

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

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

**PETITION TO DENY OF PAETEC HOLDING CORP.,
MPOWER COMMUNICATIONS CORP., AND U.S. TELEPACIFIC CORP**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. LEGAL STANDARD FOR MERGER REVIEW	3
III. THE PROPOSED MERGER WILL CREATE A DUOPOLY IN THE NATIONAL WIRELESS MARKET THAT WILL UNDERMINE THE ABILITY OF SMALLER WIRELESS PROVIDERS TO COMPETE	5
IV. THE MERGER WILL UNDERMINE COMPETITION IN THE SPECIAL ACCESS MARKET	11
V. THE MERGER WILL UNDERMINE COMPETITION IN WIRELINE MARKETS BY DIMINISHING AT&T’S INCENTIVE TO MAINTAIN ITS ESSENTIAL LOOP INFRASTRUCTURE	17
VI. THE MERGER WILL ADVERSELY AFFECT COMPETITION IN THE WIRELINE MARKET BY FACILITATING CROSS SUBSIDIZATION AND PRECLUDING CLECS FROM RESELLING LOWER PRICED T-MOBILE SERVICES.....	19
VII. NO SET OF MERGER CONDITIONS CAN ADEQUATELY PROTECT CONSUMERS AND COMPETITION FROM THE PUBLIC INTEREST HARMS THAT THIS TRANSACTION WILL CREATE	20
VIII. CONCLUSION.....	22

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PETITION TO DENY

PAETEC Holding Corp. (on behalf of its operating subsidiaries PAETEC Communications, Inc., McLeodUSA Telecommunications Services, L.L.C., and the common carrier operating subsidiaries of US LEC L.L.C. and Cavalier Telephone) (jointly, “PAETEC”), Mpower Communications Corp. and U.S. TelePacific Corp., each d/b/a TelePacific Communications (together, “Facilities-Based CLECs” or “the CLECs”) pursuant to the Federal Communication Commission’s (“FCC’s”) Public Notice,¹ file this Petition to Deny the proposed transfer of control of T-Mobile USA, Inc. (“T-Mobile”) and its subsidiaries from Deutsche Telekom AG to AT&T, Inc. (“AT&T”).

I. INTRODUCTION

To obtain approval of the proposed transfers of control, AT&T and T-Mobile bear the burden to show that their merger would serve the public interest by *enhancing* competition.² This

¹ *Applications of AT&T, inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-673 (rel. April 14, 2011) (“Public Notice”).

² *Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless; for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, 25 FCC Rcd. 8704, 8716 at ¶ 22 (June 22, 2010) (“The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.”); *Applications of AT&T, Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations and*

transaction would accomplish precisely the opposite in the national market for wireless services, special access, competitive wireline services, and other markets. The proposed merger between AT&T, the nation's (if not the world's) largest telecommunications carrier,³ and T-Mobile, the fourth largest provider of wireless services and one of the largest customers for special access, is not in the public interest because the adverse impact of the merger on the national wireless market, special access market, competitive wireline market, and other markets outweighs any purported public interest benefits touted by AT&T and T-Mobile in their Application.⁴

As set forth below, the Commission's more than six year long delay in addressing special access reform has provided AT&T with supra-competitive profits (with AT&T's rate of return estimated as high as 138%)⁵ and the ability to engage in a variety of anticompetitive conduct against its wireless competitors with respect to wireless backhaul, and its wireline competitors with respect to special access. Similar concerns exist as to the longstanding requests pending before the Commission seeking to prevent AT&T and other incumbents from abandoning copper facilities, rather than make them available to competitive carriers.

Modify a Spectrum Leasing Arrangements, WT Docket No. 08-246, 24 FCC Rcd 13915, 13928, at ¶ 27 (Nov. 5, 2009).

³ As of 2009, AT&T was “the largest communications company in the world by revenue” with \$123 billion in revenues in 2009. *Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless; for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, 25 FCC Rcd. 8704, 8706 at ¶ 3 (June 22, 2010) (“AT&T / Verizon Order”); AT&T reported operating revenues of \$124,000,000,000 and net income of \$19,864,000,000 in 2010. AT&T, Inc. 2010 Annual Report, at 30.

⁴ See, e.g., *Acquisition of T-Mobile USA, Inc. by AT&T, Inc., Description of Transaction, Public Interest Showing and Related Demonstrations*, WT Docket No. 11-65 at 6-8, 32 (April 21, 2011) (“Description of Transaction”).

⁵ Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25 (Jan. 19, 2010), Attachment B, Susan M. Gately *et al.*, *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS*, at 3, 25-26 (January 2010) (“Ad Hoc Users Comments”); See, Sprint Siwek Study, at 5, 9; Bluhm, P. and Loube, R., National Regulatory Research Institute, *Competitive Issues in Special Access Markets – Revised Edition*, at 69-71, First Issued January 21, 2009.

Rather than consider adopting time-limited, merger-specific wholesale access or pricing conditions that will relatively quickly expire, the Commission should first complete its pending wholesale competition reforms, before considering AT&T's request for further horizontal and vertical integration. The Facilities-Based CLECs urge the Commission to finalize its special access proceeding,⁶ address copper loop retirement and other wholesale issues as called for in the National Broadband Plan,⁷ address Cbeyond's fiber access petition⁸ and other wholesale reforms prior to consideration of this proposed merger. Moreover, because the consequences, both intended and unintended, of the continued concentration of the largest players in the communications industry are yet to be determined, the public interest will benefit from delaying consideration of this merger until the Commission completes its pro-competitive broadband reforms and has more data to review from prior mergers.

II. LEGAL STANDARD FOR MERGER REVIEW

In reviewing the Merger, the Commission must conduct a public interest analysis pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("the Act") to determine whether AT&T and T-Mobile have demonstrated that the public interest would be

⁶ See, e.g., FCC Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, DA 09-2388 (rel. Nov. 5, 2009).

⁷ National Broadband Plan, at xii, 36, 47 ("The FCC should ensure that special access rates, terms, and conditions are just and reasonable," and "should ensure appropriate balance in its copper retirement policies."), 48, n75 ("the FCC should comprehensively review its current policies and develop a cohesive and effective approach to advancing competition through its wholesale access policies" and act on recent petitions such as Cbeyond's petition regarding "competitive access to local fiber facilities."), 140, 143, 148. Specifically, the Commission should complete all the wholesale market proceedings discussed in Recommendations 4.7 through 4.10, inclusive.

⁸ *Pleading Cycle Established for Comments on Petition for Expedited Rulemaking filed by Cbeyond, Inc.*, WC Docket No. 09-223, Public Notice, 24 FCC Rcd 13638 (2009) (requesting a rulemaking to provide competitive carriers with access to packetized bandwidth of ILEC hybrid fiber-copper loops, fiber-to-the-home loops, and fiber-to-the-curb loops at the same rates that ILECs charge their own retain customers).

served by the transfer of control of T-Mobile's many licenses to AT&T.⁹ Pursuant to sections 214 and 310 of the Act, the FCC must weigh the potential public interest harms resulting from the Merger against the potential public interest benefits “to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity.”¹⁰ *The burden of proof is upon Applicants* to demonstrate through a preponderance of the evidence that the Merger serves the public interest.¹¹ The Commission examines several factors including “whether the transaction would substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes;” and “whether the merger promises to yield affirmative public interest benefits.”¹² This analysis requires “defining the relevant product markets and relevant geographic markets,” examining market concentration, and inquiring “whether entry conditions are such that new competitors could likely enter” and prevent attempts of the dominant carrier to impose price increases and other anti-competitive conditions.¹³

The Commission considers “the competitive effects of the transaction” such as market shares, but its “analysis under the public interest standard is somewhat broader; for example, it considers whether a transaction will *enhance*, rather than merely preserve existing competi-

⁹ 47 U.S.C. §§ 214(a), 303(r), 310(d). See *Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22,24,25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, 14736 at ¶ 46 (1999) (“*Ameritech/SBC Order*”); *AT&T/Verizon Order*, at ¶ 22.

¹⁰ *AT&T/Verizon Order*, at ¶ 22; See *Intelsat, Ltd., Transferor, and Zeus Holdings Limited, Transferee*, IB Docket No. 04-366, DA 04-4034, at ¶ 15 (rel. Dec. 22, 2004).

¹¹ *AT&T/Verizon Order*, at ¶ 22; *Ameritech/SBC Order*, 14 FCC Rcd 14737 at ¶ 48.

¹² *Ameritech/SBC Order*, 14 FCC Rcd 14737 at ¶ 48.

¹³ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18304 ¶ 23 (2005) (“*SBC/AT&T Merger Order*”).

tion.”¹⁴ Finally, the FCC’s analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the Merger that is informed by traditional antitrust principles.¹⁵

The Applicants have failed to meet their burden of proof that the Merger is in the public interest. In fact, the Merger as proposed would have significant anticompetitive effects that would frustrate the Commission’s attempts to implement Congress’ objectives expressed in the Telecommunications Act of 1996 to ensure a competitive telecommunications market, and would undermine competition in the wireless, special access and other markets.

III. THE PROPOSED MERGER WILL CREATE A DUOPOLY IN THE NATIONAL WIRELESS MARKET THAT WILL UNDERMINE THE ABILITY OF SMALLER WIRELESS PROVIDERS TO COMPETE

As AT&T observes, “T-Mobile USA is the fourth largest [wireless] carrier nationally, serving roughly 34 million subscribers, or about 11 percent of national [wireless] subscribers.”¹⁶ However, AT&T downplays the fact that the proposed transaction would create a behemoth in the national wireless market with approximately a 41% market share serving an estimated 130 million users nationwide.¹⁷ The post-transaction wireless market would effectively be a duopoly,

¹⁴ *AT&T / Verizon Order*, at ¶ 24 (emphasis added); *AT&T v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001).

¹⁵ *Ameritech/SBC Order*, 14 FCC Rcd 14737 at ¶ 49.

¹⁶ Declaration of Dennis W. Carlton, Allan Shampine, and Hal Sider, at ¶ 121 (“Carlton Declaration”); 2010 Annual Report of Deutsche Telekom Group, at 88-89 (as of December 31, 2010, T-Mobile USA “had 33.7 million customers”).

¹⁷ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, Fourteenth Report, FCC 10-81, at 31, Tables 3 and Chart 1 (May 20, 2010) (“FCC’s Fourteenth Report”). As of late 2008, T-Mobile ranked fourth in wireless customers and wireless revenues behind Verizon Wireless, AT&T, and Sprint Nextel. *Id.*; Edward Wyatt, *AT&T and T-Mobile Chiefs Field Skeptical Questions on Capitol Hill*, *The New York Times* (May 11, 2011) (The merger “would create a carrier that controls and estimated 43 percent of the cellular-phone market.”); Declaration of Dennis W. Carlton et al., at ¶ 121 (“T-Mobile USA is the fourth largest [wireless] carrier nationally, serving roughly 34 million subscribers, or about 11 percent of national [wireless] subscribers.”); 2010 Annual Report of Deutsche Telekom Group, at 88-89 (As of December 31,

with Verizon and AT&T together controlling “close to 80 percent of the national market.”¹⁸ As Leap Wireless recently stated: “if the acquisition is permitted to occur, it would result in the domination of the wireless industry by two massive super-carriers, AT&T and Verizon, who together would control more than 80 percent of the wireless market.”¹⁹ Sprint Nextel underscores that “[t]his is over four and a half times Sprint’s national revenue share of 16.6 percent.” Thus, Sprint, the only other nationwide wireless provider, would be a distant third place carrier.²⁰ Further, even supporters of the Merger have raised doubts regarding Sprint’s financial capability to engage in robust competition with AT&T and Verizon, noting that Sprint “is financially weak,” had a “junk” credit rating, a debt to equity ratio of 138% in 2010, and posted “net losses of \$8.6 billion from 2008-10.”²¹ There are considerable doubts that Sprint and smaller competitors such as Leap would have the financial capability to compete with AT&T and Verizon for additional spectrum. The impact of the merger on the competitive environment is brought into further focus when post-merger AT&T’s 41% market share is compared to the miniscule market

2010, T-Mobile USA “had 33.7 million customers” in 2010); Press Release, Leap Wireless (May 24, 2011); Paul Barbagallo, *Leap Wireless Comes Out Against Proposed Merger of AT&T and T-Mobile*, BNA Daily Report for Executives, 101 DER A-9 (May 24, 2011).

¹⁸ Edward Wyatt, *AT&T and T-Mobile Chiefs Field Skeptical Questions on Capitol Hill*, The New York Times (May 11, 2011); Trey Hanbury of Sprint Nextel notes that “Verizon Wireless and AT&T would control more than 80% of the wireless market if the merger is approved.” Telecommunications Reports Daily, at 4 (May 19, 2011); AT&T, Inc. and T-Mobile USA, Inc., Joint Petition for the consent and approval in advance for AT&T, Inc.’s acquisition of the stock of T-Mobile USA, Inc. or, in the alternative, for a Commission Order exempting the proposed transaction from the provisions of West Virginia code § 24-2-1-2, Case No. 11-0563-C-PC, Sprint Communication’s Company L.P.’s Petition to Intervene, at 3 (May 2, 2011) (“Sprint WVA Petition”) (“Nationally, if the merger is approved, the AT&T-Verizon duopoly will have over 76 percent of all wireless revenues.”).

¹⁹ Press Release, Leap Wireless (May 24, 2011); Paul Barbagallo, *Leap Wireless Comes Out Against Proposed Merger of AT&T and T-Mobile*, BNA Daily Report for Executives, 101 DER A-9 (May 24, 2011) (“Together AT&T and Verizon would control 76.2 percent of the market for post-paid wireless voice and data communications services.”).

²⁰ Sprint WVA Petition, at 3.

²¹ Communications Workers of America, *AT&T / T-Mobile Merger*, at 2, 4 (April 2011).

share of other wireless providers. In fact, as observed by Public Knowledge, “[i]f the fifth largest carrier, merged with every single remaining regional and local wireless carrier, they would still be smaller than T-Mobile.”²²

Such concentration in the industry does not serve consumers or the public interest. As stated by Mr. Hutcheson, President and CEO of Leap, the proposed transaction “raises problems of spectrum concentration and impaired access to spectrum by competitive carriers; undercuts access to wholesale voice and data roaming services; and threatens to foster reduced device availability [to Tier 2 providers] and reduced interoperability of wireless networks and devices.”²³ As Sprint has observed, “[c]oncentrating most of the industry’s buying power into two large companies would make it difficult for Sprint [and competitors other than Verizon] to acquire top-quality devices.”²⁴

The Commission makes its assessment of the appropriate product markets “from the perspective of customer demand.”²⁵ As suggested by Sprint, the Commission should scrutinize the merger “at the national level, not the local level, since AT&T advertises and prices services on a national basis, and since consumers, in most markets, perceive what they are actually buying as a ‘national’ service.”²⁶ AT&T is already a dominant player in the national wireless market, along with Verizon. Together these two companies would control 80% of the national wireless market should the transaction be approved. Smaller wireless providers would find it difficult to compete

²² Paul Barbagallo, *Regulatory Approval of AT&T - T-Mobile Deal Could Hinge on Market Definition*, Daily Report for Executives, BNA, 99 DER C-1 (May 23, 2011).

²³ Press Release, Leap Wireless (May 24, 2011).

²⁴ Casey Newton, *Sprint CEO Fights Merger of AT&T, T-Mobile*, San Francisco Chronicle, at D-1 (April 16, 2011). The concern regarding device availability arises because of the increased use of exclusive handset arrangements which the Commission has described as “an arrangement in which the handset manufacturer or vendor agrees to sell a particular handset model to only one wireless service provider.” FCC’s Fourteenth Report, at ¶ 316.

²⁵ *SBC/AT&T Merger Order*, 20 FCC Rcd 18290, 18336 ¶ 83 (2005).

²⁶ Paul Barbagallo, BNA, 99 DER C-1 (May 23, 2011).

with this duopoly. As Ben Moncrief of Cellular South states, it “will struggle to compete against the ‘Big Three’,” and especially the duopoly.²⁷

AT&T attempts to characterize T-Mobile as a declining company with “questions about its long-term capital support,” “capacity constraints in a number of key markets,”²⁸ and an uncertain future. AT&T argues that “T-Mobile USA is likely to become a less significant competitor in the future in the absence of the proposed transaction”²⁹ and suggests that T-Mobile can only be saved from its inevitable decline by the proposed merger with AT&T.³⁰ Notwithstanding AT&T’s description, T-Mobile is a vibrant company whose total revenue in the U.S. operating segment grew by 4% year-on-year in 2010 to “EUR 16.1 billion in 2010 compared to EUR 15.5 billion in 2009,” and it reported EBITDA of EUR 4.2 billion in 2010.³¹ Further, T-Mobile represents that it invested EUR 2.1 billion in capital in 2010 which was driven “by continued network investment including coverage expansion and upgrade to HSPA+.”³² In fact, T-Mobile boasts it “now offers customers America’s largest 4G network with HSPA+ service available in 100 metropolitan areas reaching 200 million people from coast to coast.”³³ Further, T-Mobile’s

²⁷ Paul Barbagallo, BNA, 99 DER C-1 (May 23, 2011); Sprint WVA Petition, Case No. 11-0563-C-PC, at 3 (May 2, 2011) (“By eliminating the fourth largest national competitor, AT&T would foreclose the prospect of an innovative, value-oriented competitor providing service throughout West Virginia.”).

²⁸ *See, e.g.*, Description of Transaction, at 5-6, 30-31.

²⁹ Carlton Declaration, at ¶ 121.

³⁰ AT&T’s argument thoroughly overlooks that the excessive prices it charges T-Mobile for special access services is a likely contributor to T-Mobile’s financial performance. In essence, AT&T seeks to be rewarded for successfully exercising market power over a critical input that is forcing a large competitor to join forces with its antagonist rather than continuing to compete.

³¹ 2010 Annual Report of Deutsche Telekom Group, at 89. (T-Mobile’s revenues declined by approximately 1% in U.S. dollars during this period).

³² 2010 Annual Report of Deutsche Telekom Group, at 89.

³³ 2010 Annual Report of Deutsche Telekom Group, at 89; Declaration of William Hogg, Senior Vice President of Network Planning and Engineering, AT&T Services, Inc., at ¶ 23 (“Like AT&T, T-Mobile USA has deployed a mobile broadband network using the UMTS standard with HSPA or HSPA+. T-Mobile USA’s HSPA network now covers 212 million POPs

capital spending for long term assets such as plant and equipment increased 35 % during 2008.³⁴ Thus, if T-Mobile is not a viable competitor to the emerging duopoly of AT&T and Verizon, one must question who could be, given the small market shares of Metro PCS, Leap, Alltel and others.

AT&T ignores these facts and argues instead that “T-Mobile USA’s absence from the marketplace will not have a significant competitive impact,” because “mavericks like MetroPCS and Leap” will “quickly replace the diminished market role T-Mobile USA plays today.”³⁵ Notwithstanding AT&T’s pleas not to worry that real competition is on the way, the Commission should focus instead on the huge impact of the proposed merger on the national wireless market as it exists today. The Commission should bear in mind that Alltel, the fifth largest wireless provider, has only about 5% market share, and Metro PCS, the sixth largest, has about 2% market share, compared to the 41% of the post-merger AT&T.³⁶

The Herfindahl-Hirschman Index (“HHI”), used to measure market concentration, shows that concentration has already dangerously increased in the wireless market. In fact, in 2008, the weighted average of HHIs was 2848, representing an increase from 2674 in 2007, and it has increased by nearly 700 since the Commission first observed this metric in 2003.³⁷ By comparison, the Department of Justice’s anti-trust merger guidelines consider a market to be “highly concentrated” if the post-merger HHI exceeds 2500.³⁸ Thus, the wireless market is *already*

and its HSPA+ coverage includes 200 million POPs.”); at ¶ 20 (“The combination of HSDPA and HSUPA is referred to as High Speed Packet Access (“HSPA”). UMTS/HSPA is significantly more spectrally efficient than GSM.”) (“Hogg Declaration”).

³⁴ FCC’s Fourteenth Report, at ¶¶ 208, 213, and Chart 33.

³⁵ Description of Transaction, at 13.

³⁶ FCC’s Fourteenth Report, at 31 Chart 1.

³⁷ FCC’s Fourteenth Report, at 15, 40-41.

³⁸ FCC’s Fourteenth Report, at ¶ 49; U.S. Department of Justice, and the Federal Trade Commission, Horizontal Merger Guidelines, at 21 (Aug. 19, 2010) (“Horizontal Merger Guidelines”).

highly concentrated, and will be even more so if the Merger takes place. The Commission acknowledges that this rapid increase in concentration reflects several mergers that were approved by the Commission.³⁹ It appears that the post-merger HHI for the national wireless market would increase by over 600.⁴⁰ Mergers in highly concentrated markets that involve an increase in the HHI of 200 points are “presumed to be likely to enhance market power,” and “raise significant competitive concerns.”⁴¹ Thus, the HHI increase here appears to be three times the level that would trigger scrutiny by the Department of Justice. Antitrust precedent has established that high market share alone is enough to indicate the existence of monopoly power.⁴² However, in this case, there are other factors that indicate the merger will lead to market power⁴³ including the removal of a low-cost competitor and the impact of the merger on the special access and other related markets.

For example, the proposed merger will “eliminate a relatively low-cost carrier as an option that many consumers need access to in order to afford quality wireless service.”⁴⁴ As Parul

³⁹ FCC’s Fourteenth Report, at 15, 41 (¶ 51) (“The 2008 HHI data reflect several mergers that were completed during 2008, including the mergers of AT&T/Aloha (February 2008), T-Mobile/Suncom (February 2008), Verizon Wireless/Rural Cellular (August 2008), and Verizon Wireless/Alltel (January 2009).”).

⁴⁰ The increase in HHI is equal to twice the product of the market shares of the merging firms. Horizontal Merger Guidelines, at 21.

⁴¹ Horizontal Merger Guidelines, at 22.

⁴² *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (“holding that the existence of monopoly “power ordinarily may be inferred from the predominant share of the market” and that the fact that one participant in the market held a market share of 87% left “no doubt” that it possessed “monopoly power.”); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (80% market share established monopoly power); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over two-thirds of the market is a monopoly); *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (75%).

⁴³ Market power is defined as the ability to “exclude competition or control prices.” *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁴⁴ Sprint WVA Petition, Case No. 11-0563-C-PC, at 5 (May 2, 2011); FCC’s Fourteenth Report, at ¶ 315 (“In 2009, T-Mobile introduced its “Even More Plus” plan that offers a lower monthly service price for customers that use unsubsidized handsets.”).

Desai of Consumers Union has observed: “AT&T wireless plans typically cost consumers up to \$50 more per month than comparable plans from T-Mobile, and consumers are consistently less satisfied with the service they get from AT&T than T-Mobile,”⁴⁵ such that T-Mobile’s departure will eliminate a low cost, quality choice now available to consumers. Consumers will be harmed by the merger because it will eliminate a lower cost alternative provided by T-Mobile that is available on a national footprint. Moreover, as demonstrated below, AT&T combined with T-Mobile will have dominance over related markets for infrastructure, such as special access, and other markets.

IV. THE MERGER WILL UNDERMINE COMPETITION IN THE SPECIAL ACCESS MARKET

AT&T has acknowledged that after the merger T-Mobile will no longer purchase special access⁴⁶ for wireless backhaul⁴⁷ on a competitive basis in the open market, but instead will use “existing AT&T facilities where possible for transport.”⁴⁸ AT&T argues that moving T-Mobile’s special access and other purchases to AT&T’s network create “savings from a reduction in interconnection and toll expenses” and are a prime example of “network synergies” that support its argument that the transaction is in the public interest.⁴⁹ However, AT&T ignores the impact of

⁴⁵ Sprint WVA Petition, Case No. 11-0563-C-PC, at 4-5 (May 2, 2011).

⁴⁶ Special access services do not use local switches; instead, they use dedicated facilities that run directly between two designated locations. FCC’s Fourteenth Report, at n.784.

⁴⁷ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Ex Parte Letter of Sprint, Attachment, Stephen Siwek, *Economic Benefits of Special Access Price Reductions*, at 5 (March 15, 2011) (“Sprint Siwek Study”) (“Special access services are also heavily used by wireless carriers to make connections within their own networks. For example, a wireless carrier may require special access facilities to connect its cell towers to its mobile switch center or transport network. This form of special access usage is commonly referred to as “wireless backhaul.”).

⁴⁸ Description of Transaction, at 52 (“Further savings will arise from a reduction in interconnect and toll expenses as a result of switching to AT&T where possible for transport.”); Declaration of Rick L. Moore, Senior Vice President, AT&T, Inc., at ¶ 34 (“Moore Declaration”).

⁴⁹ Description of Transaction, at 52; Moore Declaration, at ¶ 34.

its projected sole-sourcing of T-Mobile's special access requirements on the already fragile competitive market for these services. Other carriers will simply not have the opportunity to compete for this special access business if the merger is consummated before the Commission adopts the reforms contemplated in its pending wholesale competition proceedings.

The merger will undermine competition in the special access market in AT&T's 22 state wireline service territory because AT&T is acquiring one of the largest independent customers of special access. With respect to special access, the transaction is a vertical merger in which AT&T is adding to its existing special access market share of over 90% in its 22 state territory (which is already indicative of market power)⁵⁰ by buying one of the largest special access customers. The Commission has noted that “[b]ackhaul costs currently constitute a significant portion of a mobile wireless operator’s network operating expense, and the demand for backhaul capacity is increasing.”⁵¹ As the Commission has observed, “[w]ireless providers unaffiliated with a wireline provider often must rely on their competitors’ affiliates for access.”⁵² For example, Sprint Nextel, the third largest wireless provider and a large buyer of special access for backhaul, noted that 98% of all of its DS1 backhaul facilities are purchased as special access circuits from ILECs.⁵³ Likewise, T-Mobile stated in 2010 that it “continues to seek an alternative

⁵⁰ See GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 12 (Nov. 2006) (“GAO Report”) (“In the 16 major metropolitan areas we examined, facilities-based competition for dedicated access services exists in a relatively small subset of buildings. Our analysis of data on the presence of competitors in commercial buildings suggests that competitors are serving, on average, less than 6 percent of the buildings with at least a DS-I level of demand.”); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of PAETEC Holding Corp., at 5 (May 28, 2010) (“Indeed, nearly every measure of (1) the physical connections to commercial buildings shows that incumbent LECs control over 90 percent of those connections, (2) the Type 1 DS3 services market shows that incumbent LECs control over 80 percent of that market, and (3) the Type 1 DSI market shows that incumbent LECs control over 90 percent of that market.”).

⁵¹ FCC’s Fourteenth Report, at ¶ 296.

⁵² FCC’s Fourteenth Report, at ¶ 296.

⁵³ FCC’s Fourteenth Report, at ¶ 295; Sprint Nextel Comments, WC Docket No. 05-25, at ii (filed Jan 19, 2010).

to subsidizing its two largest competitors, but today. AT&T and Verizon continue to supply the majority of T-Mobile's backhaul services."⁵⁴ In 2005, Nextel reported that when it issued a Request for Information for the provision of high capacity circuits to its 1,500 cell towers in the New York City area, it received offers from CLECs covering only 43, or less than 3% of those cell towers.⁵⁵

Even absent the merger, there are strong indications that AT&T and Verizon have market power in the special access market. For example, one study found that in 2007 "AT&T's return (including BellSouth) was 138% (more than ten times the [FCC's] last authorized return level [of 11.25%])."⁵⁶ In addition, the Commission has found that only "between 3% and 5% of the nation's commercial office buildings are served by competitor-owned fiber loops."⁵⁷

Further, AT&T has locked-up most large purchasers of special access in its 22 state territory through contracts that require buyers to obtain nearly all of their special access requirements from AT&T in order to obtain discounts off of AT&T's excessive "rack rate" special access prices.⁵⁸ For example, Sprint reports that it "typically has to commit to five-year contracts with

⁵⁴ T-Mobile Ex Parte Letter, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 1-2 (May 6, 2010) ("*T-Mobile Ex Parte*") ("T-Mobile still purchases ILEC backhaul in most if its 3G coverage area.").

⁵⁵ Reply Comments of Nextel Communications, Inc., WC Docket No. 05-25, Attachment 1, Declaration of Bridger M. Mitchell and John R. Woodbury, at p. 24, ¶ 62 (July 29, 2005).

⁵⁶ *Ad Hoc Users Comments*, at 3; see, Sprint Siwek Study, at 5, 9; Bluhm, P. and Loube, R., National Regulatory Research Institute, *Competitive Issues in Special Access Markets – Revised Edition*, at 69-71, First Issued January 21, 2009 ("[o]ver the last ten years, a variety of studies have concluded that special access services produce excess rates of return as high as 77.9%").

⁵⁷ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17155, n.856 (2003).

⁵⁸ See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers*, Comments of Level 3 Communications, LLC, WC Docket No. 05-25, at 24-27 (Jan. 19, 2010) ("For example, several contract tariffs require that a certain percentage of the customer's purchase commitment each year or a certain amount of DS-1 and DS-3 services bought from the ILEC be converted from services previously provided by other carriers."); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of PAETEC Holding Corp., at 18-21

its large rivals [AT&T and Verizon] to get the best rates, with the pricing structured to discourage looking at alternative suppliers.”⁵⁹ These lock-up contracts discourage alternative suppliers from building out facilities to compete for special access customers, which has the compounding effect of discouraging competitors from deploying alternative broadband facilities in AT&T’s region. As PAETEC has previously described:

[s]uch discount plans also harm competition because they tie the demand of the customer at locations where there is no competition to demand at the limited number of locations where there is competition. As a result, even though non-incumbent LEC wholesalers offer on-net service in certain locations at prices below those charged by the incumbent, the buyer would be worse off choosing the competitive wholesaler in many instances. This is because the penalties that the purchaser would need to pay or the discounts that the purchaser would lose due to missed volume commitments made to the incumbent might well exceed the cost savings associated with purchasing a small number of circuits from a non-incumbent LEC wholesaler.⁶⁰

T-Mobile has raised similar concerns regarding special access services in the past, stating: “Supra-competitively priced critical inputs into T-Mobile’s service (in this case, ILEC DS-1 and DS-3 special access services) have the effect of limiting T-Mobile’s ability to compete

(May 28, 2010) (“PAETEC Comments”) (“incumbent LECs’ discount plans contain numerous unreasonable terms and conditions including onerous minimum annual revenue commitments (“MARC”) or circuit commitments which “ratchet up” if the MARC or circuit commitment is exceeded (thereby locking-in excess demand), limitations on UNE purchases . . .”).

⁵⁹ Roger Cheng, *Leap Wireless Opposes T-Mobile Deal*, *The Wall Street Journal* (May 24, 2011).

⁶⁰ PAETEC Comments, at 21, n.73. As economist Michael Pelcovits has explained, “[t]he key to successful exclusionary pricing is to condition the pricing of the monopoly portion of the customer’s demand on the choices the customer makes for the competitively sensitive portion of demand. The customer then pays a higher price on the monopoly demand if he deals with a competitor on the competitively sensitive demand.” Reply Comments of WorldCom, Attachment A: Declaration of Michael D. Pelcovits, RM-10593, at 7 (filed Jan. 23, 2003).

against its suppliers' [AT&T and Verizon] wireline and wireless offerings.”⁶¹ In 2010, T-Mobile noted that it “has contracted for alternative backhaul services at only approximately 20% of its cell sites today” and this can “reduce long-run backhaul costs by ~ 90%” where alternative backhaul is available.⁶² Sprint, by contrast, said last year that it buys only 2% of its DS-1 backhaul from independent providers.⁶³ Thus, the loss of T-Mobile as an independent buyer of special access has a much greater impact than reflected by its share of the wireless market. T-Mobile’s open market purchases of wireless backhaul, while “only” 20% of its total,⁶⁴ are several multiples higher than the purchases of Sprint and other wireless carriers. T-Mobile stressed that “[i]mportantly, in areas where ILECs continue to enjoy a monopoly, backhaul costs remain unreasonably high.”⁶⁵ Accordingly, T-Mobile urged the Commission to “adopt more stringent pricing flexibility rules,” as the present triggers for pricing flexibility are inadequate.⁶⁶

Further, there will be increased barriers to entry for potential competing wireless providers if the market for special access backhaul is further dominated by vertically integrated competitors such as Verizon and AT&T who likely will not offer the same terms and conditions to other wireless providers as they do their respective wireless affiliates or to each other.⁶⁷ This could have important adverse effects on competition in the wireless market because, as the

⁶¹ *Special Access Rates for Price Cap Local Exchange Carriers*, Comments of Level 3 Communications, LLC, WC Docket No. 05-25, Reply Comments of T-Mobile USA, Inc., at iii-iv (July 29, 2005) (“T-Mobile Reply Comments”).

⁶² *T-Mobile Ex Parte*, at 1.

⁶³ Sprint Nextel Comments, WC Docket No. 05-25, at ii (filed Jan 19, 2010).

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⁶⁵ *Id.*

⁶⁶ T-Mobile Reply Comments, at iv.

⁶⁷ Both Verizon and AT&T provide unique special access discounts to each other under contract tariffs designed so that only the other carrier is eligible. Thus, they already have arrangements in place that will allow them to perpetuate duopoly control over the wireless and wireline markets by placing all other wireless competitors at a significant cost disadvantage for critical network inputs.

Commission has observed, “[i]n light of the growing need for backhaul, cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace.”⁶⁸ Moreover, special access, often used to provide wireless backhaul, is a key input that constitutes a significant portion of a mobile wireless provider’s network operating costs.⁶⁹ In fact, Sprint states that a third of the expense to operate a cellular site can be attributed to purchases of special access services for backhaul.⁷⁰ Through its control of the upstream special access market for wireless backhaul, AT&T (and Verizon) could undermine competition in the downstream wireless market by raising the price of its competitors’ backhaul. Accordingly, the merger should not be considered for approval until the Commission completes its reform of the special access market to reduce prices charged by AT&T and Verizon and eliminates the anti-competitive use of lock up terms and conditions, as well as addressing the other wholesale reforms contemplated in the National Broadband Plan.

AT&T’s acquisition of T-Mobile, one of the largest purchasers of special access, when combined with AT&T’s anti-competitive policies of using long-term contracts and tariffs to lock-up special access customers will make it increasingly difficult for special access competitors to achieve a minimum viable scale. Without such minimum viable scale, competitors will be forced to either exit the special access market altogether or reduce their investment in competitive special access facilities. In turn, the absence of alternative special access providers will enable the wireless duopoly to increase their competitors’ costs for special access services which may represent a third of their cost basis. This is an especially critical risk for carriers such as Leap that represent a low cost wireless alternative. The special access problem is exacerbated by the fact that AT&T’s rates and terms for special access backhaul are largely unregulated because

⁶⁸ FCC’s Fourteenth Report, at ¶ 296.

⁶⁹ FCC’s Fourteenth Report, at ¶ 296.

⁷⁰ Roger Cheng, *Leap Wireless Opposes T-Mobile Deal*, The Wall Street Journal (May 24, 2011).

the Commission effectively deregulated special access prices for DS1 and DS3 services through its Pricing Flexibility Order.⁷¹

Unless and until the Commission moves decisively to reform and update its policies regarding copper loop retirement, special access, and other wholesale issues to constrain AT&T's ability to engage in anti-competitive conduct, the Commission should not consider the proposed merger. To do so will make any future effort to reform special access and wholesale markets considerably more difficult to accomplish. Thus, the Facilities-Based CLECs urge the Commission to finalize its special access and other local competitive dockets promptly.

In addition, in order to protect the potential for competition in the special access market in the face of industry consolidation, the Commission should consider rolling back the pricing flexibility granted to AT&T under the Pricing Flexibility Order and conducting a more granular analysis with revised competitive triggers that reflect the true state of competition. The Commission should also examine the restrictive terms and conditions contained in AT&T's tariffs, contract tariffs and contracts for special access that serve to lock-up buyers of special access and prohibit anti-competitive provisions such as excessive volume commitments, long term commitments and other provisions as unreasonable.

V. THE MERGER WILL UNDERMINE COMPETITION IN WIRELINE MARKETS BY DIMINISHING AT&T'S INCENTIVE TO MAINTAIN ITS ESSENTIAL LOOP INFRASTRUCTURE

AT&T has indicated that its merger with T-Mobile will make AT&T even more focused on investments in burgeoning wireless data markets, which inevitably will result in AT&T diverting investment from its legacy wireline loop infrastructure. As AT&T relies more heavily on mobile connections to tower sites with backhaul to its central offices, it will have diminished incentive to incur costs to maintain its wireline loop infrastructure which is of declining impor-

⁷¹ *Access Charge Reform*, CC Dockets Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14297-98, at ¶¶ 4, 24-25, 55, 145, 153 (1999) ("Pricing Flexibility Order").

tance to AT&T, but is a critical input for competitors in the wireline marketplace. This local loop infrastructure is an essential input for CLECs competing with AT&T in the wireline market, which provides AT&T with additional incentive to limit investment in maintaining its local loop infrastructure and related back office wholesale operations to undermine its wireline competitors, particularly as it deploys Long Term Evolution (“LTE”) and other technologies. In fact, AT&T underscores that it “invested approximately \$21.1 billion between 2008 and 2010 to upgrade and expand its wireless network,”⁷² and it expects its investment to continue to grow as it deploys additional cell sites, WiFi, Long-Term Evolution (“LTE”) and other technologies.⁷³ These substantial wireless investments will divert investment away from local loop infrastructure.

AT&T’s diversion of investment from its local loop infrastructure to deployment of LTE and other wireless investments will undermine the already fragile competition in local wireline markets. If AT&T is permitted to ignore maintenance of its wireline loop infrastructure, then the only serious in-region competition to the reconstituted AT&T will come from the other leading wireless provider and cable companies, resulting in an unacceptable situation. Most of AT&T’s loop infrastructure was created effectively at public expense during the decades in which AT&T’s various constituent companies had a government sanctioned monopoly in their 22 state service territory. In addition, AT&T is compensated for ongoing maintenance of this critical loop structure through the price paid by competitors for unbundled loops. Nonetheless, AT&T has every incentive to shift investment away from its loop infrastructure and wholesale operations, which is used as an essential input by competitors, toward the wireless market.

⁷² Description of Transaction, at 67 (emphasis in original).

⁷³ Carlton Declaration, at ¶ 136 (“AT&T’s post-merger business plans are to expand output” ... “to maintain competitive pressure against other wireless carriers”).

VI. THE MERGER WILL ADVERSELY AFFECT COMPETITION IN THE WIRE-LINE MARKET BY FACILITATING CROSS SUBSIDIZATION AND PRE-CLUDING CLECS FROM RESELLING LOWER PRICED T-MOBILE SERVICES

As discussed in Section III, if the Commission approves the transaction, it will effectively create a duopoly in the wireless market wherein the two dominant vertically integrated providers “would control more than 80% of the wireless market.”⁷⁴ The elimination of significant wireless competition would create an environment that enables AT&T (and Verizon) to cross subsidize their respective wireline and broadband operations with their burgeoning profits from the wireless market. In light of the fact that AT&T and Verizon have secured deregulation of wireline business service offerings over the past several years, there are few regulatory impediments to prevent AT&T from engaging in this type of anti-competitive cross subsidization, and few regulatory tools still available even to detect, much less prevent it.

In addition, the merger if consummated, will result in the elimination of T-Mobile as a low cost provider of wireless services. As Sprint has observed, “AT&T wireless plans typically cost consumers up to \$50 more per month than comparable plans from T-Mobile, and consumers are consistently less satisfied with the service they get from AT&T,”⁷⁵ such that T-Mobile’s departure will eliminate a low cost, quality choice now available to consumers. CLECs often resell the wireless services of smaller, often lower-priced wireless providers in order to compete with the wireline and wireless bundles offered by the dominant providers, including AT&T. The proposed transaction will make it even more difficult for wireline competitors to compete against AT&T’s bundle of wireline and wireless services. Further, the merger will make it easier for AT&T to tie its wireless offerings with business wireline offerings that no other competitor could match in the legacy 22-state AT&T wireline footprint.

⁷⁴ Telecommunications Reports Daily, at 4 (May 19, 2011). Edward Wyatt, *AT&T and T-Mobile Chiefs Field Skeptical Questions on Capitol Hill*, The New York Times (May 11, 2011).

⁷⁵ Sprint WVA Petition, Case No. 11-0563-C-PC, at 4-5 (May 2, 2011).

The reconstituted AT&T, which began as Southwestern Bell, has had several large mergers over the years – characterized as 15 deals in 15 years.⁷⁶ To secure approvals of prior mergers, AT&T has made numerous commitments to regulators including the FCC and state commissions. For instance, when SBC acquired Ameritech, it promised to aggressively start competing “out of region” against other RBOCs. Yet AT&T utterly failed to meet its commitment in any meaningful way; it never deployed its own network facilities out of region. Instead, AT&T used the now defunct UNE-P, which some RBOCs called “sham” competition when used by other competitive providers. AT&T also made several commitments when it acquired Bell South, and many of its competitors complained that AT&T did not faithfully abide by those merger conditions as well. Now AT&T is promising to deploy more broadband in rural areas if this deal is approved and to reach 97% of Americans with LTE technology.⁷⁷

VII. NO SET OF MERGER CONDITIONS CAN ADEQUATELY PROTECT CONSUMERS AND COMPETITION FROM THE PUBLIC INTEREST HARMS THAT THIS TRANSACTION WILL CREATE

The FCC’s approach to RBOC mergers over the years has been to approve all such mergers once the Applicants offer a set of acceptable “voluntary” conditions, which are then incorporated into the approval.⁷⁸ Past “voluntary” RBOC merger conditions represent a litany of measures intended to protect competition and consumers in exchange for allowing RBOCs to reconstitute themselves into large national providers that are once again dominating the industry throughout the United States.⁷⁹

If one of the critical standards for merger approval is whether the merger *enhances* competition, then it should be clear that the FCC’s approach has been an abysmal failure. Competi-

⁷⁶ FCC’s Fourteenth Report, at ¶¶ 75-80, Table 9.

⁷⁷ Description of Transaction, at 1.

⁷⁸ See, e.g., *AT&T, Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, FCC 06-189, 22 FCC Rcd 5662, at ¶ 227, Appendix F (rel. March 26, 2007).

⁷⁹ *Id.*

tion will be just as, if not more, fragile than it has ever been in both the wireline and wireless markets if this transaction is approved. AT&T has secured deregulation of its pricing for business customers throughout its 22 State region leaving business customers unprotected from AT&T's ability to charge excessive prices should competition falter. In addition to allowing AT&T to consolidate market power, AT&T's mergers have generated significant synergies for its multitude of operating affiliates whilst never being required to meaningfully pass along those synergies in the form of reduced costs to their competitors. Instead, AT&T has increased special access prices paid by enterprise customers and its competitors. UNE loop prices have not been reduced despite the fact that wireline competitors do not even have the ability to use the forward looking fiber loops reflected in current UNE loop prices.

Members of Congress from both sides of the aisle have expressed concern that this proposed transaction is a game changer that will forever transform the telecommunications industry in the United States. Reverting to a duopoly in US market is a far cry from the vision of the 96 Act. No set of conditions that will last for some limited period of time can adequately offset AT&T's market power that will endure well beyond a set of merger conditions that will have a limited shelf life of four or five years at most. Moreover, the FCC cannot ignore AT&T's less than stellar track record complying with prior merger conditions. Numerous examples exist where AT&T fought competitors that tried to avail themselves of merger conditions only to have to fight AT&T for much of the life of the merger condition. Power in the marketplace is but one dimension of the power that AT&T brings to bear on consumers and competitors. With an army of lawyers, federal and state government relations and public policy staff, as well as another army of outside federal and state lobbyists at its disposal, AT&T's power in the policy and political arena cannot be ignored in evaluating whether the public interest will be served by allowing it to assimilate a competitor that had been a leading opponent fighting AT&T on a number of policy fronts that are important to competition.

VIII. CONCLUSION

The Facilities-Based CLECs agree with T-Mobile that because “merger-specific conditions are time-limited,” “[t]hey provide only limited relief from anticompetitive activities and do not address the underlying problems of the existing regulatory framework or special access marketplace failure.”⁸⁰ Rather than adopt time-limited merger conditions that will expire and return the industry to today’s unacceptable status quo, the Commission should first complete its reform of wholesale competition including, but not limited to special access regulation and abandonment of copper loops, prior to consideration or approval of yet another AT&T merger.

Respectfully submitted,

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⁸⁰ T-Mobile USA, Inc. Comments, WC Docket 05-25, at 4 (filed Aug. 8, 2007).

SERVICE LIST

I, Sonja Sykes-Minor, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Petition to Deny of Paetec Holding Corp., Mpower Communications Corp., and U.S. TelePacific Corp. to be served, as specified, upon the parties listed below:

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