

**Before the
Federal Communications Commission
Washington, DC 20556**

In the Matter of)	
)	WT Docket No. 11-65
Applications of AT&T, Inc. and)	
Deutsche Telecom AG to Transfer)	
Control of T-Mobile USA, Inc. to)	
AT&T, Inc.)	

Comments of United States Cellular Corporation

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Introduction and Summary

United States Cellular Corporation ("U.S. Cellular") hereby files its Comments on the above-captioned applications proposing the acquisition by AT&T, Inc. ("AT&T") of T-Mobile, USA, Inc. ("T-Mobile") and all its wholly owned, majority-owned, and controlled subsidiaries.¹

U.S. Cellular takes no position at this time on whether the Federal Communications Commission ("FCC" or "Commission") should ultimately approve the above-captioned transaction. The decisions of the FCC and Department of Justice ("DOJ") regarding the merger will obviously be the result of a careful evaluation of a vast quantity of data bearing on the proposed acquisition's impact on competition on a national basis and in the relevant markets and a consideration of broader public interest issues. We believe that the FCC and the DOJ will evaluate those issues carefully and will come to a fair resolution of them.

US Cellular does, however, have serious concerns about the proposed acquisition, which is likely the most significant and consequential in the history of the U.S. wireless

¹ See Public Notice, "AT&T and Deutsche Telecom AG Seek FCC Consent to The Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T, Inc," DA-799, released April 28, 2011.

industry. And we believe that the FCC cannot approve the acquisition without considering the imposition of conditions on AT&T sufficient to ensure that AT&T cannot use its market power to exclude the smaller competitors generating the “intense” wireless competition to which AT&T and T-Mobile refer in their application.²

Specifically, we request that the FCC impose conditions on any order granting the applications which will: (1) require AT&T’s wireline affiliates to provide “special access” to wireless backhaul on just and reasonable terms; (2) ensure that AT&T supports the development of LTE devices capable of operating across all 700 MHz band classes; (3) prevent AT&T from having exclusive access to any handset; (4) require that AT&T accept limitations on how much additional spectrum it may acquire post-merger; and (5) require that AT&T not use any Universal Service support to implement 4G LTE in any state as they have already committed to during hearings before Congress addressing the propriety of this acquisition, and to not include line counts for any entity not eligible for USF support in any line count filing for any AT&T or T-Mobile entity currently eligible to receive such support.

I. Fair Special Access Rates Should Be Made a Condition of Grant

Wireline backhaul facilities are a crucial part of all wireless networks. The pricing of such facilities is governed by the FCC’s “special access” regulations. It has been repeatedly demonstrated that wireless carriers with large affiliated wireline networks, such as AT&T, are able to secure an unfair advantage over their wireless rivals lacking such networks by charging their competitors unreasonably high rates. AT&T, for

² “Post-merger the combined company will continue to face intense competition from the following providers among others: [Verizon Wireless, Sprint, MetroPCS, Leap, U.S. Cellular, Cellular South, Cincinnati Bell Wireless, Lightsquared, Clearwire]” See AT&T-T-Mobile “Description of Transaction, Public Interest Showing, and Related Demonstrations p. 11 (“Public Interest Showing”).

example, has increased special access prices to its wireless competitors above the level which would be found in a competitive market,³ as well as pursuing other types of exclusionary conduct. This conduct has caused harm throughout the U.S. economy, by extracting monopoly profits at the expense of other wireless carriers and their customers.⁴

Recognizing the problem, the FCC commenced a proceeding in 2005 to deal with the issue of regulating incumbent LEC special access services.⁵ Despite the evidence of abuse presented to the FCC in the proceeding and subsequently, no action has been taken by the Commission concerning special access rates. We believe the FCC should take action regardless of the outcome of this merger proceeding.

Approval of this merger in the absence of any FCC action to regulate AT&T's special access rates would only exacerbate the problem, by increasing AT&T's overall market power while decreasing by one the already limited number of unaffiliated carriers who would be inclined to purchase special access, if such sources were available, from someone other than AT&T. Moreover, it is a problem which will grow worse as all carriers have to expand their networks to comply with the FCC's broadband coverage mandates and strengthened buildout requirements generally.⁶ If the FCC approves the acquisition, it should impose cost-based restrictions on AT&T's pricing of special access services. We make no specific proposal but note that this matter is likely to be raised by various filers and the FCC will be able to evaluate all the relevant data once again. If

³ See, e.g., letter from Christopher Wright and A. Richard Metzger, Jr., Counsel for Sprint Corp., to Marlene Dortch, W.C. Docket 05-25 (October 5, 2007).

⁴ See Letter from Thomas Jones, Counsel for tw telecom, inc. to Marlene Dortch. WC Docket No. 05-25, at 8-11 (June 14, 2010).

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

⁶ See, e.g., Section 27.14(g) of the FCC's Rules (requiring 35 percent license area coverage after four years and 70 percent license area coverage by the end of the license term for post-Auction 73 700 MHz licensees).

AT&T is allowed to acquire T-Mobile, matters cannot be left as they are with respect to special access services.

II. The FCC Must Impose A 700 MHz Handset Condition

The captioned applications once again raise crucial questions regarding the decision of AT&T to deploy 4G broadband services with devices which operate exclusively on the Lower B and C Block spectrum in the 700 MHz band.⁷ AT&T's decision, as well as Verizon Wireless' decision to commence deployments in the Upper C Block, threaten to recreate the GSM/CDMA divide in a new form, frustrating expectations that Long Term Evolution ("LTE") technologies would lead to important advances in commercial network interoperability. U.S. Cellular and other commenters have asked that those decisions and their consequences be thoroughly and promptly reviewed in rulemaking proceedings. We support the adoption of rules and policies fostering the development of 700 MHz devices covering Band Classes 12, 13, 14 and 17 ("full spectrum" devices) so that consumers and public safety licensees can benefit from timely and cost effective access to the devices and capabilities provided over a vigorously competitive 700 MHz broadband ecosystem. And because the FCC has not acted in response to these requests, we now ask that the FCC review this issue in this proceeding and impose an appropriate condition.

The recent acquisitions by AT&T and VZW via auctions and commercial transactions of massive 700 MHz commercial paired spectrum holdings, coupled with decisions by AT&T and VZW to deploy single 700 MHz band class devices rather than

⁷ The 3GPP equipment standards for the 700 MHz band which were published in September of 2008 under 3GPP Release 8.3 and include the following four band classes: Band Class 12 for the Lower A, B and C Blocks; Band Class 17 for the Lower B and C Blocks; Band Class 13 for the Upper C Block; and Band Class 14 for the Upper D Block and the PSBL spectrum. These issues are discussed in detail in U.S. Cellular's Comments in RM-11592, filed March 31, 2010.

support parallel development of a 700 MHz broadband device ecosystem including Band Classes 12 and 14, is already impeding the competitive rollout of 4G broadband coverage by other commercial providers. This will slow consumer adoption of broadband in the those parts of the U.S. not served by AT&T and VZW and will reduce options for consumers to choose from a diversity of service providers based on the broadband features, price and service quality which are important to them.

Moreover, the increasing wireless market share of AT&T coupled with its dominant spectrum position in the 700 MHz band has created circumstances where it could dictate 700 MHz equipment standards and drive the development of the equipment in a manner that advantages itself and its own customers, but disadvantages the customers of every other small, rural, mid-tier and nationwide carrier.

Specifically the record in RM-11592 illustrates how AT&T was able to acquire 700 MHz spectrum and then dictate changes in 3GPP standards to subdivide Band Class 12, thereby creating a unique Band Class 17 encompassing its dominant Lower 700 MHz B and C Block spectrum holdings. USCC has commented in RM-11592 that AT&T's decision had consequences which diminished the prospects for data roaming, delayed availability of 700 MHz devices for other 700 MHz licensees, increased device costs for other licensees, and took away regulatory incentives promoting consumer choice and device innovation in the 700 MHz band.

It is undisputed that the proposed transaction will augment AT&T's spectrum holdings and thus increase AT&T's market power by adding T-Mobile's PCS and AWS spectrum to AT&T's existing 700 MHz, cellular, and PCS spectrum.⁸ If this is to be permitted, the FCC must now act to prevent AT&T from driving 700 MHz handset

⁸ Public Interest Statement, p. 33.

development in a narrow manner that limits opportunities for other carriers that wish to provide LTE services. An appropriate condition can be developed from the proposals made in the RM-11592 proceeding, perhaps requiring that all such devices be interoperable across all 700 MHz spectrum bands within 12 months of completion of the merger. In any case, given the huge change in the wireless industry which this merger would create, it is essential that the FCC now focus on this issue in this context.

III. AT&T Should Not Now Be Allowed Exclusive Access To Any Handset

The inability of AT&T's and VZW's competitors to get access to 700 MHz handsets is part of a larger problem, namely the two largest carriers' preferred access to handsets, often on an "exclusive" basis. For four years, AT&T for example had exclusive access to perhaps the most famous wireless device in history, Apple's iPhone, which had large effects on the wireless market. The proposed merger necessitates long overdue FCC action to deal with this issue.

In 2008, the Rural Cellular Association ("RCA"), asked the FCC to initiate a rulemaking proceeding to deal with handset exclusivity.⁹ RCA and other commenters demonstrated that the exclusive handset arrangements entered into by the largest carriers were anticompetitive and, if allowed to continue, would have significant adverse consequences for small and mid-sized carriers and their customers.¹⁰

The effect of handset exclusivity on wireless industry concentration was also described in the FCC's 2010 Competition Report, which notes that smartphones accounted for 44 percent of handset sales in the third quarter of 2009 and that AT&T

⁹ Petition For Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Rural Cellular Association, RM-11497 (filed May 27, 2008).

¹⁰ See, RCA Comments, pp. 2-3; RTG Comments, pp. 9-10; MetroPCS Comments, pp. 14-16 in RM-11497.

reported that 40 percent of its iPhone customers had switched to AT&T from another carrier.¹¹ Again, such stark results refute the case made by the largest carriers to the effect that exclusive arrangements for the most desirable handsets do not matter because many other handsets are available.¹²

As the comments demonstrated in that docket, exclusive arrangements, especially those maintained for excessive lengths of time, help to maintain and strengthen the emerging wireless duopoly. This cannot be understood in isolation from the other factors which shape the emerging marketplace. Indeed exclusive handset arrangements are a by-product of the concentration that has been allowed to occur in the industry because it is the carriers with the highest purchasing volumes that have been able to demand them for the “iconic,” most sought after, handsets. And it is spreading and no longer limited to “only” certain highly desirable handsets, such as the iPhone.

Unless the FCC acts now, AT&T’s ability to obtain handset exclusivity will only be increased by the augmentation of its market power promised by the additional purchasing volume that this merger will create. We believe that this merger would justify a condition which provides that AT&T, post merger, should not have any exclusive handset arrangements. Such a step would be crucial to the preservation of competition. U.S. Cellular supports a general rule to that effect for all carriers. But a merger specific condition would be an important interim step and justified by the additional harm this merger will cause to rural and regional carriers ability to acquire handsets on comparable terms and conditions. Should the FCC determine that a reasonable time period for exclusives is necessary, a period of no more than three months is appropriate.

¹¹ 2010 Competition Report, ¶309, ¶138.

¹² See, e.g., Verizon Wireless Comments in RM 11497, pp. 97-103.

IV. AT&T Must Accept Limitations On The Amount of Spectrum It Can Acquire Post-Merger

The basic, indisputable fact about the proposed merger is that it will greatly increase AT&T's spectrum holdings and market share, whether considered nationally or by individual markets. For example, it has been reliably estimated that AT&T would increase its percentage of total wireless customers in the U.S. from 28.9 percent to 40.2 percent and its percentage of total wireless revenue from 27.8 percent to 39.9 percent. Taken together, VZW and AT&T would have 71.7 percent of total wireless customers and 76.4 percent of wireless revenues.¹³

AT&T and T-Mobile acknowledge this but attempt to justify the merger by pointing to alleged efficiency gains from the merger in the form of "substantial synergies, [and] expanding output," which are now prevented by "severe capacity constraints."¹⁴ The FCC and DOJ will have to assess those claims in making their decisions. However, if the merger is approved, even with some divestitures, a change of this magnitude in the direction of a wireless duopoly must mean that the FCC can no longer apply its current policies for accessing spectrum aggregation in relation to AT&T in the future, because manifestly those policies have not worked to prevent the emergence of the duopoly.

At present, one carrier, Verizon Wireless, dominates the ranks of CDMA carriers, and the other, AT&T, is the dominant GSM carrier. Approval of the merger will eliminate AT&T's largest GSM competitor, T-Mobile. This state of affairs will obviously have negative implications for handset acquisition, roaming, and every other aspect of wireless competition. The FCC has recognized this problem in some of its recent actions, e.g., ending the "in market" and data roaming exceptions and imposing

¹³ Stifel Nicolaus, Washington Telecom, Media & Tech Insider, March 29, 2011, p. 2.

¹⁴ Public Interest Showing, p. 19

restrictions on how much spectrum may be leased to the two largest wireless carriers by satellite carrier SkyTerra Communications, Inc. We support these actions.¹⁵

But still the net result of the FCC's system of spectrum acquisition in auctions and transaction evaluation since 2004 has been to allow the largest wireless carriers to attain positions of dominance without precedent in wireless history. If wireless competition is to be preserved, at a time when the amount of "greenfield" wireless spectrum will be severely circumscribed,¹⁶ new approaches to safeguard it will have to be adopted by the FCC, beginning with this merger. And, lastly, it should be noted that the FCC is obligated by Section 309(j)(3)(B) of the Communications Act¹⁷ to "avoid excessive concentration of licenses" and to disseminate licenses among "a wide variety of applicants," a responsibility its current wireless policies fail to meet.

The FCC should establish a fixed, per county, spectrum cap, applicable in all markets for AT&T, and/or adopt a special, restrictive "cap" applicable in markets where market data confirms that there is significant concentration of AT&T's subscriber market

¹⁵ Seq, e.g., In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and other Providers of Mobile Data Service, WT Docket No. 05-265, Order of Reconsideration and Second Notice of Proposed Rulemaking, released April 21, 2010; ¶¶ 18-41; In the Matter of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, FCC 11-52, released April 7, 2011 ("Data Roaming Order"); In the Matter of SkyTerra Communications, Inc. Transferor and Harbinger Capital Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, IB Docket No. 08-184, et al. Memorandum Opinion and Order and Declaratory Ruling, DA 10-535, released March 26, 2010.

¹⁶ The only wireless spectrum below 3 GHz presently in line to be auctioned is the 700 MHz D Block (758-763, 793-798 MHz) and AWS-2 and AWS-3 spectrum (1915-1920, 1995-1920, 2020-2025, 2175-2180, 2155-2175 MHz). The 700 MHz allocation being delayed pending White House and congressional review of the FCC's National Broadband Plan ("NBP") Recommendation in 5.8.2., and the AWS-2 and AWS-3 spectrum are both the subject of contested rulemaking proceedings. In the case of the AWS-2 spectrum, the Commission must resolve how to make this spectrum available without creating unmanageable interference issues for nearby incumbents. In addition, AWS-3 spectrum is now subject to a special coordination procedure mandated under a White House Executive Memorandum released June 28, 2010 to determine whether the spectrum might be freed up within the next five years.

¹⁷ 47 U.S.C., Section 309(j)(3)(B).

shares.¹⁸ If, as a result of the merger or otherwise, AT&T now would meet or exceed the cap in a given county, it should at the least not be allowed to acquire more spectrum in upcoming auctions or in the private market. The FCC should certainly consider more general measures to preserve the rights of small and mid-sized carriers to acquire spectrum. But placing some restrictions on AT&T as a consequence of the merger is a vital first step.

V. **AT&T Must Agree Not To Use Universal Service Support for Its LTE Deployment**

In various filings in recent years, U.S. Cellular has emphasized the critical importance of the continuing availability of universal service support to its ability and that of similarly situated wireless carriers to expand their services in rural America. As the FCC contemplates transitioning support from voice networks to broadband networks in the most economical and efficient way possible, we believe approval of the merger should be conditioned on AT&T's agreement that they will forego receipt of USF support for their LTE deployment.

AT&T's Chairman, Chief Executive Officer and President, Randall Stephenson, recently testified to the alleged benefits that the proposed acquisition would provide to rural Americans.

As we understand it, Mr. Stephenson committed AT&T to provide 4G LTE service to 97% of the American population "without any subsidies or taxpayer dollars."¹⁹ We ask the Commission to hold AT&T to this commitment by requiring that as a

¹⁸ For example, the FCC might consider adopting a special "cap" lower than the spectrum "screen" totals for mobile telephone/broadband services" applicable in markets when AT&T's HHI is above a certain threshold.

¹⁹ During the hearing, Mr. Stephenson testified that building service to 97% of the American population would encompass approximately 55% of the land mass of the United States.

condition of approval AT&T agree to provide the Commission with an annual certification that none of the high-cost support that the combined company receives will be used to invest in 4G LTE equipment or services.

Secondly, with respect to any USF support that AT&T or T-Mobile remain eligible to receive under the current USF regime, the combined company should certify that it will not file line counts in any state for an otherwise ineligible entity, increasing support without prior authorization required pursuant to Section 214 of the Act. For example, in any state where T-Mobile is designated as an ETC but AT&T is not, the combined company may only file line counts from T-Mobile's network, not AT&T's. Likewise, in any state where AT&T is an ETC but T-Mobile is not, the combined company may only file line counts from AT&T's network, not T-Mobile's. This restriction applies to any subsidiary company, effectively preventing AT&T from reporting T-Mobile lines within a company previously designated as an ETC, such as American Cellular or Dobson Cellular.

VI. AT&T Should Be Required To Abide By The Data Roaming Order

As noted above, last April the FCC adopted a landmark order requiring facilities based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.²⁰ U.S. Cellular considers the right to data roaming to be vital to all small and mid-sized wireless carriers and applauds the FCC's action. However, the data roaming order has been appealed by Verizon Wireless to the United States Court of Appeals for the D.C. Circuit (Case Nos. 1135, 1136) and its fate is uncertain.

²⁰ Data Roaming Order, *supra*.

Accordingly, we request that the FCC either impose as a condition or that AT&T voluntarily agree to adhere to the terms of the data roaming order for some reasonable time, such as seven years, even if Verizon Wireless' appeal is successful. In the absence of a binding data roaming obligation, elimination of the only national alternative GSM roaming carrier would seem to be problematic. Such a commitment by AT&T would go a long way to demonstrating that AT&T, despite its market power, intends to treat its competitors and roaming partners fairly.

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