

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

In the Matter of)	
)	
Applications of AT&T Inc. and)	
Deutsche Telekom AG)	WT Docket No. 11-65
)	DA 11-799
For Consent to Assign or Transfer Control of)	
Licenses and Authorizations)	

**REPLY OF THE RURAL CELLULAR ASSOCIATION
TO JOINT OPPOSITION OF AT&T AND T-MOBILE**

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The Rural Cellular Association (“RCA”) hereby replies to the joint opposition¹ (“Opposition”) filed by AT&T Inc. (“AT&T”), Deutsche Telekom AG (“DT”), and T-Mobile USA, Inc. (“T-Mobile,” and collectively with AT&T and DT, “Applicants”) in response to the petitions to deny the above-captioned docket.

INTRODUCTION AND SUMMARY

Applicants’ Public Interest Statement failed to justify AT&T’s audacious proposal to eliminate a major competitor by acquiring T-Mobile, and their Opposition to the petitions to deny filed by RCA and many other parties does not alleviate the grave concerns posed by the transaction. Indeed, the Opposition and supporting declarations represent a massive exercise in misdirection. As the petitions document, the proposed takeover of T-Mobile would result in extraordinary concentration in the wireless marketplace, with devastating effects for competition and consumers. In an effort to divert attention from the obvious competitive harms at stake, Applicants devote the bulk of their papers to touting efficiencies that they claim can only be

¹ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (filed Jun. 10, 2011) (“Opposition”).

achieved through the proposed merger. But even assuming the asserted efficiencies were as significant as Applicants contend (and they are not), they would still fail to justify the irreversible reduction in competition threatened by the transaction. As RCA's petition pointed out, if the Commission's longstanding market-driven policies are to retain any meaning, the Commission cannot accept AT&T's core argument that eliminating one of only four nationwide carriers (and, in turn, any semblance of competitive balance) would *advance* the public interest.

Among other fatal flaws, the Opposition relies heavily on misleading characterizations of competition in the *pre-acquisition* world that, even if true, say nothing about the *future* competitive conditions that would prevail if the Commission were to approve the acquisition. For instance, Applicants assert that a supposedly thriving marketplace for roaming services would continue to flourish post-acquisition,² but they rely entirely on *voice* roaming agreements that have no bearing on competitive carriers' ability to obtain *data* roaming (which will be far more significant in the future). Indeed, AT&T has flatly refused to offer data roaming on reasonable terms in the current marketplace, and it would have an even greater incentive and ability to thwart competition post-acquisition.³ Applicants likewise assert that smaller carriers' access to competitive and interoperable handsets would grow post-acquisition.⁴ Yet the Commission has recognized that "access to handsets [is] an increasing challenge faced by mid-sized and small providers" in the current marketplace,⁵ and Applicants concede that the

² See Opposition at 155-62.

³ See Petition to Deny of the Rural Cellular Association at 14-18, WT Docket No. 11-65 (filed May 31, 2011) ("RCA Petition").

⁴ See Opposition at 143-55.

⁵ *Fourteenth Wireless Competition Report* ¶ 299.

acquisition would increase AT&T's buying power,⁶ which would strengthen its ability to block competitors' access in the future. Applicants also assert that AT&T's "leadership" in wireless broadband justifies its attempt to lock up vast swaths of broadband-capable spectrum through deals with T-Mobile, Qualcomm, and a bevy of smaller licensees⁷—even though the record shows that AT&T has mismanaged its current spectrum assets,⁸ and that acquiring T-Mobile would both diminish incentives for AT&T to streamline the use of its spectrum and further marginalize smaller carriers.⁹ The fact that the marketplace is already beset by anticompetitive practices—caused in large part by AT&T—hardly makes such concerns non-merger specific. To the contrary, the fact that the proposed acquisition would exacerbate these already-significant harms makes it clear that the acquisition would undercut the public interest.

Although Applicants trot out several supposed "benefits" of combining two of the four nationwide carriers—repeating over and over that consolidation, not competition, is the only way to achieve these "efficiencies"¹⁰—their argument proves too much. Under Applicants' logic, there would be no reason to stop at a duopoly; a wireless *monopoly* would be the best path forward because it could deliver far greater efficiencies than the acquisition of T-Mobile alone.

⁶ See Opposition at 82 (conceding that the acquisition would give the combined AT&T/T-Mobile the buying power to demand "higher volume discounts on handsets and equipment").

⁷ See *id.* at 180.

⁸ See, e.g., Petition to Deny of Sprint Nextel Corp. at 85-89, WT Docket No. 11-65 (filed May 31, 2011) ("Sprint Petition") (chronicling AT&T's "history of failing to take innovative risks or make the investments in its network necessary to maximize the efficiency of its spectrum and provide quality service to consumers"); Petition to Deny of Leap Wireless International, Inc. and Cricket Communications, Inc. at 28-31, WT Docket No. 11-65 (filed May 31, 2011) ("Leap Petition") (demonstrating that, "to the extent AT&T faces any spectrum constraints, they are largely constraints of its own making that have arisen through its mismanagement of resources").

⁹ See RCA Petition at 11-14.

¹⁰ Opposition at 19.

While AT&T would no doubt prefer to reconstitute Ma Bell on the wireless side, such consolidation would plainly disserve the public interest. The “efficiencies” AT&T touts consist largely of unfair competitive advantages that AT&T would realize by eliminating one of its chief competitors. At any rate, even substantial “efficiencies” would not outweigh the far greater anticompetitive effects that would result from the proposed transaction.¹¹ Nor should the Commission credit the Orwellian assertion that allowing AT&T to swallow up T-Mobile would somehow “*promote* competition”;¹² the loss of the nationwide competitor with the lowest prices (among various other attributes) plainly would have the opposite effect.

Similarly, Applicants cannot dispel fears of a post-acquisition wireless duopoly by manipulating the definition of the term, or by pretending that a handful of much smaller carriers could effectively compete with AT&T and Verizon post-merger. Applicants seek to characterize “duopoly” conditions as limited to situations “in which there are *only two sellers* of a product,”¹³ even though the accepted definition is, of course, less formalistic. Indeed, the Department of Justice (“DOJ”) filed suit just last month to enjoin a merger to “duopoly” in a market where the

¹¹ See *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd 20559 ¶ 102 (2002) (“*EchoStar-DirecTV Hearing Designation Order*”) (holding that in a transaction likely to result in a “substantial increase in concentration,” merger applicants must demonstrate that “*countervailing, extraordinarily large, cognizable, and non-speculative efficiencies . . . are likely to result from the merger*” (emphasis added)). See also *id.* (noting that the Commission requires such parties to provide “*proof of extraordinary efficiencies*,” not mere speculation and promises about post-merger behavior” (emphasis added), quoting *Fed. Trade Comm’n v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001)).

¹² Opposition at 93.

¹³ *Id.* at 94 (emphasis in original, quoting *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 71 n.2 (2d Cir. 2005)). Notably, Applicants apparently had to search so far and wide for that definition that they resort to citing only a single footnote in a single case.

two remaining firms post-transaction would serve “approximately 90% of all consumers”¹⁴— alongside several smaller competitors.¹⁵ Applicants fall back then to argue that “vibrant” competition makes petitioners’ concerns about duopoly “empty.”¹⁶ But there is nothing “empty” about these concerns when, post-transaction, AT&T and Verizon together would have 82 percent of post-paid subscribers and 88 percent of all wireless operating profits.¹⁷ While Applicants trumpet the subscriber levels of MetroPCS, Leap Wireless, and US Cellular, these three smaller carriers “together ha[ve] only about 60% of the number of subscribers served by T-Mobile”¹⁸— which AT&T consistently disparages as competitively insignificant. And although Applicants go so far as to treat Cellular South, which has “nearly 900,000 subscribers in several southern states,”¹⁹ as a major competitive threat, the fact of the matter is that it would be forced to contend with a combined AT&T/T-Mobile that serves more than *130 million* wireless subscribers.²⁰ Thus, what *is* truly “empty” is the notion that T-Mobile is not a genuine competitor to AT&T, but these far smaller providers are, despite their much weaker spectrum position, dramatically inferior access to capital, and relative inability to obtain roaming or cutting-edge handsets.

¹⁴ Complaint at 2, *United States v. H&R Block, Inc.*, No. 1:11-cv-00848 (D.D.C. May 23, 2011).

¹⁵ *Id.* at 17.

¹⁶ Opposition at 4.

¹⁷ Sprint Petition at ii.

¹⁸ Joint Declaration of Steven C. Salop, Stanley M. Besen, Stephen D. Kletter, Serge X. Moresi, and John R. Woodbury, ¶ 136, *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 (filed May 31, 2011) (“CRA Declaration”).

¹⁹ Opposition at 11.

²⁰ See Leap Petition at 7. Sprint estimates that the combined AT&T/T-Mobile would have 118 million wireless subscribers, which would still dwarf the subscriber levels of Cellular South, Leap, MetroPCS, and U.S. Cellular combined. See Sprint Petition at ii.

Seemingly recognizing their inability to win the competitive-effects debate on the merits, Applicants resort to playing politics by rattling off a laundry list of “supporters.” Leaving aside the fact that the record includes far more opposition than support, it is hardly surprising that AT&T’s legendary lobbying budget, extensive alliances, and clear ability to retaliate against uncooperative equipment suppliers has enabled it to drum up support among politicians, advocacy groups that look to AT&T for financial support, and vendors seeking to stay in AT&T’s good graces. In any event, Applicants’ roster of allies fails to live up to their rhetoric regarding supposedly “unprecedented” support. For example, Applicants boast that “the governors of seventeen states” support the transaction,²¹ which suggests that the governors of 33 states have declined to support the deal. Applicants point to support from labor unions,²² but these unions understandably are eager to see the significant gain in *union* jobs that would result from absorbing T-Mobile’s non-union employees into AT&T’s unionized workforce, even if the transaction entails a net loss of jobs overall.²³ And while Applicants name several supportive equipment and handset manufacturers (most of which depend heavily on AT&T as a customer), that list conspicuously excludes Apple—AT&T’s “partner” in bringing the iPhone to market.²⁴

Applicants thus have failed once again to justify combining two of the four nationwide wireless carriers, driving the industry to unprecedented levels of concentration, and aggregating massive amounts of spectrum in the hands of AT&T—a company that has repeatedly shown its willingness to undermine competition whenever that serves its interests. Critically, as discussed

²¹ Opposition at 1.

²² *Id.*

²³ See Sprint Petition at 78 (“[E]fficiencies’ is code for an unsettling possibility: the elimination of thousands of jobs.”) (quoting Sara Jerome, *Groups Say AT&T Merger is Job Killer*, THE HILL, Mar. 23, 2011, available at <http://thehill.com/blogs/hillicon-valley/technology/151587-atat-merger-jobkiller>).

²⁴ Opposition at 2.

in greater detail below, Applicants have not rebutted the core arguments advanced by RCA and its members. If the Commission were to approve the acquisition, rural and regional carriers (and, indeed, all carriers besides Verizon) would face higher roaming rates, diminished access to cutting-edge handsets, and an even greater spectrum gap relative to AT&T. The acquisition would plainly harm competition and disserve the public interest. The Applications should therefore be denied.

DISCUSSION

I. **AT&T CANNOT CREDIBLY MAINTAIN THAT ITS ACQUISITION OF T-MOBILE WOULD HAVE NO EFFECT ON THE ABILITY OF SMALLER CARRIERS TO OBTAIN ROAMING RIGHTS AT REASONABLE RATES**

As RCA and numerous other petitioners have explained, AT&T's proposed acquisition of T-Mobile would make it significantly more difficult for competitive carriers to obtain voice and data roaming rights on national networks on reasonable terms and conditions.²⁵ The acquisition would have particularly anticompetitive consequences in the market for nationwide 3G GSM roaming, where AT&T and T-Mobile currently operate the *only* two GSM networks that can offer roaming services on a nationwide basis. As leading economists affiliated with Charles River Associates ("CRA") explain in a declaration attached to Sprint's Petition, "[p]rior to the proposed merger, the small GSM fringe carriers have been able to benefit from actual or potential competition between T-Mobile and AT&T for wholesale roaming," but "[i]f T-Mobile

²⁵ See, e.g., RCA Petition at 14-18; Sprint Petition at 43; Leap Petition at 21-22; Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent or Deny Applications at 56, WT Docket No. 11-65 (filed May 31, 2011) ("MetroPCS/NTELOS Petition"); Petition to Deny of Center for Media Justice, Consumers Union, Media Access Project, New America Foundation, and Writers Guild of America, at iv, WT Docket No. 11-65 (filed May 31, 2011) ("Public Interest Petition"); Petition to Deny of COMPTTEL at 2, WT Docket No. 11-65 (filed May 31, 2011).

were eliminated as a competitor, . . . AT&T would lose this constraint.”²⁶ CRA points to a natural experiment in Mexico, where the combination of the only two CDMA carriers led to an immediate and substantial rise in roaming rates to competitive carriers,²⁷ and predicts that the same would happen in the United States if AT&T were permitted to create a GSM monopoly by acquiring T-Mobile.²⁸ As roaming fees rise, smaller carriers would necessarily pass a portion of those fees along to consumers, making potential subscribers less likely to select those competitive providers and thus “increas[ing] the ability of AT&T and Verizon to raise their prices further, even while increasing their market shares.”²⁹

Applicants respond to this showing about the effects of a GSM monopoly with the incredible claim that, contrary to basic economic principles and common sense, “[t]he combined company will have no incentive or ability to charge unreasonable roaming rates post-merger.”³⁰ Specifically, they argue that a combined AT&T/T-Mobile will lack the incentive to drive up roaming rates because it “has an interest in lower roaming rates” as a “net purchaser of roaming services” through bilateral agreements involving “a single, reciprocal rate.”³¹ Of course AT&T has an interest in lowering the roaming rates that *it* pays, but the notion that a combined AT&T/T-Mobile would seek to reduce the roaming rates its *competitors* pay is absurd.

As an initial matter, Applicants neglect to mention that smaller carriers today have rarely been able to obtain data roaming rights *at any rate*, let alone a “reciprocal” rate. As T-Mobile itself pointed out shortly before agreeing to be acquired by AT&T, AT&T is largely to blame for

²⁶ CRA Declaration ¶ 100.

²⁷ *Id.* ¶ 100 n.92.

²⁸ *Id.*

²⁹ *Id.* ¶ 101.

³⁰ Opposition at 156-57.

³¹ *Id.* at 157.

today's anemic data roaming marketplace and is notorious for refusing to deal with other carriers.³² The Commission similarly found in its recent *Data Roaming Order* that "AT&T has largely refused to negotiate domestic 3G roaming arrangements,"³³ and that it is "unlikely" that AT&T would be willing to offer roaming arrangements for 4G LTE networks "any time in the near future."³⁴ AT&T would have even less incentive post-transaction to enter into roaming agreements on fair, reasonable, and non-discriminatory terms.

Moreover, if a combined AT&T/T-Mobile *were* to negotiate roaming agreements with smaller competitive carriers, such agreements would not likely involve "a single, reciprocal rate." "Reciprocal" rates are by no means universal in the few data roaming agreements that exist today. As AT&T noted in its comments in the Commission's data roaming proceeding, the "value of the reciprocal roaming arrangement will *vary greatly* depending on the extent to which the requesting provider can support the mobile broadband data requirements of the host provider's customers."³⁵ And even if some past roaming arrangements did entail a truly "reciprocal" rate, there is no reason to believe that a combined AT&T/T-Mobile would continue that practice. Applicants' argument in this regard suffers from the same infirmity that plagues most of the Opposition: a reliance on pre-acquisition competitive conditions to predict competitive effects in a dramatically different post-acquisition landscape. The competitive

³² See T-Mobile USA, Inc., Notice of Ex Parte, WT Docket No. 05-265, at 4 (filed March 10, 2011) (emphasis added) (calling T-Mobile's inability to secure a roaming agreement from AT&T "a classic case of market failure" and proof that "roaming is increasingly becoming a monopoly service provided on a unilateral basis").

³³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52, ¶ 25 (rel. Apr. 7, 2011) ("*Data Roaming Order*").

³⁴ *Id.* ¶ 27.

³⁵ Comments of AT&T Inc. at 60, WT Docket No. 05-625 (filed Jun. 14, 2010) (emphasis added).

pressure that T-Mobile exerts on AT&T as a 3G GSM roaming provider would vanish if the Commission were to approve the merger. In a post-transaction world without T-Mobile as a competitor, AT&T would be able to use its monopoly power in the market for nationwide GSM roaming services to demand favorable rates for itself, and sharply unfavorable rates for its competitors.

Nor can Applicants credibly argue that the recently adopted data roaming rules would deprive the combined firm of the “ability” to deny roaming rights at fair rates.³⁶ Those rules—which AT&T vehemently opposed and Verizon is now petitioning to overturn in court—require only that a host carrier offer roaming services on “commercially reasonable” terms compared to their competitors,³⁷ and did not anticipate a merger-to-monopoly in GSM roaming.³⁸ Such rules would be neutered in a world where a combined AT&T/T-Mobile is the *only* seller of nationwide GSM roaming services, and whose monopoly rents would be the only basis for assessing “commercial reasonableness.”

It is too clever by half for Applicants to contend that “the terms for which *AT&T itself*, as a net purchaser, buys roaming from other providers” could serve as a “benchmark” for assessing commercial reasonableness.³⁹ Applicants ignore the fact that a combined AT&T/T-Mobile, with its vast wireless broadband network, would have little need to purchase 3G GSM data roaming

³⁶ Opposition at 159-60.

³⁷ See 47 C.F.R. § 20.12(e) (“A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions.”); *id.* § 20.12(d) (requiring host carriers to provide automatic voice roaming “on reasonable and not unreasonably discriminatory terms”).

³⁸ See CBW Petition at 14 (noting that the Commission, in adopting the data roaming rules, “did not foresee the combination of by far the largest and second largest GSM carriers in the GSM roaming market (and the second and fourth largest of only four national wireless carriers in the wireless market overall”).

³⁹ Opposition at 159 (emphasis in original).

from other providers. Such “benchmark” rates simply would not exist. Moreover, Applicants’ repeated references to AT&T as a “net purchaser” of roaming services from all other carriers *in the aggregate* obscure the fact that, on an individualized basis, AT&T dwarfs each of these carriers and sells each one far more roaming services than it purchases. And as Applicants point out, the data roaming rules would allow AT&T to “negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reflect actual differences in particular cases”—including the massive difference between AT&T’s national network and a smaller carrier’s regional network.⁴⁰ AT&T thus already has the ability to force individual smaller carriers to accept lopsided rates and burdensome terms to roam on its nationwide network, and that ability would only grow if the Commission were to approve the acquisition.

Applicants also fail to explain away the transaction’s harmful effects on 4G LTE roaming. The Opposition repeats the same argument made in the Application—and debunked in several petitions—that “T-Mobile has no clear path to LTE,” and therefore “the merger could not deprive other providers of an additional provider of LTE roaming service, at least in the foreseeable future.”⁴¹ But repeating the refrain that “T-Mobile has no clear path to LTE” will not make it so. Several petitioners have shown that T-Mobile *does* have a long-term path to LTE,⁴² and that its 4G HSPA+ service would be robustly competitive with LTE options in the short and intermediate term.⁴³ Indeed, T-Mobile has just announced that it “is doubling the

⁴⁰ *Id.* at 159 n.281 (quoting *Data Roaming Order* ¶ 85).

⁴¹ *Id.* at 160.

⁴² *See, e.g.*, Sprint Petition at 50-51; Leap Petition at 32; Petition to Deny of the Diogenes Telecommunications Project at 18-24, WT Docket No. 11-65 (filed May 31, 2011).

⁴³ *See, e.g.*, Sprint Petition at 117-18 (“[W]hile the Application paints a dire outlook for T-Mobile, T-Mobile’s own statements in January show that T-Mobile is a strong competitor

speed of its 4G networks in 42 markets,” and that it “expects more than 150 million Americans to have access to these increased 4G speeds by mid-2011.”⁴⁴ An independent T-Mobile thus would represent a significant competitive alternative to AT&T in the sale of next-generation roaming services. Conversely, LightSquared and Clearwire, two carriers that Applicants identify as alternative LTE roaming providers in a post-transaction world,⁴⁵ have far higher hurdles to overcome than T-Mobile. LightSquared now faces serious questions about whether and when it will be able to deploy LTE due to GPS interference issues, and Chairman Genachowski has made it clear that the Commission “will not permit LightSquared to provide commercial service until it is clear that potential GPS interference concerns have been resolved.”⁴⁶ As for Clearwire, it explains in its comments that fewer and fewer handsets can roam on its high-frequency WiMAX service, largely because AT&T “helped to muscle WiMAX out of the picture” in favor of LTE.⁴⁷ It is ironic, to say the least, for AT&T to claim that one of the victims of its abuses of market power will suddenly reemerge as a significant roaming alternative.

with sufficient spectrum capacity to compete and a range of options to strengthen its service in the long term.”); *see also* Public Interest Petition at 22-23.

⁴⁴ Press Release, T-Mobile’s 4G Network Now Even Faster in Nearly 100 Markets Across the Country, Jun. 15, 2011, *available at* <http://newsroom.t-mobile.com/articles/t-mobile-new-markets-faster-speeds>.

⁴⁵ Opposition at 160.

⁴⁶ *See* Letter from Chairman Genachowski to Senator Charles E. Grassley, May 31, 2011, *available at* <http://www.fcc.gov/document/chairman-genachowski-response-sen-grassley-regarding-lightsquareds-operation-mss-l-band>.

⁴⁷ Comments of Clearwire Corporation at 10, WT Docket No. 11-65 (filed May 31, 2011); *see also id.* (noting that AT&T’s strong-arm tactics led vendors to “announce[] plans to stop producing WiMAX-compatible handsets and start producing LTE phones”); Leap Petition at 26 (“[P]articularly during the transition to 4G, AT&T and Verizon have advocated narrow, virtually carrier-specific standards that will allow them to procure devices that they will assert are incompatible with other carriers’ 4G standards.”).

It is hardly reassuring for AT&T to assert that it is *already* a monopolist in the market for 3G GSM roaming because of the different spectrum bands used by AT&T and T-Mobile.⁴⁸ Such a response, if true, would be cold comfort for the Commission in letting AT&T expand even further through acquisition. Moreover, as noted above, the fact that AT&T was engaging in anticompetitive practices before proposing to acquire T-Mobile hardly makes such concerns non-merger specific. To the contrary, the fact that the proposed acquisition would exacerbate these already-significant harms makes clear that the acquisition would undercut the public interest. In any event, T-Mobile itself has confirmed that the different bands used by the two carriers is a “non-issue” when it comes to roaming, and that T-Mobile’s handsets have no problem roaming on AT&T’s network.⁴⁹ The experience of RCA’s members likewise shows that Applicants’ contention that AT&T and T-Mobile do not compete for the sale of roaming services to smaller GSM carriers is overstated. Cincinnati Bell Wireless (“CBW”) explained in its own petition that it has actively attempted to negotiate GSM roaming rights with both AT&T and T-Mobile—despite their use of different spectrum bands—and that between the two, T-Mobile’s proposed terms and conditions “ha[ve] been far more favorable.”⁵⁰ Although CBW notes that handsets supporting both bands are not always “widely available” and are “more expensive than widely available models,”⁵¹ that is hardly CBW’s fault; as discussed below, AT&T has used its considerable market power to restrict access to advanced handsets, and its ability to do so would only increase post-acquisition.

⁴⁸ See Opposition at 158.

⁴⁹ See Ex Parte Letter from Thomas J. Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene Dortch, Secretary, WT Docket No. 05-265 (filed Nov. 9, 2010).

⁵⁰ Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications at 10, WT Docket No. 11-65 (filed May 31, 2011) (“CBW Petition”).

⁵¹ *Id.* at 29.

II. APPLICANTS ALSO FALL SHORT OF REBUTTING THE MERGER-SPECIFIC HARMS ASSOCIATED WITH HANDSET EXCLUSIVITY AND INTEROPERABILITY

As numerous petitioners point out, the proposed acquisition also would exacerbate the already-pervasive competitive disadvantages faced by smaller carriers in gaining access to competitive and interoperable handsets.⁵² The Commission has identified “access to handsets as an increasing challenge faced by mid-sized and small providers,”⁵³ and AT&T has led the charge to restrict that access—either by pressuring handset manufacturers for exclusive rights to handsets, or by insisting on handset design specifications that prevent interoperability on other networks. A merged AT&T/T-Mobile, with the combined buying power of *both* nationwide GSM carriers, would be in an even stronger position to impose its will on handset manufacturers and block competitors’ access to competitive and interoperable handsets. Handset exclusivity also harms consumers, particularly those in rural areas where AT&T and Verizon do not offer wireless services and thus do not make their cutting-edge handsets available.⁵⁴ Applicants respond to these serious competitive concerns with three arguments, each of which is meritless.

First, Applicants argue that, because “wireless competition is more intense today than it has ever been,” it is “clear that the dystopian predictions that exclusive arrangements would harm competition were wrong.”⁵⁵ But the factual premise for this argument is exactly backwards; as RCA and others have explained, the market for wireless services has grown

⁵² See, e.g., RCA Petition at 18; MetroPCS/NTELOS Petition at 58; Petition to Deny of Public Knowledge at 39, WT Docket No. 11-65 (filed May 31, 2011); Petition to Deny of Credo Mobile Inc. at 3, WT Docket No. 11-65 (filed May 31, 2011).

⁵³ *Fourteenth Wireless Competition Report* ¶ 299.

⁵⁴ See CBW Petition at 31 (“The situation is even more dire for consumers who live in rural communities that do not have coverage from these ‘national’ carriers; these customers are completely denied access to the most innovative and popular handsets.”).

⁵⁵ Opposition at 144, 146.

increasingly concentrated in recent years,⁵⁶ so much so that the Commission last year declined to certify that the industry is characterized by effective competition.⁵⁷ Moreover, there is ample evidence that exclusive arrangements *are* harming competition from smaller carriers. While AT&T is fond of pointing out that Verizon now offers the iPhone (albeit four years after its initial release), Apple has yet to make the iPhone available to other carriers, including Sprint. Notwithstanding AT&T's bluster about the competitive threat posed by smaller providers, it is telling that none has been able to secure rights to distribute the iPhone, despite intense interest in doing so. As a result of that inability and similar experiences with other manufacturers, smaller carriers are less effective competitors to AT&T.⁵⁸ As its buying power increases with the acquisition of T-Mobile, AT&T would be in an even stronger position to insist on such exclusivity arrangements.

Second, Applicants contend that the combined firm would somehow lack the buying power in a “global” market for GSM devices to “distort this international marketplace” through exclusivity agreements and non-interoperability provisions that cause device manufacturers to “forsake AT&T’s wireless competitors.”⁵⁹ This argument has an air of unreality, given that

⁵⁶ See, e.g., RCA Petition at 4-7; Leap Petition at 10-12; CRA Declaration ¶ 121; see also Government Accountability Office, *Telecommunications: Enhanced Data Collection Could Help FCC Better Competition in the Wireless Industry*, Report to Congress, GAO-10-779, at 10 (July 2010) (“GAO 2010 Wireless Report”) (explaining that the “primary change in the wireless industry” over the past decade is “industry consolidation [that] has created some challenges for small and regional carriers to remain competitive”).

⁵⁷ *Fourteenth Wireless Competition Report* ¶ 3.

⁵⁸ Similarly, Applicants’ contention that exclusive arrangements promote interbrand competition among handset manufacturers is wholly inapposite to concerns over interbrand competition among competing wireless carriers. See Opposition at 150-51. Indeed, the assertion that AT&T’s exclusive with the iPhone prompted Verizon to get a competing exclusive for the Motorola DROID offers no comfort to smaller carriers that have access to neither.

⁵⁹ *Id.* at 149-50.

AT&T historically *has* been able to wield its buying power—even without T-Mobile’s added heft—to coerce device manufacturers to “forsake” sales to smaller carriers. The Commission’s most recent wireless competition report found that AT&T alone offered almost *twice* as many smartphones as U.S. Cellular, MetroPCS, and Leap *combined*,⁶⁰ and that almost *half* of the smartphones on the market “were subject to EHAs [exclusive handset arrangements] at launch, including some of the most popular (e.g., Apple iPhone, Motorola DROID, Palm Pre).”⁶¹ As much as Applicants insist that, all things being equal, manufacturers want maximum distribution for their handsets, all things are *not* equal, and handset manufacturers plainly would have little choice but to accede to the demands of a behemoth like AT&T/T-Mobile. After all, manufacturers of popular handsets have little to lose from exclusivity arrangements with major carriers like AT&T, because they can count on consumers who want access to a particular handset to switch from a smaller carrier to AT&T.⁶² As CRA points out, AT&T compensates these manufacturers handily for whatever revenues they might lose in the short term for agreeing to an exclusive arrangement, by “paying the handset manufacturer a premium for denying access to the handset to Sprint [and other competitive carriers].”⁶³ With the acquisition of T-Mobile, AT&T’s ability to engage in anticompetitive “pay-for-delay” tactics to frustrate competitors’ access to cutting-edge handsets would only increase.

Third, Applicants argue that the concerns raised by RCA and others regarding AT&T’s efforts to frustrate the interoperability of 4G LTE handsets in the 700 MHz band are “not

⁶⁰ *Fourteenth Wireless Competition Report* ¶ 308, Chart 43 (showing that, as of December 2009, AT&T offered 25 smartphones, while U.S. Cellular, MetroPCS, and Leap offered 11, 2, and 0, respectively).

⁶¹ *Id.* ¶ 317.

⁶² *See id.* ¶ 299 (reporting that “38 percent of respondents who had switched providers did so because it was the only way to obtain the handset that they wanted”).

⁶³ CRA Declaration ¶ 107.

merger-specific.”⁶⁴ But these concerns go to the very heart of the proposed acquisition, because it would strengthen AT&T’s ability to engage in anticompetitive conduct designed to prevent handset interoperability. The record in this docket, as well as in the Commission’s ongoing 700 MHz proceeding, demonstrates that AT&T has sought to create *de facto* exclusivity for its handsets by requiring manufacturers to develop 4G LTE devices that work only within the 700 MHz bands that AT&T selects⁶⁵—and, importantly, not in the 700 MHz A Block where several of RCA’s members hold licenses to deploy next-generation wireless services in rural areas.⁶⁶ As part of these efforts, AT&T has successfully manipulated the Third Generation Partnership Project (“3GPP”), the standard-setting body for 700 MHz handsets, which has rubber-stamped AT&T’s schemes to prevent interoperability across the 700 MHz band.⁶⁷ If AT&T were permitted to acquire T-Mobile, it would bolster its influence within 3GPP and increase its buying

⁶⁴ Opposition at 153.

⁶⁵ See, e.g., Comments of United States Cellular Corporation at 4-5, WT Docket No. 11-65 (filed May 31, 2011).

⁶⁶ See Comments of Rural Cellular Association at 2, *700 MHz Mobile Equipment Capability; Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to Be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks*, RM-11592 (filed Mar. 31, 2010) (noting “concern[] that small rural and regional wireless carriers that have invested in Lower A Block spectrum will not be able to utilize this spectrum because of the threatened unavailability of suitable mobile devices that will operate both in the Lower A Block and in other paired commercial blocks in the 700 MHz band”).

⁶⁷ See Petition for Rulemaking at 2, *Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to Be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks*, RM-11592 (filed Sep. 29, 2009) (“The nation’s two largest wireless carriers are collaborating with 3GPP to establish self-serving ‘band classes’ for 700 MHz mobile equipment.”); see also U.S. Cellular Comments at 5 (noting that the record in 700 MHz proceeding “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” and 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”).

power vis-à-vis 4G LTE handset manufacturers. While Applicants state that the Commission has a “pending rulemaking on this very topic,”⁶⁸ the fact of the matter is that the Commission has yet to issue a Notice of Proposed Rulemaking in response to the pending petition, and in any event the mere possibility of new rules would not ameliorate the harm and thereby justify the proposed transaction.

III. APPLICANTS FAIL TO JUSTIFY THE UNPRECEDENTED AGGREGATION OF SPECTRUM THAT WOULD RESULT FROM THE PROPOSED ACQUISITION

Applicants also have failed to dispel concerns that the proposed acquisition would concentrate massive amounts of spectrum in the hands of AT&T. As numerous parties have pointed out, AT&T already has the strongest spectrum position of any of the four national wireless carriers, with roughly 100 MHz on average in the top 100 markets nationwide.⁶⁹ The proposed acquisition would create far greater disparities than those that already make it difficult for smaller carriers to compete. According to Sprint, after the transaction “AT&T would have nearly *three times* Sprint’s nationwide spectrum holdings, and more than *five times* the *combined* holdings of MetroPCS, Leap, and U.S. Cellular.”⁷⁰ At the same time, the far smaller spectrum holdings of RCA’s members would remain stagnant, and these carriers would become even less effective competitors relative to AT&T.

Applicants claim that “no rational objective could be served” by blocking this unprecedented aggregation of spectrum.⁷¹ Of course, allowing competition to flourish—rather

⁶⁸ Opposition at 154.

⁶⁹ J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings*, Mar. 30, 2011, at 1, available at https://mm.jpmorgan.com/stp/t/c.do?i=62A4E-B32&u=a_p*d_569842.pdf*h_-ifi22f3.

⁷⁰ Sprint Petition at 60.

⁷¹ Opposition at 179.

than letting the industry become excessively concentrated—is a perfectly rational objective. Indeed, that objective is the centerpiece of U.S. competition policy. Applicants also repeatedly assert that AT&T needs this spectrum because it faces “uniquely serious and urgent capacity constraints.”⁷² But as RCA and others have pointed out, AT&T’s spectrum needs are not unique; Verizon, for instance, certainly faces capacity constraints on the same scale as AT&T, and it is “‘extremely confident’ it has the ‘spectrum position’ it needs” to support current 2G and 3G technologies *and* roll out a nationwide 4G LTE network.⁷³ Indeed, AT&T later concedes that it merely wants T-Mobile’s spectrum to “bridge the gap” from GSM to LTE;⁷⁴ such a limited objective cannot possibly justify the massive aggregation of spectrum that AT&T is proposing. AT&T’s attempt to cast itself as a “pioneer[] in the mobile broadband revolution” is as self-serving as it is misplaced;⁷⁵ Verizon and Sprint both offer a host of smartphones and other devices today that put the same strains on their networks. And there is nothing “unique” about AT&T’s need to support legacy technologies in addition to 4G devices;⁷⁶ Verizon, Sprint, and nearly every regional carrier face identical challenges. Indeed, the fact that smaller carriers must grapple with the same problems with less spectrum makes the proposed transaction—which would give the carrier with the most spectrum even more—clearly contrary to the public interest.

Applicants’ response to the idea that AT&T could free up spectrum by migrating its customers from older-generation handsets to 3G and 4G handsets is particularly weak.

Applicants claim it would impossible to do so because “such transitions, particularly when they

⁷² *Id.* at 180.

⁷³ AT&T/T-Mobile Public Interest Statement at 79, WT Docket No. 11-65 (filed Apr. 21, 2011) (quoting Verizon Wireless CEO Dan Mead).

⁷⁴ Opposition at 56.

⁷⁵ *Id.* at 20.

⁷⁶ *Id.* at 21.

involve large numbers of customers, require significant time to accomplish in a customer friendly way.”⁷⁷ As an initial matter, AT&T’s purported concern for consumers is unconvincing, given that it has the worst customer satisfaction ratings among national carriers.⁷⁸ But more significantly, the fact that such a transition “require[s] significant time” only means that AT&T should have begun migrating customers *sooner*. AT&T’s response confirms what RCA and several other parties have already pointed out to the Commission: that AT&T’s supposed capacity constraints are the result of mismanagement of its spectrum resources.⁷⁹ AT&T dug itself into this hole, and it should not be permitted to buy its way out by absorbing a major competitor at the expense of the public interest.

IV. APPLICANTS DO NOT ADEQUATELY RESPOND TO OTHER HARMS TO COMPETITION RAISED IN RCA’S PETITION

The Opposition is also unpersuasive regarding the harmful effects of the proposed acquisition on the ability of competitive carriers to obtain backhaul services at reasonable rates. Applicants claim that petitioners’ backhaul-related concerns are unfounded because “the backhaul market is subject to both robust competition and regulation.”⁸⁰ But this fantasy of “robust” backhaul competition is belied by the Commission’s latest wireless competition report, which explains that “over 98 percent of all DS1 circuits are purchased from incumbent local exchange carriers (LECs), as are the vast majority of DS3 connections.”⁸¹ Moreover, AT&T’s reliance on Ethernet backhaul alternatives is misplaced; as the Commission’s report notes,

⁷⁷ *Id.* at 32.

⁷⁸ See Sprint Petition at 87 (citing *Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier*, CONSUMER REPORTS (Dec. 6, 2010)).

⁷⁹ CRA Declaration ¶ 195; Sprint Petition at 85-89; Leap Petition at 28-31; RCA Petition at 27-28.

⁸⁰ Opposition at 162-63.

⁸¹ *Fourteenth Wireless Competition Report* ¶ 295.

“[o]ther options, including higher bandwidth Ethernet services, are currently unavailable in a number of markets.”⁸² And even if Ethernet backhaul were widely available, “Ethernet special access is essentially unregulated,” meaning that “AT&T’s control of Ethernet backhaul facilities” would make a post-acquisition AT&T “free to increase price and otherwise harm competition.”⁸³

Applicants also fail to rebut RCA’s concerns that the proposed transaction would impair smaller carriers’ access to capital by undermining their competitiveness and decreasing investor confidence.⁸⁴ In fact, they do not respond to these concerns at all. Nor could they; the Commission and the GAO have each determined that smaller carriers “face challenges securing investments” as they become less competitive relative to the major carriers,⁸⁵ and the proposed transaction would plainly exacerbate that disparity.

⁸² *Id.* ¶ 295 n.783.

⁸³ Petition to Deny of NoChokePoints at 7, WT Docket No. 11-65 (filed May 31, 2011).

⁸⁴ *See* RCA Petition at 22-23.

⁸⁵ *GAO 2010 Wireless Report* at 18; *see also Data Roaming Order* ¶ 17 (noting evidence in the record that “investment banks and other sources of investment capital are likely to make the judgment that a small rural or regional carrier that cannot obtain data roaming agreements with the large national carriers will find it more difficult to attract and retain customers”) (internal quotation marks and citations omitted).

CONCLUSION

For the reasons stated above and in RCA’s petition, AT&T’s proposal to take over T-Mobile would have a number of harmful effects on competition—any one of which would be reason enough to block the deal, but which, taken together, would be devastating to rural and regional carriers and their customers. Applicants have failed to dispel these concerns or offer adequate proof of “countervailing, extraordinarily large, cognizable, and non-speculative efficiencies.”⁸⁶ Accordingly, the Commission should deny the Applications.

Respectfully submitted,

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⁸⁶ *EchoStar-DirecTV Hearing Designation Order* ¶ 102.

CERTIFICATE OF SERVICE

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