

REDACTED - FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Applications of AT&T Inc. and)
Deutsche Telekom AG) WT Docket No. 11-65
)
for Consent to the Transfer of Control of)
Commission Licenses and Authorizations)
Pursuant to Sections 214 and 310(d) of the)
Communications Act)

**PETITION OF
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.
TO CONDITION CONSENT, OR DENY APPLICATION**

Mark A. Stachiw
General Counsel, Secretary, and Vice
Chairman
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082

Mary McDermott
Senior Vice President-Legal and Regulatory
Affairs
NTELOS
401 Spring Lane
Waynesboro, VA 22980

Jean L. Kiddoo
Patrick J. Whittle
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, DC 20006-1806
Tel: (202) 373-6034
Fax: (202) 373-6001
Email: jean.kiddoo@bingham.com
patrick.whittle@bingham.com

Counsel for MetroPCS Communications, Inc.
and NTELOS Inc.

Dated: May 31, 2011

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	2
II.	INTEREST OF PETITIONERS	8
	A. MetroPCS.....	8
	B. NTELOS	12
III.	STANDARD OF REVIEW	14
IV.	THE RELEVANT MARKET FOR COMMISSION CONSIDERATION IS NATIONAL, NOT LOCAL	16
	A. The market for wireless services has changed from being local to being national in scope	17
	B. AT&T has argued in the past that the wireless market is national	20
	C. AT&T's claims that local competition solves the public interest issues with the merger are false.....	21
	D. The Commission must, however, focus locally in assessing the effects of the merger on spectrum concentration.....	22
V.	THE MERGER CANNOT BE JUSTIFIED BY THE PUBLIC INTEREST BENEFITS CLAIMED BY AT&T	24
	A. AT&T's claims that it has unique needs for additional spectrum should be rejected.....	24
	B. AT&T's claims that it is an efficient user of spectrum must be rejected	26
	C. AT&T's gambit to use the merger to perpetuate inefficient uses of spectrum must be rejected.....	30
	D. The proposed merger also will concentrate spectrum holdings dramatically.....	33
	E. The merger must be conditioned on significant spectrum divestitures of usable paired spectrum to remaining non-national carriers	34
	F. AT&T's problems are of AT&T's making and the merger is not the solution.....	36
	G. Innovation will suffer if the merger is approved without conditions.....	38
	H. AT&T's request for a government bailout should be rejected	40
	I. The merger is not required for rural buildout, and AT&T's use of it is merely a regulatory pay-off	41
	J. The merger will not result in greater consumer choice.....	44
	K. Without effective competition, consumers may not benefit from the anticipated efficiencies resulting from the merger.....	45
	L. The current spectrum screen should not be altered.....	46

REDACTED - FOR PUBLIC INSPECTION

VI. THIS TRANSACTION WILL RESULT IN THE SOLIDIFICATION OF A DUOPOLY IN THIS MARKET AND THEREBY SIGNIFICANTLY INCREASE THE RISKS OF UNILATERAL ANTICOMPETITIVE EFFECTS AND COORDINATED INTERACTION 47

A. The dangers of unilateral effects 47

B. The dangers of coordinated Interaction 49

C. The proposed merger will concentrate the wireless market dramatically 50

D. AT&T’s market dominance goes beyond end users services to essential competitive inputs 53

1. AT&T and Verizon dominate essential backhaul markets 54

2. AT&T and Verizon control essential roaming services and the merger will remove T-Mobile, which has more reasonable roaming policies 54

E. The merger will silence a strong critic of the wireless duopoly 57

F. AT&T and Verizon have strong buy-side market power which allows them to enter into exclusive handset arrangements and discourage interoperability 58

G. The spectrum concentration resulting from the merger will increase barriers to entry 61

VII. IF THE MERGER PROCEEDS AS PROPOSED, THE WIRELESS DUOPOLISTS WILL BE ABLE TO EXERCISE CONTROL OVER BOTH THE RETAIL AND WHOLESALE MARKETS 62

A. Once established, the duopoly will be irreversible 62

B. AT&T and Verizon will be able to control the retail market 63

VIII. IF THE MERGER IS APPROVED, THE COMMISSION MUST RE-EXAMINE ITS REGULATORY STRUCTURE FOR WIRELESS 66

IX. THE COMMISSION DECIDES TO APPROVE THE MERGER IT MUST DO SO ONLY AFTER IMPOSING CERTAIN CONDITIONS 67

A. The Commission must require significant spectrum divestitures to existing carriers 68

B. The Commission must impose meaningful roaming obligations 71

C. The Commission must disallow exclusive handset arrangements 73

X. CONCLUSION 75

REDACTED - FOR PUBLIC INSPECTION

SUMMARY

The proposed merger of the second largest national broadband carrier with the fourth largest national broadband wireless carrier would create the largest national broadband wireless carrier in the United States based on number of subscribers. The transaction upsets the delicate competitive equilibrium that has evolved in the broadband wireless industry and must be approved with substantial conditions, or in the alternative denied. This careful balance has led to lower prices, more competitive choices for consumers, and substantial innovation. The proposed acquisition would be transformative and game-changing for the wireless industry, the telecommunications industry as a whole and consumers and would cement, once and for all, the consolidation of the wireless industry into a true and unequivocal duopoly comprising of AT&T on the one hand and Verizon on the other. The rise of this duopoly is confirmed by any conceivable measure of market concentration: subscribers, revenue, profits, EBITDA and spectrum holdings, all will be highly concentrated in AT&T's and Verizon's hands following the merger. If the transaction proceeds without conditions that foster and preserve competition, the proposed merger will allow these duopolists to enjoy dominant market power, raise prices and profits to supracompetitive levels, strangle competition, squeeze out smaller competitors, stifle innovation, all of which will severely harm consumers.

AT&T's arguments in favor of the merger are eerily reminiscent of the early-twentieth century arguments that telecommunications is a natural monopoly – which sustained AT&T in its historical domination for many decades. In the previous days of market domination by AT&T, there was a regulatory regime in place for dominant carriers that was designed to constrain excessive prices and the extraction of monopoly rents. Now, after thirty years of evolution, wireless regulation has been reduced in favor of robust competition to control

REDACTED - FOR PUBLIC INSPECTION

anticompetitive behavior. It would be both sadly ironic and quite dangerous to allow market dominance to be reestablished in the wireless markets, which has rapidly become the most important sector of the telecommunications industry. If the merger is not adequately conditioned, the duopolists' market power will not only increase the prices that consumers ultimately pay for services, but also reduce the availability of, and dampen innovation in, wireless products and services.

AT&T holds out mid-tier, rural and regional carriers, such as Petitioners, as "mavericks" which will keep the wireless market fiercely competitive even in a post-AT&T/T-Mobile merger world. Flattered as Petitioners are to be so characterized by AT&T, in order for the Petitioners to be able to compete effectively, the Commission must impose strict remedial conditions on the proposed merger. Without such conditions, the Petitioners will have inadequate spectrum resources and tools to effectively cause the combined AT&T/T-Mobile to pass through the proposed merger synergies to its customers and to continue to innovate.

The relevant market for Commission consideration is national, not local. Sales, advertising, marketing, pricing, equipment offerings and procurement, and management are all carried out nationally. Moreover, any carrier who wishes to compete even for end-users based in a specific region must offer those end users nationwide service, including roaming where necessary. Regional competitors thus cannot hope to constrain the behavior of the nationwide carriers without conditions that allow them to offer nationwide service on terms that place them on a level playing field with the large national carriers. Accordingly, the Commission must be cognizant of the fact that the merger will result in a virtual duopoly, with only two healthy nationwide carriers remaining, and the only way to constrain it is to condition the merger with substantial conditions.

REDACTED - FOR PUBLIC INSPECTION

The merger cannot be justified by the public interest benefits claimed by AT&T.

AT&T's "spectrum crunch" is a problem entirely of its own making, caused by years of bad decisions and clinging to inefficient technologies. AT&T can solve this problem the same way its mid-tier, regional and rural competitors have, by using ever more innovative techniques to squeeze greater and greater efficiencies out of existing spectrum. These competitors are in many cases more than twice as efficient in using spectrum as AT&T, and AT&T should emulate them, rather than be allowed to amass ever-increasing hoards of spectrum in an effort to overwhelm them. It is not for the Commission to bail out AT&T by permitting it to squander ever-increasing amounts of spectrum, such as by acquiring T-Mobile. This would simply disincite AT&T from finding the efficiencies that its competitors have been forced to find by their relative paucity of spectrum. Rather, the Commission must find ways to equitably balance spectrum among all competitors, especially the mid-tier, regional and rural carriers, which AT&T holds out as its greatest competitive threat going forward.

As for the other "benefits" alleged by AT&T, each and every one of them can be accomplished by AT&T alone and does not require the merger of AT&T with T-Mobile. AT&T could invest the \$39 billion it proposes to spend on buying T-Mobile in a much more constructive manner, by building out infrastructure to enable the more efficient use of spectrum and expand rural coverage, by accelerating the swap-out of legacy handsets which retard the growth of efficiency, by rolling out new pricing plans, and by speeding up its deployment of 4G LTE service. All of these are benefits AT&T claims from the merger, yet all, while valuable, are objectives AT&T could equally well accomplish in the same way its competitors have – by innovating and investing. Moreover, if the merger is permitted without adequate conditions, the economic benefits of all these measures would flow solely to AT&T, since competition would

REDACTED - FOR PUBLIC INSPECTION

not be sufficient to force AT&T to pass them on to consumers. Since these would not be public benefits, and are not merger-dependent in any event, they cannot properly be counted in the plus column for this merger.

The post-merger duopolists would not only have market power in the sale of service to consumers, they would also have a stranglehold on essential inputs need by their competitors, especially roaming, backhaul, spectrum, and handsets. Without conditions to address these issues, their direct control over the first three would allow them to compromise their competitors' ability to competitive service at competitive prices. Their buying power in the handset market would allow them to dictate to manufacturers exclusive deals denying state-of-the-art devices to smaller competitors. Indeed, by imposing conditions of non-interoperability on manufacturers, and, indirectly, by dwarfing their competitors' scope and size, the duopolists post-merger will be able ultimately to deny their competitors' *any* handsets that work with their services.

All of this shows that the merger will cause grievous injury, not benefit to the public interest unless adequately conditioned to protect against these harms. The merger can only be approved, if at all, with the following conditions at a minimum:

- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;
- Roaming obligations which would allow carriers which do not have the benefit of national spectrum to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and

REDACTED - FOR PUBLIC INSPECTION

- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment.

These conditions are directly tied to the harms that consumers will suffer from the increase in market dominance resulting from the proposed merger. Without these conditions, the merger must be disallowed.

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Applications of AT&T Inc. and)
Deutsche Telekom AG) WT Docket No. 11-65
)
for Consent to the Transfer of Control of)
Commission Licenses and Authorizations)
Pursuant to Sections 214 and 310(d) of the)
Communications Act)

PETITION OF
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.
TO CONDITION CONSENT, OR DENY APPLICATION

MetroPCS Communications, Inc. (“MetroPCS”)¹ and NTELOS Inc. (“NTELOS”)² (collectively, “Petitioners”), by their undersigned counsel and pursuant to the Federal Communications Commission’s (“Commission”) April 28, 2011 *Public Notice* in the above-captioned proceeding, hereby respectfully petition the Commission to condition the above-captioned applications (the “Applications”) of AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“DT”) (collectively, the “Applicants”) with conditions that would ameliorate the significant harm to the public interest that the merger would otherwise cause and in the alternative, if such conditions are not imposed, to deny the Applications. In support, the Petitioners respectfully show as follows:

¹ For purposes of this Petition, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its Commission-licensed subsidiaries.

² For purposes of this Petition, the term “NTELOS” refers to NTELOS Inc. and all of its Commission-licensed subsidiaries.

REDACTED - FOR PUBLIC INSPECTION

I. INTRODUCTION AND SUMMARY

The Applicants seek the Commission's consent to transfer control of various common carrier and radio licenses and authorizations held by T-Mobile USA and various of its affiliates (collectively, "T-Mobile") in connection with a proposed acquisition of T-Mobile USA by AT&T. As this proposed acquisition evidences, AT&T finds itself with \$39 billion to spend. But AT&T does not propose to use this money to buy additional spectrum from the FCC at auction (which would reduce the deficit),³ to invest in new infrastructure, or – even more importantly in this era of greater and greater demands on spectrum – to invest in technologies which will allow it to more efficiently use its vast store of existing spectrum. Rather than investing in spectrum capacity or technology, AT&T instead proposes to spend \$39 billion to buy up one of its only three remaining genuine nationwide competitors – and its *only* nationwide competitor in GSM.⁴

The proposed acquisition would be transformative and game-changing for consumer, the wireless industry, and the telecommunications industry as a whole. The proposed merger of the second largest national broadband carrier with the fourth largest national broadband wireless carrier would create the largest national broadband wireless carrier in the United States based on number of subscribers. The transaction upsets the delicate competitive equilibrium that has evolved in the broadband wireless industry.⁵ This competitive equilibrium has led to lower prices, more competitive choices for consumers, and substantial innovation.

³ Indeed, AT&T has been a supporter of reallocating 700 MHz D Block CMRS spectrum from CMRS to public safety.

⁴ See *Applications of AT&T Inc., Deutsche Telekom AG and T-Mobile, Inc.*, WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations (filed April 21, 2011) ("*Public Interest Statement*").

⁵ This competitive equilibrium has been under attack for some time. However, this transaction, rather than incrementally changing the balance, wholesale destroys the balance and requires radical changes in order to reestablish some competitive balance.

REDACTED - FOR PUBLIC INSPECTION

This transaction is not comparable in scope or importance to any wireless acquisition approved in the past few years, and the potential impact on the industry and consumers is much more harmful. Unlike prior approved mergers which primarily expanded the acquiring party's footprint, this transaction would not expand AT&T's geographic footprint, but rather would give AT&T considerably more customers, spectrum and infrastructure in each existing market. While the prior transactions marked an alarming trend toward higher market concentration, the AT&T/T-Mobile merger -- by taking out a *national* competitor and the only other national carrier using GSM -- would cement, once and for all, the consolidation of the wireless industry into a true and unequivocal duopoly comprised of AT&T on the one hand and Verizon on the other. And, the negative consequences of the merger do not end there: it could very well lead ultimately to even further consolidation in the industry.⁶

In its inquiry into whether the public interest will be served by the proposed merger, one important focus of the Commission must be on whether consumers will be better off after the proposed merger than before. But this test cannot be met by AT&T's bare unfounded claims that it would enjoy increased economies of scale and scope or lower costs by virtue of the merger, or that competition will flourish and innovation will continue unabated. The determinative question is whether the post-merger market will remain sufficiently competitive after the proposed merger that consumers will reap the benefits of increased efficiency and continued innovation. If the transaction proceeds without conditions that foster and preserve competition, the proposed merger will allow these duopolists to severely harm consumers, enjoy dominant market power,

⁶ Daniel Hesse, the Chairman of Sprint, has mentioned that this acquisition could lead to the acquisition of Sprint by Verizon Wireless. *See e.g.*, Written Testimony of Daniel R. Hesse, Chief Executive Officer, Sprint Nextel Corporation, Re: Proposed AT&T/T-Mobile Merger Before The Senate Judiciary Committee, Subcommittee On Antitrust, Competition Policy and Consumer Rights, May 11, 2011 at 5 ("*Hesse Testimony*"); Sara Jerone, "AT&T, Sprint spar on merger," *The Hill*, April 17, 2011 (quoting Dan Hesse as saying, "We just cannot let this happen. If the proposed AT&T and T-Mobile merger is allowed to go forward, it can also push the wireless industry from competition to duopoly.").

REDACTED - FOR PUBLIC INSPECTION

raise prices and profits to supracompetitive levels, strangle competition, squeeze out smaller competitors, and stifle innovation.

In essence, this transaction represents the end-game of industry consolidation that began in the middle of the last decade. It rolls back the competitive tide that began to rise with the original divestiture of AT&T and progressed with the growth of the wireless industry beyond the duopoly of the original cellular allocation. Step by step, AT&T and Verizon have been busy reassembling the old duopoly. Approving this transaction without the appropriate conditions would place the keystone on their preferred market structure and will have profound implications for the future of the wireless industry and the US economy as a whole.

The Petitioners agree with the Commission – and, for that matter, with AT&T² – that broadband data service is the future for the wireless industry and that today there is insufficient spectrum for the projected growth in demand for broadband data service in the immediate future. The industry faces a serious timing problem – there is insufficient additional spectrum *currently* available to support the ongoing explosion of wireless data. The Commission, however, cannot allow this spectrum scarcity challenge to justify a transaction which will allow two dominant competitors to effectively corner the market with an oversupply of the essential necessary raw materials – spectrum – when more efficient competitors also need spectrum to compete effectively as well. Carriers who secure spectrum first will be in a position to build unassailable beachheads against those who acquire spectrum later when the Commission finally is able to make it available. The public interest is not served when carriers are able to build dominant spectrum positions and aggregate spectrum holdings that foreclose effective competition. The only true solution is for the Commission to impose conditions that re-establish the competitive

² *Public Interest Statement* at 1, 54.

REDACTED - FOR PUBLIC INSPECTION

equilibrium and allow other proven carriers to remain effective competitors against the merged AT&T/T-Mobile. In the absence of such conditions, the Commission should deny the merger.

AT&T's arguments in favor of the merger are nothing more than a series of variations on the theme "bigger is better." Indeed, AT&T's arguments are eerily reminiscent of the early-twentieth century arguments that telecommunications is a natural monopoly – which sustained AT&T in its historical domination for many decades.⁸ In those days, at least, there was a regulatory regime in place for dominant carriers that was designed to constrain excessive prices and the extraction of monopoly rents by AT&T. Now, after thirty years of evolution, wireless regulation has been reduced in favor of robust competition to control anticompetitive behavior. It would be both sadly ironic and quite dangerous to allow market dominance to be reestablished in the wireless markets, which has rapidly become the most important sector of the telecommunications industry.⁹ This market power affects not only the price that consumers ultimately pay for services, but also the availability of and innovation in products and services. The market power of the largest two carriers already has led, for example, to a situation where certain highly sought after products – such as the iPhone – are available only to customers of the largest two carriers.¹⁰ And the merger will only increase the Big 2's ability to create these situations. Without appropriate conditions, the competitors AT&T identifies who will remain after the merger will be unable to cause the combined AT&T/T-Mobile to pass along to

⁸ Arguably, a monopoly can be the most efficient business structure, but, without competition, the government must assume the role of actively regulating the monopolist to ensure that the innovation continues and cost efficiencies are passed along to the consumer – something from which this Commission recently has shied away.

⁹ The Commission needs to recognize that if it approves the proposed transaction it should examine whether it is now appropriate to start differentiating in its regulation of the industry between the dominant carriers – AT&T and Verizon Wireless – and the rest of the industry.

¹⁰ In response to requests by thousands of its customers, both NTELOS and MetroPCS have persistently attempted over the course of many months to open a dialogue to obtain the ability to offer the iPhone, but to no avail.

REDACTED - FOR PUBLIC INSPECTION

consumers the efficiencies and additional innovation that AT&T claims will result from the merger. Further, reduced competition will break the virtuous cycle of innovation and development that has propelled the wireless market to its current state.

Notwithstanding AT&T's arguments to the contrary, Sprint is not an effective competitor against this duopoly as it will have barely a quarter of the subscribers of the two largest carriers combined and merely a pittance in terms of free cash flow.¹¹ If the merger of AT&T/T-Mobile goes through without imposing conditions that address the resulting market power and spectrum concentration of the combined AT&T/T-Mobile, then consumers across this nation will suffer as competition withers.

Ultimately, there are only two possible solutions: condition the merger in a manner that creates an environment where competition can flourish or, if these conditions are not imposed, disapprove the proposed merger. If the Commission decides to move forward with the proposed merger, the Commission *must* do so only under a framework of conditions that adequately address the competition issues. This will allow competitors such as the Petitioners to effectively compete with the combined AT&T/T-Mobile so that consumers get the benefits of competition – lower prices, increased innovation, and choice. If the Commission chooses to proceed, it cannot take a business as usual approach where the only conditions imposed are those offered up by the acquiring party, which only affect the margins of the transaction.

So what are the conditions that at minimum must be imposed to ensure that consumers get the benefit of continued competition, innovation and choice? The Petitioners propose that the merger can only be approved, if at all, with the following minimum conditions:

¹¹ Credit Suisse, "Tremendous Upside Potential; Too Many Unknowns; We Remain on the Sidelines Pending Clarity on Funding and Strategic Relationships," at 113 (Feb. 6, 2011) ("*Credit Suisse Report*").

REDACTED - FOR PUBLIC INSPECTION

- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;
- Roaming obligations which would allow carriers which do not have the benefit of national spectrum to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and
- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively.

These conditions are common sense and are directly tied to the harms that consumers will suffer from the increase in market dominance resulting from the proposed merger. Without these conditions, consumers will suffer because the remaining carriers in the market will not be able to mount any effective competition to the combined AT&T/T-Mobile and innovation will suffer.

The Petitioners are flattered by the extent to which AT&T holds out mid-tier, rural and regional carriers, such as Petitioners, as “mavericks” and fierce competitors that will keep the wireless market competitive even in a post-AT&T/T-Mobile merger world. AT&T seeks to soothe concerns over its rising dominance by saying that companies like MetroPCS, for example, are “mavericks” which “will continue winning consumers with their low-priced service plans after this transaction closes.”¹² The Petitioners are indeed “mavericks” and fierce competitors and plan to compete vigorously against the combined AT&T/T-Mobile. However, in order for the Petitioners to be “mavericks” and able to compete effectively, the Commission must, at a minimum, impose the proposed conditions on the proposed merger to allow this to happen. Without such conditions, the Petitioners will have inadequate spectrum resources and tools to

¹² *Public Interest Statement* at 13, 12; see also *id.* at 82-85.

REDACTED - FOR PUBLIC INSPECTION

effectively cause the combined AT&T/T-Mobile to pass through the proposed merger synergies to its customers and to continue to innovate.¹³ Since AT&T claims to place enormous importance on carriers such as the Petitioners serving as a continuing competitive check on the combined AT&T/T-Mobile, it is essential that the concerns, needs and comments of Petitioners be given great weight.

II. INTEREST OF PETITIONERS

Both Petitioners have a substantial interest in maintaining the competitiveness of the wireless market.

A. MetroPCS

MetroPCS is the fifth largest facilities based carrier in the United States, based on number of subscribers served. MetroPCS has been an active participant throughout many Commission proceedings dealing with wireless, roaming and spectrum issues. MetroPCS owns or has access to licenses covering a population of approximately 149 million people in 14 of the 25 largest metropolitan areas in the United States. As of March 31, 2011, MetroPCS had approximately 8.9 million subscribers and it currently offers service in the New York, Boston, Miami, Orlando, Tampa, Atlanta, Dallas, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, and Sacramento metropolitan areas.

¹³ For example, the combined AT&T/T-Mobile will have in excess of 183 MHz on average in each of MetroPCS' major metropolitan areas whereas MetroPCS on the other hand has only 22 MHz on average – or only about one-eighth AT&T's post-merger holdings – across its major metropolitan areas. As a result, MetroPCS is constrained in its ability to offer certain services – such as laptop cards, tablets and connected devices – and will therefore not be an effective competitive check against the combined AT&T/T-Mobile unless additional spectrum becomes available to MetroPCS. Similarly, in the most populous markets serviced by NTELOS in the Norfolk-Virginia Beach BTA, NTELOS has 20 MHz and AT&T/T-Mobile will have over 120 MHz. The only way to effectively ensure that competition continues after the consummation of the merger is to require AT&T to divest adequate spectrum to those carriers in each market which now have inadequate spectrum, so that those competitors will be able to provide an effective check on *all* of the services the combined AT&T/T-Mobile plans to offer.

REDACTED - FOR PUBLIC INSPECTION

MetroPCS' services are a flexible, low-cost alternative to the plans offered by the large national wireless carriers. MetroPCS' services allow customers to place unlimited calls from within MetroPCS' service area and to receive unlimited calls from any area while in MetroPCS' service area, under simple, affordable, and flexible service plans starting as low as \$40 per month. For an additional \$5 to \$20 per month, MetroPCS' customers may select a service plan that offers additional services, such as unlimited voicemail, caller ID, call waiting, enhanced directory assistance, unlimited text messaging, unlimited mobile Internet browsing, push e-mail, mobile instant messaging, picture and multimedia messaging, GPS-based friend-finding and the ability to place unlimited long distance calls from within MetroPCS' service area to any number in the continental United States and to a number of international locations. For additional fees, MetroPCS provides unlimited international long distance, unlimited international text messaging, ring tones, ring back tones, downloads, games and content applications, location services, unlimited directory assistance and other value added services. In January 2010, MetroPCS introduced a new family of service plans that include all applicable taxes and regulatory fees and offer nationwide voice, text and web access services on an unlimited basis for a low flat rate beginning as low as \$40 per month.

Existing and future data services offered by MetroPCS – over a network which is already 4G LTE-based in its core areas – include:

- Unlimited mobile Internet access, including web browsing and streaming audio and video;
- Services provided through the Binary Runtime Environment for Wireless, (or “BREW”), Blackberry, Windows and Android platforms, such as ringtones, ringback tones, games, applications and content;

REDACTED - FOR PUBLIC INSPECTION

- Unlimited text messaging services (domestic and international), which allow the customer to send and receive alphanumeric messages that the handset can receive, store and display on demand;
- Location based and social networking services;
- Multimedia messaging services, which allow the customer to send and receive messages containing photographs; and
- Push e-mail.

MetroPCS has been and remains an innovator in the wireless industry and an efficient user of spectrum. For example:

- MetroPCS pioneered the 'no long term contract unlimited service for a flat fee' business model;
- In 2002, MetroPCS was the first carrier in the United States to launch an all 1xRTT CDMA network;
- MetroPCS pioneered the widespread use of six sector cell sites to more effectively utilize existing spectrum;
- MetroPCS pioneered the use of distributed antenna systems ("DAS") as a method of constructing networks over significant portion of metropolitan areas, including constructing the entire core of Philadelphia using DAS;
- MetroPCS was the first carrier in North America to deploy commercial 4G LTE services; and
- MetroPCS was the first provider worldwide to launch a combined CDMA/4G LTE handset, the Samsung Craft, and the first worldwide to launch a combined CDMA/4G LTE Android handset, the Samsung Galaxy Indulge.

Finally, MetroPCS is a highly efficient user of spectrum. Based on third party information, MetroPCS, in all but four of its markets, is the most efficient user of spectrum.¹⁴

¹⁴ See Table 1 in Section V.B. In San Francisco, MetroPCS is the second most efficient user of spectrum. The spectrum efficiency is determined by dividing the number of subscribers in a metropolitan area by the amount of spectrum held by the carrier in the metropolitan area. AT&T's spectrum includes the proposed acquisition of spectrum by AT&T of Qualcomm spectrum and WCS spectrum. As is demonstrated *infra*, AT&T is among the least efficient user of spectrum and the combined AT&T/T-Mobile will be no better.

REDACTED - FOR PUBLIC INSPECTION

MetroPCS is a relatively new entrant which brings competition to existing markets and also is expanding the market for wireless services by attracting new customers to wireless services. MetroPCS estimates that a significant number of its users are first-time wireless users. Further, because of its pricing approach, the MetroPCS service has become a substitute for landline service for many of its customers. MetroPCS' data indicate that a substantial portion of MetroPCS subscribers use their MetroPCS wireless phone as their primary or exclusive telecommunications service.

Because MetroPCS is a relative newcomer to the wireless market, with fewer financial and other resources than the largest incumbents, MetroPCS has been unable to assemble a nationwide footprint of licenses. In order to compete, MetroPCS must rely upon roaming arrangements with other carriers to be able to provide a competitive nationwide service to its customers.¹⁵ At present, MetroPCS is party to certain automatic roaming agreements which cover broadband voice services and some broadband services, but do not include 4G LTE, and in many cases the rates for broadband data from those carriers willing to offer it are at rates that make offering 3G data prohibitive.¹⁶

Because the proposed merger will have severe consequences for the state of competition in the wholesale wireless marketplace and will allow AT&T, together with its new co-duopolist

¹⁵ The Commission has recognized this reality in *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶¶ 3, 27-28 (2007) (“*Automatic Roaming Order*”), *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 15 (2011) (“*Data Roaming Order*”), and *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81, WT Docket No. 09-66, ¶ 125 (2010) (“*Wireless Competition Fourteenth Report*”).

¹⁶ The specific rates, terms and conditions of MetroPCS' roaming contracts are confidential, and MetroPCS is therefore unable to provide any specificity with respect to them in this Petition, even under seal, absent consent of the other party. The Commission should request that AT&T and T-Mobile turn over all of its roaming agreements to the Commission so the Commission can examine the differences between each carrier's approaches to roaming and the potential impact on competition in the future. See also nn. 36, 106.

REDACTED - FOR PUBLIC INSPECTION

Verizon, to dominate the retail market, MetroPCS and its customers stand to be substantially adversely impacted by the proposed acquisition.

B. NTELOS

NTELOS holds PCS licenses to operate in twenty-nine basic trading areas (“BTAs”) clustered in Virginia and West Virginia with a total licensed population of approximately 8.8 million. NTELOS has built out its network in twenty of those BTAs and covers 5.2 million POPs. As of March 31, 2011, NTELOS’ wireless retail business had approximately 429,500 NTELOS retail subscribers, representing a 7.3% penetration of its total covered population. As of the same date, 1,093 (approximately 83%) of NTELOS’ total cell sites contain Evolution Data Optimized Revision A (“EVDO”) technology, which provides NTELOS with the technical ability to support high-speed mobile wireless data services.

NTELOS began acquiring PCS spectrum in western Virginia and West Virginia in the early 1990s and began operations in Virginia in late 1997, in West Virginia in late 1998, and in eastern Virginia (Richmond, Hampton Roads, Norfolk, Virginia Beach) in 2000. Much of NTELOS’ PCS Spectrum was acquired through the partition of licenses awarded to Primeco (in western Virginia) and from GTE (in West Virginia) in the first broadband PCS auction. Indeed, NTELOS obtained two of the first three partitioned PCS spectrum licenses approved by the Commission. The larger carriers sold their entire PCS spectrum holdings in these markets to NTELOS. It was clear at the time that these carriers were focused on the urban areas and were not interested in building out or serving a more rural geography. NTELOS, by contrast, has been steadily building out mountainous and relatively sparsely populated communities for many years.

In August of 2007, NTELOS announced that it would upgrade virtually its entire network for mobile broadband services using EVDO. In order to accomplish the EVDO upgrade,

REDACTED - FOR PUBLIC INSPECTION

NTELOS replaced the wireless switches in its western Virginia and West Virginia networks, and upgraded existing switches in eastern Virginia, as well as deploying equipment at over 1,000 cell sites. The EVDO deployment has been the largest capital project in the company's history, and has enabled NTELOS to provide mobile broadband services to its customers in nearly all its Virginia and West Virginia markets. EVDO data services are 10 times faster than those available on NTELOS' legacy 2G network – the wireless equivalent of moving from dial-up to DSL.

NTELOS, however, has not rested on its laurels. NTELOS is continuing to make network improvements, particularly within its existing service coverage areas, including network expansion and cell site additions. Additionally, NTELOS is continuing to improve its handset offerings and refine the plans, features and communication it offers to customers. NTELOS is also analyzing its options for taking its network from 3G to 4G and has recognized that, without additional spectrum, 4G will be difficult or impossible for it to offer.

NTELOS offers a wide array of voice and data plans to meet the varying needs of postpaid and prepaid customers. Plans that offer unlimited calling on the NTELOS network are available to any customer. NTELOS also offers national plans to all of its customers. Some of these plans are unlimited, and others feature buckets of daytime, mobile-to-mobile, and night and weekend minutes. NTELOS customers can choose from a variety of added-value features like integrated voicemail and data services such as location based services, text and picture messaging, games, ring-tones, ring-back tones, news, entertainment and hundreds of BREW applications. NTELOS prides itself on being part of the communities it serves, with numerous retail stores in its footprint and local customer care call centers in Waynesboro, Daleville and Covington, Virginia.

REDACTED - FOR PUBLIC INSPECTION

For the same reasons as cited above for MetroPCS, NTELOS and its customers also stand to be substantially adversely impacted by the proposed acquisition.

III. STANDARD OF REVIEW

In deciding whether to grant the Applications, the Commission must determine, pursuant to Sections 214(a) and 310(d) of the Communications Act, “whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.”¹⁷ It is the Applicants who bear the burden of proof that the proposed merger is in the public interest.¹⁸ In making this determination, the Commission must “consider whether [the merger] could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes [and] then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”¹⁹

The key factors in the Commission’s analysis of a merger of this sort are set forth in the Commission’s *Verizon-Alltel Order*. They include:

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. Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.²⁰

The Commission has stressed that its review is broader than the Department of Justice’s review under antitrust laws in that, unlike the DOJ, the Commission “consider[s] whether a

¹⁷ *Verizon Wireless and Atlantis Holdings LLC (Transfer of Control)*, FCC 08-258, 23 FCC Rcd 17444, released: November 10, 2008 (“*Verizon-Alltel Order*”) at ¶ 26 (citations omitted).

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.* (citations omitted).

²⁰ *Id.* at ¶ 27 (citations omitted).

REDACTED - FOR PUBLIC INSPECTION

transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market.”²¹

Particularly important is the awareness that a transaction may have both good and ill consequences, and that these must be weighed against each other: “[C]ombining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.”²² Thus, it is not unusual that merger applicants claim that the merger will enable them to achieve new efficiencies and roll out new products, as Applicants have done here. Indeed, it is virtually impossible to think of a significant merger in this industry in which the applicants did *not* make such claims. But it is vital that the Commission both examine these claims carefully to see how *real* they are, assess carefully the harms to the public interest that the merger threatens, and weigh the negative consequences of any merger against any positive effects and, if appropriate -- which is the case here -- impose merger conditions to address any public interest harms resulting from the merger.

Because the Applicants have not met their burden to clearly show that the benefits of the transaction to the public interest outweigh the harms, the application must be denied *unless* conditions are imposed that would prevent the harms to the public interest that would otherwise arise. As the Commission has stressed: “unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall

²¹ *Id.* at ¶ 28 (citations omitted).

²² *Id.* at ¶ 29 (citations omitted).

public interest benefits.”²³ Thus, if the Commission can find and impose such conditions here, it can permit the merger to go forward.

As Petitioners show below, if approved without conditions, this merger will patently be contrary to the public interest. However, Petitioners believe that the merger can go forward if – but only if – the Commission carefully constructs a set of stringent, enforceable conditions, including at a minimum those set forth in detail below, that are adequate to prevent the merger from causing the harms to the public interest identified in this Petition.

IV. THE RELEVANT MARKET FOR COMMISSION CONSIDERATION IS NATIONAL, NOT LOCAL

In this proceeding, AT&T asserts (contrary to prior positions it has taken) that the market for wireless services is local, not national.²⁴ As an initial matter, focusing on local markets only may lead to inaccurate predictions about the likely effects of the merger. For example, Professor Gavil illustrates the problem as follows:

Consumers purchase major appliances and automobiles locally, but we would not analyze a merger of Whirlpool and General Electric or General Motors and Chrysler solely through local market data. In both examples, the firms are obviously national rivals, as is also obviously the case with AT&T, Verizon, Sprint Nextel and T-Mobile. In such cases, exclusive reliance on local market analysis would ignore too many dimensions of the merger that could impact competition. That is why a formalistic, market definition-driven approach, rather than an effects-driven approach, could lead to inaccurate predictions about the likely effects of the merger.²⁵

²³ *Id.*

²⁴ As is shown *infra* this is a change in position to one that AT&T has historically taken with the Commission. At least one economist has argued that this change in position may be to elicit negotiations on divestitures rather than examine the greater economic impacts of the merger on the market. See Written Testimony of Andrew I. Gavil, Professor, Howard University School of Law, “How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?” presented before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition, and the Internet, May 26, 2011, at 19 (“An illustration of my concern is glaring back at us in AT&T’s insistence that the relevant markets for purposes of evaluating the merger are local. [T]hat strategy may reflect a strategic choice designed to [elicit] a posture of negotiation from the Justice Department and the FCC that would likely lead to divestitures.”) (“*Gavil Testimony*”).

²⁵ *Id.* at 11.

REDACTED - FOR PUBLIC INSPECTION

In effect, AT&T is asking the Commission to consider the effect of this merger on competition (and spectrum concentration) using a market based approach focused solely on a local market-by-market basis rather than nationally.²⁶ Such an approach would miss the many additional effects of the merger on such important matters as spectrum, roaming, backhaul, and handsets. While such a definition of the relevant market might be appropriate when the merger does not include two national carriers, here AT&T and T-Mobile compete in virtually every metropolitan area and offer nationwide services, and so the effect on the market from a consumer perspective must be examined on a national basis.

A. The market for wireless services has changed from being local to being national in scope

The market for wireless services has changed dramatically over the past several years in at least two respects. First, in the past, the national market boasted four substantial nationwide competitors. This merger would disturb that market structure. One of the four is being acquired by the second largest carrier, and another, Sprint, has indicated that the proposed transaction will effectually remove it from the mix as a viable competitor.²⁷ Accordingly, the Commission can no longer afford to focus its attention solely on individual markets when the nationwide competitive equilibrium has been disturbed at its core.

Second, the services being provided by wireless carriers have changed from being predominantly a local or regional services to a national service. Over the last several years, consumer perception has changed. The first hand experience of MetroPCS proves this point. When MetroPCS first started service in 2002, service outside of the local MetroPCS footprint was of only limited interest to MetroPCS customers. In the last several years, however, the

²⁶ *Public Interest Statement* at 72-75.

²⁷ *See supra* n.6.

REDACTED - FOR PUBLIC INSPECTION

ability of MetroPCS to offer nationwide service to its customers has become a major driver of the customer's purchase decision and today MetroPCS only offers its customers nationwide service. NTELOS has also found that nationwide service is "table stakes" in the marketplace and spends a large portion of its advertising and promotional dollars to demonstrate to customers that a regional carrier can meet the need for nationwide service. Clearly, consumers view the relevant market as national, which means that the Commission would be ignoring commercial realities to examine the effects of the merger solely on a local basis. The Commission must assess the effect of the merger on competition *nationwide* – and among other things assess the extent to which, post-merger, the regional and mid-size carriers will still be able to compete effectively nationally.

Though AT&T now claims to the contrary, the national nature of the market from the consumer's perspective must come as no surprise. AT&T, Verizon, Sprint, and – until the merger – T-Mobile (the "Big-4") have spent billions of dollars on national advertising campaigns. It is estimated that AT&T alone spent some \$1.1 *billion* on advertising in 2010, most of it national in scope.²⁸ It is estimated that Verizon, too, spent \$1.1 billion on advertising in 2010.²⁹ These advertising campaigns tout *nationwide* service, and *national* pricing plans. They implement *national* marketing plans. They boast of *nationally* available handsets and infrastructure. If the wireless market were purely local, the expenditure of these funds and efforts would be sheer folly. Further, the Big-4 make all their network technology and handset choices and purchases nationally, have nationwide management structures run from a single location, and deploy capital, financing, human and other resources on a national basis. For example, the iPhone is available in *all* AT&T and Verizon Wireless markets but is not available on *any* Sprint, T-

²⁸ David Broughton, "Sports ad spending roars back," *Sports Business Journal*, May 2, 2011.

²⁹ *Id.*

REDACTED - FOR PUBLIC INSPECTION

Mobile or other systems. Finally, although the Big-4 may give modest latitude to their local management teams in a given metropolitan area, they all offer national service and pricing plans that include service throughout their entire footprint. This hardly bespeaks a local market. The large national carriers also have focused competitive attention on the mid-tier unlimited no contract carriers with national service offerings. For example, the large national carriers have established “flanker” brands which are designed to specifically target the customers of the mid-tier unlimited no contract carriers which offer nationwide service.³⁰ These brands have helped raise the bar so that nationwide service is the only competitive service category.

Further, the Commission must not overlook that the services being sold to consumers are being produced through national networks. Although the services may be sold locally (and local markets may have some flexibility in how such services are marketed and priced locally), the network responsible for creating such services is national. The local-only analysis advocated by AT&T would be akin to a local-only examination of a manufacturing enterprise which manufactures different components of its products in different locales but requires all of the manufacturing units to produce a single product which it sells nationwide. In the wireless industry, national service requires either a national network or a local/regional network with a roaming agreement that allows for national service. If the merger is examined strictly on a local basis, the Commission would miss the most important aspect of what is happening here: that AT&T is removing from the market a national network which produces national services. Thus, the effects of this merger on competition must be examined from a national perspective.

Indeed, the very purpose of this transaction, according to AT&T, is to increase its *national* footprint for broadband data services by promising to deliver broadband service to 97%

³⁰ For example, AT&T offers the “GoPhone,” and Sprint provides the “Boost” phone, which are all pay as you go services.

of Americans. If markets were purely local in character, this increase would be a matter of indifference to AT&T, to consumers and the public interest. So AT&T's insistence that the market is local cannot withstand even the most superficial reading of its Public Interest Statement.

B. AT&T has argued in the past that the wireless market is national

It is not surprising, then, that AT&T and Verizon in prior filings repeatedly have told the Commission that the wireless market is a national one. Starting as early as 2004 in the Cingular merger with AT&T Wireless, AT&T argued that the market was *national* ("the geographic scope of competition in the provision of wireless calling plans should be analyzed as national").³¹ Similarly, in its application to undertake the Centennial merger in 2009, AT&T argued that "the evidence shows that the predominant forces driving competition among wireless carriers operate at the *national* level" and that AT&T develops "its rate plans, features and prices in response to competitive conditions and offerings at the national levels."³²

So why has AT&T purportedly changed its mind? Because AT&T realizes that, if the market is examined now on a national basis, the transaction will properly be viewed as consolidating the second and fourth largest carriers – leaving only three national wireless carriers

³¹ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Transfer of Control of PCS Licenses*, WT Docket No. 02-354, "Description of Transaction, Public Interest Statement and Waiver Project," at 30 (emphasis added and citations omitted) ("*AT&T/Cingular Application*"); see also Declaration of Richard J. Gilbert, to *AT&T/Cingular Application*, at ¶ 52 ("the geographic scope of competition in the provision of mobile wireless call plans should be analyzed as national").

³² *Applications of AT&T Inc. and Centennial Communications Corp. for Transfer of Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket 08-246, "Description of Transaction, Public Interest Showing and Related Demonstrations," at 28-29 (filed Nov. 18, 2008)(emphasis added). Verizon made similar representations during its acquisition of Alltel. See *Application of Verizon Wireless and Atlantis Holdings LLC for Transfer of Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-95, "Public Interest Statement" at 29 ("the wireless business today is increasingly national in scope") and at 31 ("While a national geographic scope has been rejected in certain prior merger proceedings, growing national forces - such as the increasing reliance on national rate plans - argue more and more for redefining how the Commission judges the competitive effects of transactions.").

REDACTED - FOR PUBLIC INSPECTION

(counting Sprint, which, as discussed in greater detail below, cannot materially constrain the market power of the “Big 2”). In the recent past, the Commission has taken comfort in the fact that the number of nationwide competitors is four, not three.³³ With this proposed merger, however, the Commission can no longer take such comfort. Indeed, there may realistically be only two national carriers if this transaction is consummated. Sprint has indicated that it will not be a viable competitor if the proposed merger is consummated.³⁴ The Commission must take seriously the concerns expressed by Sprint regarding the dire competitive effects of the transaction. When a market consolidates from four to three national carriers, one might expect all three remaining carriers to benefit from the resulting oligopoly. Thus, it is no great surprise that Verizon has not lined up in opposition to this merger transaction.³⁵ In contrast, the fact that Sprint is opposed is significant, particularly since it is a publicly-traded company with legal obligations not to make statements that mislead its shareholders. Thus, Sprint can say that the proposed merger will have dire consequences for Sprint only if it believes that to be true.

C. AT&T’s claims that local competition solves the public interest issues with the merger are false.

AT&T seeks to sidestep this loss of competition at the national level by focusing on the competitive prowess of mid-tier, regional carriers and rural carriers, like the Petitioners, which do not have national facilities-based footprints. However, the ability of these carriers to continue to provide effective national competition is limited. First and foremost, these carriers are limited in the spectrum resources that they may have. For example, the combined AT&T/T-Mobile will have on average 183 MHz of spectrum in each of the major metropolitan areas in which

³³ *Verizon-Alltel Order* at ¶ 98.

³⁴ *See supra* n.6.

³⁵ Verizon seems more concerned that this merger may lead to greater regulation of the wireless industry. Verizon’s fears are justified. As discussed *infra*, if the merger is approved, the Commission will need to examine whether further regulation is warranted on the Big 2 carriers.

REDACTED - FOR PUBLIC INSPECTION

MetroPCS operates while MetroPCS on average only has 22 MHz.³⁶ NTELOS has only 20 MHz of spectrum in its Virginia east markets of Richmond, Norfolk, Hampton Roads and Virginia Beach and the average across its region for NTELOS is only 23 MHz. Without an adequate supply of spectrum, carriers like MetroPCS and NTELOS will be unable to compete effectively against the combined AT&T/T-Mobile. The Commission therefore should not allow the proposed merger to proceed without significant divestitures of spectrum to the carriers AT&T identifies as viable competitors who have limited spectrum resources.

Second, as AT&T well knows, smaller carriers can only effectively compete with the combined AT&T/T-Mobile if they are in a position to provide ubiquitous and cost-effective roaming services outside their home areas. But AT&T's actions over the recent past have been purposefully designed to make it impossible for these competitors to offer cost-effective roaming.³⁷ Allowing AT&T to absorb its only technologically compatible nationwide competitor, without stringent roaming conditions allowing competitors to roam on the combined AT&T/T-Mobile system at rates that will allow them to compete effectively, would give AT&T a free hand to further choke off roaming by its non-national competitors.

D. The Commission must, however, focus locally in assessing the effects of the merger on spectrum concentration

The national nature of the wireless market does not mean that the Commission should be unconcerned about those instances in which the merger has a particularly severe anti-competitive impact in a particular market or on inputs necessary for national competition. For example, spectrum cannot be used outside the territory where it is licensed, so concentration issues relating to spectrum should still be examined on a market-by-market, geographic-area-by-geographic-

³⁶ See discussion *infra* at Section IV.B.

³⁷ In addition, Verizon has offered roaming rates with a cost differential of over 1000 times wholesale rates offered to their own mobile virtual network operators.

REDACTED - FOR PUBLIC INSPECTION

area basis as well as on a national level. Since much of the spectrum is licensed on a BTA, CMA, EA or MEA basis, the Commission should consider the effects of the merger on the concentration and nature of spectrum holdings within specific BTAs or CMAs. Such an analysis would allow the Commission sufficient granularity to determine the concentration of spectrum where the spectrum can in fact be used.³⁸ However, this localized analysis must supplement and not supplant analysis of the impact of the proposed merger on the larger national market for wireless services. Focus on local concentration should not blind the Commission to AT&T's ability, post-merger, to dominate the national market. Here, based on an examination just in the metropolitan areas where MetroPCS operates, the proposed merger will result in significant increases in spectrum concentration.³⁹

Indeed, the Commission must determine not only whether the combined entity will have an oversupply of spectrum in any given area, but also whether the spectrum resources of the competing licensees are sufficient to allow robust competition to continue. In the past, the Commission focused predominantly on the amount of spectrum being aggregated by the acquirer.⁴⁰ Here, the approach needs to be different because AT&T itself has pointed to the mid-tier and other carriers as a competitive check on the combined AT&T/T-Mobile. Consequently, to validate AT&T's claim, the Commission must consider the adequacy of the spectrum holdings

³⁸ Petitioners note that there are many local markets where the spectrum concentration are over 145 MHz when taking into consideration WCS and the 700 MHz spectrum being acquired by AT&T from Qualcomm.

³⁹ Exhibit A shows the spectrum holdings of all carriers in the fourteen major MetroPCS metropolitan areas.

⁴⁰ Of course, the spectrum screen is based on an assumption that there would be spectrum for at least four licensees in each market with an adequate amount of spectrum. Here, however, the Commission must go further and update the projection of how much spectrum each licensee must have to be able to effectively compete and to ensure that the right parties get the spectrum. For example, Verizon Wireless getting more as result of the divestiture in a market where Verizon Wireless already holds in excess of 80 MHz would do nothing for the carriers with 20 MHz or less.

by each *remaining* competitor since, if they do not have adequate spectrum, they will be unable to compete effectively on a going forward basis against the combined entity.⁴¹

V. THE MERGER CANNOT BE JUSTIFIED BY THE PUBLIC INTEREST BENEFITS CLAIMED BY AT&T

In its Public Interest Statement, AT&T cites a variety of purported public interest benefits of the proposed merger. There are fatal problems with each of these supposed benefits. But, as a starting point, the Petitioners must resoundingly agree with the statement of Public Knowledge that

It is particularly striking that every single public interest benefit AT&T has claimed as a result of the merger can be accomplished without removing a competitor. Expansion of 4G coverage to overlap their current 2G and 3G network coverage of 97 percent and improving their network capacity are already possible and therefore are not merger-specific benefits.⁴²

Thus, most of AT&T's supposed Public Interest Statement can simply be thrown out as irrelevant, and is certainly far from sufficient to outweigh the massive harm to the public interest that will result if the merger proceeds without conditions that address the problems arising from the merger.

A. AT&T's claims that it has unique needs for additional spectrum should be rejected

Perhaps most specious of all is AT&T's argument regarding its supposedly unique need to amass more spectrum to better serve its customers. Everyone knows that the industry as a whole needs more spectrum over the next decade. The proper role for the Commission to play is

⁴¹ For example, MetroPCS is unable to offer broadband data service to laptop cards, tablets and connected devices with the spectrum that it has in its metropolitan areas. Accordingly, if the Commission expects MetroPCS to act as a competitive check on the combined AT&T/T-Mobile post merger, it must see that MetroPCS has adequate additional spectrum. Getting this spectrum in several years at auction is not sufficient since delay would allow the combined AT&T/T-Mobile to establish an unassailable beachhead in these services.

⁴² Testimony of Gigi B. Sohn, President, Public Knowledge, Before the U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Hearing: "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" at 2-3, May 11, 2011 (citations omitted) ("*Sohn Testimony*").

REDACTED - FOR PUBLIC INSPECTION

to identify spectrum to repurpose for commercial mobile wireless use and to adopt licensing rules that will result in an equitable pro-competitive assignment of the spectrum to carriers. Allowing the most voracious and well-funded competitor simply to gobble up other competitors and to thereby corner the market with an oversupply of spectrum, will not solve the problem, it will exacerbate it. Absent meaningful divestitures, no new spectrum would be made available to others by the merger, and AT&T's claims that the merger would result in greater efficiency do nothing but beg the question as to whether the purported efficiency gains are worth the market harm.

In fact, no credible case has been made by AT&T that enhancing its spectrum holdings from approximately 100 MHz on average to over 170 MHz on average measurably improves network efficiency. Professor Gavil sums the issue up succinctly as follows:

The argument invites two immediate questions: (1) how can two capacity constrained firms increase their capacity through merger? In other words, how can $0 + 0 = 1$? And (2) why can't AT&T utilize the substantial cash it is using to acquire T-Mobile to instead make these improvements on its own?⁴³

Accordingly, the Commission must view with skepticism unfounded claims made by AT&T that somehow by amassing additional spectrum it will be able to be more efficient.

Taking AT&T's claims to their logical conclusion, a monopoly would be most efficient user of spectrum and provide the most benefit to consumers.⁴⁴ But more than a century of antitrust enforcement and three decades of Commission efforts to increase competition in this industry are ample proof that this country's policies are based on the well-founded belief that over-concentration is bad, not good, for consumers. Further, allowing AT&T to gain such a

⁴³ *Gavil Testimony* at 17.

⁴⁴ Such an argument ignores that monopolies tend to stifle innovation. For example, a customer of the monopoly AT&T in the 1950s and 1960s could have any color phone they wanted so long as it was black and rotary dial. That is neither choice nor innovation.

REDACTED - FOR PUBLIC INSPECTION

massive advantage over its competitors in spectrum holdings will allow AT&T to create a beachhead that may be unassailable when the Commission finally is able to identify and license additional spectrum.

As AT&T's presentation itself shows, much of the capacity "constraints" it faces are due to the grossly inefficient use it makes of spectrum today. For example, a considerable number of its customers are currently on non-state-of-the-art GSM, GPRS and EDGE networks. Indeed, AT&T states that these customers number in the "tens of millions."⁴⁵ But rather than find ways to migrate these customers to newer and much more efficient technologies, AT&T seeks to put off the day of reckoning by merely throwing more spectrum at the problem. The efficiency of these AT&T services, measured in Bps/Hz, is minute compared to the efficiency of advanced technologies such as HSPA rel. 7, WiMAX or LTE.⁴⁶ Because of its inexcusable lethargy in rolling out advanced services, AT&T's average efficiency of usage today in many markets is less than half that of MetroPCS. Yet, AT&T argues that giving it more spectrum is the panacea for its efficiency problems! To the contrary, the way for AT&T to serve the public interest and to provide better services to its customers is to invest in more infrastructure and technology to make more efficient use of its own existing spectrum, not to amass monopolistic amounts of other people's spectrum.

B. AT&T's claims that it is an efficient user of spectrum must be rejected

Interestingly, AT&T claims that it has the least amount of spectrum holdings per subscriber and thereby is either starved and needs additional spectrum or conversely is the most efficient user of spectrum. For example, AT&T claims that MetroPCS has 3.3 MHz holdings per million subscribers while AT&T has 0.86 MHz holdings per million subscribers and that the

⁴⁵ *Public Interest Statement* at 22.

⁴⁶ *Credit Suisse Report* at 38.

REDACTED - FOR PUBLIC INSPECTION

combined AT&T/T-Mobile would have 1.02 MHz holdings per million subscribers.⁴⁷ This is total obfuscation; the real story is vastly different.

The following table demonstrates that, rather than AT&T being the most spectrum starved and the most efficient user of spectrum, it is MetroPCS who holds that distinction in its major metropolitan areas:

[*** BEGIN CONFIDENTIAL***]

Table 1: Spectrum Holdings in MHz Below 2.5 GHz (including WCS)

	MetroPCS (MHz)	MetroPCS Subs/MHz (000s)	AT&T (MHz)	AT&T Subs/MHz (000s)	T Mobile (MHz)	T Mobile Subs/MHz (000s)	Combined AT & T Mo (MHz)	AT&T & T Mo Combined Subs/MHz (000s)
Atlanta	20		136		70		206	
Boston	22		126		50		176	
Dallas/ Ft. Worth	30		136		50		186	
Detroit	20		104		60		164	
Jacksonville	20		131		60		191	
Las Vegas	20		121		50		171	
Los Angeles	20		141		50		191	
Miami	30		129		60		189	
New York City	20		103		50		153	
Orlando	20		131		73		204	
Philadelphia	10		113		50		163	
Sacramento	30		136		45		181	
San Francisco	30		141		70		211	
Tampa	20		116		65		181	

Based on Nielsen data March 2011 and FCC records as of March 31, 2011, AT&T spectrum includes WCS and QCOM 200 MHz.

[***END CONFIDENTIAL***]

⁴⁷ AT&T + T-Mobile: World Class Platform for the Future of Mobile Broadband, at 9, http://www.att.com/Common/about_us/pdf/INV_PRES_3-21-11_FINAL.pdf.

REDACTED - FOR PUBLIC INSPECTION

This analysis shows that MetroPCS has significantly more subscribers per MHz of spectrum than AT&T, with the exception of only three metropolitan areas – Boston, New York and Las Vegas – and in these three metropolitan areas MetroPCS has only recently started operations so that slightly lower yield per MHz is to be expected. Why is this the appropriate measure as opposed to the measure being touted by AT&T? First, it is not entirely clear how AT&T derives its figures and they may be based on outdated subscriber counts. Second, it is not clear how much spectrum AT&T is including within its numerator – such as AT&T’s sizable holdings of WCS spectrum and the Qualcomm spectrum. Third, dividing subscribers by spectrum is more akin to other efficiency measures ordinarily used in the telecommunications industry, such as the ratio of subscribers to interconnection trunks. Based on this analysis, it is clear that MetroPCS is more efficient – in several cases two to three times more efficient -- than AT&T and the combined AT&T/T-Mobile. Exhibit B includes a complete analysis which shows that, in most of MetroPCS’ major metropolitan areas, MetroPCS is the most efficient (and has the least spectrum to grow) than all of the other carriers in its major metropolitan areas.

MetroPCS is not the only one who believes that AT&T is not fully utilizing its spectrum. Other analysts have also concluded that AT&T is underutilizing its spectrum capacity.⁴⁸ Striking evidence for this conclusion resides in the fact that Verizon holds almost the same amount of spectrum as AT&T, but has publically stated that it has enough spectrum for the near term.⁴⁹

⁴⁸ See, e.g., Dave Burstein, “70-90% Of AT&T Spectrum Capacity Unused,” *Fast Net News*, Mar. 21, 2011, <http://www.fastnews.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused> (last viewed on Apr. 1, 2011).

⁴⁹ See Charles B. Goldfarb, “The Proposed AT&T/T-Mobile Merger: Would it Create a Virtuous or a Vicious Cycle?” *Congressional Research Service*, May 10, 2011, at 14.

REDACTED - FOR PUBLIC INSPECTION

This is despite the fact that Verizon's smartphone subscribers use more data capacity than AT&T's.⁵⁰

Apportioning spectrum more equitably among market participants is essential to assure that consumers enjoy the purported efficiencies and cost savings promised by the Applicant and to ensure that innovation continues. The Big 2 already have a pronounced advantage in the amount of spectrum available to them. Through this merger, AT&T hopes to gain an even more disproportionate advantage and will have the ability to use it to dominate the industry. Like a steel mill that needs iron ore to produce steel, wireless carriers need spectrum in order to offer their services. But if the Big 2 are allowed to corner the market on this scarce resource to build an oversupply available only to them, then they will be able to engage in anticompetitive and anti-consumer practices to their hearts' content, with no fear of market discipline from other carriers.

If T-Mobile remains in existence, AT&T would not have access to T-Mobile's spectrum – but this would make it no worse off than any other carrier, and still much better off than all but Verizon. Like other carriers, AT&T would need to improve its efficiency by investing in infrastructure and technology to squeeze more and more use out of a limited supply of spectrum. Instead, the merger would alter the dynamic and allow AT&T and Verizon to hold the vast majority of the raw material needed by all carriers. In this scenario, technological developments would have to be driven by the carriers which face the greatest resource constraints, the mid-tier, regional and rural carriers. For example, 4G might not be a reality without the current competitive environment. MetroPCS, not AT&T or Verizon, pioneered 4G LTE and was the

⁵⁰ See "Validas Reports Verizon Wireless Smartphones Consume More Data Than iPhones," *PR Newswire*, July 26, 2010, available at <http://www.prnewswire.com/news-releases/validas-reports-verizon-wireless-smartphones-consume-more-data-than-iphones-99234019.html>.

first to deploy 4G LTE – substantially ahead of AT&T, which is just now planning to deploy 4G LTE in a limited number of metropolitan areas.⁵¹ But because, as discussed previously and below, the Big 2 carriers would have both the power and the incentive post-merger to quash this innovation, it may well not occur at all in the future if this merger is approved without adequate conditions.

As AT&T itself notes, operators can achieve much lower unit costs if they have greater amounts of spectrum because of channel pooling efficiencies, spare capacity pooling, the spreading of control channels over more non-control channels, and the like.⁵² However, mid-tier, regional and rural operators, which have been shut out of recent new spectrum allocations, may be less and less able to compete on a cost basis with a merged AT&T/T-Mobile and thus without conditions there is a substantial likelihood the efficiencies will not be passed through to customers. While AT&T claims that it will achieve greater efficiency because it will gain spectrum from the T-Mobile deal, in fact, the opposite is true: their relative track records so far indicate that this spectrum would do far more good in the hands of mid-tier, regional and rural carriers than AT&T, and that handing it over to AT&T would allow AT&T to continue to perpetuate its inefficient use of spectrum.

C. AT&T's gambit to use the merger to perpetuate inefficient uses of spectrum must be rejected

AT&T seeks to use its acquisition of the T-Mobile spectrum as a substitute for investment and true innovation – to allow it to deploy higher speed and greater capacity ahead of the competition without maximizing use of its already vast spectrum resources. This would

⁵¹ See e.g. Douglas McIntyre, "AT&T's 4G Battle Plan: 15 Major Cities in 2011," *Daily Finance*, May 26, 2011, <http://www.dailyfinance.com/2011/05/26/atandts-4g-battle-plan-15-major-cities-in-2011/>.

⁵² *Public Interest Statement* at 8-9.

REDACTED - FOR PUBLIC INSPECTION

allow AT&T to build a beachhead and gain a head start in these services which will make it impossible for more innovative, but less well-funded, competitors to assail this beachhead or catch up with this head start. Even if carriers such as the Petitioners are able to get the spectrum they need in a few years AT&T would be so far ahead by then that these competitive carriers will not be able to catch up – assuming that they will still exist to actually receive the spectrum.

AT&T complains that it is foreclosed from achieving these efficiencies because it is serving “tens of millions” of legacy GSM and UMTS handsets. Perversely, AT&T predicts that the merger will *increase* use of these inefficient handsets by making them usable in a wider area.⁵³ But AT&T has the resources to incent users to migrate to more flexible handsets and thereby achieve efficiencies as great or greater than those already achieved by mid-tier, rural and regional carriers such as the Petitioners. It could, for example, follow the lead of MetroPCS, which has adopted aggressive, consumer-friendly pricing and designed attractive feature rich 4G LTE data plans in order to incent customers to move from its 1xRTT service to its LTE service. If MetroPCS can effectively turn over and replace handsets in more than one-half of its entire subscriber base in one year, surely AT&T can do the same. Moreover, the fact that MetroPCS already is achieving two times more efficiency than AT&T – with considerably less spectrum – demonstrates that AT&T could double the utilization of its existing spectrum in many markets merely through investments in technology and infrastructure. This outcome would be far more beneficial to the public interest than simply ceding more spectrum to AT&T to allow it to perpetuate obsolete technologies. AT&T now states that it plans to pursue just such a handset migration strategy following the merger, but the Commission should ask itself whether AT&T should undertake such activity first and whether approving the merger is necessary to promote

⁵³ *Id.* at 43-44.

this migration.⁵⁴ To the contrary, it appears likely that AT&T's incentives for prompt migration will evaporate when the deal is approved, with the result that the implementation at advanced technology will actually slow if the transaction closes.

Because of Petitioners' relatively smaller spectrum resources, they have had to use technology – rather than larger piles of spectrum – to gain efficiencies. For example, MetroPCS has deployed 6-sector cells on a wide spread basis, while the rest of the industry is still largely tied to 3-sector cells. MetroPCS has successfully deployed DAS in core outdoor metropolitan areas – such as Philadelphia – to increase spectrum utilization. AT&T in its Petition has downplayed DAS as a solution, arguing that DAS is really only good for indoor deployments and for limited area deployments.⁵⁵ However, DAS offers substantial capacity improvements over existing macro cell deployments. DAS allows a carrier to initially deploy sites that are simulcast together. As capacity needs increase, the carrier can increase capacity by first making each DAS node a separate site and then, when further capacity increases are necessary, going to three or six sectors. This is how MetroPCS has been able to serve Philadelphia on CDMA and 4G LTE with just 10 MHz of combined spectrum. AT&T has also identified the costs of developing cell sites as an important impediment to adding capacity, but DAS provides a solution to this need as well. DAS networks allow quicker and easier deployment since in many instances the carrier can avoid having to obtain site by site approval from local municipalities. Nothing prevents AT&T from enjoying success from DAS similar to that of MetroPCS, yet it has not done so.

Similarly, MetroPCS was the first to deploy 4G LTE – substantially ahead of AT&T which is only now planning to deploy 4G LTE. AT&T claims spectrum constraints have slowed

⁵⁴ *Id.* at 22-25.

⁵⁵ *Id.* at 48.

it down, yet MetroPCS faces much worse constraints, yet has innovated in this area faster than AT&T.

D. The proposed merger also will concentrate spectrum holdings dramatically

This merger will also dramatically increase concentration in the wireless industry by another very important measure -- spectrum. The importance of considering the combined spectrum holdings of merged carriers has been a consistent focus of the Commission and resulted in the development of the spectrum screen. The combined spectrum holdings of AT&T/T-Mobile and Verizon after this merger would dwarf the spectrum holdings of Petitioners -- whom AT&T holds up as the carriers who will act as the most significant competitive check on the combined AT&T/T-Mobile. For example, absent spectrum divestitures, post-merger, AT&T would have an average of 183 MHz of spectrum in the 14 MetroPCS major metropolitan areas -- nearly nine times MetroPCS' average of 22 MHz. Attachment A hereto shows the effect of the merger on spectrum holdings below 2.3 GHz in MetroPCS' 14 markets in three regions. As can readily be seen, in all three of the regions, Northeast, Southeast and Northwest, the combined post-merger holdings of AT&T and Verizon would dwarf those of the other major providers in those markets. Indeed, only in Verizon's traditional home region, the Northeast, are even Verizon's holdings in these markets as high as two-thirds those of the post-merger AT&T, and elsewhere, AT&T has more than double Verizon's holdings. On average, the post-merger holdings of the five shown carriers in these regions stack up as follows:

Provider	Northeast	Southeast	Southwest	Overall
AT&T/T-Mobile	153.5	188.2	180	168.2
Verizon	103	92	72.4	81

REDACTED - FOR PUBLIC INSPECTION

Sprint	57.5	45.6	53.6	51.9
MetroPCS	18	22	26	22.3

Note: Based on licensed spectrum from Commission records and on spectrum holdings below 2.5 GHz.

In short, if the merger were allowed to proceed, AT&T would have more than twice the spectrum holdings of Verizon in these markets, over three times those of Sprint, and nearly eight times those of MetroPCS.⁵⁶

This concentration of spectrum is particularly important because – as AT&T itself boasts – its aggregation of spectrum allows it to offer more and a greater variety of broadband data services at lower cost than if it had less spectrum.⁵⁷ What AT&T conveniently ignores, however, is that this same analysis holds for its competitors with less spectrum. Indeed, as the spectrum disparity grows, the competitors with less spectrum become less and less able to compete for certain data customers – the fastest growing and most spectrum intensive segment of the wireless market – because their costs will not be decreasing as quickly as the reduction of prices and therefore they may not be able to compete for whole segments of mobile broadband data customers, such as laptop cards, tablets and connected devices⁵⁸ – and thus will not be able to act as the competitive check that AT&T claims they will be.

E. The merger must be conditioned on significant spectrum divestitures of usable paired spectrum to remaining non-national carriers

⁵⁶ Unfortunately, certain spectrum allocation decisions of the Commission have exacerbated these spectrum disparities. For example, MetroPCS repeatedly expressed concern prior to the 700 MHz auction that the licensing rules which included large spectrum blocks, large license areas and combinatorial bidding – were unfairly swayed in favor of the nationwide carriers. The auction results, which were dominated by AT&T and Verizon, confirmed that MetroPCS was right.

⁵⁷ *Public Interest Statement* at 25.

⁵⁸ Without such spectrum, it is also unlikely that the carriers with less spectrum would act as a competitive check on wireline broadband services as well since such services typically will require even more spectrum than that required to compete with mobile broadband services.

REDACTED - FOR PUBLIC INSPECTION

AT&T posits, and Petitioners agree, that the amount of spectrum to a large measure dictates the cost (to the carrier) of service; additional spectrum properly deployed can allow a carrier to be more efficient. But AT&T will not pass any cost savings it enjoys along to consumers in the form of lower prices unless there is effective competition. The cost to consumers of uploading or downloading a megabyte of data has dropped precipitously in the last several years and is projected to continue to drop.⁵⁹ This drop will require carriers to continue to reduce their costs to transmit a megabyte of data in order to be able to continue to effectively compete. The Commission has properly recognized that the industry faces a serious spectrum crunch, and is actively trying to reallocate an additional 500 MHz of commercial broadband spectrum for the industry.⁶⁰ The only saving grace is that today, all carriers are starved for spectrum and face common challenges that incent them, each in their own circumstances, to find innovative efficiencies while meeting the never-ceasing consumer demand for more and better services. But this transaction will disturb this relative equilibrium and provide one competitor with more than enough spectrum while the government struggles to locate, reallocate and auction additional spectrum for the remaining non-national carriers, who will remain deprived of the spectrum they need *now* to effectively compete in the newest services, and also to vie long term with a combined AT&T/T-Mobile.⁶¹ To maintain the existing equilibrium among competitors, it would be necessary to assure that *all* competitors receive proportionate amounts of additional spectrum. As the graph below shows, this would be required to avoid AT&T obtaining a huge head start over the rest of the industry. At the same time, AT&T and Verizon will have fewer

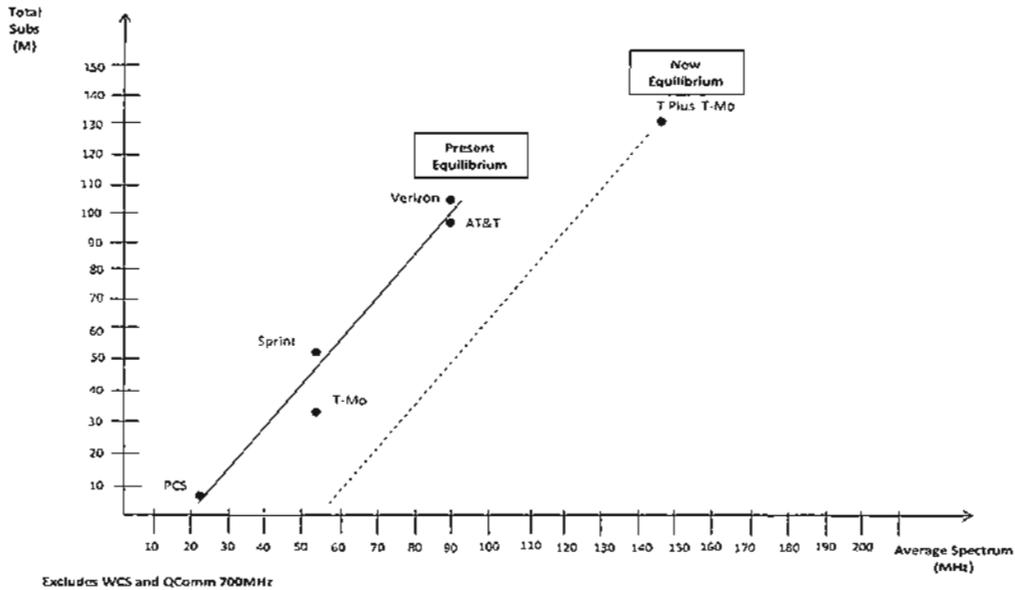
⁵⁹ *Credit Suisse Report* at 9.

⁶⁰ *See Connecting America: The National Broadband Plan*, Section 5.4 Making More Spectrum Available Within the Next 10 Years (rel. March 16, 2010).

⁶¹ *See discussion infra* Section IX.A.

incentives to compete and innovate aggressively as the competitive threat from smaller carriers diminishes over time.

Competitive Equilibrium Based on Spectrum Concentration



F. AT&T’s problems are of AT&T’s making and the merger is not the solution

Much of AT&T’s current self-described spectrum crunch has arisen for two reasons. First, AT&T has clung (and acquiesced in “tens of millions” of customers clinging) to legacy technologies that are far less efficient than today’s state of the art, and are rapidly becoming obsolete. Second, AT&T has not invested in infrastructure as quickly or in the same amount as other carriers.

In its Petition, AT&T admits that it has tens of millions of subscribers on technologies that are much less efficient than its own most efficient technology.⁶² AT&T of course would argue that the solution cannot be to require its customers to have service terminated. The

⁶² Public Interest Statement at 22.

REDACTED - FOR PUBLIC INSPECTION

Petitioner agree. However, that is not the only solution. For example, AT&T could subsidize its customers upgrading to more efficient technology, which could very well relieve the capacity problems that AT&T argues it faces. If MetroPCS can upgrade almost half of its entire subscriber base in one year, surely AT&T with its vastly greater resources could subsidize the upgrade of its subscribers on legacy technologies to more efficient devices. AT&T could also incent its customers to upgrade on their own by giving rate plan discounts and other incentives for customer to upgrade to HSPA+. MetroPCS, for example, has established a \$40 4G LTE rate plan for exactly that reason – to encourage its existing 1xRTT CDMA users to migrate to 4G LTE. Surely AT&T can do the same.

Second, to a large extent, AT&T's problems stem from its own lack of investment. Some analysts have concluded that, notwithstanding the widely publicized iPhone launch, AT&T has only increased its capital expenditures by 1% while at the same time Verizon has increased its capital expenditures by 10%.⁶³ So would an additional increase of 9% of its capital budget solve the problems identified by AT&T? It is not clear, but since AT&T has eschewed infrastructure investments and technology improvements, such as 6-sector cells and DAS, the Commission should not put its thumb on the competitive balance in favor of AT&T.

Perversely, the additional spectrum AT&T seeks to gain from T-Mobile would *lessen* the pressure on AT&T to update its services and migrate users to more efficient technologies. And, because of AT&T's huge market share – and its corresponding clout with manufacturers – its delay in broadly implementing state-of-the-art technology will slow 4G adoption rates and prevent the costs of 4G equipment from declining as rapidly (due to reduced volume) as they otherwise would. AT&T has been slow to upgrade to 4G LTE for the very same reasons that it

⁶³ See Charles G. Goldfarb, "The Proposed AT&T/T-Mobile Merger: Would it Create a Virtuous or a Vicious Cycle?" *Congressional Research Service*, May 10, 2011, at 15.

wants to acquire T-Mobile. AT&T does not want to retire its HSPA+ assets or pay for refarming. But these are problems of AT&T's own making. AT&T should not have invested in a non-upgradable technology, or it should, like any competitive business, accept the consequences of rapid technological change. Verizon Wireless and MetroPCS began deploying 4G LTE last year, but AT&T is only now claiming that it plans to roll out a limited number of markets on 4G LTE late this year.⁶⁴ This is a precursor of what will happen if AT&T is allowed to acquire T-Mobile and AT&T is not forced to divest spectrum to the remaining non-national carriers.

MetroPCS and Verizon have put competitive pressure on AT&T to deploy 4G LTE. Without additional spectrum MetroPCS will not be able to serve this role in the future. Thus, while at the margin and in the short run the merger might make AT&T's own use of spectrum marginally more efficient, in the bigger picture, it will only postpone the day of reckoning for AT&T and thereby delay the widespread introduction of cost-effective innovative efficiencies into the wireless market as a whole.

G. Innovation will suffer if the merger is approved without conditions

If the proposed merger is approved without conditions, such as those proposed by the Petitioners, innovation will suffer as well, since the Big 2 carriers have often brought up the rear of major technological developments. For example, it was T-Mobile, not AT&T or Verizon, that pioneered Android. Indeed, even the introduction of the vaunted iPhone shows that it is often in AT&T's interest to stifle, rather than foster, innovation. As Public Knowledge President Gigi Sohn put it, in recent testimony before the Senate Judiciary Committee:

During negotiations with AT&T, Apple had to consistently fight with AT&T over what innovative features would be allowed. Such features include how and when

⁶⁴ See *supra* n.6.

REDACTED - FOR PUBLIC INSPECTION

YouTube would function on its network, video calling (which is allowed in Europe and Asia as well as on T-Mobile, but not on AT&T), and tethering the device.⁶⁵

If Apple – the world’s largest technology company by market capitalization,⁶⁶ and certainly one of its most influential – encountered such stout resistance to innovation and openness from AT&T, imagine the problems that smaller and less powerful handset manufacturers will have negotiating with AT&T and Verizon post-merger.⁶⁷ It is a certainty that innovation in handsets and other equipment will suffer if AT&T and T-Mobile merge.

These known, identifiable concerns are all the more troubling in light of the fact that some negative consequences of the merger are not even knowable. For example, some pro-competitive events may simply never happen if the merger is allowed to go through. Concentration of buying power for infrastructure could easily cause product and innovation stagnation. Infrastructure manufacturers might not develop beneficial products that they might otherwise have developed, either because they are not being pressed by a smaller competitor (like T-Mobile) or because they are unable to arouse advance interest in the Big 2. The history of the wireline equipment market is instructive here. The wireline equipment marketplace blossomed after the passage and implementation of the Telecommunications Act of 1996 with the rise of the CLECs; once the CLECs had crested and mostly disappeared as a major competitive force, wireline equipment innovation has now slowed drastically.

The Commission should expect the same outcome in the wireless market if this merger is allowed to proceed without conditions, such as those proposed by Petitioners, that allow the

⁶⁵ *Sohn Testimony* at 14.

⁶⁶ *Value Line*, “The 30 Largest Market Capitalizations - March 11, 2011,” <http://www.valueline.com/Stocks/Screen.aspx?id=10494>.

⁶⁷ Verizon reportedly passed on the chance to be the exclusive distributor of the Apple iPhone because it did not approve of the financial terms Apple was seeking. Some of the terms that Verizon refused included allowing Apple to share in monthly fees, allowing Apple to determine how and where iPhones could be sold, and allowing Apple to continue a relationship with iPhone customers. See Leslie Cauley, “Verizon Rejected Apple iPhone Deal,” *USA Today*, Jan. 29, 2007.

REDACTED - FOR PUBLIC INSPECTION

remaining carriers to act as an innovative check on the Big 2. AT&T and Verizon have not driven innovation – on the contrary, in many instances they have adopted innovative technologies only when competitors got there first and threatened to make them obsolete. For instance, the prospects of 4G would still be remote but for Clearwire’s and Sprint’s forcing the issue with their deployment of WiMAX.⁶⁸ Similarly, Verizon might not have accelerated its 4G deployment plans but for MetroPCS first deploying 4G LTE in key markets. Indeed, the Commission might want to explore whether it was Verizon’s or MetroPCS’ launch of 4G LTE service which has now awakened AT&T from its 4G slumber. Since the next great innovation or application in wireless may come out of garages in Silicon Valley, the Commission must ensure that sufficient competition and choice exist as a market for such products and applications to allow innovation to blossom. Otherwise, the Commission can and should expect that innovation will slow as the Big-2 carriers reach the duopoly they are seeking.

H. AT&T’s request for a government bailout should be rejected

AT&T essentially is asking the Commission for a huge government bailout, but in the form of spectrum rather than money. AT&T repeatedly has made poor choices on how it has invested its already sizable wireless earnings. Rather than invest in technologies, such as six sector cells, DAS and 4G LTE, AT&T has chosen to buy spectrum. Now, AT&T wants the Commission to rescue it from its poor choices and allow it to undertake a merger which would have anticompetitive effects. As Ms. Sohn of Public Knowledge points out:

AT&T has been reported to have ‘only increased wireless capital expenditures by one percent in 2009 compared with an increase in capital spending from Verizon Wireless by about 10 percent. ... Put simply, AT&T has not invested aggressively enough and has instead put its capital into acquiring existing and potential competitors making the

⁶⁸ In the long run, however, because the propagation characteristics of its above-2.5 GHz spectrum make it much more costly to deploy and provide services over this spectrum than the Big 2’s “beachfront spectrum,” Clearwire is unlikely as it is presently constituted to pose a serious threat to the Big 2.

capacity issues the company will face in the near future a self-inflicted wound. Eliminating T-Mobile as a competitor will hardly cure this lack of foresight but rather will simply reward AT&T for its failings. Raising prices, reducing competition, and reducing innovation hardly seem worthy trade-offs to help AT&T avoid the inevitable result of customers voting with their feet.⁶⁹

AT&T repeatedly makes the claim that it will be able to roll out LTE more quickly following the merger.⁷⁰ But AT&T could use the same \$39 billion it proposes to spend on T-Mobile to accelerate the roll out of LTE using its current spectrum. To be sure, this latter approach would require AT&T to be more innovative and efficient on its own, but unlike the merger it would be pro-competitive and pro-innovation. AT&T has all the financial and spectrum resources needed to increase LTE deployment to 97 percent of the U.S. population without T-Mobile. Indeed, AT&T admits in the Public Interest statement that its decision to build-out LTE to 80% of the population pre-transaction was a “business” decision, not a decision predicated on a lack of spectrum or other resources.⁷¹

I. The merger is not required for rural buildout, and AT&T’s use of it is merely a regulatory pay-off

Now that it has the need to gain regulatory favor, AT&T trumpets that it will commit to building out 4G in rural areas following the merger. This offered regulatory payoff, however, is no substitute for vigorous competition. Even if AT&T follows through on this “plan,” and doesn’t end up citing “unforeseen circumstances” or seeking endless delays and waivers, the lack of meaningful competition post-merger will mean that the development and deployment of “5G” and subsequent generations of technology will be slowed drastically if not foreclosed.

Remember that, when AT&T was a monopoly, it had the concept for cellular phone service on

⁶⁹ *Sohn Testimony* at 16-17.

⁷⁰ *Public Interest Statement* at 11.

⁷¹ *Id.* at 55 (“AT&T’s current (pre-merger) plans call for deployment of LTE to approximately 80 percent of the U.S. population but no more. The remaining 20 percent of the population generally lives in less populated areas, including rural and smaller communities, where economies of scale and density are very low and per-customer costs are very high.”).

REDACTED - FOR PUBLIC INSPECTION

its drawing board for *thirty-five years* before the first cell was operational, notwithstanding that, as events showed, there was a huge pent-up demand for reliable, cost-effective mobile wireless service.²² Remember too that AT&T long distance was the preferred repository for the emerging cellular technology when the Department of Justice broke up the Ma Bell monopoly because cellular service providers, like long distance providers, required access to the local loop. Yet AT&T wasn't interested in cellular then. AT&T has since become a dominant player in the wireless space only by acquiring wireless assets, which it could have acquired on the ground floor, from non-wireline carriers (*e.g.*, McCaw Communications) and LECs (*e.g.*, Cingular). The return of the wireless duopoly will mean a return to the same stagnant backward-looking state of affairs that existed in the early 1980s.

Even apart from the doubt cast on this "promise" by its track record, AT&T's argument that it needs additional spectrum to sustain its rural build out promises is particularly thin. The large amount of spectrum that AT&T holds in the 700 MHz and 850 MHz cellular bands is considerably better suited to covering rural POPS than the PCS and AWS spectrum held by T-Mobile. Indeed, the reason that companies such as T-Mobile and Sprint have considerably less rural coverage today than AT&T and Verizon is that the spectrum they hold is not as well-suited to large scale rural deployments. The difference in coverage is dramatic.²³ Thus it is far less cost-effective to use the T-Mobile spectrum for rural buildout than the spectrum AT&T already holds. Further, one of the current initiatives of the Commission is to repurpose some of the

²² "The development of commercial cellular systems did not occur rapidly -- almost 36 years passed between the initial elucidation of the cellular concept at Bell Labs in 1947 and the debut of the first commercial systems in Chicago and Washington/Baltimore in 1983." SRI International, *The Role of NSF's Support of Engineering in Enabling Technological Innovation Phase II*, prepared for The National Science Foundation, 1998 at Chapter 4, available at <http://www.sri.com/policy/csted/reports/sandt/techin2/chp4.html>.

²³ See Exhibit C, *Credit Suisse Report* at 45.

REDACTED - FOR PUBLIC INSPECTION

Universal Service Funds to establish a Mobility Fund to fund rural deployment.⁷⁴ Therefore, there is no need for the Commission to accept the competitive harm that comes from an AT&T/T-Mobile merger in order to get rural deployment.

Given this uncomfortable fact, AT&T has not adequately explained its contention that acquisition of T-Mobile's PCS and AWS spectrum will allow AT&T to more rapidly or effectively build-out in rural areas. Rather, this promise seems to be nothing more than a blandishment which plays to the Commission's goal of rural coverage.

Experience shows that the Commission must take with a grain of salt any promises that the merger will result in greater rural buildout. This promise sounds eerily like the argument (but in reverse) that AT&T (then Southwestern Bell) made to the government to get its 1999 merger with Ameritech approved. In that merger, AT&T committed to buildout wireline facilities in the top 30 markets outside of its area (called the "national-local" strategy).⁷⁵ By many accounts, though AT&T would insist that it technically complied with the merger condition, this plan was a failure and resulted in AT&T basically operating a single switch in many of these markets –not effectively providing competition to the incumbent local exchange carriers, such as BellSouth, outside of its home area as the condition was intended to ensure.⁷⁶ AT&T did not really compete outside its home market areas until its purchase of BellSouth a few years later – and then only through yet another merger. The lesson is that the Commission

⁷⁴ See *Universal Service Reform, Mobility Fund*, Notice of Proposed Rulemaking, WT Docket No. 10-208 (Oct. 14, 2010).

⁷⁵ The condition was as follows: "The SBC/Ameritech Out-of-Territory Entities shall provide local service, as described in Subparagraph c of this Section, in 30 markets in which SBC/Ameritech currently does not operate as an incumbent LEC (the "out-of-territory markets"), which may include markets in states currently served by the SBC/Ameritech's incumbent LECs."

⁷⁶ See "FCC Can't Create Enforceable Merger Conditions," <http://www.newnetworks.com/TeletruthAT&TBellSouth2.htm> (last viewed May 27, 2011).

should not rely on empty promises when AT&T has done the bare minimum, if that, to comply with prior conditions.

J. The merger will not result in greater consumer choice

Particularly ludicrous is AT&T's claim that the merger will result in customers having access to a greater number of rate plans.⁷⁷ There is nothing today to stop either AT&T or T-Mobile from offering any rate plan they want to their own customers without the merger. And, of course, a T-Mobile customer who is dissatisfied with T-Mobile's rate plans and prefers an AT&T plan could switch to AT&T (or vice versa). The only thing stopping customers is the carrier's own behavior imposing termination fees on customers who want to leave service before the expiration of their contract.

Indeed, the situation is exactly the opposite of what AT&T claims will happen. T-Mobile's customers in fact will have even less choice if the merger is completed. AT&T has promised that T-Mobile subscribers will be able to stay in service on their existing rate plans. However, AT&T is silent on what happens once the customer's contract runs out. Will that customer be able to continue on the old rate plan or will it be forced onto the AT&T rate plans? Further, once their rate plans run out at least one competitive choice – T-Mobile – will be gone so customers will have even less choice than they have today. AT&T's rate plans are in fact considerably higher priced than T-Mobile. For example, for a data customer who only uses 200MB of data, the increase in rates would be 50% and a 10GB user, the rate would be 64% higher.⁷⁸ This can hardly be seen as leading to lower prices or greater choice for consumers.

⁷⁷ *Id.* at 44-45.

⁷⁸ See Testimony of Parul P. Desai, "How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?" House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, May 26, 2011, at 4. This testimony provides a good overview of the impact that this merger will have subscriber rates.

REDACTED - FOR PUBLIC INSPECTION

Finally, today, customers who want to leave T-Mobile will be able to continue to use their handset on AT&T's network since they both use GSM. However, after the merger, once their T-Mobile customer contracts run out, they will not be able to take their phone anywhere since the only other national GSM provider will have vanished.

AT&T also has not addressed what will happen to those subscribers who are on T-Mobile's plan and want access to the handsets only currently available to AT&T subscribers – such as the iPhone. Today, consumers can terminate their service with T-Mobile and switch to AT&T and get the new customer contract (and iPhone subsidy). Will they get the same choice if they merely want to upgrade from an old T-Mobile phone? The merger, therefore clearly does not result in greater consumer choice.

K. Without effective competition, consumers may not benefit from the anticipated efficiencies resulting from the merger

The Commission should not be blinded by AT&T's promises of anticipated efficiencies for another reason.²⁹ AT&T is investing \$39 billion dollars to acquire T-Mobile. The AT&T stockholders are going to demand a return on their investment. If AT&T passes through to its customers all of the savings resulting from the efficiencies gains it may enjoy as a result of the merger, it is not clear how AT&T stockholders' investment will earn a return. Of course, AT&T may not pass through all of its efficiencies, but even a modest return on a \$39 billion investment will require that a substantial portion of those efficiencies will need to be retained by AT&T and not passed along to consumers. The only way to ensure that greater efficiency gains are delivered to consumers is to have competitors who can effectively compete. To the extent that consumers do not enjoy the efficiency dividends resulting from the removal of a competitor and

²⁹ AT&T has told the financial markets that it will enjoy synergies of over \$39 billion – or in other words 100% of the investment. Such a return is highly unusual and makes it highly unlikely to actually occur.

REDACTED - FOR PUBLIC INSPECTION

remaining competitors do not receive the spectrum and other conditions they need to ensure a level playing field, the balance clearly weighs against the merger.

Of course, anticipated efficiencies are just that – anticipated. What happens if the efficiency gains do not materialize or do not materialize in the amount that AT&T anticipates? The answer is simple -- AT&T will be forced to raise prices or engage in anti-competitive efforts to increase its market share. The stockholders of AT&T will not sit idly by while they have made an investment of \$39 billion which is not producing an acceptable return on investment. Increasing market share at the expense of competitors who do not enjoy the same economies of scale means that those competitors will become less profitable and will ultimately cease being a competitive threat. When this happens, AT&T will be able to raise prices further.⁸⁰

Prices have not been broadly increased in this industry in some time. But because the merger, without conditions, will lead to a return to a duopoly, the duopolists will be able to raise prices, or at a minimum slow the decline or hold it steady, since no competitor can emerge to stop them given the existing barriers to entry. The Commission therefore needs to make sure that the merger is subject to conditions that ensure that consumers are not hurt if AT&T's anticipated efficiencies do not materialize or do not materialize in the amounts anticipated by AT&T. The best way to do that is to approve the deal only upon conditions that ensure that the remaining competitors can act as an effective competitive check against AT&T raising prices. If AT&T will not agree to those conditions, then the Applications should be denied.

L. The current spectrum screen should not be altered

The Petitioners note AT&T's suggestion that the Commission's usual spectrum screen should not be applied here. Instead, AT&T asks for the screen to be significantly increased, with

⁸⁰ Prices can be raised directly – through moving rate plan prices higher – or indirectly – through such actions as caps, usage based pricing, and the like.

the inclusion of all BRS spectrum (only 55.5 MHz is currently considered by the Commission) and MSS spectrum.⁸¹ If followed, AT&T's request could increase the spectrum screen to close to 200 MHz, rendering it nugatory. Yet, as the preceding analysis shows, this is far in excess of an amount that would clearly give AT&T market power. Moreover, AT&T's proposal to raise the spectrum cap ignores the fact that the spectrum nearly monopolized by AT&T and Verizon – *i.e.*, 700 MHz, cellular, and AWS – is clearly better spectrum for providing reliable and cost-effective mobile broadband services. AT&T's suggestion here should be rejected out of hand. Even unchanged, the spectrum screen is a tool for competitive analysis, not the be-all-and-end-all. And the evidence is overwhelming that, spectrum screen or no spectrum screen, the impact of this merger on the public interest would be enormously destructive.

VI THIS TRANSACTION WILL RESULT IN THE SOLIDIFICATION OF A DUOPOLY IN THIS MARKET AND THEREBY SIGNIFICANTLY INCREASE THE RISKS OF UNILATERAL ANTICOMPETITIVE EFFECTS AND COORDINATED INTERACTION

For horizontal transactions, the Commission has indentified two main antitrust concerns that may be implicated and must factor into any competitive analysis: (1) unilateral effects and (2) coordinated interaction. By making possible an AT&T-Verizon virtual duopoly, this transaction drastically increases the potential of both harms, and the Commission should take these concerns into account whether its examination of the market is national or local.

A. The dangers of unilateral effects

Unilateral effects arise when the merged firm finds it profitable to alter its behavior following the merger by elevating price and suppressing output. The Commission previously has noted that in the case of mobile telephony/broadband services, “this might take the form of delaying improvements in service quality or adversely adjusting plan features without changing

⁸¹ *Public Interest Statement* at 76-78.

REDACTED - FOR PUBLIC INSPECTION

the plan price. Incentives for such unilateral competitive actions vary with the nature of competition in the relevant markets.”⁸²

In a determination of whether there would be an increased likelihood, on a market-by-market basis, of unilateral effects as a result of a transaction, the Commission has considered, among other factors, “the merging firms’ individual and combined market shares, the degree of substitutability between the merging firms, and the number of rivals with sufficient ability and capacity to respond to a unilateral action by the merged entity.”⁸³ Further, this analysis considers, where appropriate, the role of MVNOs and other resellers in disciplining the market.

In *AT&T/Centennial*, the Commission found a number of markets in its market-by-market analysis in which it determined that other providers are not present or do not possess the capacity to prevent the exercise of unilateral market power.⁸⁴ The Commission should come to the same conclusion here, except on a much greater and national scale. For instance, as noted herein, AT&T and T-Mobile are considered competitors to each other, and may be considered relatively close substitutes for each other in the eyes of consumers. Indeed, T-Mobile consistently has referenced AT&T in its marketing materials. In addition, for those customers that require a GSM handset or international roaming, particularly traveling business executives, AT&T and T-Mobile may be the only game in town. In many markets, other providers generally are unable to match the price/service options offered by the Applicants. Moreover, other licensees in these markets have limited ability to reposition in response to any attempted exercise of market power by the merged firm. Nor can entry by firms not currently providing service in

⁸² *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer of Control of Licenses, Authorizations and Spectrum Leasing*, Memorandum Opinion and Order, 24 FCC Rcd 13915, at ¶ 54 (2009) (“*AT&T/Centennial Order*”).

⁸³ *Id.* at ¶ 56.

⁸⁴ *Id.* at ¶ 58.

these markets be counted on to prevent possible exercise of market power. And forces pushing firms away from setting differing prices between local markets cannot be counted on to prevent such differential pricing by AT&T in the future. For the above reasons, the Commission must conclude that unilateral effects will certainly result from the proposed transaction – and such effects must be guarded against by appropriate conditions to allow this transaction to proceed.

B. The dangers of coordinated Interaction

The proposed transaction also drastically increases the risks of coordinated interaction.

The Commission has noted that:

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. Accordingly, one way in which a transaction may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete. Successful coordination depends on two key factors. The first is the ability to reach terms that are profitable for each of the firms involved, and the second is the ability to detect and punish deviations that would undermine the coordinated interaction.⁸⁵

The Commission has found that a number of market conditions may affect whether coordinated interaction is more likely as a result of the transaction, "including the availability of information about market conditions, the extent of firm and product homogeneity, and the presence of maverick providers in the market."⁸⁶ The Commission's analysis of coordinated interaction has also been taken into account in its market-by-market analysis.

With the proposed transaction, it is certain that only a few firms will account for most of the sales of a product – and both of the Commission's factors noted above will clearly be met.

⁸⁵ *Id.* at ¶ 59.

⁸⁶ *Id.* at ¶ 61. However, the Commission has noted that there is considerable variation across local markets with respect to all of the above, and thus has noted that it is difficult to "generalize about the impact of the transaction in facilitating coordinated interaction to restrict competition on price or non-price terms in specific markets." *Id.*

REDACTED - FOR PUBLIC INSPECTION

Both AT&T and Verizon will be able to reach terms that are profitable for each of them, and it will be easy for AT&T and Verizon to detect and punish violations that would undermine such tacit interaction.

As noted herein, AT&T and Verizon will have by far the lion's share of the market, both nationally and in the vast majority of local markets across the country. AT&T and Verizon, while not likely to directly coordinate prices, would certainly be able to tacitly coordinate pricing for wireless plans and handsets. Moreover, the structure of the wireless marketplace makes it easy for AT&T and Verizon to see what each other is doing, and match each other accordingly. Indeed, AT&T and Verizon often follow each other currently when it comes to pricing decisions. This practice will only get worse if the proposed transaction is approved. With two players controlling the vast majority of the wireless market, the Commission should be extremely concerned about the prospect of coordinated interaction between the two – both at the national and local market levels.

C. The proposed merger will concentrate the wireless market dramatically

The AT&T/T-Mobile merger, if allowed to take place as proposed, will combine the second and fourth largest (by subscribers) wireless carriers and further entrench AT&T as a dominant behemoth in terms of subscribers, resources and spectrum. This combined entity will enjoy overwhelming market power on its own. Worst of all, the merger will bring to fruition the long-held dream of the “Big 2” wireless carriers: to effectively recreate the duopoly in wireless services that existed in the early cellular era – and was a source of such competitive concern.⁸⁷ Indeed, Congress and the Commission in the mid 1990s allocated additional spectrum in order to

⁸⁷ *Commercial Mobile Radio Services (Annual Report and Analysis of Competitive Market Conditions)*, Second Annual Report, 12 FCC Rcd 11266, at 11272 (1997) (finding that “competitive forces would generally be much stronger than they had been in a cellular market duopoly market structure”).

REDACTED - FOR PUBLIC INSPECTION

remake the wireless market from a then duopoly to the competitive market that exists today. The transaction will eliminate that market structure. Along with Verizon, the merged entity will control the mobile wireless marketplace, as shown by the following, among many other indicators:

- The combined AT&T/T-Mobile entity will hold an average of more than 1700MHz of spectrum in each major metropolitan market;⁸⁸
- The combined AT&T/T-Mobile entity will hold in excess of 43% of all customers;⁸⁹
- The combined entity will hold approaching half of the industry EBITDA;⁹⁰
- The combined AT&T/T-Mobile and Verizon together would hold in excess of 91% of the free cash flow of the industry, 80% of the subscribers in the industry, over 92% of the EBITDA of the industry, approaching 300MHz on average in every major metropolitan area.⁹¹

In the past several years, the number of terrestrial wireless broadband mobile facilities-based carriers has decreased dramatically as a result of FCC-approved industry consolidation. Since 2007, AT&T has absorbed Dobson, Aloha, and Centennial and has recently applied for approval, among other things, to acquire up to 24 MHz of 700 MHz spectrum held by Qualcomm as well as acquire all of T-Mobile.⁹² Verizon, meanwhile, has acquired Rural Cellular and Alltel. Finally, in the past several years T-Mobile acquired Sun Com Wireless and Sprint was on its own acquisition spree which included Nextel, IPCS, Ubiquitel, Nextel Partners, Alamosa, and US Unwired. As a result of this consolidation, the wireless market has become even more highly concentrated than when the Commission last faced a major acquisition.

⁸⁸ Bernstein Research, "AT&T Buys T-Mobile: A 'High Degree of Confidence' that the Deal Can Get Done," at Exhibit 5, EBITDA 2010 and Pro Forma for Merger (by Subscribers), March 21, 2011 ("*Bernstein Research Report - March 2011*")

⁸⁹ *Id.* at Exhibit 7, HHI Today and Pro Forma for Merger (by Subscribers).

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 5-6.

⁹² In 2008, T-Mobile acquired Suncom, so that this merger would also result in the roll-up of the old Suncom into AT&T. *Wireless Competition Fourteenth Report* at ¶ 75. See e.g., Lower 700 MHz Band Auction Closes, Public Notice, Attachment A (listing Redwood County Telephone Company as a winning bidder in the Lower 700 MHz Band Auction) (Sept. 20, 2002).

REDACTED - FOR PUBLIC INSPECTION

According to the *Wireless Competition Fourteenth Report*, the concentration of the U.S. mobile telephone market, based on each carrier's number of mobile subscribers nationwide and measured by the Herfindahl-Hirschman Index ("HHI"), calculated as a weighted average by Economic Area ("EA") population, already was 2848 at the end of 2008, before the closing of the AT&T-Centennial and Verizon-Alltel mergers. With this HHI, the U.S. Department of Justice and the Federal Trade Commission would consider the wireless industry to have been "highly concentrated" in 2008 without regard to this merger according to their *Horizontal Merger Guidelines*, because it exceeded the 2500 HHI benchmark number necessary for such designation.²³

The recently-consummated Verizon-Alltel and AT&T-Centennial mergers have increased the HHI further. Based on the same 2008 *Wireless Competition Fourteenth Report* numbers cited above, and using the metric that the increase in HHI resulting from the merger of two entities is equal to twice the product of their pre-merger market shares, the HHI following the consummation of the AT&T-Centennial and Verizon-Alltel mergers would have increased to approximately 3120, and the AT&T/T-Mobile merger would result in a further increase to 3800, an increase of *far* more than the 200 points that the *Horizontal Merger Guidelines* recognize as "presumed to be likely to enhance market power."²⁴

These numbers are consistent with the estimate of another knowledgeable industry analyst based on 2010 (as opposed to 2008) data. That analyst estimates that the HHI following

²³ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, revised Aug. 19, 2010, at § 5.3.

²⁴ *Id.* Before any of these three mergers, AT&T's national market share of subscribers was 29%, while Verizon's was 27%, Alltel's was 5%, T-Mobile's was 12% and Centennial's was somewhat less than 1%. *Fourteenth Report* at Table C-4. Thus, the increase in HHI from the first two mergers would have been about $2 \times 27 \times 5$, or 270 points, and from the currently proposed merger would be $2 \times 29 \times 12$, or about 696 points. Note that the scale of measurement is not precisely the same in the before and after numbers, so that these results must be seen as approximate. MetroPCS and NTELOS expect that further HHI information will be filed by other parties in this proceeding and reserve the right to modify their comments appropriately.

REDACTED - FOR PUBLIC INSPECTION

the proposed merger, treating subscribers as the relevant measure of market share, would rise from about 2800 to about 3500 – a swing of some 700 points. Again, this far exceeds the 200-point threshold at which the *Horizontal Merger Guidelines* presumes that the increase will enhance market power. Based on revenues, this same analyst estimates an even greater HHI increase – from about 2600 to about 3500.⁹⁵ By any measure, the increase in concentration resulting from this merger must set off loud alarms requiring intense Commission scrutiny here.

Incredibly, AT&T and T-Mobile argue that they do not *really* compete against each other.⁹⁶ This argument does not pass the laugh test. T-Mobile has actively promoted its 4G speeds against the AT&T network – even rebranding the iPhone and its slower data speeds by name in recent commercials.⁹⁷ T-Mobile's footprint greatly overlaps with AT&T's and they compete for the same retail customers. As discussed earlier, on the wholesale side, T-Mobile is the only significant competitor to AT&T for GSM-based services. For AT&T to argue that T-Mobile is not a real competitor, while much smaller carriers are, is breathtakingly disingenuous.

D. AT&T's market dominance goes beyond end users services to essential competitive inputs

The adverse effects of the emerging duopoly will not be limited to the wireless market. AT&T and Verizon already dominate the overall telecommunications industry in the United States. This overall dominance allows them to dictate terms to wireless competitors for other essential inputs, notably special access facilities and wireline termination facilities. When dominant carriers effectively control important inputs to a non-dominant competitor's services, the dominant carriers effectively control the entire market since they can cause the competitor to

⁹⁵ *Bernstein Research Report - March 2011* at 2.

⁹⁶ *Public Interest Statement* at 13. See also *Humm Testimony* and *Stephenson Testimony*.

⁹⁷ Indeed, AT&T started calling its 3G HSPA+ network 4G apparently in response to T-Mobile's advertisements claiming that its 3G HSPA+ network was 4G.

incur higher costs and thus prevent effective competition.⁹⁸ This is as true today as it was in the early days of the original antitrust laws, when a single group of railroads in St. Louis controlled the only railroad bridge over the Mississippi and various other critical terminal facilities and used that control to squeeze competitors.⁹⁹

1. AT&T and Verizon dominate essential backhaul markets

Competitors such as Sprint, MetroPCS and NTELOS all use AT&T and Verizon wireline facilities to backhaul their traffic from cell sites back to their switches and to interconnect with the Public Switched Telephone Network (“PSTN”).¹⁰⁰ These facilities are a critical input to Petitioners’ services. Notably, even before this transaction was announced, repeated concerns were expressed regarding the need for the Commission to address competitive issues with the special access facilities used for backhaul.¹⁰¹ The costs and availability of these facilities will be of even greater importance going forward, as the requirements for backhaul increase exponentially with broadband data. If the merger proceeds without conditions relating to backhaul, AT&T and Verizon will have even greater ability – and greater incentive – to whipsaw their bottleneck wireline facilities to further disadvantage their wireless competitors.

2. AT&T and Verizon control essential roaming services and the merger will remove T-Mobile, which has more reasonable roaming policies

AT&T and Verizon are the only realistic providers to which carriers such as Petitioners can go for nationwide roaming.¹⁰² AT&T and T-Mobile admit in their Senate testimony that

⁹⁸ Indeed, it was the bottleneck control of AT&T over access to the local telephone loop, which other carriers needed access to that motivated the divestiture by AT&T of the local telephone companies.

⁹⁹ See *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912).

¹⁰⁰ See, e.g., *Hesse Testimony* at 5-6. As Mr. Hesse notes, while AT&T’s and Verizon’s competitors must pay billions of dollars in backhaul fees, the Big 2 provide backhaul to themselves without (net) cost and rake in huge profits from the backhaul fees they charge their competitors.

¹⁰¹ *Wireless Competition Fourteenth Report*, at ¶¶ 297-98.

¹⁰² While Sprint does provide roaming, it only covers around 200 million POPs while AT&T and Verizon cover over 97% of POPs. This difference can make a substantial difference to some customers.

REDACTED - FOR PUBLIC INSPECTION

consumers expect nationwide service, not just service in their home areas,¹⁰³ and any carrier which cannot offer truly nationwide service at a competitive rate is doomed to die a slow and painful death. But the only way mid-tier, regional and rural carriers such as Petitioners, can offer nationwide service is through roaming agreements with these very same providers. As has been shown to the Commission over and over, AT&T and Verizon have been less than model citizens when it comes to offering roaming services on reasonable terms and conditions. These carriers have pervasively charged rates greatly in excess of their costs (plus a reasonable profit), imposed exclusionary terms forbidding certain types of competition from the regional and smaller carriers, or both.¹⁰⁴ Indeed, AT&T repeatedly has refused to make 3G data roaming available, and has prevented regional competitors from competing for roaming traffic by requiring its roaming partners to route to AT&T rather than competitors whenever AT&T's signal is available.¹⁰⁵ Verizon has charged competitors a rate for voice services roaming that is many times higher than the rate it charges its own retail customers for comparable services. Yet its cost to serve its own customers must be *higher* than those to serve roamers, since Verizon need not incur costs such as number administration and billing for roamers. Verizon also has denied even 2G data roaming and offered it at rates that are simply breathtaking.¹⁰⁶

¹⁰³ See Oral Testimony of Randall Stephenson, Chairman, CEO and President of AT&T Inc. and Philipp Humm, CEO of T-Mobile USA, Inc. before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?" on May 11, 2011.

¹⁰⁴ See e.g. Petition of MetroPCS Communications Inc. and NTELLOS Inc. to Condition Consent or Deny Application, *Applications of Atlantis Holdings LLC and Celco Partnership d/b/a Verizon Wireless for Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-95 (filed Aug. 11, 2008); Petition of Cincinnati Bell Wireless LLC to Condition or Deny Application, *Applications of Centennial Communications Corp. and AT&T, Inc. for Consent to the Transfer of Control of Commission Licenses, Leasing Arrangements and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-246 (filed Jan. 15, 2009) ("Cincinnati Bell Comments").

¹⁰⁵ *Id.* at 7 (describing AT&T's "primary carrier" provisions in roaming agreements).

¹⁰⁶ OPASTCO indicated that a nationwide carrier for 3G roaming services (which, on information and belief, MetroPCS understands to be Verizon) had offered data roaming at rates up to \$1 per megabyte. See

REDACTED - FOR PUBLIC INSPECTION

The serious problems in the roaming market will be exacerbated if and when AT&T and T-Mobile join forces. T-Mobile has been a better roaming partner than AT&T— and the Petitioners expect it would still have been one for 4G LTE when deployed.¹⁰⁷ Today, at least, T-Mobile provides some level of competition to AT&T in GSM roaming. By acquiring T-Mobile, AT&T will at one stroke eliminate its only large competitor for GSM roaming partners. Mid-tier, regional and rural carriers using GSM will not even have the limited roaming alternative to AT&T that T-Mobile has provided.

This loss of choice will go beyond GSM services. As noted above, AT&T has in the past refused to allow 3G data roaming and, given its track record, it can be expected to exploit every possible means of denying advanced data roaming service even under the Commission's new data roaming order,¹⁰⁸ such as by denying that services are technically compatible or technically feasible, imposing exorbitant rates, or insisting upon anticompetitive terms such as those it has historically used for hobbling competitors.

T-Mobile has provided a useful competitive alternative in the 3G market and but for the merger might eventually cause AT&T to step up to its duties in this regard. But now, to support the merger, T-Mobile claims to have insufficient spectrum to deploy LTE on a single 20 MHz

Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at 4 (filed June 14, 2010) (stating that roaming rates for data range from 30 cents/MB to \$1/MB). If a customer uses just 20% of its data usage while roaming and has 400 MB per month on average, the roaming charged would be \$160 per month *just for roaming*.

¹⁰⁷ While T-Mobile has indicated that it might not have adequate spectrum to deploy 4G LTE on virgin spectrum, it could have deployed 4G LTE just like MetroPCS on channel widths of 1.4 MHz or 3 MHz and refarmed its existing spectrum. Further, T-Mobile no doubt would have participated in future auctions *that it was pushing for immediately prior to the announcement of the merger* for 700 MHz D Block and AWS-2 and AWS-3 spectrum.

¹⁰⁸ See *Data Roaming Order* at Appendix A, Final Rules (adopting rules requiring “facilities-based provider of commercial mobile data services . . . to offer roaming arrangements to other such providers for commercially reasonable terms and conditions”).

channel,¹⁰⁹ thereby suggesting that it will be unable to provide a competitive alternative to AT&T for data roaming in the post-3G world. T-Mobile fails to mention, however, that: (1) it can offer LTE on a channel as small as 1.4 MHz to start – or 3 MHz in total – and can refarm its inefficient technology; (2) technology improvements are coming which will allow bonding of non-adjacent channels to form a single 20 MHz channel for LTE, and (3) additional spectrum should be forthcoming that would allow T-Mobile to deploy 4G LTE. These are not pipe dreams – MetroPCS is today offering 4G LTE on 1.4 MHz channels in Boston and Philadelphia, among others. While the Petitioners, like others, needs more spectrum to compete as technology continues to develop, they stand as living proof that T-Mobile’s characterization of its current spectrum situation is mere poor-mouthing.

E. The merger will silence a strong critic of the wireless duopoly

The merger also will silence a strong pro-competitive voice on a number of issues that face the wireless industry. For example, T-Mobile has been a strong proponent for roaming,¹¹⁰ lower access rates,¹¹¹ 700 MHz interoperability¹¹² and the allocation of additional spectrum, among others.¹¹³ Its voice has been an important counterweight to the Big 2 carriers in regulatory proceedings – a very important function given the massive funds and staffs devoted by the Big 2 to promoting their own interests in regulatory proceedings. The simple reality has been that when T-Mobile aligns with small, rural and mid-tier carriers in a regulatory proceeding

¹⁰⁹ Introductory Remarks by Philipp Humm, CEO T-Mobile USA, Inc., May 11, 2011, at 1 (“*Humm Testimony*”).

¹¹⁰ See e.g. Comments of T-Mobile USA, Inc., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66 (filed Sept. 30, 2009).

¹¹¹ See e.g. Comments of T-Mobile USA, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (filed June 13, 2005).

¹¹² See Reply Comments of T-Mobile USA, Inc., *Implementing a Nationwide Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229 (filed Jan. 7, 2011)

¹¹³ See e.g. Comments of T-Mobile USA, Inc., *Annual Report and Analysis of Competitive Market Condition With Respect to Mobile Wireless Including Commercial Mobile Services*, WT Docket No. 09-66 (filed Sept. 30, 2009).

REDACTED - FOR PUBLIC INSPECTION

against Verizon and AT&T, the Commission takes note. Thus, yet another benefit of the merger for AT&T – but not for the public interest – would be the stilling of one of the last effective voices opposed to the Big 2 in the regulatory arena. With the removal of T-Mobile’s strong voice on these issues, it is less likely that the remaining competitors in the industry will be as effective at getting the necessary attention to the competitive issues facing the industry.

F. AT&T and Verizon have strong buy-side market power which allows them to enter into exclusive handset arrangements and discourage interoperability

AT&T’s and Verizon’s market dominance post-merger will not be limited to the provision of carrier services. They will have market power on the buy side as well. Because of their overwhelming market power, AT&T and Verizon each will be able to insist upon exclusivity when they buy handsets from manufacturers. Indeed, in the last several years, AT&T and Verizon combined have launched 24 handsets on an exclusive basis to Sprint’s three and T-Mobile’s eight.¹¹⁴ If T-Mobile’s exclusive handset launches are now included with AT&T, the number of exclusive launches by the Big 2 would be 29 or more than 90% of these exclusive handset launches. And the merger will only increase AT&T’s ability to force these terms on manufacturers.

At the same time, the downside to the manufacturers of accepting exclusivity will be reduced by the merger. Since AT&T and Verizon will have over 80% of all customers,¹¹⁵ any manufacturer will be able to sell a product exclusively to one or the other of them and still recover its costs of developing the product. In effect, standing alone AT&T or Verizon will be big enough to make a market for the manufacturer. Thus, AT&T and Verizon will always be able between them to lock up the newest, “coolest” devices and ensure that customers who want

¹¹⁴ *Wireless Competition Fourteenth Report*, at 84.

¹¹⁵ *Bernstein Research Report - March 2011*, at 1.

REDACTED - FOR PUBLIC INSPECTION

these devices will be forced to obtain service – generally under a long-term contract – from AT&T or Verizon. Since a large proportion of customers purchase services based on handset selection, lack of access to the newest handsets can be major market barrier to the remaining carriers in the market.¹¹⁶

Other carriers in the industry have no chance to compete effectively for state of the art devices as long as AT&T and Verizon are free to insist on exclusivity. Their much smaller post-merger market share – only about 20% in the aggregate – alone would likely deny them the ability to compete for these exclusive deals. But even further, these carriers are split in their use of different technologies, different frequency bands and widely different demographic customer bases. No one of them has enough clout to even encourage development of handsets to meet its customers' needs, let alone obtain exclusivity. Indeed, the *Wireless Competition Fourteenth Report* does not show any exclusive handset launches by other than the largest four carriers and the Petitioners do not anticipate that would change if the proposed merger is allowed to close.

Nor will the Big 2 voluntarily refrain from entering into exclusive deals out of altruism or wider concerns. As noted above, in only the years 2008-2009, AT&T had *fifteen* exclusive smart phone launches and Verizon Wireless had nine.¹¹⁷ Sprint had only three, while T-Mobile had five, meaning that these two carriers *combined* had only eight exclusive smartphone launches.¹¹⁸ Since T-Mobile and Sprint's combined share of customers was a bit less than Verizon's, this evidence demonstrates clearly that as a carrier's market share goes up, the number of exclusive handset deals that it can wrangle from manufacturers goes up as well.

¹¹⁶ See *Wireless Competition Fourteenth Report*, at 311-17; Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497 (filed May 20, 2008).

¹¹⁷ *Wireless Competition Fourteenth Report* at Table C-5.

¹¹⁸ *Id.*

REDACTED - FOR PUBLIC INSPECTION

AT&T and Verizon have another highly effective way to use their growing market power to further disadvantage mid-tier, regional and rural carriers: by engaging in monopsony buying practices, they can (and will) refuse to encourage manufacturers to produce handsets that are interoperable across all bands. This will further lock both manufacturers and consumers into their networks and deny mid-tier, rural and other carriers access to the economies of scale that come from purchasing the same products as the largest carriers. This is not mere conjecture. This serious problem – which was raised with the Commission long before this transaction was announced – will be seriously exacerbated by the proposed combination of AT&T and T-Mobile.

The 700 MHz equipment compatibility controversy which is already occurring is an excellent example of the kind of tactic that the duopoly will be both more free and more motivated than ever before to employ with impunity against its competitors. On September 29, 2009, four Lower 700 MHz Band A Block licensees filed a petition for rulemaking, asking the Commission to “assure that consumers will have access to all paired 700 MHz spectrum that the Commission licenses, to act so that the entire 700 MHz band will develop in a competitive fashion, and to adopt rules that prohibit restrictive equipment arrangements that are contrary to the public interest.”¹¹⁹ The petitioners alleged that the Big 2 carriers were reportedly issuing RFPs seeking the manufacture of equipment that would be capable of using only the Big 2’s allocated portion of the 700 MHz band, and would not be able to use the portion of the band held by other carriers such as the petitioners. By engaging in such behavior, the Big 2 seek to ensure that their competitors do not even receive collateral benefits from the Big 2’s scale economies, since if the Big 2 get away with such behavior any manufacturer development of interoperable

¹¹⁹ See Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks 700 MHz Mobile Equipment, filed Sept. 29, 2009, in RM-11592.

REDACTED - FOR PUBLIC INSPECTION

equipment, or equipment to serve the remainder of the 700 MHz band, would have to be based solely on a business plan of serving only the much smaller customer base of the non-Big 2 carriers. Thus, recovery of the large fixed costs of development would be artificially restricted so that the smaller carriers would have to cover a much higher unit R&D cost for these devices. The anticompetitive nature of such behavior is obvious, and AT&T and Verizon would be freed to engage in such practices on an even grander scale if the merger is allowed.

G. The spectrum concentration resulting from the merger will increase barriers to entry

The proposed merger between AT&T and T-Mobile would leave AT&T and Verizon with much larger resources than the rest of the industry, which will allow them to have greater economies of scale and in turn lower their costs and will increase barriers to entry. Indeed, AT&T cites having more resources as the major benefit of the merger.¹²⁰ But without effective competition, neither of these carriers will have any incentive to pass those efficiencies along to consumers or to engage in aggressive innovation. It is Economics 101 that a duopolist is incited to keep any efficiency gains and cost savings it attains to itself. The increased concentration of spectrum will increase barriers to entry by increasing the difference in costs between what an efficient new entrant can enjoy and the reduced costs enjoyed by the duopolists. This increase in barriers to entry are essential to the merger as without conditions AT&T would have sole access to these efficiencies. The only way to have effective competition and for consumers to reap the efficiency gains and cost savings promised by AT&T would be to condition the merger in a meaningful manner that creates opportunities for competitive carriers and a regulatory regime that will preserve competition and consumer benefits. If such conditions cannot be imposed or agreed to by AT&T, then the merger must be denied.

¹²⁰ *Public Interest Statement* at 8.

VII. IF THE MERGER PROCEEDS AS PROPOSED, THE WIRELESS DUOPOLISTS WILL BE ABLE TO EXERCISE CONTROL OVER BOTH THE RETAIL AND WHOLESALE MARKETS

A. Once established, the duopoly will be irreversible

As the American Antitrust Institute has rightly observed, “[t]his merger, if approved, would give AT&T a “government-assisted competitive advantage over its rivals in providing national wireless broadband service.”¹²¹ The consequence, as discussed above, would be the establishment of a nationwide wireless duopoly. As a result, as the American Antitrust Institute warns:

The merger will tighten the oligopolistic structure of the industry and enhance the possibility of adverse effects through coordinated interaction. This could drive prices higher, reduce choice, and stymie innovation related to easing the spectrum problem. In an industry where consumer unhappiness about service and billing runs high, it is particularly important to maintain an adequate range of choices, so that consumers can switch service providers with relative ease.¹²²

Of course, even this reference to an “oligopolistic structure” assumes that Sprint will remain an effective third competitor, which it has disavowed will be the case. In reality, we are talking here about an effective duopoly.

And, the American Antitrust Institute further notes, the very spectrum scarcity that AT&T relies upon to support its proposed merger creates an extremely high barrier to entry by new competitors, or to expansion of capacity by the remaining existing competitors, and makes it virtually impossible for competition to discipline AT&T’s pricing or to cause AT&T to innovate.¹²³ In addition, the high capital cost to acquire spectrum and deploy networks, the relatively high penetration rates, the significant market shares held by incumbent operators, all

¹²¹ American Antitrust Institute, “The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions,” http://www.antitrustinstitute.org/sites/default/files/AAI_Brief%20on%20ATT-T-Mobile.pdf, at 2 (“*American Antitrust Institute Analysis*”), quoted in *Sohn Testimony* at 11.

¹²² *Id.* at 3.

¹²³ *Id.* at 4.

act as effective barriers to entry by new carriers. As a consequence, the duopoly, once in place, will become perpetual.

Unfortunately, the Commission cannot expect that a future allocation of additional spectrum will have the same impact of breaking up an effective duopoly. In 1995 the Commission allocated and auctioned PCS spectrum to break the original cellular duopoly. The process worked then because, at that time, there were no effective nationwide operators, the cost to acquire nationwide spectrum was considerably less than the most recent auction prices, and the market was significantly under penetrated. The costs associated with nationwide deployment and the maturing market make new entry unlikely.¹²⁴

B. AT&T and Verizon will be able to control the retail market

The post-merger duopolists will be able to exercise control over the retail market, especially for pre-paid and broadband services. The middle market already is beginning to wither and the post-paid providers – which AT&T cites as a bulwark of remaining competition after the merger¹²⁵ – cannot hope to discipline the duopoly's pricing absent conditions. Without conditions on the merger to level the playing field, the post-paid and non-national providers lack adequate market shares, spectrum resources and geographic footprints to impose meaningful competitive discipline on the Big 2. As Public Knowledge points out, AT&T cites “[s]uch strong ‘competitors’ [as] companies that are 4/10ths of one percent the size of AT&T (Cincinnati Bell), to a company reported to be exiting the retail wireless broadband market (Clearwire), to a

¹²⁴ The current national plans of LightSquared and others similarly situated are not to the contrary. Hopes for these plans seem to be pinned on sharing the infrastructure of existing carriers presumably because the cost to deploy a new network are so high – and LightSquared did not have to pay for its spectrum at auction as any new entrant would be required to do.

¹²⁵ *Public Interest Statement* at 78.

REDACTED - FOR PUBLIC INSPECTION

wholesale company (Lightsquared) that does not exist today and may never exist as a competitor.”¹²⁶

The fact that this merger reduces the number of major competitors in the wireless market from four to three understates the problem. The ostensible third national carrier post-merger, Sprint, by its own admission, will be in no position to serve as a competitive counterweight to the Big 2. In testimony before the senate Judiciary Committee, Sprint’s CEO, Daniel R. Hesse, described the true state of affairs in stark terms:

{F}or many Americans, wireless has become their only means of accessing information, communicating, and increasingly, conducting business. It is their lifeline. But, if the Department of Justice and the FCC allow AT&T to devour the nation’s 4th largest carrier, the Twin Bells would be uniquely positioned as the gatekeepers of this lifeline. They will control access to, and the price of, the digital ecosystem and related industries. Upstream content providers and device manufacturers would have little choice but to deal with these entrenched duopolists controlling about 80% of the market.

Allowing AT&T and Verizon to control approximately 80% of the wireless industry’s revenues will increase the scale and scope advantages that these companies already possess with regard to market share, spectrum holdings, infrastructure control, and ability to invest. These enormous companies would be significantly more profitable than all other wireless providers combined, which creates a formidable barrier to entry and expansion by other potential rivals. For example, AT&T and T-Mobile’s combined 2010 EBITDA was approximately \$27.2 billion and Verizon’s was \$26.5 billion. Sprint’s 2010 EBITDA, in contrast, was only \$4.5 billion. If the T-Mobile takeover is approved, AT&T and Verizon would control 88% of all wireless industry profits. Consequently, the disparity between the duopolists and all other providers is likely only to worsen. Going forward, it would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce quality, raise prices charged to content sellers for access to consumers or raise prices to customers for access to voice or Internet service.¹²⁷

As Mr. Hesse shows, AT&T’s and Verizon’s financial resources dwarf those of Sprint.

Their combined 2010 EBITDA was more than *thirteen times* that of Sprint. And the merger would only worsen this disparity. Small wonder that he concludes that “[I]f AT&T is allowed to takeover T-Mobile, the benefits of competition that have driven the wireless marketplace for

¹²⁶ *Sohn Testimony* at 9 (citations omitted).

¹²⁷ *Hesse Testimony* at 4-5.

REDACTED - FOR PUBLIC INSPECTION

nearly two decades could virtually disappear.”¹²⁸ Based on Sprint’s own statements as well as all the other evidence discussed above, the Commission simply cannot count on Sprint alone to discipline the market.

Other competitors who are smaller than Sprint will be even more at the mercy of the post-merger Big 2.¹²⁹ Mid-tier, regional and rural carriers lack the geographic footprints to compete on a facilities-based retail basis. They are highly dependent on roaming from other carriers. Just as the local loop proved to be an anti-competitive bottleneck facility when competing wireless carriers were seeking interconnection to terminate local traffic from local exchange carriers with market power, so the nationwide systems of the dominant wireless carriers have become an essential facility for competing carriers. In the recent Verizon-Alltel and AT&T-Centennial mergers, the FCC acknowledged the nature of roaming as an essential facility by imposing conditions that would keep in place, for a limited period, roaming arrangements that had been reached with the smaller carrier in each merger, since the smaller carrier was more likely to have provided roaming at market-based rates and conditions.

In sum, if allowed to proceed, the merger will completely undo the worthy efforts the Congress, the Commission and consumer advocates have made since the inception of cellular service to eliminate the duopoly market structure that throttled competition and hampered innovation in the wireless industry. The harm this will cause the public interest is impossible to overstate.

¹²⁸ *Id.* at 6.

¹²⁹ *See e.g.*, Leap Opposes Proposed AT&T Acquisition of T-Mobile USA, Press Release, May 24, 2011, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1567098&highlight>.

VIII. IF THE MERGER IS APPROVED, THE COMMISSION MUST RE-EXAMINE ITS REGULATORY STRUCTURE FOR WIRELESS

Mid-tier, regional and rural carriers also are affected by the high relative costs of complying with one-size-fits-all regulatory mandates – such as net neutrality – that are by their nature designed to constrain the anticompetitive and anti-consumer behavior of carriers with bottleneck facilities and/or market power, neither of which the mid-tier, regional and rural carriers possess. At the same time, other aspects of the regulatory structure assume the opposite: that all carriers are subject to adequate competition. Clearly, this one-size-fits-all approach has become more and more untenable, and would be patently inadequate to address the state of the marketplace following the proposed merger.

If the merger is allowed to proceed, the Commission must, among other things, revamp its regulatory approach to assure that the two dominant carriers, AT&T and Verizon, are adequately constrained from charging unjust and unreasonable prices to, and imposing unjust and unreasonable terms on, both their wholesale and retail customers, and that they are required to provide the necessary inputs to their competitors – including spectrum, roaming, access facilities, and handsets – to allow them to effectively compete with the combined AT&T/T-Mobile. At the same time, since the remaining carriers will have considerably less ability to drive higher prices or deter innovation, the Commission need not regulate them the same as AT&T and Verizon since AT&T and Verizon can act as a competitive check on their behavior. Accordingly, the Commission must be careful to reduce regulatory constraints on non-dominant carriers to assure that they are not hobbled by restrictions that make no sense when applied to non-dominant carriers because they lack market power and are subject to complete market discipline.

IX. THE COMMISSION DECIDES TO APPROVE THE MERGER IT MUST DO SO ONLY AFTER IMPOSING CERTAIN CONDITIONS

As amply demonstrated above, the proposed merger will disturb the delicate competitive equilibrium which has existed for the last several years and the Commission, if it decides to approve the merger, must do so only after imposing conditions on the merger which establish a new equilibrium to allow competition to flourish and innovation to continue.

In the context of other recent mergers, the Commission has sought to address competitive concerns by imposing conditions on the merged entity. It is clear, however, that applying only the typical conditions adopted in the past would not be adequate to protect against the massive consumer harm that would result from this merger. If the transaction proceeds, the needed outcome is for the Commission to adopt more stringent conditions that promise to foster multiple viable competitors – not just two. For example, even a divestiture condition would not solve the spectrum problem if Verizon is allowed to acquire the divested spectrum and thereby increase its own market-dominating spectrum holdings. Moreover, divestitures would not work if the divested spectrum is saddled with antiquated non-state-of-the-art systems, since these tag-along assets would merely force AT&T's inefficiencies onto the buyer. Instead, only the divestiture of presently unused or cleared AT&T-Mobile spectrum divestiture would have any chance of promoting meaningful competition.

Accordingly, given the transformational nature of this proposed transaction, the Commission should only approve the transaction, if at all, with the following conditions *at a minimum*:

- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check

REDACTED - FOR PUBLIC INSPECTION

on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;

- Roaming obligations which require AT&T to publicly disclose its agreements and allow carriers which do not have the benefit of national spectrum the right to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and
 - Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively.
- A. The Commission must require significant spectrum divestitures to existing carriers**

The Commission must require significant pre-merger spectrum divestitures to one or more of the remaining non-national carriers that AT&T has identified as viable competitors. The amount of spectrum which must be divested should be enough to allow the acquiror(s) to be able to effectively compete against the combined AT&T/T-Mobile for data services.¹³⁰ AT&T and others have acknowledged that to be an effective mobile broadband competitor for all broadband services, it is necessary to have at least 20 MHz of clean spectrum in the near term. The Commission should study the public statements of AT&T and Verizon on the subject, and should also invite specific comment on how much spectrum is necessary to offer robust mobile broadband services. The Petitioners believe that the appropriate amount is larger than 20 MHz, since it is not clear how long the 20 MHz will have to last before additional spectrum is made available by the Commission. Further, this spectrum must be divested on a “fix it first” basis to a proven competitor – not a new entrant.

¹³⁰ Sprint currently holds or has access to significant spectrum. Sprint currently holds between 40-60 MHz of paired spectrum in all of MetroPCS' major metropolitan areas, which includes the 10MHz of clean paired spectrum in the PCS G Block. Further, Sprint holds a greater than 50% interest in Clearwire which holds in excess of 120 MHz in many major metropolitan areas. Since the other competitor in each market holds or has access to considerably less spectrum than Sprint or the combined AT&T/T-Mobile, it is appropriate that any divestiture go to such non-national carrier.

REDACTED - FOR PUBLIC INSPECTION

Required divestitures should be of bare spectrum and, at a minimum, should not include the infrastructure that T-Mobile or AT&T deployed on the spectrum or other impediments which would allow AT&T to impose its inefficiencies on the purchasing carrier. The reason for this is several-fold. First, requiring a purchaser to also purchase infrastructure will drive up the purchase price and foreclose mid-tier carriers from buying it. The price of spectrum and infrastructure together is likely to be much higher than merely the sale of spectrum. The spectrum needs to go to the remaining non-national carriers, and they have considerably less financial resources to fund an acquisition than do the large national carriers. If the Commission wants to ensure that the fourth carrier in each market is able to effectively compete with the merged AT&T/T-Mobile, it should not require such carriers to purchase infrastructure that the carrier does not need. Of course, if the remaining non-national carrier wants the infrastructure, AT&T should be obligated to sell it – but it should be at the election of the buyer, not AT&T.

Second, since in most areas the other carriers are CDMA-based, GSM infrastructure is considerably less attractive to, and potentially unusable by, these carriers. Since the remaining carriers do not utilize GSM, they would have to retrain their technicians to understand and work on such equipment and they would have to manage a new-to-them GSM handset inventory. The better approach is not to require the purchaser to undertake these costs, since such a requirement would limit the purchaser's ability to be an effective competitor in the short run.

Third, any infrastructure that is purchased will undoubtedly need to be replaced quickly, which will result in the purchaser potentially having a significant write-off. This may limit the ability of the purchaser to finance the acquisition of the infrastructure since the assets being purchased will be of little value in several years.

REDACTED - FOR PUBLIC INSPECTION

Fourth, divesting clean spectrum will allow the purchaser to immediately begin to deploy 4G services without having to refarm its existing spectrum. Since broadband is the service that the Commission should be most worried about in this merger, divesting clean spectrum to allow the remaining competitors to immediately deploy 4G should be a priority.

Fifth, divestiture of the infrastructure is not required even if the Commission decides that customers also need to be divested – AT&T can be required to enter into a long term resale agreement at rates that allow the buyer to enjoy a margin on the customers. This would give the purchaser the time to convert the customers over to its own system without having to incur upfront non-recoverable costs for the infrastructure.

The Commission also should restrict any divestitures to the remaining non-national competitor(s) in an area. Given the high concentration levels for the industry, divesting the spectrum to one of the other carriers who also have significant market share nationwide will not materially reduce the concentration in the market. Both of the other nationwide carriers have said either that they have adequate spectrum for the near term to compete with the merged AT&T/T-Mobile (Verizon) or have access to spectrum (or resale deals) that they can or have already deployed 4G (Sprint). Further, neither of these carriers is a “maverick” and thus they will not be able to effectively discipline the merged AT&T/T-Mobile. It is Petitioners and others like them that AT&T has characterized as “mavericks.” Accordingly, any divestitures should be directed to the non-nationwide carriers who are mavericks and who will remain in the market.

While in the past the Commission has not imposed conditions that mandated sales to a particular carrier or type of carrier, given the already robust spectrum holdings of the other national carriers, the public interest would be best served if the spectrum is divested to those mid-tier, rural and regional carriers already in the market. Divestiture to such established carriers

REDACTED - FOR PUBLIC INSPECTION

would allow competition to begin much sooner with the combined AT&T/T-Mobile than if the spectrum is sold to a new entrant, and the costs to provide mobile broadband service by the existing carrier would be substantially less than those which would be required for a new entrant.

Requiring spectrum divestiture would allow the remaining carriers to act as a competitive check on the combined AT&T/T-Mobile and consumers would benefit. Consumers would benefit because the cost efficiencies that AT&T believes will result from its merger would be passed along to its customers and innovation would continue. Without significant spectrum divestiture there is serious question whether the existing carriers could effectively check the behavior of the combined AT&T/T-Mobile.

B. The Commission must impose meaningful roaming obligations

As discussed at length above, the ability to offer nationwide service is the only way carriers will be able to effectively compete with the Big 2. However, given that carriers other than the Big-4 generally do not have spectrum in every metropolitan area across the United States, they must rely on roaming from the Big-4 carriers (Big 3 after the merger). The existing roaming rules, however, are untested and do not have many of the safeguards which would be appropriate when the provider has dominant market power – such as restraints on the price that the duopolist can charge for roaming.

Further, conditions like those imposed in the previous mergers would be far from sufficient to safeguard the roaming market after this merger. If conditions were imposed with time limits similar to those previously adopted, they would expire far too early (the Verizon/Alltel condition is already soon to expire) to accomplish anything except briefly postponing the damage to the competitors' roaming arrangements that would otherwise be caused by the merger. More to the point, mere extensions of T-Mobile roaming arrangements,

REDACTED - FOR PUBLIC INSPECTION

which would be the remedy that would parallel the AT&T-Centennial and Verizon-Alltel conditions, would fail to place meaningful data roaming constraints on the Big 2 going forward and would not address the need for 4G LTE roaming at all. Finally, the recently adopted data roaming rules are already under appellate attack by the other member of the Big 2, and the Commission can be assured based on past performance that AT&T will use every loophole or ambiguity it can find to avoid providing meaningful data roaming to its competitors.¹³¹

As a result, the Commission must require the combined AT&T/T-Mobile to offer roaming services on terms and conditions, including rates, that would allow the remaining carriers to effectively compete with the combined AT&T/T-Mobile. The Commission should require AT&T and T-Mobile to turn over to the Commission their existing roaming and wholesale agreements for the Commission to examine how the existing rules have driven prices. The Commission then would be in a position to be able to determine what rates would be appropriate under the circumstances. The Commission should also require AT&T to publish all of its roaming agreements, just as the ILECs are obligated to post interconnection agreements, so that requesting carriers have the market information they need to know whether they are being treated fairly.

One way to establish the cost of roaming may be to require AT&T to offer roaming on terms no less favorable than AT&T offers for wholesale services (or, if lower, AT&T's retail rates). Since wholesale services include more costs than roaming and should include a reasonable profit, such a rate may be appropriate under the circumstances. This mechanism may work for existing 2G and 3G services but will probably not work for 4G services since AT&T is

¹³¹ A cynic (or realist) might conclude that it was only AT&T's judgment that such a step would be impolitic right now that stayed its hand in filing its own appeal of the data roaming rules. See discussion *supra* at V.H.

not currently offering those services on a retail or wholesale basis. An appropriate way to set prices for 4G may be to set the price at AT&T's forward looking price to provide such service with a reasonable profit. While the Commission has been reluctant in the past to step in and set rates, the transformational nature of this transaction dictates that the Commission do so. Otherwise, the existing competitive equilibrium which has allowed prices to fall and innovation to flourish may not exist.

C. The Commission must disallow exclusive handset arrangements

AT&T has proven to be a significant beneficiary of exclusive handset arrangements and the Commission should expect that absent a condition addressing this issue AT&T will continue to enter into exclusive handset arrangements. Such arrangements, however, can stifle competition and deter innovation if the remaining carriers are not given access to the same handsets. The best way to address such a condition would be to prohibit AT&T from purchasing any handsets which are not made available to other carriers using the same air interface. This would not impose any obligation on the equipment manufacturers and would in fact promote more openness on handsets.

D. AT&T Should be Required to Meet the Conditions as a Requirement of Closing

The Commission also should require AT&T to "fix it first" or, in other words, be required to divest the spectrum and undertake the other conditions so that any closing on the divestiture would occur contemporaneous with the consummation of the merger with T-Mobile. If the Commission requires AT&T to meet the conditions only after the consummation of the merger, the conditions might not be met until months after the consummation of the merger

REDACTED - FOR PUBLIC INSPECTION

giving AT&T/T-Mobile a substantial head start against its competition.¹³² While DOJ and the Commission will undoubtedly approve any divestiture of spectrum as soon as possible, AT&T will nonetheless be required to negotiate agreements with the acquiring carrier and file any necessary applications with the DOJ and the Commission. Such a process alone can take several months. In addition, AT&T may not be incented to meet the conditions as soon as possible because doing so would empower competition to AT&T/T-Mobile. A “fix it first” approach will assure that a viable competitor has been able to reach an agreement at an acceptable price that will enable it to bring needed competition to the marketplace. Otherwise, the purpose of the conditions will have failed.

Moreover, if a failure to divest in a timely manner only results in AT&T having to place the necessary assets in trust, AT&T/T-Mobile, not consumers, will benefit since competitors will not have access to the spectrum to compete with AT&T/T-Mobile. Trust arrangements always raise complicated issues regarding the nature and extent of the communications that will be allowed between the trustee and the merger parties, and require continuing oversight and regulatory intervention. A “fix it first” approach avoids these complications. Any head start is further exacerbated by the time that it will take for the acquiring carrier to deploy the spectrum in its network. While divesting spectrum to an existing carrier will reduce the time required to deploy the spectrum, nonetheless it will take some time to deploy the spectrum and during this period consumers will suffer because the competitive alternative from the acquiring carrier will not exist. In addition, requiring AT&T to fix it first would ensure that AT&T will have met its conditions at least initially. There is always a risk in requiring post closing conditions that the

¹³² This is especially true for the divestiture of spectrum which will require DOJ and Commission approval.

REDACTED - FOR PUBLIC INSPECTION

party delays meeting those conditions or the conditions are not fully met.¹³³ Either way, requiring the conditions be met at closing will ensure that a framework exists for future compliance and the Commission can be assured that any headstart that AT&T may enjoy would be minimized.

Requiring AT&T to fix it first will not impose an undue burden on AT&T. AT&T already has indicated that it expects that the Commission and DOJ may require divestitures so AT&T should already be undertaking the process of identifying potential purchasers and starting negotiations with them.¹³⁴ AT&T clearly has the resources and the ability to begin the process of meeting the conditions prior to the approval of the Commission. Since the review of the transaction is expected to last a number of months, if AT&T starts the process of negotiating the divestitures now, any delay in the consummation of its merger with T-Mobile should be minimal, if any. And, since the preferred buyer will be an experienced carrier whose licensee qualifications already have been established, and whose spectrum holdings in the market will not raise concentration or other competitive issues, the divestiture should be capable of being processed by the Commission on an expedited basis. Accordingly, the Commission should require AT&T to meet the proposed conditions *prior* to the consummation of the AT&T/T-Mobile merger.

X. CONCLUSION

AT&T's acquisition of T-Mobile, if allowed to proceed without stringent, meaningful conditions, would be devastating for consumers. It would complete the re-establishment of the wireless duopoly and allow AT&T, in concert with Verizon to choke off the remaining

¹³³ See discussion *infra* Section V.I.

¹³⁴ See e.g., Roger Cheng, "AT&T CEO Expects Some Divestitures in T-Mobile Deal," Fox Business, March 30, 2011, <http://www.foxbusiness.com/industries/2011/03/30/att-ceo-expects-divestitures-t-mobile-deal/>.

REDACTED - FOR PUBLIC INSPECTION

competition in this market. As a result, prices would rise to monopolistic levels, and innovative development of technology would be driven not by the marketplace but by the whims of the executives of two powerful companies. Such conditions will be difficult to craft, but if the Commission is unwilling or unable to impose such conditions, it must deny the applications.

Respectfully submitted,

/s/ Jean L. Kiddoo

Mark A. Stachiw
General Counsel, Secretary, and Vice
Chairman
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082

Mary McDermott
Senior Vice President-Legal and Regulatory
Affairs
NTELOS
401 Spring Lane
Waynesboro, VA 22980

Jean L. Kiddoo
Patrick J. Whittle
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, DC 20006-1806
Tel: (202) 373-6034
Fax: (202) 373-6001
Email: jean.kiddoo@bingham.com
patrick.whittle@bingham.com

Counsel for MetroPCS Communications, Inc.
and NTELOS Inc.

Dated: May 31, 2011

REDACTED - FOR PUBLIC INSPECTION

SERVICE LIST

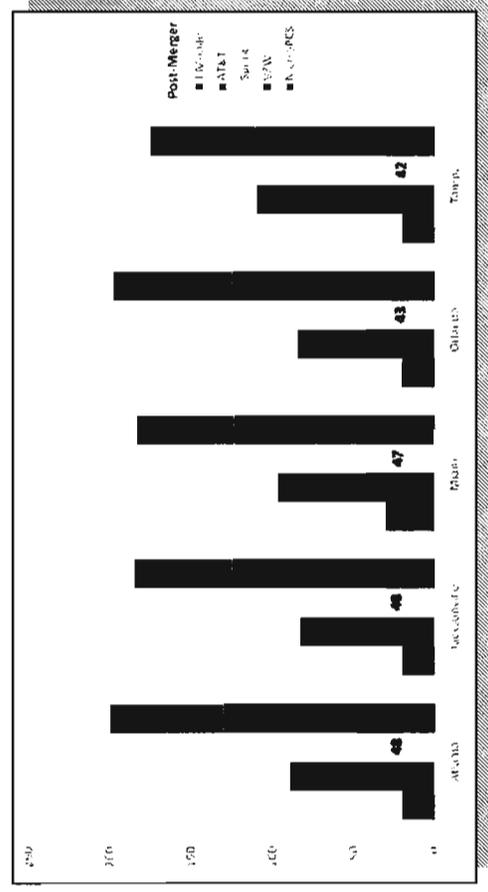
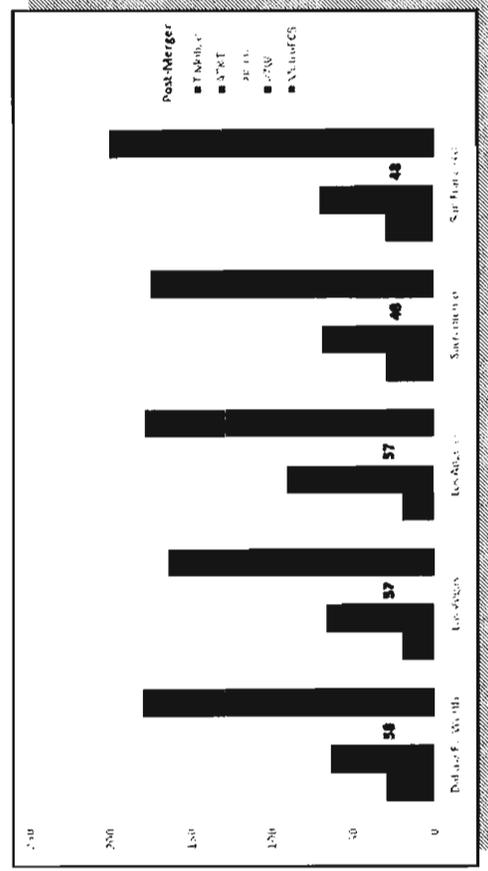
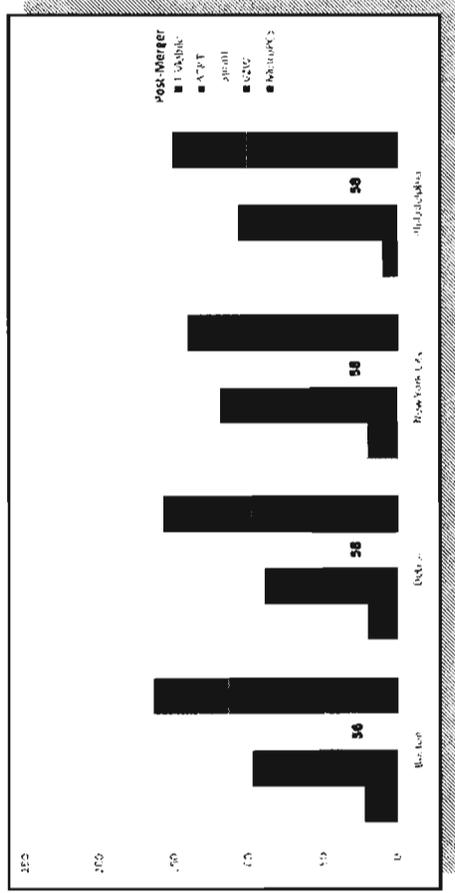
I, Kimberly A. Lacey, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing **PETITION OF METROPACS COMMUNICATIONS, INC. AND NTELOS INC. TO CONDITION CONSENT, OR DENY APPLICATION** to be served, as specified, upon the parties listed below:

<p>Peter J. Schildkraut Scott Feira Arnold & Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter_schildkraut@aporter.com scott_feira@aporter.com <i>Outside Counsel to AT&T Inc.</i> (Via Electronic Mail - REDACTED)</p>	<p>Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com <i>Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.</i> (Via Electronic Mail - REDACTED)</p>
<p>Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov (Via Hand Delivery - CONFIDENTIAL) (Via Electronic Mail - REDACTED)</p>	<p>Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov (Via Electronic Mail - REDACTED)</p>
<p>David Krech, Policy Division International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 david.krech@fcc.gov (Via Electronic Mail - REDACTED)</p>	<p>Jim Bird, Office of General Counsel Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 jim.bird@fcc.gov (Via Electronic Mail - REDACTED)</p>
<p>Best Copy and Printing, Inc. 445 12th St., S.W. Washington, D.C. 20554 FCC@BCPIWEB.COM (Via Electronic Mail - REDACTED)</p>	

/s/ Kimberly A. Lacey
Kimberly A. Lacey

EXHIBIT A

Spectrum Holdings In MetroPCS Major Metropolitan Areas below 2.5 GHz



AT&T Spectrum includes WCS and QCOM Spectrum and based on FCC records as of 3/31/11

EXHIBIT B

REDACTED - FOR PUBLIC INSPECTION

REDACTED - FOR PUBLIC RELEASE

Relative Efficiencies of Carriers in Major MetroPCS Metropolitan Areas

	MetroPCS (MHz)	MetroPCS Subs/MHz (000s)	VZW (MHz)	VZW Subs/MHz (000s)	Sprint (MHz)	Sprint Subs/MHz (000s)	AT&T (MHz)	AT&T Subs/MHz (000s)	T Mobile (MHz)	T Mobile Subs/MHz (000s)	Combined T & T Mo (MHz)	AT&T & T Mo Combined Subs/MHz (000s)
Atlanta	20	89	89	48	136	70	206					
Boston	22	97	97	56	126	50	176					
Dallas/ Ft. Worth	30	64	64	58	136	50	186					
Detroit	20	89	89	58	104	60	154					
Jacksonville	20	82	82	48	131	60	191					
Las Vegas	20	67	67	57	121	50	171					
Los Angeles	20	91	91	57	141	50	191					
Miami	30	96	96	47	129	60	189					
New York City	20	119	119	58	103	50	153					
Orlando	20	84	84	43	131	73	204					
Philadelphia	10	107	107	58	113	50	163					
Sacramento	30	69	69	48	136	45	181					
San Francisco	30	71	71	48	141	70	211					
Tampa	20	109	109	42	116	65	181					

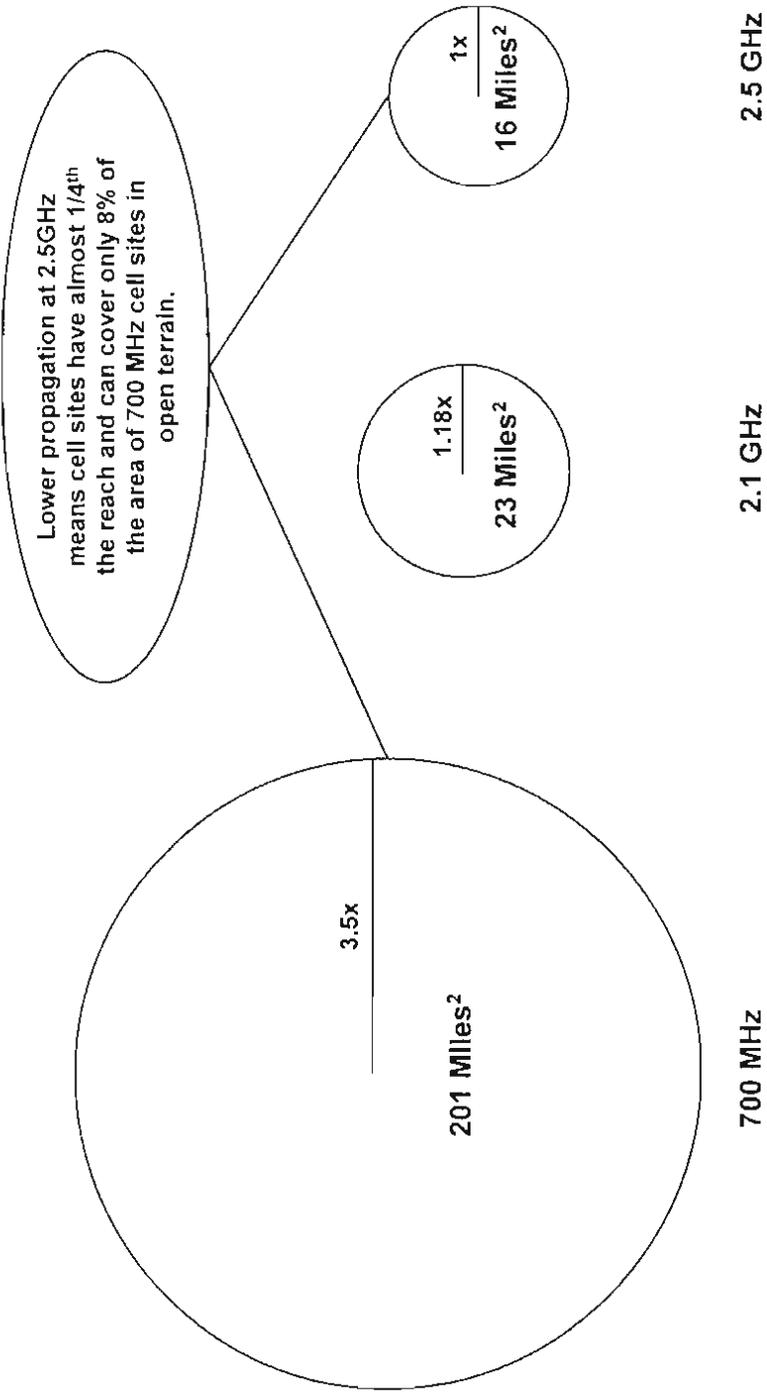
- Nielsen Data March 2011
- Spectrum count includes WCS and QCOM and from FCC records
- Sprint does not include Clearwire

EXHIBIT C

Higher Frequency Spectrum Has Less Reach

Telecom Services
Equity Research

Maximum Radius by Frequency



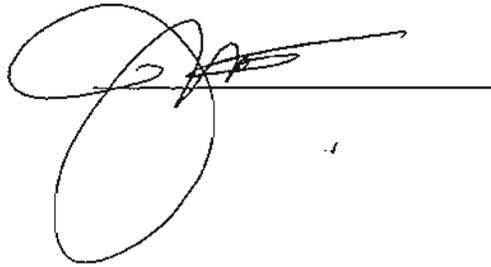
Source: VZ Presentation (1/11/2010); OBI Paper, "The Broadband Availability Gap"; Credit Suisse Estimates

VERIFICATION

I, James A. Hyde, declare that I am the Chief Executive Officer of NTELOS Inc. and that the facts set forth in the Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent, or Deny Application ("Petition"), except for statements uniquely pertaining to MetroPCS Communications, Inc., are true and correct to the best of my knowledge, information and belief.

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

Executed on May 31, 2011

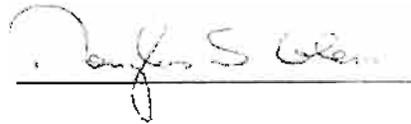
A handwritten signature in black ink is written over a solid horizontal line. The signature is stylized and appears to be 'J. A. Hyde'.

VERIFICATION

I, Doug Glen, declare that I am the Senior Vice President, Corporate Development for MetroPCS Communications, Inc. and that the facts set forth in the Petition of MetroPCS Communications, Inc. and NTELOS, Inc. to Condition Consent, or Deny Application ("Petition"), except for statements uniquely pertaining to NTELOS, Inc., are true and correct to the best of my knowledge, information and belief.

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

Executed on May 31, 2011



Doug S Glen