data or analysis to overcome the presumption that this high national concentration would cause serious harm to consumers and competition.

Moreover, in flat contradiction with previous arguments made while seeking Commission approval to acquire regional wireless carriers, AT&T now urges the Commission to consider local markets only in assessing the competitive effects of AT&T's proposed takeover of T-Mobile.[59] For example, in his declaration in support of AT&T's acquisition of Centennial Communications Corp., David Christopher (Chief Marketing Officer of AT&T's Mobility and Consumer Markets Division) could not have been clearer as to why the relevant geographic market should be national:

> AT&T makes nearly all competitive decisions in response to national competition. AT&T offers national plans that give subscribers a consistent number of minutes of service for a single monthly price, with no roaming charges, and does not provide regional or local plans that vary depending on subscriber location. (A small number of customers continue to receive service on previously purchased local plans that are no longer promoted or actively sold.)
>
> AT&T's plans are uniform for a number of reasons. Demand for wireless telephony is generally similar throughout the country, and we have found that plans that appeal to consumers in one part of the country also appeal to customers living elsewhere. Providing the same plans across the country is more cost-efficient: national plans eliminate the administrative costs that were associated with local plans, which required customized training for sales and customer service personnel, and also permit AT&T to contract more easily with national retailers to sell AT&T wireless service, an additional efficiency.[60]

Tellingly, AT&T's economic team is silent on the question of geographic market definition, sidestepping this important issue without taking any position on what the appropriate

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59 Application at 72-74.

60 Declaration of David A. Christopher, attached to Applications of AT&T Inc. and Centennial Communications Corporation for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 08-246, ¶¶ 3-4 (November 21, 2008).

geographic market(s) should be in which to evaluate the competitive effects of the merger.[61] The same economic team was not silent during the Verizon-ALLTEL merger, where Professor Carlton and his colleagues urged that "competition in the wireless industry has become increasingly national in scope,"[62] and stated that "[t]he proposed merger reflects an attempt to further realize efficiencies resulting from operating wireless networks on a *national* instead of regional scale."[63]

Based on the FCC's grant of the original cellular licenses for Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs"), and the presumption that consumers obtain their wireless service in a local area, the FCC traditionally has defined wireless geographic markets as local.[64] However, in reviewing recent wireless transactions involving local or

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61 Declaration of Dennis W. Carlton, Allan Shampine and Hal Sider, attached to Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, ¶ 8 (Apr. 21, 2011) (noting only the "usefulness of an area-by-area analysis") ("Carlton Decl.").

62 Declaration of Dennis W. Carlton, Allan Shampine and Hal Sider, attached to Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, WT Docket No. 08-95, ¶ 36 (June 13, 2008).

63 *Id.* ¶ 53.

64 *See Applications of AT&T Inc. and Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶ 23 (2007) ("*AT&T-Dobson Merger Order*"); *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd 11526, ¶¶ 29-30 (2006) ("*ALLTEL-Midwest Wireless Merger Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 56 (2005) ("*Sprint-Nextel Merger Order*"); *Applications of Western Wireless Corporation and ALLTEL Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13053, ¶ 35 (2005) ("*ALLTEL-Western Wireless Merger Order*"); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶¶ 89-90 (2004) ("*AT&T-Cingular Merger Order*"); *Sprint Nextel Corporation and Clearwire*

regional wireless providers, the Commission has found that the relevant local market for wireless service may encompass multiple counties and, depending on the consumer's location, even parts of more than one state.[65] In those reviews, the Commission identified two sets of geographic areas that could be used to define wireless markets: CEAs or, alternatively, Cellular Market Areas ("CMAs").[66]

Industry dynamics have changed dramatically since 2006, when the Commission reviewed Sprint's acquisition of Nextel Communications, Inc. ("Nextel"),[67] the last merger between two national carriers. In its review of that transaction, the Commission analyzed the CEA/CMA geographic market. The Commission chose the CEA/CMA geographic market in large part because of "two salient features" it identified regarding the sale of mobile telephony services and handsets. First, the Commission noted that "carriers base their monthly rates on the purchaser's billing address or zip code."[68] Second, the Commission observed that "promotions and handset prices are not attached to a billing address and do vary across a region."[69] Neither of those "salient features" is true today.

Corporation; Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, Memorandum Opinion and Order, 23 FCC Rcd 17570, ¶ 52 (2008) ("*Sprint Nextel-Clearwire Merger Order*"); *Verizon-Atlantis Merger Order* ¶ 49; *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, ¶ 41 (2008) ("*Verizon-RCC Merger Order*").

65 *See Verizon-RCC Merger Order* ¶ 39; *AT&T-Dobson Merger Order* ¶ 23.

66 *See, e.g., Verizon-Atlantis Merger Order* ¶ 49.

67 At the time of the transaction, Nextel, together with its affiliate Nextel Partners, provided service to 297 of the top 300 markets with its network covering 260 million Pops. *See Sprint-Nextel Merger Order* ¶ 7.

68 *Sprint-Nextel Merger Order* ¶ 54.

69 *Id.* ¶ 55.

The ability to offer nationwide service is now a critical dimension of competition. It is this nationwide service that consumers want and that wireless carriers strive to offer, either through networks, roaming and access agreements, or both. AT&T has previously acknowledged that "rate plans of national scope, offering nationwide service at a single price without roaming charges, have become the standard in the wireless industry."[70] Victor Meena, the CEO of Cellular South, testified recently, "[t]here is no market for regional or local calling plans."[71] He added, "[t]he U.S. wireless market is national, not regional. So it is ironic that AT&T's promotional materials regarding its takeover of T-Mobile cast carriers like Cellular South as national competitors while pressing regulators to review competition on a market-by-market basis."[72]

1. Other National Carriers Recognize that Retail Wireless Service Is National

Just as AT&T publicly stated that "the predominant forces driving competition among wireless carriers operate at the national level,"[73] Verizon argued in its application to acquire ALLTEL that "the wireless business today is increasingly national in scope with four major national providers competing vigorously through pricing plans and service offerings that are national in scope."[74]

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70 Public Interest Statement, attached to Applications of AT&T Inc. and Dobson Communications Corp. for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, at 18 (July 13, 2007) ("AT&T-Dobson Application").

71 Meena Testimony at 6.

72 *Id.*

73 AT&T-Dobson Application at 18.

74 Public Interest Statement, attached to Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses,

The four large national carriers now price their services and equipment on a national basis; handsets are now developed, procured, and offered nationally; the four major carriers advertise predominantly nationally; plans are distributed through national chains; and the national carriers promote their national networks. For these reasons, assessing the effect on retail wireless service of the combination of AT&T and T-Mobile – two of only four national wireless carriers – requires the Commission to analyze competition at a national level.

(a) AT&T, Verizon, Sprint, and T-Mobile Price Post-Paid Wireless Plans Nationally

AT&T has explained its practices with respect to pricing in the following way:

> AT&T establishes its rate plans and pricing on a national basis, which means that the terms of such plans are set without reference to market structure at the CMA level. Rather, AT&T develops its rate plans, features, and prices in response to competitive conditions and offerings at the regional and national level – primarily the plans offered by the other national carriers.[75]

Sprint prices exclusively on a nationwide basis, meaning that it offers the same plans at the same prices throughout the United States.[76] As of April 2011, **[begin confidential information]** [redacted] **[end confidential information]** percent of Sprint's new post-paid subscribers

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Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, WT Docket 08-95, at 29 (June 13, 2008) ("Verizon-Atlantis Application").

[75] AT&T-Dobson Application at 19 (footnotes omitted). AT&T and Verizon can offer bundled options combining wireline, wireless, and/or Internet service (*e.g.*, "double play" and "triple play") where, as a result of the Ma Bell legacy, they are the local wireline provider. These offerings are by definition not nationwide in scope because AT&T or Verizon can only offer them where they are the incumbent local exchange carrier ("LEC").

[76] Souder Decl. ¶ 3. There are some limited circumstances in which Sprint will offer a plan or service on less than a nationwide basis. For example, a new network technology will be offered as its geographic scope is built out, or Sprint may test a promotion in a limited area to determine if it should be implemented broadly (in which case it would be offered nationwide). Importantly, however, these differences are not driven by competition in those local areas. *Id.* ¶ 4.

are on national plans that have the same pricing regardless of where the customer lives or bought the plan.[77]

In its application to acquire ALLTEL, Verizon noted that "close to 100 percent of new subscribers are enrolled in plans with national pricing,"[78] and stated:

> Like other national carriers, Verizon [] primarily prices – and advertises – on a national basis, leaving very little room for local (or even regional) variation in pricing. Most prices are set on a national level, and therefore local market conditions are less relevant to a carrier's competitive strategy than are actions taken by other national carriers.[79]

Similarly, T-Mobile explained in its application for approval of its merger with SunCom Wireless Holdings, Inc.: "T-Mobile's retail rates, like some other national carriers, are set on a national level, with little or no variation by locality or region. The acquisition of SunCom would not materially change T-Mobile's national pricing strategies or offerings in a manner that would harm consumers."[80]

To demonstrate this point empirically, Sprint's economic consultants examined retail price data for a sample of zip codes. Their analysis reinforces the position of AT&T, Verizon, and T-Mobile that the national carriers set their prices on a nationwide basis for the various products and services they offer.[81]

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77 *Id.* ¶ 3.

78 Verizon-Atlantis Application at 31, n.52.

79 *Id.* at 31-32 (footnotes omitted).

80 Public Interest Statement, attached to Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc. for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-237, at 24 (Oct. 1, 2007).

81 CRA Decl. ¶ 56, n. 46.

(b) Handsets are an Extremely Important Factor in Consumers' Selection of a Wireless Carrier, and They are Developed and Sold Nationally

A handset must be built with the correct chips, antennae, and transmitters to be operable on a carrier's nationwide network, and there is a significant amount of engineering and testing involved in bringing a handset to market.[82] The arrangements between handset manufacturers and wireless carriers to bring new handsets to market are nationwide in scope. For example, availability of AT&T's Apple iPhone, Sprint's HTC EVO 4G, Verizon's HTC ThunderBolt, and T-Mobile's Samsung Galaxy S 4G, is not dependent on where in the country the consumer lives; the same phones are available to consumers in Los Angeles, CA and in Atlanta, GA.[83] Indeed, AT&T's CEO Randall Stephenson even testified before Congress that "we tend to standardize our product set and our handset selections across our various geographies."[84]

(c) The Four National Carriers Together Account for the Vast Majority of All Wireless Advertising and Advertise and Market Nationally

Advertisements for handsets, including the popular iPhone, are national, not local. The four national carriers together account for about **[begin confidential information]** [redacted] **[end confidential information]** percent of all wireless advertising and advertise and market their brands nationally.[85] Virtually all of Sprint's advertising is done nationally, with a national

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82 Declaration of Fared Adib, Attachment E ¶¶ 4-5 ("Adib Decl.").

83 *See id.* ¶ 3.

84 *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?*: *Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (May 11, 2011) (testimony of Randall L. Stephenson, Chairman, CEO, and President, AT&T Inc.) Federal News Service Transcript at 28, *available at*: <http://fednews.com/printtranscript.htm?id=20110511t3772>.

85 Appendix A, Wireless Category Media Spend.

message that is the same across the country.[86] Market research shows that the vast majority of advertising spend by the four national carriers is on a national basis. For example, the percentage of advertising that was national in 2010 was **[begin confidential information]** [redacted] **[end confidential information]** percent for Sprint, **[begin confidential information]** [redacted] **[end confidential information]** percent for AT&T, **[begin confidential information]** [redacted] **[end confidential information]** percent for T-Mobile, and **[begin confidential information]** [redacted] **[end confidential information]** percent for Verizon.[87] T-Mobile's latest advertising campaign, which touts the superiority of T-Mobile service over the offerings of AT&T and Verizon, is another example of the national focus of advertising by the four nationwide carriers.[88]

The national carriers' advertising campaigns focus on national slogans that promote their nationwide attributes, including their national footprints (*e.g.*, AT&T's "The Nation's Fastest Mobile Broadband Network," Verizon's "America's Most Reliable Network," Sprint's "America's Favorite 4G Network," and T-Mobile's "Step Up to America's Largest 4G Network").

(d) The Most Important Channels of Distribution for Wireless Plans and Handsets Are Increasingly National, Not Local

Independent nationwide retail stores such as Wal-Mart, Best Buy, and RadioShack play a pivotal role in driving wireless sales, and those stores sell national wireless plans at the same rates in every store.[89] Today, Sprint sells more of its wireless plans through these national

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[86] Declaration of John Carney, Attachment F ¶¶ 4-5 ("Carney Decl.").

[87] Appendix A, 2010 Local vs. National Advertising Spend.

[88] Carney Decl. ¶ 15; Video Release, T-Mobile, *The T-Mobile Total Package: Step Up to Nationwide 4G*, YOUTUBE (Jan. 12, 2011), *available at*: <http://www.youtube.com/user/TMobile#p/u /3/6pb9-LbxFeU>.

[89] Souder Decl. ¶ 5.

retailers than it sells through its own Sprint retail stores.[90] The fact that some wireless customers still purchase their handsets and rate plans in local stores is meaningless because the plan and handset purchased in those stores are offered on the same terms throughout the United States.[91] Furthermore, all the national carriers are pushing to increase Internet sales, because they are cheaper than selling through brick and mortar locations. Sprint's combined Internet sales and telesales, for example, have increased **[begin confidential information]** [redacted] **[end confidential information]** percent since the first quarter of 2009.[92]

2. The Geographic Market for Corporate and Government Accounts Is National

The Commission also should consider the market for corporate and government wireless accounts to be nationwide. These plans are not sold in local stores, but are typically awarded through formal RFPs or other bidding procedures that generally call for national (or national plus international) service.[93] Many businesses have multiple locations across the country, or employees who travel outside their local home base, and deem service by a nationwide carrier to be essential.[94] These enterprise businesses need one solution for all of their employees regardless of where they are located, and reliable access to a high quality nationwide network is an important factor in selecting a wireless provider.[95]

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90 *Id.*

91 *See id.* ¶ 3.

92 *Id.* ¶ 5.

93 Dupree Decl. ¶¶ 7-13.

94 *Id.* ¶ 7.

95 *Id.*

C. Even If the Retail Markets Were Local, a Significant Number Would Exceed the HHI Screen

Even if the transaction were analyzed at the local CMA or CEA level, the transaction would reduce competition in a significant number of these local areas. Calculations performed by CRA show that the proposed T-Mobile takeover exceeds the FCC's HHI screen in **[begin NRUF/LNP confidential information]** [redacted] **[end NRUF/LNP confidential information]** CMAs and **[begin NRUF/LNP confidential information]** [redacted] **[end NRUF/LNP confidential information]** CEAs.[96] Moreover, the FCC's HHI screen is exceeded in **[begin NRUF/LNP confidential information]** [redacted] **[end NRUF/LNP confidential information]** largest CMAs by population.[97] CMAs that fail the screen collectively account for **[begin NRUF/LNP confidential information]** [redacted] **[end NRUF/LNP confidential information]** percent of the U.S. population, and the CEAs that fail the screen collectively account for **[begin NRUF/LNP confidential information]** [redacted] **[end NRUF/LNP confidential information]** percent of the U.S. population.[98]

The combined entity's holdings would far exceed the HHI screens in many of these local areas, indicating that these markets are highly concentrated and that the transaction is presumed to enhance market power.[99] For example, **[begin NRUF/LNP confidential information]** [redacted]

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96 CRA Decl. ¶ 11, Tables 5b-5c.

97 *Id.* at Table 5c.

98 *Id* ¶ 79.

99 The FCC screen is exceeded when: (1) the post-merger HHI is over 2,800 and the increase is at least 100; or (2) the HHI increase is at least 250 regardless of the post-merger HHI level. *AT&T-Centennial Merger Order* ¶ 46.

[redacted] **[end NRUF/LNP confidential information].**[100] Given the high concentration in these local markets, the proportionately small local and regional carriers would be unable to restore the competition that would be lost by AT&T's proposed takeover.

In sum, whether examined nationally or locally, the proposed transaction would lead to substantially greater concentration in each of the relevant wireless product markets and would have significant adverse effects on wireless consumers and competition.

III. THE PROPOSED TRANSACTION WOULD LEAD TO HIGHER PRICES, LESS INNOVATION, AND LOWER QUALITY SERVICE

AT&T's takeover of T-Mobile would lead to anti-competitive levels of horizontal concentration in retail wireless and other services as described in Part A, Section II above. AT&T's post-merger market share would raise a clear presumption of competitive harm under antitrust and Commission precedent. However, even this high degree of concentration greatly understates the competitive harm that would result, because AT&T's takeover of T-Mobile would fundamentally change the structure of the wireless markets by creating a duopoly. This change would allow AT&T to raise prices and curtail innovation while entrenching AT&T and Verizon as duopolists.

100 CRA Decl. at Table 5b.

A. AT&T Would Unilaterally Increase Prices for All Wireless Retail and Post-Paid Wireless Retail as a Result of the Proposed Transaction

T-Mobile, as one of only four national carriers, provides a critical constraint on AT&T's consumer retail prices. Today, T-Mobile offers lower prices than AT&T,[101] but those lower prices would likely be eliminated when T-Mobile's existing customer contracts expire. More importantly, by reducing competition, the transaction would allow AT&T to profitably increase prices above what they would have been absent the transaction. This is true whether the product market is all retail wireless, post-paid retail wireless, or corporate and government accounts.

AT&T argues that the transaction is not likely to result in higher prices because: (1) the transaction would increase output by alleviating capacity constraints; (2) T-Mobile is not a particularly close competitor to AT&T; and (3) the smaller carriers are sufficient to maintain competition. But as explained in Part B, Section II, AT&T's output claims are speculative at best, and there are numerous solutions to its alleged capacity problem that do not create a duopoly. Moreover, as demand continues to increase, all competitors will need to increase output and the merger will lead to less efficient use of spectrum capacity overall. Further, T-Mobile is a strong competitive force, and its impact on competition cannot be replaced by the smaller, regional carriers post-merger. Therefore, this merger would be contrary to the public interest.

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101 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407, 11472, ¶ 92 (2010) ("*14th CMRS Competition Report*") (reporting that AT&T prices its post-paid service at a premium over T-Mobile's); Press Release, Consumers Union, *Consumers Union Warns Congress AT&T/T-Mobile Merger Means Higher Prices, Less Satisfied Customers* (Apr. 12, 2011) ("T-Mobile Wireless plans typically cost $15 to $50 less per month than comparable plans from AT&T."), *available at*: <http://www.consumersunion.org/pub/2011/04/017625print.html>.

CRA used available data to assess the effect of the merger on price and to estimate AT&T's ability to raise prices unilaterally. As CRA explains, "[a]dverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products."[102] To measure whether a merger would create such an incentive, the DoJ employs a tool called the Gross Upward Pricing Pressure Index ("GUPPI"). The GUPPI is an estimate of how much each of the merging parties' prices are likely to increase as a result of the transaction. CRA's initial calculations show that, post-merger, T-Mobile's prices would likely increase by 12.2 to 24.6 percent and AT&T's prices would likely increase by 4.9 to 11.2 percent.[103] Thus, virtually the entire range of these estimated price increases would exceed the five percent safe harbor defined by the DoJ, and reinforce the conclusion that the merger would lead to a significant adverse effect on retail prices.[104] And as CRA explains, these estimates are conservative because they ignore the upward pricing pressure from the merged firm's ability to raise its rivals' costs, pricing responses from non-merging firms, and the increased likelihood of coordinated interaction post-merger.[105]

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[102] CRA Decl. ¶ 146 (quoting DoJ & Fed. Trade Comm'n, Horizontal Merger Guidelines (issued Aug. 19, 2010) *available at*: <http://www.justice.gov/atr/public /guidelines/hmg-2010.html#foot1>).

[103] *Id.* ¶¶ 162, 164. These increases are based on a recapture rate of 80 percent.

[104] *Id.* ¶¶ 148, 166.

[105] *Id.* ¶¶ 148, 151.

B. The Proposed Transaction Likely Would Lead to Increased Coordination Between AT&T and Verizon

As the Commission has recognized:

> Both economic theory and empirical economic research have shown that firms in concentrated, oligopoly markets take their rivals' actions into account in deciding the actions they will take. When market participants' actions are interdependent, noncompetitive collusive behavior that closely resembles cartel behavior may result – that is, high and stable prices.[106]

AT&T's proposed takeover of T-Mobile also is likely to harm competition and the public interest through tacit coordination between AT&T and Verizon, which together would control 76 percent of the market for all wireless and 82 percent of the post-paid market. The CRA Declaration explains that the transaction would increase the likelihood of coordination between AT&T and Verizon in two ways. First, AT&T and Verizon would likely accommodate each other's price increases by raising their own prices in response.[107] Second, as the two dominant firms in the industry, the Twin Bells, without necessarily making an express agreement, would recognize the mutual benefits of coordination.[108] The CRA Declaration thus concludes:

> The wireless market is vulnerable to coordination by AT&T and Verizon and the merger would increase that vulnerability. The merger would eliminate one national competitor, T-Mobile, and the exclusionary effects of the merger would weaken the other national competitor, Sprint, as well as the regional fringe. The combined subscriber shares of AT&T and Verizon would increase to 76% in an all-wireless market and to 82% in a postpaid service market. Their share of wireless revenues would be even higher. In addition, AT&T and Verizon know each other's prices, buyers are small, and competitors have higher costs. Moreover, competitors are dependent on both AT&T and Verizon for essential inputs. AT&T and Verizon also are similarly situated in the market as [incumbent LECs] with high market shares, meaning that both carriers would account for wireline "cannibalization" in setting wireless prices. As a result, the

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106 *EchoStar-DirecTV Hearing Designation Order* ¶ 170.

107 CRA Decl. ¶¶ 172-73.

108 *Id.* ¶¶ 174-77.

> merger raises a substantial risk of parallel accommodating conduct as well as the risk of facilitating informal coordination resulting from a common understanding by AT&T and Verizon of their mutual interdependence and the relative gains from cooperative versus non-cooperative conduct. Although the resulting coordination would not be perfect, consumers still would be harmed.[109]

AT&T argues that the takeover poses "no prospect of anticompetitive coordination" because: (1) there are many firms with different characteristics, which would make tacit coordination difficult; (2) wireless markets are characterized by rapid changes in technology and "every provider has strong individual incentives to be an early provider of new services and to serve rapidly growing demand"; (3) wireless markets are prone to disruption by mavericks; and (4) the local nature of wireless markets precludes coordination.[110] These arguments are unpersuasive as they grossly misconstrue marketplace realities and overstate the competitive significance of the small, "fringe" wireless players.

First, the wireless markets are not "characterized by many heterogeneous firms with many different service plans and diverse market positions" to an extent that would make coordinated interaction unlikely.[111] Post-merger, 76 percent of the all-wireless market would be dominated by two firms – AT&T and Verizon. The only coordination necessary to raise prices to the vast majority of the market would be between AT&T and Verizon – firms that offer similar service plans and handset options,[112] hold similar sets of competitive assets,[113] and share

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[109] *Id.* ¶ 16.

[110] Application at 95–96.

[111] *Id.* at 95.

[112] *Compare* Plans, *Family Share Plans*, Verizon Wireless, *available at*: <http://www.verizonwireless.com/b2c/store/controller?item=familyShare&action=viewFSPlanList&catId=323&sel=fam&typeId=2> (20001 used at zip code prompt) (last visited May 28, 2011) *with* Wireless, Cell Phone Plans, Family Plans, *FamilyTalk Cell Phone Plans*, AT&T Inc., *available at*: <http://www.wireless.att.com/cell-phone-service/cell-phone-plans/family-cell-

a common legacy Bell company lineage.[114] They own the incumbent landline monopolies in their respective regions and would have every interest in accommodating each other while raising rivals' costs and otherwise disadvantaging them.[115] Moreover, the Twin Bells' landline monopolies give them a common interest in discouraging to the maximum extent possible cord-cutting by their wireline customers.[116] Whether smaller firms such as MetroPCS, U.S. Cellular, and Cincinnati Bell have different characteristics that would make coordination between them and AT&T difficult is irrelevant because those firms are so small that they do not need to participate in the coordinated interaction for industry prices to rise. Moreover, the

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phone-plans.jsp> (20001 used at zip code prompt) (last visited May 28, 2011). According to their pricing literature, AT&T and Verizon offer identical Individual rates for 450-minute, 900-minute, and unlimited calling plans and both have a $20 unlimited text messaging add-on available. AT&T offers a $25 per month 2GB, while Verizon offers an unlimited data plan for $29.99 per month. Both companies offer an array of advanced smartphones including the iPhone, several BlackBerry models, as well as numerous Android- and Windows-powered phones. *See* AT&T, *Cell Phones and Mobile Devices*, *available at*: <http://www.wireless.att.com/cell-phone-service/cell-phones/cell-phones.jsp#fbid=UbML-7Zkkiu> (last visited May 27, 2011); Phones and Devices, *Smartphones*, Verizon Wireless, *available at*: <http://www.verizonwireless.com/b2c/ index.html> (20001 used at zip code prompt) (last visited May 27, 2011).

113 *Infra* Part A, Section III.F, G.

114 Verizon was formed by the merger of GTE and Bell Atlantic, which had previously merged with NYNEX. Bell Atlantic and NYNEX were two of the seven RBOCs formed at the break-up of the Bell System, which was a common name for the organizational structure of the American Telephone and Telegraph Co. prior to 1984. *Verizon Corporate History*, Verizon, *available at*: <http://www22.verizon.com/investor/corporatehistory.htm> (last visited May 27, 2011). Similarly, the current AT&T has evolved through mergers of the divested long-distance unit of the Bell System and four other RBOCs: Southwestern Bell, BellSouth, Ameritech, and Pacific Telesis. *See AT&T Inc. and BellSouth Corporation; Application for Consent to Transfer Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶¶ 6-13 (2007) ("*AT&T-BellSouth Merger Order*"); *The History of AT&T*, AT&T, Inc., *available at*: <http://www.corp.att.com /history/> (last visited May 28, 2011).

115 CRA Decl. ¶¶ 92-101, 179.

116 *Id.* ¶ 179.

smaller firms would have no incentive to deter price increases because they would benefit from a higher price umbrella.

Second, AT&T and Verizon would be able to raise the costs for Sprint and other carriers through their control of backhaul circuits, landline interconnection, and roaming, thereby preventing the non-Bells from offering lower prices and thus hindering if not blocking effective retail price competition.[117]

Third, removing T-Mobile from the market would substantially reduce the likelihood of market disruption by a maverick. Among the four national carriers, T-Mobile is recognized as the low-price carrier. AT&T's strained argument that the local and regional carriers are the true industry mavericks is demonstrably false. Most of these firms focus predominantly on the pre-paid market and, even in the aggregate, they cannot provide meaningful competition to AT&T and Verizon.[118] To suggest that the small players are disruptive while T-Mobile is not is simply disingenuous.

Fourth, there is no reason to believe that strong demand or the incentives of all carriers to be early providers of new services would prevent, or even deter, market coordination. The local and regional carriers are constrained by their smaller subscriber counts and more limited resources from partnering with handset manufacturers to develop new technologies.[119] Innovation is led by the national carriers, and eliminating T-Mobile as a national carrier would increase AT&T and Verizon's incentives to coordinate in introducing new products because local or regional carriers would be unlikely to exercise any significant market leadership or

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117 *Infra* Part A, Section III.F, G.

118 CRA Decl. ¶¶ 134-39.

119 Adib Decl. ¶ 7.

market discipline.[120] In addition, with a nationwide subscriber penetration rate of approximately 90 percent, subscriber growth comes mainly from attracting customers from competing firms.[121] Thus, both AT&T and Verizon have the incentive to rein in competitive initiatives rather than expend their resources competing for the same shared pool of customers with little prospect for net gains.

Finally, AT&T's argument that the local nature of competition precludes post-merger coordination by the dominant Twin Bells is entirely beside the point. AT&T and Verizon would be the dominant firms post-merger, whether viewed locally or nationally, and coordination between them would reduce competition at both a national and local level.

C. AT&T Would Increase Prices for Corporate and Government Accounts as a Result of the Proposed Transaction

AT&T would have the incentive and ability to raise prices post-merger for corporate and government accounts. The local and regional carriers cannot meet the needs of most enterprise customers and are not meaningful competitors in this segment in any sense.[122] T-Mobile is a particularly important factor in the competitive dynamics of this market segment because it is the low-price leader.[123] Even when T-Mobile does not win a bid, its presence as an actual or potential bidder can result in lower prices from the other national competitors.[124]

In addition, T-Mobile is an even more significant competitor to AT&T for corporate and government accounts with international travel needs because they are the only two national

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120 *Infra* Part A, Section III.E.

121 *14th CMRS Competition Report* ¶ 155.

122 *See* Dupree Decl. ¶ 15.

123 *Id.* ¶ 16.

124 *Id.*

carriers using GSM, by far the most prevalent air interface outside the United States.[125] This commonality makes AT&T and T-Mobile particularly close substitutes for these customers. Sprint, on the other hand, is at a disadvantage when competing for customers with international roaming needs because its handsets are designed for a Code Division Multiple Access ("CDMA") interface, and because it has difficulty negotiating with foreign carriers for GSM roaming on attractive terms.[126] Sprint holds relatively little leverage in these negotiations because it cannot offer the same volume as AT&T or Verizon and it cannot offer reciprocal service because its networks run on the CDMA and Integrated Digital Enhanced Network ("iDEN") standards.[127] Because Sprint is not as strong a competitor for these accounts, a merged AT&T would be able to raise prices to corporate and government customers who travel internationally.

D. The Proposed Takeover Would Exacerbate the Disparity Between the Twin Bells and Other Carriers and Further Diminish Competition Over Time

The wireless industry is characterized by high fixed costs and comparatively low marginal costs as a result of the high costs of acquiring spectrum licenses, building a network, and advertising and marketing.[128] This cost structure means that the wireless industry is subject to very significant economies of scale, which give larger firms significant advantages over smaller ones. To illustrate, AT&T and Verizon are each more than twice the size of the next largest competitor, based on revenues, and are significantly more profitable than the rest of the wireless firms. In 2010, they accounted for 64 percent of wireless subscribers nationwide, but

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125 *Id.* ¶ 17.

126 *Id.*

127 Schieber Decl. ¶ 9.

128 CRA Decl. ¶¶ 114, 155.

reaped 79 percent of wireless industry operating profits.[129] The disproportionate share of profits retained by the Twin Bells not only provides them with more internally-generated cash to invest, but also reduces the costs of obtaining financing from the external markets.

The financial advantages enjoyed by AT&T and Verizon allow them to entrench and expand their leading position. As CRA explains:

> This combination of economies of scale plus financing advantages can create a vicious cycle that can entrench the dominance of leading firms in a high investment industry like wireless. The more profitable leading firms have the ability to invest disproportionately more than the smaller firms. As a result, the leading firms can increase their lead over time, other things equal. This, in turn, further increases their market shares and profit advantage and can thus increase the already disproportionate ability of the two ILECs to invest in exclusive handset contracts and spectrum.[130]

AT&T's proposed takeover of T-Mobile would exacerbate the disparity between the Twin Bells and the rest of the industry. As a result, the merger could tip today's market – where AT&T and Verizon are constrained to a significant extent by two smaller national competitors – to one where the Bell duopoly is increasingly less constrained by the remaining smaller national competitor.[131] That outcome would harm the public interest by leading to higher prices and reduced innovation.

E. The Proposed Transaction Would Stifle Innovation

The development of new products and technology is driven by competition among the four national wireless carriers.[132] The proposed takeover would simultaneously eliminate

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[129] *Id.* ¶ 115.

[130] *Id.* ¶ 118.

[131] *Id.* ¶ 122.

[132] Adib Decl. ¶¶ 13-14.

T-Mobile as a key competitive innovator and significantly reduce Sprint's ability to compete through innovation.

T-Mobile has consistently proven itself to be a valuable source of innovation in the wireless industry. It was the first U.S. carrier to sell the BlackBerry, the precursor to the modern smartphone. More recently, T-Mobile was a pioneering member of the Open Handset Alliance, which along with Sprint, Google, and others, worked vigorously to develop and market the Android operating system.[133] In 2008, T-Mobile introduced the first Android smartphone, the G1, which was the product of collaboration between T-Mobile, Google, and HTC.[134] Smartphones running on the Android operating system are now the key competitors to the iPhone and account for 34 percent of smartphones in the United States.[135] AT&T's proposed takeover of T-Mobile would eliminate this powerful innovator in the wireless marketplace.

AT&T's increased post-merger size and scale – both independently and in combination with Verizon's existing size and scale advantages – would also make it more difficult for Sprint to compete in the prospective Twin Bell duopoly marketplace by offering innovative new handsets or other user devices. Post-merger, AT&T and Verizon would each have a subscriber base more than twice the size of Sprint's, the next largest competitor. The Twin Bells would be far more attractive partners than Sprint or any of the smaller carriers for manufacturers interested in developing new wireless devices and technologies.[136]

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133 *Id.* ¶ 16.

134 *Id.*

135 *Id.*; Press Release, comScore, *comScore Reports March 2011 U.S. Mobile Subscriber Market Share* (May 6, 2011), *available at*: <http://www.comscore.com/Press_Events/Press_Releases/2011/5/comScore_Reports_March_2011_U.S._Mobile_Subscriber_Market_Share>.

136 Adib Decl. ¶¶ 11-18.

For example, a manufacturer could build a single handset platform for the Twin Bells using their common core spectrum bands that could be marketed to 76 percent of all wireless customers. Given that reality, manufacturers would have less incentive to build devices for Sprint and smaller carriers using different (one-off) spectrum bands and, even when they did, those devices would cost more given the carriers' lack of scale relative to AT&T and Verizon.[137] With the proposed transaction, the Bells' larger number of subscribers would allow them to spread research and development ("R&D") costs over a larger group of customers and guarantee sales of a larger number of handsets.[138] These scale advantages would allow the Twin Bells to obtain exclusive access for lengthy terms to the most advanced handsets that are most in demand by consumers.[139]

The proposed T-Mobile takeover would increase the size and scale differential between AT&T and the remaining wireless carriers, making Sprint a less attractive potential handset partner.[140] Sprint and the smaller carriers would pay more for the latest phones and consumer devices – if they could even obtain them while they are still "cutting-edge." The result: higher prices and reduced innovation in handset and other consumer devices.[141]

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137 *Id.* ¶ 12; FierceWireless MetroPCS Article (reporting that "MetroPCS likely won't benefit from the economies of scale derived from purchasing the same equipment as [AT&T and Verizon]" for LTE because its LTE buildout will sit primarily in the AWS spectrum band, not the 700 MHz bands occupied by the Twin Bells).

138 Adib Decl. ¶¶ 6-7.

139 *Id.* ¶¶ 11, 18.

140 CRA Decl. ¶ 106.

141 *Id.* ¶¶ 106, 113.

F. The Proposed Takeover Would Increase the Incentive and Ability of AT&T and Verizon to Raise Backhaul Rates, Leading To Higher Prices

AT&T is vertically integrated and controls key backhaul assets necessary for other wireless carriers to compete effectively.[142] AT&T's takeover of T-Mobile would increase AT&T's ability to exclude its competitors and raise their costs by increasing backhaul rates.[143] Approval of the proposed transaction would therefore harm competition in at least two ways. First, the takeover would eliminate a potential major customer of competitive services in AT&T's region, making it harder for alternative providers of special access services (such as cable companies, competitive LECs, and microwave operators) to generate sufficient business to attract investment and remain viable.[144] Second, because the takeover would substantially increase the likelihood that AT&T and Verizon will raise prices to their retail customers, it would also make it more likely that both companies will raise the special access rates they charge to Sprint and other carriers.[145]

1. The Proposed Transaction Would Eliminate T-Mobile as a Potential Purchaser of Alternative Backhaul Service

Over 90 percent of special access sold to other carriers, including backhaul services, is provided by LECs, primarily AT&T and Verizon. Most of the remaining backhaul services are provided by cable companies such as Comcast, fiber owners such as tw telecom and Level3, and

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142 Response of T-Mobile USA, Inc., WC Docket No. 06-74, at 3 (June 20, 2006) (explaining that T-Mobile's ability to compete effectively with the incumbent LECs "depends on its ability to obtain services and facilities from ILECs such as AT&T and BellSouth on nondiscriminatory terms and reasonable cost-based prices").

143 CRA Decl. ¶¶ 94-98.

144 *Id.* ¶ 97.

145 *Id.* ¶ 98.

other providers including FiberTower.[146] Wireless carriers, such as Sprint and T-Mobile, rely on incumbent LEC special access services[147] to provide the dedicated connections they need to link their cell sites to their switches and other parts of their networks.[148] Where available, however, independent wireless carriers will seek to purchase special access service from competing providers as a way to keep prices somewhat competitive. T-Mobile plays a significant role in generating business opportunities for competitive providers of special access services. Just last year, for example, T-Mobile told the FCC that "T-Mobile is proud of its success in creating competition for Ethernet services in many major metropolitan areas."[149] T-Mobile's important role in stimulating competition for special access services would be vacated if it were eliminated as a purchaser of competitive special access services.[150]

The merger would harm competition in AT&T's territory by eliminating T-Mobile – the nation's second largest wireless carrier unaffiliated with a Bell operating company – as a purchaser of special access with a strong interest in obtaining services from vendors with whom

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146 Schieber Decl. ¶ 10.

147 The Commission has defined special access as a dedicated transmission link between two locations. *See, e.g., AT&T-BellSouth Merger Order*, ¶ 27 n.88.

148 *See, e.g.*, Reply Comments of T-Mobile USA, Inc., WT Docket No. 10-133, at 7 (Aug. 16, 2010) ("[W]ireless providers need special access services and facilities to provide backhaul to connect their base stations to mobile switching centers, as well as to link their networks to the networks of other providers."). Business users and competitive wireline carriers also rely on special access to connect to the Internet and/or to LEC central offices. *See, e.g., Applications of SBC Communications Inc. and AT&T Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 24 (2005) ("*SBC-AT&T Merger Order*").

149 Letter from Kathleen O'Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 2 (May 6, 2010). Even so, T-Mobile noted that it remained heavily dependent on incumbent LECs for backhaul services. *Id.* ("after years of negotiating long-term, multi-market contracts with a variety of suppliers . . . T-Mobile still purchases ILEC backhaul in most of its 3G coverage area").

150 *See* Meena Testimony at 11 ("AT&T's takeover of T-Mobile removes a significant competitive carrier partner and advocate from America's wireless marketplace.").

it does not compete in providing retail wireless services. If T-Mobile no longer had an incentive to buy special access from competitive alternatives to AT&T, it would diminish the ability of such providers to remain in business and compete with AT&T's in-region wireline offerings. Indeed, third-party providers of special access may find that their businesses are no longer viable if they lose T-Mobile as a potential customer.[151] Thus, the merger would substantially diminish any prospect that alternative backhaul providers will emerge to compete with AT&T and Verizon in their incumbent wireline service areas.[152] Absent a realistic threat of competitive entry in areas where the combined demand from T-Mobile, Sprint, and other unaffiliated Commercial Mobile Radio Service ("CMRS") carriers potentially could attract new backhaul providers, marketplace forces will not constrain AT&T's (or Verizon's) ability to impose unreasonable rates, terms, and conditions on its wireless rivals in its incumbent service territory.[153]

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151 Competitive backhaul providers already are concerned that "their entire business model could face strains as a result of the merger" removing T-Mobile as a potential customer. *See* Sara Jerome, *Backhaul Industry Fears AT&T Merger*, THE HILL (May 11, 2011) (reporting that officials in the alternative backhaul industry fear that the merger could "potentially sink[] some companies . . . leaving AT&T and Verizon to dominate the backhaul market"), *available at:* <http://thehill.com/blogs/hillicon-valley/technology/160407-backhaul-industry-fears-atat-merger>.

152 AT&T and Verizon "historically have not engaged in vigorous wireline competition against [each other or] other ILECs." Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 11-12 (June 13, 2005); *see also, e.g.*, Declaration of Chris Sykes, attached to Comments of T-Mobile USA, Inc., WC Docket No. 05-25, ¶ 11 (June 13, 2005) ("ILECs have not competed vigorously against each other in the provision of any wireline service, including special access service.").

153 Letter from Kathleen O'Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 1 (May 6, 2010) ("in areas where ILECs continue to enjoy a monopoly, backhaul costs remain unreasonably high"); Second Declaration of Simon J. Wilkie, attached to Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, ¶¶ 25-26 (July 29, 2005) (noting that "on routes where there is no competition," incumbent LEC special access rates can be "many times higher"); Reply Comments of T-Mobile USA, Inc., WC Docket No.