separately, without merging. AT&T recently announced that it plans to launch its new fourth-generation (4G) network in the cities of Atlanta, Chicago, Dallas, Houston, and San Antonio during the summer of 2011, and that it also plans to deploy LTE service to an additional 10 markets later in the year. According to press accounts, the 4G LTE service will be delivered over 700 MHz, as well as 1700/2100 MHz Advanced Wireless Services ("AWS") spectrum.[79] Similarly, the Applicants describe the "fundamentally transformative change" that

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76 / *Id.*, at para. 40.

77 / *Id.*, at para. 42.

78 / *See, e.g., id.*, at para. 29.

79 / "Regional -- AT&T to launch faster service in five cities," *TR's State NewsWire*, May 25, 2011. The AWS spectrum is identified by the Commission for use by wireless services, including third generation ("3G") mobile broadband and advanced wireless services. See http://wireless.fcc.gov/services/index.htm?job=service_home&id=aws.

cloud computing represents,[80] but fail to demonstrate that they could not each pursue cloud computing separately.

V. COMPETITION

Applicants contend that the proposed transaction will promote competition by enabling the merged entity to achieve network synergies that would increase network capacity beyond the levels that each of the merging companies could achieve if they operated independently, and that this in turn would lead to increased output.[81] However, the Applicants fail to demonstrate that they are not now meeting demand, nor do they demonstrate adequately that, absent the proposed transaction, they would be unable to meet demand for the foreseeable future.

Furthermore, contrary to the Applicants' assertion that the market is competitive,[82] the wireless industry is not characterized by effective competition (see section infra), and therefore, the purported increased output may be priced at supracompetitive levels. Although Rate Counsel of course does not oppose an increase in wireless supply, Rate Counsel does oppose a future where the vast majority of the nation's wireless supply is controlled by two companies. The pursuit of new spectrum and more efficient use of spectrum should not cloud judgment about the way in which that spectrum ultimately is offered to consumers.

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80 / Donovan Declaration, at para. 30; *see also*, *id.*, at paras. 31-32.

81 / Carlton/Shampine/Sider Declaration, at para. 7.

82 / *Id.*

The proposed transaction would increase and entrench market concentration.

The proposed transaction would further concentrate an already substantially concentrated industry, thus elevating the market power of AT&T, and therefore raising concerns about anticompetitive behavior, prices increases, and service quality degradation. The FCC has previously determined that "a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest."[83]

The FCC has previously defined relevant product and geographic markets in its assessment of wireless mergers. Regarding the relevant product market, the FCC has used a combined mobile telephony/broadband services product market, which consists of mobile voice and data services including those provided over broadband wireless networks.[84] Regarding the relevant geographic market, the FCC has concluded that the most appropriate geographic level for market analysis consists of cellular market areas ("CMA") and component economic areas ("CEA")[85] and "is the area within which a consumer is most likely to shop for mobile telephony/broadband services."[86] Using this geographic market definition, the FCC has previously analyzed wireless provider data (using the Number Resource Utilization and Forecast ("NRUF") database, which tracks phone number usage by all telecommunications service providers), to estimate subscribership levels, market shares, and concentration for various

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[83] / *Verizon/AllTel Order*, at para. 40.

[84] / *Id.*, at para. 45. *See also, id.*, at paras. 46-48.

[85] / *Id.*, at paras. 49, 52. CMAs are the areas for which the Commission initially granted licenses for cellular service. CEAs are defined by the Bureau of Economic Analysis and "are designed to represent consumers' patterns of normal travel for personal and employment reasons and may therefore capture areas within which groups of consumers would be expected to shop for wireless service." *Id.*, at fn 200.

[86] / *Id.*, at para. 52, cite omitted.

geographic markets.[87] Using this analysis, the FCC conducts its "initial screen" to determine the Herfindahl-Hirschman Index ("HHI") and the changes in the HHI as well as the Applicants' share of spectrum.[88] The FCC's initial screen for wireless mergers thus includes both an HHI analysis and a spectrum analysis.[89] Based on the results of the initial screen, the FCC then examines particular markets in more detail to assess whether unilateral effects could arise (where the merged firm could find it profitable to raise rates and suppress output).[90]

In this Petition, in order to provide a general assessment of the increased level of market concentration that the proposed transaction would yield, Rate Counsel analyzes public data at a national level. However, Rate Counsel anticipates that the Commission will conduct its market concentration analysis at the local level, based on proprietary data. The trend of increasing wireless market concentration has been observed previously by the Commission. In his statement accompanying the FCC's 14th Mobile Wireless Competition Report, Commissioner Copps states that the report

> confirms something I have been warning about for years— that competition has been dramatically eroded and is seriously endangered by continuing consolidation and concentration in our wireless markets. One number sticks out like a sore thumb: the Herfindahl- Hirschman Index—a widely-recognized and highly-credible measurement of industry concentration— shows that the concentration of mobile wireless service providers has skyrocketed to a weighted average of 2848. That's a jump of nearly 700 since we first calculated this metric a mere 7 years ago! So without denying those things that are right in the wireless world—and they are many—the facts also tell us that some things are not right.[91]

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87 / *Id.*, at para. 78.

88 / *Id.*

89 / *Id.*, at para. 81.

90 / *Id.*, at para. 84.

91 / Statement of Commissioner Michael J. Copps, 14th Mobile Wireless Competition Report, *In the Matter of 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

The proposed merger of AT&T and T-Mobile would severely worsen market concentration. The 14th Mobile Wireless Competition Report explains that in the five years through 2009, the two largest wireless operators, AT&T and Verizon Wireless, continued to gain market share, acquiring 60 percent of both subscribers and industry revenue.[92] The Report provides data, summarized below, detailing net gains and year-end subscribers for the four nationwide service providers, and several top regional competitors, for 2009. As Table 1 below shows, relative to the top four wireless carriers, the AYCE and regional carriers have significantly smaller shares, and therefore do not pose a significant competitive threat to the nation's four large wireless providers. For example, in 2009, MetroPCS served approximately 6.6 million subscribers, which is only 2.4% of the 276 million wireless subscribers served by the nation's seven largest facilities-based carriers in 2009.

Table 1
Wireless Market Structure as of Year-End 2009[93]

	Subscribers Year End 2009 (Thousands)	2009 Net Additions/Loss (Thousands)	2009 Percent Increase/Loss
AT&T	85,120	8,111	10.5%
Verizon Wireless	91,249	19,193	26.6%
Sprint Nextel	48,133	(205)	(0.4%)
T-Mobile	33,790	1,032	3.2%
US Cellular	6,141	(55)	(0.9%)
MetroPCS	6,640	1,273	23.7%
Leap	4,954	1,109	28.8%

Docket No. 09-66, Rel. May 20, 2010 ("14th MWCR"), at 276. The FCC's 15th Mobile Wireless Competition Report is likely to be released in the near future.

92 / *Id.*, at para. 4.

93 / *Id.*, at para. 52.

In describing the wireless structure, the FCC explains that "[a]s of year-end 2008, there were four facilities-based mobile wireless service providers in the United States that industry observers typically describe as 'nationwide'", which include AT&T, Sprint, T-Mobile, and Verizon Wireless ("Verizon").[94] The FCC also explains that "[w]hen a facilities-based provider is described as being nationwide, it does not literally mean that the provider's network covers the entire land area or entire population of the United States," and that the "four facilities-based providers that analyst reports typically describe as nationwide all have mobile wireless networks that cover in excess of 86 percent of the U.S. population in large proportions of the western, mid-western, and eastern United States."[95]

The FCC describes the next tier of wireless providers as consisting of facilities-based companies that provide mobile wireless services on a regional, multi-metro, or local basis. The FCC states: "Leap Wireless International, Inc. ("Leap") and MetroPCS Communications Inc. ("MetroPCS") – provide service in multiple large and medium-sized metropolitan areas across the nation," "United States Cellular Corporation (US Cellular) is a large regional provider that serves regions in the western, mid-western, and eastern United States" and "Clearwire, a recent entrant to the mobile wireless services market, provides mobile wireless broadband services in several metropolitan areas across the country."[96]

Facilities-based providers also include over one hundred small providers that may serve only a single area, often in rural areas. Among these companies are Cincinnati Bell Wireless

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[94] / *Id.*, at para. 27, cite omitted.

[95] / *Id.*

[96] / *Id.*, at para. 28, cites omitted.

(serving the Cincinnati, Ohio area), and Cellular South (which serves the southeastern part of the United States, primarily Mississippi). Non-nationwide service providers typically rely on roaming agreements with nationwide facilities-based providers so that they can extend their coverage.[97] Based on its analysis of wireless providers, the FCC stated in its 14th Mobile Wireless Competition Report:

> Average HHI (weighted by Economic Area (EA) population) increased in 2008 relative to prior years. Both the lowest EA HHI value and the highest EA HHI value are both higher than preceding years' lowest and highest EA HHI values. The weighted average of the HHIs (weighted by EA population) was 2848 in 2008, an increase from 2674 in 2007. The weighted average HHI has increased by nearly 700 since we first calculated this metric in 2003.[98]

Figure 1 reproduces a figure from the 14th Wireless Competition Report, which shows the upward trend of the average HHI, based on the FCC's analysis as applied to the shares of subscribers held by facilities-based mobile wireless providers at the level of economic areas "EA"), calculating shares of subscribers from the providers' numbers of subscribers. The FCC uses EAs in its Wireless Report "to maintain continuity with past Reports and to avoid compromising the confidential information found in the NRUF data," and emphasizes that, in using EAs, it is "not concluding that the EA is the appropriate geographic market for other purposes."[99]

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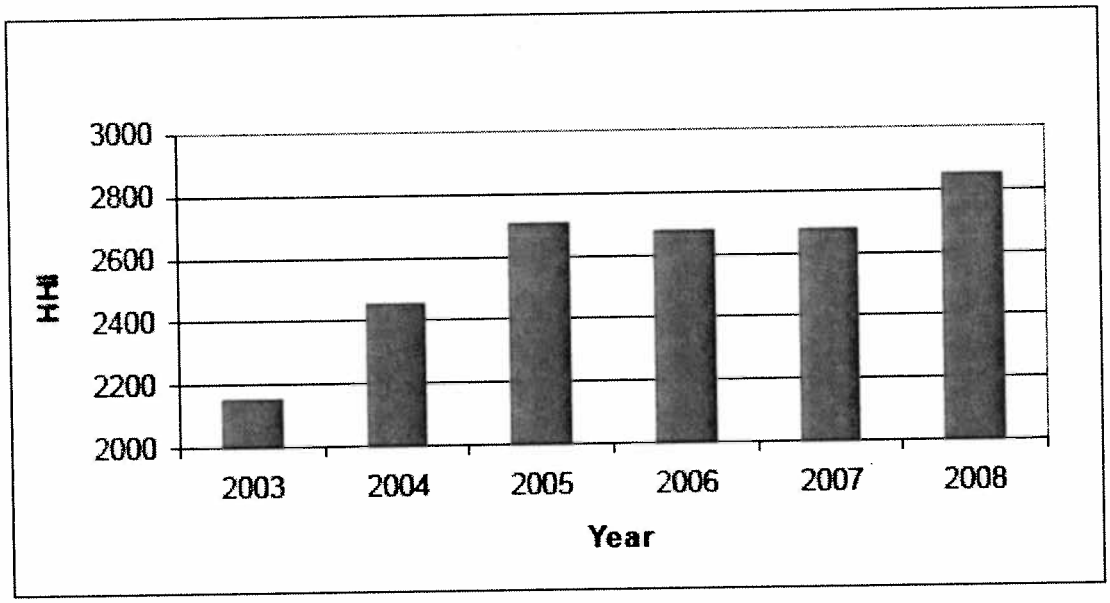
97 / *Id.*, at para. 29, cites omitted.

98 / *Id.*, at 15.

99 / *Id.*, at para. 50.

Figure 1[100]

Average Herfindahl-Hirschman Index



Rate Counsel concurs with the report's observation that "[h]igh market concentration may be a reasonable proxy for significant market power when a reduction in the number of competitors or an increase in their shares of subscribers result in significantly fewer constraints on the market power of the remaining firms."[101] The HHI is a well-known and well-respected measure of market share concentration,[102] and is computed as the sum of the squares of each firm's market share. If a single firm serves a market, the HHI is 10,000 (that is, $100^{2)}$, the highest possible HHI, and if two firms each equally serve a market the HHI of that market is 5000 (that is, 50^2 +

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[100] / *Id.*, at para. 52.

[101] / *Id.*, at para. 55.

[102]/ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued August 19, 2010 ("Horizontal Merger Guidelines"), § 5.3; F.M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, Chicago, 1970, 50-52. The most recent guidelines released in August 2010 relaxed the definition of highly concentrated. The guidelines released in 1997 defined "highly concentrated" as HHI above 1800. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued April 2, 1992, revised April 8, 1997, §1.5.

50^2). The larger the HHI, the greater the concentration. Markets with HHI below 1500 are considered to be unconcentrated; those with an HHI between 1500 and 2500 are considered to be moderately concentrated, and those with an HHI above 2500 are considered to be highly concentrated.[103]

Recent data corroborate the trend of market concentration, a trend that the proposed transaction would accelerate.

Recent data confirm the trend of wireless industry consolidation. Using data for year-end 2010 for the four nationwide wireless service providers, and for the regional providers identified by the Applicants,[104] the following table shows the substantial increase in AT&T's market share (as measured by subscribers) that would result from the proposed transaction. Presently, AT&T and Verizon Wireless control 63% of the wireless market. If the proposed transaction were to occur, these two companies would control 75% of the wireless market.

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[103]/ *Horizontal Merger Guidelines,* § 1.51.

[104] / *See* Carlton/Shampine/Sider Declaration, at paras. 101-115.

Table 2
Subscriber Base Before and After Proposed Transaction:
Nationwide and Regional Wireless Providers[105]

Before Transaction

	Subscribers (millions)	Share of Subscriber Base
AT&T	95.5	33%
Verizon Wireless	88.0	30%
T-Mobile	34.0	12%
Sprint	49.9	17%
MetroPCS	8.2	3%
US Cellular	6.1	2%
Leap	5.5	2%
Cellular South	0.9	0.3%
Cincinatti Bell	0.7	0.2%
nTelos	0.4	0.1%
"Market" Total	289.2	

After Transaction

	Subscribers (millions)	Share of Subscriber Base
AT&T	129.5	45%
Verizon Wireless	88.0	30%
Sprint	49.9	17%
MetroPCS	8.2	3%
US Cellular	6.1	2%
Leap	5.5	2%
Cellular South	0.9	0.3%
Cincinatti Bell	0.7	0.2%
nTelos	0.4	0.1%
"Market" Total	289.2	

[105] / Data is based on subscribers as of year-end 2010 and subscriber estimates in Application. Sources: 2010 Annual Reports for AT&T Inc., Verizon Communications, and MetroPCS; Sprint News Release, February 10, 2011, available at: http://newsroom.sprint.com/article_display.cfm?article_id=1796; Carlton/Shampine/Sider Declaration, at para. 108-121 (Leap; US Cellular; Cellular South; Cincinatti Bell; nTelos; and T-Mobile).

These four carriers represent the vast majority of the nation's wireless subscribers: the FCC's Local Competition Report shows a total of 279 million total wireless subscriptions as of June 30, 2010.[106] As Table 2 above shows, US Cellular, MetroPCS, and Leap served just under 20 million customers at year-end 2010. As Table 3 below shows, an HHI analysis of the four nationwide providers and the regional providers identified in the Application yields an increase in HHI from 2,452 to 3,229 as a result of this transaction.

[106] / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2010*, rel. March 2011, at Table 17.

Table 3
Proposed AT&T-T-Mobile Merger Would Increase Market Concentration Significantly

Before Transaction

	Subscribers (millions)	Share of Subscriber Base	HHI Component
AT&T	95.5	33%	1,090
Verizon Wireless	88.0	30%	926
T-Mobile	34.0	12%	138
Sprint	49.9	17%	298
MetroPCS	8.2	3%	8
US Cellular	6.1	2%	4
Leap	5.5	2%	4
Cellular South	0.9	0.3%	0.1
Cincinatti Bell	0.7	0.2%	0.1
nTelos	0.4	0.1%	0.02
HHI			2,452

After Transaction

	Subscribers (millions)	Share of Subscriber Base	HHI Component
AT&T	129.5	45%	2,005
Verizon Wireless	88.0	30%	926
Sprint	49.9	17%	298
MetroPCS	8.2	3%	8
US Cellular	6.1	2%	4
Leap	5.5	2%	4
Cellular South	0.9	0.3%	0.1
Cincinatti Bell	0.7	0.2%	0.1
nTelos	0.4	0.1%	0.02
HHI			3,229
Difference in HHI due to proposed transaction:			776

Regarding the HHI, in its 14th Wireless Competition Report, the Commission stated:

> For context, the DOJ antitrust guidelines consider a market to be "highly concentrated" if the post-merger HHI exceeds 1800. DOJ antitrust scrutiny is typically applied to a merger if it would trigger an increase in the HHI of 100 or greater when the post-merger HHI is between 1000 and 1800, and an increase of 50 or greater when the post-merger HHI is above 1800... [T]he Commission has previously used a higher screen, 2800 for the HHI and 100 for the change in HHI, in reviewing mergers of mobile providers.[107]

The proposed transaction clearly raises concerns about unwarranted and harmful market concentration: it would raise the HHI to above 2,800 after the transaction (or by an additional 776 points). The Merger Guidelines state in pertinent part:

> Small Change in Concentration: Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
>
> Unconcentrated Markets: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
>
> Moderately Concentrated Markets: Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
>
> Highly Concentrated Markets: Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.[108]

Revenues

As Table 4, below, shows, as measured by revenues (which reflect not only carriers' supply of services but also the prices that they can sustain in the market), the proposed

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[107] / 14th MWCR, at 40-41 (cites omitted).

[108] / *Horizontal Merger Guidelines*, at §5.3.

transaction would increase AT&T's share of the four nationwide carriers' revenues from approximately one-third (36%) to almost one-half (48%).

Table 4
First Quarter 2011 Wireless Service Revenues[109]

	Quarterly Wireless Service Revenues (billions)
AT&T	$14.0
Verizon Wireless	$14.3
T-Mobile	$4.6
Sprint	$5.6

The transaction would establish a clear path toward a duopolistic market structure and would create pressure for further market concentration.

As has been the case with so many of the proposed mergers that have come before the Commission in recent years, the justification for the proposed transaction would apply equally to future transactions (such as a possible acquisition by Verizon of Sprint). Rate Counsel understands fully that the FCC must examine the merits of this specific transaction, but certainly, in weighing such merits for the public interest, the FCC should consider the tremor that an approval of this merger would send through the wireless industry.

If approved, the wireless industry would consist of two industry giants (AT&T and Verizon) with Sprint as a distant third and then various regional and niche wireless providers that lack the ability to discipline the nationwide rates, terms, and conditions of wireless services.

[109] / AT&T Investor Briefing, 1st Quarter 2011, April 20, 2011, at 3-4; Verizon Investor Quarterly, First Quarter 2001, April 21, 2001, at 2 and 11; T-Mobile USA Press Release "T-Mobile USA Reports First Quarter 2011 Results," May 6,2011, at 9; Sprint News Release "Sprint Nextel Reports First Quarter 2011 Results," April 28, 2011, at 11.

AT&T and Verizon would dominate both wireline and wireless services. AT&T provides wireline, wireless and broadband services to mass market, business, government and wholesale customers.[110] As of year-end 2010, AT&T served more than 43.7 million wireline access lines and approximately 17.8 million broadband connections nationwide.[111] Verizon provides wireline, wireless, broadband and information services to consumer, business, wholesale and government customers. As of year-end 2010, Verizon served more than 26 million wireline access lines and approximately 8.4 million broadband connections nationwide.[112] Together, post-merger, they would serve 46% of the nation's wirelines, 32% of the fixed broadband subscribers, and 66% of the nation's wireless subscribers.[113] The FCC should deny the Petition so that the AT&T-Verizon duopoly is not further entrenched.

The transaction would reduce consumer choice. As the FCC has previously found, "in markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their actions."[114]

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110 / AT&T Inc. 2010 Annual Report.

111 / *Id*, at 30.

112 / Verizon Communications 2010 Annual Report, at 25.

113 / This analysis compares data from Verizon's and AT&T's Annual Report (i.e. year end 2010) with the FCC's latest publically available data, which is as of June 30, 2010. According to the FCC there were 81.7 million fixed broadband connections (over 200 kbps in at least one direction) in service as of June 30, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Internet Access Services: Status as of June 30, 2010,* rel. March 2011, at Table 1. There were 151 million wireline retail local telephone service connections (including switched access lines and interconnected VoIP) as of June 30, 2010. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2010*, rel. March 2011, at Figure 2. There were 122 million end-user switched access lines in service. *Id.*, at 1. As of June 30, 2010, there were 279 million mobile telephony subscribers nationwide. *Id.*, at Table 17. For the purpose of this calculation, Rate Counsel used year end 2010 wireless subscription data from the carrier's annual reports: approximately 88 million retail wireless subscriptions for Verizon (Verizon Communications 2010 Annual Report, at 22) and 95 million subscriptions for AT&T (AT&T Annual Report, at 30).

114 / *Verizon/AllTel Order*, at para. 88, cite omitted.

Specifically, the FCC has found that "in any market in which the transaction would reduce the number of genuine competitors to three or fewer, the proposed transaction may result in a significant likelihood of successful unilateral effects and/or coordinated interaction."[115] In this proceeding, by examining recent NRUF data,[116] the FCC will be able to examine, among other things, the extent to which customers seek to have their wireless numbers ported between AT&T and T-Mobile, as well as local market shares.

On the other hand, if the technological and operational synergies resulting from the merger are as sweeping and substantial as the Applicants depict,[117] the logical conclusion could be that the wireless industry has the characteristics of a natural monopoly. If it is determined that consumers would be better served by fewer suppliers because of these substantial, merger-related efficiency gains, then the FCC's regulatory framework should be modified accordingly.

But a path that combines increasing market concentration and, based on a pretext of competition, a hands-off regulatory regime will lead to high rates and poor service quality. Before contemplating any further market concentration in the wireless industry, the FCC should ensure that it possesses the requisite congressional authority to regulate the wireless industry so that consumers can be protected from anticompetitive consequences.

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115 / *Id.*, at para. 101, cite omitted.

116 / See Proposed Transfer of Control of T-Mobile USA, Inc. and Its Subsidiaries From Deutsche Telecom AG to AT&T Inc.; Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports To Be Placed Into the Record, Subject to Protective Order, WT Docket No. 11-65, CC Docket No. 99-200, Public Notice, DA 11-710 (rel. Apr. 18, 2011); Proposed Transfer of Control of T-Mobile USA, Inc. and Its Subsidiaries From Deutsche Telecom AG to AT&T Inc.; Additional Local Number Portability Information To Be Placed Into the Record, Subject to Protective Order, WT Docket No. 11-65, CC Docket No. 99-200, Public Notice, DA 11-945 (rel. May 24, 2011).

117 / *See e.g.* Hogg Declaration, at paras. 12-15, 42-56.

Applicants have failed to show the public interest in approving this transaction. Rate Counsel's HHI analysis clearly demonstrates why it is certainly not in the public interest for the FCC to do so.

"All-you-can-eat" and regional carriers are not comparable competitors to the four nationwide wireless carriers.

Applicants rely on the presence of the "low-cost, no-contract 'all-you-can-eat' ('AYCE') carriers – especially MetroPCS and Leap – as significant wireless competitors that offer a 'post-pay experience for pay-in-advance customers.'"[118] Applicants also include U.S. Cellular, and other regional and local carriers such as Cellular South and Cincinnati Bell as competitors,[119] as well as wholesale providers such as ClearWire and LightSquared, and "non-traditional" entrants such as Cox.[120]

Applicants recognize Verizon and Sprint as competitors, stating that Verizon is AT&T's closest competitor and indeed that Verizon "vigorously competes with AT&T in virtually every market,"[121] and characterizing Sprint as a "tough, significant, and resurgent competitor."[122] By contrast, AT&T asserts that T-Mobile "does not exert substantial competitive pressure on

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[118] / Christopher Declaration, at para. 8, cites omitted. *See also id.*, at paras. 48-62; Carlton/Shampine/Sider Declaration, at paras. 101-111 (discussing, among other things, their aggregate coverage, estimated to include approximately two-thirds of the population (at para. 102), their deployment of LTE, and their pioneering of the AYCE plans that national companies were then forced to adopt (at para. 110)).

[119] / Christopher Declaration, at paras. 9, 63-68; Carlton/Shampine/Sider Declaration, at paras. 112-115 (observing, among other things, that U.S. Cellular has 6.1 million subscribers (95% are contract customers) and operates in the following major DMAs: Madison and Milwaukee, Wisconsin; Chicago, Oklahoma City and St. Louis (at para. 112), Cellular South is another regional competitor in the southeastern part of the country with approximately 880,000 subscribers (at para. 114), and other regional carriers, including Cincinnati Bell, Atlantic Tele-Network, and nTelos which all have approximately one half million subscribers each (at para. 115)).

[120] / Christopher Declaration, at paras. 10-11, 69-75.

[121] / *Id.*, at para. 21.

[122] / *Id.*, at para. 22.

AT&T."[123] According to AT&T, T-Mobile has relied on price to differentiate its service.[124] The fact that T-Mobile's lower prices have not caused AT&T to offer low-price services simply suggests that wireless markets are not effectively competitive.

The Applicants' analysis leads to conflicting conclusions: Carlton, Shampine and Sider suggest that there are plenty of competitors with "widely divergent strategies,"[125] but also state that there are differences between AT&T and T-Mobile that indicate that "subscribers see them as imperfect substitutes, lowering concerns that the proposed transaction will result in higher prices to consumers due to unilateral or coordinated effects."[126] The Applicants contend that T-Mobile's service is an imperfect substitute for AT&T's service, yet also attempt to persuade the FCC that all the other carriers' services are reasonable substitutes for AT&T's service. Juxtaposed, these two positions seem incompatible.

Similarly, the Applicants' characterization of Sprint with its near-national footprint and "next generation" services[127] sounds similar to the attributes of T-Mobile. As described by the Applicants, Sprint's subscribership declined but then started to rebound.[128] If Sprint can endure a decline and then recover, why is the same path not open to T-Mobile?

It is remarkable that T-Mobile USA's competitive significance should be disregarded according to Carlton, Shampine and Sider,[129] yet, in their view, the other smaller carriers and

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123 / *Id.*, at para. 20; *see also id.*, at paras. 23-27.

124 / *Id.*, at para. 27.

125 / Carlton/Shampine/Sider Declaration, at para. 87.

126 / *Id.*, at para. 88.

127 / *Id.*, at para. 90.

128 / *Id.*, at para. 96.

129 / *Id.*, at para. 121.

regional carriers all have significant competitive importance. T-Mobile's subscribership of 34 million, in comparison with other carriers' 6.1 million (U.S. Cellular) and 500,000 (Cincinnati Bell) certainly seem to suggests that T-Mobile is a more formidable actual and potential competitor in relevant product and geographic markets than the smaller wireless carriers. Furthermore, the comparisons that the Declarants make regarding churn and consumer satisfaction surveys mostly focus on T-Mobile as compared to AT&T, Verizon and Sprint,[130] but they do not include much discussion about T-Mobile as compared to the AYCE and regional carriers. If T-Mobile is comparable to the other three national carriers, why doesn't its competition count?

Similarly, the Applicants make comparisons between T-Mobile and AT&T on shares of subscribers and revenues from enterprise customers' data-intensive consumers, and contract vs. non-contract consumers,[131] but do not include corresponding comparisons between T-Mobile and the AYCE and regional carriers that are purported competitors. This is another failure of Applicants' proof.

Finally, the Applicants would have the Commission dismiss T-Mobile as a competitor because the percentage of U.S. subscribers served by T-Mobile has fallen for two years.[132] Yet, as noted above, Carlton, Shampine, and Sider cite Sprint as a major competitor while also acknowledging the fact that it "experienced significant subscriber losses" in 2006, but that "this pattern reversed in 2010."[133]

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130 / *Id.*, at para. 122.

131 / *Id.*, at 123-126.

132 / AT&T Public Interest Statement, at 13.

133 / Carlton/Shampine/Sider Declaration, at para. 98.

Carlton, Shampine and Sider discuss MetroPCS's and Leap's "all you can eat" pricing and suggest that these two wireless providers are competitively important as evidenced by the national carriers' adoption of "all you can eat" pricing.[134] However, the Deutsche Bank analysis of MetroPCS cited by the declarants would also seem to fit T-Mobile: "We believe these consumers, who are typically no longer on contract, are porting their number to [MetroPCS] once they recognize the value proposition offered by unlimited month-to-month usage and near-nationwide coverage for an all-in flat rate."[135] The Declarants cite the FCC's Twelfth Mobile Wireless Competition Report, which highlights the fact that "all you can eat" pricing was introduced by MetroPCS and Leap before the national wireless carriers began offering that type of pricing.[136] But the Fourteenth Mobile Wireless Competition Report states:

> The focus of price competition now appears to be shifting to unlimited service offerings. In an effort to reduce churn, T-Mobile introduced a lower-priced version of its unlimited national voice calling plan in the first quarter of 2009, but limited its availability to select existing customers. With the subsequent launch of its new "Even More" plans in October 2009, T-Mobile reset prices on tiered offerings at significant discounts to its legacy plans, and brought its pricing structure more closely into line with that of Sprint Nextel, the least expensive nationwide service provider. The biggest pricing changes were made on T-Mobile's unlimited service offerings, which include bundled voice, text and data offerings as well as an unlimited voice-only calling plan. At the same time, T-Mobile discontinued its myFaves unlimited calling circle offer.
>
> 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

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134 / *Id.*, at para. 110.

135 / *Id.*, citing Deutsche Bank, "MetroPCS Comm, Increasing 4Q2010 Net Adds on Positive Channel Checks," January 4, 2011, p. 5.

136 / *Id.*

> 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 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.[137]

Declarants may be exaggerating the purportedly dire state of T-Mobile.

Declarants state that because, among other reasons, T-Mobile's declining market share and purported lack of a clear path to delivering LTE-based service, its current market share "overstates its future significance"[138] and Declarants suggest T-Mobile is somehow so far behind in deploying state-of-the-art technology that it cannot compete successfully in the wireless industry. However, the oft-repeated assertion by the Applicants that T-Mobile "has no clear path to delivering LTE service,"[139] has not been supported and the showing is inadequate to justify the proposed transaction and the anticompetitive effects that it would cause.

Moreover, the Applicants' speculation is certainly open to much debate. In November 2010, U.S. Cellular announced LTE trials to begin at the end of 2011,[140] which suggests that T-Mobile is hardly light years behind other wireless providers. Furthermore, it is entirely plausible that T-Mobile put its technology plans on hold once it started merger talks with AT&T. Cellular South is just launching LTE trials in late 2011, which it also just announced in November

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137 / 14th MWCR, at para. 92.

138 / Carlton/Shampine/Sider Declaration, at para. 131. *See also, id.*, at paras. 128-130.

139 / Christopher Declaration, at para. 32. *See also,* Carlton/Shampine/Sider Declaration, at para. 128; Langheim Declaration, at para. 11 (Langheim contends that T-Mobile had no "clear path to deployment of LTE that is necessary for it to compete robustly in the U.S. longer term").

140 / Carlton/Shampine/Sider Declaration, at para. 113.

2010.[141] And T-Mobile just announced new technology, which would seem to undermine T-Mobile's position that it is lagging very far behind.[142]

Post-merger, AT&T would have an incentive to raise rates.

The Applicants contend that the transaction would lower prices "relative to levels expected in the absence of the proposed transaction."[143] This speculative benefit is so general and unsupported as to be meaningless. As Rate Counsel's analysis below shows, evidence suggests precisely the contrary – in today's pre-merger market, AT&T sets rates significantly above those of T-Mobile. In a post-merger and vastly more concentrated market, and confronting pressure to achieve its projected $39 billion in synergies, it seems highly unlikely that AT&T will choose to lower its rates.

Current pricing demonstrates that T-Mobile offers consumers greater value at every level of service. The tables below show that at each price point, T-Mobile customers get more minutes to use for calling. The tables below compare prices for individual and family plans. The fact that T-Mobile offers lower prices yet AT&T has higher market share is evidence of

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141 / Carlton/Shampine/Sider Declaration, at para. 115. Cellular South News Release, "Cellular South announces strategic alliance with Samsung Telecommunications to build LTE 4G high-speed wireless broadband data network infrastructure," dated November 17, 2010 available at: https://www.cellularsouth.com/news/News2010.html.

142 / T-Mobile Release, "America's Largest 4G Network Now Twice as Fast in More Than 50 New Markets," Bellevue, Washington, May. 24, 2011. http://newsroom.t-mobile.com/articles/t-mobile-increase-4G-network-speed T-Mobile announced last week: "Today, T-Mobile USA, Inc. announced it is doubling the speed of its 4G network in more than 50 markets to achieve theoretical peak download speeds of up to 42 megabits per second (Mbps). T-Mobile customers in 55 markets will now have access to increased 4G network speed, capacity and reliability. These markets include Atlanta, Ga.; Chicago, Ill.; Denver, Colo.; Detroit, Mich.; Dallas and Houston, Texas; Los Angeles, Calif.; Miami, Fla.; New Orleans, La.; Phoenix, Ariz.; Pittsburgh, Pa.; Portland, Ore.; and San Francisco, Calif., among others."

143 / Carlton/Shampine/Sider Declaration, at para. 9.

several attributes of wireless markets: consumers consider various factors such as access to handsets (e.g., the iPhone), coverage, name brand and price. The merger would harm T-Mobile consumers for whom price may be a significant factor in their selection of wireless providers, and could harm all consumers if the overall effect of the increased market transaction is to cause all wireless rates to increase.

Table 5
Comparison of AT&T and T-Mobile Individual Plans[144]

AT&T		T-Mobile	
Minutes	Monthly Price	Minutes	Monthly Price
450	$39.99	500	$39.99
900	$59.99	1000	$49.99
Unlimited	$69.99	Unlimited	$59.99

Table 6
Comparison of AT&T and T-Mobile Family Plans[145]

AT&T			T-Mobile		
Shared Minutes	Monthly Price (first 2 lines)	Each Additional Line	Shared Minutes	Monthly Price (first 2 lines)	Each Additional Line
550	$59.99	$9.99	1000	$59.99	$10.00
700	$69.99	$9.99	2000	$79.99	$10.00
1400	$89.99	$9.99	Unlimited	$99.99	$30.00
2100	$109.99	$9.99			
Unlimited	$119.99	$49.99			

AT&T claims that the transaction will be pro-consumer:[146] "T-Mobile USA's absence from the marketplace will not have a significant competitive impact,"[147] and "the more efficient use of

144 / AT&T website, searched May 24, 2011 for South Orange, NJ; T-Mobile website searched May 24, 2011 for South Orange, NJ.

145 / *Id.*

spectrum will reduce the unit costs of providing service."[148] However, one equally possible outcome of this transaction is that, in its pursuit of $39 billion in synergies, AT&T will simply replace T-Mobile's packages with AT&T's higher-priced offerings.

The Applicants observe that wireless prices for voice, text and data have been declining.[149] However, without cost data, one cannot assess whether, even with price decreases, prices are set at supracompetitive levels.[150] If, for example, the cost to supply a wireless minute is a penny, then a price reduction from 10 cents per minute to 8 cents per minute, although certainly better than no price decrease, does not demonstrate that the wireless industry is competitive. In seeking to maximize profits, suppliers may consider the elasticity of demand, and, as part of that consideration, may lower rates slightly to stimulate new demand such that the overall effect is to increase their net revenues. A simple review of rate changes is an insufficient basis for concluding that the wireless market is competitive. Rate Counsel urges the FCC to require Applicants to submit cost data for wireless access, voice usage, text usage, and video usage.

The cost and rate structures of the wireless industry remain largely unexamined. Rate Counsel acknowledges that the Commission should not address broad matters in its review of

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146 / AT&T Public Interest Statement, at 9.

147 / *Id.*, at 13.

148 / *Id.*, at 39.

149 / *See, e.g.,* Christopher Declaration, at para. 17.

150 / On May 27, 2011, the FCC issued its first set of information and data requests. The Commission seeks responses to its requests no later than June 10, 2011. *See* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to William R. Drexel, AT&T Inc., Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011; Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to Dan Menser, T-Mobile License LLC, Deutsche Telekom AG, Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011.

this transaction that are better suited to a rulemaking or industry-wide proceeding, but it is clear that the proposed merger elevates existing concerns to a heretofore unreached level of concern. Precisely because of the substantial market concentration that would result from the proposed transaction, it is entirely appropriate for the Commission to consider the broader impact of the transaction on post-merger incentives for pricing, service quality, and on the impact of consumers' near-term and long-term access to well-advertised affordable wireless packages, as part of its public interest review.

AT&T asserts that T-Mobile customers "will be able to keep their current rate plans."[151] However, this unenforceable promise provides scant reassurance to existing customers, and, furthermore, there is no evidence to suggest that AT&T would offer reasonably priced wireless plans to *new* customers. The FCC's bill shock proceeding provides ample evidence of the ability of the wireless industry's dominant providers to charge excessive rates and, as stated by the FCC: "The wireless industry will continue to profit from customer confusion about wireless plans."[152]

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[151] / Christopher Declaration, at para. 31.

[152] / Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure, CG Docket Nos. 10-207 and 09-158, *Notice of Proposed Rulemaking*, rel. October 14, 2010. FCC Public Notice, "Comment Sought on Measures Designed to Assist U.S. Wireless Consumers to Avoid 'Bill Shock,'" CG Docket No. 09-158, DA 10-803, rel. May 11, 2010; The bill shock proceeding is separate from the enforcement actions announced in October 2010 by the FCC. (The FCC's Enforcement Bureau announced on October 3, 2010 that it had opened an investigation into fees that Verizon Wireless customers had complained about appearing on their bills. FCC News Release, "FCC Confirms Investigation into Verizon Wireless' Mystery Fee," October 3, 2010. On October 3, 2010, Verizon Wireless announced that it was refunding its customers a total of up to $90 million for the charges, which it now acknowledges were erroneous charges for data usage. Verizon New Release, available at: http://news.vzw.com/news/2010/10/pr2010-10-03.html.

The Applicants have failed to demonstrate that the $39 billion in merger-related synergies will benefit consumers.

The Applicants have failed to demonstrate that the projected $39 billion in merger-related synergies will benefit consumers. The promises in the Application are simply promises. The synergies are likely to benefit shareholders. However, the wireless market is not sufficiently competitive to cause AT&T to flow through savings to consumers

VI. SPECIAL ACCESS

The loss of a stakeholder in the special access proceeding is not insignificant.

The proposed merger would not eliminate a large provider of special access, but it would eliminate a large **customer** of special access services, and therefore would weaken the minimial competition that exists in some markets today: Competitive local exchange carriers ("CLEC") that now sell special access services to T-Mobile likely will not continue to do so, particularly in AT&T's footprint, but perhaps will also be barred nationwide if AT&T typically purchases special access services out-of-region from Verizon, CenturyLink, and other incumbent local exchange carriers.

Furthermore, the proposed merger would eliminate a strong voice in the Commission's special access proceedings. As the number of major carriers in the market dwindles, particularly those without their own "in-house" source of special access, the Commission loses important perspectives that could otherwise inform policy making and regulation Structural changes in telecommunications markets, including horizontal and vertical integrations resulting from mergers among ILECs and from ILEC acquisitions of legacy AT&T and MCI, have exacerbated

anticompetitive harms that legacy AT&T identified in its original 2002 petition seeking review of interstate special access rates.[153]

The impact of the multiple mergers and acquisitions that have occurred since the enactment of the Telecommunications Act of 1996 on competition in various telecommunications markets has been dire. Rate Counsel continues to be concerned about the impact of increasing market concentration on the potential for and possible existence of anticompetitive practices in special access services markets. Without special access reform, Verizon and AT&T have the ability to affect competition by charging higher rates for special access which will directly impact the cost of other carriers who compete in the wireless markets.

Consumers ultimately pay for inflated prices either directly to incumbent local exchange carriers ("ILEC") (in the instance of large consumers) or indirectly in the prices they pay for non-ILEC telecommunications services as well as goods and services across the economy. The inefficient rates lead to loss of consumer welfare, and thwart competition. Supracompetitive rates for special access products provide economically inefficient pricing signals and distort investment decisions. When competitors and customers confront above-cost prices, they may invest to replicate special access facilities, which could lead to society supporting the inefficient duplication of resources.

Broadband deployment continues to be harmed as a result of high special access rates. NoChokePoints Coalition explained in 2010: "Special access services are critical inputs for

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153 / *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking, filed Oct. 15, 2002. *See, also, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, released January 31, 2005.

broadband services provided by rural telecommunications carriers and wireless carriers, and therefore are essential for broadband deployment and competition. Special access is also the foundation of dedicated high-speed broadband for businesses, universities, hospitals, public safety organizations, and government agencies throughout the country."[154] T-Mobile, as a member of NoChokePoints Coalition provided an importance voice urging the Commission to set rates for interstate special access that provide accurate pricing signals and therefore spur efficient deployment of broadband infrastructure throughout the United States.

The NoChokePoints Coalition released a statement on May 19, 2011, in response to statements by AT&T: "The high-speed 'special access' broadband lines upon which the entire broadband economy depends are already under the thumb of AT&T and Verizon, to the tune of well over 80% in most markets. *Losing T-Mobile as a major competitor and purchaser of the few alternative special access circuits available only makes a very bad thing that much worse, by making it impossible for any competitor to survive in already toxic, anticompetitive market.*"[155] AT&T contends that T-Mobile does not provide special access and has "made significant strides to move away from local landline carrier special access. In fact, last year, T-Mobile projected

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[154] / In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Comments of the NoChokePoints Coalition, January 19, 2010, at 4-5. NoChokePoints Coalition, at the time comments were filed in January 2010, included: T-Mobile U.S.A., Inc., The New America Foundation, Public Knowledge, Media Access Project, Association for Information Communications Technology Professionals in Higher Education ("ACUTA"), Ad Hoc Telecommunications Users Group, Computer & Communications Industry Association ("CCIA"), U.S. PIRG, Deltacom, Inc., Cbeyond Inc., BT Americas Inc., One Communications, Sprint Nextel Corporation, U.S. Cellular, Cellular South, Inc., Clearwire, Integra Telecom, XO Communications, and tw telecom inc. See, more recently, Ex parte letter from Maura Corbett Spokesperson for the NoChokePoints Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission, March 14, 2011, Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, Attachment: Stephen E. Siwak, Economics Incorporated, *Economic Benefits of Special Access Price Reductions*, March 2011.

[155] / Statement of Maura Corbett, Spokeswoman for the NoChokePoints Coalition, May 19, 2011 available at http://nochokepoints.org/sites/default/files/NCP%20Statement_5.19.11_FINAL.pdf (emphasis added).

that by 2Q11, 75% of its cell sites would be served by alternative providers. What this means is that this merger has absolutely no impact on the issue of special access/wireless backhaul."[156] However, AT&T's assertion overlooks the fact that T-Mobile purchases special access service and likely would migrate its purchases away from CLECs.

VII. ROAMING

The FCC has previously examined the impact of a wireless merger on roaming agreements.[157] When the subscriber of one provider travels beyond that provider's service area and uses the facilities of another provider to place an outgoing call, receive an incoming call, or to continue an in-progress call, roaming occurs.[158] In its order released last month, the FCC addressing data roaming, stating, among other things:

> In this Order, we promote consumer access to nationwide mobile broadband service by adopting a rule that requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations. Widespread availability of data roaming capability will allow consumers with mobile data plans to remain connected when they travel outside their own provider's network coverage areas by using another provider's network, and thus promote connectivity for and nationwide access to mobile data services such as e-mail and wireless broadband Internet access. The rule we adopt today also serves the public interest by promoting investment in and deployment of mobile

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156 / Bob Quinn, May 18, 2011 post on AT&T Public Policy Blog, available at: http://attpublicpolicy.com/government-policy/mythbusters-part-2-sprint%e2%80%99s-unthinking-reflex-on-wireless-backhaul/.

157/ *Verizon/AllTel Order*, at paras. 171-181. The FCC conditioned its approval of the transaction on Verizon's commitment to honor AllTel's existing roaming agreements with other carriers. *Id.*, at para. 178. The FCC also indicated that it would address other concerns that had been raised about roaming "in other, more appropriate proceedings." *Id.*, at para. 180, citing Reexamination of Roaming Obligations of Commercial Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

158 / *Id.*, at para. 171.

broadband networks, consistent with the recommendations of the National Broadband Plan. The deployment of mobile data networks is essential to achieve the goal of making broadband connectivity available everywhere in the United States, and the availability of data roaming will help ensure the viability of new wireless data network deployments and thus promote the development of competitive facilities-based service offerings for the benefit of consumers. Today's actions will therefore advance our goal of ensuring that all Americans have access to competitive broadband mobile data services.[159]

In this proceeding, the Applicants have failed to demonstrate that the proposed transaction would not harm the ability of small and regional carriers to obtain roaming agreements at reasonable rates, terms, and conditions. Rate Counsel urges the Commission to assess the impact of the transaction on roaming agreements.[160]

VIII. NET NEUTRALITY

On December 21, 2010, the FCC issued its "network neutrality" decision.[161] The order was a crucial first step for ensuring that consumers and innovators can make their own choices about applications, services, launching new technologies, and communicating. The FCC's order acknowledges that most consumers have limited choices for broadband services and that,

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159 / *Reexamination of Roaming Obligations of Commercial Radio Service Providers*, WT Docket No. 05-265, *Second Report and Order,* released April 7, 2011, at para. 1.

160 / *See* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to William R. Drexel, AT&T Inc., Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011; Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau to Dan Menser, T-Mobile License LLC, Deutsche Telekom AG, Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries (WT Docket No. 11-65), May 27, 2011. See request nos. 34, 35, 40, 41, and 42 to AT&T and request nos. 32. 37, 38, and 39 to T-Mobile. The FCC seeks, among other things, information about current agreements.

161 / *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191,WC Docket No. 07-52, *Report and Order*, released December 23, 2010 ("Net Neutrality Order"), at para. 1. The Net Neutrality Order has not yet been published in the Federal Register.

furthermore, broadband providers' financial interests in their own telephony and pay television services create incentives for them to block or degrade other providers' services. The FCC's rules (1) require transparency by providers,[162] (2) prohibit the blocking of lawful content and applications,[163] and (3) prohibit unreasonable discrimination in the treatment of lawful Internet traffic.[164] Regarding the third category of rules, the FCC explains that:

> In evaluating unreasonable discrimination, the types of practices we would be concerned about include, but are not limited to, discrimination that harms an actual or potential competitor to the broadband provider (such as by degrading VoIP applications or services when the broadband provider offers telephone service), that harms end users (such as by inhibiting end users from accessing the content, applications, services, or devices of their choice), or that impairs free expression (such as by slowing traffic from a particular blog because the broadband provider disagrees with the blogger's message).[165]

The third rule, however, unfortunately does not apply to wireless providers. This is particularly troubling in that many underserved and unserved areas appear to be targeted for mobile broadband deployment and many low-income and minority consumers rely solely upon mobile broadband for broadband Internet access.[166]

The FCC also discusses its decision to decline to apply the no unreasonable discrimination rule to mobile broadband, and its "measured steps" for protecting openness for mobile broadband at this time in the following manner:

> We are taking measured steps to protect openness for mobile broadband at this time in part because we want to better understand how the mobile broadband

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162/ Transparency will be provided through broadband providers' disclosures regarding network practices, performance characteristics, and commercial terms. See *Net Neutrality Order*, paras. 53-61.

163/ See *id.*, at paras. 62-67.

164/ See *id.*, at paras. 68-79.

165/ *Id.*, at para. 75 (cites omitted).

166 / *See National Broadband Plan*, at 180.

> market is developing before determining whether adjustments to this framework are necessary. To that end, we will closely monitor developments in the mobile broadband market, with a particular focus on the following issues: (1) the effects of these rules, the C Block conditions, and market developments related to the openness of the Internet as accessed through mobile broadband; (2) any conduct by mobile broadband providers that harms innovation, investment, competition, end users, free expression or the achievement of national broadband goals; (3) the extent to which differences between fixed and mobile rules affect fixed and mobile broadband markets, including competition among fixed and mobile broadband providers; and (4) the extent to which differences between fixed and mobile rules affect end users for whom mobile broadband is their only or primary Internet access platform. We will investigate and evaluate concerns as they arise. We also will adjust our rules as appropriate. To aid the Commission in these tasks, we will create an Open Internet Advisory Committee, as discussed below in paragraph 162, with a mandate that includes monitoring and regularly reporting on the state of Internet openness for mobile broadband.[167]

This transaction should be examined in light of the FCC's unfortunate exclusion of wireless service from a key component of its decision to ensure broadband openness. Moreover, in the *Verizon/AllTel Order*, the FCC declined to impose the Commission's *Internet Policy Statement*.[168] Yet clearly an open Internet is essential. The FCC has also stated:

> There is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services. The record demonstrates the importance of freedom and openness for mobile broadband networks, and the rationales for adopting high-level open Internet rules, discussed above, are for the most part as applicable to mobile broadband as they are to fixed broadband. Consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission are as important when end users are accessing the Internet via mobile broadband as via fixed. And there have been instances of mobile providers blocking certain third-party applications, particularly applications that compete with the provider's own offerings; relatedly, concerns have been raised about inadequate transparency regarding network management practices. We also note that some mobile

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[167] / *Net Neutrality Order*, at para. 105.

[168] / *Verizon/AllTel Order*, at para. 191.

broadband providers affirmatively state they do not oppose the application of openness rules to mobile broadband.[169]

Commissioner Copps, in his concurring statement, clearly articulated various regrets about the Order, including, among others that the Order lacked "real parity between fixed and mobile."[170] Particularly in light of this lack of parity, the proposed merger poses serious harm to consumers and is not in the public interest.

IX. HANDSETS

Consistent with a competitive market, customers should be able to migrate freely among wireless providers and differing handsets. The wireless industry should not be permitted to penalize consumers who elect to choose a different carrier, handset, or package. The Applicants have failed to demonstrate how the proposed transaction would eliminate transactions costs associated with consumers' decisions to choose among wireless suppliers, handsets, and pricing plans.

Furthermore, the merger would tilt the industry toward a monopsony – where a single (or perhaps two) purchasers of equipment (e.g., AT&T and Verizon) purchase the vast majority of handsets, thereby diminishing innovation and diversity in supply.

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169 / *Net Neutrality Order*, at para. 93.

170/ *Id.*, at 141. Among Commissioner Copps' other concerns were that that the FCC did not put broadband telecommunications back under Title II of the FCC's enabling statute, did not establish a general ban on "pay for priority," and did not do more to "strip loopholes from the definition of 'broadband Internet access service' to prevent companies falsely claiming they are not broadband companies." *Id.*

X. UNIVERSAL SERVICE

Rate Counsel has examined data compiled and reported by the Universal Service Administrative Company ("USAC")[171] as well as data compiled and reported by the Federal-State Joint Board on Universal Service[172] regarding the Applicants' receipt of universal service fund support (not including Lifeline and Link Up Support).[173] The FCC should require the Applicants to provide complete data regarding all the various AT&T, AT&T Wireless and T-Mobile entities and their USF receipts. Rate Counsel's preliminary analysis of universal service data shows the following:

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171 / Universal Service Administrative Company (USAC), Quarterly Administrative Filings for 2011, Third Quarter (3Q) Appendices, "HC01 - High Cost Support with Capped CETC Support Projected by State by Study Area - 3Q2011."

172 / Federal Communications Commission, *Universal Service Monitoring Report, CC Docket No. 98-202, 2010 (Data received through October 2010)*, prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 96-45.

173 / Identifying and compiling universal service support that an individual ILEC (particularly the largest ILECs who serve many study areas) receives is unduly burdensome and requires a search through the entire database of high cost fund recipients for all known subsidiaries of a given ILEC. This is a particularly unwieldy task given the numerous changes in corporate structure of ILECs in recent years. In the interest of transparency and accountability, the USF data should be readily available by carrier and not require manual searching as is now required.

Table 7[174]
Projected 2011 USF Disbursements to AT&T Inc. and T-Mobile USA

AT&T Projected High Cost Support for Q3 2011

State	Study Area Name	Total High Cost Support
AL	AT&T WIRELESS (AL)	$1,480,395
AL	SO CENTRAL BELL-AL	$5,835,507
AR	CINGULAR WIRELESS (AR)	$2,026,788
AR	SOUTHWESTERN BELL-AR	$53,436
CA	AT&T	$16,743
CA	PACIFIC BELL	$2,018,676
CT	SOUTHERN NEW ENGLAND	$119,844
FL	AT&T WIRELESS (FL)	$0
FI	SOUTHERN BELL-FL	$2,212,821
GA	SOUTHERN BELL-GA	$3,952,485
IL	ILLINOIS BELL TEL CO	$0
IN	INDIANA BELL TEL CO	$0
KS	SOUTHWESTERN BELL-KS	$173,001
KY	SO CENTRAL BELL-KY	$3,310,410
LA	SO CENTRAL BELL-LA	$2,202,390
MI	MICHIGAN BELL TEL CO	$0
MI	NEW CINGULAR WIRELESS PCS, LLC, D/B/A AT&T MOBILITY	$1,424,805
MO	SOUTHWESTERN BELL-MO	$0
MS	SO CENTRAL BELL-MS	$18,970,059
NC	SOUTHERN BELL-NC	$1,037,484
NV	NEVADA BELL	$943,155
NY	AT&T COMMUNICATIONS OF N.Y. INC.	$20,751
OH	OHIO BELL TEL CO	$0
OK	SOUTHWESTERN BELL-OK	$532,533
OR	CINGULAR WIRELESS (OR)	$2,630,649
PR	CINGULAR WIRELESS	$8,510,145
SC	SOUTHERN BELL-SC	$1,007,088
TN	SO. CENTRAL BELL -TN	$1,614,474
TX	SOUTHWESTERN BELL-TX	$0
VA	CINGULAR WIRELESS (VA)	$670,911
WA	CINGULAR WIRELESS, LLC D/B/A AT&T WIRELESS (WA)	$5,288,151
WI	NEW CINGULAR WIRELESS PCS, LLC (AT&T MOBILITY)	$719,334
WI	WISCONSIN BELL	$0
	AT&T Total	**$66,772,035**
	Estimate of Annual High Cost Support (3Q 2011 Amount * 4)	**$267,088,140**

T-Mobile Projected High Cost Support for Q3 2011

State	Study Area Name	Total High Cost Support
FL	T-MOBILE SOUTH LLC	$981,615
KY	T-MOBILE CENTRAL LLC AND POWERTEL/MEM	$411,375
NC	T-MOBILE USA, INC.	$136,002
WA	T-MOBILE WEST CORPORATION	$575,259
	T-Mobile Total	**$2,104,251**
	Estimate of Annual High Cost Support (3Q 2011 Amount * 4)	**$8,417,004**

174 / Universal Service Administrative Company (USAC), Quarterly Administrative Filings for 2011, Third Quarter (3Q) Appendices, "HC01 - High Cost Support with Capped CETC Support Projected by State by Study Area - 3Q2011." The high cost disbursements shown include the following categories: High Cost Model, High Cost Loop, Safety Net Additive, Safety Valve, Interstate Access, Local Switching, and Interstate CL.

With an anticipated $39 billion in synergies, the Applicants certainly should not need to draw funds from the USF. As detailed in Table 7 above, the Applicants are projected by USAC to receive approximately $275 million in high cost support in 2011 alone. However, even if the Applicants were to agree to phase out their competitive eligible telecommunications carrier ("CETC") support (as did Verizon Wireless[175]), and even all their high cost support, the merger would still not be in the public interest.

XI. CONCLUSION

Rate Counsel urges the Commission to deny the proposed transaction for the reasons set forth in this Petition. Rate Counsel reserves the right to supplement this Petition based on its review of the Applicants' responses to the FCC's information requests.

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175 / *Verizon/AllTel Order*, at para. 196.

Respectfully submitted,

Stefanie A. Brand
Director
Division of Rate Counsel
Christopher J. White
Deputy Rate Counsel
P.O. Box 46005
Newark, NJ 07101
Phone (973) 648-2690

Economic Consultant:
Susan M. Baldwin

May 31, 2011

Attachment A

DECLARATION UNDER PENALTY OF PERJURY

I, Susan M. Baldwin, hereby state the following:

1. I am an economic consultant retained by the New Jersey Division of Rate Counsel.

2. I have read the forgoing "Petition to Deny." With the exception of those facts of which official notice can be taken, all facts set forth herein are true and correct to the best of my knowledge, information, and belief.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 31 day May, 2011.

Susan M. Baldwin

Susan M. Baldwin

CERTIFICATE OF SERVICE

I hereby certify that I am an attorney with the New Jersey Division of Rate Counsel and that on May 31, 2011 I caused to be sent by electronic mail (e-mail), a copy of the foregoing "Petition to Deny" to the following:

nvictory@wileyrein.com	Counsel for T-Mobile
scott_feira@aporter.com	Counsel for AT&T
peter_schildkraut@aporter.com	Counsel for AT&T
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Christopher J White
Deputy Rate Counsel