

**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 NOCHOKEPOINTS

May 31, 2011

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PETITION TO DENY OF NOCHOKEPOINTS

Pursuant to the April 28, 2011 Public Notice¹ in the above-captioned proceeding, NoChokePoints² hereby submits this Petition to Deny the Application of AT&T Inc. (“AT&T”) and Deutsche Telekom AG (collectively, the “Applicants”) for consent to transfer control of the licenses and authorizations held by T-Mobile USA, Inc. (“T-Mobile”) to AT&T.³

I. INTRODUCTION AND SUMMARY.

While the focus of many parties to this proceeding will likely be the effect of AT&T’s proposed acquisition of T-Mobile on downstream mobile wireless services, there is another critical dimension of this merger that the Commission must address. In particular, T-Mobile’s

¹ See *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.*, Public Notice, DA 11-799 (rel. Apr. 28, 2011).

² The NoChokePoints coalition represents constituents, members, enterprise customers, competitive broadband providers and communities that rely on high-capacity special access lines. NoChokePoints seeks FCC adoption of regulations that ensure that incumbent LEC special access services are offered on just, reasonable and not unjust or unreasonably discriminatory terms and conditions. Such regulation is the key to lasting economic growth, broadband deployment and job creation. See www.NoChokePoints.org.

³ Coalition members with positions that are more expansive than, or vary from, this petition may make individual filings in this docket.

decision to exit the market is due in significant part to the FCC's failure to fix the flaws in its special access regulations. The absence of effective special access regulation has allowed AT&T to use its market power over critical wireline backhaul facilities to set high prices for unaffiliated competitors like T-Mobile, while AT&T's wireless affiliate effectively obtained cost-based prices. T-Mobile itself warned the FCC about this form of discrimination and urged the FCC to adopt special access regulations to address the problem. The FCC failed to do so. Instead, the FCC made matters worse by deregulating packetized (including Ethernet) and optical special access facilities, thereby essentially freeing incumbent LECs to charge whatever prices they desire and to engage in exclusionary conduct to prevent the robust development of viable wholesale competition in the provision of special access. It is no wonder that T-Mobile's owners have decided to sell the company to AT&T.

But approving the proposed transaction would only make matters worse. It would weaken competitive providers of special access services in numerous ways, and it would undermine Sprint's ability, as the sole national mobile wireless provider without an incumbent LEC owner, to discipline wireless pricing as the incumbent LECs' exploit their market power in the special access marketplace. Indeed, approving this transaction without addressing the underlying problem of special access would create an anti-competitive market dynamic in which special access competition would be even less likely to develop and competition would suffer in the downstream retail market for mobile wireless services.

NoChokePoints urges the Commission to take a different approach. Rather than accede to increased market concentration, higher prices, less innovation, and harm to consumers, the Commission should establish the necessary preconditions for a competitive mobile wireless market. Because special access is a critical input for all wireless providers, the Commission

should reject the proposed transaction and promptly adopt regulations that prevent incumbent LECs from increasing prices and engaging in exclusionary conduct in the provision of special access. The result would be less concentration, lower prices, more innovation and benefits to consumers in both the wireless and special access markets.

II. DISCUSSION

For almost a decade, purchasers of special access have urged the FCC to adopt regulations that prevent AT&T and other incumbent LECs from abusing their market power in the provision of special access services. Prior to its acquisition by SBC, AT&T itself filed a petition for rulemaking in 2002 demonstrating that the incumbent LECs' profit margins on special access services were exorbitantly high and seeking the adoption of effective regulation to constrain these profit margins.⁴ Commission delay forced AT&T to file with the D.C. Circuit Court of Appeals a petition seeking a writ of mandamus requiring the FCC to rule on the AT&T petition for rulemaking. In response to AT&T's petition, the FCC initiated a rulemaking proceeding in 2005 for the purposes of determining the appropriate means of regulating incumbent LEC special access services.⁵

Six years have now passed since the FCC initiated the special access rulemaking proceeding and the FCC still has failed to take action despite the fact that the FCC itself found that there is no realistic possibility of competition in most areas of the country for the provision of DS1 and DS3 local transmission facilities.⁶ Moreover, an analysis conducted by the GAO in

⁴ See *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (Oct. 15, 2002).

⁵ See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("Special Access NPRM").

⁶ See *Unbundled Access to Network Elements, et al.*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 149, 166 (2005) (Concluding that it is not "economic" or "possible" for a reasonably efficient

2006 demonstrated that the FCC's so-called pricing flexibility regime for special access was flawed. Under that regime, incumbent LEC special access services are deregulated in areas that meet certain proxies for competition based on the FCC's prediction that competition would develop in such areas. But the GAO found that, in the cities it studied, competitors had built facilities to a lower percentage of commercial buildings in areas where, by operation of the pricing flexibility regime, incumbent LECs were no longer subject to price cap regulation than in areas still subject to price cap regulation.⁷ In addition, the GAO found that the incumbent LECs' special access prices were in most cases higher in areas no longer subject to price cap regulation than in areas subject to price cap regulation.⁸

Rather than adopt regulations that effectively restrain incumbent LECs from exploiting their market power, the Commission permitted incumbent LECs to acquire their largest competitors in the provision of special access services (transactions that were themselves the result of the FCC's failure to regulate special access),⁹ has continued to grant pricing flexibility

competitor to construct DS1 or even a single DS3 loop in the vast majority of wire centers in the U.S.).

⁷ See United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *Telecommunications: 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"). This is unsurprising because the special access pricing flexibility rules are incoherent. See Comments of Time Warner Telecom and One Communications, WC Docket No. 05-25, at 18-21 (Aug. 8, 2007) (describing flaws in the pricing flexibility rules).

⁸ See GAO Report at 13.

⁹ See *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005).

for TDM special access, and has almost entirely deregulated packetized (including Ethernet) and optical special access services.¹⁰

The record in the FCC's special access rulemaking showed that AT&T and other incumbent LECs actually gained market share while maintaining supra-competitive prices in the special access market since the release of the Special Access NPRM in 2005.¹¹ In fact, last year AT&T demonstrated its ability to unilaterally increase special access prices by raising the prices that had been constrained by a condition on the approval of the AT&T/BellSouth merger back to the levels that had applied before the merger conditions took effect.¹² Moreover, the record in the special access proceeding also shows that pricing flexibility has enabled incumbent LECs to condition the availability of discounts off of extraordinarily high monthly special access rates on compliance with terms that have the effect of preventing the development of a competitive wholesale market for special access.¹³

¹⁰ See *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (eliminating dominant carrier regulation of Qwest packetized and optical special access services); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (eliminating dominant carrier regulation of AT&T packetized and optical special access services); FCC News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (rel Mar. 20, 2006) (announcing elimination of Title II economic regulation of Verizon packetized and optical special access services by operation of law).

¹¹ See, e.g., Letter from Christopher J. Wright & A. Richard Metzger, Jr., Counsel for Sprint Next Corp., to Marlene H. Dortch, WC Docket No. 05-25, at 2 (Oct. 5, 2007) ("Sprint Oct. 5, 2007 Letter").

¹² See, e.g., Ameritech Services, Tariff FCC No. 2, Description and Justification, Transmittal No. 1617, at 1 (May 18, 2007) (stating that AT&T would increase its special access prices on June 30, 2010).

¹³ See Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, WC Docket No. 05-25, at 8-11 (June 14, 2010).

The incumbent LECs' high prices and exclusionary conduct have caused serious harm throughout the U.S. economy, including in the mobile wireless market. As T-Mobile has itself explained, mobile wireless carriers that are not affiliated with incumbent LECs must purchase incumbent LEC special access as an input into downstream retail mobile wireless service offerings.¹⁴ The high prices charged by incumbent LECs for special access create a serious problem for competitors like T-Mobile. As T-Mobile explained, “[b]ecause of their dominance in the special access marketplace, [AT&T and Verizon] have both the ability and the incentive to discriminate against competitors in favor of their wireless affiliates.”¹⁵ Such conduct results in a huge differential in the special access input costs of mobile wireless carriers that are unaffiliated with incumbent LECs and the special access input costs of mobile wireless carriers like AT&T that are owned by incumbent LECs. Moreover, the cost of special access constitutes a significant portion of the costs of running a mobile wireless network.¹⁶ The FCC’s failure to regulate special access prices has thus placed mobile wireless carriers at a significant competitive disadvantage as compared to AT&T and Verizon.

¹⁴ See Reply Comments of T-Mobile USA, Inc, WC Docket No. 05-25, RM-10593, at 2 (Feb. 24, 2010); Comments of T-Mobile USA, Inc., WC Docket No. 05-25, RM-10593, at 6 (Aug. 8, 2007) (“T-Mobile Comments”) (explaining that incumbent LECs are T-Mobile’s “sole source” of special access service at virtually all of its cell sites). Sprint has had a similar experience. See Sprint Oct. 5, 2007 Letter at 3. (“Sprint Nextel purchases nearly 98 percent of its DS1 connections from incumbent LECs in the top 50 Metropolitan Statistical Areas”).

¹⁵ See T-Mobile Comments at 5. AT&T and Verizon can either “underprice special access services to their wireless affiliates” or “overprice to their wireless affiliates (which would have no ‘bottom line’ impact to the consolidated entity) in order to support a supposedly ‘non-discriminatory’ inflated price to non-affiliated competitors such as T-Mobile.” *Id.* at n.10.

¹⁶ As Sprint has explained, “Special access constitutes, on average, approximately 33% of the monthly cost of operating a cell site. The pricing of special access, thus, has a direct and material effect on the retail prices paid by CMRS consumers.” Comments of Sprint Nextel Corp., WC Docket No. 05-25, at 33 (Aug. 8, 2007).

This competitive disadvantage will only become more extreme for T-Mobile (and Sprint) in the future as mobile wireless providers become increasingly reliant on Ethernet for backhaul. Ethernet is so essential to the deployment of 4G services that AT&T is only labeling a market as one in which 4G is available if AT&T has Ethernet backhaul facilities deployed to its cell sites in the market.¹⁷ As explained above, Ethernet is subject to essentially no regulation at all. It follows that AT&T will be almost entirely free of regulatory constraints to increase the price, slow roll the provisioning and otherwise degrade the quality of an essential input for 4G services in the future.

But approving the transaction would make a bad situation even worse. In particular, as business customers increasingly demand that their service providers offer integrated wireline and wireless service offerings, it will be increasingly important that providers offer both. The merger will eliminate T-Mobile as an independent provider of wholesale mobile wireless services, leaving only three potential national wholesale providers. Removing T-Mobile from the market would create an effective duopoly of Verizon and AT&T who will control approximately 80% of the wireless market and result in higher wholesale prices.

The transaction would also eliminate T-Mobile as an actual/potential purchaser of special access services from non-incumbent LEC wholesale providers of special access. After the transaction, the AT&T incumbent LEC would provide T-Mobile with backhaul services throughout the vast AT&T incumbent LEC territory. By diminishing the addressable market for independent wholesale providers of special access, the transaction would further reduce the likelihood that competition in the wholesale special access market would develop in the future.

¹⁷ See Kevin Fitchard, *AT&T LTE To Go Live in 5 Cities This Summer, Connected Planet*, May 25, 2011, available at <http://connectedplanetonline.com/3g4g/news/AT-T-LTE-to-go-live-in-5-cities-this-summer-0525/>.

In the longer term, the transaction would create a deleterious marketplace dynamic. Sprint would be the sole remaining national mobile wireless provider that is not affiliated with an incumbent LEC, and absent special access regulation, Sprint will continue to face the same competitive disadvantage *vis a vis* AT&T and Verizon that has undermined T-Mobile's viability as an independent competitor. This will compromise Sprint's ability to provide a competitive check against duopoly pricing by AT&T and Verizon in the mobile wireless market. Moreover, the harms to the wholesale market for mobile wireless services and the attendant harms to special access competition would be further exacerbated.

The ultimate result of these consequences will be retail mobile wireless markets dominated by the two vertically integrated Bell operating companies, rather than by competition among four or more competitors. The great irony is that the less competitive markets will yield calls for more comprehensive regulation of retail services. Thus, by failing to establish targeted regulation of special access services so that competing wireless providers can obtain critical inputs at a reasonable and non-discriminatory price, the FCC will effectively invite more complex, costly, and inefficient regulation of entire suites of retail services.

Thus, the proposed transaction presents the FCC with a critical choice between (a) further consolidation and diminished competition in the wireless market, less competition in the special access market, and deteriorating conditions for competition in the long run, and (b) preservation of multiple independent competitors, economically efficient pricing for critical wireless service inputs, competition-driven innovation and investment, and lower retail prices. NoChokePoints urges the Commission to choose the path of competition over consolidation.

To achieve this outcome, the FCC should reject the proposed transaction and promptly establish the preconditions for robust competition in the mobile wireless market by establishing

regulations that ensure that incumbent LEC TDM, packetized (including Ethernet), and OCn special access services are available on just and reasonable terms and conditions and that competition among non-incumbent LEC wholesalers of special access can develop.

III. CONCLUSION

For the aforementioned reasons, the Commission should deny the application for approval of the proposed transaction. The Commission should also promptly adopt regulations requiring the incumbent LECs to offer special access on rates, terms and conditions that enable firms that are not affiliated with incumbent LECs to compete in the downstream retail markets for wireless services.

Respectfully submitted,

/s/ _____

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May 31, 2011

CERTIFICATE OF SERVICE

I, Maura Colleton Corbett, do hereby certify that on this day, May 31, 2011, I caused to be served a true and correct copy of the foregoing Petition to Deny of the NoChokePoints Coalition to the following:

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