Exhibit 1

General Docket
US Court of Appeals for the Second Circuit

Second Circuit Court of Appeals

INDIV

DISPOSED

Court of Appeals Docket #: 06-1871-cv
Nsuit : 3410 Antitrust

In re: AMERICAN EXPRESS MERCHANTS' LITIGATION Filed 4/18/06
v.

Appeal from: SDNY (NEW YORK CITY)

Case type information:

Civil

Private

None

Lower court information:

District: 03-cv-9592

Trial Judge: George Daniels

MagJudge:

Date Filed: 12/03/03

Date order/judgement: 3/20/2006

Date NOA filed: 4/18/2006

Fee status: Paid

Panel Assignment:

Panel: RSP RDS NONE 500 Pearl

Date of decision: 3/8/11

Prior cases: NONE

Current cases NONE

Official Caption 1/

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Docket No. [s] : 06-1871 -cv

In re: American Express Merchants` Litigation,

Italian Colors Restaurant, on or behalf of itself and all similarly situated persons, National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp,

Plaintiffs-Appellants,

v.

American Express Travel Related Services Company, American Express Company,

Defendants-Appellees.

Authorized Abbreviated Caption 2/

Docket No. [s] : 06-1871 -cv

In re: AMERICAN EXPRESS MERCHANTS` LITIGATION v.

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].
2/ For use on correspondence and motions only.

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Clifford B. Storms	Briscoe R. Smith Esq.
Movant	[LD n] Atlantic Legal Foundation 2039 Palmer Avenue Larchmont , NY , 10538 212-867-3322
Earnest T. Patrikis	Briscoe R. Smith Esq.(See above)
Movant	[LD n]

Hayward D. Fisk	Briscoe R. Smith Esq.(See above)
Movant	[LD n]
Robert A. Lonergan	Briscoe R. Smith Esq.(See above)
Movant	[LD n]
William B. Lytton	Briscoe R. Smith Esq.(See above)
Movant	[LD n]

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American Express Company	Bruce H. Schneider Esq.
Defendant-Appellee	[LD ret] Stroock & Stroock & Lavan, LLP 180 Maiden Lane New York , NY , 10038 212-806-5400
American Express Travel Related Services Company. Inc. Defendant-Appellee	Bruce H. Schneider Esq.(See above) [LD n]
Business Roundtable	Catherine E. Stetson Esq.
Amicus Curiae	[LD n] Hogan & Hartson L.L.P. 555 13th Street, N.W. Washington , DC , 20004 202-637-5600
American Antitrust Instittute	Daniel E. Gustafson Esq.
Amicus Curiae	[LD n] Gustafson Gluek PLLC 650 Northstar East 608 Second Minneapolis , MN , 55402 612-33-8844
Public Justice, P.C.	Edith M. Kallas Esq.

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Amicus Curiae	[LD n] Whatley Drake & Kallas LLC 75 Rockefeller Plaza, 19th Floor New York , NY , 10019 212-447-7070
American Express Company	Evan R. Chesler Esq.
Defendant-Appellee	[n] Cravath, Swaine & Moore LLP 825 8th Ave. New York , NY , 100197475 212-474-1243
American Express Travel Related Services Company. Inc. Defendant-Appellee	Evan R. Chesler Esq.(See above) [n]
492 Supermarket Corp	Gary B. Friedman Esq.
Plaintiff-Appellant	[LD ret] Friedman Law Group, LLP 270 Lafayette St., 14th Fl. New York , NY , 10012 212-680-5150
Bunda Starr Corp	Gary B. Friedman Esq.(See above)
Plaintiff-Appellant	[LD ret]

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Italian Colors Restaurant	Gary B. Friedman Esq.(See above)
Plaintiff-Appellant	[LD ret]
National Supermarkets Association Plaintiff-Appellant	Gary B. Friedman Esq.(See above) [LD ret]
Phoung Corp	Gary B. Friedman Esq.(See above)
Plaintiff-Appellant	[LD ret]
American Express Company	Michael K. Kellogg Esq.
Defendant-Appellee	[n] Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. 1615 M Street, N.W.

	Washington , DC , 20036
	202-326-7902
American Express Travel Related Services Company. Inc. Defendant-Appellee	Michael K. Kellogg Esq.(See above) [n]

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492 Supermarket Corp	Noah L. Shube Esq.	
Plaintiff-Appellant	[n] Friedman Law Group, LLP 270 Lafayette St., 14th Fl. New York , NY , 10012 212-680-5150	
Bunda Starr Corp	Noah L. Shube Esq.(See above)	
Plaintiff-Appellant	[n]	
Italian Colors Restaurant	Noah L. Shube Esq.(See above)	
Plaintiff-Appellant	[n]	
National Supermarkets Association Plaintiff-Appellant	Noah L. Shube Esq.(See above) [n]	
Phoung Corp	Noah L. Shube Esq.(See above)	
Plaintiff-Appellant	[n]	
American Express Company	Peter T. Barbur Esq.	
Defendant-Appellee	[n] Cravath Swaine & Moore LLP 825 8th Ave. Worldwide Plaza New York , NY , 10019 212-474-1000	
American Express Travel Related Services Company. Inc. Defendant-Appellee	Peter T. Barbur Esq.(See above) [n]	

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4/18/06 Copy of notice of appeal and district court docket entries on behalf of APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , filed. [Entry date Apr 26 2006] [JP]

4/18/06 Copy of district court Judgment dated 3/20/06 endorsed by J. Michael McMahon, Clerk of Court, RECEIVED. [Entry date Apr 26 2006] [JP]

4/18/06 Copy of district court Memorandum Opinion and Order dated 3/15/06 endorsed by Honorable George B. Daniels USDJ, RECEIVED. [Entry date Apr 26 2006] [JP]

4/18/06 Copy of receipt re: payment of docketing fee filed on behalf of APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , Receipt #: E 576295. [Entry date Apr 26 2006] [JP]

5/4/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , Form C filed, with proof of service. [Entry date May 22 2006] [JP]

5/4/06 Notice of appeal acknowledgment letter from Gary Friedman received. [Entry date May 22 2006] [JP]

5/4/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , Form D filed, with proof of service. [Entry date May 22 2006] [JP]

5/4/06 Notice of appearance form on behalf of Gary Friedman, Noah Shube , Esq., filed. (Orig in acco, copy to Calendar) [Entry date May 22 2006] [JP]

5/8/06 Notice of appeal acknowledgment letter from Bruce Schneider received. [Entry date May 10 2006] [JP]

6/27/06 Scheduling order #1 filed. Record on appeal due 7/25/2006. Appellants brief due 8/1/2006. Appellees brief due 8/31/2006. Ready week 10/16/2006. (SB) [Entry date

Jun 29 2006] [JP]

6/27/06 Pre-Argument Conference Notice and Order from Stanley A. Bass, Re-Scheduled For:

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July 11, 2006 at 4:30 pm, Filed. [Entry date Jun 29 2006] [JP]

7/11/06 First pre-argument conference held by SB. [Entry date Sep 28 2006] [EG]

7/20/06 Scheduling order #2 filed. Appellants brief due 9/1/2006. Appellees brief due 9/11/2006. Ready week 11/20/2006. (SB) [Entry date Jul 20 2006] [CI]

7/20/06 Notice to counsel in re: Scheduling order # 2 filed July 20, 2006. [Entry date Jul 20 2006] [CI]

8/3/06 Appellees American Express Travel Related Services Company. Inc., and American Express Co., motion for extension of time to file briefs, filed with proof of service. [Entry date Aug 4 2006] [JP]

8/21/06 Order FILED GRANTING motion for extended of time on briefing schedule by Appellees American Express Co., American Express Travel Related Services Company. Inc., endorsed on motion AH dated 8/3/2006 Extended Appellants brief due is 9/5/2006. Extended Appellees brief due is 11/1/2006. Extended Ready week is 12/25/2006.

Before: Hon. Ralph K. Winter, Circuit Judge [Entry date Aug 25 2006] [JP]

8/23/06 Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court). [Entry date Aug 25 2006] [CI]

8/25/06 Notice to counsel in re: Order FILED GRANTING motion for extended of time on briefing schedule by Appellees American Express Co., American Express Travel Related Services Company. Inc., filed 8/21/06. [Entry date Aug 25 2006] [JP]

9/6/06 Request for address/phone change sent to Systems. [Entry date Sep 8 2006] [JP]

9/8/06 Non-dispositive stipulation to amend caption

dated 9/8/06, RECEIVED. [Entry date Sep 12 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , brief FILED with proof of service. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant,

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National Supermarkets Association, ET AL , joint appendix filed w/pfs. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , Joint Appendix filed w/pfs. (volume #2) [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , special appendix filed(w/pfs) [Entry date Oct 3 2006] [JP]

9/11/06 Anti-Virus Certificate on behalf of APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , Brief, Received. [Entry date Oct 3 2006] [JP]

9/18/06 AMICUS CURIAE American Antitrust Instittute, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

9/20/06 AMICUS CURIAE Trial Lawyers for Public Justice, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

9/20/06 Anti-Virus Certificate on behalf of AMICUS CURIAE Trial Lawyers for Public Justice, Brief, Received. [Entry date Oct 11 2006] [JP]

9/22/06 Non-Dispositive Stipulation to Amend Caption dated 9/22/06, FILED. [Entry date Sep 28 2006] [JP]

9/28/06 Notice to counsel in re: Non-Dispositive Stipulation to Amend Caption filed 9/22/06.

[Entry date Sep 28 2006] [JP]

9/28/06 The CAPTION PAGE for this appeal has been AMENDED. [Entry date Sep 28 2006] [JP]

11/1/06 APPELLEE American Express Company, American Express Travel Related Services Company. Inc., brief filed with proof of service. [Entry date Nov 8 2006] [JP]

11/2/06 APPELLEES American Express Company, American Express Travel Related Services Company. Inc., corrected Certificate of Compliance filed. [Entry date Nov 8 2006] [JP]

11/13/06 Movants Hayward D. Fisk and Robert Lonergan, et al, brief received.(Motion Pending)

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[Entry date Nov 15 2006] [JP]

11/13/06 Movants Hayward Fisk, Robert Lonergan, William Lytton, et al motion to file brief as amicus curiae filed with proof of service. [Entry date Nov 15 2006] [JP]

11/14/06 AMICUS CURIAE Business Roundtable, brief filed with proof of service. [Entry date Nov 15 2006] [JP]

11/16/06 Notice to counsel in re: Order FILED REFERRING motion to file brief as amicus curiae by Movants Hayward Fisk, Robert Lonergan, William Lytton, Ernest Patrikis, Clifford Storms, to the merits panel/presiding judge, dated 11/16/06. [Entry date Nov 16 2006] [JP]

11/16/06 Order FILED REFERRING motion to file brief as amicus curiae by Movants Hayward Fisk, Robert Lonergan, William Lytton, Ernest Patrikis, Clifford Storms, to the merits panel/presiding judge endorsed on motion AH dated 11/13/2006. [Entry date Nov 16 2006] [JP]

11/17/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , reply brief filed with proof of service. [Entry date Nov 28 2006] [JP]

12/12/06 Letter received from Arthur Keng, paralegal informing this court of new contact

information. [Entry date Dec 18 2006] [JP]

3/5/07 Letter received from Heidi Balk, Esq., dated 3/5/2007 in re: dates unavailable for oral argument. (Copy sent to Calendar) [Entry date Mar 6 2007] [JP]

3/19/07 Notice Received from Amicus Curiae Public Justice dated 3/14/2007 stating: Counsel for Amicus Curiae Trial Lawyers for Public Justice hereby inform the Court of a change in the business identity and name of both amicus and the firm of one of its counsel from Trial Lawyers for Public Justice, P.C. to Public Justice, P.C. [Entry date Mar 21 2007] [JP]

5/31/07 Proposed for argument the week of 9/4/07 [Entry date May 31 2007] [SC]

7/9/07 **ORIGINAL**Argument as early as week of 10/16/06 [Entry date Jul 9 2007] [SC]

7/9/07 Proposed for argument the week of 10/8/07

[Entry date Jul 9 2007] [CA]

7/19/07 Proposed for argument the week of 10/15/07 [Entry date Jul 19 2007] [SC]

8/17/07 Set for argument on 10/15/07. [Entry date Aug 17 2007] [AG]

8/20/07 Calendar argument notice mailed to attorneys/parties. [Entry date Aug 20 2007] [RD]

9/11/07 Order adjourning oral argument FILED. APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , [Entry date Sep 11 2007] [SC]

9/11/07 **ORIGINAL**Argument as early as week of 10/16/06 [Entry date Sep 11 2007] [SC]

9/11/07 Notice to counsel re: order adjourning oral argument. [Entry date Sep 11 2007] [SC]

9/13/07 Amicus Curiae Hayward D. Fisk, et al brief filed with proof of service. [Entry date Sep 24 2007] [AV]

9/13/07 Order FILED GRANTING motion to file brief as amicus curiae by Movant Hayward Fisk, Movant Robert Lonergan, Movant Clifford Storms, Movant Earnest Patrikis, Movant William Lytton, endorsed on motion dated 11/13/2006. [Entry date Sep 24 2007] [AV]

9/14/07 Proposed for argument the week of 12/10/07 B-Panel [Entry date Sep 14 2007] [SC]

9/24/07 Notice to counsel re:order granting motion to file amicus curiae brief. [Entry date Sep 24 2007] [AV]

10/17/07 Set for argument on 12/10/07-B Panel [Entry date Oct 17 2007] [AG]

10/29/07 Calendar argument notice mailed to attorneys/parties. [Entry date Oct 29 2007] [RD]

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11/16/07 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter FILED. [Entry date Nov 19 2007] [LY]

11/29/07 APPELLEES American Express Company and American Express Travel Related Services Company. Inc., 28(J) letter received. [Entry date Nov 29 2007] [TM]

12/4/07 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter FILED. [Entry date Dec 5 2007] [LY]

12/10/07 Case heard before POOLER, SACK, SOTOMAYOR, C. JJ
CD DATE: 12/10/07 [Entry date Dec 10 2007] [RD]

12/14/07 Letter received from Morrison & Foerster requesting oral argument tape, fee paid, receipt 190994, forwarded to calendar [Entry date Dec 14 2007] [NS]

12/17/07 Letter received from Friedman Law Group requesting oral argument tape, fee paid, receipt # 191007, forwarded to calendar [Entry date Dec 17 2007] [NS]

12/26/07 APPELLEE American Express Company, American Express Travel Related Services Company. Inc., 28(J) letter FILED. [Entry date Dec 26 2007] [LY]

1/3/08 Oral argument CD ready to be pick up for Howard Foerster. A phone call was placed on 1/3/08 to Mr. Foerster. [Entry date Jan 4 2008] [RD]

1/3/08 Oral argument CD mailed to Sarah Field. [Entry date Jan 4 2008] [RD]

1/3/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter FILED. [Entry date Jan 4 2008] [LY]

1/23/08 Letter received from Docutrieval requesting oral argument tape, fee paid, receipt #191588, forwarded to calendar [Entry date Jan 23 2008] [NS]

1/25/08 Oral argument tape mailed to Eillen Tangonan . [Entry date Jan 25 2008] [RD]

3/11/08 APPELLEE American Express Company,

American Express Travel Related Services Company. Inc., 28(J) letter received. [Entry date Mar 11 2008] [YS]

4/24/08 Letter received from Mandrika Moonsammy(Kaplan Fox), requesting oral argument CD, fee paid, receipt # 192968, forwarded to calendar [Entry date Apr 24 2008] [NS]

5/1/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter received. [Entry date May 1 2008] [YS]

5/2/08 Oral argument CD sent to Kaplan Fox [Entry date May 2 2008] [LY]

5/2/08 APPELLEE American Express Company, American Express Travel Related Services Company. Inc., 28(J) letter received in response to the Appellants 28(j) letter. [Entry date May 5 2008] [EM]

11/12/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter dated 11/10/08 received. [Entry date Nov 13 2008] [EM]

11/12/08 APPELLEE American Express Company, American Express Travel Related Services Company. Inc., response to the 28(J) letter of the Appellant, received. [Entry date Nov 13 2008] [EM]

1/30/09 Judgment of the district court is REVERSED and REMANDED by published signed opinion filed. (RSP) [Entry date Jan 30 2009] [AM]

1/30/09 Judgment filed. [Entry date Jan 30 2009] [AM]

1/30/09 Notice to counsel in re: Opinion filed 1/30/09. [Entry date Jan 30 2009] [AM]

2/9/09 Oral argument tape CD sent to Skadden [Entry date Feb 9 2009] [LY]

2/20/09 Judgment MANDATE ISSUED. CLOSED [Entry date Feb 20 2009] [HT]

2/20/09 Notice to counsel in re: Mandate issued 02/20/09. [Entry date Feb 20 2009] [HT]

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3/17/09 Undeliverable mail for Edith M. Kallas, Esq. returned to USCA - 2d Cir. from the USPS, received. Problem: attempted/ not known. [Entry date Mar 23 2009] [AG]

4/24/09 Notice from Supreme Court granting APPELLEE American Express Company, American Express Travel Related Services Company. Inc. , extension of time in which to file a writ of certiorari until 06/01/09, received. [Entry date Apr 24 2009] [HT]

6/5/09 Notice of filing petition for APPELLEE American Express Company, American Express Travel Related Services Company. Inc., dated May 29, 2009, filed. Supreme Court #: 08-1473. [Entry date Jun 5 2009] [DB]

5/7/10 Writ of Certiorari GRANTED [Entry date May 12 2010] [AS]

6/18/10 Supreme Court judgment and costs filed.

[Entry date Jun 21 2010] [AS]

7/30/10 REINSTATEMENT, pursuant to Supreme Court of the United States judgment dated 06/04/2010 and this court's order dated 07/30/2010, FILED. Reinstatement Code: M. [Entry date Jul 30 2010] [AG]

7/30/10 ORDER, each party shall submit a written brief limited to the issue of how Stolt-Nielsen applies to this case, no later than 08/23/2010 and reply briefs no later than 09/08/2010, by RDS, RSP, FILED. [Entry date Jul 30 2010] [AG]

7/30/10 Notice to counsel in re: Order filed. [Entry date Jul 30 2010] [AG]

8/3/10 The new case manager assigned to this case is: Beesley, Dylan. [Entry date Aug 3 2010] [AM]

8/11/10 NOTICE OF APPEARANCE FORM from Michael Kellogg, on behalf of Appellees American Express Co. and American Express Travel Related Services Co., Inc., FILED. [Entry date Aug 12 2010] [DB]

8/23/10 SUPPLEMENTAL BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp., National Supermarkets Association, ET AL., FILED. [Entry date Aug 24 2010] [DB]

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8/24/10 SUPPLEMENTAL BRIEF, on behalf of APPELLEE American Express Company, American Express Travel Related Services Company. Inc., FILED. [Entry date Aug 24 2010] [DB]

9/8/10 SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLEES American Express Company and American Express Travel Related Services Company. Inc., FILED. [Entry date Sep 8 2010] [DB]

9/8/10 SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp, Bunda Starr Corp, National Supermarkets Association, ET AL., FILED. [Entry date Sep 8 2010] [DB]

9/8/10 Case submitted before POOLER, SACK, C.JJ. [Entry date Mar 7 2011] [MR]

3/8/11 OPINION, district court judgment reversed and remanded, FILED (RSP). [Entry date Mar 8 2011] [CM]

3/8/11 Notice to all parties of Opinion dated 03/08/2011. [Entry date Mar 8 2011] [CM]

3/8/11 The new case manager assigned to this case is: Mazariego, Connie. [Entry date Mar 8 2011] [CM]

3/8/11 Certified copy of the order, dated 03/08/2011 issued to the district court, [informational only]. [Entry date Mar 8 2011] [CM]

3/8/11 Judgment filed. [Entry date Mar 10 2011] [CM]

3/9/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , 28(J) letter FILED. [Entry date Mar 16 2011] [CM]

3/23/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , itemized and verified bill of costs received, w/pfs. [Entry date Mar 25 2011] [CM]

3/23/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , itemized and verified bill of costs received, w/pfs. [Entry date Mar 29 2011] [CM]

3/28/11 ACKNOWLEDGMENT and NOTICE OF APPEARANCE

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FORM from Atty Peter Barbur, on behalf of American Express Company and American Express Travel Related Services Compnay Inc. FILED. (Orig in acco, copy to Admissions Dept.). [Entry date Mar 29 2011] [CM]

3/28/11 ACKNOWLEDGMENT and NOTICE OF APPEARANCE FORM from Atty Evan Chesler, on behalf of American Express Company and American Express Travel Related Services Company Inc. FILED. (Orig in acco, copy to Admissions Dept.). [Entry date Mar 29 2011] [CM]

3/28/11 MOTION, to stay the mandate, on behalf of

Appellee American Express Travel Related Services Company. Inc., Appellee American Express Company FILED. [Entry date Mar 29 2011] [CM]

4/4/11 OPPOSITION PAPERS, on behalf of Appellant Italian Colors Restaurant et al FILED. [Entry date Apr 5 2011] [CM]

4/11/11 Notice to all parties of Order dated 04/11/2011. [Entry date Apr 11 2011] [CM]

4/11/11 RESPONSE PAPERS, to the opposition of motion to stay mandate on behalf of Appellee American Express Company, American Express Travel Related Services Company. Inc., RECEIVED. [Entry date Apr 12 2011] [CM]

4/11/11 ORDER, Appellant Italian Colors Restaurant, Appellant National Supermarkets Association, Appellant 492 Supermarket Corp, Appellant Bunda Starr Corp, Appellant Phoung Corp, Appellee American Express Company, Appellee American Express Travel Related Services Company. Inc.`s motion to stay the mandate granted, FILED. [Entry date Apr 11 2011] [CM]

5/9/11 ORDER, dated 05/09/2011, it is hereby Ordered that each party shall submit a letter brief, not to exceed ten (10) double-spaced pages, limited to the issue of how Concepcion applies to this case. Parties shall submit their briefs concurrently no later than June 3, 2011, FILED. (RSP, RDS). [Entry date May 9 2011] [CM]

5/9/11 Notice to all parties of Order dated 05/09/2011. [Entry date May 9 2011] [CM]

5/20/11 ORDER, dated 05/20/2011, Bill of Costs of Appellants Italian Colors Resturant et al. is denied without prejudice to refiling after the mandate has been issued, FILED. [Entry date May 20 2011] [CM]

5/20/11 Notice to all parties of Order dated

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05/20/2011. [Entry date May 20 2011] [CM]

5/31/11 Notice from Supreme Court granting APPELLEE

American Express Company, American Express Travel Related Services Company. Inc. , extension of time in which to file a writ of certiorari. [Entry date Jun 1 2011] [CM]

6/3/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL , LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

6/3/11 Undeliverable mail returned to USCA - 2d Cir. from the USPS, received. Problem: not deliverable as addresses, unable to forward. [Entry date Jun 6 2011] [CM]

6/3/11 Undeliverable mail returned to USCA - 2d Cir. from the USPS, received. Problem: not deliverable as addressed, unable to forward. [Entry date Jun 6 2011] [CM]

6/6/11 APPELLEE American Express Company, American Express Travel Related Services Company. Inc., LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

6/13/11 LETTER, dated 06/13/2011, on behalf of Appelllee American Express RECEIVED. [Entry date Jun 14 2011] [CM]

8/1/11 ORDER, dated 08/01/2011, In light of the Supreme Court's decision of April 27, 2011 in AT &T Mobility LLC v. Conception,- - U.S. - -, 2011 WL 1561956 (2011), this panel is sua sponte considering rehearing, No additional briefing is necessary at this time, FILED (RSP, RDS). [Entry date Aug 1 2011] [CM]

8/1/11 Notice to all parties of Order dated 08/01/2011. [Entry date Aug 1 2011] [CM]

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PACER Service Center

Transaction Receipt

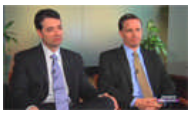
09/09/2011 09:56:10

PACER Login:	mb0116	**Client Code:**	02012375
Description:	dkt report	**Case Number:**	06-1871
Billable Pages:	18	**Cost:**	1.44

Exhibit 2

Fight AT&T's Takeover of T-Mobile

Contact Us



Insider Exclusive TV
Profile of Bursor & Fisher

www.FightTheMerger.com

FIGHTHEMERGER.COM OVERVIEW | YOUR RIGHTS | THE $10,000 PAYMENT | OUR TEAM | OUR RETAINER | WHAT WE'LL DO

YOUR RIGHTS

The Clayton Antitrust Act allows anyone who may be affected by a proposed merger to sue in federal court to enjoin the merger - to prevent the merger from being completed - if the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. If you purchase goods or services in the U.S. wireless market, you may be affected by higher prices caused by this merger. That gives you standing to sue to enjoin the merger.

If you are an AT&T customer, however, the terms of your wireless customer agreement http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp say that you cannot sue AT&T in any court for any reason. AT&T's agreement would force you to resolve disputes with AT&T on an individual basis, through mandatory arbitration. That way, if AT&T cheats millions of customers by charging illegal termination fees, secretly locking their phones, or overbilling them for data use or other charges, you would have no effective means to bring a legal claim. Because how many people are going to read the fine print, figure out how to file an arbitration, and find a lawyer to represent them on a claim for a few hundred dollars? It almost never happens.

Our team has spent years litigating class actions against AT&T, and litigating the validity of AT&T's Arbitration Agreement. We have read the fine print. And we have a plan to use AT&T's own Arbitration Agreement to help stop the takeover of T-Mobile.

We have already started the process of initiating dozens of arbitrations on behalf of our clients, any one of which could stop this merger. We have a team in place with the resources to bring thousands more. If we are successful, we may be able to seek a $10,000 payment for every one of our participating clients.

Sign Up To Fight AT&T's Takeover Of T-Mobile
-And-
To Seek A $10,000 Award Under Your AT&T Contract

First name
Last name
AT&T billing address
City
State Select a state ...
ZIP code
Phone
E-mail address

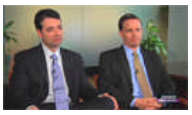
☐ I am an AT&T Wireless Customer.
☐ I agree to the Terms of Our Retainer.
Click to Submit

Am I eligible? Check our FAQs.

Exhibit 3

Fight AT&T's Takeover of T-Mobile

Contact Us



Insider Exclusive TV
Profile of Bursor & Fisher

www.FightTheMerger.com

FIGHTHEMERGER.COM OVERVIEW | YOUR RIGHTS | THE $10,000 PAYMENT | OUR TEAM | OUR RETAINER | WHAT WE'LL DO

FIGHT THE MERGER

AT&T's $39 billion takeover of T-Mobile would turn back the clock to the era of the Ma Bell monopoly. The deal would give AT&T and Verizon control over 80% of the wireless market, would stifle the competitive market forces that would otherwise help to keep prices down, and would stifle new products and innovation.

AT&T's claim that the takeover will help improve network quality makes no sense. T-Mobile's network overlaps almost entirely AT&T's. And AT&T already has more spectrum than any other company. In most areas, AT&T already holds at least 40 MHz of spectrum it is not even using. AT&T is keeping that spectrum off the market, which prevents competitors from using it to provide better service at lower prices.

Turning back the clock to the Ma Bell monopoly era will allow AT&T and Verizon to dictate what type of phone you can use, how you can use it, and what you will pay. It will destroy competition, leading to higher prices and worse service.

Dozens of AT&T customers have already retained our team of lawyers to help them fight the merger and preserve competition in the wireless market. This website was designed to provide information for others who may wish to join that effort.

Sign Up To Fight AT&T's Takeover Of T-Mobile
-And-
To Seek A $10,000 Award Under Your AT&T Contract

First name
Last name
AT&T billing address
City
State Select a state ...
ZIP code
Phone
E-mail address

I am an AT&T Wireless Customer.
I agree to the Terms of Our Retainer.
Click to Submit

Am I eligible? Check our FAQs.

Exhibit 4

» Print

Law firm strikes back at AT&T over merger

Wed, Jul 27 2011

By Terry Baynes

NEW YORK (Reuters) - A New York-based law firm is waging a creative legal battle to block AT&T Inc's (T.N: Quote, Profile, Research, Stock Buzz) $39 billion takeover bid for T-Mobile USA TMOG.UL.

With its "Fight the Merger" campaign, Bursor & Fisher is seeking to stop the mega-deal by inundating AT&T with arbitration claims. The firm, which historically handled consumer class actions against AT&T, maintains the merger would violate federal antitrust law and stifle competition in the wireless market. The firm is using its website to recruit AT&T customers willing to initiate arbitration proceedings.

So far, 750 customers have volunteered, according to Scott Bursor, the firm's founding partner. The firm has sent around 700 notices of dispute to AT&T and 20 arbitration demands, Bursor said.

"Fight the Merger" is a not-so-veiled reference to a class action that AT&T customers lost in the Supreme Court in April. In that case, AT&T Mobility v. Concepcion, customers sued AT&T for allegedly advertising discounted cell phones, but charging sales tax on the full price. The Supreme Court sided with AT&T, ruling that clients who signed phone contracts containing mandatory arbitration clauses waived their right to bring a class action against the company. AT&T could enforce a contractual term that required customers to arbitrate their disputes individually.

Bursor & Fisher decided to try to turn that setback into an advantage for customers.

"If (AT&T) wants to arbitrate on an individual basis, that's what we'll do," Bursor said.

His firm has appointed a network of attorneys across the country to represent every customer willing to challenge the merger before an arbitrator.

"IN THEIR AGREEMENT"

AT&T's customer contract provides that any consumer who prevails in arbitration is entitled to a $10,000 payment. To recruit clients, Bursor & Fisher is promoting the AT&T payment offer on its "Fight the Merger" site, with a suggestion customers will win. The AT&T contract also promises double attorney's fees to successful customers, which explains the firm's willingness to take on the arbitration cases.

In AT&T Mobility v. Concepcion, the carrier emphasized these financial incentives to the Supreme Court to defend the fairness of its contract.

"Now we're going to put that to the test," Bursor said.

AT&T responded in an emailed statement that the Bursor & Fisher's claims are "completely without merit" and that an arbitrator does not have the authority to block the merger currently under review by the Federal Communications Commission and the Department of Justice.

Andrew Gavil, an antitrust law professor at Howard University Law School, said he doubted an arbitrator would have the power to prevent the merger, but it would turn on language in the contract and what types of disputes were committed to arbitration. He said Bursor & Fisher might be trying to strong-arm AT&T into arguing that the arbitration clause does not cover antitrust claims, thereby reopening the door to a traditional class action lawsuit.

AT&T has already argued in a letter to the American Arbitration Association that the arbitration clause was intended for individual billing disputes, not a $39-billion-dollar antitrust case, according to Bursor. But the arbitration clause is broad, covering all "claims arising out of or relating to any aspect of the relationship between us, whether based on contract, tort, statute, fraud, misrepresentation or any other legal theory," according to a copy of the contract posted on the firm's website.

The firm is bringing the arbitration claims under the Clayton Antitrust Act.

Bursor said his firm has no intention of forcing AT&T into a traditional class action lawsuit. He expects AT&T to settle, given the "daunting" prospect of fighting more than 750 arbitrations, any one of which could stop the deal.

"If they didn't want to have individual arbitrations, then they shouldn't have put this clause in their agreement," Bursor said. "AT&T wrote this and we're going to force them to honor it."

(Reporting by Terry Baynes; editing by Andre Grenon)

Exhibit 5

All Things Digital.

News

AT&T Customers File Arbitration Cases Seeking to Block T-Mobile Merger

Published on July 22, 2011
by **Ina Fried**

A group of lawyers has filed arbitration cases on behalf of 11 AT&T customers in hope of blocking the company's planned $39 billion acquisition of T-Mobile USA.

The New York-based firm of Bursor & Fisher law firm filed a 236-page arbitration demand on Thursday, alleging that the proposed deal would harm competition in violation of the Clayton Antitrust Act.

Although the deal already requires approval from the Department of Justice and Federal Communications Commission, the law firm is seeking to represent individual AT&T customers who want to bring their own legal challenges to the deal.

"Government enforcement is an important part of the antitrust laws, but the Clayton Act also permits private parties who may be adversely affected to challenge a proposed merger," attorney Scott Bursor said in a statement. "That means any AT&T cellphone, data or iPad customer who will suffer higher prices and diminished service because of this merger can sue to stop it from happening."

The firm, which has set up a Web site arguing its case, said it plans to file additional arbitration cases on Friday, with hopes of filing hundreds of such cases. AT&T's standard contract terms prevent class-action suits but allow for disputes to be brought up for arbitration, at AT&T's expense.

In an interview, Bursor talked about how that could help in this case.

"If we bring 100 cases and we lose 99 of them we are going to win," Bursor told **AllThingsD**. "We just need one arbitrator to say, 'Wait a minute, this merger is going to hurt competition.'"

Bursor and his firm have been involved in other consumer suits against the wireless industry, including a class-action suit against Sprint Nextel over its early termination fees and another dispute with AT&T over the locking of handsets.

An AT&T representative was not immediately available for comment.

AT&T has lined up backing from a number of governors and other elected officials, as well as high-tech firms, labor and other groups; meanwhile, Sprint has been fighting the deal, along with several consumer

groups and smaller wireless carriers. This week, Senator Herb Kohl, a top democrat on antitrust matters, called on the federal government to block the deal.

In its earnings call on Thursday, AT&T said it remains confident the deal will win approval and close in the first quarter of next year, despite the objections.

Return to: AT&T Customers File Arbitration Cases Seeking to Block T-Mobile Merger

URL: http://allthingsd.com/20110722/att-customers-file-arbitration-cases-seeking-to-block-t-mobile-merger/

Exhibit 6

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[Additional Counsel Listed on Signature Page]

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

SHANE BUSHMAN, individually, Claimant, -against- AT&T, Inc., and AT&T MOBILITY, LLC, Respondents.	Case No. _____

DEMAND FOR ARBITRATION

Claimant hereby submits this demand for arbitration against respondents AT&T, Inc. and AT&T Mobility, LLC, for violations of the Clayton Antitrust Act in connection with the proposed takeover of T-Mobile USA, Inc.

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I. PARTIES

1. Claimant is a purchaser of goods and services from AT&T Mobility LLC.

2. Claimant is a party to the AT&T Wireless Customer Agreement. Section 2.2(3) of that agreement states: "Unless AT&T and [Claimant] agree otherwise, any arbitration hearings will take place in the county (or parish) of [Claimant's] billing address." Claimant's billing address is: 7145 Lake Island Dr, Lake Worth, FL 33467.

3. Respondent AT&T Inc. ("AT&T") is a business organization with its principal place of business in Atlanta, Georgia. Respondent AT&T Mobility, LLC, is a subsidiary of AT&T Inc.

4. AT&T is and at all times relevant hereto been engaged in the business of providing cell phone services and related wireless telecommunications products and services to the public throughout the United States.

II. NATURE OF THE ACTION

5. This demand for arbitration is filed pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to enjoin AT&T's proposed acquisition of T-Mobile USA, Inc. ("T-Mobile") from Deutsche Telekom ("DT"), or in the alternative to seek divestiture of certain assets, and to obtain other equitable relief.

6. On March 20, 2011, AT&T and T-Mobile announced that they have entered into a stock purchase agreement ("The Agreement") to acquire T-Mobile from DT for approximately $39 billion in cash and stock ("The Proposed Transaction"). AT&T and T-Mobile are two of the four leading suppliers of nationwide wireless telecommunications services in the United States.

7. The Proposed Transaction would eliminate T-Mobile, and thus any competition from the nation's fourth largest telecommunications carrier. The Proposed Transaction would

also turn back the clock on competition and innovation and bring this era of unprecedented wireless expansion and technological innovation to an abrupt, but avoidable, halt. The Proposed Transaction would make AT&T the nation's largest wireless carrier with 118 million subscribers in total and 43 percent of the post-paid market. Coupled with Verizon's more than 94.1 million total subscribers and 39 percent of the post-paid market, the transaction would create a "Twin Bell" duopoly with 82 percent of post-paid subscribers, over 78 percent of all wireless revenues, and 88 percent of all wireless operating profits. The Twin Bells' market dominance would dwarf companies like Sprint, the sole remaining national carrier, and the rest of the wireless industry, thereby creating an entrenched, anti-competitive duopoly.

8. The Proposed Transaction would harm consumers, businesses, and competition in the telecommunications industry and the American economy at large. These harms would occur on a national level because, as AT&T has repeatedly stated in prior transactions, competition among wireless providers takes place on a national level. These anti-competitive harms would also result at the local level because much smaller carriers would have little ability or incentive to deter the Twin Bells from coordinating their behavior, increasing prices, and reducing consumer choice.

9. AT&T's control over assets other providers need to compete, such as backhaul, spectrum, and roaming, would exacerbate the anti-competitive effects of the takeover. As descendants of the Bell monopolies, AT&T and Verizon control key pieces of the nation's wireline infrastructure, including backhaul facilities. This control enables the Twin Bells to raise competitors' costs, reduce their network quality, and quash competitive alternatives. Permitting AT&T to amass unprecedented spectrum holdings would leave a diminished supply of this valuable input for other competitors. Finally, the merger would create a national GSM

monopoly and reduce roaming options for GSM carriers by eliminating the only other nationwide GSM provider. Roaming is a key input for smaller carriers that do not operate national networks.

10. If the proposed takeover were approved, the Twin Bell duopolists would be positioned as gatekeepers of the digital ecosystem. Upstream content providers and device manufacturers would have little choice but to deal with AT&T and Verizon because of their overwhelming share of wireless subscribers and revenue. Handset manufacturers, for example, would be less willing to partner with any provider other than the Twin Bells, because their control of 76 percent of all wireless subscribers and 82 percent of post-paid subscribers would give them far greater leverage to demand exclusive arrangements or rights of first refusal. Post takeover, the market share of the non-Bell carriers would fall from 36 percent of all subscribers to 24 percent. This vast difference in size between the top two providers and any other competitor would reduce the ability of Sprint or other providers to influence the pace of industry innovation. The transaction would thus stifle the development of new devices and applications, reducing consumer choice and undercutting research and development. The result of diminished competition would be less innovation and economic growth in the U.S. wireless sector, which would have serious adverse implications for the U.S. economy as a whole.

11. AT&T claims that the proposed takeover would alleviate network capacity constraints that it will allegedly face, and allow AT&T to expand deployment of its LTE network to 97 percent of the U.S. population. Both claims rely on speculation and flawed assumptions.

12. Moreover, AT&T can achieve both alleged benefits without the anti-competitive elimination of the nation's fourth largest carrier and the only other national GSM competitor.

13. AT&T's alleged capacity constraints are contradicted by the facts. Even without the Proposed Transaction, AT&T has the largest licensed spectrum holdings of any wireless carrier. AT&T also is the largest holder of unused spectrum, with 40 MHz, on a population-weighted nationwide basis, of unused or underutilized AWS, 700 MHz, and WCS spectrum. AT&T could use this reserve of spectrum to improve service for its customers, but has chosen instead to warehouse it for future services. Moreover, AT&T has repeatedly reassured investors that it has the spectrum and network capacity it needs to meet the growing demand for data services. Yet now, in attempting to justify its takeover proposal, AT&T asserts that it is so spectrum constrained that it has no other choice but to acquire T-Mobile for its spectrum.

14. If AT&T has capacity constraints, they are the result of its failure to upgrade and invest in its network. AT&T has lagged significantly in network investment. Its network investment per subscriber has been below the industry average, even after its exclusive iPhone deal placed increased demands on its network. Like any other carrier, AT&T can invest in new cell sites and network technologies to maximize efficient use of its spectrum to meet consumer demand for its services. AT&T has made the business decision not to do so. That decision may mean higher dividends for its investors, but it also has resulted in the worst customer satisfaction ratings among all major wireless carriers. AT&T glosses over these facts and seeks to repackage its management decisions into a spectrum shortage problem to justify the proposed takeover. In effect, AT&T is seeking a bailout for problems of its own making, with the cost of the bailout paid by consumers in terms of higher prices, less innovation, and poor service.

15. AT&T's claim that the takeover will enable AT&T to expand LTE deployment is speculative and unrelated to the Proposed Transaction. AT&T provides no timeline or schedule for implementing their purported promise to expand its LTE deployment, which makes the

alleged expansion speculative and unverifiable. Nor does AT&T bother to explain what it plans to invest to reach this deployment target or substantiate how the proposed takeover would allow AT&T to expand its LTE footprint from 80 percent, its prior LTE deployment target, to 97 percent of the population.

16. AT&T does not need to acquire T-Mobile to expand the reach of its LTE network. AT&T's current spectrum holdings and network already reach approximately 97 percent of the population. To the extent it needs spectrum in a few isolated rural areas, it can acquire spectrum rights to fill the gap. Instead of paying Deutsche Telekom $39 billion – which DT has said it would use to deploy broadband services in Europe, not the United States – AT&T can invest a fraction of that amount to expand its LTE deployment. In the absence of the Proposed Transaction, competition likely will drive AT&T to reach this target anyway. Today's competitive wireless marketplace has made either 3G or 4G mobile services available to more than 98 percent of the nation's population. The same marketplace forces will cause carriers to make 4G services, including AT&T's LTE service, available across the same coverage area within the next few years – provided the Proposed Transaction is enjoined to preserve a competitive wireless marketplace.

17. AT&T and T-Mobile are significant competitors with large market shares in an already concentrated market. Elimination of the competition between AT&T and T-Mobile likely will result in AT&T's ability to raise prices to its customers. In addition, by eliminating T-Mobile, the transaction increases the likelihood of coordinated interaction between AT&T and the few other leading suppliers of wireless telecommunications services. As a result, the proposed acquisition would substantially lessen competition in the development, production, and

sale of wireless telecommunications services in the United States, in violation of Sections 7 and 16 of the Clayton Act, 15 U.S.C. § 18 and 15 U.S.C. § 26.

18. Section 7 of the Clayton Antitrust Act of 1914 (the "Clayton Act") prohibits mergers and acquisitions in any line of commerce where the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly."[1] Courts have interpreted the language of the Clayton Act to prohibit transactions that may reduce competition in any relevant market.[2] In practice, a transaction would substantially lessen competition if it (1) raises prices, (2) lowers quality, or (3) reduces innovation.[3] The proposed merger of AT&T and T-Mobile will do all three.

19. In assessing whether a transaction will reduce competition, the Department of Justice ("DOJ") compares the state of current competition with its evaluation of the degree of competition that will exist if the parties are combined. Therefore, the relevant question is not whether the industry will be competitive or not after the transaction, but whether the industry will be less competitive as a result of the merger. The DOJ and Federal Trade Commission ("FTC") have outlined their approach to evaluating mergers in jointly issued Horizontal Merger Guidelines, the most recent version of which was released in August 2010 ("Guidelines").[4]

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[1] 15 U.S.C. § 18.

[2] See United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294.

[3] *See* DOJ & FTC, Horizontal Merger Guidelines, at Section 1 (Aug. 19, 2010) ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.")

[4] These new Guidelines replace the Horizontal Merger Guidelines issued in 1992 and later amended in 1997. The new Guidelines reflect the ongoing accumulation of experience at the

20. The generally accepted test as to whether a merger will violate the Clayton Act is whether it is likely to result in increased prices, reduced quality or less innovation. This evaluation is extremely fact-intensive, as the nature and competitive dynamics of the industry at issue, and the roles of the specific merging parties within that industry, are unique from one Proposed Transaction to the next. Economic modeling and analysis, which accounts for the industry and party-specific facts, is central to the evaluation. As demonstrated below, this merger will result in increased prices, reduced quality and less innovation.

21. Defining a relevant market in which competition will be reduced is typically both a threshold issue of antitrust analysis and a key determinant of the outcome because a transaction is likely to reduce competition only if (i) both merging parties are competitors or potential competitors in that market; and (ii) the other competitors in that market are insufficient to ensure that the market will remain competitive post-merger.[5] Relevant markets have both product and geographic dimensions.[6] A relevant product market consists of all the products/services

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DOJ and FTC and differ markedly from the predecessor guidelines. Among other things, the new Guidelines "reduce[] focus on market definition and deemphasize[] bright-line tests" as well as place "heightened emphasis on particular microeconomic tools." See "Including Exclusion in the 2010 Horizontal Merger Guidelines," D. Bruce Hoffman and Daniel Francis, The Antitrust Source (published October 2010)

[5] The 2010 Horizontal Merger Guidelines deemphasize the importance of market definition, noting that the "agencies' analysis need not start with market definition." See 2010 Horizontal Merger Guidelines at Section 4. However, courts still require the definition of a relevant market, and ultimately if a merger is litigated between the DOJ and the merging parties, a court will decide the question. See *Malaney v. UAL Corp*., 2010 WL 3790296, *5 (N.D. Cal. Sept. 27, 2010) ("To advance the requisite showing of a likely violation of Section 7, and thereby warrant injunctive relief, a plaintiff must, by a preponderance of the evidence, first show the existence of a relevant market and then establish that the pending acquisition is 'reasonably likely to cause anticompetitive effects' in that market.")

[6] See *F.T.C. v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009) ("An analysis of the likely competitive effects of a merger requires determinations of (1) the relevant product market, (2) the relevant geographic market, and (3) the transaction's probable effect on competition in those markets.")

regarded as substitutable by customers by virtue of the products' characteristics, their prices and their intended use.[7] A Proposed Transaction could potentially impact a number of relevant product markets.[8] A relevant geographic market refers to the area in which the parties' customers may reasonably turn for substitutes.[9] In this case the relevant product markets are retail and wholesale wireless services. The relevant geographic market is the national market for wireless services not the local market because mobile wireless services are marketed and sold to provide services on a nationwide basis not on a fixed or local basis. The United States Supreme Court has itself recognized that the relevant geographic market is national in scope when national competitive forces determine prices and the same products are offered nationwide at the same price.[10] The national carriers all market and advertise their services on a nationwide basis and their individual pricing plans are the same regardless of where the respective customer resides in the United States.

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[7] See *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) ("The general rule when determining a relevant product market is that '[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it.'…In other words, the general question is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.") (citing *Brown Shoe*, 370 U.S. at 325 and *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 70 n.8 (2d Cir 1984))

[8] See *F.T.C. v. ProMedica Health System, Inc.*, 2011 WL 1219281, *54-55 (N.D. Ohio Mar. 29, 2011) (recognizing and analyzing two separate relevant product markets: one for general acute-care inpatient services and a second for inpatient obstetrical services and noting it would be "would be inappropriate and misleading" to use only one relevant product market). See also *CCC Holdings*, 605 F. Supp. 2d at 39-40 (recognizing two separate product markets for Estimatics and TLV)

[9] See *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 598 (8th Cir. 2009) ("Properly defined, a geographic market is a geographic area 'in which the seller operates, and to which ... purchaser[s] can practicably turn for supplies.'") (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

[10] See *United States v. Grinnell Corp*., 384 U.S. 563, 575 (1966) (finding that relevant market for security services was nationwide where defendants had a "national schedule of prices, rates, and terms.")

22. After the relevant markets in which to analyze the transaction have been determined, the next step is to identify the other competitors or potential competitors in each market. Market participants are "all firms that currently earn revenues in the relevant market,"[11] as well as firms that are not yet participating in the industry but are positioned to easily and quickly enter the market. Once the relevant market is defined and the market participants are identified, the agencies look at the various participants' market shares and how concentrated the market is before and after the transaction. Market concentration is measured by the Herfindahl-Hirschman Index ("HHI"). Under the 2010 Horizontal Merger Guidelines, markets with an HHI of below 1500 are "unconcentrated," markets with an HHI between 1500 and 2500 are "moderately concentrated" and markets with an HHI above 2500 are "highly concentrated." The agencies also look at the change in HHI caused by the Proposed Transaction; mergers that cause an increase of 200 or more points in highly concentrated markets raise an inference of enhanced market power. The Proposed Transaction has an HHI of over 3500 and will result in a change of more than 750 points, well above the established thresholds. Evaluation of market concentration is only an initial screen. If a market is not concentrated, a transaction is unlikely to reduce competition. However, if a market is concentrated, further analysis of the likely competitive effects of the transaction is required to determine if a reduction in competition is in fact likely. In the instant merger AT&T will hold a 43% market share post merger. Verizon Wireless, the next largest competitor-post-merger will hold a 33% market share and combined, the Twin Bells will hold almost a 77% market share.

23. The most important part of the antitrust analysis is the "competitive effects" analysis. When the DOJ considers all the industry facts and competitive dynamics it will likely

[11] See Guidelines at Section 5.

determine that this Proposed Transaction will "substantially lessen competition" by allowing the merged AT&T to raise prices, reduce quality and harm innovation. Additionally, the DOJ will also likely find that the wireless industry will be likely to act in a coordinated fashion to match the pricing set by AT&T post-merger.

24. If the DOJ determines that this transaction will lead to reduced competition, it will assess the estimated efficiencies or synergies of the Proposed Transaction and weigh the likely consumer benefits against the potential consumer harms.[12] The DOJ will not credit AT&T's claimed efficiencies set forth in its Public Interest Statement that are vague, speculative or otherwise unverifiable. In addition, all such efficiencies will only be credited to the extent they are "mergerspecific," meaning that they can only be achieved via the merger.[13] Moreover, the loss of competition and the potential consumer benefits are not weighed exactly. As a practical matter, the DOJ usually believes that harms are more likely and immediate and that benefits are more speculative and take longer to be realized. When the potential anticompetitive effects of a merger are significant, the claimed efficiencies must be "extraordinary" to prevent a challenge. For all the reasons stated in this Demand for Arbitration, AT&T has not met this burden. Accordingly, the proposed merger should be blocked and/or alternative remedies should be imposed to prevent a lessening of competition in the development, production, and sale of wireless telecommunications services in the United States, in violation of Sections 7 and 16 of the Clayton Act, 15 U.S.C. § 18 and 15 U.S.C. § 26.

[12] In its Fourteenth Report, the FCC could not make a determination that effective competition exists. Fourteenth Report at ¶ 3 ("As a result, rather than reaching an overarching, industry-wide determination with respect to whether there is 'effective competition,' the Report complies with the statutory requirement by providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes.")

[13] See Guidelines at Section 10.

III. ARBITRATION PROVISION & APPLICABLE RULES

25. This action is brought pursuant to the arbitration provision contained in the AT&T Wireless Customer Agreement Terms & Conditions attached hereto as **Attachment A** (hereafter, the "Arbitration Provision").

26. In relevant part, the Arbitration Provision provides as follows:

- Paragraph 2.1: "In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction…., we agree to resolve those disputes through binding arbitration. … Arbitrators can award the same damages and relief that a court can award. Any arbitration under this agreement will take place on an individual basis ...." [emphasis added].
- Paragraph 2.2(1): "AT&T and you agree to arbitrate all disputes and claims between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to: claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory [emphasis added]."
- Paragraph 2.2(3): "The arbitration will be governed by the commercial arbitration rules and supplementary procedures for consumer related disputes (collectively, "AAA rules") of the American Arbitration Association ("AAA"), as modified by this agreement, and will be administered by the AAA."
- Paragraph 2.2(6): "YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL

CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.**"**

27. Pursuant to Rule C-1 of AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Rules"), the AAA may apply the AAA Wireless Industry Arbitration Rules ("WIA Rules"), for the "AAA Rules."

28. Pursuant to WIA Rule R-1, this action is governed by the WIA Rules. The WIA Rules Expedited Track Procedures cannot apply to this dispute because claimant asserts claims for equitable relief. The WIA Rules Regular Track Procedures apply.

29. Pursuant to WIA Rule R-1*, and Rule C-1 of the Supplementary Procedures for Consumer Related Disputes, the AAA Rules also apply to this arbitration.

30. The Arbitration Provision permits this arbitration to proceed as required by Rules C-1(a) of the Supplementary Rules for Consumer Related Disputes.

IV. BACKGROUND: THE PROPOSED MERGER OF AT&T AND T-MOBILE

31. On March 20, 2011, AT&T and DT announced their entry into the Agreement under which AT&T agreed to acquire from DT all of the issued and outstanding shares of its subsidiary T-Mobile in exchange for approximately $39 billion, consisting of $25 billion in cash and approximately $14 billion of the Company's common stock, subject to certain adjustments.

32. An acquisition of T-Mobile by AT&T combines the two largest Global System for Mobile Communications ("GSM")-based carriers in the United States, as well as the second

and fourth largest carriers in the U.S. The deal also combines AT&T's 95.5 million subscribers with T-Mobile's 34 million subscribers to create the nation's largest mobile operator.

33. If the Proposed Transaction is approved, the resulting colossal company would become America's largest telecom player with approximately 130 million subscribers, or roughly 43 per cent of the U.S. wireless market.

34. Pursuant to § 332(c)(1)(c) of the Communications Act, the Federal Communications Commission (FCC) is charged with the responsibility of reporting to Congress on the state of competition in the mobile services marketplace. The FCC's latest analysis and report to Congress is contained in a 281 page report adopted on May 10, 2010, entitled the "Mobile Wireless Competition Report." In that report, issued well before AT&T's proposed elimination of T-Mobile as a competitor, the FCC found that:

- Over the past five years, market concentration has increased dramatically in the provision of mobile wireless, including a 32% increase since 2003 and a 6.5% increase last year.
- "There are only 4 nationwide mobile wireless service providers: AT&T, Verizon, Sprint, and T-Mobile. AT&T and Verizon are the two largest providers, with over 60% of the market share."
- "T-Mobile has been a leader in innovations and price reductions." "T-Mobile's price changes have prompted Verizon and AT&T to narrow the price premium on unlimited service offerings." One such price benefit is T-Mobile's unlimited family plan, which allows family groups to "realize some of the value of unlimited plans." "Verizon and AT&T do not allow families to

have an unlimited plan, but rather each individual must purchase an unlimited plan at a far greater cost."

- The Herfindahl-Hirshman Index (HHI Index) is the widely accepted standard, used to measure the concentration of mobile wireless service providers, and it has increased every year since 2003. It is now nearly 2900, a 700 point increase since 2003, indicating a very highly concentrated industry (above 1800 is considered highly concentrated). The FCC concluded that this very high market concentration provides the remaining competitors with "the ability to charge prices above the competitive level for a sustained period of time," as there are significantly fewer constraints on the market power of the remaining firms. In other words, the industry was already experiencing a concentration that was unhealthy for competition even before AT&T's March 2011 announced intention to eliminate competition with T-Mobile.
- Current FCC FCCer, Michael J. Copps, recently concluded that "competition has been dramatically eroding and is seriously endangered by continuing consolidation and concentration in our wireless markets."

35. The purported competitive benefits of the Proposed Transaction are either wholly illusory or vague, without support in theory or practice. By comparison, the harm to competition and to purchasers of goods and services in the relevant markets would be material, demonstrable, and irreversible.

36. Part V of this Demand for Arbitration summarizes the serious anti-competitive and public interest harms the Proposed Transaction would impose. Any way the anticompetitive

effects of the Proposed Transaction are measured, the result would be to substantially lessen competition in violation of the Clayton Act.

V. SUMMARY: AT&T'S PROPOSED TAKEOVER OF T-MOBILE WOULD HARM CONSUMERS AND COMPETITION

37. AT&T's proposed takeover of T-Mobile would create a Twin Bell duopoly that would dominate the wireless marketplace.[14] As the Chief Executive Officer ("CEO") of Cellular South said, "[i]f AT&T is permitted to take over T-Mobile, AT&T and Verizon Wireless would each have more subscribers than all of the nation's other wireless carriers combined."[15] AT&T, along with its sister Regional Bell Operating Company ("RBOC"), Verizon,[16] would control 82 percent of the post-paid market, putting AT&T in a position, unilaterally and through tacit coordination, to raise prices and impose other anti-competitive harms. With the Proposed Transaction, the vertically integrated Twin Bells would increase their already large share of the critical inputs for wireless service, including spectrum, backhaul, and roaming, and would be able to raise their competitors' costs. The Proposed Transaction would undermine innovation in the development of new broadband devices and applications. In short, AT&T's takeover of T-Mobile would fundamentally alter the structure of the wireless industry and eliminate the possibility of more robust competition from a stronger third or fourth carrier. The inevitable result of this transaction would be a return to a world dominated by Ma Bell's offspring, ushering in higher prices, less innovation, and decreased quality and customer service.

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[14] See *EchoStar-DirecTV Hearing Designation Order* ¶ 100 ("courts have generally condemned mergers that result in duopoly").

[15] Testimony of Victor H. "Hu" Meena, President & CEO, Cellular South Inc., Before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, at 3 (May 11, 2011) available at: <http://judiciary.senate.gov/pdf/11-5-11%20Meena%20Testimony.pdf> ("Meena Testimony")

[16] For purposes of the petition, "Verizon" is used to refer to Verizon or Verizon Wireless.

38. Where, as here, "a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, extraordinarily large, cognizable, and non-speculative efficiencies that are likely to result from the merger."[17] AT&T can make no such demonstration. AT&T claims that the Proposed Transaction will provide it additional spectrum and network capacity, but AT&T, even without the transaction, holds more licensed spectrum than any other carrier. AT&T is better positioned to meet consumer demand for mobile broadband services than any of its competitors provided it undertakes the same smart network management practices and network investment the rest of the industry has pursued. AT&T's claim that the proposed takeover is necessary to extend its Long Term Evolution ("LTE") network footprint to 97 percent of the U.S. population is also flawed and unrelated to the Proposed Transaction. AT&T's network already covers 97 percent of the U.S. population and it currently holds the spectrum necessary to make LTE available to its entire existing customer base without acquiring T-Mobile.[18] AT&T's statements about the Proposed Transaction are disconnected from reality. To cite a few examples:

- AT&T asserts that T-Mobile does not really compete with AT&T, but at the same time AT&T's own merger website lists T-Mobile as one of the five competitors consumers may choose from in various markets as an example of how "fiercely competitive" the market is today.[19]

[17] EchoStar-DirecTV Hearing Designation Order ¶ 102.

[18] See Press Release, AT&T, AT&T Sets Record Straight on Verizon Ads, available at: http://www.att.com/gen/ press-room?pid=14002

[19] See Know the Facts, Competitive Landscape, AT&T Inc., available at: <http://www.mobilizeeverything.com/ competition.php> (last visited May 27, 2011)

- AT&T argues that T-Mobile is a "struggling" asset for DT,[20] but just a few months ago DT's CEO told investors that "T-Mobile is a very good asset"[21] which generated a net profit of $135 million on $5.16 billion in revenue in the first quarter of 2011 alone.[22]
- AT&T maintains that post-merger AT&T will face strong competition from small regional carriers and companies such as LightSquared, but the small carriers serve less than 3 percent of all post-paid subscribers and LightSquared offers no service today. At the same time, John Stankey, President and CEO of AT&T Business Solutions questions whether wholesale players like LightSquared can compete effectively.
- AT&T asserts that AT&T's network is facing dire capacity constraints, but in January of this year AT&T's CEO proclaimed that "we're really starting to feel good about the network situation" and just two years ago another AT&T executive stated that "[w]e feel very good about our spectrum position … [a]nd we say that with full understanding of what the data demands will be."
- AT&T's claim that the transaction is necessary to expand AT&T's LTE service because AT&T does not have sufficient Advanced Wireless Service ("AWS") and 700 MHz spectrum, but last year an AT&T executive made

[20] Description of Transaction at 71, 100-01.

[21] Transcript of Briefing by Deutsche Telekom and T-Mobile USA, Inc. to Analysts, at 2 (Jan. 20, 2011), available at: <http://www.telecom.de/ dtag/cms/contentblob/dt/en/979218/ blobBinary/transcript+20012011.pdf/> ("Jan. 20, 2011 Deutsche Telekom Briefing")

[22] Press Release, T-Mobile USA, Inc., T-Mobile USA Reports First Quarter 2011 Results (May 9, 2011), available at: <http://www.t-mobile.com/Cms/Files/Published/ 0000BDF20016F5DD010312E2BDE4AE9B/ 5657114502E70FF3012FD6A0635D5CAB/file/TMUS%20Q1%202011%20Press%20Release-Final.pdf>.

clear that, thanks to AT&T's cellular band and Personal Communications Service ("PCS") spectrum holdings, AT&T "will have the opportunity [to grow spectrum for] LTE in future years" beyond the AWS and 700 MHz bands.

39. AT&T's claims are belied by the facts and their own prior statements. The Proposed Transaction would cause serious anti-competitive harms with no countervailing benefits.

40. This Demand for Arbitration details the competitive harms that would result from The Proposed Transaction. It further describes the relevant product markets and explains why the Tribunal should analyze the transaction on the basis of a national geographic market, but also explains how the transaction would result in unacceptably high levels of horizontal concentration even if it is viewed on a local geographic market basis.

VI. THE PROPOSED HORIZONTAL MERGER WOULD GREATLY INCREASE CONCENTRATION IN THE WIRELESS INDUSTRY AND HARM COMPETITION IN NATIONAL AND LOCAL MARKETS ALIKE

41. "Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, or in coordination with other firms."[23] The FCC and the Department of Justice ("DOJ") use the Herfindahl-Hirschman Index ("HHI") to measure market concentration and to evaluate whether a proposed merger would result in such competitive concerns. FCC precedent calls for close review of a transaction's competitive effects when the post-transaction

[23] Id. ¶ 97.

HHI would be greater than 2800 and the change in HHI will be 100 or greater, or the change in HHI would be 250 or greater, regardless of the level of the HHI.[24]

42. AT&T's proposed takeover of T-Mobile would result in a very highly concentrated wireless market and lead to serious anti-competitive harms in multiple separate product markets that are described below. For example, even in a broad product market that includes all retail wireless services, at a national level, the transaction would give AT&T and Verizon 76 percent of wireless subscribers and increase HHI levels by 696 to a post-merger HHI of 3,198.[25] These measures far exceed the FCC's HHI screen and provide strong evidence that the takeover would enhance AT&T's market power and reduce competition. Even if the Tribunal accepts AT&T's argument that the only relevant geographic markets are local – an argument that contradicts AT&T's past positions, goes against the weight of the evidence, and ignores the material changes in the market – the proposed T-Mobile takeover fails the FCC's HHI screen in Component Economic Areas ("CEAs") accounting for a large percentage of the U.S. population.[26] In utilizing this commonly accepted methodology for calculating anticompetitive impact, the Tribunal should come to a similar, if not identical conclusion.

43. The Tribunal's assessment of the competitive effects of Proposed Transactions should begin with a determination of the relevant product and geographic markets.[27] Consistent with this approach, Subsection A below describes the various product markets that would be affected by AT&T's proposed acquisition of T-Mobile. Subsection B explains why the Tribunal

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[24] AT&T-Centennial Merger Order ¶ 46.

[25] Joint Declaration of Steven C. Salop, Stanley M. Besen, Stephen D. Kletter, Serge X.Moresi, and John R. Woodbury, Charles River Associates, **Attachment B** ¶ 74, Table 2 ("CRA Decl.").

[26] *Id*. ¶ 11.

[27] *AT&T-Centennial Merger Order* ¶ 34.

should analyze the transaction on the basis of a national geographic market given the changes in the marketplace over the past several years, and describes the very high HHI levels that would result on a national level if the Tribunal allowed the merger to proceed. Subsection C describes how The Proposed Transaction, even if analyzed on a local geographic market basis, would lead to high concentration levels in many markets throughout the country.

A. The Proposed Takeover Would Adversely Affect Multiple Product Markets, Including All Wireless, Post-Paid Retail, and Corporate and Government Accounts

44. The goal of determining the relevant market is to help to identify the consumers who might be injured by a merger as well as the potential competitive constraints that might mitigate or prevent that injury.[28] AT&T and Sprint compete in a number of different product markets and segments, and therefore the Tribunal should, at a minimum, evaluate the significant reduction in competition in (1) the combined market of all retail wireless services; (2) the market for post-paid wireless retail services; and (3) the market for corporate and government accounts. As discussed in the CRA Declaration, an analysis of each of these markets, both on national as well as local levels, demonstrates that this transaction would make it easier for AT&T and Verizon to coordinate their pricing and other competitive behavior, allow AT&T to raise prices on its own, and make it easier for AT&T and Verizon to impair the ability of other wireless carriers to compete. This transaction must be rejected under an analysis of any one of these product markets.[29]

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[28] CRA Decl. ¶ 26.

[29] In addition to these specific markets, the Proposed Transaction would reduce competition in a number of related areas, including by raising costs of rivals who depend on the Twin Bells' vertically integrated legacy assets for necessary inputs such as backhaul, as well as those who require access to roaming and wholesale service (for resellers). In addition, the merger would create a duopoly bottleneck between consumers and the upstream developers who use wireless for access to markets, including content providers and applications developers.

1. All Wireless Services

45. Since 2008, the FCC has defined the relevant market as a combined market of "'mobile telephony/broadband services' . . . which is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services)."[30] At a national level, in an "all wireless" market measured by revenues, Verizon accounts for 35 percent, AT&T 32 percent, Sprint 15 percent, and T-Mobile 12 percent.[31] A merger of AT&T and T-Mobile would increase AT&T's share of the market to 44 percent, with Verizon continuing to hold 35 percent. The takeover of T-Mobile would thus result in a highly concentrated market that "would far exceed even the relaxed threshold in the new Guidelines for mergers that are 'presumed to be likely to enhance market power.'"[32] Moreover, as explained below and in the CRA Declaration, an analysis of the competitive conditions within the market shows that the Proposed Transaction would lead to higher prices to consumers, less technical innovation, and higher rates for critical inputs for wireless service, such as special access and roaming.[33]

2. Post-Paid Wireless Services

46. The all wireless services product market includes both pre-paid as well as post-paid services. Because, as we show below, there are substantial differences between post-paid and pre-paid products, the Tribunal should conduct a separate review of the effect of the

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[30] *See* 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, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 45 (2008) ("*Verizon-Atlantis Merger Order*").

[31] CRA Decl. at Table 3

[32] *Id.* ¶ 70

[33] *Id.* ¶¶ 13-15.

proposed merger on the post-paid wireless market. AT&T's proposed acquisition would cause even greater concentration in the post-paid wireless market than in the all wireless market. Post-transaction, AT&T would control 43 percent of all post-paid subscribers nationwide. Verizon and AT&T collectively would control 82 percent of the subscribers in the post-paid market.[34]

47. A variety of factors distinguish post-paid from pre-paid wireless services. Typically, post-paid services are offered under long-term, often two-year, contracts, and are available only to customers who satisfy a credit check.[35] Pre-paid services, on the other hand, are offered under month-to-month billing arrangements that require upfront or pay-as-you-go payments for a set number of minutes. Because pre-paid services do not offer long-term contracts, these services do not offer the same subsidies on handsets that the post-paid services can offer.[36] Thus, to make their phones affordable, pre-paid carriers tend to offer cheaper phones – which tend to be older models and/or have less functionality – than those offered by the post-paid carriers. Some pre-paid handsets sell for as little as $29.[37] On the higher end, the Samsung Galaxy S 4G, one of T-Mobile's newer smartphones, retails for $499, but with a two-year contract T-Mobile offers that phone for $129.99.[38] In contrast, the most advanced handsets

[34] *Id.* at Table 4. Verizon currently accounts for 39 percent of all post-paid subscribers, AT&T accounts for 32 percent, Sprint accounts for 15 percent, and T-Mobile accounts for 11 percent. The remaining wireless firms serve less than 3 percent of all post-paid subscribers.

[35] Declaration of William Souder, **Attachment C** ¶¶ 9-10 ("Souder Decl.").

[36] *Id.* ¶ 11

[37] *See, e.g., Phones*, MetroPCS, *available at*: <http://www.metropcs.com/shop/phonelist.aspx> (last visited May 20, 2011); Shop, *Cell Phones*, Cricket, *available at:* <http://www.my cricket.com/cell-phones> (20001 used at zip code prompt) (last visited May 25, 2011).

[38] Shop, Phones, Samsung Galaxy S 4G, T-Mobile, available at: <http://www.t-mobile.com/shop/phones/Cell-Phone-Detail.aspx?cell-phone=Samsung-Galaxy-

offered by MetroPCS (largely a pre-paid provider) include Samsung's Craft, which retails for $349 and the Galaxy Indulge, which retails for $399;[39] MetroPCS offers each of these phones for $299[40] – a significantly higher price than T-Mobile charges for a better phone because, for contract customers, T-Mobile can offer far larger handset subsidies.

48. Another distinction between post-paid service and pre-paid service is network coverage. The four national carriers offer true nationwide service. Their networks allow customers the broadest coverage and they do not charge additional fees for roaming. While some facilities-based pre-paid carriers claim to offer nationwide service, they often charge their customers extra for roaming, and service can be limited outside of the pre-paid carriers' "home" coverage areas. For example, MetroPCS's coverage maps indicate that its customers can use text, talk, web, and email in its "Home Areas," but that in "Extended Home Areas," web and email are only "available in some areas." And, in large swaths of the country, only "TravelTalk" services are available at an additional roaming charge of 19 cents per minute.[41] For an additional five dollars per month, MetroPCS also offers roaming bundles that allow only 30 minutes of roaming in TravelTalk areas.[42] Although Leap's Cricket claims to offer nationwide service,

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S4G&Wt.z_searchCategory=Site+Search +Summary&Wt.z_searchZone=Products&WT.z_searchTerm=Galaxy+S&WT.z_searchProduct=Galaxy+S%99+4G+> (last visited May 11, 2011)

[39] Phones, MetroPCS, available at: <http://www.metropcs.com/shop/phonelist.aspx> (last visited May 12, 2011)

[40] *Id.*

[41] Coverage, *Coverage Map*, MetroPCS, *available at:* <http://www.metropcs.com/coverage/> (last visited May 19, 2011).

[42] Plans, *Rate Plans*, MetroPCS, *available at:* <http://www.metropcs.com/plans/default.aspx? tab=family> (last visited May 13, 2011).

much of its service coverage is roaming,[43] which requires an add-on service upgrade or costs Cricket customers 25 cents per minute.[44] Moreover, the ability of these small players to cobble together something approximating national coverage depends on their ability to secure roaming at competitive rates – which the Proposed Transaction threatens.

49. The predominantly pre-paid carriers also offer far less high speed data coverage than the national post-paid carriers. For example, MetroPCS offers LTE coverage in only 14 cities[45] and offers virtually no third generation ("3G") coverage.[46] MetroPCS noted in its latest annual report that it may not be able to increase its fourth generation ("4G") service offerings beyond those 14 markets.[47] Further, because of its limited spectrum capacity, MetroPCS's LTE service offers speeds comparable to 3G service rather than the 4G speeds of Verizon's LTE network.[48]

50. In addition, post-paid and pre-paid wireless services cater to very different customer groups. Pre-paid subscribers tend to be younger and have lower incomes than post-paid subscribers.[49] Therefore, pre-paid wireless services are targeted at a younger and less affluent

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[43] See Coverage Maps, Wireless Nationwide Coverage Maps, Cricket Wireless, available *at:* <http://www.mycricket.com/coverage/maps/wireless> (last visited May 13, 2011).

[44] *See, e.g.*, Shop, Plans, *Unlimited $45 Plan*, Cricket Wireless, *available at:* <http://www.mycricket.com/cell-phone-plans/plan/45_4m5> (last visited May 13, 2011).

[45] *See* Coverage, *Coverage Map*, MetroPCS, *available at:* <http://www.metropcs.com /coverage/> (follow "4G" tab) (last visited May 19, 2011).

[46] Mike Dano, *MetroPCS to skip 3G with LTE rollout?*, FIERCEWIRELESS (Aug. 3, 2010) ("MetroPCS doesn't have much of a 3G network. The carrier said it only offers CDMA EV-DO connections in one or two markets."), *available at*: <http://www.fiercewireless.com/ story/metropcs-skip-3g-lte-rollout/2010-08-03> ("FierceWireless MetroPCS Article")

[47] MetroPCS Communications, Inc., Annual Report (Form 10-K), at 37 (Mar. 1, 2011)

[48] *See* FierceWireless MetroPCS Article; Sascha Segan, *MetroPCS Launches LTE in New York, Boston,* PCMAGAZINE (Dec. 15, 2010), *available at*: <http://www.pcmag.com/article2/0,2817,2374359,00.asp>.

[49] Souder Decl. ¶ 10.

customer base. These significant differences between pre-paid and post-paid wireless services manifest themselves in the significantly lower average revenue per user ("ARPU") for pre-paid carriers than predominantly post-paid carriers. For example, AT&T's ARPU is close to $63, whereas MetroPCS's ARPU is $40 and Leap's is $38.[50]

51. In short, given the significant differences between pre-paid and post-paid wireless services, the Tribunal must consider the competitive effects of the Proposed Transaction in a separate post-paid wireless product market. Because the smaller local and regional carriers (such as MetroPCS and Leap) sell little post-paid service, approval of the transaction would give AT&T and Verizon control of 82 percent of all post-paid subscribers.[51] The competitive effects in the post-paid market would likely be even more adverse than those described above in the all wireless market.

3. Corporate and Government Accounts

52. The Tribunal also must consider the competitive effects of the proposed merger on a separate product market of corporate and government accounts because those accounts differ from retail wireless sales in a number of fundamental respects. Corporate and government customers do not buy plans and handsets in retail stores or via the Internet like many consumers. Instead, corporate and government buyers typically ask for bids, often through a formal request for proposals ("RFPs") for services and devices for multiple lines for their employees.[52] These customers secure pricing different than that available to retail customers, and price changes in the retail and corporate markets do not necessarily affect each other.[53] The carriers that serve

[50] CRA Decl. at Table 1.

[51] *Id.* at Table 4.

[52] Declaration of John Dupree, **Attachment D** ¶ 12 ("Dupree Decl.").

[53] CRA Decl. ¶ 45.

these accounts have organizations and departments of employees dedicated to serving this distinct customer segment. The four national carriers dominate this segment. The smaller local and regional carriers do not often compete for or win business from large corporate and federal government accounts because they lack the size and scope that these customers typically seek.[54]

53. Given the stark differences between retail wireless sold to individual consumers and families versus the wireless plans for corporate and government accounts, corporate and government accounts are an important separate product market in which the transaction must be evaluated. As explained below, losing T-Mobile as a competitor in the corporate and government account market would have particularly severe anti-competitive effects because:

> (1) T-Mobile tends to be the lowest bidder for these customers, and thus constrains the ability of AT&T and the other national carriers to raise prices;[55] and
>
> (2) T-Mobile is a particularly close competitor to AT&T for accounts with international travel needs due to its advantages in countries using the Global System for Mobile Communications ("GSM") standard.[56]

B. The Proposed Merger Will Concentrate the Wireless Markets Dramatically

54. The AT&T/T-Mobile merger, if allowed to take place as proposed, will combine the second and fourth largest (by subscribers) wireless carriers and further entrench AT&T as a dominant behemoth in terms of subscribers, resources and spectrum. This combined entity will enjoy overwhelming market power on its own. Worst of all, the merger will bring to fruition the long-held dream of the "Big 2" wireless carriers: to effectively recreate the duopoly in wireless

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[54] *Id.* ¶ 15.

[55] *Id*. ¶ 16.

[56] *Id*. ¶ 17; Declaration of Paul Schieber, **Attachment E** ¶ 9 (noting difficulties Sprint has in obtaining international roaming agreements on financially attractive terms) ("Schieber Decl.").

services that existed in the early cellular era — and was a source of such competitive concern.[57] Indeed, Congress and the FCC in the mid 1990s allocated additional spectrum in order to remake the wireless market from a then duopoly to the competitive market that exists today. The transaction will eliminate that market structure. Along with Verizon, the merged entity will control the mobile wireless marketplace, as shown by the following, among many other indicators:

- The combined AT&T/T-Mobile entity will hold an average of more than 1700MHz of spectrum in each major metropolitan market;[58]
- The combined AT&T/T-Mobile entity will hold in excess of 43% of all customers;[59]
- The combined entity will hold approaching half of the industry EBITDA;[60]
- The combined AT&T/T-Mobile and Verizon together would hold in excess of 91% of the free cash flow of the industry, 80% of the subscribers in the industry, over 92% of the EBITDA of the industry, approaching 300MHz on average in every major metropolitan area.

55. In the past several years, the number of terrestrial wireless broadband mobile facilities-based carriers has decreased dramatically as a result of FCC-approved industry consolidation. Since 2007, AT&T has absorbed Dobson, Aloha, and Centennial and has recently

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

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

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

[60] *Id.* at 6.

applied for approval, among other things, to acquire up to 24 MHz of 700 MHz spectrum held by Qualcorrim as well as acquire all of T-Mobile.[61] Verizon, meanwhile, has acquired Rural Cellular and Alltel. Finally, in the past several years 'F-Mobile acquired Sun Com Wireless and Sprint was on its own acquisition spree which included Nextel, IPCS, Ubiquitel, Nextel Partners, Mamosa, and US Unwired, As a result of this consolidation, the wireless market has become even more highly concentrated than when the FCC last faced a major acquisition.

56. According to the Wireless Competition Fourteenth Report, the concentration of the U.S. mobile telephone market, based on each carrier's number of mobile subscribers nationwide and measured by the Herfindahl-Hirschman Index ("HHI"), calculated as a weighted average by Economic Area ("EA") population, already was 2848 at the end of 2008, before the closing of the AT&T-Centennial and Verizon-Alltel mergers. With this HHI, the U.S. Department of Justice and the Federal Trade FCC would consider the wireless industry to have been "highly concentrated" in 2008 without regard to this merger according to their Horizontal Merger Guidelines, because it exceeded the 2500 HHI benchmark number necessary for such designation.[62]

57. The recently-consummated Verizon-Alltel and AT&T-Centennial mergers have increased the HHI further. Based on the same 2008 Wireless Competition Fourteenth Report numbers cited above, and using the metric that the increase in HHI resulting from the merger of two entities is equal to twice the product of their pre-merger market shares, the HHI following the consummation of the AT&T-Centennial and Verizon-Alltel mergers would have increased to

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

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

approximately 3120, and the AT&TIT-Mobile merger would result in a further increase to 3800, an increase of far more than the 200 points that the Horizontal Merger Guidelines recognize as "presumed to be likely to enhance market power.[63]

58. These numbers are consistent with the estimate of another knowledgeable industry analyst based on 2010 (as opposed to 2008) data. That analyst estimates that the HHI following the proposed merger, treating subscribers as the relevant measure of market share, would rise from about 2800 to about 3500 — a swing of some 700 points. Again, this far exceeds the 200-point threshold at which the Horizontal Merger Guidelines presumes that the increase will enhance market power. Based on revenues, this same analyst estimates an even greater N HI increase — from about 2600 to about 3500.[64] By any measure, the increase in concentration resulting from this merger must set off loud alarms requiring intense FCC scrutiny here.

59. Incredibly, AT&T and T-Mobile argue that they do not really compete against each other.[65] This argument does not pass the laugh test. T-Mobile has actively promoted its 4G speeds against the AT&T network — even referencing the iPhone and its slower data speeds by name in recent commercials.[66] T-Mobile's footprint greatly overlaps with AT&T's and they compete for the same retail customers. As discussed earlier, on the wholesale side, T-Mobile is the only significant competitor to AT&T for GSM-based services. For AT&T to argue that

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[63] *Id.* Before any of these three mergers, AT&T's national market share of subscribers was 29%, while Verizon's was 27%, Alltel's was 5%, T-Mobile's was 12% and Centennial's was somewhat less than 1%. *Fourteenth Report* at Table C-4. Thus, the increase in HHI from the first two mergers would have been about 270 points, and from the currently proposed merger would about 696 points. Note that the scale of measurement is not precisely the same in the before and after numbers, so that these results must be seen as approximate.

[64] *Bernstein Research Report- March 2011* at 2

[65] *Public Interest Statement* at 13. *See also Humm Testimony and Stephenson Testimony*

[66] Indeed, AT&T starting calling its 3G HPSA+ network 4G apparently in response to T-Mobile's advertisements claiming that 3G HPSA+ network was 4G.

T- Mobile is not a real competitor, while much smaller carriers are, is breathtakingly disingenuous.

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

60. Even if The Proposed 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 CMAs and CEAs.[67] Moreover, the FCC's HHI screen is exceeded in the largest CMAs by population.[68] CMAs that fail the screen collectively account for a significant percentage of the U.S. population, as do CEAs that fail the screen collectively.[69]

61. 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.[70] 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.

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[67] CRA Decl. ¶ 11, Tables 5b-5c.

[68] *Id.* at Table 5c.

[69] *Id* ¶ 79.

[70] 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.

D. The Enormous Level of Concentration Created By This Merger Will Severely Impact Traditional "Output" Markets and "Input" Markets

62. The sheer number of distinct markets negatively impacted by the merger makes it difficult to categorize and list all of them. Accordingly, the Tribunal should consider the specific examples given in this Demand for Arbitration as illustrative rather than definitive. Claimant addresses the respective harms to both the post-acquisition "Output Market" and the post-acquisition "Input Market." Next, continuing to follow an anticompetitive analysis, Claimant will discuss related markets such as wireline voice and data, and unique concerns arising from vertical integration, such as the impact on the special access market.

1. Output Markets

63. Mobile Voice and Text. Traditionally, the FCC's inquiry begins here, as should the Tribunal's inquiry.[71] Residential mobile voice and text remain the core output markets for many consumers. This does not, of course, negate the growing importance of residential mobile data which, in light of current trends, should be analyzed as a separate market. Nevertheless, it is important to note that even under the most favorable product definition and geographic market, assuming away all switching costs and information asymmetries that would impact the ability to switch, the merger would presumptively fail the hypothetical monopoly test in the top 30 markets under a standard antitrust screen. The same result holds true for a national HHI analysis. If after giving AT&T every possible benefit of the doubt, the merger would still fail a standard antitrust screen, the Tribunal must ask itself how it can possibly allow the Proposed Transaction under any set of conditions. At some point, a merger crosses a line and becomes intrinsically inimical to competition.

[71] *See* AT&T/Cingular Order, at ¶72.

64. Mobile Data. As the FCC previously recognized in the ATT-Cingular transaction, mobile data constitutes a separate market. This definition has been followed in subsequent mergers.[72] In the Verizon Alltel merger, the FCC revised its previous definitions of product markets to include mobile broadband services, highlighting the growing importance of data services.[73] As one leading analyst has noted, the wireless market is increasingly differentiating between a high end market dominated by AT&T and Verizon, to the detriment of Sprint, and a low end market for voice/text only where AT&T and Verizon compete with low-cost providers such as MetroPCS.[74] As the FCC itself has recognized, differentiated technologies and market strategies may negate the potential of a competitor to mitigate the harms of concentration.[75] In other words, bye following the FCC's lead, even if the Tribunal accepted the AT&T's assertion that MetroPCS or Cricket have such strong appeal to a niche market of cost-conscious consumers of such enormous potential that the Tribunal may ignore the HHI analysis, it would not magically eliminate the anticompetitive nature of the merger. Whatever AT&T would gain by a more relaxed analysis of the voice/text market, it loses far more as a consequence of the more restrictive analysis of the mobile data market.

65. Enterprise Markets. The enterprise market constitutes an entirely separate market from the residential market.[76] This is particularly important given that several "competitors" identified by AT&T simply do not compete in the enterprise market. The enterprise market itself

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[72] AT&T/Centennial Order, at ¶37; Verizon/Alltel Order, at ¶45; Sprint/Nextel Order, at ¶38.

[73] VerizonlAlltel Order, at ¶45.

[74] Wireless Barbell at 5-20.

[75] *See* Echostar/Hughes Electronics Corp. Order, at IN110-115; *see also* Applications for Consent to the Transfer of Licenses; XM Satellite Holdings Inc., Transferor To Sirius Satellite Radio inc., Transferee, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd 12348, ¶42 (2008).

[76] Sprint/Nextel at ¶ 43.

has numerous product markets that require analysis. In the AT& T Bell South merger, the FCC found that local voice, long distance voice and data services constituted separate markets for enterprise customers.[77] In addition, the FCC also found that, in many instances, small business customers could be classified as a separate product market than large enterprise customers. The FCC explained that this was because of differences in the nature of products purchased by these customers as well as their different abilities to negotiate contracts with the providers.[78]

2. Input Markets

66. Roaming. The FCC has long recognized roaming as a separate market.[79] This definition is reinforced by the FCC's recent Data Roaming Order, which requires market negotiations on commercially reasonable terms.[80] Roaming is a critical "input market." As the FCC has found in its recent competition report, roaming can be "particularly important for small and regional providers" who want to "remain competitive by meeting their customer's expectations of nationwide service.[81] The FCC also explained that roaming is also critical to new entrants.[82] AT&T has already demonstrated that, absent a FCC rule or an adverse decision by an Tribunal, AT&T will not willingly enter into roaming deals at market rates. So critical is

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[77] AT&T Inc. and Bell South Corporation, Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd 5662, ¶64, (December 29, 2007), (hereinafter "AT&T/Bell South Order").

[78] *Id.* at 1 ¶ 66.

[79] Verizon/Alltel Order, ¶178-181; Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

[80] 53 Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report & Order, WT Docket No.05-265, (April 7, 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0408/FCC-11-52Al.pdf

[81] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourteenth Report,* 25 FCC Red 11407, ¶125, (2010)(hereinafter "Wireless Competition Report 2010").

[82] Id.

roaming for successful competition, and so difficult has it been to obtain from AT&T, that FCCer Robert McDowell jokingly referred to the Proposed Transaction as "the mother of all roaming agreements.[83] AT&T will, by operation of the merger, become the dominant potential provider for voice roaming and future LTE roaming by virtue of its enhanced spectrum position, and the only possible provider of roaming for 3G GSM providers.

67. Spectrum Secondary Markets. In addition to using roaming, those requiring spectrum access can lease spectrum through the FCC's secondary market rules. The FCC has recently recognized the importance of these markets in promoting efficient uses of spectrum.[84] The acquisition will enhance AT&T's already significant spectrum advantage, increasing its ability to raise prices in secondary markets either by raising the price of leasing its own spectrum or by withdrawing available spectrum from the market.

68. Handsets and applications. The FCC's refusal to adopt rules that would decouple the handset market and the applications market from the wireless carrier market makes these markets inextricably linked. Indeed, AT&T, at various times, has argued extensively that they need to maintain control over handsets and applications for the purpose of competing with each other and differentiating their wireless service from that of their competitors.[85] AT&T cannot

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[83] Paul Kirby, "McDowell, Baker, Decline Comment on AT&T-T-Mobile Deal," Telecommunications Daily (March 23, 2011), available at Commissioner McDowell was obviously speaking humorously, this is a fine application of the old saw that "many a true word is spoke in jest."

[84] *See* Promoting More Efficient Use of Spectrum Through Dynamic Use Technologies, ET Docket No. 10-237, ¶4, (November 30, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-198-A1.pdf.

[85] *See* Preserving the Open Internet, *Comments of T-Mobile USA*, GN Docket No. 09191, 11-14, (October 12, 2010), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id+7020916628;*Comments of AT &T Inc.*, 53-66, (October 12, 2010), *available at:*http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916485

now seriously argue that the presence of numerous handset manufacturers or application providers somehow negates their ability to influence these markets. In fact, AT&T continues to engage in anti-competitive control over handset vendors using their market power. This has been the case with the AT&T iPhone deal between 2007 and this year. AT&T has continued to exhibit this exclusive handset control with a new HP credit card sized smartphone in May, 2011.[86] Similarly, AT&T has demonstrated the ability to exert control over the market for applications.[87] AT&T has also argued strenuously that it needs to maintain control over applications in order to protect its networks against apps that are bandwidth intensive.[88] Historically, however, AT&T has appeared particularly keen on applying this limitation where its restrictions on applications neatly align with its competitive interests. For example, in 2009, AT&T blocked the iPhone slingbox application from streaming television from a subscriber's home, ostensibly on the grounds of limiting consumption of bandwidth. At the same time, it permitted streaming of live baseball games from MLB.com, after MLB agreed to an affiliation agreement.[89] While AT&T eventually removed the restriction, this history provides an example of how AT&T is likely to use its enhanced market power over the application and equipment market to favor its own products and disadvantage rivals.

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[86] *See* Mark Hachman, *AT&T Gets Exclusive on HP Veer, Due May* 15, PC Mag., (May 5, 2011), http://wwvv.pcmag.com/article2/0,2817,2384970,00.asp.

[87] 14th Competition Report at ¶ 151-52.

[88] Comments of AT&T, *In the Matter of Preserving The Open Internet and Broadband Industry Practices*, GN Docket No.09-191, WC Docket No. 07-52, 56, (Ocotber 12, 2010), *available at* http://fjallfoss.fcc.goviecfs/documentiview?id=7020916485; Comments of T-Mobile USA Inc., *In the Matter of Preserving The Open Internet and Broadband Industry Practices*, GN Docket No.09-191, WC Docket No. 07-52, 16, (October 12, 2010), *available at* http://fjallfoss.fcc.goviecfs/document/view?id=7020916628.

[89] Chris Foresman, *AT&T's Move to Block iPhone SlingPlayer From 3G is Poppycock*, ArsTechnica, May 13, 2009 http://arstechnica.com/appleinews/2009/05/atts-move-toblock-iphone-slingplayer-from-3g-is-poppycock.ars.

69. This problem is aggravated by AT&T's bandwidth caps, which appear calculated to enhance AT&T's profitability rather than to limit bandwidth consumption at peak times. At present, T-Mobile does not regulate use by charging penalties, but opts to throttle the downloads of users who exceed their capacity caps. Post-acquisition, AT&T will have greater freedom to influence the application market by control of bandwidth caps for nearly 45% of the mobile market, combined with reduced alternatives for dissatisfied consumers.[90]

70. Equipment and Protocol Development. The experience with the 700 MHz band and its multiple band classes where equipment specified by AT&T is not interoperable throughout the band and the shift to 4G wireless demonstrates that the market is already dangerously concentrated, and that permitting further concentration will enhance both the specific market power of AT&T and the danger of coordinated action with surviving competitors. For example, the manufacturers and vendors of chipsets are unwilling to create handsets for smaller competitors in the 700 MHz band. More telling is the "death of WiMAX." Until 2008, WiMax was the leading protocol for emerging 4G technology. Sprint and Clearwire had invested heavily in WiMax, as had numerous other smaller wireless providers, and WiMax was regarded as a thriving market. After the 700 MHz auction, Verizon, AT&T, and T-Mobile announced they would adopt LTE, not WiMAX, as the 4G technology. No sooner had these three carriers made this pronouncement when industry watchers rushed to declare WiMAX "dead."[91] Despite strenuous efforts by Sprint and Clearwire, and despite the fact that WiMAX

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[90] *See* Phil Goldstein, *AT&T, Cellular South Debate 700 MHz Interoperability at FCC,* Fierce Wireless, April 26, 2011, http://www.mediaaccess.org/2011/04/att-cellular-southdebate-700-mhz-interoperability-at-fcc/.

[91] Jim Duffy, *LTE vs. WiMAX*, Network World, June 07, 2010, http://www.networkworld.com/news/2010/060710-tech-argument-lte-wimax.html; Lance Whitney, *Report: LTE to Dominate WiMAX in 4G Market,* Digital Media, February 8, 2011, http://news.cnet.com/8301-10233-20030996-93.html; Maija Palmer, *Intel Succumbs to*

was an established market and LTE equipment did not even exist at the time the three carriers made this pronouncement, the decision of the three major carriers to abandon WiMAX in favor of LTE shifted the market dramatically. Today, there is no doubt that CMRS will adopt LTE as the dominant technology, a fact recognized by the FCC[92] and AT&T.[93] If the independent decisions of AT&T, T-Mobile and Verizon could so dramatically alter the less concentrated market of 2008, how can AT&T possibly argue that the combined AT&T/T-Mobile constitutes no danger to the market of 2011, either through enhanced market power or collective action with the next largest firm?

71. GSM. Many of these harms would be aggravated by AT&T's enhanced position in the GSM market. For the remaining smaller carriers using GSM, they would face a monopoly provider for national or even regional roaming.

72. Special access. Many wireless service providers, including T-Mobile, purchase backhaul services from LECs, including AT&T.[94] Wireless backhaul is a critical input for wireless services in connecting their networks to other carriers and to the Internet.[95] Furthermore, the roll out of advanced wireless networks that support higher data throughput "w ill make

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Evolution of 4G, Financial Times, August 16, 2010, http://www.ft.corn/intl/cms/s/2/alf4522c-a956-11df-a6f2-00144feabdc0.html#axzzlNgt7lanv7.

[92] FCC White Paper, The Public Safety Nationwide Interoperable Broadband Network: A Model for Capacity, Performance and Cost, 4, June 2010, available at http://transition.fcc.gov/pshs/docs/releases/DOC-298799Al.pdf.

[93] Michelle Maisto, *AT&T, T-Mobile Deal Faces More Scrutiny, Debate,* eWeek.com, May 27, 2011, http://www.eweek.com/c/a/Mobile-and-Wireless/ATandT-TMobile-DealFaces-More-Scrutiny-Debate-107100/.

[94] Wireless Competition Report 2010, at ¶295.

[95] *Id* at 64.

access to sufficient backhaul for wireless services even more critical over time."[96] The proposed merger between AT&T and T-Mobile would enhance the power of AT&T to extract extremely high prices from its wireless competitors who purchase backhaul services from AT&T's wireline services. Thus, AT&T's already significant power over its competitors would be enhanced.

73. Tower and telco equipment. The proposed merger would increase AT&T's ability to dictate terms to tower companies. Thus AT&T would be able to unilaterally determine contract terms that give it favorable tower sitings and antenna positions. The FCC has noted in its recent competition report that inability to get desirable tower citing and favorable antenna positions act as barriers to new firm entry.[97] Similarly, the market for some kinds of telecommunications gear will trend toward monopsony as the number of buyers of telecommunications gear continues to shrink.

74. Intercarrier compensation. As AT&T aggregates voice traffic, its ability to negotiate intercarrier compensation rates increases. This is particularly true in light of AT&T's announced plan to shift its wireless network and wireline networks to VOIP.[98] With nearly 45% of all wireless voice minutes, joined to its own wireline VOIP traffic, AT&T will be well situated to demand highly favorable intercarrier compensation rates for exchanges of traffic, particularly if it joins with Verizon to demand $.0007 for all VOIP traffic. Indeed, it is difficult to see how even significant rural carriers such as CenturyLink, let alone smaller wireless or wireline carriers, could resist a coordinated effort by AT&T and Verizon to set the exchange rate for VOIP traffic by fiat.

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[96] Wireless Competition Report 2010, at ¶[295].

[97] Wireless Competition Report 2010, at ¶292.

[98] "AT&T Also Looking at Voice Over LTE, Paints A Bullseye on 2013," Endgadget, (February 15, 2011). http : //www. engadget. com/2011/02/15/atandt-also-looking- at-voiceover-lte-paints -a-bullseye-on-2013/

75. Retail: The proposed merger would also adversely impact retailers, such as Best Buy, who sell handsets. The merged company would have immense power to impose onerous conditions on retailers. For example, AT&T could refuse to permit Best Buy to sell the next version of the iPhone, unless Best Buy agreed to funnel a larger portion of its revenue from sales to AT&T. In addition, AT&T could use its enhanced market power in the retail market to require independent retailers to disadvantage competitors or advantage its own products. AT&T could insist on superior display positioning for its products, or require retailers to limit the number of handsets it carriers from rival providers. This would prove particularly potent to smaller competitors, who have fewer retail outlets and therefore rely more on third-party retailers, electronic stores, and box stores. In either case, it will ultimately be consumers who suffer through the loss of competitive outlets where they can readily find alternative providers and easily compare products. The Tribunal must act to protect the retail market in mobile services by denying the merger.

76. Mobile commerce. As the FCC noted in its recent wireless competition report,[99] successful mobile commerce needs buy in and investment from a number of players, including wireless service providers. Indeed, wireless service providers control a bottleneck infrastructure that facilitates mobile commerce. As explained above, wireless service providers currently exert control over the wireless applications and devices that use their networks. The incentive and ability to exercise such control is only going to increase if the proposed merger were to be approved. For mobile commerce, this would mean that the merged company would have the ability to control the types of vendors who may sell their products and services, the types of mobile commerce applications that may be downloaded to a device, and the types of products

[99] *Id.* at 333-338.

and services that may be purchased using mobile commerce applications. For example, the merged company could use its control of applications to prevent or discourage users from purchasing, via mobile commerce, applications that would require greater throughput.

77. Shortcodes. In addition to standard person-to-person text messaging, the proposed merger would negatively impact the short code market.[100] Carriers exert immense control over short codes. They control what short codes can be used for, the content they transmit, who can use them, and how much that transmission costs. Although all major carriers adhere to the standard Mobile Marketing Association guidelines for short code content, each carrier also creates its own additional short code rules and regulations. As a result, the rules governing conduct on short codes are different for every carrier. Also, the enforcement of those rules varies from carrier to carrier. In some instances, a single carrier will object to a use of short code that is allowed by other carriers.[101] Carriers also differ in the prices they charge users to transmit short code messages over carrier networks, and even to create the initial network connection. These prices are often one of the highest costs to a user of text messaging and can significantly impact the viability of the use. While the short code market is far from a model of competition and is in no way free from abuses, there is some indication that the limited competition that does exist curbs the most abusive carrier practices. In the past, industry outcry convinced Verizon to cancel

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[100] Short codes are 5- or 6- digit numbers used for various text message-based "campaigns." For more information *see* Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, *Petition for Declaratory Ruling,* WT Docket No. 08- 7, Dec. 11, 2007, at http://www.publicknowledge.org/pdf/text-message-petition20071211.pdf; *see also Public Knowledge Explains Short Codes, available at* http://vvwvv.youtube.com/watch?v=2tf qyB-m68&.

[101] *See, e.g. T-Mobile SUED For Blocking Marijuana App!,* PerezHilton.com, Sep. 21, 2010, *available at* http://perezhilton.com/2010-09-21- tmobile_sued for_blocking_marijuana_application

a planned increase in the fee charged for sending messages to Verizon customers.[102] More recently ESPN, The Weather Channel, and MSNBC announced that they were ceasing delivery of messages to Sprint customers due to an increase in Sprint connection fees.[103] However, they are able to continue to offer service to customers on other carriers. Although such drastic responses to carrier practices are rare, they are able to occasionally occur because there is some competition between wireless carriers. Further consolidation of national wireless carriers would further reduce the ability of a business, organization, or individual who wishes to make use of short codes to push back against predatory industry practices.

78. Wireline voice and broadband. Wireline service providers compete with each other and that this competition is likely to increase in future.[104] Furthermore, the FCC has expressed its commitment to promoting such competition.105 Because AT&T provides wireline services in addition to wireless services, the proposed merger would adversely impact this intermodal competition. In the Cingular/AT&T merger, the FCC recognized that a company that provides both wireline and wireless services has an incentive to protect its wireline services from competition from wireless services.[106] Merger of such a company, in that case Cingular, with one that provided wireless services only, in that case AT&T Wireless, would act as a disincentive on

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[102] *See* Mickey Alam Khan, *Verizon rescinds decision to levy SMS fee hike Nov.* 1, MobileMarketer.com, Oct. 23, 2008, *available at* http://www.mobilemarketer.com/cms/news/messaging/1965.html.

[103] *See* Karl Bode, *ESPN Refuses to Pay New Sprint SMS Fee*, DSLReports.com, May 12, 2011, *available at* http://www.dslreports.com/shownews/ESPN-Refuses-to-Pay-NewSprint-SMS-Fee-114185.

[104] AT&T/Cingular Order, at ¶237; Sprint/Nextel Order, at ¶141

[105] Sprint/Nextel Order, at ¶141.

[106] AT&T/Cingular Order, at ¶ 237.

the merged entity to offer new innovative plans that increased intermodal competition.[107] However, the FCC was less concerned with this effect because the FCC found that at that time intermodal competition was still very limited.[108] However, the FCC cautioned that "further losses of significant independent wireless carriers to wireline-affiliated carriers [would] be closely scrutinized, and absent significant offsetting public interest benefits, may lead to different conclusions." The proposed merger presents that opportunity for scrutiny. As explained below, the proposed merger does not present offsetting public interest benefits.

79. International concerns. Two inevitable key consequences of the AT&T/T-Mobile Deal, if allowed to continue, will be: 1) The establishment in the US of an effective monopoly supplier of GSM/HSPA services and monopsony buyer of GSM/HSPA equipment and devices; And 2) the removal of T-Mobile USA from the joint global purchasing venture between Deutsche Telekom (DT) and Orange (France Telecom, FT), whose negotiating power with respect to GSM/HSPA/LTE suppliers is greater than that of AT&T, even if the latter is combined with T-Mobile USA. Stemming from these two consequences are several undesirable impacts: GSM/HSPA operators, who currently account for 90% of global mobile connections, will be left with only one negotiating partner for continuing or establishing national roaming agreements, both for broadband data and voice, in order to fully service their customers while traveling in the US. This issue will certainly raise concern among foreign regulatory authorities that will demand action from the FCC. For US GSM/HSPA mobile customers roaming abroad, there will be no basis for competition in terms of alternative innovative international roaming services, for example the kind of arrangement an independent T-Mobile USA might introduce across its parent's (and perhaps even some of Orange's international roaming services) non-US properties,

[107] *Id.* at 245.

[108] *Id.* at 238.

whereby its US customers would be able to access service within their coverage areas on the same terms as when they are in their "home" network, without incurring any of the typically high international roaming charges. Other US-based wireless companies, including small GSM as well as CDMA2000 providers, and in particular the smaller ones, e.g., Metro PCS, Leap, and US Cellular, will find themselves at an even greater disadvantage with respect to their ability to get the attention of large foreign GSM/HSPA companies when attempting to negotiate competitive international roaming agreements, either through separate GSM/HSPA handsets, made available to their customers for their international trips, or through multi-mode (GSM/HSPA/ CDMA2000) devices.

80. T-Mobile, and hence the entire community of GSM/HSPA users in the US, will be denied access to the potentially wider range of devices, along with other more favorable conditions, that the joint purchasing venture between DT and FT should be able to negotiate with equipment and device vendors compared to those that AT&T will pursue or be likely to achieve.

E. Recent Data Corroborates the Trend of Market Concentration, a Trend That the Proposed Transaction Would Accelerate

81. Recent data confirm the trend of wireless industry consolidation. Using data for year-end 2010 for the four nationwide wireless service providers, and for the regional providers identified by the AT&T,[109] the following table shows the substantial increase in AT&T's market share (as measured by subscribers) that would result from the Proposed Transaction. Presently, AT&T and Verizon Wireless control 63% of the wireless market. If the Proposed Transaction were to occur, these two companies would control 75% of the wireless market.

[109] *See* Carlton/Shampine/Sider Declaration, at paras. 101-115.

Table 2
Subscriber Base Before and After Proposed Transaction:
Nationwide and Regional Wireless Providers[110]

Before Transaction	Subscribers (millions)	Share of Subscriber Base
AT&T	95.5	33%
Verizon Wireless	88.0	30%
T-Mobile	34.0	12%
Sprint	49.9	17%
MetroPCS	8.2	3%
US Cellular	6.1	2%
Leap	5.5	2%
Cellular South	0.9	0.3%
Cincinatti Bell	0.7	0.2%
nTelos	0.4	0.1%
"Market" Total	289.2	

After Transaction	Subscribers (millions)	Share of Subscriber Base
AT&T	129.5	45%
Verizon Wireless	88.0	30%
Sprint	49.9	17%
MetroPCS	8.2	3%
US Cellular	6.1	2%
Leap	5.5	2%
Cellular South	0.9	0.3%
Cincinatti Bell	0.7	0.2%
nTelos	0.4	0.1%
"Market" Total	289.2	

82. These four carriers represent the vast majority of the nation's wireless subscribers: the FCC's Local Competition Report shows a total of 279 million total wireless subscriptions as of June 30, 2010.[111] As Table 2 above shows, US Cellular, MetroPCS, and Leap served just under 20 million customers at year-end 2010. As Table 3 below shows, an HHI analysis of the

[110] Data is based on subscribers as of year-end 2010 and subscriber estimates in Description of Transaction. Sources: 2010 Annual Reports for AT&T Inc., Verizon Communications, and MetroPCS; Sprint News Release, February 10, 2011, available at: http://newsroom.sprint.com/article disnlay.cfm?article id=1796; Carlton/Shampine/Sider Declaration, at para. 108-121 (Leap; US Cellular; Cellular South; Cincinatti Bell; nTelos; and T-Mobile).

[111] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as ofJune 30, 2010,* re. March 2011, at Table 17.

four nationwide providers and the regional providers yields an increase in HHI from 2,452 to 3,229 as a result of this transaction.

Table 3
Proposed AT&T-T-Mobile Merger Would Increase Market Concentration Significantly

Before Transaction

	Subscribers (millions)	Share of Subscriber Base	HHI Component
AT&T	95.5	33%	1,090
Verizon Wireless	88.0	30%	926
T-Mobile	34.0	12%	138
Sprint	49.9	17%	298
MetroPCS	8.2	3%	8
US Cellular	6.1	2%	4
Leap	5.5	2%	4
Cellular South	0.9	0.3%	0.1
Cincinatti Bell	0.7	0.2%	0.1
nTelos	0.4	0.1%	0.02
HHI			2,452

After Transaction

	Subscribers (millions)	Share of Subscriber Base	HHI Component
AT&T	129.5	45%	2,005
Verizon Wireless	88.0	30%	926
Sprint	49.9	17%	298
MetroPCS	8.2	3%	8
US Cellular	6.1	2%	4
Leap	5.5	2%	4
Cellular South	0.9	0.3%	0.1
Cincinatti Bell	0.7	0.2%	0.1
nTelos	0.4	0.1%	0.02
HHI			3,229
Difference in HHI due to proposed transaction:			776

83. Regarding the HHI, in its 14th Wireless Competition Report, the FCC stated:

> For context, the DOJ antitrust guidelines consider a market to be "highly concentrated" if the post-merger HHI exceeds 1800. DOJ antitrust scrutiny is typically applied to a merger if it would trigger an increase in the HHI of 100 or greater when the post-merger HHI is between 1000 and 1800, and an increase of 50 or greater when the post-merger HHI is above 1800...[T]he FCC has previously used a higher screen, 2800 for the HHI and 100 for the change in HHI, in reviewing mergers of mobile providers.[112]

The Proposed Transaction clearly raises concerns about unwarranted and harmful market concentration: it would raise the HHI to above 2,800 after the transaction (or by an additional 776 points). The Merger Guidelines state in pertinent part:

> Small Change in Concentration: Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
>
> Unconcentrated Markets: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
>
> Moderately Concentrated Markets: Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
>
> Highly Concentrated Markets: Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.[113]

Revenues

84. As Table 4, below, shows, as measured by revenues (which reflect not only carriers' supply of services but also the prices that they can sustain in the market), the Proposed Transaction would increase AT&T's share of the four nationwide carriers' revenues from approximately one-third (36%) to almost one-half (48%).

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[112] 14th MWCR, at 40-41 (cites omitted)

[113] Horizontal Merger Guidelines, at §5.3.

Table 4
First Quarter 2011 Wireless Service Revenues[114]

	Quarterly Wireless Service Revenues (billions)
AT&T	$14.0
Verizon Wireless	$14.3
T-Mobile	$4.6
Sprint	$5.6

F. The Wireless Industry Has Become Highly Concentrated And is Teetering on the Brink of True Duopoly

85. AT&T's proposal to acquire T-Mobile comes at a time when the level of concentration in the mobile wireless industry has never been higher. The FCC acknowledged the precarious state of competition in its latest wireless competition report, where, for the first time, it was unable to certify that the industry is characterized by effective competition.[115] The report attributed the decline in competition to "continued industry consolidation . . . over the past five years,"[116] with two dominant carriers, AT&T and Verizon, holding "60 percent of both subscribers and revenue" as of 2009 "and continu[ing] to gain share."[117] The FCC also pointed to a steady increase in the Herfindhal-Hirschman Index (HHI), a common indicator of industry consolidation. According to the FCC's report, the mobile wireless industry's HHI value in 2008

[114] AT&T Investor Briefing, 1st Quarter 2011, April 20, 2011, at 3-4; Verizon Investor Quarterly, First Quarter 2001, April 21, 2001, at 2 and 11; T-Mobile USA Press Release "T-Mobile USA Reports First Quarter 2011 Results," May 6,2011, at 9; Sprint News Release "Sprint Nextel Reports First Quarter 2011 Results," April 28, 2011, at 11.

[115] See Annual Report and Analysis of Comptetitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd 11407¶ 3 (2010) ("Fourteenth Wireless Competition Report")

[116] *Id.* ¶ 4.

[117] *Id.*

was a staggering 2,848, which reflects a sharp increase of "32 percent since 2003 and 6.5 percent in the most recent year for which data is available."[118] The problem of consolidation is even more pronounced in the rural areas that many of RCA's members serve, with only 30 percent of the rural population served by at least three providers capable of offering mobile broadband services.[119] These figures paint a gloomy portrait of an industry marching steadily towards a true duopoly—even before AT&T announced its audacious plan to swallow one of its last remaining nationwide competitors.

86. In fact, the FCC has recently grown so concerned about the consolidation of the mobile wireless sector—and in particular with the market power already held by AT&T and Verizon—that it has imposed conditions on third parties restricting their ability to lease any more spectrum to AT&T and Verizon. Specifically, in its order approving the sale of SkyTerra Communications to Harbinger Capital Partners Funds, the FCC required SkyTerra (now LightSquared) to "obtain FCC approval" before "mak[ing] spectrum available to either of the two largest terrestrial providers of CMRS and broadband services"—that is, AT&T and Verizon.[120] The FCC also required SkyTerra "to obtain FCC approval before traffic to these largest terrestrial providers accounts for more than 25 percent of SkyTerra's total traffic on its terrestrial network in any Economic Area."[121] These conditions reflect a well-founded concern that any additional competitive advantage obtained by AT&T (or Verizon) would tip the industry towards duopoly, and significantly harm consumers as a result.

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[118] *Id.*

[119] *Id.*

[120] Sky Terra Communications, Inc., Trasferor and Harbinger Capital Partner Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, Memorandum Opinion and Order and Declaratory Ruling, 25FCC Rcd 3059 ¶ 72 (IB 2010).

[121] *Id.*

87. The Government Accountability Office ("GAO") recently joined the FCC in recognizing the dangerously high level of consolidation in the wireless industry. The GAO's report found that "the primary change" in the wireless industry over the last decade has been "the consolidation of wireless carriers," and showed that in a span of only three years, from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent."[122] The GAO report concluded that progressive consolidation since 2000 "has made it more difficult for small and regional carriers to be competitive."[123] In particular, the GAO report found that, "[d]ue in part to the consolidation of carriers and spectrum, the top national carriers have increasingly dominated the acquisition of subscribers"—a dynamic that only fuels the loss of competition from small and regional carriers.[124] The report also noted the difficulties that small and regional carriers face in undertaking network investments and obtaining handsets in a world where AT&T and Verizon dominate the marketplace, and explained that such difficulties only "reinforc[e]" the major national carriers' "competitive advantage" over their small and regional counterparts.[125] RCA's members already are struggling to overcome these challenges, and allowing AT&T to become an even more dominant provider would put fair competition out of reach.

88. Economists have likewise concluded that AT&T, along with Verizon, has "growing dominance" in the mobile wireless industry.[126] Professor Peter Cramton has noted that

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[122] Government Accountatbility Office, Telecommunications: Ehnanced Data Collection Could Help FCC Better Competition in the Wireless Industry, Report to Congress, GAO-10-779 at 10,13 (July 2010) ("GAO 2010 Wireless Report").

[123] *Id.* at 17.

[124] *Id.*

[125] *Id.* at 19-23.

[126] See Peter Cramton, *700 MHz Device Flexibility Promotoes Competition* at 3 (Aug. 9, 2010) ("*Cramton Report*"), attached to *Ex Parte Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC,* filed in RM-11592 (Aug.10, 2010).

"the competitive landscape [in the wireless industry] has continued to deteriorate in the last several years," as AT&T and Verizon "have increased market share steadily, while other operators struggle to maintain share."[127] In addition to noting the high subscriber shares of AT&T and Verizon, Dr. Cramton estimated that the "Big Two" enjoy 89 percent of industry EBITDA (earnings before interest, taxes, depreciation, and amortization)—a staggering statistic that is particularly "troubling in an infrastructure intensive business, since as the industry matures new investment must come from these earnings."[128]

89. Not surprisingly, this consolidation has led to higher prices than would otherwise have prevailed in a more competitive marketplace. Contrary to AT&T's suggestion that the trend toward consolidation in the last decade has led to lower prices, the fact of the matter is that a once-rapid decline in prices has leveled off, even as prices have continued to fall sharply in other comparable industries.[129] Of course, as any basic economics textbook would predict, the significant diminution in competition occasioned by AT&T's and Verizon's serial acquisitions has allowed those dominant players to hold the line on pricing. Moreover, the modest price decreases that have occurred in the nationwide marketplace are primarily attributable to the low-priced offerings from T-Mobile and Sprint, and AT&T's Proposed Transaction thus would all but eliminate what remains of price competition among the major providers.

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[127] *Id.*

[128] *Id*. at 5.

[129] *See generally* No Takeover Project, *'Falling Prices' Rebuttal: How AT&T Is Manipulating the Data, available at* http://www.notakeover.org/sites/default/files/ATTFalling-Prices-Rebuttal.pdf (demonstrating that, over the past decade, an increasingly concentrated wireless industry has not afforded consumers the same steady price drops seen in other comparable industries, such as personal computers, computer software and accessories, and information technology).

90. Given the widespread concern about industry consolidation before the Proposed Transaction, it should come as no surprise that many economists anticipate a death blow to competition should the FCC approve the deal. A similar decision by the Tribunal would produce an equally devastating result. AT&T and Verizon's share of total U.S. wireless subscriptions "will be close to 80% if AT&T is allowed to take over T-Mobile," with "only one remaining company with double digit shares."[130] Indeed, AT&T and Verizon would each have more subscribers than all of the nation's other wireless carriers combined if AT&T were allowed to acquire T-Mobile.[131] Translating these market share figures into HHI values further underscores the remarkable degree of concentration that would result from the transaction. Stanford economists Roger Noll and Gregory Rosston have estimated that AT&T's proposed acquisition of T-Mobile would push the HHI value for the nationwide mobile wireless market to roughly 3,100,[132] while other post-transaction estimates have ranged from "over 3,000 HHI"[133] to 3,280 HHI.[134] All of these estimates are well above the FCC's trigger for exacting review,[135] and under

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[130] *See* Letter of Derek Turner, Research Director, Free Press, to Sens. Herb Kohl and Mike Lee, May 10, 2011, at 6-7, *available at* http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf *("Turner Report").*

[131] *Id.* at 6 (using data from the FCC's competition reports and from SNL Kagan studies to show that, post-transaction, AT&T and Verizon would have 43 percent and 34 percent market shares, respectively, both of which dwarf the 23 percent aggregate share of Sprint and all other carriers combined).

[132] Roger G. Noll and Gregory L. Rosston, Competitive Implications of the Proposed Acquisition of T-Mobile by AT&T Mobility, SIEPR Policy Brief, Apr. 2011, at 2, available at siepr.stanford.edu/system/files/shared/ documents/pb_04_2011.pdf ("Noll & Rosston Report").

[133] American Antitrust Institute, The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions, Mar. 2011, at 2, available at http://www.antitrustinstitute.org/sites/defaultifiles /AAI_Brief%20on%20ATT-TMobile.pdf ("AAI Report").

[134] Economics and Technology Inc., And Then There Were Three: AT&T Swallows T-Mobile, Mar. 2011, at 1, available at http://econtech.com/newsletter/ ETIViewsandNewsMarch2011.pdf ("ETI Report").

the DOJ's guidelines, such HHI levels establish a presumption that the combination will be anticompetitive.[136] Indeed, Noll and Rosston appropriately concluded that "the proposed acquisition appears to run seriously afoul of the merger policy of the antitrust enforcement agencies."[137]

91. AT&T cannot escape these damning indicators of industry consolidation by trying to cast the market for mobile wireless services as local in nature.[138] In fact, AT&T itself made the opposite argument in its application to take over Centennial Communications in 2008, telling the FCC that "the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level."[139] AT&T went on to explain that it "establishes its rate plans and pricing on a national basis, without reference to market structure at the CMA level," and that a regional carrier's "pricing is an inconsequential factor in AT&T's competitive decision making."[140] AT&T has also publicly claimed that it views pre-paid and post-paid services as separate and distinct offerings that do not compete; its CFO Richard Lindner told investors on an earnings call in 2009 that AT&T would not have offered its own pre-paid option,

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[135] *See Fourteenth Wireless Competition Report* ¶ 52 (explaining that the Commission applies an HHI "screen" to identify service areas where "the post-transaction HHI would be both greater than 2800 and would increase by at least 100," and then subjects those service areas to a "further case-by-case competitive analysis").

[136] *See U .S.* DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, Sec. 5.3 (2010) (explaining that the DOJ rates markets with 2500 HHI and higher as "highly concentrated," and "presume[s]" that "[m]ergers resulting in highly concentrated markets that involve an increase . . . of more than 200 points will . . . be likely to enhance market power").

[137] *Noll & Rosston Report* at 1.

[138] *See* AT&T/T-Mobile Public Interest Statement at 72-75.

[139] AT&T/Centennial Public Interest Statement at 28, Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246 (filed Nov. 21, 2008).

[140] *Id.* at 28-29 (emphasis added).

the GoPhone, if it had believed the pre-paid service "would impact or cannibalize our postpaid base."[141]

92. It is simply not credible for AT&T to change its tune now that it is seeking to combine two of the four nationwide carriers, asserting that it suddenly faces robust, price-disciplining competition from rural, regional, and pre-paid wireless providers. To the contrary, as explained above, the increased consolidation in recent years has weakened the competitive position of rural and regional providers vis-à-vis AT&T and Verizon, which explains why the FCC was unable to characterize the wireless marketplace as subject to effective competition for the first time in 2010. AT&T meant what it said when it characterized competition from rural and regional providers as "inconsequential" at the end of 2008, and such competition would be further imperiled if this transaction were allowed to proceed.

93. The experience of RCA's members further confirms that the market for mobile wireless services is national, not regional or local. At a Senate hearing earlier this month, Hu Meena, President and CEO of Cellular South and Chairman of RCA, testified that "Cellular South and other competitive carriers must be able to offer customers nationwide use of their devices," and categorically stated that "[t]here is no market for regional and local calling plans."[142] Other RCA members have faced similarly strong consumer demand for nationwide coverage and have found it difficult to attract enterprise customers, which typically insist on the true national networks that only the "Big Four" (AT&T, Verizon, T-Mobile, and Sprint) can

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[141] *See* AT&T Q2 2009 Earnings Call Transcript, Question-and-Answer Session, Jul. 23, 2009, *available at* http : //seekingalpha.corrilarticle/150935-at-amp-t-q2-2009- earningscall-transcript?part—qanda.

[142] Testimony of Victor H. "Hu" Meena, President & Chief Executive Officer, Cellular South, Inc., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?", May, 11, 2011, at 6, available at http :// judiciary.senate.gov/pdf/11-5-11%20Meena%Testimony.pdf. See also id.

provide. That reality explains why roaming rights and handset interoperability have been top priorities for RCA members and remain make-or-break issues; without such critical safeguards, smaller providers have no hope of offering the nationwide coverage required to compete with the industry behemoths. In short, AT&T cannot hide from concerns over nationwide industry consolidation by pretending that today's market for mobile wireless services is local or regional; based on AT&T's consistent arguments in prior proceedings, the locus of wireless competition is plainly national.[143]

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

94. 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 Section VI above. AT&T's post-merger market share would raise a clear presumption of competitive harm under antitrust and FCC 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.

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

95. 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,[144] but those

[143] See also Turner Report at 5 ("While the regional carriers had more consumer relevance a decade ago, it is clear that today's market is a national market.").

[144] *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*

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.

96. 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 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.

97. 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."[145] To measure whether a

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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>.

[145] 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>).

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.[146] 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.[147] 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.[148]

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

98. As the FCC 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.[149]

99. 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

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

[147] *Id.* ¶¶ 148, 166.

[148] *Id.* ¶¶ 148, 151.

[149] *EchoStar-DirecTV Hearing Designation Order* ¶ 170.

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.[150] 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.[151] 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 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.[152]

100. 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.[153] These arguments are

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[150] CRA Decl. ¶¶ 172-73.

[151] *Id.* ¶¶ 174-77.

[152] *Id.* ¶ 16.

[153] Description of Transaction at 95–96.

unpersuasive as they grossly misconstrue marketplace realities and overstate the competitive significance of the small, "fringe" wireless players.

101. 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.[154] 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,[155] hold similar sets of competitive assets, and share a common legacy Bell company lineage.[156] They own the incumbent landline monopolies in their respective

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[154] *Id.* at 95.

[155] *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- 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.verizon wireless.com/b2c/ index.html> (20001 used at zip code prompt) (last visited May 27, 2011).

[156] 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).

regions and would have every interest in accommodating each other while raising rivals' costs and otherwise disadvantaging them.[157] Moreover, the Twin Bells' landline monopolies give them a common interest in discouraging to the maximum extent possible cord-cutting by their wireline customers.[158] 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 smaller firms would have no incentive to deter price increases because they would benefit from a higher price umbrella.

102. 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.

103. 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.[159] To suggest that the small players are disruptive while T-Mobile is not is simply disingenuous.

104. 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.

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[157] CRA Decl. ¶¶ 92-101, 179.

[158] *Id*. ¶ 179.

[159] CRA Decl. ¶¶ 134-39.

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.[160] 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 market discipline. In addition, with a nationwide subscriber penetration rate of approximately 90 percent, subscriber growth comes mainly from attracting customers from competing firms.[161] 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.

105. 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

106. 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.[162] T-Mobile is a particularly important factor in the competitive dynamics of this market segment

[160] Adib Decl. ¶ 7.

[161] *14th CMRS Competition Report* ¶ 155.

[162] *See* Dupree Decl. ¶ 15.

because it is the low-price leader.[163] 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.[164]

107. 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 carriers using GSM, by far the most prevalent air interface outside the United States.[165] This commonality makes AT&T and T-Mobile particularly close substitutes for these customers. On the other hand, Sprint, for example, 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.[166] 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.[167] 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

108. 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,

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[163] *Id.* ¶ 16.

[164] *Id.*

[165] *Id.* ¶ 17.

[166] *Id.*

[167] Schieber Decl. ¶ 9.

and advertising and marketing.[168] 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 reaped 79 percent of wireless industry operating profits.[169] 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.

109. 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.[170]

110. 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

[168] CRA Decl. ¶¶ 114, 155.

[169] *Id*. ¶ 115.

[170] *Id*. ¶ 118.

smaller national competitor.[171] That outcome would harm the public interest by leading to higher prices and reduced innovation.

E. The Proposed Transaction Would Stifle Innovation

111. The development of new products and technology is driven by competition among the four national wireless carriers.[172] The proposed takeover would simultaneously eliminate T-Mobile as a key competitive innovator and significantly reduce Sprint's ability to compete through innovation.

112. 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.[173] In 2008, T-Mobile introduced the first Android smartphone, the G1, which was the product of collaboration between T-Mobile, Google, and HTC.[174] 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.[175] AT&T's proposed takeover of T-Mobile would eliminate this powerful innovator in the wireless marketplace.

113. 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

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[171] *Id*. ¶ 122.

[172] Adib Decl. ¶¶ 13-14.

[173] *Id*. ¶ 16.

[174] *Id.*

[175] *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>.

difficult for Sprint and other telecommunications providers 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.[176]

114. 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.[177] 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.[178] 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.[179]

115. 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

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[176] Adib Decl. ¶¶ 11-18.

[177] *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).

[178] Adib Decl. ¶¶ 6-7.

[179] *Id.* ¶¶ 11, 18.

handset partner.[180] 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.[181]

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

116. AT&T is vertically integrated and controls key backhaul assets necessary for other wireless carriers to compete effectively.[182] 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.[183] 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.[184] 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.[185]

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[180] CRA Decl. ¶ 106.

[181] *Id.* ¶¶ 106, 113.

[182] 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").

[183] CRA Decl. ¶¶ 94-98.

[184] *Id.* ¶ 97.

[185] *Id.* ¶ 98.

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

117. 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 other providers including FiberTower.[186] Wireless carriers, such as Sprint and T-Mobile, rely on incumbent LEC special access services[187] to provide the dedicated connections they need to link their cell sites to their switches and other parts of their networks.[188] 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."[189] T-

[186] Schieber Decl. ¶ 10.

[187] 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.

[188] *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*").

[189] 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").

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.[190]

118. 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 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.[191] 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.[192] 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

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[190] *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.").

[191] 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>.

[192] 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.").

impose unreasonable rates, terms, and conditions on its wireless rivals in its incumbent service territory.[193]

2. The Proposed Transaction Would Increase Incentives for AT&T and Verizon to Raise Their Already Inflated Special Access Rates

119. As CRA explains, AT&T's proposed takeover of T-Mobile would make it more likely that AT&T and Verizon will be able to raise their prices for retail services and exclude competitors by further increasing the special access rates they charge Sprint and other retail competitors and/or reducing the quality of service they provide to those carriers.[194] Raising the input costs of their retail rivals would enable AT&T and Verizon to capture the additional revenues generated by higher retail prices if their competitors match their price increases and, at the same time, prevent competitors from winning customers away from AT&T and Verizon by offering lower prices. As their special access costs rose, Sprint and other competitive providers would be forced to raise their own retail rates and/or reduce the investments they make to expand and upgrade their networks.[195] Increased rates, potentially combined with deteriorating service,

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[193] 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. 05-25, at 13 (July 29, 2005) (explaining that prices for a special access circuit can be as much as three times lower in areas where incumbent LECs are subject to competition); *see also* Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 7 (Feb. 24, 2010) (explaining that "introducing true competitive alternatives in areas served by only one supplier is far superior to relying on regulatory mandates" in ensuring that backhaul connectivity is available at reasonable rates and with reasonable terms and conditions); *id.* at 8 ("competition is much more effective than regulation to ensure the reasonableness of rates, terms, and conditions").

[194] CRA Decl. ¶¶ 51, 98.

[195] Higher special access costs would create a vicious cycle: competitive carriers would be unable to make the investments needed to attract and retain customers; this would lead to a smaller subscriber base, which would cause competitive carriers to lose economies of scale and network effects; this, in turn, would further reduce competitors' ability to lower retail prices or

would drive customers away from competitive providers, allowing AT&T and Verizon to increase their number of subscribers even as they raised retail rates.[196] Thus, the ultimate victims of the merger would be consumers, such as Claimant, who would face higher retail rates and be denied the prospect of innovative new services fostered by a competitive marketplace.[197]

G. The Proposed Takeover Likely Would Raise Roaming Costs, Leading to Higher Prices

120. AT&T's proposed takeover of T-Mobile would allow AT&T and Verizon to exclude competitors by raising their costs and degrading their service quality due to their control over roaming. Through previous mergers in which they acquired the largest providers of rural coverage – including Dobson, Centennial, and ALLTEL – AT&T and Verizon have assembled large wireless footprints. Post-merger, the Twin Bells would understand that they control the key

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invest in upgrading their networks, further hampering the competitive carriers' ability to attract and retain customers.

[196] 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., at 5 (May 11, 2011) (testimony of Daniel R. Hesse, CEO, Sprint Nextel Corporation) (explaining that if the merger were approved, it "would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce[d] quality [or] raise[d] prices"), available at: <http://judiciary.senate.gov/pdf/11-11-5%20Hesse%20Testimony.pdf> ("Hesse Testimony").

[197] *See, e.g.*, Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 8 (Aug. 8, 2007) (explaining that "[c]onsumers ultimately suffer from the high cost of special access" and describing the investments T-Mobile and other providers would make to achieve "customer-focused improvements" if special access were available at more reasonable rates); Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 2 (Feb. 24, 2010) ("Consumers will enjoy the benefits of ubiquitous mobile broadband service and choice among service providers only if . . . special access[ ] is available at reasonable rates, terms, and conditions. . . ."); *see also* Hesse Testimony at 2-3 (explaining that competition and innovation led to the deployment of 4G services); *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., at 5 (May 11, 2011) (testimony of Gigi B. Sohn, President, Public Knowledge) (providing other examples of benefits that competition has brought to the wireless marketplace), *available at*: <http://judiciary.senate. gov/pdf/11-5-11%20Sohn%20Testimony.pdf >.

assets necessary for Sprint and others to offer nationwide service through roaming, and that if they both raise prices they will earn greater returns while simultaneously raising their rivals' costs. This would effectively set a price floor by increasing the cost structures of all other carriers. As wireless competitors and gatekeepers to essential roaming service, the Bells would have every incentive to deny Sprint and the smaller fringe carriers access to their networks for roaming or to increase their fees to erode the ability of Sprint and other firms to effectively compete on price.

121. The combination of AT&T and T-Mobile would be particularly devastating for carriers using the GSM standard because the combination of AT&T and T-Mobile would leave just one national carrier for GSM roaming. Indeed, as the President and CEO of Cellular South has warned, "[i]f AT&T is permitted to take over T-Mobile, AT&T would be the only potential nation-wide GSM roaming partner for competitive carriers."[198] In its declaration, CRA points out that when the only two CDMA carriers in Mexico merged, Sprint's roaming rates increased dramatically almost immediately and have increased significantly in total since the merger.[199]

122. The eventual transition of carriers from GSM and CDMA to LTE would not cure this competitive problem. First, any transition is likely to occur over many years and existing 3G technologies are likely to continue to provide an important access point for consumers for many years, just as second generation ("2G") offerings do today. Second, the LTE configurations of both AT&T and Verizon, as presently devised, would not allow roaming on their networks without additional hardware and software. Unlike the cellular and PCS bands, where consumer devices were capable of operating across the entire bands regardless of the particular licensing block assigned to a carrier, AT&T and Verizon have obtained unique "Band

[198] Meena Testimony at 10.

[199] CRA Decl. ¶ 100, n.92.

Class" designations for their respective 700 MHz spectrum block assignments.[200] What this means is that the LTE equipment standards permit AT&T and Verizon to have device manufacturers build handsets and other devices that will operate only in each carrier's Band Class (the carrier's licensed spectrum) – even if both carriers are operating otherwise compatible LTE broadband networks.[201]

123. AT&T and Verizon are using their market power, size, and scale advantages to limit the devices they sell to their own spectrum blocks, thereby preventing customers from roaming or from taking their LTE devices to another carrier.[202] The result is that the smaller 700 MHz licensees, and even prospective 700 MHz public safety broadband users, will not only be precluded from roaming on AT&T or Verizon's 700 MHz LTE networks, but they will be excluded from sharing in the scale efficiencies and lower costs that a common Band Class would bestow on all Band Class members. AT&T and Verizon are thus exercising their market power to deny competitors the scale advantages they would otherwise enjoy from handsets built to operate across the 700 MHz band.

H. Innovation Will Suffer if the Merger is Approved Without Conditions

124. If the proposed merger is approved without conditions, such as those proposed by the Petitioners, innovation will suffer as well, since the Big 2 carriers have often brought up the

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[200] Lynette Luna, *700 MHz interoperability issue should have been on FCC's agenda*, FIERCEBROADBANDWIRELESS (Apr. 14, 2011), *available at*: <http://www.fiercebroadband wireless.com/story/700-mhz-interoperability-issue-should-have-been-fccs-agenda/2011-04-14>.

[201] *Id*

[202] *See* Phil Goldstein, *AT&T, Cellular South debate 700 MHz interoperability at FCC*, FIERCEWIRELESS (Apr. 26, 2011) *available at*: <http://www.fiercewireless.com/story/att-cellular-south-debate-700-mhz-interoperability-fcc/2011-04-26> ("Smaller and rural carriers have claimed that Verizon and AT&T are ordering LTE equipment that will not work with the band classes of 700 MHz spectrum they own, effectively shutting them out of the growing LTE ecosystem.").

rear of major technological developments. For example, it was T-Mobile, not AT&T or Verizon, that pioneered Android. Indeed, even the introduction of the vaunted iPhone shows that it is often in AT&T's interest to stifle, rather than foster, innovation. As Public Knowledge President Gigi Sohn put it, in recent testimony before the Senate Judiciary Committee:

> During negotiations with AT&T, Apple had to consistently fight with AT&T over what innovative features would be allowed. Such features include how and when YouTube would function on its network, video calling (which is allowed in Europe and Asia as well as on T-Mobile, but not on AT&T), and tethering the device.[203]

125. If Apple — the world's largest technology company by market capitalization,[204] and certainly one of its most influential — encountered such stout resistance to innovation and openness from AT&T, imagine the problems that smaller and less powerful handset manufacturers will have negotiating with AT&T and Verizon post-merger.[205] It is a certainty that innovation in handsets and other equipment will suffer if AT&T and T-Mobile merge. As a result, consumers such as Claimant will have far fewer device options.

126. These known, identifiable concerns are all the more troubling in light of the fact that some negative consequences of the merger are not even knowable. For example, some pro-competitive events may simply never happen if the merger is allowed to go through. Concentration of buying power for infrastructure could easily cause product and innovation stagnation. Infrastructure manufacturers might not develop beneficial products that they might

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[203] *Sohn Testimony* at 14.

[204] *Value Line,* "The 30 Largest Market Capitalizations - March 11, 20) http://www.valueline.com/ Stocks/Screen.aspx?id-10494.

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

otherwise have developed, either because they are not being pressed by a smaller competitor (like T-Mobile) or because they are unable to arouse advance interest in the Big 2. The history of the wireline equipment market is instructive here. The wireline equipment marketplace blossomed after the passage and implementation of the Telecommunications Act of 1996 with the rise of the CLECs; once the CLECs had crested and mostly disappeared as a major competitive force, wireline equipment innovation has now slowed drastically.

127. The Tribunal should expect the same outcome in the wireless market if this merger is allowed to proceed without conditions, such as those proposed by in Section XIV of this Demand for Arbitration, that allow the remaining carriers to act as an innovative check on the Big 2. AT&T and Verizon have not driven innovation — on the contrary, in many instances they have adopted innovative technologies only when competitors got there first and threatened to make them obsolete. For instance, the prospects of 40 would still be remote but for Clearwire's and Sprint's forcing the issue with their deployment of WiMAX.[206] Similarly, Verizon might not have accelerated its 4G deployment plans but for MetroPCS first deploying 4G LTE in key markets. Indeed, the Tribunal might want to explore whether it was Verizon's or MetroPCS' launch of 4G LTE service which has now awakened AT&T from its 4G slumber. Since the next great innovation or application in wireless may come out of garages in Silicon Valley, the Tribunal must ensure that sufficient competition and choice exist as a market for such products and applications to allow innovation to blossom. Otherwise, the Tribunal can and should expect that innovation will slow as the Big-2 carriers reach the duopoly they are seeking.

[206] In the long run, however, because the propagation characteristics of its above-2.5 GHZ spectrum make it much more costly to deploy and provide services over this spectrum than the Big 2's "beachfront spectrum," Clearwire is unlikely as it is presently constituted to pose a serious threat to the Big 2.

I. The Proposed Combination Will Decrease Consumer Choice and Increase Prices

128. The elimination of T-Mobile as a competitor to Verizon Wireless and AT&T will remove meaningful choices of services and service plans from the market. Decreased choice of service provider quickly equates to increased price of service, simply because the remaining firms have fewer external factors affecting their ability to set prices.[207]

129. Consumers Union has performed a detailed price analysis for the proposed AT&T/T-Mobile combination.[208] It finds that AT&T's existing prices are 43% to 64% higher than T-Mobile prices for wireless data services, depending on the size of the data plan.[209] In addition, because this proposed combination would not be a marriage of equals, T-Mobile's award winning customer service would also quickly become a thing of the past.210

J. The Proposed Transaction Would Reduce Competition in Upstream Markets

130. AT&T's acquisition of T-Mobile would create a bottleneck between downstream customers and the upstream content and product developers that need a wireless bridge to offer their products to consumers. Allowing AT&T and Verizon to control the vast majority of all traffic over this wireless bridge would hamper the growth of the digital economy and the Internet.

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[207] *See, e.g., Fourteenth Report*, 25 FCC Rcd. at 11469 ¶ 87 ("One way that mobile wireless providers compete is through differentiated pricing plans.").

[208] Testimony of Parul P. Desai, Policy Counsel, Consumers Union, Regarding "How will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?," Before the House Committee on the Judiciary Subcommittee on Intellectual Property, Competition, and the Internet at 4-5 (May 26, 2011) available at http://judiciary.house. gov/hearings/pdf/Desai05262011.pdf.

[209] Desai Testimony at 4.

[210] T-Mobile's commitment to customer satisfaction and quality has earned "highest ranking" status in multiple awards in 2008 and 2009 from J.D. Power and Associates, the leading conductor of independent customer satisfaction and product quality surveys. T-Mobile was also ranked 96th on FORTUNE's 12th annual "Best Companies to Work For" list.

131. Many companies rely on wireless services to distribute their products to consumers. For example, eBay alone expects to sell over four billion dollars of goods over mobile connections in 2011.[211] A bottleneck created by the Twin Bells would allow them to charge supra-competitive prices to the upstream technology industry, thus making those upstream businesses less attractive and leading to less investment, less innovation, and fewer jobs. Mobile applications and commerce, and the technologies that support them, are perhaps the most important growth vector of technology companies like Amazon, Apple, eBay, and thousands of others which continue to maintain U.S. leadership in the Internet. The availability of competitive mobile broadband access has allowed tech companies to invest and innovate with the belief that they could monetize their new products and services without having to pay a supra-competitive toll to a carrier controlling access to consumers. Freed of effective competitive constraint following the takeover of T-Mobile, AT&T could also exercise market power over video, music, and other content providers by, among other things: Raising prices; Charging a premium to deliver quality video content to AT&T's more than 130 million post-merger wireless customers; Charging a premium to place a phone application in a visible location in its customer's devices; or Demanding a share of advertising revenue sold over its devices in exchange for delivering content to end users on a priory basis.

132. If the takeover is approved, parties could have to pay Verizon and AT&T to deliver their applications and information to consumers, and these gatekeepers could raise prices and reduce the incentives of upstream innovators to offer new and better products. Thus, Claimant would have no choice but to submit to paying higher prices for the same applications and information.

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[211] Rachael Metz, *EBay first-quarter profit rises 20%*, Seattle PI, Apr. 30, 2011, *available at* http://www.seatlepi.com/business/article/EBay-first-quarter-profitrises-20-percent-1355339.php.

VIII. AT&T'S ARGUMENTS THAT THE TAKEOVER OF T-MOBILE WILL NOT REDUCE COMPETITION ARE WITHOUT MERIT

133. To deflect concerns about the reduction in competition that would result from its takeover of T-Mobile, AT&T argues that T-Mobile is in terminal decline as a competitor so eliminating it is not meaningful, and smaller local and regional players will offset any loss in competition. Neither argument withstands scrutiny.

A. AT&T'S Claims that T-Mobile Is Not Competitively Significant Are Belied by the Evidence

134. AT&T claims that eliminating T-Mobile would not reduce competition because "T-Mobile USA does not exert strong competitive pressure on AT&T and the two brands serve substantially different groups of subscribers."[212] AT&T further argues that the merger "will not eliminate a major competitive force from the marketplace [because] T-Mobile USA is now 'struggling for relevance' in this increasingly competitive market."[213] AT&T also claims that absent the merger T-Mobile would have "decreasing significance in the higher end of the market because T-Mobile USA has no clear path to deploy LTE" and that T-Mobile "would be subject to substantial spectrum limitations and capital-financing challenges."[214] AT&T grossly mischaracterizes and understates T-Mobile's competitive significance today and in the future.

1. T-Mobile Is and Will Continue to Be a Strong Competitor

135. T-Mobile is a strong competitor to AT&T. T-Mobile consistently out-performs AT&T on customer service, it offers lower pricing for handsets and services, it has upgraded more of its network for high speed data services than AT&T, it has constructed a national network, it has helped develop and launch new innovative handsets (such as the G1), and it

[212] Description of Transaction at 98.

[213] *Id.* at 100-01.

[214] *Id.* at 102.

engages in aggressive advertising against AT&T. Indeed, T-Mobile's advertising mocking AT&T's high speed data services has been the talk of the industry. The fact that T-Mobile lost post-paid subscribers in the past quarter is not evidence of a failing firm.

136. AT&T's claim that T-Mobile is failing is belied by pre-merger statements of T-Mobile's executives and the FCC's own findings. For example, at its investor day on January 20, 2011, T-Mobile's management team presented a clear path for renewed growth. T-Mobile described itself as a "challenger" and announced a plan to grow revenues by $3 billion by 2014. That plan includes aggressively marketing smartphones and data on its new 4G network:

> [T]he challenger strategy which will fuel all growth going forward. . . . We have five levers. The first one is we will not let our network competitive advantage go and we will therefore monetize our 4G network. . . . Second, we will focus on making the purchase and the use of smart phones affordable to all Americans. We estimate that about 150 million Americans want smart phones but do not have smart phones today.. . . Third, while we are the number one service Company in our industry having won more than ten times the J. D. Powers award which is really great, we aspire for more. We want to be one of America's most trusted brands. . . . Part four and five of the strategy really focus on overcoming scale either on the revenue side which is a multi segment player or on the cost side which is challenger business model.[215]

137. Similarly, René Obermann, the CEO of DT, said, "[w]e are convinced that T-Mobile is a very good asset. We have a 34 million customer base and in the first nine months of 2010 we generated revenues of over $16 billion and over $4.5 billion of EBITDA. And we are generating a positive operating free cash flow of between $2.5 billion and $3 billion per annum."[216] The FCC also found that T-Mobile is a vigorous competitor, noting in the 14th CMRS Competition Report that T-Mobile's decision to lower the prices on its unlimited calling

[215] Jan. 20, 2011 Deutsche Telekom Briefing at 7-8.

[216] *Id.* at 2.

plans "appear[s] to have prompted Verizon and AT&T to narrow the price premium on unlimited service offerings."[217]

138. T-Mobile competes aggressively with AT&T on its website and in national television advertisements. T-Mobile's advertising spent in the first half of 2010 was up over 40 percent from the first half of 2009.[218] T-Mobile's advertising highlights AT&T's slow network speeds compared to T-Mobile's and touts T-Mobile's cutting edge mobile broadband devices, such as the myTouch 4G.[219] Senator Kohl, Chair of the U.S. Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently emphasized the direct competition between AT&T and T-Mobile:

> Mr. Humm [of T-Mobile], on your website, you compare your prices for data service to AT&T's and announce that your price for unlimited 4G data service is $5 cheaper than AT&T's price for 3G service. You also promote the fact that your unlimited voice, text and data service is $35 cheaper than AT&T.[220]

139. T-Mobile's head-to-head marketing of its smartphones and data services against AT&T appears to be paying off. T-Mobile's recent quarterly performance numbers show that its blended data ARPU increased more than 25 percent from the fourth quarter of 2009 to the fourth quarter of 2010.221 As T-Mobile's CEO elaborated:

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[217] *14th CMRS Competition Report* ¶ 92.

[218] *See* Jan. 20, 2011 Deutsche Telekom Briefing at 23-34.

[219] *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) Federal News Service Transcript at 41, *available at*: <http://fednews.com/printtranscript.htm?id=20110511t3772>.

[220] Press Release, T-Mobile, *T-Mobile USA Reports Fourth Quarter 2010 Results* (Feb. 25, 2011), *available at*: <http://s.tmocache.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/5657114502E70FF3012B5A79D454F2C8/file/TMUSQ42010Pre ssReleaseFinalv2.pdf>.

[221] Jan. 20, 2011 Deutsche Telekom Briefing at 5.

> Now the good news is that if you look at the performance year over year in the last quarters, year over year revenue hit bottom at the end of 2009 and is now trending in the right direction driven mainly by data revenues as more customers adopt smart phones.. . . [O]ur blended data RPU is advancing at a rate of $2.40 year over year or 24% over the last four quarters.[222]

140. Indeed, even AT&T admits that T-Mobile has been making major advances in smartphone sales, noting that between the fourth quarter of 2009 and the end of 2010 the percentage of T-Mobile's customers using 3G/4G smartphones doubled from 12 percent to 24 percent.[223]

2. AT&T's Claims that T-Mobile Has No Clear Path to LTE Are Misleading

141. AT&T's assertion that T-Mobile has no clear path for LTE misrepresents T-Mobile's ability to offer high-speed wireless broadband. While T-Mobile might be considered a late-comer to 3G, it has invested in rolling out a robust nationwide network and is well-positioned to compete for high-end services. It currently has the largest HSPA+ network (far larger than AT&T's) and, according to T-Mobile, its network is the largest and fastest 4G network with speeds of up to 21 Mbps.[224] According to DT's CEO, René Obermann, "[i]ndependent field surveys show that real life data transmission speeds on our network are superior to most competitors and they are at least equivalent to LTE."[225]

142. T-Mobile plans to double the speed of its HSPA+ network in 2011 to 42 Mbps, has explained that speeds of 84 Mbps and beyond are possible on HSPA+, and believes that the

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[222] Jan. 20, 2011 Deutsche Telekom Briefing at 5.

[223] Description of Transaction at 30.

[224] Jan. 20, 2011 Deutsche Telekom Briefing at 5.

[225] *Id.* at 2.

HSPA+ network will be very competitive as LTE is slowly rolled out by Verizon and AT&T.[226] Looking further ahead, T-Mobile has stated that its network will be in a good position to roll out LTE at the appropriate time:

> At the right point in time when it's needed for us we can roll out LTE more as a capacity overlay because there are awesome benefits and the capacity delivery of LTE in the right spectrum configurations that will drive better economics and better performance for our customers. But when we do that, we don't have to go and touch the lion's share of our cell sites at all. So, you can see our expectation on investment levels around the LTE rollout for T-Mobile USA are more in the $1 billion to $2 billion range for that radio infrastructure upgrade depending on how far we go and how deep we go.[227]

3. T-Mobile's Pre-Announcement Statements Contradict AT&T's Claims that T-Mobile Will Not Be an Effective Competitor Due to Spectrum Limitations

143. AT&T argues that its acquisition of T-Mobile will not reduce competition because spectrum limitations will prevent T-Mobile from being a significant competitor if it remains independent. However, these claims are contradicted by recent statements from T-Mobile's Chief Technical Officer shortly before the deal with AT&T was reached:

> [O]ne of the things that we're working aggressively on as we've been migrating our customer base from 1900 where we live with our GSM services today, all of that growth that's occurring in HSPA+ in the AWS spectrum is freeing up head room for our customers and for our business in 1900. It's almost a third of our base that's moved across to AWS. So, that's freeing up 1900 spectrum in many markets which opens up this opportunity we call refarm. That spectrum presents opportunities for us to deploy more HSPA+ or LTE and we're working through those option discussions right now. But there are many markets where already today we have a lot of 1900 spectrum we could repurpose. So, we're in a good position with refarm.[228]

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[226] *See id.* at 13 ("LTE is coming but it is going to take time for the technology to both mature from a technology perspective, for the bugs to be worked through that technology. It's also going to take time for the handset ecosystem to develop . . . [a] [m]uch richer ecosystem [is] now growing in the HSPA+ world which we will fully leverage at T-Mobile USA."). "HSPA" stands for High Speed Packet Access.

[227] *Id.* at 14.

[228] *Id.* at 16.

144. In addition, T-Mobile has told its investors that it has the financial ability to purchase additional spectrum if and when needed. As explained above, T-Mobile has outlined a clear path to grow revenues by three billion dollars over the next few years. In addition, it has indicated that it will be able to raise additional capital to fund its long-term spectrum needs through external sources and the sale of non-strategic assets, particularly its cell tower portfolio.[229] Reuters reports an analyst's estimate that the sale of T-Mobile's 7,000 cell towers could raise up to two billion dollars.[230] Such a sale would certainly raise significant capital that could be used to access additional spectrum for the long term. Thus, notwithstanding AT&T's doomsday assessment of T-Mobile's future, T-Mobile's own statements and objective evidence demonstrate that T-Mobile is, and would continue to be, a significant competitor in retail wireless absent its takeover by AT&T.

B. Local and Regional Firms with Only Seven Percent of the All Wireless Market Would Not Replace Competition from T-Mobile

145. AT&T also claims that its acquisition of T-Mobile would not significantly alter the competitive landscape because "other providers already fill – or could easily move to fill – the competitive role T-Mobile USA occupies today."[231] According to AT&T, notwithstanding the high levels of market concentration in local markets of the U.S. population,[232] the presence of an assortment of smaller regional and local competitors in many of these areas will be sufficient to ensure that the market remains competitive. In particular, AT&T points to carriers such as MetroPCS (pre-paid), Leap (pre-paid), U.S. Cellular, Cellular South (which testified that if the

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[229] *Id.* at 4.

[230] Sinead Carew & Nadia Damouni, *T-Mobile USA eyes potential $2 bln tower sale*, REUTERS (Jan. 20, 2011) (citing a Benchmark Company analyst), *available at*: <http://www.reuters.com/article/2011/01/21/tmobileusa-idUSN2025129820110121>.

[231] Description of Transaction at 70.

[232] CRA Decl. ¶ 11.

merger is allowed, "all that will remain is the endgame, where the remaining non-Bell carriers wait their turn to be acquired or bled dry"),[233] Allied Wireless, Cincinnati Bell (with only about 500,000 subscribers), Cox Communications (a cable television company providing no facilities-based wireless services),[234] and possible future wholesalers Clearwire (with funding challenges and an evolving strategy) and LightSquared (with no end-user subscribers) as potential entrants.

146. AT&T's arguments substantially overstate the competitive significance of a collection of firms that combined account for about seven percent of all wireless subscribers.[235] These local, regional, and wholesale carriers could not replace the competition that would be lost by AT&T's proposed acquisition. First, they do not and cannot constrain pricing by the national carriers to any meaningful extent.[236] Indeed, they would have no incentive to deter unilateral price increases by AT&T or coordination by the Twin Bells. Second, the four national players serve predominantly post-paid customers, while MetroPCS and Leap, two of the top three smaller players, serve predominately pre-paid customers. Third, these smaller players are not attractive options for customers seeking the most recent and high performance handsets because they generally do not (and often cannot) offer them, nor do they have the customer bases or financial resources to regularly develop innovative handsets. Indeed, Leap Wireless recently acknowledged in its Securities and Exchange FCC ("SEC") filings that "[a]s device selection and pricing become increasingly important to customers, our inability to offer customers the latest and most popular devices . . . could put us at a significant competitive disadvantage and make it

[233] Meena Testimony at 5.

[234] Declaration of Scott Kalinoski, **Attachment F** at 1-2.

[235] CRA Decl. ¶ 44.

[236] *Id*. ¶ 131.

more difficult for us to attract and retain customers."[237] Fourth, the smaller carriers cannot match the cost-efficient nationwide coverage and functionality provided by the four national carriers. As explained above, they do not have nationwide networks, and their roaming services come with significant limitations, particularly with respect to text and data. Fifth, these smaller carriers cannot compete without access to backhaul and roaming, and the proposed T Mobile takeover would increase AT&T's control over these critical inputs and allow it to raise its rivals' costs. Sixth, these smaller carriers lack the brand strength to compete more widely. Seventh, these carriers are extremely small in comparison with AT&T and Verizon. While AT&T trumpets that in the fourth quarter of 2010 Leap and MetroPCS added 100,000 and 300,000 subscribers, respectively, the fact is they remain fringe players.[238] Finally, not even AT&T's own business people take potential competition from wholesalers such as LightSquared and Clearwire seriously. As John Stankey, President and CEO of AT&T Business Solutions, admits: "We have two people staking out a wholesale play in the market. It's hard in economic theory and it's hard in past practice in telecommunications to ever find a market where two wholesale players ever competed effectively."[239]

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[237] Leap Wireless International, Inc., Annual Report (Form 10-K), at 10 (Feb. 25, 2011).

[238] CRA Decl. ¶ 44; Press Release, AT&T, Inc., AT&T Reports Record 2.8 Million Wireless Net Adds, Strong U-verse Sales, Continued Revenue Gains in the Fourth Quarter (Jan. 27, 2011) available at: <http://www.att.com/gen/pressroom?pid=18952&cdvn=news&newsarticleid=31519&mapcode=financial>.

[239] Karl Bode, *AT&T's Stankey Trash Talks Clearwire, LightSquared: Suggests They Have to Merge to be Viable*, BROADBAND DSL REPORTS (May 16, 2011), *available at*: <http://www.dslreports.com/shownews/ATTs-Stankey-Trash-Talks-Clearwire-Lightsquared-114242>.

C. T-Mobile is the Downward Price Leader in the Wholesale Market for Mobile Wireless Services Provided Over National Networks

147. Among the Big Four nationwide carriers, T-Mobile has been a maverick on price and innovation in the industry. T-Mobile's prices through wholesale channels like USA Mobility are consistently lower than the prices of the other major nationwide carriers. The FCC's latest competition report found that T-Mobile had the lowest-priced retail plans of the four nationwide carriers-10 dollars per month lower than AT&T and Verizon for unlimited voice, and 20 dollars per month lower than AT&T and Verizon for all other plans, including unlimited voice, text, and smartphone data.[240] The savings for USA Mobility and its customers from T-Mobile's wholesale plans are comparable. Indeed, AT&T concedes that "value-conscious consumers . . . have long constituted T-Mobile USA's base,"[241] and the same goes for USA Mobility's value-conscious enterprise and governmental customers.[242] T-Mobile is also a market leader in innovation, having been one of the first carriers to introduce smartphone data plans and technology.[243] Smartphones and data plans have now become standard in the industry and key components of any service plan for large enterprise customers. In addition, T-Mobile is the only national carrier other than AT&T to operate a GSM network—now the most widely used standard in the world.[244] T-Mobile's network enables customers of some companies to use the same phone and number in

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[240] *Fourteenth Wireless Competition Report* ¶ 92. Sprint and T-Mobile tied for lowest- priced plan for voice, text, and smartphone data. *See id.*

[241] AT&T/T-Mobile Public Interest Statement at 71.

[242] *See also* Economics and Technology Inc., *And Then There Were Three: AT&T Swallows T-Mobile,* Mar. 2011, at 1, *available at* http://econtech.com/newsletter/ETIViewsandNewsMarch2011.pdf *("ETI Study")* ("T-Mobile has been the only major national carrier to break rank on pricing and contract terms.").

[243] *AAI Study* at 2.

[244] For instance, the European Community has long mandated that its carriers use the GSM standard for providing wireless services. *See Fourteenth Wireless Competition Report* ¶ 108 n.294.

more than 150 countries and locations worldwide.[245] This international connectivity is especially important to these large enterprise customers, many of which have employees that travel outside the United States on business. Thus, AT&T's assertion that T-Mobile "has steadily lost market share" in an undifferentiated market for mobile wireless services does not paint an accurate picture.[246] That claim obscures the fact that T-Mobile appears to be a growing competitor in the large enterprise and governmental segments.

148. T-Mobile's price leadership benefits customers of all anti-merger cellular telecommunications providers (not to mention mass market consumers) and has a disciplining effect on AT&T. Notably, USA Mobility recently entered into deals to provide 1,000 T-Mobile lines to one large customer and 2,000 T-Mobile lines to another. These customers chose T-Mobile because of its attractive pricing and its nationwide coverage. And although AT&T claims that it "does not view T-Mobile as a . . . major competitive threat,"[247] empirical evidence demonstrates otherwise. Indeed, the FCC recently found that "T-Mobile's price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings,"[248] and pointed to an instance in January 2010 where a reduction in T-Mobile's prices prompted AT&T and Verizon to respond with price cuts of their own.[249] The FCC's observation comports with the notion that T-Mobile's downward price leadership has prevented AT&T from instituting price increases in the wholesale market, even though AT&T tends to charge a steady premium for its services.

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[245] *See for example,* USA Mobility Products, T-Mobile Services: Enterprise Voice and Data Solutions, *available at* http://usamobility.com/products/wirelessphones/ tmobile_content.asp

[246] *See* At& T/T-Mobile Public Interest Statement at 71.

[247] *Id.* At 98.

[248] *Fourteenth Wireless Competition Report* ¶ 92.

[249] *Id.*

D. The Proposed Transaction Would Remove an Important, Innovative, Price-Disciplining Retail Competitor and Wholesale Customer

149. If the Tribunal were to deny Claimant injunctive relief as to AT&T's acquisition of T-Mobile, the combined entity would have the incentive and ability to raise wholesale prices for not just its own customers, but customers of all wireless telecommunications services providers. T-Mobile's exit from the supply side of the wholesale market would eliminate a key, low-priced input for integrated wireless communications providers. Absent T-Mobile's market-leading low prices, AT&T would face diminished price competition and have a freer hand to raise prices, particularly through wholesale channels serving enterprises and governmental customers that demand nationwide coverage. And for enterprise and governmental customers that demand international connectivity on a GSM network, AT&T would be in a position to charge monopoly rates, as the only major GSM carrier left standing in the U.S.

150. MetroPCS, Leap Wireless, and other smaller carriers would not discipline AT&T's post-transaction pricing in the wholesale market because, as discussed above, they lack truly national networks, do not offer contract-based plans, and are therefore not viewed as adequate substitutes. While many such customers would respond to a small but significant price increase from AT&T by switching to T-Mobile, they would not do so by switching to a small, value-oriented carrier such as MetroPCS.[250] Indeed, AT&T has conceded in earnings calls with investors that "pay-in-advance" services like those offered by MetroPCS and Leap Wireless do not exert competitive pressure on its post-paid rate plans.[251] And even if such customers were to

[250] *See ETI Study* at 1 ("Losing T-Mobile as a competitor leaves MetroPCS as the next largets carrier to challenge prices . . . . [T]he MetroPCS pricing scheme has not elicited any response from AT&T or Verizon.").

[251] *See* AT&T Q2 2009 Earnings Call Transcript, Question-and-Answer Session, Jul. 23, 2009, *available at* http://seekingalpha.com/article/150935-at-amp-t-q2-2009-earningscall-transcript?part=qanda (reporting that AT&T CFO Richard Lindner told investors that AT&T offered the

consider switching to a regional carrier after an AT&T price increase, a recent study by the American Antitrust Institute found that these regional carriers "do not have access to enough spectrum to enable them to service substantially more customers.[252] Regional carriers such as MetroPCS and Leap Wireless thus would not "easily move to fill . . . the competitive role T-Mobile USA occupies today."[253] And without MetroPCS and Leap Wireless filling that gap, "the proposed merger creates a real danger of price increases."[254]

151. Several economic studies confirm that the mobile wireless industry would be highly concentrated and far less competitive if the transaction were allowed to proceed. For instance, Stanford economists Roger Noll and Gregory Rosston, applying the Herfindahl—Hirschman Index ("HHI") to measure concentration, estimated a 600-point post-transaction increase to roughly 3,100 HHI.[255] Similarly, the American Antitrust Institute estimated a 600-point increase "to over 3,000 Hill in a highly concentrated market,"[256] while a study from Economics and Technology Inc. projected a 759-point increase to 3,280 HHI.[257] Notably, each of these studies proceeded from estimates of current industry consolidation that were several hundred points lower that the FCC's latest pre-transaction valuation of 2,848 HHI.[258] Thus, the

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GoPhone, a pre-paid service, because it knew that the service "would [not] impact or cannibalize our postpaid base").

[252] *AAI Study* at 3.

[253] AT&T/T-Mobile Public Interest Statement at 70.

[254] *AAI Study* at 3.

[255] Roger G. Noll and Gregory L. Rosston, *Competitive Implications of the Proposed Acquisition of T-Mobile by AT&T Mobility,* SIEPR Policy Brief, Apr. 2011, at 2, *available at* siepr.stanford.edu/system/filesishared/documents/ pb_04_2011.pdf.

[256] AAI Study at 2.

[257] *ETI Study* at 1.

[258] *See Fourteenth Wireless Competition Report* ¶ 4.

FCC's post-transaction valuation of industry consolidation would likely be even higher than these economists' estimates.

152. All of these estimates are well above thresholds used by the FCC and the Department of Justice ("DOJ") for merger review and, under the DOJ' s analysis, thus create a presumption that AT&T will have the power to raise prices post-transaction. According to its recently revised Horizontal Merger Guidelines, the DOJ rates markets with 2500 HHI and higher as "highly concentrated," and "presume[s]" that "[m]ergers resulting in highly concentrated markets that involve an increase . . . of more than 200 points will . . . be likely to enhance market power."[259] Similarly, the FCC applies an HHI "screen" to identify service areas where "the post-transaction HHI would be both greater than 2800 and would increase by at least 100," and then subjects those service areas to a "further case-by-case competitive analysis."[260] Even the lowest-end economist estimate—a 600-point rise to "over 3,000 HHI"—would easily meet either agency's threshold and support a presumption of anticompetitive effects.

153. AT&T has failed to overcome this presumption generally, or in particular regarding the wholesale market for mobile wireless services. Indeed, AT&T's Public Interest Statement focuses exclusively on purely retail price effects, and completely sidesteps the critical issue of price effects in the wholesale market for mobile wireless services.[261] The only substantive discussion of a "wholesale market" relates to the wholesale spectrum market—for instance, when discussing Clearwire or LightSquared leasing spectrum to non-facilities-based

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[259] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, Sec. 5.3 (2010).

[260] *See 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,* FCC 10-81, ¶ 52 (rel. May 20, 2010).

[261] *See generally* AT&T/T-Mobile Public Interest Statement at 95-103 (discussing competitive effects in retail markets alone).

Mobile Virtual Network Operators ("MVNOs").[262] Even there, AT&T's arguments ultimately focus on the competition that MVNOs purportedly offer in the retail market for wireless services; they do not address the wholesale market for wireless services provided through integrated wireless communications providers.

154. Thus, in the wholesale market for mobile wireless services, AT&T has failed to meet its "burden of proving, by a preponderance of the evidence, that the Proposed Transaction, on balance, will serve the public interest."[263] AT&T has not adequately shown that the loss of T-Mobile as a nationwide would enhance competition,[264] that a combined entity would lack the ability to raise prices through wholesale channels, or that a regional carrier would be able to counter these higher prices. Nor could it; for the reasons discussed above, the transaction would yield net anticompetitive effects, particularly as to the plethora consumers who fall in the same position as Claimant.

E. As a Result of the Acquisition, AT&T Would No Longer Face Pricing Pressure from T-Mobile and Would Raise Prices to Wholesale and Enterprise Customers

155. One need only be an American who occasionally watches television to know that T-Mobile is the upstart “maverick” of the U.S. retail wireless marketplace, with the lowest priced consumer rate plans, the most imaginative branding and marketing, and with broad appeal to families and particularly to younger adults. The FCC’s most recent Wireless Competition Report

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[262] *See id.* at 94, 100.

[263] *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*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 ¶ 26 (2008).

[264] *See id.* ¶ 28 (stating that the Commission will "consider[] whether a transaction will enhance, rather than merely preserve, existing competition").

testifies to T-Mobile's current leadership in disciplining retail wireless prices- especially that of AT&T and other giant carrier, Verizon Wireless:

> Even before T-Mobile launched its new pricing plans, Verizon Wireless and AT&T priced their postpaid service offerings at a premium relative to those of T-Mobile and Sprint Nextel. . . . T-Mobile's price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings. In January 2010, Verizon Wireless reduced the prices of its unlimited voice plans for both individual and shared family offerings. Later the same day, AT&T responded to Verizon Wireless's changes with matching price reductions on its unlimited voice plans. While Verizon Wireless's and AT&T's unlimited plan price cuts were significant, their postpaid service offerings remained the most expensive in the industry, even following these price changes . . . . Verizon Wireless and AT&T shared a virtually identical tiered pricing structure before and after these pricing changes. . .

156. More specifically, a recent Consumer Reports survey reveals that T-Mobile customers typically pay between $15 and $50 less per month for their wireless service than they would under comparable AT&T rate plans,[265] and its customer service and satisfaction are regularly rated far higher than AT&T's. Indeed, according to another recent Consumer Reports survey, AT&T is the lowest-scoring wireless carrier in the U.S., and of all the providers rated, AT&T was the only one to drop significantly in overall satisfaction.[266] Despite AT&T's assurances that pre-existing T-Mobile subscribers will continue to enjoy their lower-priced service plans for a limited interval (but not "indefinitely"), AT&T is conspicuously silent when it comes to new subscribers or the longer terra, and predictably will force former T-Mobile

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[265] Consumer Reports, *"CR Analysis: T-Mobile is cheaper than AT&T,"* April 8, 2011, *available at* http://news.consumerreports.org/electronics/2011/04/cr-analysis-t-mobile-is-cheaper-thanatt.html.

[266] Consumer Reports, "Cell-Service Ratings: AT&T is the Worst Carrier," Dec. 6, 2010, *available at* http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html.

subscribers off their "legacy" plans and onto the higher-priced AT&T plans when the slightest change is ordered.[267]

157. T-Mobile has also been a key innovator in the retail wireless market. It was the first U.S. network to support the extremely popular Android smart phone, it has been a pioneer and market leader in unlimited minutes and text messaging plans and deeply discounted family plans, and its predecessor, VoiceStream, was the first to offer two-way text messaging.[268]

158. Finally—and of critical importance to the prospects for a robust wholesale market in the wireless sector-- as discussed earlier, T-Mobile also has been the most likely significant customer for wholesale wireless broadband network capacity. With the proposed acquisition of T-Mobile, however, the addressable wholesale market will potentially be materially impacted as AT&T eliminates yet another large former retail competitor.

159. In sum, it is imperative to the future of competition and innovation in the wholesale and retail U.S. wireless marketplace, and indeed to the survival of the consumer and enterprise benefits that competition and innovation have forged in that marketplace since the advent of the FCC's pro-competitive, pro-entry wireless policies of the 1990s, that the FCC as well as the Department of Justice pursue an intensive and complete investigation into this proposed merger.

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[267] *See* Washington Post, "AT&T, "T-Mobile file Merger Application: Q&A with James Cicconi," April 11, 2011, *available at* http://www.washingtonpost.com/blogs/post-tech/post/atandt-tmobile-file-merger-application-qandawith-james-cicconi/2011/04/11/AFhzCTQD_blog.html.

[268] *See 2010 Wireless Competition Report, supra; Thirteenth Report* (WT Docket No. 08-27), FCC 09-54 (rel. Jan. 16, 2009) at ¶ 112.

F. AT&T and Verizon Control Essential Roaming Services and the Merger Will Remove T-Mobile, Which Has More Reasonable Roaming Policies

160. AT&T and Verizon are the only realistic providers to which other carriers can go for nationwide roaming.[269] AT&T and T-Mobile admit in their Senate testimony that consumers expect nationwide service, not just service in their home areas,[270] and any carrier which cannot offer truly nationwide service at a competitive rate is doomed to die a slow and painful death. But the only way mid-tier, regional and rural carriers, can offer nationwide service is though roaming agreements with these very same providers. As has been shown to the FCC over and over, AT&T and Verizon have been less than model citizens when it comes to offering roaming services on reasonable terms and conditions. These carriers have pervasively charged rates greatly in excess of their costs (plus a reasonable profit), imposed exclusionary terms forbidding certain types of competition from the regional and smaller carriers, or both.[271] Indeed, AT&T repeatedly has refused to make 3G data roaming available, and has prevented regional competitors from competing for roaming traffic by requiring its roaming partners to route to

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

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

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

AT&T rather than competitors whenever AT&T's signal is available.[272] Verizon has charged competitors a rate for voice services roaming that is many times higher than the rate it charges its own retail customers for comparable services. Yet its cost to serve its own customers must be higher than those to serve roamers, since Verizon need not incur costs such as number administration and billing for roamers. Verizon also has denied even 2G data roaming and offered it at rates that are simply breathtaking.[273]

161. The serious problems in the roaming market will be exacerbated if and when AT&T and T-Mobile join forces. T-Mobile has been a better roaming partner than AT&T – and the companies like MetroPCS expect it would still have been one for 4G LTE when deployed.[274] Today, at least T-Mobile provides some level of competition to AT&T in GSM roaming. By acquiring T-Mobile, AT&T will at one stroke eliminate its only large competitor for GSM roaming partners. Mid-tier, regional and rural carriers using GSM will not even have the limited roaming alternative to AT&T that T-Mobile has provided.

162. This loss of choice will go beyond GSM services. As noted above, AT&T has in the past refused to allow 3G data roaming and, given its track record, it can be expected to

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

[273] OPASTCO indicated that a nationwide carrier for 3G roaming services (which, on information and belief, MetroPCS understands to be Verizon) had offered data roaming at rates up to $1 per megabyte. *See* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at 4 (filed June 14, 2010) (stating that roaming rates for data range from 30 cents/MB to $1/MB). If a customer uses just 20% of its data usage while roaming and has 400 MB per month on average, the roaming charged would be $160 per month *just for roaming.*

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

exploit every possible means of denying advanced data roaming service even under the FCC's new data roaming order,[275] such as by denying that services are technically compatible or technically feasible, imposing exorbitant rates, or insisting upon anticompetitive terms such as those it has historically used for hobbling competitors.

163. T-Mobile has provided a useful competitive alternative in the 3G market and but for the merger, might eventually cause AT&T to step up to its duties in this regard. But now, to support the merger, T-Mobile claims to have insufficient spectrum to deploy LTE on a single 20 MHz channel,[276] thereby suggesting that it will be unable to provide a competitive alternative to AT&T for data roaming in the post-3G world. T-Mobile fails to mention, however, that: (1) it can offer LTE on a channel as small as 1.4 MHz to start – or 3 MHz in total – and can refarm its inefficient technology; (2) technology improvements are coming which will allow bonding of non-adjacent channels to form a single 20 MHz channel for LTE, and (3) additional spectrum should be forthcoming and would allow T-Mobile to deploy 4G LTE. These are not pipe dreams – MetroPCS is today offering 4G LTE on 1.4 MHz channels in Boston and Philadelphia, among others. While smaller carriers need more spectrum to compete as technology continues to develop, they stand as living proof that T-Mobile's characterization of its current spectrum situation is mere poor-mouthing.

G. The Competitive Analysis of the Special Access Markets Should Not Include Fringe Competitors

164. In its market analysis, the Tribunal need not consider fringe competition from so-called nascent services, such as Wi-Max, fixed wireless, satellite, and broadband over powerline.

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

[276] Introductory Remarks by Philipp Humm, CEO T-Mobile USA, Inc., May 11, 2011, at 1 (*"Humm Testimony").*

Although AT&T is likely to point to such services, the market shares of these competitors is infinitesimally small. T-Mobile has informed the FCC in WC Docket 0525 that its use of alternative technologies "amount to approximately one percent of T-Mobile's special access needs."[277] As the Department of Justice ("DOJ") has recognized, because none of these services has ever been shown to generate a "substantial share" of the market, it is likely that their presence in the market will not impede the ILEC's "ability to raise prices without losing sufficient sales."[278] In addition to their lack of substantial market presence, the lack of brand presence by these competitors and the "superior capacity and coverage" of AT&T's network renders these "fringe" competitors unlikely to "prevent anticompetitive behavior" that otherwise would occur in a monopoly market.[279] In the special access market, and even among wireless providers that use special access for backhaul, these nascent technologies do not provide significant competition.[280]

165. Sprint, for example, has explained that "[m]icrowave backhaul cannot completely replace wireline special access services," because of concerns regarding topology, economic efficiency, equipment costs and service availability.[281] As it stands, retail wireless providers continue to favor the security, reliability and scalability of fiber-based services to support their customers' rapidly expanding use of mobile data services.

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[277] T-Mobile 2007 Reply Comments at 3; *see* T-Mobile 2010 Reply comments at 4 ("self-provisioning, using fixed microwave links or otherwise" is not "a viable alternative.")

[278] *See MCI-Sprint* DOJ Complaint, ¶ 70.

[279] *Id.*, ¶71.

[280] *See* Clearwire Reply Comments, WC Docket No. 05.25 (August 15, 2007) (explaining how WiMax is not a viable backhaul competitor).

[281] *See* Ex parte Letter from Charles W. McKee, Sprint to Marlene H. Dortch, FCC, WC Docket No. 05-25 (filed April 6, 2010).

IX. THE PROPOSED TRANSACTION WOULD PROVIDE AT&T WITH UNPRECEDENTED CONTROL OVER SPECTRUM IDEALLY SUITED FOR MOBILE BROADBAND SERVICE

166. As part of its competitive analysis of a major transaction, the Tribunal must examine the effects that the transaction would have on the "input market for spectrum available for the provision of mobile telephony/broadband services."[282] As the FCC has pointed out, "[a]ccess to spectrum is a precondition to the provision of mobile wireless service. Ensuring that sufficient spectrum is available for incumbent licensees, as well as for entities that need spectrum to enter the market, is critical for promoting competition, investment, and innovation."[283] New entrants require access to sufficient spectrum to enter the wireless marketplace and compete with established licensees, while incumbents require additional spectrum to increase coverage or capacity as they expand their subscriber bases and work to meet increasing demand. Given the critical nature of this input, significant differences between carriers' spectrum holdings can have a decisive impact on the provision of frequency-intensive mobile broadband services. If one carrier can hoard large volumes of this resource, other providers may have limited capacities and lack the bandwidth necessary to innovate and compete effectively for subscribers.[284]

167. AT&T's proposed acquisition of T-Mobile would transform the nation's "input market for spectrum," by providing AT&T with an extraordinary and unprecedented aggregation of bandwidth. The addition of T-Mobile's population-weighted average of 50 MHz, along with Qualcomm's 700 MHz holdings, would give AT&T a nationwide, population-weighted average

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[282] *AT&T-Centennial Merger Order* ¶ 34.

[283] *14th CMRS Competition Report* ¶ 251.

[284] CRA Decl. ¶ 80. In addition, because there are significant scale economies in the provision of wireless services, a carrier with limited spectrum and a commensurately small subscriber share will likely have higher costs per subscriber than a carrier with large spectrum holdings and a large subscriber share. *Id*.

of 144 MHz of spectrum for mobile telephony/broadband services – approximately 50 percent more than Verizon and almost three times Sprint's current holdings. And, at the local market level, AT&T's vast spectrum portfolio would exceed the FCC's "spectrum screen" threshold in over one-quarter of all local market areas in the United States.

168. Beyond these megahertz counts, however, AT&T's spectrum holdings at both the national and local levels following the transaction would be particularly formidable, because the proposed takeover would add T-Mobile's desirable AWS (1.7/2.1 GHz) and PCS (1.9 GHz) spectrum to AT&T's already substantial share of "beachfront spectrum" below 1 GHz. This unprecedented aggregation of highly valuable spectrum would cause serious competitive harm in the mobile wireless marketplace. With AT&T (and Verizon) controlling the most valuable portion of the nation's mobile telephony/broadband spectrum, other competitors would be unable to meet their capacity needs in these core wireless spectrum bands. Without the same quantity or quality of spectrum as the Twin Bells, other carriers would have to incur the costs associated with developing infrastructure, equipment, and ecosystems in new spectrum bands. Having shifted these development costs to its smaller competitors, AT&T could fully exploit the scale efficiencies and mature ecosystems in its own core spectrum bands. The Tribunal should prevent these anti-competitive harms and halt AT&T's attempted spectrum grab by blocking the Proposed Transaction.

A. Following the Proposed Transaction, AT&T Would Have Far More Nationwide Licensed Spectrum Suitable for Mobile Telephone/Broadband Services Than Any Other CMRS Carrier

169. Competition among wireless service providers now takes place on a national basis, and the Tribunal should therefore evaluate the competitive effects of the Proposed

Transaction at a national level. As part of this analysis, the Tribunal should closely examine the transaction's impact on carriers' nationwide spectrum holdings.

170. Today, AT&T already controls an enormous volume of nationwide spectrum suitable for mobile telephony/broadband services, given its extensive holdings in the 700 MHz, cellular, PCS, and AWS spectrum bands. This concentration of spectrum is shown in the chart below, which provides wireless carriers' population-weighted nationwide spectrum holdings for mobile telephony/broadband services. These carriers include the four national providers, MetroPCS, Leap, U.S. Cellular, and mobile broadband provider Clearwire (which is not a CMRS provider).[285] As shown, including the 700 MHz spectrum that AT&T is acquiring from Qualcomm,[286] AT&T has a nationwide average of 94 MHz of spectrum suitable for mobile

[285] This chart does not include spectrum in the 2.5 GHz band (such as Educational Broadband Service ("EBS") spectrum) that the Commission has found unsuitable for mobile telephony/broadband services in its spectrum screen analysis. In addition, the chart's attribution of 14 MHz of 800 MHz spectrum to Sprint is based not on a population-weighted nationwide spectrum calculation, but instead on a general assessment of Sprint's current Enhanced Specialize Mobile Radio ("ESMR") spectrum holdings in this band. Because the 800 MHz band is in the midst of a multi-year reconfiguration process, a precise, population-weighted analysis in this band is not feasible at this time. Sprint's spectrum at 800 MHz is presently unavailable for broadband deployment due to the interleaved nature of this spectrum and its proximity to public safety receivers. In addition, it is not yet known how much 800 MHz spectrum Sprint will be able to utilize in the areas adjacent to the U.S.-Mexico border. *See, e.g.*, *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) ("*800 MHz Report and Order"*), *aff'd sub nom*. *Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006).

[286] On January 13, 2011, AT&T and Qualcomm Incorporated ("Qualcomm") submitted an application seeking the Commission's approval for the assignment of Qualcomm's Lower 700 MHz band licenses to AT&T. Application of Qualcomm Incorporated, Assignor, to AT&T Mobility Spectrum LLC, Assignee, File No. 0004566825, WT Docket No. 11-18 (Jan. 13, 2011) ("AT&T-Qualcomm Application"). If approved, this transaction will enable AT&T to acquire Qualcomm's six Lower 700 MHz D Block (6 MHz) licenses, which collectively have a nationwide footprint, and five Lower 700 MHz E Block (6 MHz) licenses in five large markets. In addition to these Qualcomm licenses, there are pending applications to assign or transfer 44 other 700 MHz band licenses to AT&T. *See* ULS File Nos. 0004544869 and 0004544863 (proposing the assignment of six Lower 700 MHz B Block licenses and three Lower 700 MHz C

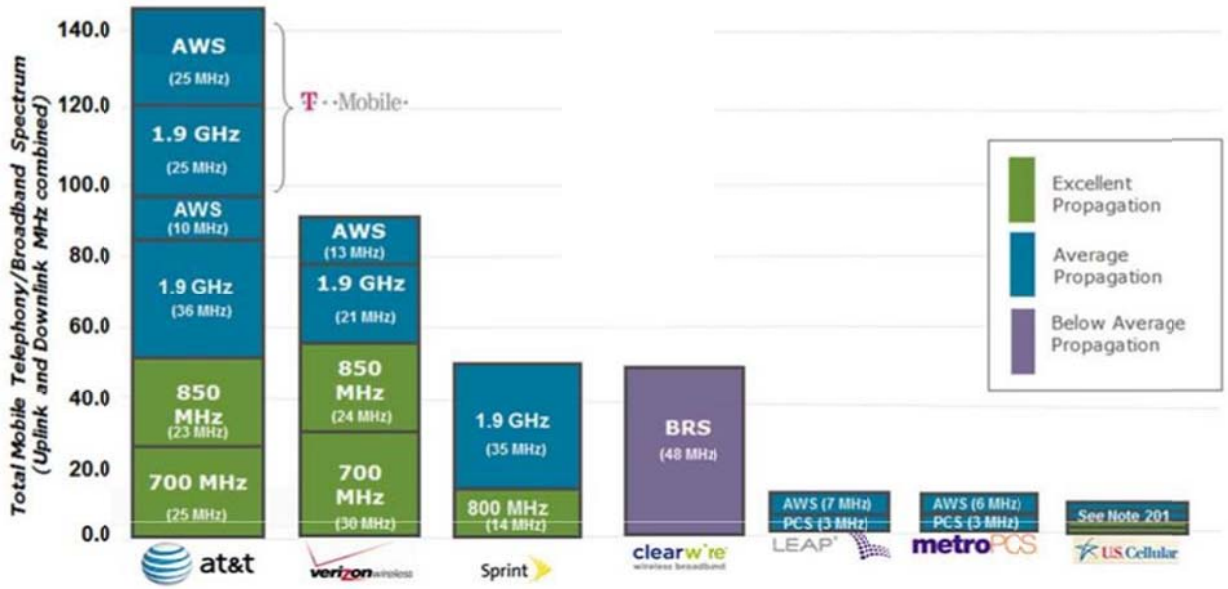
telephony/broadband services, exceeding Verizon's total of 88 MHz.[287] On a nationwide basis, AT&T has approximately 90 percent more spectrum than Sprint and T-Mobile each, and Verizon has approximately 75 percent more spectrum than each of those carriers. In addition, AT&T and Verizon each has more than three times the amount of spectrum held by MetroPCS, Leap, and U.S. Cellular[288] combined. As T-Mobile itself has observed, "substantial disparity has developed between the spectrum holdings of the two largest U.S. wireless carriers and the more limited spectrum resources of all of their competitors."[289]

Block licenses from Whidbey Telephone Company to AT&T); ULS File No. 0004621016 (proposing the assignment of one Lower 700 MHz C Block license from 700 MHz, LLC to AT&T); ULS File No. 0004635440 (proposing the assignment of one Lower 700 MHz B Block license from Knology of Kansas, Inc. to AT&T); ULS File No. 0004643747 (proposing the transfer of control of five Lower 700 MHz B Block licenses and seventeen Lower 700 MHz C Block licenses from Redwood Wireless Corp. to AT&T); ULS File No. 0004681773 (proposing the assignment of one Lower 700 MHz B Block license from Windstream Lakedale, Inc. to AT&T); ULS File No. 0004681771 (proposing the assignment of three Lower 700 MHz B Block licenses from Windstream Iowa Communications, Inc. to AT&T); ULS File International, LLC to AT&T); ULS File No. 0004448347 (proposing the assignment of six Lower 700 MHz C Block licenses from D&E Investments, Inc. to AT&T).

[287] AT&T also holds a nationwide average of approximately 13 MHz of Wireless Communications Service ("WCS") spectrum in the 2.3 GHz band. This WCS spectrum is not included in the chart below, despite the Commission's 2010 order amending its WCS rules to "enable licensees to provide mobile broadband services in 25 megahertz of the WCS band." *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band,* Report and Order and Second Report and Order, 25 FCC Rcd 11710, ¶ 1 (2010) ("*WCS R&O*"). Claimant takes this conservative approach toward AT&T's WCS holdings in light of the Commission's previous exclusion of WCS frequencies from its spectrum screen analysis.

[288] U.S. Cellular holds approximately 2 MHz of spectrum in each of the 700 MHz, 850 MHz, 1.9 GHz (or PCS), and AWS bands, for a total of 8 MHz.

[289] Letter from Thomas Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Chairman Rick Boucher and Ranking Member Cliff Stearns, H. Subcomm. on Communications, Technology and the Internet, at 3 (Sep. 23, 2009), attached to Letter from Cheryl A. Tritt, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WT Docket No. 06-150 (Sept. 24, 2009).



171. The Proposed Transaction would increase AT&T's concentration of spectrum in the PCS and AWS bands by approximately 50 MHz, based on T-Mobile's current population-weighted nationwide holdings. Thus, if the Tribunal does not enjoin the proposed takeover, AT&T would hold a nationwide average of 144 MHz suitable for mobile telephony/broadband services, far exceeding even Verizon's holdings. 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.

172. If the Tribunal allows this vertically integrated Bell company unprecedented control over the wireless industry's core spectrum bands, the resulting spectrum imbalance would cause serious competitive harm, both nationally and at the local level. The Tribunal should refuse to permit this outcome.

B. The Transaction Would Concentrate Vast Amounts of Scarce Spectrum in the Hands of AT&T

173. As the wireless industry has grown ever more concentrated, AT&T has also amassed a vast war chest of spectrum—"an increasingly pivotal input" for wireless providers.[290] In the past decade, AT&T has aggregated large portions of the cellular/PCS bands through its acquisitions of Telecorp (2002), Highland Cellular and BellSouth (2006), Dobson Communications (2007), Edge Wireless and McBride Spectrum Partners I (2008), and Centennial Communications (2009), as well as former Alltel spectrum from Verizon (2010).[291] AT&T also purchased 48 AWS-1 licenses at auction in 2006 (Auction No. 66) for approximately $1.3 billion—licenses that cover nearly 200 million POPs.[292]

174. AT&T's appetite for spectrum has been particularly ravenous in the 700 MHz band, where it purchased spectrum from Aloha in 2007 covering 72 of the 100 largest markets in the U.S., and where, in 2008, it bid $6.6 billion to acquire an additional 227 B Block licenses during the FCC's 700 MHz auction (Auction No. 73).[293] AT&T and Verizon collectively acquired 70 percent of the available 700 MHz spectrum in that auction.[294] AT&T then continued its run on beachfront 700 MHz spectrum earlier this year when it announced a deal to acquire Qualcomm's 700 MHz licenses, "including six D block licenses, which together provide a nationwide footprint, and five E block licenses in the Boston, Los Angeles, New York,

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[290] *Fourteenth Wireless Competition Report* ¶ 4.

[291] GAO 2010 Wireless Report at 12, Figure 2; Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses, WT Docket No. 09-104 (June 22, 2010).

[292] *See* Top 10, Bidders, FCC Advanced Wireless Services Auction No. 66, available at http://wireless.fcc.gov/auctions/66/charts/66press_3.pdf.

[293] *See* Stifel Nicolaus, Special Focus: The Wireless World After 700 MHz(March 28,2008).

[294] *Id.* at 2-3.

Philadelphia, and San Francisco Economic Areas.[295] Several parties have filed petitions to deny the transfer of Qualcomm's 700 MHz licenses to AT&T,[296] many of which are still pending.[297] And just in the past two weeks, the FCC has opened three proceedings on new applications from AT&T to acquire a total of 27 Lower 700 MHz B and C Block licenses (along with 15 AWS licenses) from Knology, Redwood Wireless, and Windstream.[298]

175. In the wake of this unprecedented spectrum aggregation, AT&T claims that it somehow "faces network spectrum and capacity constraints more severe than those of any other wireless provider.[299] But AT&T's spectrum stockpile was already the largest of any of the four major national carriers before it proposed to acquire T-Mobile. A recent study by J.P. Morgan estimated that AT&T currently holds 100 MHz on average in the top 100 markets nationwide,

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[295] AT&T and Qualcomm Public Interest Statement at 2, *Applications of AT&T MobilitySpectrum LLC and Qualcomm Inc. for Consent to the Assignment of Licenses and Authorizations,* WT Docket No. 11-18 (filed Jan. 13, 2011).

[296] *See* Petition to Deny of Rural Cellular Association, *Applications of AT&T MobilitySpectrum LLC and Qualcomm Inc. for Consent to the Assignment of Licenses and Authorizations,* WT Docket No. 11-18 (filed Mar. 11, 2011).

[297] RCA and five other petitioners in the AT&T/Qualcomm proceeding have filed a Joint Motion to Consolidate that proceeding with the Commission's review of the AT&T/TMobile transaction. *See* Joint Motion to Consolidate, *Applications of AT&T MobilitySpectrum LLC and Qualcomm Inc. for Consent to the Assignment of Licenses and Authorizations,* WT Docket No. 11-18 (filed Apr. 27, 2011).

[298] *See* Public Notice, *AT&T Mobility Spectrum LLC and Knology of Kansas, Inc. Seek FCC Consent to the Assignment of One Lower 700 MHz Band B Block License*, DA 11-922, ULS File No. 0004635440 (rel. May 19, 2011); Public Notice, *Shareholders of Redwood 700, Inc. and AT&T Inc. Seek FCC Consent to the Transfer of Control of Lower 700 MHz Band B and C Block Licenses Held by Redwood Wireless Corp.*, DA 11-943, ULS File No. 0004643747 (rel. May 24, 2011); Public Notice, *AT&T Mobility LLC and Windstream Iowa Communications, Inc. and Windstream Lakedale, Inc. Seek FCC Consent to the Assignment of Lower 700 MHz Band B Block and Advanced Wireless Services Licenses.*, DA 11-955, ULS File Nos. 0004681771 and 0004681773 (rel. May 26, 2011).

[299] AT&T/T-Mobile Public Interest Statement at 1.

without counting T-Mobile's spectrum licenses towards AT&T's tota1.[300] AT&T's next closest competitor, Verizon, holds "just over 90 MHz"-10 percent less spectrum on average than AT&T.[301] AT&T admits that Verizon, for its part, is "'extremely confident' it has the 'spectrum position' it needs" to roll out a nationwide 4G LTE network.[302] And J.P. Morgan also found that "AT&T and Verizon also have the highest-quality spectrum . . . with large holdings below 1 GHz."[303] Thus, as discussed further below, AT&T's claim that it is facing debilitating spectrum constraints rings hollow.

176. By adding T-Mobile's significant spectrum holdings to AT&T's, the Proposed Transaction would only cement AT&T's dominant spectrum position at the expense of the rest of the industry. According to J.P. Morgan, AT&T and T-Mobile would own, on a combined basis, "approximately 150 MHz on average, with the top 100 markets ranging from 85 to 180 MHz."[304] Such a massive aggregation of an essential input like spectrum plainly has harmful effects on competition.[305] Spectrum that AT&T amasses for itself is spectrum that smaller rivals cannot use to compete. As AT&T's spectrum portfolio swells while competitive carriers' holdings remain constant at levels already far behind AT&T, these carriers would become less effective competitors relative to AT&T. Importantly, a merged AT&T/T-Mobile would find it easier to raise its prices by a small but significant and non-transitory amount, as small and independent

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[300] J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings,* Mar. 30, 2011, at 1, *available at* hitps://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=ap*d_569842.pdf*h_-ifi22f3 *("J.P. Morgan Spectrum Study").*

[301] *Id; see also id.* (estimating that "Sprint and T-Mobile USA each have –50 MHz").

[302] AT&T/T-Mobile Public Interest Statement at 79.

[303] *J.P. Morgan Spectrum Study* at 1.

[304] *Id.* at 1. The combined spectrum of AT&T and T-Mobile would also exceed Clearwire's spectrum holdings, which average 140 MHz across the country. *See id.* at 2.

[305] *See Crampton* Report at 3-6.

telecommunications providers would face significant spectrum limitations in their efforts to expand service offerings to recruit AT&T customers. And as smaller carriers become less effective competitors, they become less able to retain subscribers, less able to maintain a consistent revenue stream, and less able to attract sufficient capital to invest in infrastructure, handsets, and service quality.

C. AT&T's Post-Transaction Spectrum Holdings Would Exceed the FCC's Spectrum Screen Threshold in Over One-Quarter of Local Markets

177. Since 2004, the FCC has utilized an initial "spectrum screen" to guide its competitive analysis of major wireless transactions in local markets.[306] In markets where applicants' volume of spectrum falls below the FCC's spectrum screen threshold, the FCC has presumed that the proposed spectrum aggregation will have no adverse competitive effects. In local markets where the applicants' combined holdings exceed the screen threshold, the FCC conducts a further analysis of the proposed transaction's effects on competition.[307]

178. In its spectrum screen analysis, the FCC has included all spectrum that it believes will be "suitable" for mobile telephony/broadband service within two years.[308] Under the FCC's standard, "suitability" is determined by "whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony broadband

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[306] A*T&T-Cingular Merger Order* ¶¶ 81, 109-12; *Sprint Nextel-Clearwire Merger Order* ¶¶ 54-74; *Verizon-Atlantis Merger Order* ¶¶ 54-70; *AT&T-Centennial Merger Order* ¶¶ 43-51.

[307] *Sprint Nextel-Clearwire Order* ¶¶ 30, 79-80; *Verizon-Atlantis Merger Order* ¶¶ 41, 75; *AT&T-Centennial Merger Order* ¶¶ 34, 46.

[308] *Sprint Nextel-Clearwire Order* ¶ 61; *Verizon-Atlantis Merger Order* ¶ 62.

services."[309] The FCC's spectrum screen threshold is set at approximately one-third the volume of spectrum that is suitable for mobile telephony/broadband services.

179. In its most recent orders, the FCC has found that the amount of spectrum suitable for mobile telephony/broadband services varies on a market-by-market basis. The FCC has considered at least 280 MHz of spectrum to be suitable in all markets; this amount includes 50 MHz of 850 MHz cellular band spectrum, 120 MHz of PCS spectrum, 30 MHz of spectrum in the 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") bands, and 80 MHz of 700 MHz spectrum.[310] The FCC has included an additional 90 MHz of spectrum in the AWS band in markets where that band has been cleared and is available, and an additional 55.5 MHz of Broadband Radio Service ("BRS") spectrum in markets where the 2.5 GHz transition has been completed. Thus, in markets where both AWS and BRS spectrum are available, the FCC has found that 425.5 MHz of spectrum are suitable for mobile telephony/broadband services, and established a spectrum screen of 145 MHz.[311]

180. AT&T concedes that if the FCC applies this spectrum screen in its analysis as to the Proposed Transaction, "202 CMAs would be flagged by [this] screen and subject to further

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[309] *Sprint Nextel-Clearwire Order* ¶ 53. *See also Verizon-Atlantis Merger Order* ¶ 62; *AT&T-Centennial Merger Order* ¶ 43.

[310] *Sprint Nextel-Clearwire Order* ¶ 54; *Verizon-Atlantis Merger Order* ¶ 54

[311] *Sprint Nextel-Clearwire Order* ¶¶ 70, 72, 74; *Verizon-Atlantis Merger Order* ¶¶ 65-66; *AT&T-Centennial Merger Order* ¶ 46. In markets where AWS but not BRS spectrum is available, the Commission has found that 370 MHz are suitable for mobile telephony/broadband, and set the spectrum screen at 125 MHz. In markets where BRS but not AWS spectrum is available, 335.5 MHz are considered suitable for these services, and the Commission has set the spectrum screen at 115 MHz. Finally, in markets where neither AWS nor BRS spectrum is available, 280 MHz are considerable for mobile telephony/broadband, and the applicable screen has been set at 95 MHz.

analysis."[312] This total represents over one-quarter of the 734 CMAs in the United States. Thus, if the FCC's own spectrum screen calculations confirm AT&T's results, the FCC would further scrutinize the competitive effects of the Proposed Transaction in each of those 202 CMAs. If the Tribunal employed these calculations, the same level of scrutiny as to those 202 CMAs should be employed, especially as to Claimant, who would otherwise be left to the mercy of an anticompetitive industry.

D. The Proposed Transaction Will Remove a Major Competitor While Removing Spectrum Opportunities for Potential New Entrants

181. The proposed sale of T-Mobile to AT&T would impair competition in two significant respects. As discussed above, if approved, it will place a tremendous amount of spectrum (and marketplace power) in the hands of a company already controlling one-third of the nation's subscribers and with a history of anticompetitive behavior. Furthermore, it will prevent all of the other small, rural and regional operators and potential new market entrants from acquiring the scarce spectrum in T-Mobile's possession. Claimant agrees with FCC Chairman Julius Genachowski and the rest of the FCC that more spectrum is needed for the mobile wireless industry to remain competitive. Unfortunately, since the release of the National Broadband Plan[313] (one goal of which was repurposing at least 500 megahertz of airwaves) not a single megahertz anywhere in the country has been repurposed and auctioned off to the public to address the "looming spectrum crunch" that the nation currently faces."[314] To the extent that

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[312] Description of Transaction at 76. AT&T's analysis presumes approval of AT&T's pending application to acquire Qualcomm's 700 MHz spectrum.

[313] *In the Matter of Joint Statement on Broadband,* GN Docket No. 10-66, Connecting America: The National Broadband Plan (released March 16, 2010) *("National Broadband Plan")* at p. 3.

[314] Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, at the Minority Media & Telecom Council Broadband and Social Justice Summit, Washington, DC (January 20, 2011) at p. 3.

AT&T needs more spectrum to offer more enhanced mobile broadband services, so does every other mobile wireless carrier in the nation.

182. AT&T suggests that "the wireless marketplace will be more competitive because of the transaction"[315] and that "other competitors can quickly replace the diminished market role T-Mobile USA plays today."[316] The facts do not support this assertion. T-Mobile is the country's fourth-largest mobile wireless carrier, the smallest of the "nationwide" providers, and it has approximately 34 million customers. It took 17 years and numerous acquisitions for T-Mobile to achieve this subscriber count and national geographic reach. The next eight largest mobile carriers after T-Mobile, by size, have a combined subscriber count that is not even two-thirds the size of T-Mobile.[317] Furthermore, neither their combined geographic coverage today nor their spectrum portfolio matches what T-Mobile has today. For AT&T to claim that any of these competitors, whether individually or collectively, could "quickly replace" T-Mobile is laughable. Indeed, if AT&T believes it cannot itself compete effectively without additional spectrum, it surely cannot expect competitors with far less spectrum than AT&T to be able to do so.

183. Before the Tribunal even considers permitting hyper-consolidation, the removal of a market player with tens of millions of customers and the return of a duopoly, it should wait until more spectrum can become available through auctions for both existing and new carriers. Today's mobile wireless marketplace closely resembles the state of the industry at the dawn of

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315 *Public Interest Statement* at p. 9.

316 *Public Interest Statement* at p. 13.

317 *See* http://www.dailywireless.org/2011/02/28/top-ten-us-carriers/ and http://www.nqlogic.com/2011/03/at-acquires-tmobile-usa.html (summarizing several publicly-available Q4 2010 subscriber statistics and industry analyst reports). The next eight largest facilities-based mobile wireless carriers, based on size, are MetroPCS, Leap Wireless (Cricket), US Cellular, Clearwire, Cellular South, Atlantic Tele-Network (Allied Wireless), Cincinnati Bell Wireless, and NTelos. These eight carriers' current customer counts range from 8.155 million to 432,000.

the PCS era in the mid-1990s, only it is moving in reverse and not forward. Instead of new companies and new markets launching on an almost weekly basis, we are witnessing the elimination of more companies and a concentration of resources, and customers, into the hands of AT&T and Verizon Wireless, who just happen to be the legacy "baby bell" cellular operators (a.k.a. "the Twin Bells"). The ever-increasing value of spectrum, both in auction and in the secondary market, attests to the fact that demand exceeds supply and that all market participants, including small, rural and regional players, are thirsty for more spectrum. Accordingly, no merger should be approved under any circumstance unless and until a sufficient amount of spectrum becomes available to the public via repurposing and auction.

E. The Proposed Acquisition Would Create Anti-Competitive Spectrum Aggregation

184. The proposed acquisition would give AT&T control over vast quantities of wireless spectrum, particularly when viewed in conjunction with its proposed acquisition of Qualcomm's beachfront 700 MHz spectrum and other pending acquisitions.

1. AT&T Already Holds Large Amounts of Spectrum

Today, AT&T already holds enormous amounts of spectrum, including:

- PCS/Cellular — AT&T has extensive PCS and cellular spectrum from its acquisitions of Telecorp (2002), Highland Cellular and BellSouth (2006), Dobson Communications (2007), Edge Wireless and McBride Spectrum Partners I (2008), Centennial Communications (2009), and former Alltel spectrum from Verizon (2010).
- AWS — AT&T bought 48 AWS-1 licenses at auction in 2006 that cover nearly 200 million POPs.
- 700 MHz — AT&T bought 700 MHz spectrum from Aloha in 2007, covering 72 of the largest 100 markets. In 2008, AT&T bid $6.6 billion to acquire an additional 227 B

Block licenses during the FCC's 700 MHz auctions. AT&T also recently filed applications seeking to acquire substantially more 700 MHz spectrum from Qualcomm.[318] Even prior to this transaction and prior to the proposed Qualcomm transaction, AT&T today already controls enormous amounts of spectrum, the most of any of the four major nationwide carriers. AT&T has not put to use significant portions of this spectrum. For example, AT&T acquired approximately $1.3 billion in AWS spectrum in 2006, but has yet to deploy commercial operations in this band.[319] Indeed, AT&T is sufficiently uninterested in deploying its AWS spectrum that it has offered significant blocks of it to T-Mobile as part of the breakup fee in this acquisition.[320] In other words, if this deal is not approved, AT&T is prepared to transition its network to 4G *without using its AWS spectrum at all.*

2. This Acquisition Would Further Expand AT&T's Spectrum Holdings

185. This transaction would further solidify AT&T's control over vast amounts of broadband wireless spectrum. According to the FCC's data, post-merger AT&T would hold approximately 24.3% of 700 MHz (not including its proposed acquisition of Qualcomm's 700 MHz spectrum), 42.3% of Cellular (850 MHz), 45.6% of PCS (1.9 GHz), and 38.7% of AWS

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[318] *See AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses,* WT Docket No. 11-18 (applications filed Jan. 13, 2011).

[319] *See, e.g.,* http://www.dailywireless.org/2010/06/18/phoney-spectrum-scarcity (noting that "T-Mobile, Cricket and MetroPCS are using their expensive AWS spectrum Verizon and AT&T are not"); *see also 14th Wireless Competition Report* ¶ 257.

[320] *See* Steven M. Davidoff, *AT&T Deal Shows How Different a Private Sale Can Be,* N.Y. Times, Mar. 25, 2011, *available at* http://dealbook.nytimes.com/2011/03/25/att-dealshows-how-different-a-private-sale-can-be; Philip Elmer-DeWitt, *AT&T-Mobile: What the Analysts Say,* CNN Money, (Mar. 21, 2011), http://tech.fortune.cnn.com/2011/03/21/att-mobile-what-the-analysts-say; *see also* Stock Purchase Agreement § 7.5 and Annex E (attached to Description of Transaction).

(1.7/2.1 GHz) spectrum measured on a MHz-POPs basis.[321] At a more local level, there would be more than 35 Leap markets in which post-merger AT&T would have greater than 150 MHz of spectrum—compared to zero today. Moreover, in vast regions of the country, AT&T would have between 91 and 150 MHz, again a dramatic increase over today's spectrum concentration levels. In addition, this acquisition would enable AT&T to control an extensive Wi-Fi hotspot ecosystem. AT&T has thousands of Wi-Fi hotspots, including many Starbucks stores, Barnes & Noble stores, and McDonald's restaurants nationwide. AT&T also has an extensive Wi-Fi presence at sports stadiums, universities, hospitals, and retail stores.[322] T-Mobile likewise has hotspots at thousands of locations including Starbucks and Barnes & Noble, large airports, and the airline clubs of four of the five largest U.S. airlines, among other locations.[323] The combined Wi-Fi network of AT&T and T-Mobile would give AT&T effective control over an additional large swath of unlicensed spectrum as a result of this transaction. As mobile voice service transitions to being an Internet Protocol-based service, AT&T's extensive WiFi network would give it even greater advantages over competitors.[324]

3. AT&T's Massive Post-Merger Spectrum Position Would Harm Competition

186. There are several harmful competitive effects that would arise in the spectrum market from AT&T's proposed acquisition of T-Mobile's. Spectrum is a critical input for all wireless carriers, and the availability and pricing for spectrum generally is unrelated to the

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[321] See 14th Wireless Competition Report, ¶ 266 & table 25.

[322] *Id.*

[323] *See* https://selfcare.hotspot.t-mobile.corn/locations/viewLocationMap.do.

[324] Competitors seeking to match AT&T's extensive WiFi network would need to raise substantial capital. But smaller carriers such as Leap already face challenges attracting capital, and this transaction would represent yet another example of most of the industry capital being concentrated in the hand of AT&T and Verizon.

degree of retail competition. The "competition" that the AT&T describes in their Public Interest Statement focuses on retail competition, and thus even if their analysis were accurate (which it is not), it does not account at all for the immense increase in concentration in the market for spectrum as an input, which would significantly impede retail competition going forward.

187. The Proposed Transaction could effectively prevent smaller players from acquiring spectrum at future auctions. The wireless industry is a heavily capital-intensive industry, and the trend for years has been to concentrate cash flow and capital in the hands of AT&T and Verizon.[325] This proposed acquisition would significantly worsen the disparity between AT&T's vast capital and the capital of smaller carriers. Recent auctions and private sector transactions have already confirmed the challenges that smaller carriers face: the recent 700 MHz auction, AT&T's acquisition of Aloha Partners, and its proposed acquisition of Qualcomm's 700 MHz spectrum, all demonstrate AT&T's ability to secure spectrum at prices with which smaller carriers cannot compete. This transaction would exacerbate the problem and increase the likelihood that future auctions and after-market spectrum acquisitions will continue to be dominated by AT&T and Verizon.

188. AT&T's extensive spectrum holdings, coupled with significant spectrum constraints for smaller telecommunications providers, would mean that if AT&T were to raise its prices by a small but significant and non-transitory amount, these providers would face significant spectrum limitations in their efforts to substantially and rapidly expand its service offerings to recruit AT&T retail customers. For example, in the top ten markets that Leap Wireless International serves, its spectrum holdings range from 10 MHz to 30 MHz of spectrum. By contrast, the combined AT&T and T-Mobile would have spectrum holdings in the range of

[325] *See, e.g., 14th Wireless Competition Report* ¶¶ 219-221 & charts 34-37 (providing different measures of wireless providers' cash flows).

122 MHz to 171 MHz in those same markets. In Houston, AT&T would have eight times more spectrum than Leap; in Chicago, AT&T would have fourteen times more spectrum than Leap; in Denver, Baltimore, Philadelphia, and Washington DC, AT&T would have greater than seven times more spectrum than Leap. The transaction thus would result in a tremendous concentration of spectrum in the hands of AT&T in cities and towns around the country, and put AT&T in an even more dominant position vis-à-vis Leap, and every other similarly situated wireless telecommunications provider.

189. Smaller telecommunications providers already face a significant disadvantage in their spectrum holdings relative to AT&T, and confront challenges responding to AT&T's business decisions because of its relatively weaker spectrum position and spectrum constraints. But the addition of T-Mobile's spectrum and resources to AT&T's current holdings would widen the gulf and make smaller companies far weaker in comparison to their largest competitor. Because no new spectrum is coming onto the market in the near term, the transaction would confer an enormous competitive advantage to AT&T. And again, the capital-intensive nature of deployment coupled with the concentration of cash-flow in AT&T and Verizon's hands create further impairments to smaller and mid-sized carriers' ability to compete with the super-carriers.

190. It is thus wholly disingenuous for AT&T to point to smaller carriers such as Leap as competitors that will be able to discipline AT&T's conduct when this transaction would expand AT&T's spectrum position so tremendously. AT&T's spectrum position would be enormous relative to all other carriers. If AT&T raised its prices, other carriers' spectrum constraints would sharply diminish their ability to respond competitively to AT&T's actions with regard to pricing and service offerings or to provide any meaningful discipline on AT&T's pricing. Clearly, smaller carriers would like to compete on a fair playing field with AT&T, and

could potentially take share from AT&T in a fully competitive environment, but will face challenges competing with AT&T if they remain spectrum-constrained but AT&T is not.

191. Finally, the transaction also alleviates AT&T's need to deploy its current tremendous cache of AWS and 700 MHz spectrum assets. As discussed above, AT&T has not deployed many of these assets. If the Tribunal rejects this transaction, then AT&T will be forced to employ its existing spectrum assets to their fullest capabilities—which would lead to greater investment in deployment, more jobs, and higher utilization of spectrum resources. Were the transaction to proceed, however, AT&T would have no incentive to maximize the use of its spectrum resources. AT&T already is hoarding vast spectrum resources that other carriers could put to much better use to provide more robust competition, and this transaction would greatly exacerbate the trend.[326]

F. AT&T's Claim That it Has a Unique Need for Additional Spectrum Should Be Rejected

192. Perhaps most specious of all is AT&T's argument regarding its supposedly unique need to amass more spectrum to better serve its customers. Everyone knows that the industry as a whole needs more spectrum over the next decade. The proper role for the Tribunal to play is to identify spectrum to repurpose for commercial mobile wireless use and to adopt licensing rules that will result in an equitable pro-competitive assignment of the spectrum to carriers. Allowing the most voracious and well-funded competitor simply to gobble up other competitors and to thereby corner the market with an oversupply of spectrum, will not solve the problem, it will exacerbate it. Absent meaningful divestitures, no new spectrum would be made available to

[326] In addition, the transaction would reduce AT&T's incentive to advocate for allocating more spectrum to wireless services. As Noll and Rosston note, "the acquisition may cause two advocates of allocating more spectrum to wireless to be replaced by one opponent." Noll and Rosston at 4.

others by the merger, and AT&T's claims that the merger would result in greater efficiency do nothing but beg the question as to whether the purported efficiency gains are worth the market harm.

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

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

194. Accordingly, the Tribunal must view with skepticism unfounded claims made by AT&T that somehow by amassing additional spectrum it will be able to be more efficient. Taking AT&T's claims to their logical conclusion, a monopoly would be most efficient user of spectrum and provide the most benefit to consumers.[327] But more than a century of antitrust enforcement and three decades of FCC efforts to increase competition in this industry are ample proof that this country's policies are based on the well-founded belief that over-concentration is bad, not good, for consumers. Further, allowing AT&T to gain such a massive advantage over its competitors in spectrum holdings will allow AT&T to create a beachhead that may be unassailable when the FCC finally is able to identify and license additional spectrum.

195. As AT&T's presentation itself shows, much of the capacity "constraints" it faces are due to the grossly inefficient use it makes of spectrum today. For example, a considerable number of its customers are currently on non-state-of-the-art GSM, GPRS and EDGE networks.

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

Indeed, AT&T states that these customers number in the 'tens of millions."[328] But rather than find ways to migrate these customers to newer and much more efficient technologies, AT&T seeks to put off the day of reckoning by merely throwing more spectrum at the problem. The efficiency of these AT&T services, measured in Bps/Hz, is minute compared to the efficiency of advanced technologies such as HSPA rel. 7, WiMAX or LTE.[329] Because of its inexcusable lethargy in rolling out advanced services, AT&T's average efficiency of usage today in many markets is less than half that of companies like MetroPCS. Yet, AT&T argues that giving it more spectrum is the panacea for its efficiency problems! To the contrary, the way for AT&T to serve the public interest and to provide better services to its customers is to invest in more infrastructure and technology to make more efficient use of its own existing spectrum, not to amass monopolistic amounts of other people's spectrum.

G. AT&T's Claim That it is an Efficient User of Spectrum Must Be Rejected

196. Interestingly, AT&T claims that it has the least amount of spectrum holdings per subscriber and thereby is either starved and needs additional spectrum or conversely is the most efficient user of spectrum. For example, AT&T claims that MetroPCS has 3.3 MHz holdings per million subscribers while AT&T has 0.86 MHz holdings per million subscribers and that the combined AT&T/T-Mobile would have 1.02 MHz holdings per million subscribers.[330] This is total obfuscation; the real story is vastly different. The following table demonstrates that, rather than AT&T being the most spectrum starved and the most efficient user of spectrum, it is in fact MetroPCS who holds that distinction in its major metropolitan areas:

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[328] *Public Interest Statement* at 22.

[329] *Credit Suisse Report* at 38.

[330] AT&T- Mobile: WorldCLass Platform for the Future of Mobile Broadband, at 9, http://ww.att.com/Cmmon/about_us/pdf/INV-PRES_3-21-11_FINAL.pdf.

Table 1: Spectrum Holdings in MHz Below 2.5 CH.z (including WCS)

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

197. This analysis shows that MetroPCS has significantly more subscribers per MHz of spectrum than AT&T, with the exception of only three metropolitan areas — Boston, New York and Las Vegas — and in these three metropolitan areas MetroPCS has only recently started operations so that slightly lower yield per MHz is to be expected. Why is this the appropriate measure as opposed to the measure being touted by AT&T? First, it is not entirely clear how AT&T derives its figures and they may be based on outdated subscriber counts. Second, it is not clear how much spectrum AT&T is including within its numerator — such as AT&T's sizable holdings of WCS spectrum and the Qualcomm spectrum. Third, dividing subscribers by spectrum is more akin to other efficiency measures ordinarily used in the telecommunications industry, such as the ratio of subscribers to interconnection trunks. Based on this analysis, it is

clear that MetroPCS is more efficient — in several cases two to three times more efficient -- than AT&T and the combined AT&T/T-Mobile.

198. MetroPCS is just one of many carriers who believes that AT&T is not fully utilizing its spectrum. Other analysts have also concluded that AT&T is underutilizing its spectrum capacity.[331] Striking evidence for this conclusion resides in the fact that Verizon holds almost the same amount of spectrum as AT&T, but has publically stated that it has enough spectrum for the near term.[332] This is despite the fact that Verizon's smartphone subscribers use more data capacity than AT&T's.[333]

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

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

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

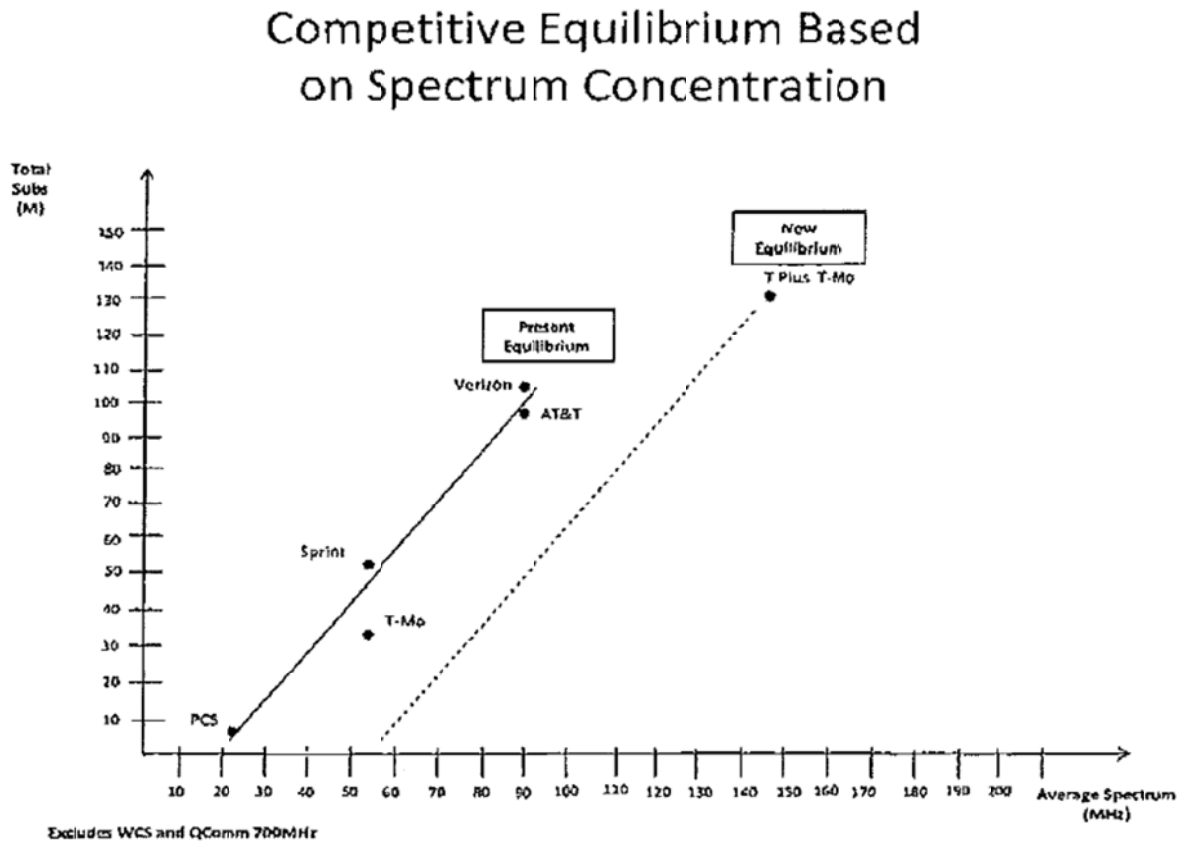
333 *See* "Validas Reports Verizon Wireless Smartphones Consume More Data Than iPhones," *PR Newswire,* July 26, 2010, *available ar* http://www.pmewswire.cominews-releases/validas-reports-verison -wireless-smartphones-cons ume-m ore-data-t han-i p hones-99234019.htm1.

200. If T-Mobile remains in existence, AT&T would not have access to T-Mobile's spectrum — but this would make it no worse off than any other carrier, and still much better off than all but Verizon. Like other carriers, AT&T would need to improve its efficiency by investing in infrastructure and technology to squeeze more and more use out of a limited supply of spectrum. Instead, the merger would alter the dynamic and allow AT&T and Verizon to hold the vast majority of the raw material needed by all carriers. In this scenario, technological developments would have to be driven by the carriers which face the greatest resource constraints, the mid-tier, regional and rural carriers. For example, 4G might not be a reality without the current competitive environment. MetroPCS, not AT&T or Verizon, pioneered 4G LTE and was the first to deploy 4G LTE — substantially ahead of AT&T, which is just now planning to deploy 40 LTE in a limited number of metropolitan areas.334 But because, as discussed previously and below, the Big 2 carriers would have both the power and the incentive post-merger to quash this innovation, it may well not occur at all in the future if this merger is approved without adequate conditions. As AT&T itself notes, operators can achieve much lower unit costs if they have greater amounts of spectrum because of channel pooling efficiencies, spare capacity pooling, the spreading of control channels over more non-control channels, and the like.[335] However, mid-tier, regional and rural operators, which have been shut out of recent new spectrum allocations, may be less and less able to compete on a cost basis with a merged AT&T/T-Mobile and thus without conditions there is a substantial likelihood the efficiencies will not be passed through to customers. While AT&T claims that it will achieve greater efficiency because it will gain spectrum from the T-Mobile deal, in fact, the opposite is true: their relative

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

[335] *Public Interest Statement* at 8-9.

track records so far indicate that this spectrum would do far more good in the hands of mid-tier, regional and rural carriers than AT&T, and that handing it over to AT&T would allow AT&T to continue to perpetuate its inefficient use of spectrum.



H. The Merger is Not Necessary to Prevent a "Spectrum Crunch" for Either AT&T or T-Mobile, and Would Result in an Enormously Wasteful Use of Spectrum

1. There Is No "Spectrum Crunch" for AT&T

201. The "spectrum crunch" asserted by AT&T/T-Mobile, along with dire warnings of service degradation, dropped calls, and technological obsolescence, is a complete fabrication. AT&T/T-Mobile lament the inefficiencies of the older GSM and UMTS technology that dominates their networks, but all wireless carriers have the same problems. AT&T/T-Mobile freely admit, however, and the industry fully knows, that transitioning to LTE technology — "the

gold standard for advanced mobile broadband services"[336] — as rapidly as possible will resolve the network management concerns raised by increasing data usage among wireless subscribers. But despite holding massive amounts of spectrum,[337] AT&T's argument that it must obtain even more spectrum to resolve these problems is disingenuous in the extreme. In fact, prior to the time that the T-Mobile opportunity arose, AT&T was bragging about its network and its ability to upgrade to broadband:

> AT&T today announced plans to upgrade the nation's fastest 3G network to deliver considerably faster mobile broadband speeds. The network upgrades are slated to begin later this year, with completion expected in 2011. "AT&T's network infrastructure gives us a tremendous advantage in that we're about to deliver upgrades in mobile broadband speed and performance with our existing technology platform," said Ralph de la Vega, president and CEO, AT&T Mobility and Consumer Markets.[338]

202. It was widely reported that subscribers to AT&T's iPhone service expressed high levels of dissatisfaction with AT&T's network, which was not fast or robust enough to enable users to employ many of the applications that the iPhone made available.[339] It was similarly

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[336] *Id.* at 1.

[337] Some observers have compared the spectrum holdings and market shares of AT&T and Verizon Wireless and, finding them relatively similar, have wondered why AT&T is complaining of a spectrum shortage and its customers in key cities are experiencing dropped calls and slow data speeds while Verizon Wireless is not having those problems. One critic alleges that "AT&T is today sitting on more spectrum than any other wireless operator in the top 21 markets in the U.S., and about a third of that spectrum is still being unused." Goldfarb, "Virtuous Cycle," at 14 (quoting Marguerite Reardon, "Is AT&T a Wireless Spectrum Hog?," CNET News, Apr. 29, 2011, available at http://news.cnet.com/8301-30686_3-20058494-266.html).

[338] AT&T Media Newsroom, "AT&T To Deliver 3G Mobile Broadband Speed Boost," May 27, 2009, available at http://www.att.com/gen/pressroom?pid=4800&cdvn=news& news articleid=26835&mapcode=comoratejwireless-networks-general.

[339] E.g., Casey Newton, "AT&T's Challenge: Retaining iPhone Users," San Francisco Chronicle, Feb. 10, 2011, available at http://www.tectrends.com/cgi/showan?an=00178773.

widely reported that consumers flooded to Verizon as soon as it was able to sell the iPhone, and that customer satisfaction with the Verizon network was much higher.340

203. Why this highly disparate experience with the two largest telecom providers in the country, both of which are operating under the same technological constraints? Because Verizon has been spending its time and money investing in upgrading its network, while AT&T has been focused on growing through acquisition. According to one commenter, AT&T began to experience congestion problems when it introduced the iPhone in 2007, yet it increased its wireless capital expenditures by only 1% in 2009 while Verizon Wireless increased its wireless capital expenditures by 10% and, in total, had lower capital expenditures than Verizon Wireless.[341] AT&T's failure to upgrade its existing technology to make effective use of the spectrum it already owns cannot be grounds for it to seek new spectrum.

2. AT&T/T-Mobile Are Proposing an Enormous Waste of Spectrum

204. AT&T/T-Mobile admit that the proposed transaction would provide only a short-term solution to their asserted problems: "AT&T estimates that the efficiencies resulting from this transaction, in combination, will push back the date of expected spectrum exhaust in many markets ... ."[342] They further note that this temporary measure will buy AT&T/T-Mobile additional time to implement a long-term solution, which is the "ramping down of GSM networks, the fuller deployment of efficient, capacity-increasing LTE technologies, and new

340 E.g., Walter S. Mossberg, "Verizon Beats AT&T in Voice Calls for iPhones," Wall Street Journal, Feb. 3, 2011, available at http://online.wsj.com/article/SB10001424052748703960804576120174165554798.html.

341 Reardon, "Spectrum Hog?".

342 Description at 9.

spectrum available at auction."[343] AT&T/T-Mobile therefore admit that upgrading their existing networks to LTE is the true solution, and that the acquisition of vast amounts of new spectrum in the proposed combination is merely an interim step before that upgrade can take place.

205. What do AT&T/T-Mobile propose to do with their combined spectrum before this transition to LTE takes place? AT&T/T-Mobile argue that it will "be exceptionally difficult, if not impossible, for AT&T to repurpose its existing spectrum quickly enough to alleviate the capacity crunch it faces."[344] This situation purportedly has arisen because AT&T must continue to support "tens of millions of GSM and UMTS subscribers" as it upgrades to LTE.[345] In addition, these subscribers will have to give up their GSM or UMTS handsets in order to use the new technology, and "it can take years for subscribers to migrate to new technologies in volumes sufficient to provide material offload from the legacy network."[346] In making this argument, AT&T/T-Mobile are proposing to use their combined spectrum to maintain three separate networks: a GSM network, a UMTS network, and an LTE network, until all their subscribers decide to upgrade to LTE. And apparently the driving factor for this consumer choice will be consumers' own willingness to buy new handsets. A more wasteful use of scarce spectrum can hardly be imagined.

206. In short, we have a problem — to the extent one exists at all — of AT&T's own making, because it has spent its time and energy on acquiring other networks rather than integrating and upgrading the networks it already owned. And the AT&T/T-Mobile proposed

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[343] Description at 33-34. See also id. at 39 (the AT&T/T-Mobile GSM networks "can hold substantially more traffic than before if [they are] repurposed for more efficient UNITS technology.").

[344] Description of Transaction, Attachment 2 at 48 (Apr. 21, 2011) (“Attachment 2”).

[345] *Id.* at 49.

[346] *Id*. at 49.

solution is to maintain separate, old-technology networks until their customers decide to buy new cell phones at a time when other carriers are pricing their handsets and services aggressively in order to encourage consumer migration to the efficient new technologies. In essence, AT&T is asking to be rewarded by the FCC and by the Tribunal, for its failure to maintain and upgrade its networks.

207. AT&T/T-Mobile's proposed solution to their asserted problem is to spend $25 Billion in cash on yet another acquisition, rather than invest in network upgrades. As one commentator notes:

> The FCC may want to explore whether the proposed merger would deplete the new entity of cash for its proposed LTE deployment. The FCC's Fourteenth Mobile Wireless Competition Report shows that in 2009, the latest year for which data were available, AT&T had capital expenditures of slightly less than $6 billion and T-Mobile had capital expenditures of more than $3.5 billion. Under the terms of the proposed merger, AT&T will have to pay Deutsche Telekom $25 billion in cash. AT&T states that the "the consolidation of these two companies is projected to produce operational savings and other costs synergies exceeding $39 billion, with annual savings of approximately $3 billion starting in year three." Even with the projected savings, it is unclear how AT&T will finance the proposed network buildout.[347]

208. We can thus summarize AT&T's proposal as follows: 1) AT&T is facing a "spectrum crunch" because, despite being the largest spectrum holder in the nation, it has failed to upgrade its network. 2) AT&T will fix self-induced problem this by buying T-Mobile, which will massively increase AT&T's spectrum holdings. It will use this spectrum to maintain two separate networks using its old technology, while it introduces new technology on a third network at some point in the future. 3) In order to acquire the new spectrum, AT&T will spend $25 Billion in cash. 4) This acquisition is expected, if AT&T's estimates are accurate, to generate annual savings of $3 Billion, starting in year three, which will then be used to upgrade the AT&T/T-Mobile networks.

[347] Goldfarb, “Virtuous Cycle,” at 17.

209. The AT&T/T-Mobile transaction would be humorous if it were not so dangerous. It will diminish competition, frustrate technology deployment, waste spectrum, and otherwise disserve the public interest. The Tribunal must reject the AT&T/T-Mobile Proposed Transaction.

X. THE PROPOSED TRANSACTION WOULD CAUSE OTHER PUBLIC INTEREST HARMS

A. The Proposed Transaction Would Result in Significant Job Loss and Reduced Investment in America Just as the Nation is Struggling to Emerge from the Recession

210. AT&T's takeover of T-Mobile would not only harm competition and reduce innovation, but its planned "operational savings and cost synergies" would lead to lost jobs and reduced investment in the United States.[348] While T-Mobile has been investing in the U.S. economy and expanding its workforce, AT&T's "growth by acquisition" strategy has resulted in thousands of layoffs. There is every reason to expect the same result here. These merger-specific anti-competitive harms contravene the public interest and provide additional reasons for the Tribunal to disapprove the proposed takeover.[349]

1. Loss of American Jobs

211. Rather than building out its spectrum, investing in new technologies, or splitting cells to improve its existing network, AT&T proposes a transaction that would reduce investment in network facilities and reduce jobs. In announcing its takeover plans to investors, AT&T highlighted the fact that, if the FCC and DOJ approve the deal, AT&T would save $10 billion in

[348] *See, e.g.*, Description of Transaction at 9.

[349] *See, e.g., ITT World Communications Inc. Application for Consent to Transfer of Control of Press Wireless, Inc. to ITT World Communications Inc.*, Memorandum Opinion and Order, 1 FCC 2d 213 (1965) ("[I]t is incumbent upon the Commission[,] in evaluating the merits of the instant application for transfer of control, to ascertain whether the proposed treatment of the employees affected is consistent with the public interest[.]").

"[a]voided purchases and investments."[350] They did not, however, consider that the Tribunal has the opportunity to allow or prevent the Proposed Transaction.

212. Moreover, to acquire T-Mobile, AT&T has agreed to pay DT a total of $39 billion, an amount that would "include a cash payment of $25 billion with the balance [$14 billion] to be paid using AT&T common stock, subject to adjustment."[351] This very high price tag would put great pressure on AT&T to slash costs by closing retail stores and cutting jobs. The "combined company is expected to close hundreds of retail outlets in areas where they overlap, as well as eliminate overlapping back office, technical and call center staff."[352] In fact, while highlighting potential profit margins to investors,[353] AT&T announced that it would carry out force reductions, close stores, and limit retail distribution through "rationalization" if the transaction is approved.[354] "'[E]fficiencies' is code for an unsettling possibility: the elimination of thousands of jobs."[355]

2. Reduced Investment in America

213. AT&T's proposed $25 billion cash payment to DT represents a capital outflow from the U.S. to Europe where, as the AT&T explains, it would be used to invest in broadband

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[350] AT&T Investor Presentation, *AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband*, at 35 (Mar. 21, 2011) ("Mar. 21, 2011 AT&T Investor Presentation") *available at*: <http://www.mobilizeeverything.com/documents/AT&T_T-Mobile%20A%20World%20Class%20Platform%20for%20the%20Future%20of%20Mobile%20Broadband.pdf>.

[351] Description of Transaction at 16.

[352] Andrew R. Sorkin, Michael J. de la Merced, & Jenna Wortham, *AT&T Makes Deal to Buy T-Mobile for $39 Billion*, N.Y. TIMES, March 21, 201, at A3.

[353] Mar. 21, 2011 AT&T Investor Presentation Transcript at 13-14 (statement of Richard G. Lindner, Senior Executive Vice President and Chief Financial Officer ("CFO"), AT&T Inc.).

[354] Mar. 21, 2011 AT&T Investor Presentation at 11.

[355] 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>.

deployment in Germany and the rest of Europe.[356] DT Senior Vice President Thorsten Langheim attested in his Declaration that the transaction would provide the resources necessary to modernize and upgrade Deutsche Telekom's core businesses in Europe.[357]

214. President Obama has stated that "now is the time to invest in America," because, "as a country, we have a responsibility to encourage American innovation."[358] As Chairman Genachowski asked, the question the FCC faces is whether we are "going to take the necessary steps to assume global leadership in broadband and fully realize these economic and social benefits here at home[,] [o]r are we going to let the lion's share of those benefits accrue to

[356] Description of Transaction at 5 (admitting that a key reason for the transaction is that "Deutsche Telekom[] must dedicate significant capital resources to broadband deployment in Germany and the rest of Europe"). It is also noteworthy that Germany, where the merger proceeds would help fund investment in broadband, "has made slow progress in introducing competition to some sectors of its telecommunications market" and may not be in compliance with its General Agreement on Trade in Services ("GATS") commitments. *See, e.g.*, 2010 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, at 139-40, *available at*: <http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE_COMPLETE_WITH_APPENDnonameack.pdf>; Letter from Jerry James, CEO, COMPTEL, to Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the U.S. Trade Representative, at 1 (Dec. 21, 2010).

[357] Declaration of Thorsten Langheim, attached to Description of Transaction of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, at 2, 3-4 (Apr. 21, 2011) (noting that the transaction would accelerate DT's "ability to transform the company by modernizing and upgrading its networks in Deutsche Telekom's core businesses in Europe" and "facilitate innovation and enable Deutsche Telekom to focus on the opportunities of a modern infrastructure for new Internet products and services in Germany and Europe") ("Langheim Decl.").

[358] President Barack Obama, Remarks by the President to the Chamber of Commerce (Feb. 07, 2011), *available at*: <http://www.whitehouse.gov/the-press-office/2011/02/07/remarkspresident-chamber-commerce> (emphasis added). *See also* President Barack Obama, Remarks by the President on Job Creation and Economic Growth (Dec. 08, 2009) (explaining that "government can help lay the groundwork on which the private sector can better generate jobs, growth, and innovation"), *available at*: <http://www.whitehouse.gov/the-press-office/remarkspresident-job-creation-and-economic-growth>.

others?"[359] The Chairman did not anticipate that the Tribunal would also have the opportunity to promote global leadership in broadband and realize our domestic economic and social benefits. Thus, the Tribunal, like the FCC, must answer by safeguarding competition in the U.S. telecommunications industry to ensure continued innovation and investment in America. Contrary to the AT&T's claims that the Proposed Transaction would promote job growth and innovation in the U.S., the transaction would export jobs and billions of investment dollars overseas.[360]

B. The Proposed Takeover Would Thwart the National Broadband Plan

215. AT&T's acquisition of T-Mobile would be flatly inconsistent with the pro-competitive policies and goals of the National Broadband Plan. As the Plan emphasizes, competition is a central element of achieving the national broadband goals. "Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices."[361] To "ensure that America has a world-leading broadband ecosystem" the

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[359] FCC Chairman Julius Genachowski, *Broadband: Our Enduring Engine for Prosperity and Opportunity*, NARUC Conference, at 4 (Feb. 16, 2010), available at: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296262A1.pdf>. *See also Consumers, Competition, and Consolidation in the Video and Broadband Market: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (Mar. 11, 2010) (statement of FCC Chairman Julius Genachowski) ("An important part of our responsibility at the Commission is to ensure that communications industry transaction do not enable firms to frustrate innovation ... Investment, innovation, and employment are key objectives, as is the rapid and widespread deployment of advanced communications services. These and other traditional goals and values will inform our review of transactions."), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296803A1.pdf>.

[360] Description of Transaction at 54-63.

[361] National Broadband Plan at 36.

National Broadband Plan recommends that the nation "maximize innovation, investment and consumer welfare, primarily through competition."[362]

National Broadband Plan	AT&T Takeover Thwarts This Goal
Goal No. 1: At least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.	AT&T's takeover would chill investment in broadband networks by diminishing competition, and would lead to higher prices for broadband access.
Goal No. 2: The United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.	AT&T's takeover of T-Mobile would create a wireless duopoly for the Twin Bells, threatening innovation. Robust competition, not duopoly, drives innovation and broadband deployment.
Goal No. 3: Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.	AT&T's takeover would increase the power of the Twin Bells to raise prices, threatening affordability, particularly for the most vulnerable populations.
Goal No. 4: Every community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals, and government buildings.	AT&T's takeover would increase the power of the Twin Bells to raise the prices of key inputs to broadband access. The National Broadband Plan emphasized the importance of these inputs to advancing the National Broadband Goals.
Goal No. 5: To ensure the safety of American communities, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.	AT&T's takeover would set back the goal of an interoperable public safety network by reinforcing AT&T's exclusive spectrum band classes.

216. The merged entity would have the incentive and ability to raise prices, putting broadband access even further out of reach for tens of millions of Americans, including Claimant. Because "[c]ompetition is a major driver of innovation and investment,"[363] the proposed acquisition threatens to slow more than two decades of rapid innovation in wireless communications. While competition has induced providers to invest in network upgrades,[364] a duopoly is likely to choke off investment and sap the power of the mobile Internet as a vital growth engine for the economy. In addition, AT&T's takeover would exacerbate the Twin Bells' incentive to extract even more revenue from their stranglehold on broadband backhaul, a key

[362] *Id.* at 11.

[363] *Id.* at 29.

[364] *Id.* at 38.

input in providing affordable broadband access to anchor institutions and businesses of all sizes. If the National Broadband Plan presented a bold roadmap for the future of the Internet in America, then AT&T's proposed takeover would put the car in reverse. Competition, not duopoly, will drive investment, innovation and broadband deployment. If approved, the takeover would threaten the long term goals of the National Broadband Plan.

C. The Proposed Transaction is Likely to Harm Customer Welfare in the Market for Mobile Wireless Data and Voice Services

1. The Proposed Transaction Will Increase Market Concentration And, Accordingly, the FCC Should Conduct A Detailed Assessment Of The Potential Anticompetitive Harms Posed By The Transaction.

217. In analyzing the effect of a proposed transaction on the level of competition in relevant markets, the FCC relies on a two-part competitive "screen."[365] If a geographic market meets the criteria of either part of the screen, the FCC conducts a detailed inquiry as to the anticompetitive harms posed by the transaction.[366]

218. In the first part of the competitive screen, the FCC considers changes in the Herfindahl Hirschman Index ("HHI") in relevant geographic markets in order to identify those markets in which a proposed transaction may harm competition and consumer welfare.[367] The

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[365] *See, e.g., Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations and Spectrum Leasing Arrangements,* Memorandum Opinion and Order, 24 FCC Rcd. 13915, ¶ 34 (2009) *("AT&T-Centennial Merger Order"); 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,* Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Red. 17444, ¶ 41 (2008) *("Verizon-ALL TEL Merger Order").*

[366] *See, e.g., id.*

[367] *See, e.g., AT&T-Centennial Merger Order* ¶ 34; *see also 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, ¶ 49 (2010) *("Fourteenth Competition Report")* (explaining that the HHI "is the most widely-accepted measure of concentration in competition analysis").

FCC most recently applied the HHI screen in the 2009 AT&T-Centennial Merger Order. As explained in that Order, the FCC subjects a geographic market to further analysis of the potential anticompetitive effects of the transaction where, post-transaction, "the HHI would be greater than 2800 and the change in HHI will be 100 or greater, or the change in HHI would be 250 or greater, regardless of the level of the HHI."[368] Here, based on Standard & Poor's national market share data as of the end of the third quarter of 2010, the change in the nationwide HHI as a result of the proposed transaction would be 756—approximately three times more than the change in HHI that triggers a more detailed inquiry of anticompetitive effects under the FCC's screen.[369] Even if the Tribunal, using the FCC's analysis, determined that the relevant geographic market is local (e.g., a Cellular Market Area ("CMA") or Component Economic Area), it is likely that the Proposed Transaction warrants a detailed inquiry regarding anticompetitive effects in most markets across the country.

219. In the second part of the competitive screen, the FCC examines whether the aggregation of spectrum by the acquiring carrier in a geographic market is significant enough to require a more detailed inquiry as to the anticompetitive effects of the transaction.[370] Here, the

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[368] *See, e.g., AT&T-Centennial Merger Order* 1146.

[369] The HHI is calculated by summing the squares of all provider subscriber shares" in the relevant geographic market. *Fourteenth Competition Report* n.105. According to Standard & Poor's, as of the end of the third quarter of 2010, Verizon Wireless ("Verizon") had a 32.4 percent share of mobile wireless subscribers, AT&T had a 32.3 percent market share, Sprint Nextel ("Sprint") had a 17.0 percent market share, and T-Mobile had an 11.7 percent market share). *See* James Moorman, *Industry Surveys, Telecommunications: Wireless,* Standard & Poor's, at 11, Jan. 20, 2011 *("S&P 2011 Wireless Industry Report").* Therefore, the sum of the squares of AT&T and T-Mobile's market shares as of the end of the third quarter of 2010 is 1180 while the square of the Merged AT&T/T-Mobile's market share as of that date is 1936, a difference of 756.

[370] *See, e.g., AT&T-Centennial Merger Order* TT 34, 43; *Verizon-ALLTEL Merger Order* ¶ 41. In the *AT&T-Centennial Merger Order,* the Commission's spectrum screen identified those markets in which "the Applicants would have, on a market-by-market basis, a 10 percent or greater interest in 95 megahertz or more of PCS, SMR, and 700 MHz spectrum, where neither

Proposed Transaction, along with AT&T's pending acquisition of Lower 700 MHz spectrum from Qualcomm,[371] will enable AT&T to further increase its already substantial spectrum holdings[372] in numerous markets across the country. Indeed, AT&T concedes that, following the Qualcomm and T-Mobile transactions, it would meet or exceed the spectrum screen used by the FCC in the AT&T-Centennial Merger Order in 202 out of 734 of the CMAs nationwide.[373] Accordingly, there is a significant risk that competitors will be unable to access sufficient spectrum to compete effectively in these markets. Furthermore, as discussed below, the Merged AT&T/T-Mobile and Verizon will hold the vast majority of the spectrum needed to provide robust 4G LTE services, making it increasingly difficult for smaller carriers to compete with these national carriers.

220. Thus, application of the two-part competitive screen yields the conclusion that the Tribunal should engage in a detailed analysis of the potential anticompetitive effects of the Proposed Transaction throughout the country. As discussed below, there is a distinct possibility that the Merged AT&T/T-Mobile and Verizon's superior spectrum position and overwhelming

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BRS nor AWS-1 spectrum is available; 115 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 125 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 145 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available." *AT&T-Centennial Merger Order* ¶ 46.

371 *See AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, Public Notice, WT Dkt. No. 11-18, DA 11-252 (rel. Feb. 9, 2011).

372 *See Fourteenth Competition Report* ¶¶ 266-267, Tables 25-26 & Chart 40; *see also* Petition to Deny of Dish Network L.L.C., WT Dkt. No. 11-18, at 9 (filed Mar. 11, 2011) (stating that "AT&T's CMRS holdings already constitute close to, or more than, one-third of the available spectrum in the cellular, PCS, 700 MHz, AWS and WCS bands").

373 *See* Public Interest Statement at 76; *see also id.*, Appendix A, n.1.

share of subscribers would cause Sprint and other competitors to be relegated to the fringe and that the market for mobile wireless data and voice services will effectively become a duopoly.[374]

221. The Tribunal should give this possibility careful consideration in light of the serious harms to consumer welfare that duopoly market structures can cause. As the FCC has found, duopoly markets are likely to yield increased prices[375] and can also result in decreased innovation.[376]

222. Moreover, because approval of both the T-Mobile and Qualcomm transactions will effectively institutionalize a barrier to any meaningful competitive entry in the U.S. market for 4G mobile wireless services, the Tribunal should consider adopting conditions to mitigate this harm. In particular, any approval of the Proposed Transaction should contemplate a partial

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[374] *See* Letter from Charles W. McKee, Vice President —Government Affairs, Federal and State Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 11-65, at 1-2 (filed May 25, 2011) ("Eliminating T-Mobile and increasing the size of AT&T in a market that is dependent upon scale would marginalize the ability of Spring and the remaining local and regional carriers to influence innovation and downward pricing and leave an effective duopoly in place.")

[375] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, 25 FCC Rcd. 8622, ifif 30-31 (2010) *("Qwest Phoenix MSA Forbearance Order").* For example, the FCC has recognized that prices in the mobile wireless industry during its duopoly period were significantly above competitive levels, and importantly, "that such prices dropped dramatically as new PCS competitors began to launch service." *Id.* ¶ 31; *see id.* n.93 ("In the *Cingular/AT&T Wireless Order,* the Commission stated that [t]he Commission's first broadband PCS auction in 1995 marked the beginning of the transition from a cellular duopoly to a far more competitive market in mobile telephony services,' and that [a]fter stabilizing at a plateau in the final years of the cellular duopoly, the price per minute of mobile telephony service started to decline shortly before the first commercial launches of PCS service and subsequently dropped sharply and steadily.") (quoting *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Services Corporation For Consent to Transfer Control of Licenses and Authorizations,* Memorandum Opinion and Order, 19 FCC Rcd. 21522, vi 61, 67 (2004)).

[376] *See Application of EchoStar Communications Corp. et al.,* Hearing Designation Order, 17 FCC Rcd. 20559, TT 175-177 (2002) *("EchoStar-DirecTV Merger Order")* (finding that the cable operator-DBS operator duopoly or the DBS operator monopoly that would result in each local market as a result of the proposed merger would cause a "reduction in the magnitude of future innovation").

divestiture of spectrum to at least leave open the possibility that a new competitor can enter the market and compete against the Merged AT&T/T-Mobile and Verizon.

2. The Proposed Transaction Will Negatively Impact Price Competition

223. T-Mobile has often offered among the lowest retail prices among the four national carriers.[377] Most recently, the company introduced a $79.99 unlimited data, calling and texting plan that "allows customers to save more than $350 per year . . . compared to similar plans from AT&T, Verizon and Sprint."[378] In addition, T-Mobile has been among the leaders in introducing innovative pricing features. For example, T-Mobile was the first of the four national carriers to introduce an unlimited "calling circle" option called "myFaves."[379] Moreover, as the FCC recognized last year, T-Mobile's price changes in late 2009 "appear to have prompted Verizon

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[377] *See, e.g., S&P 2011 Wireless Industry Report* at 5 ("[T-Mobile] continues to offer low-cost price plans and has undercut the major carriers in its pricing of mobile data."); *see id.* at 15 ("Most carriers offer unlimited text, picture, and video messaging packages for $20 a month (T-Mobile is the lowest, at $10)."); *id.* ("Most carriers[’] [family plans] offer 700 minutes for $69.99 a month for two phones, although T-Mobile charges $59.99 for 750 minutes and charges $5 to add an additional line."); Russ Wiles, *AT&T Merger with T-Mobile May Cut Competition,* azcentral.com, Mar. 22, 1011, *available at* http://www.azcentral.com/business/articles/2011/03/22/20110322att-t-mobile-merger-concems.html *("Consumer Reports* research indicates that T-Mobile charges less than many competitors on various plan types.").

[378] T-Mobile, Press Release, *T-Mobile Introduces News Unlimited Data, Calling and Texting Plan for Only $79.99 Per Month,* Apr. 13, 2011, *available at* http://newsroom.t-mobile.com/generate-pdf.php?article_code=11UDKQQ33RY7RF9T; *see also* Jonathan Spike, *T-Mobile launches news $79.99 Even More unlimited data, calling and texting plan,* Broadband Expert, Apr. 13, 2011, available at http://www.broadbandexpert.com/blog/wireless-carriers/tmobile-launches-new-79-99-even-more-unlimited-data-calling-and-texting-plan/ ("You can save between $30 and $39.99 per month over other unlimited data plans offered by Sprint, AT&T and Verizon.").

[379] *See T-Mobile introduces myFaves,* FIERCE WIRELESS, Oct. 1, 2006, *available at* http://www.fiercewireless.com/story/t-mobile-introduces-myfaves/2006-10-02. Verizon introduced its "Friends and Family" calling circle plan in February 2009 and AT&T launched its "A-List" calling circle feature in September 2009. *See Fourteenth Competition Report* ¶ 90; *see also* Eric M. *Zeman, AT&T Introduces Its Own*

Wireless and AT&T to narrow the price premium on unlimited service offerings.[380] If AT&T acquires T-Mobile, AT&T, Verizon and Sprint will no longer be subject to this competitive pricing pressure.

3. The Proposed Transaction Will Likely Diminish Network Quality Competition.

224. In addition to competing on price, T-Mobile has aggressively deployed its HSPA+ network, thereby allowing it to compete with the other three national carriers based on the quality of its network.[381] For example, a recent speed test conducted by PC World and Novarum in 13 cities nationwide demonstrated that, of the four national carriers, T-Mobile's network is the fastest for smartphones.[382] Based on these results, the authors concluded that "T-Mobile has proven . . . it can deliver speeds that are competitive with the 4G networks of its rivals."[383] In addition, T-Mobile has begun upgrading its HSPA+ network to reach theoretical

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[380] *"MyFaves" Plan, Dubbed "A-List,"* Phone Scoop, Sept. 9, 2009, *available at* http://www.phonescoop.com/news/item.php?n=4808.

[381] T-Mobile upgraded its 3G network to HSPA+ 7.2 in 2009 and HSPA+ 21 in 2010. *See, e.g.*, Stephen Lawson, *T-Mobile USA Finishes Upgrade to HSPA 7.2*, PC WORLD, Jan. 5, 2010, *available at* http://www.p cworld. com/businesscenter/article/185916/tmobile_usa_finishes_ upgrade_to_hspa_72.html; T-Mobile, Press Release, *T-Mobile USA CEO and President Philipp Humm Highlights the Company's Network Leadership and Focus on Fueling Data Adoption*, Jan. 6, 2011, *available at* http://newsroom.t-mobile.com/generate-pdf.php?article_code= 83JBZEN8KZWEUVWG (stating that, as of January 2011, T-Mobile's HSPA+ 21 network reached approximately 200 million people in 100 major metropolitan areas).

[382] *See* Mark Sullivan, *4G Wireless Speed Tests: Which Is Really The Fastest?*, PC WORLD, Mar. 13, 2011, *available at* http://www.pcworld.com/article/221931/4gwireless_speed_tests_which_ is_really thefastest.html ("[I]n our tests T-Mobile had the speediest results for smartphones. The T-Mobile HTC G2 we used for testing produced a 13-city average download speed of almost 2.3 mbps, that's about 52 percent faster than the second-fastest phone, Sprint's HTC EVO 4G, which had an average download speed of 1.5 mbps.").

[383] *Id.*

download speeds of 42 Mbps.[384] T-Mobile's Chief Technology Officer has stated that this network will deliver speeds comparable to Verizon's LTE network.[385] Again, if AT&T acquires T-Mobile, AT&T, Verizon and Sprint will no longer be subject to the network quality competition spurred by T-Mobile.

225. Moreover, if AT&T is permitted to acquire both T-Mobile's AWS spectrum licenses and Qualcomm's 700 MHz spectrum licenses, it is unlikely that any competitor other than Verizon will be able to compete with AT&T in the provision of high-quality 4G mobile wireless services. To begin with, following the proposed transaction with T-Mobile, AT&T and Verizon will hold 53.7 percent of all AWS spectrum.[386] In addition, AT&T and Verizon already hold 67 percent of all 700 MHz spectrum.[387] According to consumer advocacy groups, if AT&T acquires Qualcomm's 700 MHz licenses, "AT&T would hold more spectrum licenses below 1 GHz"spectrum considered to be "beachfront" property due to its superior propagation characteristics for mobile broadband use[388]- "than every company other than AT&T and Verizon Wireless — combined."[389] In other words, "[t]he sub-1 GHz market would be a near duopoly.[390]

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[384] *See* T-Mobile, Press Release, *America's Largest 4G Network Now Twice As Fast in More Than 50 New Markets*, May 24, 2011, *available at* http://newsroom.t-mobile.com/articles/t- mobile.com/articles/t-mobile increase-4G-netwoek-spedd;*see also id*.("By midyear, T-Mobile expects that more than 150 million Americans will have access to [these] increased 4G speeds as T-Mobile upgrades its 4G network.")

[385] *See* Mike Dano, *T-Mobile: We'll match Verizon's LTE speeds with HSPA+ 42*, FIERCE WIRELESS, Jan. 6, 2011, *available at* http://www.fiercewireless.com/ceslive/story/t-mobile-well-match-verizons-lte- speeds-hspa-42/2011-01-06

[386] *See Fourteenth Competition Report*, Table 25.

[387] *See id.*

[388] *See id*. ¶ 269.

[389] Petition to Deny of Free Press et al., WT DKT. No. 11-18, at 12 (filed Mar. 11, 2011).

[390] *Id.*

4. It Is Unlikely That Any Of The Non-National Carriers Will Be Able To Fill The Gap Left By T-Mobile Absent Appropriate Merger Conditions.

226. It is unlikely that any of the non-national carriers will, on their own and without the assistance of robust merger conditions, be able to replace T-Mobile as a competitor in the retail market. Although regional and niche market competitors have delivered significant benefits to consumers in particular geographic or demographic markets, they will face substantial obstacles to competing against the Merged AT&T/T-Mobile, Verizon, and even Sprint.

227. As the GAO has found, industry consolidation has already made it more difficult for small and regional carriers to be competitive.[391] For example, "[t]he size and scale of large national carriers gives them the advantage of being able to deploy faster networks ahead of their competitors, thus reinforcing their competitive advantage."[392] In addition, smaller carriers lack the spectrum necessary for them "to expand networks and develop faster networks, making the carrier a more attractive choice for consumers."[393] The obstacles associated with acquiring more spectrum are significant.[394] Smaller carriers also lack access to the latest, most advanced handsets, making it more challenging for such carriers to add new subscribers,[395] retain existing

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[391] *See Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry,* Government Accountability Office, GA0-10-779, at 17, July 2010, *available at* http://www.gao.govinew.items/d10779.pdf *("GAO Wireless Industry Competition Report").*

[392] *Id.* at 19.

[393] *Id.* at 21.

[394] *See, e.g., Fourteenth Competition Report* ¶ 62 (concluding, based on the prices paid in recent auctions of AWS-1 and 700 MHz spectrum, that "aggregating a significant regional spectrum footprint would involve an outlay of hundreds of millions of dollars and a national footprint would require billions of dollars"); *see also* Jeffrey Silva, *Bandwidth in Balance,* Medley Global Advisors, at 1, May 25, 2011 (discussing the "political and technical obstacles that could hinder the infusion of additional spectrum into the marketplace in the near-to-medium term").

[395] *Id.* at 18.

subscribers,[396] and "take as much advantage of new data revenue streams" as the national carriers.[397] Furthermore, smaller carriers generally lack their own distribution channels and do not enjoy the same marketing and distribution efficiencies as the national carriers. For instance, the cost to a national independent retailer of offering multiple regional carriers on a market-by--market basis is significantly higher than the costs of assorting and marketing a single national carrier such as T-Mobile.

228. A brief examination of each of the following non-national carriers confirms that none of these carriers will become a viable alternative to the Merged AT&T/T-Mobile, Verizon, or Sprint in the retail market for mobile wireless data and voice services:

> ***Leap.*** Leap is a niche player that offers prepaid service in and around major metropolitan areas and targets underserved markets, including youth and low-income consumers, that are often overlooked by the large, national carriers.[398] Leap's mobile wireless voice and broadband networks have significantly less coverage than those of the national carriers, and Leap has significantly fewer spectrum holdings than the national carriers.[399] Furthermore, Leap lags far behind AT&T and Verizon in its 4G LTE deployment plans. Leap plans to deploy an LTE network "over the next few years, with a commercial trial market scheduled to be launched in late 2011."[400] Indeed, accordingly to one industry analyst, "Leap doesn't have a defined 4G strategy and likely to be one of the last carriers to upgrade," thereby increasing the carrier's risk of losing existing customers.[401]

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396 *Id.* at 19.

397 *Id.* at 22. For instance, Verizon and AT&T each reported average revenue per user (ARPU) from data services for the fourth quarter of 2009 in the mid-teens, while U.S. Cellular reported ARPU from such services of approximately $10. *Id.*

398 *See* Imari Love, *MetroPCS Posts Record Subscriber Growth and Churn Rates in 1Q,* Morningstar, at 1, May 3, 2011.

399 *See Fourteenth Competition Report,* Tables 1 & 2 (showing that Leap's mobile wireless voice network has only approximately one-third of the coverage of the national carriers' mobile wireless voice networks and that Leap's mobile wireless broadband network has less than one-third of the coverage of Verizon's mobile wireless broadband network); *see id.*, Table 25 (showing that Leap holds no 700 MHz spectrum, only 2.3 percent of all PCS spectrum and 8.8 percent of all AWS spectrum).

400 Leap Wireless 2010 Annual Report, Form 10-K, at 3 (filed Feb. 25, 2011).

401 Imari Love, *Another Solid Leap Forward,* Morningstar, at 3, May 5, 2011.

MetroPCS. MetroPCS is also a niche player whose customer base and rate plans resemble Leap's.[402] Like Leap, MetroPCS lacks the network coverage and the spectrum holdings of the national carriers.[403] Indeed, based on the FCC's most recent data, MetroPCS holds only 0.5 percent of all 700 MHz spectrum while AT&T and Verizon hold 67 percent of all such spectrum.[404] Moreover, while MetroPCS has deployed a 4G LTE network in most of its markets,[405] there are risks associated with the carrier's provision of 4G LTE services. First, because MetroPCS holds a 700 MHz license in a different spectrum block than the 700 MHz licenses held by AT&T and Verizon and some equipment manufacturers are focusing their equipment development efforts on the channel blocks held by those two carriers, there is a risk that devices made by these manufacturers "will not be cross-compatible for use on the 700 MHz channel block [MetroPCS] hold[s]."[406] Second, MetroPCS is deploying 4G LTE on PCS and AWS spectrum and unless its customers' handsets are capable of using the 700 MHz spectrum on which AT&T and Verizon are deploying 4G LTE, MetroPCS' customers will not be able to roam on those carriers' networks for 4G LTE services.[407]

U.S. Cellular. U.S. Cellular is a Midwest-based regional carrier that provides service in only half of the states.[408] Based on the FCC's most recent data, U.S. Cellular's mobile wireless broadband network has one-tenth of the coverage of Verizon's mobile wireless broadband network,[409] and like Leap and MetroPCS, it has few spectrum holdings relative to the national carriers.[410] In addition, according to one industry analyst, U.S. Cellular lacks not only the coverage and scale, but also the "handset portfolio to differentiate itself from

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[402] *See S&P 2011 Wireless Industry Report* at 12.

[403] *See Fourteenth Competition Report,* Table 1 (showing that MetroPCS' mobile wireless voice network has about one-third of the coverage of the national carriers' mobile wireless voice networks); *see id.*, Table 25.

[404] *See id.*

[405] *See* MetroPCS 2010 Annual Report, Form 10-K, at 11 (filed Mar. 1, 2011).

[406] MetroPCS Quarterly Report for the Period Ending March 31, 2011, Form 10-Q, at 36 (filed May 6, 2011).

[407] *Id.*

[408] *See U .S.* Cellular 2010 Annual Report, Form 10-K, at 1 (filed Feb. 25, 2011).
[51] *See Fourteenth Competition Report,* Table 2.

[409] *Fourteenth Competition Report,* Table 2.

[410] *See id*, Table 25 (showing that U.S. Cellular has 2.7 percent of all 700 MHz spectrum, 4.3 percent of all cellular spectrum, 1.8 percent of all PCS spectrum, and 2.0 percent of all AWS spectrum).

the major U.S. carriers."[411] Furthermore, while U.S. Cellular plans to launch LTE service in late 2011, the deployment will only cover approximately one-fourth of the carrier's subscriber base.[412]

Cincinnati Bell. Cincinnati Bell provides service in parts of only three states (Ohio, Kentucky, and Indiana)[413] and therefore lacks the scale and coverage needed to compete effectively with the Merged AT&T/T-Mobile and Verizon.

Cellular South. Cellular South serves customers in Mississippi and only portions of four other southeastern states.[414] Thus, it also lacks the scale and coverage necessary to compete effectively with the Merged AT&T/T-Mobile and Verizon.

Cox. Cox, the cable operator, offers wireless services in only seven states,[415] and it does not provide such services over its own facilities.[416] Moreover, Cox has stated that it plans to target its existing cable customer base and is "not looking at going after the wireless market in total."'[417]

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[411] *See* Imari Love, *First-Quarter Results for TDS and USM in Line with Expectations,* Morningstar, at 1, May 10, 2011.

[412] *Id.*

[413] *See* Cincinnati Bell 2010 Annual Report, Form 10-K, at 5 (filed Feb. 28, 2011).

[414] *See Testimony of Victor H. "Hu" Meena, President & Chief Executive Officer, Cellular South, Inc., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?"* at 1, May 11, 2011, *available at* http://judiciary.senate.gov/pdf/11-5- 11%20Meena%20Testimony.pdf.

[415] *See* Cox Communications, Press Release, *Cox Launches Wireless in Rhode Island, Connecticut, Cleveland,* May 17, 2011, *available at* http://cox.mediaroom.com/index.php? s=43 &item=543.

[416] *See* Todd Spangler, *Cox To Stop Building Its Own 3G Wireless Networks,* MULTICHANNEL NEWS, May 24, 2011, *available at* http://www.multichannel.com/article/468738-Cox_ToStop_Building_Its_Own_3G_Wireless Networks.php ("Cox Communications will decommission the 3G wireless networks it was building in a few markets, deciding instead to focus on rolling out voice and data service via its wholesale agreement with Sprint Nextel. Cox never put its own 3G CDMA networks into service.").

[417] *See* Janice Podsada, *Cox Communications Launches Wireless Cell Phone Service in Connecticut,* HARTFORD COURANT, May 16, 2011, *available at* http://www.courant.com/business/hc-cox-launches-wireless-phone-servic20110516,0,6936581.story (quoting company spokeswoman).

Clearwire. While Clearwire has deployed 4G mobile wireless broadband services in numerous markets across the country, it faces a number of significant obstacles to competing effectively with the Merged AT&T/T-Mobile and Verizon. To begin with, it does not offer interconnected mobile wireless voice service.[418] Additionally, it relies on WiMAX rather than LTE technology, which is "likely to become the global standard" for 4G services.[419] As Clearwire has conceded, LTE "may deliver performance that is similar, to, or better than, or may be more widely accepted than the mobile WiMAX technology [it is] currently deploying."[420] Moreover, Clearwire lacks financial stability. Among other things, the company's aggressive network expansion plans have resulted in funding shortfalls[421] and forced Clearwire to lay off employees,[422] scale back marketing campaigns and the opening of retail stores,[423] and most recently, outsource management of its network.[424] The company has also abandoned plans to sell Clearwire-branded smartphones,[425] a decision which will make it even more difficult for

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[418] *See* Clearwire 2010 Annual Report, Form 10-K, at 7 (filed Feb. 22, 2011) ("Clearwire 2010 Form 10-K"); *see also Fourteenth Report* 1169.

[419] Michael Hodel, *Clearwire Under Review as Intel Sale Sends Shares Lower,* Morningstar, at 1, May 12, 2011 *("Clearwire Under Review").*

[420] Clearwire 2010 Form 10-K, at 16-17.

[421] *See, e.g., Clearwire Under Review* at 5 (discussing uncertainties regarding Clearwire's funding plans); *see also* Brad Reed, *Sprint still losing money despite adding 1.1 M customers; Sprint postpaid subscriptions still falling despite surge in prepaid numbers,* NETWORK WORLD, Apr. 28, 2011, *available at* http ://www.networkworld.com/news/2011/042811-sprint-losing-money.html ("[Clearwire] says that the vast majority of its capital expenditures over the past three years were incurred from network build-outs that have helped Clearwire bring its WiMAX services to every major market in the U.S. Even so, Clearwire's revenue has failed to keep up with the increased operating costs, resulting in a $2.3 billion loss in 2010, nearly double the $1.25 billion loss posted in 2009.").

[422] *See* Stephen Lawson, *Clear wire to lay off 15 percent to save cash; The WiMax carrier will also hold off on retail and marketing efforts in some cities where its network goes live,* NETWORK WORLD, Nov. 4, 2010, *available at* http://www.networkworld. com/news/2010/110410-clearwireto-lay-off-15 .html.

[423] *See id.*

[424] *See* Clearwire, Press Release, *Clearwire Selects Ericsson for Managed Services,* May 18, 2011, *available at* http://corporate.clearwire.com/common/download/download.cfm?companyid=CLWR&fileid=469326&filekey=ef27bb19-98b8-41f8-bbab-44dc26e8765a&filename=578764.pdf (emphasizing Clearwire's goal of "reduc[ing] operating costs").

[425] *See* Greg Bensinger & Amy Thomson, *Clearwire Shelves Rollout of Its Own Branded Smartphones,* Bloomberg, Mar. 24, 2011, *available at* http://www.bloomberg.com/news/2011-03-24/clearwire-shelves-rollout-of-clear-branded-phones-chairman-says.html.

Clearwire to compete with the Merged AT&T/TMobile and Verizon in the retail market.

D. The Proposed Transaction is Likely to Harm Consumer Welfare in the Market for Mobile Devices as Well as the Market for Mobile Applications

229. As both the FCC and the GAO have recognized, handsets used with mobile wireless service comprise a critical part of the mobile wireless ecosystem.[426] In some cases, mobile wireless carriers develop handsets with manufacturers and/or with mobile operating system designers, and carriers generally offer those handsets pursuant to exclusive distribution arrangements.[427] In other cases, such as AT&T's initial offer of the iPhone, wireless carriers offer handsets pursuant to exclusive distribution arrangements even though the carriers had no role in the development of the handsets.[428] Finally, mobile wireless carriers also sometimes support handsets for which they do not have exclusive distribution arrangements.[429] T-Mobile has participated in the mobile wireless ecosystem in several ways. First, it has developed handsets pursuant to exclusive distribution arrangements with manufacturers. For example, "T-Mobile partnered with Nokia, Samsung, and Sony Ericsson to develop the first handsets to operate on [AWS] spectrum."[430]

230. Second, T-Mobile has developed handsets in coordination with mobile operating system developers and manufacturers and offered those handsets pursuant to exclusive distribution arrangements. For instance, T-Mobile invested heavily—"with more than one year of work and millions of dollars in research and development"—"in its partnership with Google to

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[426] *See Fourteenth Competition Report* ¶ 299; *see also GAO Wireless Industiy Competition Report* at 18-19.

[427] *See Fourteenth Competition Report* ¶ 143.

[428] *Id.*

[429] *Id.* ¶ 135.

[430] *See* Reply Comments of T-Mobile USA, Inc., RM-11497, at 9 (filed Feb. 20, 2009) ("T-Mobile Feb. 20, 2009 Comments").

develop the Gl, the first handset to employ Google's open source mobile software platform, Android."[431] T-Mobile also worked with HTC to develop the G1[432] and offered the G1 pursuant to an exclusive distribution arrangement with that manufacturer.[433] These partnerships benefitted consumers in that the success of the G1 "paved the way" for future Android-based handsets that became available on the networks of other carriers as well as T-Mobile.[434] Indeed, as the FCC has recognized, "in January 2010, Google began selling its own version of an Android-based smartphone, the Nexus One, directly to end users as a reseller of wireless network services."[435]

231. Third, T-Mobile has also been willing to support devices without exclusive distribution arrangements. For example, in 2009, T-Mobile introduced its "Even More Plus" plan, which offered lower monthly service plans for subscribers that use unsubsidized handsets.[436] As the FCC has recognized, this was "the first attempt by a national provider to change the incentives associated with device subsidies and service plan rates in a way to encourage mass market customers to use an unsubsidized device."[437] As another example, T-Mobile permits consumers to 'bring their own device' provided that it is compatible with T-Mobile's GSM network.[438] In addition, T-Mobile "does not lock unsubsidized devices and allows

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[431] *Id*. at 7.

[432] *See* T-Mobile, Press Release, *T-Mobile Unveils the T-Mobile G1– the First Phone Powered by Android*, Sept. 23, 2008, *available at* http://newsroom.t-mobile.com/articles/t-mobileQWERTY-Google-touchscreen.

[433] *See id.; see also* Lance Ulanoff, *Google, T-Mobile Launch 'Game Changing' G1 Phone*, PC MAGAZINE, Sept. 23, 2008, *available at* http://www.pcmag.com/article2/0,2817,2331007,00.asp.

[434] T-Mobile Feb. 20, 2009 Comments at 8; *see also Fourteenth Competition Report* ¶ 141.

[435] Fourteenth *Competition Report* ¶ 141.

[436] *Id.* ¶ 315.

[437] *Id.*

[438] Comments of T-Mobile USA, Inc., GN Dkt. No. 09-191 et al., at 13 (filed Oct. 12, 2010).

subscribers to unlock subsidized handsets after only 40-60 days, depending on the customer's service plan."[439]

232. If AT&T is allowed to acquire T-Mobile, consumers will lose the benefit of both T-Mobile's independent development of devices with manufacturers and mobile operating system designers made available pursuant to exclusive distribution arrangements. More importantly, consumers will likely lose the benefit of T-Mobile's willingness to support handsets for which it does not have an exclusive distribution arrangement. Indeed, the FCC has found that of 67 selected smartphone launches in 2008 and 2009, 32 were launched by one of the four national carriers on an exclusive basis and almost half of those were by AT&T.[440] Therefore, it seems likely that, post-transaction, legacy T-Mobile will be less interested in supporting handsets for which it does not have exclusive distribution arrangements.

233. Furthermore, as explained, if AT&T is able to acquire both T-Mobile's spectrum and Qualcomm's 700 MHz spectrum, AT&T and Verizon would have similar spectrum holdings (AWS and 700 MHz) for which to develop 4G LTE networks that the FCC essentially acknowledges would be distinctly superior to those of other carriers. These spectrum holdings, along with AT&T and Verizon's vastly larger customer bases, will enable the two carriers to work with manufacturers to develop 4G handsets that work only on their 4G networks and that are offered exclusively with AT&T and/or Verizon service. In fact, as discussed above, MetroPCS already faces the risk that 4G devices made for AT&T and Verizon will not work on its network. The increase in horizontal market concentration as a result of the Proposed Transaction will only increase AT&T's incentive to engage in this conduct.

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[439] *Id.*

[440] *Fourteenth Competition Report* ¶ 143 & Chart 9.

234. Thus, the elimination of T-Mobile as an independent competitor in the market and AT&T's acquisition of T-Mobile and Qualcomm's spectrum will likely diminish the number of handsets developed. The Proposed Transaction and the AT&T-Qualcomm transaction will also increase AT&T's incentive to use exclusive distribution arrangements to limit the availability of the handsets that are developed.

235. Finally, it is worth noting that there is an increased likelihood that the proposed transaction will also reduce competition in the provision of mobile applications. As the FCC has recognized, "[t]he emergence of web-friendly smartphones and a handful of smartphone operating systems with application stores have influenced the ability of mobile wireless service providers to differentiate themselves based on mobile applications.[441] But mobile broadband service providers have sometimes blocked third-party applications that have the potential to cannibalize their existing revenue streams. For example, "AT&T reported in August 2009 that Apple had agreed not to allow the iPhone to use AT&T's 3G network for VoIP calling without first obtaining AT&T's consent.[442] While AT&T later dropped this requirement, the increase in AT&T's market power as a result of the Proposed Transaction will likely increase its incentive to engage in such conduct.

E. The Proposed Transaction is Likely to Harm Consumer Welfare in the Wholesale Market for Mobile Wireless Data and Voice Services

236. MVNOs rely on wholesale agreements with facilities-based mobile wireless carriers to provide consumers with differentiated service offerings. As the FCC has recognized, "MVNOs may target their service and product offerings at specific demographic, lifestyle, and

[441] *Fourteenth Competition Report* ¶ 150.

[442] *See id.* ¶ 151.

market niches that have particular needs or interests.[443] In addition, MVNOs make new and innovative service offerings available to consumers, thereby increasing competition. For example, Virgin Mobile's offering of the first prepaid mobile wireless broadband plan prompted AT&T and Verizon to offer similar plans.[444]

237. In order for MVNOs to make these service offerings available to consumers, they must have access to wholesale mobile wireless data and voice services on reasonable rates, terms and conditions. In a market with four national carriers, there is a greater chance that one of the carriers will offer wholesale service on reasonable rates, terms and conditions. Stated differently, if T-Mobile is eliminated as a competitor, it is less likely that any of the remaining three national carriers will have the incentive to offer MVNOs wholesale service on reasonable rates, terms and conditions. As the FCC has found, where a transaction "would reduce the number of genuine competitors to three or fewer," the transaction "may result in a significant likelihood of successful [anticompetitive conduct].[445] The remaining carriers could exercise their market power by, for example, unilaterally raising prices above competitive levels or tacitly or explicitly coordinating to raise prices above competitive levels.[446] This potential for supra-competitive prices is a particular concern in a market dominated by a few firms where, as here, the barriers to entry are high.[447] Thus, the Proposed Transaction will likely make it more difficult for MVNOs to obtain reasonably priced wholesale service.

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[443] *Id*. ¶ 31.

[444] *See* Phil Goldstein, *AT&T launches prepaid mobile broadband offerings*, FIERCE WIRELESS, Nov. 23, 2009, *available at* http ://www. fiercewirele ss com/story/t-launches -prepaid-mobilebroadband-offerings/2009-11 -23 .

[445] *Verizon-ALLTEL Merger Order* ¶ 101.

[446] *See id.; Qwest Phoenix MSA Forbearance Order* ¶ 30.

[447] *See Qwest Phoenix MSA Forbearance Order* ¶ 29.

238. For example, the Proposed Transaction will also make it more difficult for independent retailers seeking to enter the retail market for mobile wireless data and voice services via resale to obtain such agreements on reasonable rates, terms and conditions. For example, as discussed above, T-Mobile has provided the underlying mobile wireless service for Walmart's white label offering. If T-Mobile is acquired by AT&T, it is not clear that any of the remaining three national carriers will have the incentive to offer Walmart wholesale service on reasonable rates, terms and conditions.

239. Moreover, if, as seems likely, AT&T's and Verizon's LTE networks emerge as superior to other mobile wireless networks, a viable resale strategy could well depend on the ability to resell AT&T or Verizon's LTE service. If there are effectively only two competitors, it is almost certain that neither will be willing to offer wholesale service on reasonable rates, terms and conditions. Indeed, as the FCC has held, a substantial body of both theoretical and empirical evidence demonstrates that a duopoly is unlikely to yield competitive outcomes.[448]

240. Finally, while AT&T suggests that the merged AT&T/T-Mobile will face strong competition in the wholesale market from Clearwire and LightSquared,[449] it is not entirely clear that this is the case. First, there are significant questions about Clearwire's long-term viability because, as discussed above, Clearwire is in financial "turmoil"[450] and it does not currently use the technology (i.e., LTE) that will likely become the standard for 4G mobile wireless services. Second, while LightSquared's business model holds considerable promise, the company has several significant obstacles to overcome. For example, LightSquared must resolve interference concerns raised by the GPS industry and Federal agencies to the FCC's satisfaction before it can

[448] *See Qwest Phoenix MSA Forbearance Order* TR 30-31.

[449] *See* Public Interest Statement at 92-94.

[450] *Clearwire* Under Review at 1.

begin offering commercial service.[451] In addition, as a condition of the HarbingerSkyTerra Transfer Order, LightSquared must construct a terrestrial network that ultimately covers 260 million people nationwide by the end of 2015.[452] Furthermore, LightSquared must comply with the FCC's costly "gating" requirements for Mobile Satellite Service licensees with Ancillary Terrestrial Component authority, including providing continuous satellite service in specified geographic areas and maintaining spare satellites.[453]

241. It is therefore unlikely that competition from Clearwire or LightSquared will be sufficient to constrain the exercise of market power by the Merged AT&T/T-Mobile (and Verizon) in the wholesale market in the near future. Indeed, the head of AT&T Business Solutions recently suggested that Clearwire and LightSquared should merge because "[t]here really isn't a profitable wholesale model in wireless today."[454]

F. The Proposed Transaction Will Likely Diminish Independent Retailers' Ability to Serve Consumers

242. As explained above, independent retailers have the ability to lower mobile wireless consumers' transaction costs and to expand the range of competitive options available to these consumers. Elimination of T-Mobile from the wireless marketplace will make it more difficult for independent retailers to serve consumers because independent retailers will no longer have the ability to assist them in understanding the comparative benefits offered by T-

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[451] *See LightSquared Subsidiary LLC, Request for Modification of its Authority for an Ancillary Terrestrial Component,* Order and Authorization, 26 FCC Rcd. 566, TT 40-41 (2011).

[452] *See SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC,* Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 3059, Attachment 2 (2010) (Condition 2).

[453] *See* 47 C.F.R. § 25.149(b).

[454] Sinead Carew, *AT&T: No Room For Both Clearwire and LightSquared*, Reuters, May 16, 2011, *available at* http://www.reuters.com/article/2011/05/16/us-summit-att-clearwire-idUSTRE74F3MG20110516 (quoting John Stankey, President and CEO, AT&T Business Solutions).

Mobile in terms of price, network quality, handsets and other dimensions of competition. In addition, it is likely that the Merged AT&T/T-Mobile would have the incentive to restrict independent retailers' ability to serve mobile wireless consumers in other ways.

243. First, the Merged AT&T/T-Mobile would likely have the incentive to prevent independent retailers from reducing consumers' transaction costs. For example, if independent retailers are free to offer, and advise consumers regarding, a wide range of competitors' service plans and devices as alternatives to the Merged AT&T/T-Mobile's offerings, some consumers that would have chosen a service plan from the Merged AT&T/T-Mobile will instead choose the Merged AT&T/T-Mobile's competitors service plans. To the extent that such competitors offer lower prices, innovative pricing options, or other advantages, the availability of such offerings at independent retailers could increase the pressure on the Merged AT&T/T-Mobile to offer its own, similar offerings. Stated differently, if independent retailers were not able to sell the offerings of competitors to the Merged AT&T/T-Mobile, the customers in question might never consider such competitive carriers' offerings. This is particularly likely with regard to smaller, regional and niche mobile wireless carriers that lack the national carriers' brand recognition and advertising budgets.

244. There are many ways in which the Merged AT&T/T-Mobile could act on this incentive to prevent independent retailers from lowering consumers' transaction costs. For example, the Merged AT&T/T-Mobile could do the following:

- condition the availability of its service offerings in independent retailer stores on the independent retailers' agreement not to carry some (e.g., regional/niche) or all other carriers' offerings;

- limit the number of low-priced service plans sold by independent retailers by, for example, making corporate discounts or special price discounts available to consumers only at Merged AT&T/T-Mobile stores or on the Merged AT&T/T-Mobile's website;
- place restrictions, such as unreasonable voice or data usage caps, on lower-priced plans when sold by independent retailers; and/or
- require that independent retailers sell unrelated products (e.g., Merged AT&T/T-Mobile video or wireline broadband services) bundled with mobile wireless services.

245. Second, the Merged AT&T/T-Mobile would likely have the incentive to prevent independent retailers from lowering the price of the Merged AT&T/T-Mobile's mobile wireless offerings. As explained above, independent retailers sometimes "share" their FCCs from mobile wireless carriers with consumers in the form of lower priced devices. Where independent retailers lower prices in the manner, the Merged AT&T/T-Mobile may be required to lower the prices it charges via other retail channels. If so, the Merged AT&T/T-Mobile would likely have the incentive to limit or prohibit the extent to which independent retailers may use FCCs to lower retail prices offered to consumers.

246. Third, the Merged AT&T/T-Mobile would likely have the incentive to restrict the extent to which independent retailers can proactively increase consumers' choice of service plans, devices and applications. This is because the introduction of alternatives in the market would likely cause the Merged AT&T/T-Mobile to lose customers or respond to competition by lowering prices or introducing new service options. The Merged AT&T/T-Mobile would have the incentive to avoid these outcomes.

247. Again, there are many ways in which the Merged AT&T/T-Mobile could act on this incentive to diminish the extent to which independent retailers could themselves introduce new competitive alternatives in the marketplace. For example, the Merged AT&T/T-Mobile could do the following:

- limit the extent to which wireless devices or applications developed by or at the direction of third parties, including independent retailers themselves, can operate on or are supported by the Merged AT&T/T-Mobile network;
- limit the extent to which wireless devices or applications developed by or at the direction of the Merged AT&T/T-Mobile can be used by subscribers to other mobile wireless carrier services, including the services offered by independent retailers pursuant to a resale agreement with an underlying wholesale mobile wireless carrier; and/or
- limit the extent to which independent retailers can tailor the suite of applications and functionalities available that run on the Merged AT&T/T-Mobile network by, for example, adding applications or disabling undesirable applications or features.

248. Finally, and more generally, the Merged AT&T/T-Mobile's may also have the incentive to limit the extent to which independent retailers can divert business and profits from the Merged AT&T/T-Mobile affiliated retail stores and website. There are many ways in which the Merged AT&T/T-Mobile could seek to make independent retailers less effective competitors to the Merged AT&T/T-Mobile's stores and web sites. For example, the Merged AT&T/T-Mobile could do the following:

- allocate device inventory to the Merged AT&T/T-Mobile's affiliated stores on preferential terms and in greater volumes than is the case with independent retailers;

- prevent manufacturers from selling iconic wireless devices, such as Apple's iPhone or iPad, to independent retailers; and/or
- reduce FCCs paid to independent retailers.

249. By reducing the effectiveness of independent retailers in this manner, the Merged AT&T/T-Mobile could capture a larger share of the higher prices that the Merged AT&T/T-Mobile could charge as a result of the proposed transaction.

G. The Market For Wholesale Access to Incumbent Facilities Would Be Harmed By This Transaction

250. Just as traditional facilities-based competition would be diminished if this transaction is approved, the market for wholesale access to incumbent wireless facilities would be gravely injured. Providers currently have very limited options for obtaining wholesale access. Of the four national carriers, AT&T and Verizon have both been unwilling to provide meaningful wholesale access to their facilities to provide data services. Indeed, AT&T has largely refused to negotiate even roaming agreements on its 3G network, and Verizon has similarly been quite resistant.[455] These carriers are the market leaders in a highly-concentrated market, and it is not in their interest to offer wholesale facilities on reasonable terms, since this would help rivals overcome what could otherwise be significant barriers to entry. The likelihood that these carriers will cooperate would only lessen if this transaction if approved, as their control of the market would be considerably strengthened.

251. Post-merger, Sprint would be the only national carrier willing to provide wholesale access to its facilities, and thus could be expected to offer less competitive terms than it does when competing with T-Mobile. Equally important, Sprint's viability would be threatened if the proposed transaction proceeds, as Sprint would be dwarfed in size by post-merger AT&T

[455] Data Roaming Order ¶25.

and Verizon. Indeed, Sprint's chief Executive Officer has acknowledged that, if the acquisition is approved, Spring would be vulnerable to a takeover by Verizon, and that even without the acquisition is approved, Sprint would be vulnerable to a takeover by Verizon, and that even without such a takeover, it would be very difficult for Sprint to compete against Verizon and AT&T.[456]

252. Allowance of the Proposed Transaction would also make reliance on regional carriers for wholesale access to facilities – a challenging model in the current market – significantly more difficult. Relying on these carriers alone to provide service across the country, and with redundant backup networks necessary for high-reliability-intensive applications, is impossible. Rather, arrangements with regional carriers must be supplemented with roaming from national carriers. Obtaining roaming arrangements is challenging enough currently.[457] And this transaction would remove one of only four national carriers and one of only two national GSM-based carriers in the country. Moreover, as with Sprint, given the barriers competitors will face due to AT&T and Verizon's scope and scale post-merger, regional carriers' competitive role going forward would be unclear at best.[458]

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[456] Hessee Testimony.

[457] While the Commission's Data Roaming Order may ameliorate some of these problems, it casts doubt on whether carriers relying on wholesale access like CSCT can take advantage of them. *See* Data Roaming Order at ¶¶34, 38 & n.116, 41 & n.122, 88 (stating repeatedly that data roaming rules cannot be used to require a carrier to offer its services for resale – one form of service using wholesale access). Moreover, as mentioned above, that order does not address problems such as the high price for roaming.

[458] By contrast, Japan has three carriers covering a population of approximately 130 million people, and Ireland has five carriers covering approximately 4.5 million people. *Mobile – Q2 2011 BMI Telecommunications Report*, Japan Telecommunications Report, Business Monitor International Ltd. (April 2011); Commission for Communications Regulation, *Irish Communications Market Quarterly Key Data Report* (2010), 45, 62, *available at* http://www.comreg.ie/_fileupload/publications/ComReg10106.pdf.

253. Finally, approval of the merger would further hinder companies like Clearwire and LightSquared,[459] carriers that aim to provide wholesale services. These companies face significant challenges to begin with, including access to sufficient financing, and, in LightSquared's case, vocal claims that its service interferes with GPS-based services.[460] If the merger is approved, these companies would also have to face the same competitive challenges that Sprint has already made clear would be exceedingly difficult to overcome.

H. There Are Significant Barriers to Entry in the Special Access Market

254. Like the FCC, the Tribunal should examine entry barriers to determine whether a new entrant could efficiently enter the market and begin serving customers fleeing the incumbent's service if the incumbent were to raise its prices above a certain threshold.[461] Indeed, the FCC has found that deployment of loops is a "costly and time consuming" undertaking.[462] Further, the FCC has found that "carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited."[463] Because of these high barriers, the FCC has determined that it is "unlikely

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[459] *See* Public Interest Statement at 92-94.

[460] *See In re Fixed and Mobile services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz,* Report and Order ET Docket No. 10-142,2011 WL 1325514 (FCC 11-57 rel. April 6, 2011); Marguerite Reardon, *LightSquared: The answer to U.S. wireless competition?,* CNET (April 21, 2011), *available at* http://news.cnet.com/8301-30686_3-20055922-266.html.

[461] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, 3293 ¶38 (1995) *("AT&T Non-Dominance Order").*

[462] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17107 ¶205 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) *vacated in part, remanded in part on other grounds, United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[463] *SBC/AT&T Merger Order,* 20 FCC Rcd at 18310, ¶39.

that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment."[464] Therefore, the FCC had concluded that "Carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment,"[465] and that even in those cases "where there is adequate retail demand, the cost of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry."[466] Thus, "for many buildings, there is little potential for competitive entry."[467]

255. The FCC has previously harmonized its analysis of entry barriers with the DOJ's competitive analysis.[468] For example, in the evaluation of the merger between SBC and AT&T Corp., the DOJ found that "in certain buildings where 'SBC and AT&T are the only firms that own or control a direct wireline connection to the building,' the merger was 'likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those Buildings.'"[469] Further, the DOJ recognized the entry barriers that precluded competitors from deploying their own facilities, determining that "although other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and

[464] *Id.*

[465] *Id.*

[466] *Id.*

[467] *Id.*

[468] *Id.* ¶ 40.

[469] *See id.*

expensive process."[470] Such barriers include physical barriers, such as rivers and railbeds between the CLEC's network and the customer's location, and the need for consents from building owners and municipal officials.[471] These barriers impose costs that result in a single connection costing tens of hundreds of thousands of dollars, and as a result "CLECs will typically only build in to a particular building after they have secured a customer contract of sufficient size and length to justify the anticipated constructions costs for that building."[472]

256. These conclusions regarding the existence of entry barriers are supported by the conclusions in reports by the GAO and National Regulatory Research Institute.[473] The NRRI Report analyzed the costs to deploy competitive special access facilities and the potential revenues available in the market, and concluded that the revenue that a CLEC could obtain by selling a DS-1 that required construction of ¼ mile would be only 4% of the revenue needed, even if the CLEC could find buyers at the RBOC's rack rate prices.[474] And the GAO Report

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[470] *United States v. SBC Communications, Inc. and AT&T Corp.,* Civil Action No. 1:05CV02102 (D.D.C. Nov. 16, 2005), *Competitive Impact Statement* at p.8. (*"US v. SBC/AT&T Competitive Impact Statement").*

[471] Complaint, *United States v. SBC Comm., Inc.,* Civ. Action No. 1:05CV02102 (D.D.C. October 27, 2005) at ¶27 ("*U.S. v. SBC Complaint*"); Complaint, *United States v. Verizon Comm. Inc.,* Civ. Action No. 1:05CV02103, (D.D.C. October 27, 2005) at ¶27 (*"U.S. v. Verizon Complaint"). See* AT&T Petition, RM-10593, at p. 31 (contrasting the high transaction costs that a CLEC incurs in obtaining rights-of-way from local governments with the "minimal transaction costs" that the Bells incurred as "first movers.")

[472] *US v. SBC/AT&T Competitive Impact Statement* at p. 8.

[473] United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services," November 2006 ("GAO Report"), at 26-27; National Regulatory Research Institute "Competitive Issues in Special Access Markets," January 21, 2009, at pp. 54-55 ("NRRI Report").

[474] NRRI Report at 54. A Declaration submitted on behalf of AT&T, before it was acquired by SBC, asserted that deployment of transport facilities to a particular point of aggregation (Local Dedicated Interoffice Circuits) is only economic when there are at least 18 DS-3s of traffic available. Reply Declaration of Janusz A. Ordover and Robert D. Willig on behalf of AT&T Corp., *In the Matters of Special Access Rates for Price Cap Local Exchange Carriers and AT&T*

emphasized that obtaining governmental consents may impose delays as well as costs on an entrant, that landlords may demand a percentage of a competitor's revenue for allowing it to enter the building, and that even if a competitor is located within a given building, it may be "unable to connect to businesses on all floors within that building."[475]

257. Entrants encounter common barriers when seeking to enter the markets for transport or local loops. In both cases, deployment involves considerable sunk and fixed cost,[476] including the costs associated with undergoing the pole licensing and make-ready process controlled by the ILECs,[477] obtaining governmental consents and paying associated fees, purchasing the fiber-optic cables and optronic equipment, and physically installing the fiber the fixed costs are high, particularly in urban centers where fiber must be deployed underground.[478] While the cost to deploy fiber is generally lower is less populated areas, the revenue opportunities are typically insufficient to justify such deployment.[479] Moreover, such costs represent especially high barriers when associated with deployment of fiber to remote or isolated cell sites, because such network extensions are significantly less likely to be used by additional

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petition for rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Special Access Services, WC Docket No. 05-25; RM 10593, at ¶29.

[475] GAO Report at 22, 27.

[476] *See TRRO* ¶ 72.

[477] By means of its order in *Implementation of Section 224 of the Act,* WC Docket No. 07-245, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. April 7, 2011) (*"Pole Order"),* the Commission has taken an important step that should reduce significantly the cost of obtaining access to utility right-of-way facilities. Nevertheless, even where the Commission regulates pole attachments, those cost reductions are not likely to be broadly realized over the next several years because utility resistance will undoubtedly arise, both in court and in the innumerable daily encounters, in the field among representatives of the pole owners and the attachment license applicants. Moreover, the new access rules will not have immediate or direct effect in the numerous states that have certified that they regulate pole attachments.

[478] *TRRO* ¶ 73.

[479] *See id.*

customers that are fiber facilities installed along routes dense with heavy users of telecommunications.

258. Large customers for special access services, such as wireless providers, typically need connectivity among large numbers of locations, creating another entry barrier. As a result of the ubiquitous networks – a legacy of their previously state-sanctioned monopolies, AT&T and other ILECs gain market power from ubiquity that is unavailable to competitors.480 The GAO Report put it this way: "a bank may have 30 or 40 locations in 12 states in one region of the country and require dedicated access. To serve that customer wholly over its own facilities, a competitor would need to extend its network to all of those locations," and because the percentage of buildings in the MSAs examined with a competitor "appears to be relatively small, it is unlikely that a single competitor would have very many of its own facilities to serve such a customer.[481]

259. Consistent with the conditions found by the FCC, the DOJ, the GAO and NRRI, in their respective reviews of competition in the special access market, including reviewi9ng other mergers, the barriers to entry for providing backhaul to wireless providers are high. The major wireless providers are now implementing metro Ethernet to backhaul mobile wireless

480 *See* Declaration of Lee L. Selwyn, Attachment A to Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25 (filed January 19, 2010), at ¶¶ 2-8.

481 GAO Report at 22, 23. The fact that the Local Private Line assets of MCI and AT&T that were divested pursuant to consent decrees when they were merged into Verizon and SBC were sold at has been described as "rummage sale prices" is evidence that these isolated assets do not benefit from network externalities that are possessed by the RBOCs. *See* Declaration of Lee L. Selwyn, submitted on behalf of the National Association of State Utility Consumer Advocates (NASUCA), in *United States v. SBC Comm., Inc.,* Civ. Action No. 1:05CV02102 (D.D.C.) and *United States v. Verizon Comm. Inc.,* Civ. Action No. 1:05CV02103 (D.D.C.) (Sept. 5, 2006).

traffic from their cell towers to their switches and other aggregation points.[482] The high speed, scalable metro Ethernet backhaul the wireless companies demand requires fiber infrastructure and thus requires significant capital investment, particularly because of the combination of geographic dispersal of cell sites and increasing bandwidth need at each cell site. Once a backhaul supplier extends its fiber network to service wireless carrier cell sites, the fiber infrastructure can benefit the businesses and institutions along the fiber route by providing those businesses with competitive choice for their local bandwidth needs.

I. No Competitor is Likely to Enter the Market to Mitigate the Anticompetitive Impacts

260. Certainly, after conducting an HHI or similar analysis, the Tribunal may also consider whether the presence of an actual potential competitor mitigates the dangers of enhanced concentration. But this analysis does not stop at counting noses and weighing all competitors equally. Indeed, the entire point of HHI is the concentration in the market gives the dominant firm substantial power to undermine its competitors and enhances the attraction of coordinated action among the remaining market participants. To ignore HHI because of the presence of remaining competitors, when the HHI demonstrates how much harder it will be for these competitors post-merger, would be to stand antitrust and public interest analysis on its head.

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[482] *See* Sean Buckley, *Infonetics: IP/Ethernet dominated wireless backhaul spending in 2010, FierceTelecom,* April 12, 2011 available at http://www.fiercetelecom.com/story/infonetics-ipethernet-dominated-wireless-backhaul-spending-2010/2011-04-12?utm_medium=rss&utm_source=rss (Infonetics' new Mobile Backhaul Equipment and Services market share and forecast report revealed that 89 percent of the money spent on mobile backhaul equipment in 2010 was for IP/Ethernet platforms"); *see e.g.* T-Mobile May 6 Ex Parte (T-Mobile uses Ethernet backhaul for 3G cell sites).

261. Additionally, several other factors undermine the ability of potential or existing competitors to offset post-merger concentration. First, as AT&T has acknowledged elsewhere,[483] consumers seeking to move from one carrier to another face numerous switching costs. Second, new entrants cannot enter the market without additional spectrum, and all other competitors fact the same spectrum constraints as AT&T professes to face. Nor can providers hope to win customers without competitive devices.[484] But, as discussed above, AT&T will be in a strong position post transaction to impede the ability of existing firms or new entrants to develop and market wireless devices capable of competing with AT&T.

262. Indeed, the economics of the wireless industry ensure that AT&T would have plenty of warning if a potential new rival began to emerge and significant opportunity to use its enhanced market power to undermine those emerging competitors. Finally, both existing competitors (with the exception of Verizon) and any potential new competitor would be utterly dependent on AT&T for crucial inputs, giving AT&T further opportunity to squeeze its rivals. As explained below, the Tribunal cannot hope to address these concerns adequately with conditions.

XI. AT&T'S ARGUMENTS REGARDING NETWORK CAPACITY CONSTRAINTS LACK CREDIBILITY AND IGNORE EFFICIENT SPECTRUM MANAGEMENT PRACTICES

263. The Tribunal should reject assertions by AT&T, DT and T-Mobile that the Proposed Transaction is necessary to relieve capacity constraints their networks allegedly face as the result of growing consumer demand for broadband data services. AT&T's exaggerated claims are undermined by their own prior statements and the facts. AT&T's claims also are

[483] *See* AT&T Inc., *Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934,* Commission File Number 1-8610, *available at* http://www.sec.gov/Archives/edgar/data/732717/000073271710000074/att2q10.htm.

[484] 14th Competition Report ¶ 60.

premised on outdated assumptions and ignore a range of network management practices and new technologies that would maximize the efficient use of their existing spectrum holdings and permit them to meet consumer demand for their services without an anti-competitive merger. As Steven Stravitz, the CEO and Managing Director of Spectrum Management Consulting, concludes in his declaration,

> AT&T uses only roughly half of its licensed spectrum. Yet AT&T does not provide technically compelling reasons for idling those resources, inappropriately justifies the transaction as the cure to spectrum capacity limits, and does not provide data needed to reject many readily available spectrum and capacity management alternatives that can address [AT&T's] capacity challenges at a cost far below $39 billion. ... AT&T's proposed acquisition of T-Mobile will perpetuate AT&T's inefficient spectrum use. Rather than encouraging investment in new, innovative, and more efficient technologies, the proposed T-Mobile acquisition would permit AT&T to keep subscribers tied to older and less efficient technologies, delay innovative new facilities-based investment, and continue to maintain a large inventory of unused spectrum.[485]

A. There Is No Evidence Demonstrating that AT&T Faces Unique Demands on Its Network

264. The claims that AT&T is facing "unique spectrum and capacity challenges" and that its "mobile data volumes . . . surged by a staggering 8000% from 2007 to 2010[.]"[486] AT&T, however, does not provide sufficient data to back up this claim. As the Stravitz Declaration explains, AT&T provides "no baseline for comparison or amount of data transmitted per mobile user ... to substantiate this claim or enable analysis of the relative efficiency of AT&T's network[.]"[487] At one point AT&T refers to an 8,000 percent increase in "mobile data" volumes while a declaration AT&T submitted to the FCC refers to an 8,000 percent increase in "mobile broadband use." Which is it? Is AT&T measuring 3G data usage or are they also including 2G data services and text messaging? Does the data reflect usage by all AT&T subscribers, or just its

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[485] Declaration of Steven Stravitz, **Attachment G ¶¶** 7, 10 ("Stravitz Decl.").

[486] Description of Transaction at 2.

[487] Stravitz Decl. ¶ 11.

iPhone and smartphone subscribers? AT&T also does not provide data usage on a market-by-market basis, which would be the more relevant data to assess claims that they are facing network congestion in specific markets.[488]

265. Although there is no dispute that mobile data usage by subscribers is increasing, all carriers face this increased demand. As the Stravitz Declaration points out, "AT&T's experience as a wireless data service provider appears to be wholly unremarkable" given that the wireless industry as a whole has seen substantial growth in data traffic.[489] AT&T provides no verifiable data to substantiate that they are somehow "unique" in the network challenges it faces. Moreover, as explained in the following sections, AT&T is better equipped than most if not all carriers to handle the increased demand given its very large spectrum holdings, including its large amount of unused spectrum.

B. AT&T's Failure to Properly Invest in Its Network, Not a Lack of Spectrum, Is the Cause of Any Alleged Capacity Constraints

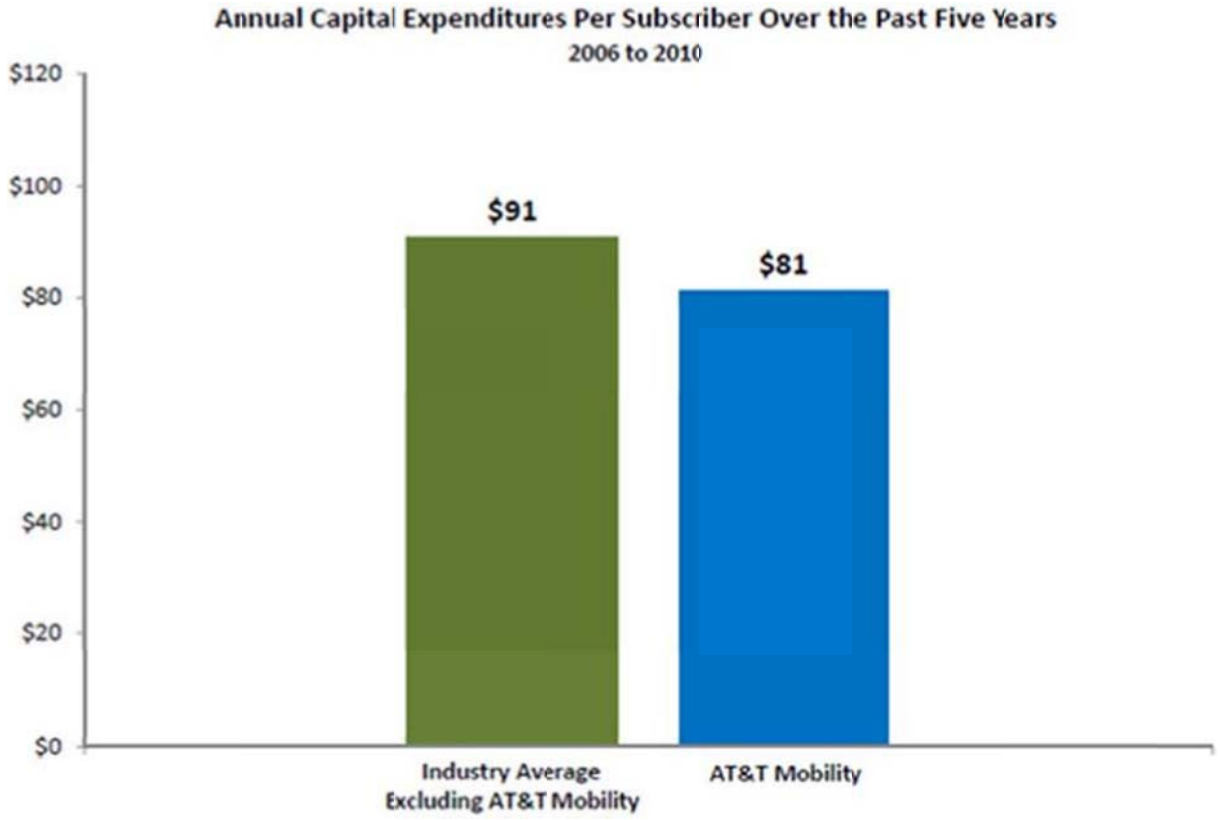
266. In the long term, the FCC will need to allocate additional spectrum for mobile broadband services, and Congress, the Administration, the FCC, and the wireless industry are working proactively to achieve this objective. In the meantime, every carrier – including AT&T and T-Mobile – can upgrade existing infrastructure, maximize the efficient use of its existing spectrum, and follow smart, proven network management practices to meet consumer demand. Allowing the marketplace to require competitors to address these types of constraints is the right

[488] *See* Stravitz Decl. ¶ 11 ("Nor did AT&T account for geographic variations between urban, rural, and suburban areas. And, of course, AT&T's claim does not capture critical monthly, daily, weekly, or even hourly fluctuations in data traffic.").

[489] *Id.*¶ 14.

way to spur competition and foster innovation. Indeed, according to T-Mobile's executives, that is exactly what T-Mobile was doing before the takeover was proposed.[490]

267. AT&T, on the other hand, has a 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. The following chart shows that AT&T has lagged significantly behind other carriers in network investment as measured on a capital expenditure per subscriber basis over the past five years.



Source: US Wireless 411, UBS Investment Research, Mar. 23, 2009, at 13, 51; US Wireless 411, UBS Investment Research, Mar. 30, 2011, at 13, 51; Clearwire, Form 10-K, 2010 (electronic form), Tables 8, 63; Clearwire, Form 10-K 2007, at 96.491

[490] Jan. 20, 2011 Deutsche Telekom Briefing at 2 ("We have made huge upgrades to our network in a very short time thanks to the great efforts from the technology teams, . . . and we are now counting about 49,000 cell sites of which almost 50% are already connected with fiber backhaul.").

268. According to a recent report, AT&T invested one billion dollars less in its network than Verizon between 2008 and 2010.[492] The report further observes that "even though AT&T already knew that it had congestion problems on its network after the introduction of the iPhone in 2007, it still only increased wireless capital expenditures by 1 percent in 2009 compared with an increase in capital spending from Verizon [] by about 10 percent."[493]

269. AT&T's "investment shortfall," not a lack of spectrum, has "been the major cause of AT&T's poor network performance."[494] As explained in the CRA Declaration, AT&T's alleged capacity constraints appear to be a result of its own failure to estimate accurately the data usage created by its iPhone and other devices.[495] Skimping on network investment may maximize net revenues and thus please investors; it certainly would please DT, which makes no secret of its desire to start collecting a "significant annual dividend" as the largest single AT&T shareholder if the Tribunal allows the proposed takeover.[496] But what may be "great for investors (AT&T's entire reason for holding full investment back) [is] not so great for those who'd actually like to complete a phone call while walking down Fifth Avenue."[497]

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[491] The analyst report cited in the chart is cited only for factual statements. Sprint otherwise disclaims and does not endorse or adopt said report, including any statements, opinions, or analysis therein.

[492] Marguerite Reardon, *Is AT&T a Wireless Spectrum Hog?*, CNET (Apr. 29, 2011), *available at*: <http://news.cnet.com/8301-30686_3-20058494-266.html>.

[493] *Id.*

[494] Karl Bode, *Analyst: AT&T Not Spending Enough on Wireless – Network Problems Are the Company's Own Fault*, BROADBAND DSL REPORTS (Jan. 20, 2010), *available at:* <http://www.dslreports.com/shownews/Analyst-ATT-Not-Spending-Enough-On-Wireless106493> ("Broadband DSL Reports Jan. 2010 Article").

[495] CRA Decl. ¶ 195; *see also* Stravitz Decl. ¶ 42.

[496] Langheim Decl. ¶ 9.

[497] Broadband DSL Reports Jan. 2010 Article.

270. AT&T's failure to invest sufficiently in its own network has resulted in the worst customer satisfaction ratings among national carriers. See, e.g., Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier, CONSUMER REPORTS (Dec. 6, 2010) ("AT&T is the lowest-scoring cell-phone carrier in the U.S., according to a satisfaction survey of 58,000 ConsumerReports.org readers. Of all the carriers rated, AT&T was the only one to drop significantly in overall satisfaction."), available at: <http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html>. See also AT&T-Cingular Merger Order ¶ 207 ("[B]oth existing companies have been criticized for the quality of their service, including the number of blocked and dropped calls and calls of marginal quality.")[498] Indeed, AT&T has previously cited its own poor service as a justification for a prior merger, claiming, as it does here, that it would improve the quality of its service by combining spectrum and network assets with a competing carrier.[499] That promise has gone unfulfilled, as AT&T continues to be ranked last among national carriers in terms of dropped calls and service quality.[500] Rather than competing in the marketplace by appropriately

[498] *See, e.g., Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier*, CONSUMER REPORTS (Dec. 6, 2010) ("AT&T is the lowest-scoring cell-phone carrier in the U.S., according to a satisfaction survey of 58,000 ConsumerReports.org readers. Of all the carriers rated, AT&T was the only one to drop significantly in overall satisfaction."), *available at*: <http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-attworst.html>. *See also AT&T-Cingular Merger Order* ¶ 207 ("[B]oth existing companies have been criticized for the quality of their service, including the number of blocked and dropped calls and calls of marginal quality.")

[499] *AT&T-Cingular Merger Order* ¶ 207.

[500] *See* Karl Bode, *Verizon iPhone Users See Fewer Dropped Calls, ChangeWave: AT&T Still has the Worst Dropped Call Ranking*, BROADBAND DSL REPORTS (Apr. 6, 2011) (noting that "[n]ot only does AT&T lead the industry in dropped calls, they generally rank as the very worst carrier in terms of overall customer satisfaction"), *available at*: <http://www.dslreports.com/shownews/Verizon-iPhone-Users-See-Fewer-Dropped-Calls-113581>; *ChangeWave Survey: Many AT&T iPhone Users Now Plan to Switch to Verizon*, MACDAILYNEWS (Jan. 14, 2011), *available at*: http://macdailynews.com/2011/01/14/changewave_survey_many_att_iphone_users_ now_plan_to_switch_to_verizon/ ("What's

investing in its network and fixing its own network management practices, AT&T once again seeks to repackage its management decisions into a spectrum shortage problem that it can use to justify an acquisition. AT&T is seeking a bailout from problems of its own making, with the cost of this bailout paid by consumers in terms of higher prices, less innovation, and poor service.

C. AT&T's Past Statements and Common Sense Contradict Its Capacity Constraint Claims

271. Spectrum is always in demand and no one disputes that making one of the essential inputs to delivering wireless broadband services more abundant brings substantial benefits. Yet AT&T's hyperbole about its capacity constraints is belied by the facts and its own prior statements concerning its spectrum holdings. As noted previously and discussed in detail below, AT&T holds more licensed spectrum than any other CMRS carrier but has yet to deploy any service on a large portion of that spectrum. Verizon, which serves more subscribers than AT&T using a similar amount of spectrum, recently stated that it has a "very, very good spectrum position"; and AT&T itself has stated that spectrum shortages are not the cause of its network problems (subsection 4 below). Thus, AT&T's assertions simply do not hold up to scrutiny.

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behind the weakening loyalty of AT&T customers? First, better than two-in-five likely switchers from AT&T cite *Poor Reception/Coverage* (42%) as their top reason for leaving, followed by *Dropped Calls* (27%)."); Press Release, J.D. Power and Associates, *Incidence of Dropped Calls Increases Considerably among Customers Who Are Most Likely to Switch Wireless Providers* (Sept. 9, 2010) (ranking AT&T lowest for call quality in the mid-Atlantic region, southeast region, southwest region, and west region), *available at*: <http://businesscenter.jdpower.com/JDPAContent/CorpComm/News/content/Releases/pdf/2010174-wcq2.pdf>; Jason Mick, *UPDATE 2: Study Finds AT&T Last in Dropped Calls, Satisfaction; AT&T Disputes Results*, DAILYTECH (May 5, 2010), *available at*: <http://www.dailytech.com/UPDATE+2+Study+Finds+ATT+Last+in+Dropped+Calls+Satisfaction+ATT+Disputes+Results/article18305.htm>; Phillip Elmer-DeWitt, *AT&T Dropping More Calls Than Ever*, CNN MONEY (May 5, 2010), *available at*: <http://tech.fortune.cnn.com/2010/05/05/att-dropping-more-calls-than-ever/>

1. AT&T Has More Licensed Spectrum than Any Other CMRS Provider Even Without the Proposed Transaction

272. AT&T has more licensed spectrum than any other CMRS provider. Moreover, AT&T will have population-weighted nationwide spectrum holdings of 107 MHz if the Qualcomm transaction is approved.[501] That gives AT&T more spectrum than Verizon (population-weighted nationwide holdings of 88 MHz), twice as much spectrum as Sprint and T-Mobile, and three times the amount of spectrum held by MetroPCS and Leap combined. The following table shows AT&T's leading spectrum position among national carriers:

Popular Name	Frequency	AT&T	T-Mo	VZ	Sprint
700 MHz	700 MHz	25	0	30	0
SMR	800 MHz	0	0	0	14
Cellular	850 MHz	23	0	24	0
900 MHz	900 MHz	0	0	0	4
PCS	1.9 GHz	36	25	21	25
G Block	1.95 GHz	0	0	0	10
AWS-1	2.1 GHz	10	25	13	0
WCS	2.3 GHz	13	0	0	2
BRS	2.5 GHz	0	0	0	0
	Total	107	50	88	55

[501] AT&T's 107 MHz of spectrum holdings include (on a population-weighted nationwide basis) 25 MHz of 700 MHz spectrum (including AT&T's proposed acquisition of Qualcomm spectrum); 23 MHz of 850 MHz cellular band spectrum; 36 MHz of PCS spectrum; 10 MHz of AWS spectrum; and 13 MHz of WCS spectrum.

273. AT&T's spectrum position is the envy of the industry, particularly given the fact that AT&T has a wealth of spectrum that has excellent propagation characteristics, making AT&T and Verizon better positioned to offer 4G services than their competitors.[502]

2. AT&T Holds a Very Large Amount of Unused Spectrum

274. Not only is AT&T the largest CMRS licensed spectrum holder, it is also the largest spectrum warehouser. AT&T has yet to provide service to a single customer on its existing 700 MHz and AWS spectrum holdings, which amount to 27 MHz of highly valuable spectrum on a population-weighted nationwide basis, or 31 percent of AT&T's total CMRS spectrum holdings.[503] While Verizon, Sprint, Clearwire, and MetroPCS have all deployed 4G wireless services to millions of subscribers across the U.S., AT&T has yet to provide 4G LTE service to a single subscriber. AT&T's warehouse of unused 700 MHz and AWS spectrum is approximately the same amount as the total spectrum holdings of MetroPCS and Leap combined (population-weighted nationwide holdings of 29 MHz combined) and used by these two companies to serve approximately 14 million subscribers. It simply is not credible for AT&T to claim it faces a spectrum crunch when it holds so much unused (and underused) spectrum.[504]

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[502] Clearwire holds rights to more than 100 MHz of 2.5 GHz spectrum, but much of that spectrum is leased from EBS licensees. Moreover, Clearwire's spectrum has below-average propagation characteristics and significant regulatory and technical burdens that make it sub-optimal for providing broadband service compared to AT&T's spectrum holdings. Sprint sells Sprint-branded capacity from Clearwire's network and holds an ownership stake in Clearwire, but does not control Clearwire's board of directors or management and does not manage Clearwire's operations.

[503] Wireless, COMM. DAILY, at 11 (Apr. 22, 2011) ("AT&T has yet to build out its AWS spectrum"); Reply to Joint Opposition of Free Press, *et al.*, WT Docket No. 11-18, at 2 (Mar. 28, 2011) ("AT&T holds substantial reserves of spectrum yet to be deployed, including its 700 MHz spectrum, AWS licenses, and others."). The 27 MHz figure described in the text does *not* include Qualcomm's 700 MHz spectrum that AT&T is seeking to acquire.

[504] *See* CRA Decl. ¶ 185 (AT&T "provides none of the underlying data to allow the Commission to determine whether its claim of 'spectrum exhaust' is plausible.").

AT&T's credibility is further undermined by its delays in deploying service on its WCS spectrum. AT&T holds approximately 13 MHz of WCS spectrum on a population-weighted nationwide basis. Last year, the FCC amended its WCS rules to "enable licensees to provide mobile broadband services in 25 megahertz of the WCS band."[505] The FCC also adopted buildout requirements for the WCS spectrum, requiring those licensees to serve 40 percent of their covered population within 42 months and 75 percent within 72 months.[506] The FCC reasoned that these performance benchmarks will "promot[e] the rapid deployment of new broadband services to the American public" and "ensur[e] that underutilized spectrum will be used intensively in the near future."[507] AT&T, however, has opposed the FCC's buildout requirements, arguing that it needs even more time to deploy service on its WCS spectrum.[508] Like its 700 MHz and AWS spectrum, AT&T's WCS spectrum remains seriously underutilized.

275. As one industry observer has stated, "AT&T already has an ample supply of unused wireless spectrum that it plans to use to expand its network over the next several years."[509] If AT&T believes its network is close to "spectrum exhaust," it should expedite the deployment of service on its grossly underutilized spectrum holdings. AT&T claims that it seeks to reserve its 700 MHz and AWS spectrum for LTE, and that AT&T's spectrum constraints are

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[505] *WCS R&O* ¶ 1.

[506] *Id.* ¶ 197.

[507] *Id.* ¶ 195. *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Seventh Broadband Progress Report & Order on Reconsideration, GN Docket No. 10-159, FCC 11-78, at 8, n.51 (rel. May 20, 2011) (noting that the Commission has "removed technical impediments to mobile broadband in the Wireless Communications Service at 2.3 GHz, freeing up 25 MHz of spectrum").

[508] Petition for Reconsideration of AT&T, WT Docket No. 07-293 (Sept. 1, 2010).

[509] Peter Svensson, *AT&T Talks of Spectrum Shortage, Yet It Has Plenty*, THE WASHINGTON TIMES, Mar. 21, 2011, *available at*: <http://www.washingtontimes.com/news/2011/mar/21/atttalks-of-spectrum-shortage-yet-it-has-plenty/.

in the GSM and UMTS/HSPA services it provides on its cellular and PCS spectrum.[510] But it is AT&T's business choice, not a spectrum constraint, to hold in reserve 40 MHz of 700 MHz, AWS, and WCS spectrum across the nation, or 44 percent of AT&T's total spectrum holdings.[511] Every carrier faces tradeoffs in deciding how best to deploy spectrum for new generations of technology while continuing to provide service to an embedded base of customers using older generations of technology. As described below, carriers, including AT&T, can use a range of technologies and sound network management practices to address these tradeoffs and meet customer demands for both old and new services. In fact, given its large spectrum holdings, AT&T is in a better position than most if not all other carriers to meet these demands without the proposed anti-competitive T-Mobile takeover.[512]

3. Verizon, Which Serves More Subscribers than AT&T Using Less Spectrum, Has a "Very, Very Good" Spectrum Position

276. Verizon has less spectrum and more subscribers (94.1 million) than AT&T (86.2 million).[513] Verizon also has faced a similar increase in customer demand for mobile broadband

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[510] Description of Transaction at 24. "UMTS" stands for Universal Mobile Telecommunications System.

[511] *See* Stravitz Decl. ¶¶ 8, 22, 42

[512] AT&T's claims regarding a "spectrum crunch" are further belied by the concerted lobbying effort it has launched to reallocate the 10 MHz Upper 700 MHz D Block spectrum to public safety services. The Communications Act requires the Commission to auction the D Block for commercial use, and the National Broadband Plan called on the Commission to go forward with such an auction. *See* 47 U.S.C. § 337(a)(2); National Broadband Plan at 76. AT&T, however, has opposed efforts by T-Mobile, Sprint, and other wireless carriers to expedite a D Block auction, and is devoting large lobbying resources in support of reallocation legislation. Reply Comments of AT&T Inc., WT Docket No. 06-150, at i (Nov. 12, 2008); List of Supporters of Public Safety Alliance, <http://www.psafirst.org/supporters> (last visited May 18, 2011). It seems unlikely that AT&T would so aggressively advocate for reallocation to public safety primary use of a highly valuable block of 700 MHz commercial spectrum if it were truly facing a spectrum crunch.

[513] CRA Decl. ¶ 73, n. 65. T-Mobile has 31.8 million subscribers and Sprint has 48.1 million subscribers. *Id.*

services and, as explained below, supports multiple generations of technologies with its current spectrum holdings.[514] During a recent earnings call, Verizon was asked how, in light of AT&T's proposed acquisition of T-Mobile, Verizon sees its spectrum needs evolving over the course of the next three to five years, and what it needs to do to keep up with rapidly growing data demand. In response, Verizon stated:

> As we said before, we think we are in a very good spectrum position. We think we have the spectrum we need, and are in a good position until about the year 2015 at this point. And we will continue to keep our eyes open to see where we need to buy spectrum or secure spectrum. But right now we are in a very, very good position. I'm not going to speak to the competitor [AT&T]. You can ask those questions as to why they did this and why they needed the spectrum, but I think we're in a very good position.[515]

277. AT&T provides no reasonable explanation as to why it faces a spectrum crunch, particularly when a very similarly situated competitor expresses strong confidence in its own spectrum position. Most likely, it is because AT&T lacks Verizon's commitment "to expand our 4G LTE footprint and invest the necessary capital in 3G to stay ahead of the data demand curve."[516]

278. AT&T's failure to invest the necessary capital in its network can be seen by comparing the two carriers' use of spectrum on a per-subscriber basis.

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[514] Transcript of Verizon Q1 2001 Earnings Conference Call, at 4 (Apr. 21, 2011) (Verizon 2011 Investor Presentation) (reporting that total data revenue grew one billion dollars or 22.3 percent and now represents 38 percent of total service revenue), *available at*: <http://www22.verizon.com/investor/investor-consump/groups/events/documents/investorrelation/event_ucm_1_trans.pdf>.

[515] *Id.* at 17. Like many wireless carriers, Verizon supports the allocation of additional spectrum for mobile broadband, and recently pointed out the need for additional allocations to avoid a spectrum crunch in the future. But at the same time Verizon indicated that it currently has strong spectrum holdings and that any spectrum shortage it would face in the absence of new allocations "is five to ten years down the road." Rich Karpinski, *TIA 2011: Genachowski, Hutchison Push Hard on Spectrum*, TIA2011CONNECTED (May 20, 2011), *available at*: <http://tia2011connected.com/stories/tia-2011-genachowski-hutchison-push-hard-on-spectrum-0520/>.

[516] Verizon 2011 Investor Presentation at 3.

	Total Spectrum (nationwide pop-weighted)	Total Subscribers	Spectrum per Subscriber (MHz per million subs)
Verizon	88 MHz	94.1 million	0.94
AT&T	99 MHz[517]	86.2 million	1.15

279. Compared to AT&T, Verizon is doing more with less due to its network investments and smarter network management practices. AT&T is not using its spectrum nearly as efficiently as its nearest rival. Most important, this analysis proves robust because, unlike a comparison with Sprint, Verizon and AT&T basically hold the same categories of spectrum. That is, the Twin Bells both hold high-value, low-frequency, broad-ecosystem cellular and 700 MHz spectrum as well as high-value, broad-ecosystem PCS and AWS spectrum. Therefore, the table above suffers from none of the "apples-to-oranges" comparison problems that would occur if disparate materially lower-value bands were introduced into the analysis. In short, AT&T's poor network performance has nothing to do with spectrum and everything to do with years of ill-advised decisions to invest far below the industry average in its network infrastructure.

4. AT&T's Own Prior Statements Undermine Its Claims Regarding Capacity Constraints

280. Although AT&T claims it faces severe capacity constraints and is "using up its spectrum at an accelerating rate,"[518] it has told a different story to Wall Street. In its quarterly earnings calls and other forums over the past three years, it has repeatedly and consistently reassured investors that it has the network capacity to meet the exploding demand for mobile data services:

[517] The 99 MHz of spectrum attributed to AT&T on a nationwide, population-weighted basis includes AT&T's current 700 MHz, 850 MHz cellular band, PCS, AWS, and WCS spectrum holdings, but does not include Qualcomm's 700 MHz spectrum or other 700 MHz licenses AT&T is seeking to acquire. See Stravitz Decl. ¶ 15, n.5.

[518] Description of Transaction at 3, 25-30.

January 2011: "[W]e're really starting to feel good about the network situation. We're making a lot of progress here. . . . [W]e had a significant clearing of backlog from our vendors in December. We were having some serious capacity constraints in key markets, and we really saw the backlogs clear. And we spent the last 45 days literally just bringing capacity online in a rather dramatic fashion, and we're seeing those numbers move. And so you put all this together, we actually feel like, again, with a little volatility in the first part of the year, we can grow contract subscribers through the course of this year."[519] Randall Stephenson, Chairman and CEO, AT&T (2010 Fourth Quarter Earnings Call)

October 2010: "[W]e're really excited about our network road map. We have the nation's fastest mobile broadband network today, and the best transition plan in the market. Because of the technology choices we have made, we will have a significant advantage for the next couple of years at least, and customers are starting to get it."[520] Ralph de la Vega, CEO of AT&T Mobility and Consumer Markets and President of Mobility and Consumer Markets (2010 Third Quarter Earnings Call)

April 2010: "With our GSM technology foundation, a seamless path through HSPA to LTE, we've got a terrific technology path going forward for customers, and we believe the best path forward to capture the next wave of wireless growth."[521] Rick Lindner, CFO, AT&T (2010 First Quarter Earnings Call)

January 2010: "The industry has seen unprecedented growth in wireless broadband volumes. . . . Customers with smartphones with advanced data capabilities are more engaged more times per day, evidenced by their usage profiles. Their expectations are higher, because the value and utility are higher. . . . To get ahead of these changes in volumes and expectations, we have executed a number of major initiatives. . . . In short, we have got an aggressive plan; we are working closely with equipment companies. Together, we are creating solutions that will benefit everyone, as usage continues to grow across the industry."[522] John Stankey, President and CEO, AT&T Operations (2009 Fourth Quarter Earnings Call)

October 2009: "As everybody knows, we are seeing a data explosion that we have never seen, at least in my history in wireless. . . . And what all of these device manufacturers have realized is that benefit of HSPA and GSM technology that when they make a

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[519] Transcript of AT&T Inc. Q4 2010 Earnings Conference Call (Jan. 27, 2011), *available at*: <http://seekingalpha.com/article/249133-at-t-s-ceo-discusses-q4-2010-results-earnings-call-transcript?part=qanda>.

[520] Transcript of AT&T Inc. Q3 2010 Earnings Conference Call (Oct. 21, 2010), *available at*: <http://seekingalpha.com/article/231453-at-t-management-discusses-q3-2010-resultsearnings-call-transcript?source= thestreet>.

[521] Transcript of AT&T Inc. Q1 2010 Earnings Conference Call (Apr. 21, 2010), *available at*: <http://seekingalpha.com/article/200029-at-amp-t-inc-q1-2010-earnings-call-transcript>.

[522] Transcript of AT&T Inc. Q4 2009 Earnings Conference Call (Jan. 28, 2010), *available at*: <http://seekingalpha.com/article/185524-at-amp-t-inc-q4-2009-earnings-call-transcript>.

> device, it can be a device that can sell anywhere in the world and that's a unique advantage to our network, so I feel good about our network capability and reach and technology capabilities, as well as some great devices that are going to be running on that network."[523] Ralph de la Vega, CEO of AT&T Mobility and Consumer Markets and President of Mobility and Consumer Markets (2009 Third Quarter Earnings Call)
>
> April 2009: "We feel very good about our spectrum position. . . . And we say that with full understanding of what the data demands will be."[524] Scott McElroy, Vice President of Technology Realization, AT&T Mobility (Interview)
>
> October 2008: "At AT&T, we have assembled a truly outstanding spectrum position. . . . We have a solid foundation in GSM and high quality spectrum and I feel very good about AT&T's wireless technology path. In fact, when you combine the quality and depth of our spectrum[,] our clear technology path, and our premiere device lineup, I believe it is clear that we are in the best position of all U.S. carriers to drive wireless data growth."[525] Ralph de la Vega, CEO of AT&T Mobility and Consumer Markets and President of Mobility and Consumer Markets (2008 Third Quarter Earnings Call)

281. AT&T's assertions about AT&T's purported spectrum constraints cannot be squared with what AT&T has been telling investors for three years. It is no surprise that AT&T's sudden change in position has been greeted with skepticism, including a recent article entitled, "The Truth Could Kill the AT&T T-Mobile Deal: Nobody is Buying AT&T's Justification for T-Mobile Acquisition."[526]

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[523] Transcript of AT&T Inc. Q3 2009 Earnings Conference Call (Oct. 22, 2009), *available at*: <http://seekingalpha.com/article/168288-at-amp-t-q3-2009-earnings-calltranscript?part=qanda>.

[524] Kevin Fitchard, *AT&T Doubling 3G Capacity*, CONNECTED PLANET (Apr. 20, 2009), *available at:* <http://connectedplanetonline.com/wireless/news/att-3g-network-capacity-increase-0420/>.

[525] Transcript of AT&T Inc. Q3 2008 Earnings Conference Call (Oct. 22, 2008), *available at*: <http://seekingalpha.com/article/101193-at-amp-t-q3-2008-earnings-call-transcript>.

[526] Dave Burstein, *The Truth Could Kill the AT&T T-Mobile Deal: Nobody is Buying AT&T's Justification for T-Mobile Acquisition*, BROADBAND DSL REPORTS (Apr. 7, 2011) ("AT&T President John Stankey has been insisting for two years that spectrum shortages were not the cause of their network problems."), *available at*: <http://www.dslreports.com/shownews/ The-Truth-Could-Kill-the-ATT-TMobile-Deal-113606>.

D. AT&T's Efficiency Arguments Are Not Merger-Specific Because They Can Alleviate Any Alleged Capacity Restraints Through a Range of Other Measures

282. AT&T currently has very substantial spectrum holdings, including a large amount of unused spectrum, available to meet consumer demand for its services. AT&T also has a range of options to use its spectrum more efficiently and increase subscriber capacity without eliminating one of its three national rivals. AT&T's predecessor companies made similar, non-merger-specific capacity constraint arguments in the AT&T-Cingular proceeding, prompting the FCC to discount such claims:

> [The alleged] benefit is difficult to quantify in terms either of effect or time, and we are also not convinced that this benefit is fully merger-specific. We accept that Cingular will acquire spectrum more quickly via this transaction than it is likely to via auction, at least in some markets. However, while the merged entity will be able to concentrate its resources and efforts in the construction of one next-generation network, instead of two, we are not convinced that Cingular could not have achieved at least some of these same network gains by investing a portion of the $41 billion purchase price associated with this transaction into improvements to its own network.[527]

283. The AT&T's capacity constraint arguments in the instant proceeding is even more tenuous and should similarly be dismissed as non-merger-specific.[528] AT&T could achieve the same spectrum efficiencies it claims it would achieve through the Proposed Transaction by investing in a range of network management practices and technologies such as those described below and in the Stravitz Declaration. As explained in the Stravitz Declaration, even in the absence of the Proposed Transaction, AT&T has three "levers" – putting to use the large amount

[527] *AT&T-Cingular Merger Order* ¶ 225. In the *AT&T-Cingular* proceeding, the Commission concluded that while the transaction was likely to result in some public interest benefits, the benefits were not sufficiently large or imminent to outweigh the potential harms, which caused the Commission to impose conditions on its approval of the transaction. The instant transaction would impose far more serious public interest harms that cannot be remedied by conditions or divestitures.

[528] *See* CRA Decl. ¶ 187 (AT&T "does not explain (or provide sufficient data and analysis to show) why other practical alternatives could not have provided some or all of the capacity expansion it claims for the merger.").

of fallow spectrum it currently holds, upgrading its network to LTE, and deploying a heterogeneous network topology that includes both macro and small cells – that will dramatically increase its network capacity and allow it to meet consumer demand.529 Moreover, like every other wireless carrier, AT&T will have opportunities to add long-term network capacity through future FCC spectrum auctions. AT&T could also choose to pursue additional spectrum through the secondary markets.

1. Expediting Migration to New Services

284. AT&T claims that its capacity restraints are exacerbated by its need to support multiple generations of technology – second generation GSM technology, third generation UMTS/HSPA technology, and fourth generation LTE technology.[530] But AT&T is hardly unique in this regard. Sprint, for example, provides service to subscribers using iDEN and CDMA (including both second generation CDMA and third generation EV-DO) technologies, and provides fourth generation WiMAX service through its arrangement with Clearwire. Verizon is providing second and third generation CDMA service (CDMA-1XRTT and EV-DO) nationwide, LTE service in numerous markets, and GSM service in certain areas as a result of its purchase of ALLTEL and other carriers.[531] In many ways, companies like Verizon and Sprint face a more difficult task in supporting multiple technologies with their spectrum holdings. LTE is part of the same family of technologies that have evolved from GSM, providing AT&T an easier, forward-compatible deployment scenario for its network equipment and subscriber handsets.[532] Verizon

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529 Stravitz Decl. ¶ 42.

530 Description of Transaction at 22-25.

531 Verizon Communications, Inc., Annual Report (Form 10-K), at 6-7 (Feb. 28, 2011). *See also* Stravitz Decl. ¶ 20.

532 *See* Stravitz Decl. ¶ 21. *See also* W. David Gardner, InformationWeek, *AT&T Announces LTE Suppliers, Timetable* (Feb. 10, 2010) (quoting AT&T executive as stating that "AT&T has

and Sprint, in contrast, must deal with the fact that their 4G and earlier generation networks are from different technology families, making the design of their devices and infrastructure more challenging.

285. AT&T is thus in a stronger position to take consumer-friendly steps to expedite the migration of subscribers to newer generations of technology, which in turn facilitate the repurposing of a carrier's existing spectrum for newer technologies. Existing subscribers will have an incentive to upgrade to new handsets if the new service offers faster speeds and more features and applications. Indeed, even without taking targeted steps to expedite migration and even in a bad economy, the average subscriber gets a new cell phone every eighteen months.[533] As the economy improves, and as consumers learn more about the benefits of 4G technologies, the cell phone replacement rate is likely to be faster – as it had been prior to the national economic slowdown.

286. AT&T, which calls itself "an industry leader in smartphone and data-centric device customers,"[534] can leverage its large spectrum holdings and 4G technology plans to

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a key advantage in that LTE is an evolution of the existing GSM family of technologies that powers our network and the vast majority of the world's global wireless infrastructure today"), *available at*: <http://www.informationweek.com/news/infra structure/management/222700797>; Transcript of AT&T Inc. Q1 2010 Earnings Conference Call (Apr. 21, 2010) (statement of Rick Lindner , Senior Executive V.P. and CFO, AT&T Inc.) ("With our GSM technology foundation, a seamless path through HSPA to LTE, we've got a terrific technology path going forward for customers, and we believe the best path forward to capture the next wave of wireless growth."), *available at*: <http://seekingalpha.com/article/200029-at-amp-t-inc-q1-2010-earnings-call-transcript>.

[533] Matt Richtel, *Consumers Hold On to Products Longer*, N.Y. TIMES, Feb. 25, 2011 ("Industry analysts also report that people on average upgrade their cellphones every 18 months, up from every 16 months just a few years ago."), *available at:* <http://www.nytimes.com/ 2011/02/26/business/26upgrade.html>.

[534] Declaration of Rick L. Moore, 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, ¶ 7 (Apr. 21, 2011) ("Moore Decl.")

accelerate the migration of its existing subscribers to this new technology. AT&T never adequately explains why it cannot step up its efforts to migrate its subscribers to more efficient LTE technology. As AT&T recognizes, "LTE is . . . about 860 percent more spectrally efficient than GSM."[535] LTE technology is evolving towards even greater spectral efficiencies.[536] The first step AT&T should take is to expedite deployment of LTE on its unused 700 MHz and AWS spectrum. As noted above, AT&T is well behind Verizon, Sprint, Clearwire, and MetroPCS in deploying 4G technologies. The faster it deploys LTE, the sooner its subscribers will have the ability to migrate to AT&T's 4G service and the sooner AT&T will be able to reduce the capacity demands of its 2G and 3G networks. The subscribers who place the largest data demands on networks through their use of smartphones and other data-hungry devices will naturally be attracted to upgrading to a 4G service that offers faster speeds. AT&T can also accelerate migration to newer technologies by offering larger discounts on the newer services and devices, reducing the amount of spectrum it needs to dedicate to GSM as well as UMTS/HSPA services.[537]

287. In many ways, however, AT&T has pursued a path that has slowed migration to more spectrally efficient networks. For example, AT&T continues to subsidize and sell GSM phones rather than steering as many customers as possible to substantially more efficient 3G and

[535] Description of Transaction at 24.

[536] Stravitz Decl. ¶ 64 (describing LTE Release 10 spectral efficiencies as "nearly equivalent to the increase that AT&T will realize in upgrading from HSPA+ to LTE").

[537] *See* CRA Decl. ¶ 187 (AT&T "does not explain why it would not be practical to use incentives, promotions, or other means to achieve more rapid migration."); Stravitz Decl. 22 ("All carriers provide deadlines for the transition of subscribers from legacy networks and offer incentives to move to new, more efficient devices, supported by the latest network technology. These incentives come in the form of subsidized or free mobile devices upgrades, discounted services, and flexible contract terms.").

4G devices.[538] In addition, AT&T has yet to deploy its flagship smartphone – the Apple iPhone 4 – to take advantage of HSPA+ technology. Instead, subscribers using AT&T's most popular device continue to use HSPA 7.2 technology, which uses 15 percent more radio resources than a HSPA+ device.[539] As a result, "the full potential of HSPA+ speed is unavailable to help relieve capacity constraints for AT&T's most important, data-hungry customers."[540] AT&T also appears to have failed to "pre-seed" the market with LTE-ready devices that could deliver immediate network capacity gains when AT&T eventually begins providing LTE service.[541] "If it were behaving as a prudent steward of its spectrum resources, AT&T would already be pre-seeding the market with LTE/HSPA+ devices as a means of ensuring the timely transition of data traffic from its older-generation networks to its far more efficient next generation systems."[542]

288. AT&T consequently can address its alleged capacity constraints by more aggressively pursuing well-established customer migration strategies to maximize the efficient use of its spectrum. AT&T should not need to continue dedicating so much spectrum to its GSM service "well into this decade" and to its UMTS/HSPA service for "even longer" and cannot reasonably claim that it has no alternative to supporting its customers other than the proposed takeover.[543] AT&T may have business reasons for avoiding a faster migration schedule, but, from a spectrum efficiency and public interest perspective, its projected schedule is too

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[538] Stravitz Decl. ¶ 17.

[539] *Id.* ¶ 18.

[540] *Id.*

[541] *Id.* ("Pre-seeding, a common industry practice, is a process by which mobile network operators introduce devices capable of running on a more advanced, yet-be-launched, network, that are still compatible with existing networks. In doing so, mobile network operators establish an installed user base that is ready to take advantage of the newest network when it is launched.").

[542] *Id.* ¶ 19.

[543] Description of Transaction at 23.

conservative and demonstrates a failure to make the necessary investments to accelerate the migration of its subscribers to newer and more efficient technology.

2. Using State-of-the-Art Network Technologies

289. AT&T's spectrum constraint arguments also reflect outdated assumptions about network technologies. As the Stravitz Declaration explains, "[t]here are many economically viable and focused engineering solutions available to mobile network operators that can relieve substantial congestion on their networks. However, AT&T has not fully employed the full range of widely-available solutions to help address the significant growth in mobile data demand."[544] Although AT&T claims its network cannot handle increased data traffic while supporting three different technologies across different spectrum bands, it ignores various innovative solutions that would greatly increase its network capacity without the proposed takeover.

290. Software-Defined Radio. Software-defined radio is a cost-efficient technology that would allow AT&T to integrate its multiple networks into a common, multimode, multiband platform.[545] The enormous spectrum efficiencies and flexibility this technology provides prompted Sprint in December 2010 to announce its "Network Vision" plan to incorporate software-defined radio technology in its networks within the next few years.[546] Software-defined

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[544] Stravitz Decl. ¶ 41.

[545] 47 C.F.R. § 2.1 (defining "software defined radio" as a "radio that includes a transmitter in which the operating parameters of frequency range, modulation type or maximum output power (either radiated or conducted), or the circumstances under which the transmitter operates in accordance with Commission rules, can be altered by making a change in software without making any changes to hardware components that affect the radio frequency emissions").

[546] With Network Vision, Sprint will consolidate these multiple networks into one seamless infrastructure by implementing multi-mode technology to enhance service and create network flexibility. *See What Is Software-Defined Radio*, WIRELESS INNOVATION FORUM, *available at*: <http://www.wirelessinnovation.org/page/Introduction_to_SDR> (last visited May 5, 2011) ("Traditional hardware based radio devices limit cross-functionality and can only be modified through physical intervention. This results in higher production costs and minimal flexibility in supporting multiple waveform standards. By contrast, software defined radio technology

radio technology would similarly offer AT&T a clear, proven solution to its alleged capacity constraints. In contrast to the Proposed Transaction, which takes capacity out of the industry, using software-defined radio is a pro-competition, pro-innovation, capacity-additive solution that AT&T could initiate today and complete within the next few years at a fraction of the cost of its proposed merger.[547]

291. Heterogeneous Networks and Small-Cell Technologies. Wireless technology is evolving toward heterogeneous networks that provide carriers the option of using a mix of macro cells, micro cells, and femto cells to maximize the efficient use of spectrum and greatly increase network capacity. UMTS/HSPA+ technology can support such heterogeneous networks, and LTE standards in particular will incorporate these new innovations. Indeed, standards to promote heterogeneous networks are expected to be defined next year in LTE Release 10.[548] The use of these innovative network topologies, including small-cell technologies, allows carriers to increase the reuse of their spectrum and thereby greatly increase network capacity. The FCC's Technical Advisory Council, which includes an AT&T representative as a member, recently

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provides an efficient and comparatively inexpensive solution to this problem, allowing multi-mode, multi-band and/or multi-functional wireless devices that can be enhanced using software upgrades.").

[547] In addition to software-defined radio, vendors (including Nokia Siemens Networks, Alcatel-Lucent, Ericsson, and others) are offering equipment upgradeable to LTE with just the addition of new LTE cards in the carrier's cell sites rather than requiring a complete infrastructure overhaul, as was the case in upgrading 2G networks to 3G. The use of this upgrade technology significantly facilitates the transition to newer generation networks and the refarming of spectrum to support the newer networks.

[548] *See* Stravitz Decl. ¶ 47-48.

recognized that accelerating deployment of small-cell technologies "would meet growing market demand for mobile broadband in dense, urban areas. . . ."[549]

292. AT&T fails to explain why AT&T cannot address many if not all of its alleged capacity challenges through the greater use of heterogeneous networks and small-cell technology. Many of AT&T's arguments, as well as its plans for integrating T-Mobile cell sites, seem premised on the continuation of a macro-cell based architecture. As the Stravitz Declaration states, "AT&T's focus on increasing its macro-cell density through the [T-Mobile] acquisition is ill-conceived and against the growing trend of utilizing small-cell site-based network architectures."[550] AT&T's claims regarding the benefits of combining the AT&T and T-Mobile networks should be given no weight when AT&T fails to account for the efficiency gains AT&T could generate through the use of more efficient, more innovative network topologies.

293. WiFi and In-Building Systems. Although AT&T has deployed WiFi hotspots, AT&T has indicated that only "an extremely small percentage of AT&T's data traffic is likely being carried via the high-efficient and low-cost Wi-Fi network."[551] The installation of more Wi-Fi hotspots, particularly in areas of high smartphone usage, would offload a large portion of AT&T's data traffic onto WiFi networks and free up substantial capacity on AT&T's wireless network. For example, AT&T could increase the number of home-based WiFi systems and facilitate greater customer use of these systems.[552] AT&T could also install more in-building wireless systems (primarily enabled by Distributed Antenna Systems) in areas of high data

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[549] Memorandum from Tom Wheeler, Chairman, Technical Advisory Council, to Chairman Genachowski, FCC, at 3 (Apr. 22, 2011), *available at*: <http://hraunfoss.fcc.gov/edocs_public /attachmatch/DOC-306065A1.doc>.

[550] Stravitz Decl. ¶ 50.

[551] *Id.*¶ 53.

[552] *Id.* ¶¶ 55, 58.

traffic.[553] AT&T cannot provide a sufficient explanation why these solutions cannot help AT&T address its alleged capacity constraints.

3. Cell Splitting Through the Installation of New Cell Sites

294. AT&T can also address its alleged capacity constraints by installing new cell sites in areas where its network is congested.[554] By doing so, it can implement any necessary "cell splitting" to increase the utilization of its spectrum in the absence of the Proposed Transaction. In most areas, AT&T can install new base stations on existing towers, obviating the need to install a new tower. There are a host of tower companies that offer to lease tower space in virtually every area of the country. Many of these existing towers have capacity available for new base stations.[555] For example, a recent article reported that "AT&T and other wireless operators could double the amount of capacity they supply with current spectrum by investing more in new wireless equipment on existing cell towers," and quoted the CEO of American Tower, one of the nation's leading tower companies, as saying that "[o]ur tower sites are about 50 percent loaded

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[553] *Id.* ¶ 56.

[554] *Id.* ¶¶ 44-46. The Description of Transaction argues that the proposed takeover will allow AT&T to integrate T-Mobile cell sites into its network and create greater network capacity through cell-splitting, but AT&T fails to provide verifiable facts to substantiate this argument. The proposed takeover is also unnecessary to achieve any such cell-splitting capacity gains because, as explained above, AT&T has numerous options for achieving the same objectives in the absence of the takeover.

[555] *See, e.g.*, American Tower Corp., Annual Report (Form 10-K), at 4 (Feb. 28, 2011) ("As a result of wireless industry capital spending trends in the markets we serve, we anticipate consistent demand for our communications sites because they are attractively located for wireless service providers and have capacity available for additional tenants.") ("American Tower Corp. Annual Report"); Crown Castle International Corp., Annual Report (Form 10-K), at 1-2 (Feb. 15, 2011) ("We seek to maximize [our] site rental revenues derived from our towers by co-locating additional tenants on our towers through long-term contracts as our customers deploy and improve their wireless networks."). *See also 14th CMRS Competition Report* ¶ 288 ("Co-locating base station equipment on an existing structure is often the most efficient and economical solution for existing and new wireless service providers that need new cell sites.").

on average."[556] Even where towers are currently at capacity, they often can be readily modified to add additional space. American Tower has stated that "[w]e believe that of our towers that are currently at or near full structural capacity, the vast majority can be upgraded or augmented to meet future tenant demand, with relatively little capital investment."[557]

295. Even assuming AT&T cannot find available tower space in a specific area, it can still enter into tower-sharing arrangements with other carriers or acquire existing towers from current owners. Interestingly, just a few months ago T-Mobile expressed interest in selling its cell towers to raise capital. In particular, at a January 20, 2011 investor conference, DT's CEO stated that "[w]e are among other options . . . ready to consider a potential sale of . . . non-strategic core assets, for example the U.S. tower portfolio."[558] By acquiring access to T-Mobile's towers, rather than eliminating T-Mobile as a competitor, AT&T would gain tower space at the same cell sites it claims are so important to enhance its network capacity. T-Mobile, in turn, could lease space on the towers to accommodate its base station equipment and also gain capital to invest in its network. Alternatively, AT&T could lease tower space from T-Mobile and install the same type of multi-band antennas and equipment.[559] Each of these alternatives would be less costly than paying $39 billion for the proposed T-Mobile takeover, while not imposing the serious anti-competitive harms that would result from it.

296. AT&T also has the option of deploying new towers in the few places where it is unable to co-locate on an existing tower. CRA estimates that, for $10 billion (about one-quarter

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[556] Spencer Ante and Amy Schatz, *Skepticism Greets AT&T Theory: Telecom Giant Says T-Mobile Deal Will Improve Network Quality, but Experts See Other Options*, WALL ST. J., Apr. 4, 2011, *available at*: <http://online.wsj.com/article/SB10001424052748703806304576236683511907142.html>.

[557] American Tower Corp. Annual Report at 4.

[558] Jan. 20, 2011 Deutsche Telekom Briefing at 4.

[559] Description of Transaction at 35.

of the $39 billion purchase price for T-Mobile), AT&T could build 30,000 new cell sites,[560] which would amount to more than 60 percent of T-Mobile's total number of cell sites.[561] AT&T could consequently achieve the same alleged capacity gains for much less money if it simply acquires new cell sites rather than acquire T-Mobile, particularly given the fact that it does not plan to use a large portion of T-Mobile's cell sites anyway.[562] The FCC has recently taken steps to accelerate the cell tower siting process, adopting a ruling in 2009 that, among other things, defined presumptively reasonable time parameters for state or local zoning authorities to review cell site applications.[563]

4. Acquiring Additional Spectrum Capacity

297. AT&T's large existing spectrum holdings, coupled with use of network management practices and technologies such as those described above, should be more than sufficient to ensure that AT&T has the network capacity to meet consumer demand for its services well into this decade.[564] There is also a large amount of spectrum that could be acquired or leased in the short term from existing licensees. For example, wireless carriers likely will be able to lease MSS spectrum or wholesale capacity in the L and S Bands for terrestrial services once the various issues and proceedings are resolved concerning those bands.[565] Joint ventures

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[560] CRA Decl. ¶ 192.

[561] Jan. 20, 2011 Deutsche Telekom Briefing at 2 (stating that T-Mobile has 49,000 cell sites).

[562] Description of Transaction at 51-52 (stating that AT&T would decommission "thousands of surplus [T-Mobile] sites").

[563] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994 (2009). *See also* CRA Decl. ¶ 192.

[564] Stravitz Decl. ¶¶ 9, 68-69.

[565] *See, e.g., Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.6 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz*, ET Docket No. 10-142, Report and Order, FCC 11-56 (rel. Apr. 6, 2011),

with other spectrum holders are another option for addressing AT&T's alleged spectrum constraints.[566]

298. AT&T as well as other parties will also have opportunities to acquire additional spectrum rights at FCC auctions within the next few years. As an AT&T senior executive recently recognized, "there is broad consensus on a bipartisan basis among the President, the Congress, the FCC and the wireless industry that we need to make additional spectrum available. . . ."[567] This consensus is paving the way for the FCC to auction significant amounts of spectrum. The National Broadband Plan identified the H Block, J Block, and AWS-3 Block as well suited for mobile broadband services and identified these blocks for auction.[568] NTIA has made it a top priority to evaluate the reallocation of federal government spectrum, including the 1755-1780 MHz band, for commercial use and pairing with AWS-3 spectrum in an FCC auction. In January 2011, a T-Mobile executive predicted that 50 MHz of such reallocated spectrum as well as AWS-3 spectrum would be auctioned "somewhat later" than 2012.[569]

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as amended by Erratum (rel. Apr. 15, 2011)("*MSS Report & Order*"); *LightSquared Modification Order*; *MSS NPRM & NOI*; *Globalstar Licensee LLC; Application for Modification of License to Extend Dates for Coming into Compliance with Ancillary Terrestrial Component Rules And Open Range; Request for Special Temporary Authority*, Order, 25 FCC Rcd 13114 (2010); National Broadband Plan at 84, 87-88.

[566] For example, wireless operators can dramatically increase cell site density and network capacity through multi-operator radio access network ("RAN") sharing arrangements. RAN sharing is technically feasible and has had demonstrated success in international markets. *See* Stravitz Decl. ¶ 51-52.

[567] Transcript of Panel Regarding a Framework for Innovative Federal Spectrum Policy, The Brookings Institution, Statement of James W. Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T Services, Inc., at 7 (Mar. 30, 2011), *available at*: <http://www.brookings.edu/~/media/Files/events/2011/0330_spectrum/20110330_spectrum_transcript.pdf>.

[568] National Broadband Plan at 86-87.

[569] Jan. 20, 2011 Deutsche Telekom Briefing at 16.

299. A large amount of spectrum is thus expected to be available within the next several years from existing licensees or FCC auctions. Moreover, President Obama and the National Broadband Plan have called for the allocation of 500 MHz of additional spectrum for mobile broadband.[570] To help meet this goal, Congress and the FCC are considering incentive-based mechanisms for repurposing up to 120 MHz of broadcast UHF spectrum to be auctioned for mobile broadband use, although the timing of incentive-auction legislation is unclear.[571] To be sure, significant portions of the spectrum described above do not yet meet the FCC's spectrum screen criteria, and the availability of this spectrum would not remedy the very substantial harm to the spectrum input market if the Tribunal approved the proposed T-Mobile takeover, given the resulting dominance AT&T and Verizon would gain over the most commercially valuable segments of spectrum. But, in the absence of the proposed takeover, a competitive marketplace, including a device and infrastructure ecosystem that is not dominated by the Twin Bells, would promote the deployment of services on the new spectrum that will be made available in the coming years for mobile broadband services.

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[570] "President Obama Details Plan to Win the Future through Expanded Wireless Access," White House Press Release (Feb. 10, 2011), *available at:* <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>; National Broadband Plan at 84. *See also* Memorandum for the Heads of Executive Departments and Agencies, *Unleashing the Wireless Broadband Revolution*, (Presidential Memorandum), released June 28, 2010, 75 Fed. Reg. 38387 (July 1, 2010), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution> (directing NTIA to collaborate with the FCC "to make available a total of 500 MHz of Federal and nonfederal spectrum over the next 10 years, suitable for both mobile and fixed wireless broadband use."); National Telecommunications and Information Administration, U.S. Dept. of Commerce, Plan and Timetable to Make Available 500 Megahertz of Spectrum for Wireless Broadband (Oct. 2010), available at <http://www.ntia.doc.gov/reports/2010/TenYearPlan_11152010.pdf>.

[571] *See* Public Safety Spectrum and Wireless Innovation Act, S.28, 112th Cong. § 204 (2011) (proposed bill to authorize FCC to conduct incentive auctions); National Broadband Plan at 88-93.

5. Network Investment and Spectrum Efficiencies

300. In declining to approve the EchoStar-DirecTV merger, the FCC rejected arguments that are similar to the efficiency claims AT&T makes in this proceeding:

> An additional problem with the [AT&T's] efficiency claims is that they ignore the possibility that, because the merged entity will possess more spectrum, it will use it less efficiently than would EchoStar and DirecTV individually absent the merger. In particular, the merger may affect the incentive of the merged entity to adopt new, more productive technology, which in turn could affect how efficiently the spectrum will be used. The reason that the merged entity may be less willing to invest in productivity-enhancing technology is that the marginal value of a firm's spectrum will decline as the total amount of spectrum it controls increases. This suggests that, if as a result of the merger, New EchoStar doubles the amount of spectrum it controls, it will have a reduced incentive to invest in productivity-enhancing technology. . . . Thus, from a social welfare point of view, the merged entity may select a technology that is less efficient than it would select if each separate DBS competitor controlled less spectrum, resulting in a public interest harm rather than a benefit.[572]

301. The FCC's concern in the EchoStar-DirecTV proceeding applies with equal strength to AT&T's efficiency claims. Rather than paying DT $39 billion to acquire T-Mobile, AT&T could invest a portion of that sum in pro-competitive network investments to meet its capacity needs through the new technologies and infrastructure improvements described above. Such investments promote the public interest by maximizing the efficient use of existing spectrum and promoting competition.

302. Wireless carriers compete with each other in upgrading and managing their networks. Indeed, every year in its mobile wireless competition report the FCC analyzes how carriers compete with each other in terms of network coverage and technology upgrades.[573] This competition not only improves service for customers, but also creates jobs, encourages new capital investment, and promotes innovation in the United States. AT&T, however, seeks to

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[572] *EchoStar-DirecTV Hearing Designation Order* ¶ 201 (footnotes omitted).

[573] *See, e.g., 14th CMRS Competition Report* ¶¶ 104-17

avoid this competition and investment through its proposed anti-competitive acquisition of T-Mobile. This approach may serve AT&T's private interests, but it harms the public interest.

E. AT&T's Alleged Efficiencies in Combining Their Two Networks Are Speculative and Unsupported

303. The Tribunal should give no weight to the AT&T's alleged network synergies not only because they are not merger-specific, but also because they are speculative, unsupported, and based on outdated technological assumptions. AT&T argues that the Proposed Transaction would create network synergies through the integration of T-Mobile's cell sites into AT&T's network, the elimination of redundant control channels, and channel pooling and utilization efficiencies.[574] However, many of these alleged synergies appear to apply only to AT&T's voice network and therefore would not help address the increased demands on AT&T's data network.[575] AT&T's alleged synergies also are premised on traditional macro-cell density networks, even though such system architectures are inherently sub-optimal for areas with large traffic volumes.[576] Rather than pursue the T-Mobile takeover as a means of supporting older generation services based on outmoded network technology assumptions, AT&T should focus on deploying current technologies and the small-cell site-based network architectures.

304. AT&T's synergy claims also suffer from a fundamental contradiction. On the one hand, AT&T claims that combining their two networks would relieve AT&T's capacity constraints. On the other hand, the AT&T states that "T-Mobile USA faces spectrum constraints

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[574] Description of Transaction at 33-42.

[575] *See* Stravitz Decl. ¶ 33. As described in the Stravitz Declaration, while data traffic has increased, AT&T and other wireless carriers are experiencing stagnating or declining voice usage on their networks on a per-subscriber basis. *Id*. ¶ 16.

[576] *Id.* ¶ 50.

of its own, despite its substantial investments in spectrum and network facilities."[577] How can combining two allegedly congested networks relieve the congestion? As Gerald Faulhaber, a former FCC Chief Economist, recently stated, "[p]utting the two networks together does not create spectrum."[578] Common sense suggests that combining two congested networks simply results in a bigger congested network.

305. A number of AT&T's synergy theories ignore this common sense notion. For example, AT&T's "utilization efficiencies" are premised on "one or both companies' GSM networks [being] underutilized."[579] AT&T offers only two examples of markets where they claim this will be the case and they provide no specific data to verify these claims.[580] In fact, in the large majority of markets it is quite likely that where one company's network is congested the other company's network will also be congested, negating any potential utilization efficiencies. Specifically, congestion arises in dense population centers and will tend to afflict both the AT&T and T-Mobile networks in the same areas, especially given the fact that the AT&T asserts that both companies are facing network constraints.

306. AT&T's "channel pooling" efficiencies are similarly flawed and speculative. AT&T provides scant concrete evidence of these efficiencies, offering only one example of a

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[577] Description of Transaction at 30.

[578] Spencer Ante & Amy Schatz, *Skepticism Greets AT&T Theory: Telecom Giant Says T-Mobile Deal Will Improve Network Quality, but Experts See Other Options*, WALL ST. J., Apr. 4, 2011, available at: < http://online.wsj.com/article/SB10001424052748703806304576236683511907142.html>. See also Peter Svensson, AT&T Talks of Spectrum Shortage, Yet It Has Plenty, THE WASHINGTON TIMES, Mar. 21, 2011 ("[M]uch of T-Mobile's spectrum is already in use, so the deal won't result in fresh airwaves becoming available."), available at: <http://www.washingtontimes.com/news/2011/mar/21/att-talks-of-spectrum-shortage-yet-it-has¬plenty/>.

[579] Description of Transaction at 39.

[580] *Id.*

market where they claim they will see an increase in capacity from channel pooling.[581] In addition, AT&T recognizes that the "variation in the size of the channel pooling efficiencies we expect in different areas is . . . a function of the size of the existing channel pools of each company in each area – greater channel pooling gains can typically be achieved when smaller pools are combined than when larger pools are combined."[582] But, AT&T provides no evidence regarding the extent to which the transaction would lead to the combination of smaller channel pools rather than larger channel pools. Such unsupported synergy claims are unverifiable and thus not cognizable by the FCC or the Tribunal. It is also fair to assume that, in larger markets where there is greater demand for wireless services, the second and fourth largest carriers in the country will each have large channel pools to meet their existing service requirements, and that combining the two pools would therefore result in few if any efficiencies under AT&T's own theory.[583]

307. AT&T asserts that they would integrate a certain number of T-Mobile cell sites into its network and thus create "cell splits" that expand the capacity of AT&T's network.[584] But this plan does not extend to a large portion of T-Mobile cell sites because AT&T states that they will deFCC "thousands of surplus sites."[585] With respect to the T-Mobile sites that are not considered "surplus," AT&T provides no empirical support to demonstrate how many are configured in a way that would address AT&T's alleged capacity problems. To make this

[581] *Id.* at 38.

[582] Declaration of William Hogg, 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, at 27, n.20 (Apr. 21, 2011) ("Hogg Decl.").

[583] *See* Stravitz Decl. ¶ 34.

[584] Description of Transaction at 34-35.

[585] *Id.* at 51.

demonstration, AT&T would need to provide specific data concerning the location and usage patterns of the sites in question as well as other information (e.g., height, orientation, gain, and radiation pattern of the site antennas).586 AT&T does not provide this information, most likely because AT&T has not performed the necessary analysis to back up its claims. Indeed, the AT&T has stated that only if and when the Proposed Transaction is approved would AT&T begin the process of "identifying T-Mobile USA sites that are complementary to AT&T's cell grid. . . ."[587]

308. Even assuming that the integration of T-Mobile's cell sites provides some of the hoped-for efficiency gains, these gains may not be achieved until so far into the future as to be speculative at this point. AT&T claims that it "expects to see service improvements in areas of various markets in as early as nine months, and it expects to complete this integration process and optimize its network architecture on a national basis within twenty-four months."[588] AT&T's allusion to a vague set of "service improvements" within "as early as nine months" is not enough to satisfy its burden of proof in this proceeding. Precisely what type of benefits will AT&T achieve through the merger that it could not achieve through other means? If these benefits occur at all, which ones will occur nine months from now and which ones will occur two years from now? Precisely how often – and over how large a geographic area – will these benefits occur? And exactly who will enjoy the unspecified benefits that AT&T projects will occur? Only voice subscribers? AT&T provides no answers to these important questions.

309. In short, AT&T's alleged efficiencies provide no basis for approving the Proposed Transaction.

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586 *See* Stravitz Decl. ¶¶ 27-28.

587 Description of Transaction at 35.

588 *Id.*

F. The Proposed Transaction Is Not Necessary to Meet T-Mobile's Network Capacity and Broadband Requirements

310. Most of AT&T's network synergy arguments focus on AT&T's alleged network problems. AT&T also contends that the Proposed Transaction is necessary for T-Mobile to confront its own capacity constraints and provide a path to LTE. The Tribunal should reject these arguments. While AT&T paints a dire outlook for T-Mobile, T-Mobile's own statements in January show that T-Mobile is a strong competitor with sufficient spectrum capacity to compete and a range of options to strengthen its service in the long term. DT's CEO stated that T-Mobile "currently own[s] 54 megahertz of spectrum in our major markets which for the next few years put us into a position which is actually better than most of our competitors are in."[589] Likewise, T-Mobile's Chief Technology Officer stated that T-Mobile has "[s]ufficient spectrum in [the] short to medium-term," and, like all other carriers, will explore participating in FCC spectrum auctions to address long-term needs.[590] As explained above, T-Mobile also made clear during the January investor conference that it believes it is in a strong position to compete with 4G services, including Verizon's and AT&T's LTE service.

311. At the January 2011 conference, DT's CEO stated that T-Mobile would consider partnership and network-sharing options.[591] Depending on the specific circumstances, such options may very well enhance T-Mobile's service and promote competition. AT&T's proposed acquisition of T-Mobile, however, would not. It would harm competition and would provide no verifiable benefits to T-Mobile subscribers or the public at large.

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589 Jan. 20, 2011 Deutsche Telekom Briefing at 2.

590 *Id.* at 15-16.

591 *Id.* at 4.

XII. AT&T'S LTE DEPLOYMENT PLANS ARE SPECULATIVE AND UNRELATED TO THE PROPOSED TRANSACTION

312. Prior to the Proposed Transaction, AT&T had announced plans to deploy LTE service on its 700 MHz and AWS spectrum to cover approximately 250 million people, or 80 percent of the U.S. population, by the end of 2013.[592] AT&T claims that it would now increase its LTE deployment to 97 percent of the U.S. population to cover approximately an additional 55 million people at some undefined point in the future.[593] AT&T argues that the Proposed Transaction would help them reach this new LTE deployment target by providing AT&T with "additional scale" as well as access to T-Mobile's AWS spectrum in markets where AT&T claims it would face the following alleged obstacles:

- Markets in which AT&T lacks any 700 MHz or AWS spectrum to deploy LTE;
- Markets in which "AT&T holds an average of 10 MHz of AWS or less and/or 12 MHz of 700 MHz spectrum or less[,]" thus falling short of the 20 MHz of contiguous spectrum AT&T claims is necessary to deploy LTE; and
- Markets in which AT&T predicts it will face an LTE capacity shortage at a certain point in the future.[594]

313. The Tribunal should dismiss these arguments. They are too vague and speculative to be verifiable. AT&T's LTE deployment plans are also unrelated to the Proposed Transaction, as AT&T will have the capability and incentive to pursue a comparable LTE deployment even in the absence of the transaction.

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[592] Hogg Decl. ¶ 27.

[593] Description of Transaction at 55-56.

[594] Description of Transaction at 5; Hogg Decl. ¶ 60; Moore Decl. ¶ 14.

A. AT&T's Arguments Regarding LTE Deployment Are Vague and Speculative

314. AT&T's claims regarding LTE deployment are unverifiable and should be given no weight by the Tribunal. Their claims about the percentage increase in AT&T's LTE footprint are misleading and conflicting. They also completely fail to answer critical questions about AT&T's LTE deployment schedule, the nature of the service AT&T would offer, and what AT&T would invest to reach its deployment target.

315. Misleading and Conflicting Projections. As an initial matter, the alleged 17 percent increase in AT&T's LTE coverage is misleading. As explained below, it is quite likely that, even without the Proposed Transaction, AT&T will ultimately deploy its LTE network to far more than its previously announced target of 80 percent, which only went through 2013. Aside from this problem, AT&T's math is difficult to fathom. Although AT&T has provided a few examples of markets that will be covered by AT&T's new LTE deployment target, it fails to provide a complete list of the specific markets that would benefit from this deployment or that fall within the three categories of alleged obstacles described above. AT&T's failure to provide these data makes it impossible for the Tribunal and interested parties to assess the accuracy of the AT&T's claims.

316. AT&T's claims also seem to be internally inconsistent. On the one hand, they claim that an additional 55 million Americans would be covered by AT&T's post-transaction LTE deployment.[595] On the other hand, AT&T suggests that eliminating the first two obstacles

[595] AT&T characterizes their 55 million person estimate as an approximation, but it is a generous one. A 17.3 percent increase in AT&T's LTE deployment would cover an additional 53.4 million people (0.173 x 308.7 million). This calculation uses the 2010 U.S. Census Bureau U.S. population estimate, which does not include Puerto Rico or U.S. territories. *See* U.S. Census Bureau, Population Distribution and Change: 2000 to 2010, at 1 (March 2011), *available at:* <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. AT&T does not explain what national population figure they use.

described above would extend LTE deployment to a total of people, which is inconsistent with this new coverage. AT&T offers no explanation of this apparent inconsistency in their coverage estimates. As for the alleged obstacle described in the third category above, AT&T merely relies on conclusory and speculative assertions about LTE capacity shortages arising in the future in certain areas for a service that AT&T has yet to deploy.

317. No Schedule for Achieving Claimed Benefits. An even more serious problem is that AT&T provides no schedule or timeline for implementing its purported new plan to deploy service to 97 percent of all Americans. AT&T's alleged expanded LTE deployment would mostly cover rural and unpopulated areas.[596] There is no shortage of spectrum in rural areas; rather, carriers must tackle the challenge of investing in infrastructure that is costly on a per-subscriber basis.[597] AT&T provides no schedule for addressing this challenge, and also ignores that T-Mobile has not deployed infrastructure in many rural areas and that the Proposed Transaction will not accelerate the build out in such markets.[598] Moreover, in markets where T-Mobile has deployed service, the AT&T does not explain the pace at which it would migrate T-Mobile's UMTS/HSPA+ subscribers to other bands or technologies so that its AWS spectrum can be repurposed for LTE, even though such migrations can take years.[599]

318. FCCNo Information on Nature of Service. AT&T has been completely silent about the nature of the LTE service AT&T would provide in rural areas. It has provided no information regarding the rates AT&T would charge for its LTE service in these areas or

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[596] Description of Transaction at 55-56.

[597] *Id.* at 55.

[598] *See e.g.*, Dan Jones, *Gleaning AT&T's 4G Plans for LTE on AWS*, LIGHT READING MOBILE (Mar. 29, 2011), *available at:* <http://www.lightreading.com/blog.asp?blog_sectionid =244& doc_id=206210>.

[599] Description of Transaction at 23. *See also* CRA Decl. ¶ 198.

whether AT&T would impose data caps or other limits on service. If its current practices are any indication, potential subscribers of AT&T's expanded LTE service will face high rates and data caps that either limit use of the service or impose extra charges for data usage above a certain level.[600] One observer has estimated that a rural subscriber who sought to use AT&T's LTE service as his or her primary Internet connection would pay $180 per month – "not exactly a great choice for rural America."[601] In areas where it provides wireline service, AT&T will of course have no incentive to compete with its own wireline broadband offerings; indeed, AT&T's LaptopConnect terms of service currently prohibit the use of an AT&T wireless connection as a substitute for wireline data connections.[602] These limitations prompted a recent article to conclude that AT&T's purported plan to extend its LTE footprint "may mean a lot less to Americans than it first appears to."[603]

319. Vague and Conflicting Statements About Network Investment. AT&T has provided no information on how much AT&T will need to invest to expand its LTE deployment or what portion of the alleged synergy savings created by the transaction would be spent on this deployment. AT&T asserts that the transaction would give AT&T the "scale, scope, [and]

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600 *See 14th CMRS Competition Report* ¶ 92 (describing Verizon's and AT&T's post-paid service offerings as "the most expensive in the industry"); Letter from Harold Feld, Public Knowledge, and Sascha Meinrath, New America Foundation, to Sharon Gillet, FCC Wireline Competition Bureau (May 6, 2011) (raising concerns about AT&T plan to charge wireline broadband customers additional fees for exceeding data caps), *available at*: < http://www.publicknowledge.org/letter-to-FCC-on-ATT-Data-Caps>; *AT&T Wireless Data Plan "Bytes,"* DEADZONES (Apr. 14, 2011) (describing AT&T data plans), *available at*: <http://www.deadzones.com/2011/04/at-wireless-data-plan-bytes.html>.

601 Sascha Segan, *Will AT&T's Rural Broadband Be First-Class or Second-Rate?*, PC MAGAZINE (May 16, 2011), *available at*: http://www.pcmag.com/article2/0,2817,2385445,00.asp

602 *Id.*

603 *Id.*

resources" to increase its LTE deployment,[604] but it provides no data or analysis to support this conclusory assertion. To the contrary, AT&T has submitted a declaration stating that it would gain "synergies" from the Proposed Transaction resulting from, among other things, the "reduced need in the near term for expenditures on network infrastructure and spectrum."[605] This statement is consistent with the frank admission by AT&T's CFO that the "sum" and "[m]ost important" aspect of the Proposed Transaction is its potential for returns to shareholders: "So to sum up, this is a transaction that creates substantial shareholder value. Most important, it enhances our long-term revenue and margin potential. ... [T]he scale and the combination of operational assets provide us with a path to industry-leading wireless margins."[606] Placing such a high priority on increasing margins to maximize returns to shareholders would be at odds with AT&T investing in its network to expand its LTE footprint.

320. Illusory Claims Do Not Meet the Burden of Proof. AT&T has the burden of demonstrating that the purported public interest benefits of the Proposed Transaction are real and verifiable. Their nebulous claims fall far short of meeting this burden. Their claim that the transaction would increase AT&T's LTE deployment is built on speculation and vague assertions and should be given no weight by the Tribunal, particularly in light of AT&T's poor track record in delivering on promises that a merger will accelerate technology upgrades. For example, in its application to acquire Centennial's licenses, AT&T claimed that the transaction would allow it to extend 3G service to Centennial's service areas (which, prior to the transaction, had been limited

[604] Description of Transaction at 55-56.

[605] Moore Decl. ¶ 9 (emphasis added).

[606] Mar. 21, 2011 AT&T Investor Presentation Transcript at 13-14 (statements of Richard G. Lindner, Senior Executive Vice President and CFO, AT&T Inc.).

to 2G service in the U.S. mainland).[607] However, according to AT&T, a year after the FCC approved the transaction "only a handful of legacy Centennial cell sites in the former Centennial service areas have been upgraded to 3G."[608]

B. AT&T's Arguments Regarding LTE Deployment Are Not Merger-Specific

321. The Proposed Transaction is not necessary to expand AT&T's LTE coverage to promote the FCC's broadband goals. AT&T announced a few months ago that it already plans to deploy LTE service to 80 percent of the U.S. population, and that deployment plan only extends through 2013. Even without access to T-Mobile's AWS spectrum, AT&T will have more than enough resources to expand its LTE network beyond 2013 and subsequently achieve a virtually nationwide LTE footprint. AT&T's current wireless data network, counting its PCS and cellular band services, reaches 97 percent of the U.S. population.[609] By upgrading its existing network platform, AT&T should have the capability to extend LTE service to 97 percent of the population without the proposed takeover.[610] AT&T's existing footprint far exceeds T-Mobile's

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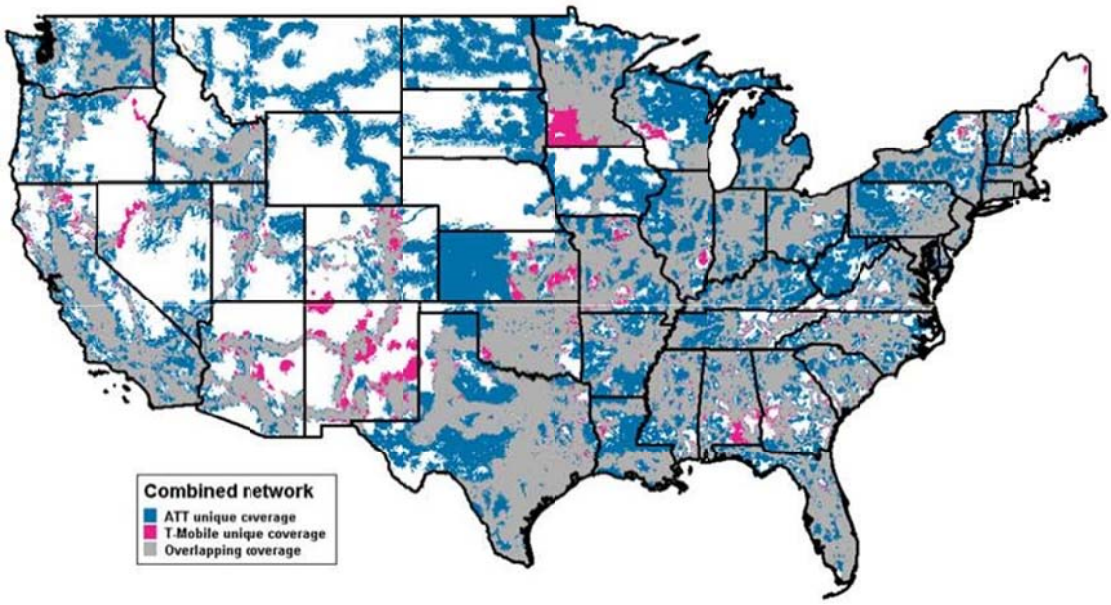
[607] *AT&T-Centennial Merger Order* ¶ 97.

[608] Report, attached to Letter from Celia Nogales, AT&T Inc., to Marlene Dortch, FCC Secretary, FCC, WT Docket No. 08-246, at 3 (Dec. 17, 2010). *See also* Dave Burstein, *AT&T's Quinn: We May Renege on 80%, 95% LTE Buildout – Is this AT&T's Attempt at Satire?*, BROADBAND DSL REPORTS (Apr. 26, 2011) (discussing whether recent statement by AT&T senior executive that FCC's data roaming decision will "discourage investment and build out of broadband facilities" means that AT&T will pull back on LTE deployment targets), *available at*: <http://www.dslreports.com/shownews/ATTS-Quinn-We-May-Renege-on-80-90-LTE-Buildout-113924>.

[609] *See* Press Release, AT&T, *AT&T Sets the Record Straight on Verizon Ads* ("AT&T's wireless data coverage reaches 303 million people – or 97% of the U.S. population"), *available at*: <http://www.att.com/gen/press-room?pid=14002>; Transcript of AT&T Q4 2009 Earning Conference Call (Jan. 28, 2010) ("We have a broad, nationwide network. It covers 97% of the U.S. population."), available at: <http://seekingalpha.com/article/185524-at-amp-t-inc-q4-2009-earnings-call-transcript>.

[610] *See* Stravitz Decl. ¶ 40 ("With coverage already of 97% of the U.S. population today on its combined 2G and 3G network, AT&T could achieve this level of deployment by overlaying LTE coverage on its existing network to reach 97% of U.S. population. The process of overlaying

national network, which covers 86 percent of the population.[611] Indeed, T-Mobile must purchase roaming services from AT&T because of the latter's more extensive coverage. As the following map shows, the Proposed Transaction would give AT&T less than one percent of additional U.S. population coverage:



322. AT&T incorrectly assumes that they can only deploy LTE service using 700 MHz and AWS spectrum. AT&T could deploy LTE on any of its spectrum bands, including its PCS and 850 MHz cellular band spectrum.[612] In fact, AT&T is already contemplating this very scenario. In its application to acquire Qualcomm's spectrum, filed just a few months ago and still pending before the FCC, AT&T's Senior Vice President for Architecture and Planning stated that "AT&T may take steps to clear a portion of its 850 MHz or 1900 MHz spectrum for LTE, as

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equipment on existing cell sites merely involves installation of new equipment and saves on the cost and time required to build the physical infrastructure of a new site, not to mention time required to obtain necessary legal clearances.").

611 Carlton Decl. ¶ 32.

612 LTE standards approved by the 3GPP standards-setting process indicate that LTE can be deployed on PCS (LTE Band 2) and 850 MHz cellular band spectrum (LTE Band 5). *See* Stravitz Decl. ¶ 40. AT&T's PCS and cellular networks are not congested in rural areas and could accommodate LTE traffic in those areas.

customers begin transitioning to LTE devices."[613] The same AT&T executive made the very same point last year in pointing out that AT&T and Verizon have stronger spectrum positions than Clearwire:

> AT&T's [Kristin] Rinne says that AT&T can expand its LTE offering into more spectrum bands. Both Verizon and AT&T are deploying LTE in the 700 MHz band, but Rinne said AT&T could eventually push LTE into its existing 850 MHz and 1900 MHZ spectrum. "We will have the opportunity [to grow spectrum for] LTE in future years, both the quality and range of it," she said. "You need to make sure you count all of our spectrum when you make these comparisons."[614]

323. These statements directly contradict the AT&T's claims that it can only deploy LTE service on its 700 MHz and AWS spectrum and that it needs T-Mobile spectrum to expand its LTE footprint.

324. AT&T also incorrectly assumes that an LTE network can only be deployed using a "contiguous 20 MHz of spectrum."[615] To the contrary, an LTE network can be deployed using smaller configurations, including 5 MHz x 5 MHz paired bands.[616] The FCC has used precisely this sort of configuration in a number of bands, including the 5 MHz x 5 MHz Upper 700 MHz D Block. MetroPCS, in fact, is deploying LTE service based on this configuration in some markets. A 5 MHz x 5 MHz block provides more than sufficient spectrum and capacity to serve rural communities, particularly given their lower-density populations and resultant lesser capacity

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[613] Declaration of Kristin S. Rinne, attached to Applications of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Lower 700 MHz Band Licenses, WT Docket No. 11-18, at ¶15 (Jan. 12, 2011).

[614] Phil Goldstein, *AT&T, Verizon push LTE plans, advantages*, FIERCEWIRELESS (Mar. 19, 2010) (punctuation in original), *available at*: <http://www.fiercewireless.com/story/t-verizonpush-lte-plans-advantages/2010-03-19>.

[615] Description of Transaction at 5. AT&T does not define the term, but Sprint assumes that "contiguous 20 MHz spectrum" means a 10 MHz x 10 MHz configuration. To the extent AT&T means a 20 MHz x 20 MHz paired block, the additional amount of such configured blocks resulting from the Proposed Transaction would be very limited. *See* Stravitz Decl. ¶¶ 36-37.

[616] Stravitz Decl. ¶ 38 ("LTE supports scalable carrier bandwidths of 1.4, 3, 5, 10, 15, and 20 MHz.").

demands.[617] As described in the Stravitz Declaration, AT&T currently has sufficient (and unused) 700 MHz and AWS spectrum holdings to deploy LTE service (1) in a 10 MHz x 10 MHz configuration to 70 percent of the U.S. population and (2) in a 5 MHz x 5 MHz configuration to more than 95 percent of the population.[618] The reach of AT&T's LTE network could extend even further when AT&T's 850 MHz cellular band and PCS spectrum are taken into account.[619]

325. AT&T's assertions about AT&T spectrum shortages are consequently overblown. AT&T already plans to deploy LTE service to 80 percent of the U.S. population by the end of 2013 and already has the spectrum resources to deploy LTE to 97 percent of the population without the proposed anti-competitive takeover. In exurban and rural areas of the country, AT&T should be able to acquire spectrum easily from licensees to the extent it needs additional spectrum in these areas. AT&T can also partner with rural carriers to extend its coverage. Verizon, for example, is actively pursuing plans to collaborate with rural companies to build and operate an LTE network in rural areas.[620]

326. Even in the absence of its proposed takeover of T-Mobile, AT&T has many options to achieve a nationwide LTE footprint and quite likely will pursue these options in order to compete with carriers who will have nationwide LTE coverage. Verizon has already launched LTE service in forty markets and has stated that it plans "to deploy LTE in virtually all of our

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[617] *Id.* ¶ 39.

[618] *Id.* ¶¶ 38-39.

[619] *Id.* ¶ 40.

[620] Press Release, Verizon, *Verizon Wireless LTE in Rural America Program, available at:* <http://aboutus.vzw.com/rural/Overview.html> (last visited May 23, 2011). *See, e.g.*, Press Release, Convergence Technologies, *Convergence Technologies Inc. Announces Rural LTE Partnership with Verizon Wireless* (Apr. 29, 2011), *available at*: <http://www.cticonnect.com/arra/verizonrurallte> (last visited May 23, 2011).

current 3G network footprint by the end of 2013."[621] As of December 31, 2009, Verizon's 3G network covered 285 million Americans, or 92 percent of the U.S. population, and that number has almost certainly increased since 2009, as Verizon has continued to "build out, expand, and upgrade our network."[622] Indeed, Verizon's Chief Technology Officer has stated that once it completes its initial LTE rollout to 285 million people in 2013, "we expect to aggressively expand this footprint, with a goal of covering all of our 700 MHz licensed territories by 2015."[623] Such a deployment would reach virtually every American.

327. AT&T will need to respond to this competition even without the Proposed Transaction. Wireless carriers compete for customers based on their national network coverage areas.[624] In a competitive marketplace, as Verizon and Sprint expand the reach of their 4G services, AT&T will likely follow suit or face the loss of subscribers to rival providers that offer better, faster wireless services on a larger national footprint. Competition can thus promote deployment of 4G mobile services to almost the entire U.S. population, just as competition has enabled nearly the entire U.S. population to enjoy access to 3G technologies today.[625] The FCC has estimated that total 3G/4G mobile broadband coverage currently reaches more than 98

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[621] Cellco Partnership, Annual Report (Form 10-K), at 3 (Mar. 12, 2010).

[622] *Id.* at 3-4.

[623] Dave Burstein, *CTO Dick Lynch on Verizon LTE Coverage*, DSL PRIME (Apr. 2, 2011), *available at:* <http://www.dslprime.com/a-wireless-cloud/61-w/4214-cto-dick-lynch-on-verizon-lte-coverage>.

[624] *See* AT&T, Annual Report (Form 10-K), Ex. 13 at 29 (Mar. 1, 2011) ("We . . . compete for customers based principally on price, service/device offerings, call quality, *coverage area*[,] and customer service.") (emphasis added).

[625] One 3G technology, EV-DO, alone now covers 97.9 percent of the U.S. population. *See 14th CMRS Competition Report* ¶ 122.

percent of the U.S. population.[626] There is no reason to doubt that 4G services alone will reach the same level of coverage within the next few years in a competitive marketplace.[627]

328. The Proposed Transaction thus would provide no benefits in terms of deploying 4G technologies. One analyst credits AT&T for doing "a brilliant job [in] confusing people" into believing that the transaction will expand its LTE deployment, but suggests that AT&T was planning to reach the same LTE coverage by 2015-2016 even without the T-Mobile transaction.[628] According to this analyst, the "net result in improved U.S. LTE coverage" stemming from the Proposed Transaction would be "0%-2%, probably closer to 0%."[629] The Tribunal should see through AT&T's rhetoric and reject their LTE deployment claims as not merger-specific.[630]

XIII. REQUESTED REMEDY: ENJOIN THE PROPOSED ACQUISITION BY AT&T OF T-MOBILE FROM DEUTSCHE TELEKOM

329. Claimant incorporates all prior paragraphs of this Demand for Arbitration as if fully set forth herein.

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[626] *Id.* ¶ 120, Table 13.

[627] *See* Dave Burstein, *U.S. LTE 2016: 96-98% Likely*, DSL PRIME (Mar. 23, 2011) (projecting LTE deployment will reach 96 to 98 percent of the U.S. population in 2016), *available at:* <http://www.dslprime.com/a-wireless-cloud/61-w/4194-us-lte-2016-96-98-likely>.

[628] *See* Dave Burstein, *AT&T LTE Result on U.S. Coverage: ~0%*, DSL PRIME (Mar. 22, 2011), *available at:* <http://www.dslprime.com/a-wireless-cloud/61-w/4192-atat-lte-result-onus-coverage-0>.

[629] *Id.*

[630] AT&T argues that the Proposed Transaction will promote broadband innovation and enhance public safety. Description of Transaction at 61-63. AT&T's cursory arguments on these issues, however, boil down to unsupported rhetoric that fails to substantiate any verifiable public interest benefits or any connection of these claims to the Proposed Transaction.

330. AT&T's proposed acquisition of T-Mobile will likely substantially lessen competition in the sale of wireless telecommunications services in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

331. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects, among others:

1. actual and potential competition between AT&T and T-Mobile in the market for wireless telecommunications services will be eliminated;

2. competition in the market for the development and sale of wireless telecommunications services in the United States would be substantially lessened; and

3. for the sale of wireless telecommunications services in the united States, prices likely would increase, quality of service would likely decrease, technical support likely would be reduced, and innovation likely would decline.

332. The injury to Claimant is of the type that the antitrust laws were designed to prevent and flows from that which makes AT&T's actions unlawful. As a result of AT&T's anticompetitive conduct, Claimant will be harmed in its business or property in an amount to be proven at arbitration.

333. Therefore, AT&T's unlawful acts will cause Claimant irreparable harm to which he/she has no adequate remedy at law. In sum, AT&T's predatory and abusive conduct has caused antitrust injury to innovation, competition, and consumers in the relevant technology service markets. Unless enjoined, the natural and proximate result of AT&T's conduct will be to leave the monopolistic wireless telecommunications provider to its abusive practices, substantially injuring competition and consumers in the relevant telecommunications markets.

334. Wherefore claimant on an individual basis, requests relief as follows:

1. Adjudge and decree AT&T's proposed acquisition of T-Mobile violates Section 7 of the Clayton Act, 15 U.S.C. § 18;

2. Enjoin AT&T and all persons acting on their behalf from consummating the proposed acquisition of T-Mobile, or from entering into or carrying out any other agreement, plan, or understanding, the effect of which will be to combine AT&T with T-Mobile, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26;

3. An award of attorney's fees and costs of this suit, including fees of experts, pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15) and the Arbitration Provision;

4. An award of such other and further relief as claimant may request by amendment of this demand in accordance with Commercial Arbitration Rules, Rule R-6, and WIA Rule R-8; and

5. An award of such other and further relief as the Arbitration Tribunal may deem necessary and appropriate to restore competition to the level it was before the Proposed Transaction, including but not limited to the alternative remedies requested in Section XVI.

XIV. ALTERNATIVE REQUESTED REMEDIES

335. Claimant incorporates all prior paragraphs of this Demand for Arbitration as if fully set forth herein.

336. As discussed in the prior section, the proposed merger of AT&T and T-Mobile should be denied. Noting, however, previous mergers that have been approved, most recently the merger of AT&T/BellSouth, Claimant acknowledges that the Tribunal may unfortunately not agree with the primary position discussed herein. Therefore, and only as a lesser alternative to the rejection of the proposed merger, Claimant proposes a number of conditions that, at a minimum, must be placed on the merger. These conditions are focused and tailored to partially offset the negative impacts that will result from the proposed merger.

337. In this proceeding, AT&T seeks to further consolidation under the AT&T banner. By absorbing the nation's fourth largest cellular provider in T-Mobile, AT&T will have effectively created a duopoly with Verizon within the wireless industry. If this were the end of the story, there would already be good cause to reject the proposed merger. Unfortunately, AT&T is also the dominant ILEC in 22 states. This telecommunications cross-ownership allows

AT&T to use market power in the wireless industry to prop-up its competitive position, resulting in less competitive choice for consumers such as Claimant.

338. As discussed in greater detail below, each of the proposed conditions are intended to lower barriers to effective competition in light of the increased market power that will be created due to the further consolidation of the telecommunications industry being in the hands of the combined AT&T/T-Mobile telecommunications conglomerate.

A. AT&T Must Divest Itself Of All T-Mobile Spectrum Licenses For Any Local Market Where The Post-Merger HHI Would Increase By 100 Points Or More And Would Exceed 2500

339. As previously discussed, under the HHI tests designated under the 2010 Horizontal Merger Guidelines, a standard employed by the FCC, markets with an HHI above 2500 are "highly concentrated." As a result, Claimant seeks a divestiture of all T-Mobile spectrum assets and licenses for any local market where the post-merger HHI would increase by 100 points or more and would exceed 2500.

B. AT&T Must Divest Itself of All Cellular Towers Acquired from T-Mobile, the T-Mobile Subscribed Base, Bandwidth, Cash, GSM Technology, and Ordered to Provide Reasonable Pricing Packages

340. Claimant requests that T-Mobile be divested of its cellular towers, subscriber base, bandwidth, cash, and GSM technology. Claimant also requests that AT&T provide lower cost pricing packages similar to those now offered by T-Mobile

C. AT&T Must Be Ordered to Impose Fair Special Access Rates

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

charging their competitors unreasonably high rates. AT&T, for example, has increased special access prices to its wireless competitors above the level which would be found in a competitive market,[631] as well as pursing other types of exclusionary conduct. This conduct has caused harm throughout the U.S. economy, by extracting monopoly profits at the expense of other wireless carriers and their customers.[632]

342. Recognizing the problem, the FCC commenced a proceeding in 2005 to deal with the issue of regulating incumbent LEC special access services.[633] Despite the evidence of abuse presented to the FCC in the proceeding and subsequently, no action has been taken by the FCC concerning special access rates. We believe the Tribunal should take action regardless of the outcome of this merger proceeding.

343. Approval of this merger in the absence of any Tribunal action to regulate AT&T's special access rates would only exacerbate the problem, by increasing AT&T's overall market power while decreasing by one the already limited number of unaffiliated carriers who would be inclined to purchase special access, if such sources were available, from someone other than AT&T. Moreover, it is a problem which will grow worse as all carriers have to expand their networks to comply with the FCC's broadband coverage mandates and strengthened buildout requirements generally.[634] If the Tribunal approves the acquisition, it should impose cost-based

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

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

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

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

restrictions on AT&T's pricing of special access services. If AT&T is allowed to acquire T-Mobile, matters cannot be left as they are with respect to special access services.

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

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

345. In 2008, the Rural Cellular Association ("RCA"), asked the FCC to initiate a rulemaking proceeding to deal with handset exclusivity.[635] RCA and other commenters demonstrated that the exclusive handset arrangements entered into by the largest carriers were anticompetitive and, if allowed to continue, would have significant adverse consequences for small and mid-sized carriers and their customers.[636]

346. The effect of handset exclusivity on wireless industry concentration was also described in the FCC's 2010 Competition Report, which notes that smartphones accounted for 44 percent of handset sales in the third quarter of 2009 and that AT&T reported that 40 percent of its iPhone customers had switched to AT&T from another carrier.[637] Again, such stark results

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

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

[637] 2010 Competition Report, ¶309, ¶138.

refute the case made by the largest carriers to the effect that exclusive arrangements for the most desirable handsets do not matter because many other handsets are available.[638]

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

348. Unless the Tribunal acts now, AT&T's ability to obtain handset exclusivity will only be increased by the augmentation of its market power promised by the additional purchasing volume that this merger will create. This merger would justify a condition which provides that AT&T, post merger, should not have any exclusive handset arrangements. Such a step would be crucial to the preservation of competition. This would be an important step and justified by the additional harm this merger will cause to carriers' ability to acquire handsets on comparable terms and conditions, which affects the options and pricing available to consumers such as Claimant. Should the Tribunal determine that a reasonable time period for exclusivity is necessary, a period of no more than three months is appropriate.

E. AT&T Must Not Be Able To Use Universal Service Support for Its LTE Deployment

349. The continuing availability of universal service support is critically important to the ability of wireless carriers to expand their services in rural America. As the FCC

[638] *See*, e.g., Verizon Wireless Comments in RM 11497, pp. 97-103.

contemplates transitioning support from voice networks to broadband networks in the most economical and efficient way possible, we believe approval of the merger should be conditioned on AT&T's agreement that they will forego receipt of USF support for their LTE deployment.

350. AT&T's Chairman, Chief Executive Officer and President, Randall Stephenson, recently testified to the alleged benefits that the Proposed Transaction would provide to rural Americans. Mr. Stephenson committed AT&T to provide 4G LTE service to 97% of the American population "without any subsidies or taxpayer dollars."[639] Claimant requests that the Tribunal holds AT&T to this commitment by requiring that as a condition of approval, AT&T agree to provide the FCC with an annual certification that none of the high-cost support that the combined company receives will be used to invest in 4G LTE equipment or services.

351. Secondly, with respect to any USF support that AT&T or T-Mobile remain eligible to receive under the current USF regime, the combined company should certify that it will not file line counts in any state for an otherwise ineligible entity. For example, in any state where AT&T is an Eligible Telecommunications Carrier (ETC) but T-Mobile is not, the combined company may only file line counts from AT&T's network, not T-Mobile's. This restriction applies to any subsidiary company, effectively preventing AT&T from reporting T-Mobile lines with a company previously designated as an ETC, such as American Cellular or Dobson Cellular.

F. AT&T Must Be Ordered to Offer Data Roaming at Cost-Based Rates and Without Anticompetitive Restrictions

352. In addition to wholesale connectivity conditions, any approval of the Proposed Transaction should be conditioned on requirements regarding data roaming. These requirements

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

should ensure that providers leasing wholesale connectivity from other carriers, such as regional carriers, will be able to roam on AT&T network. This would further aid in preserving the wholesale market that would be gravely threatened by AT&T's absorption of T-Mobile.

353. As with wholesale access, AT&T should be required to offer data roaming – on all of its data networks – at cost-based rates. As described above, the rates charged by providers like AT&T for data roaming are, where data roaming is offered at all, prohibitively expensive and far in excess of their costs. If the Proposed Transaction is approved, AT&T would have even more leverage to demand high rates for data roaming, and the Tribunal should ensure that AT&T cannot do so. Also as with wholesale access, AT&T should be prohibited from enforcing carrier-specific certification requirements to roam on its network for the reasons explained.

354. Finally, AT&T should be prohibited from maintaining "no-parking" provisions – which allow a carrier to kick off its network devices found permanently or even often roaming – in its roaming contracts. These provisions make it very difficult to offer certain applications – particularly M2M applications requiring reliability – that may need to utilize data roaming extensively. They are also plainly designed to thwart providers using wholesale connectivity.

G. AT&T Must Be Ordered to Not Engage in Any Tying Arrangements and/or Affiliate Discrimination

355. Tying arrangements between the wireless affiliate and the AT&T ILECs are already harmful to the development of the wireline and wireless markets, respectively and collectively. The example of unified messaging discussed above shows how discriminatory arrangements can allow the AT&T ILECs to offer integrated products that competitors cannot provide because they do not have the affiliation between the AT&T ILECs and the wireless affiliate.

356. To address these circumstances, a condition should be added that states as follows:

> "Where the top two national wireless providers – as long as one of those providers is AT&T – have a combined market share in excess of 50%, AT&T and its wireless affiliates will not provide any offerings to its wireline affiliates that are not available to other wireline carriers on the same terms and conditions. The wireless affiliate(s) further agree that it: (1) will make the same functionalities available to competitive wireline providers to enable unified messaging products by such competitive wireline providers at cost-based rates, and (2) will not incorporate any volume or other commitments in its contracts that would cause a disproportioned benefit to its wireline affiliates relative to a requesting competitive wireline carrier."

357. On a broad note, Claimant notes the conditional expiration of this merger condition. As the condition is based on the consolidation within the wireless sector and the ability for the resulting market power to impair the wireline sector due to AT&T's cross-ownership, it is appropriate to base the expiration of that condition on the diminishment of the consolidation rather than the passage of time as measured on a calendar.

358. The condition accomplishes a key policy imperative; it makes a clear statement that AT&T will not use its further market power to distort competition in the wireline sector. Using unified messaging as an example, wireline competition is distorted and consumer choices are diminished if AT&T is the only wireline provider able to provide a unified messaging product solely by virtue that the AT&T wireless affiliate gives the AT&T wireline affiliate favorable access to the voicemails of AT&T wireless customers.

H. AT&T Must Be Ordered to Abide By an Extension of At Least 5 Years on All Interconnection Agreements

359. As we have seen addressed in prior merger proceedings, there is a very real cost – both in terms of dollars and time as well as in uncertainty – to the process of renewing a new round of interconnection agreements in each state. While that cost of doing business may not be directly caused by AT&T, it rises to a significant barrier to developing a company's intermediate

term business plan. Recognizing that the further combination of the AT&T telecommunications conglomerate with T-Mobile will have real effects on competitive choice and the development of the telecommunications marketplace, Claimant has proposed this condition as one attempt to offset those anticompetitive effects. A five (5) year[640] extension of all interconnection agreements – without regard as to whether that agreement is in its initial term, a renewal term, or operating pursuant to an evergreen clause, will provide additional time for competitors to focus on competition in the marketplace rather than the next regulatory proceeding.

I. AT&T Must Be Ordered to Abide By an Extension of At Least 5 Years on All Special Access Agreements

360. The special access-related conditions are tailored to address the ability to use the growing consolidation under the AT&T banner and the resulting cross-ownership between wireline and wireless sectors in a manner that distorts the market. Although not identical to the conditions put forward in the AT&T/BellSouth merger, for the convenience of the Tribunal, Claimant addresses special access issues in the same order. Claimant proposes as follows:

361. "For a period of five (5) years following the closing of the proposed merger unless a larger date is stated in the specific provision:

1. AT&T affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act ("AT&T BOCs") will implement, in the AT&T Service Areas, the

[640] Claimant's reference to a five (5) year commitment here as well as every other area in which a timed commitment is recommended is an acknowledgment that the FCC has accepted similarly short time periods on the past. From a true economic perspective, the time period needs to be one that is deemed long enough to allow all resulting market power to be worked out of the market. By way of example, the Wright Amendment that restricted significant air travel out of the Dallas Love Field airport was repealed after roughly thirty (30) years. Despite the fact that restrictive legislation was in place for so long, the Congress and President still required an eight (8) year phase-out period. That legislation recognized that markets cannot adjust to such monumental changes in a brief and artificial fashion. It takes time. Claimant fundamentally believes a commitment of at least ten (10) years would be most appropriate, and ten (10) years is what Claimant would recommend throughout but for the Commission's recent history of accepting time commitments even shorter than five (5) years.

Service Quality Measurement Plan for Interstate Special Access Services ("the Plan"), similar to that set forth in the SBC/BellSouth Merger Conditions. The AT&T BOCs shall provide the FCC with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed therein. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the AT&T BOCs' monthly performance in delivering interstate special access services within each of the states in the AT&T Service Areas. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) AT&T and its affiliate(s), and (ii) non-affiliates. The AT&T BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the FCC by the 45th day after the end of the quarter. The AT&T BOCs shall implement the Plan for the first full quarter following the Merger Closing Date (that is, when AT&T files its 10th quarterly report); or (ii) the effective date of a FCC order adopting performance measurement requirements for interstate special access services.

2. No AT&T entity shall increase the rates paid by existing customers (as of the Merger Closing Date) of DSI, DS3, Ethernet, or other protocol type of local private line services that it provide in the AT&T in-region territory pursuant to, or referenced in, any AT&T entity tariff as of the Merger Closing Date.

3. AT&T will make special access services available to all carriers at prices no higher than those charged to its affiliates and will not impose volume commitments, waiver of existing UNE rights, waiver of self-certification rights or other restrictions on the availability of said prices.

4. To ensure that AT&T may not provide special access offerings to its affiliates that are not available to other special access customers, before AT&T provides a new or modified contract tariffed service under section 69.727(a) of the FCC's rules to its own affiliate(s), it will certify to the FCC that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline/wireless affiliates. AT&T also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.

5. AT&T shall not increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T in-region territory and that are set forth in tariffs on file at the FCC on the Merger Closing Date. This provision requires, among other requirements, that AT&T will renew expiring contract tariffs upon the same terms, conditions, and rates as the expiring tariff if requested by the special access customer."

362. The purpose for both the rate freeze and rate non-discrimination should be clear.

As AT&T's further cross-ownership consolidation increases its market power as a retail

provider, the Tribunal must assure that AT&T does not use that dominant position to also price squeeze its competitors by either increasing its competitors' costs and/or providing favorable rates to its affiliate(s). Similarly, it is critical to assure that the quality of wholesale access is at least equal in quality to what AT&T provides itself and its affiliates.

J. AT&T Must Be Ordered to Abide By an Extension of At Least 5 Years on All IP Interconnection Agreements

363. As this merger further consolidates the market position of AT&T within the combined wireline/wireless telecommunications industry, it is imperative that AT&T does not use its acquired market power to diminish its competitors equal access to traffic and the functional abilities for making services available to their customers nor allow AT&T to artificially manipulate the cost structure of its competitors by imposing limitations on the interconnection of networks that are not necessary from a technical perspective.

364. An ever growing percentage of telecommunications traffic is created in an IP protocol. AT&T moves substantial percentages of its own traffic internally without having to convert it to Time Division Multiplexing ("TDM"). Yet, for interconnecting competitors, AT&T resists passing traffic in an IP protocol with its competitors. The result is unnecessary conversions of traffic resulting in higher costs and lost service potential for consumers. To be sure, it is often the case that an AT&T and competitor customer could both be served pursuant to IP protocol yet the competitor is required to convert the traffic to TDM to hand it off to AT&T followed by AT&T converting the traffic back to IP protocol to complete it to the AT&T customer. There is no justification for traffic in this situation to not be handed to AT&T in the same manner that is created and received by the end users.

365. Of possibly greater importance, the requirement to convert IP traffic to TDM limits what new services can be created for the consumer. AT&T and T-Mobile discuss how they

will be able to expand their consumer offerings as a combined entity. Competitors also have creative ideas and service offerings they desire to provide to their customers. Unfortunately, AT&T's refusal to support the passing of traffic at an IP protocol unnecessarily prevents new service offerings from being developed thus impairing the competitive robustness of the marketplace.

366. As with the discussion regarding special access, Claimant believes the commitment for IP interconnection should be in place for a period of no less than five (5) years. Allowing one (1) year for the implementation, the commitment would extend to six (6) years following the merger closing date.

K. AT&T Must Be Ordered to Forebear From Both Retiring Copper Facilities or Seeking Forbearance Obligations for a Period of 5 Years From the Closing Date of the Merger

367. Following the discussions in the context of interconnection agreements and special access tariffs, it is imperative that the growing AT&T wireline/wireless provider conglomerate not be able to impair competitor's access to wholesale facilities. To that end, the AT&T ILECs should commit to forebear from both retiring copper facilities or seeking forbearance from their Section 251, and where applicable Section 271, obligations for a period of five (5) years from the closing date of this merger.

368. This condition – like a number of the ones above – is narrowly tailored to maintain the status quo for competitive access to facilities while the industry develops around the new market consolidation caused by the proposed merger. Such conditions could be drafted as follows:

1. For five (5) years from the Merger Closing Date, neither AT&T nor any of its affiliates will seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the "Act") 47 U.S.C. 160, or any other petition, altering

the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

2. For five (5) years from the Merger Closing Date, neither AT&T nor any of its affiliates will retire cooper facilities.

L. AT&T Must Be Ordered to Not Increase Prices for Transit Service

369. AT&T should commit to not attempt to increase prices for transit service. This is critical as there is insufficient transit competition to adequately discipline pricing and because a substantial amount of transit traffic is between wireline and wireless providers. A transit rate that is not based on cost would create an implicit cost advantage to AT&T as it passes traffic between its wireline and wireless affiliates. To maintain a level playing field, the following language should be committed to by AT&T:

> The AT&T incumbent LECs will not increase the rates paid by existing customers for their existing tandem transit service arrangements that the AT&T incumbent LECs provide in the AT&T in-region territory for a period of five (5) years following the merger closing date.

M. AT&T Must Be Ordered to Make Significant Spectrum Divestitures to Existing Carriers

370. The Tribunal must require significant pre-merger spectrum divestures to one or more of the remaining non-national carriers that AT&T has identified as viable competitors. The amount of spectrum which must be divested should be enough to allow the acquirer(s) to be able to effectively compete against the combined AT&T/T-Mobile for data services.[641] AT&T and

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

others have acknowledged that to be an effective mobile broadband competitor for all broadband services, it is necessary to have at least 20 MHz of clean spectrum in the near term. The Tribunal should study the public statements of AT&T and Verizon on the subject, and should also invite specific comment on how much spectrum is necessary to offer robust mobile broadband services. The appropriate amount is larger than 20 MHz since it is not clear how long the 20 MHz will have to last before additional spectrum is made available by the FCC. Further, this spectrum must be divested on a "fix it first" basis to a proven competitor – not a new entrant.

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

372. Second, since in most areas the other carriers are CFMA-based, GSM infrastructure is considerably less attractive to, and potentially unusable by, these carriers. Since the remaining carriers do not utilize GSM, they would have to retrain their technicians to understand and work on such equipment and they would have to manage a new-to-them GSM

handset inventory. The better approach is not to require the purchaser to undertake these costs, since such a requirement would limit the purchaser's ability to be an effective competitor in the short run.

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

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

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

376. The Tribunal also should restrict any divestitures to the remaining non-national competitor(s) in an area. Given the high concentration levels for the industry, divesting the spectrum to one of the other carriers who also have significant market share nationwide will not materially reduce the concentration in the market. Both of the other nationwide carriers have said either that they have adequate spectrum for the near term to compete with the merged AT&T/T-Mobile (Verizon) or have access to spectrum (or resale deals) that they have or have already deployed 4G (Sprint). Further, neither of these carriers is a "maverick" and thus they will not be

able to effectively discipline the merged AT&T/T-Mobile. It is the small carriers that AT&T has characterized as "mavericks." Accordingly, any divestitures should be directed to the non-nationwide carriers who are mavericks and who will remain in the market.

377. While in the past the FCC has not imposed conditions that mandated sales to a particular carrier or type of carrier, given the already robust spectrum holding of the other national carriers, the public interest would be best served if the spectrum is divested to those mid-tier, rural and regional carriers already in the market. Divesture to such established carriers would aloe competition to being much sooner with the combined AT&T/T-Mobile than if the spectrum is sold to a new entrant, and the costs to provide mobile broadband service by the existing carrier would be substantially less than those which would be required for a new entrant.

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

N. AT&T Must Be Ordered to Abide by Meaningful Roaming Obligations

379. As discussed at length above, the ability to offer nationwide service is the only way carriers will be able to effectively compete with the Big 2. However, given that carriers other than the Big 2 generally do not have spectrum in every metropolitan areas across the United States, they must rely on roaming from the Big-4 carriers (Big 3 after the merger). The existing roaming rules, however, are untested and do not have many of the safeguards which

would be appropriate when the provider has dominant market power – such as restraints on the price that the duopolist can charge for roaming.

380. Further, conditions like those imposed in the previous mergers would be far from sufficient to safeguard the roaming market after this merger. If conditions were imposed with time limits similar to those previously adopted, they would expire far too early (the Verizon/Alltel condition is already soon to expire) to accomplish anything except briefly postponing the damage to the competitors' roaming arrangements that would otherwise be caused by the merger. More to the point, mere extensions of T-Mobile roaming arrangements, which would be the remedy that would parallel the AT&T-Centennial and Verizon-Alltel conditions, would fail to place meaningful data roaming constraints on the Big 2 going forward and would not address the need for 4G LTE roaming at all. Finally, the recently adopted data roaming rules are already under appellate attack by the other member of the Big 2, and the Tribunal can be assured based on past performance that AT&T will use every loophole or ambiguity it can find to avoid providing meaningful data roaming to is competitors.[642]

381. As a result, the Tribunal must require the combined AT&T/T-Mobile to offer roaming services on terms and conditions, including rates, that would allow the remaining carriers to effectively compete with the combined AT&T/T-Mobile. The Tribunal should require AT&T and T-Mobile to turn over to the FCC their existing roaming and wholesale agreements for the FCC to examine how the existing rules have driven prices. The FCC then would be in a position to be able to determine what rates would be appropriate under the circumstances. The Tribunal should also require AT&T to publish all of its roaming agreements, just as the ILECs

[642] A cynic (or realist) might conclude that it was only AT&T's judgment that such a step would be impolitic right now that stayed its hand in filing its own appeal of the data roaming rules.

are obligated to post interconnection agreements, so that requesting carriers have the market information they need to know whether they are being treated fairly.

382. One way to establish the cost of roaming may be to require AT&T to offer roaming on terms no less favorable than AT&T offers for wholesale services (or, if lower, AT&T's retain rates). Since wholesale services include more costs than roaming and should include a reasonable profit, such a rate may be appropriate under the circumstances. This mechanism may work for existing 2G and 3G services but will probably not work for 4G services since AT&T is not currently offering those services on a retail or wholesale basis. An appropriate way to set prices for 4G may be to set the price at AT&T's forward looking price to provide such service with a reasonable profit. While the FCC has been reluctant in the past to step in and set rates, the transformational nature of this transaction dictates that the Tribunal does so do so. Otherwise, the existing competitive equilibrium which has allowed prices to fall and innovation to flourish may not exist.

O. AT&T Must Be Required To Allow Compatible Devices To Use Its Network

383. Moreover, if the Tribunal approves this transaction, it should require AT&T to adhere to the open platform requirements analogous to those currently applied to the C Block – which generally prohibit the licensee from restricting the ability of its customers to use the devices and applications of their choice on the licensee's network.[643] The Tribunal has acknowledged that device and application-related restrictions harm consumers and have been used by incumbent providers "without an appropriate justification."[644]

384. This condition would facilitate an additional, important means of wholesale-like partnership that could restore some of the competition that would be lost if this transaction is

[643] *See* 47 C.F.R. § 27.16.

[644] *C Block Order*, 22 FCC Red at 15,363, ¶ 200.

approved. Specifically, the condition would enable a WiFi provider like Cablevision to provide dual-mode WiFi-Cellular Broadband devices to its customers, and certify those devices to work on AT&T's mobile cellular network as part of a wholesale or roaming relationship. Access to a robust market for devices that interoperate on the AT&T network will permit innovation by third parties, like Cablevision, in devices that meet specific consumer needs.

P. AT&T Must Be Subject to Meaningful Conditions on the Provision of DSL Services

385. As we have shown, if the transaction is approved, the merged company will have increased power in the broadband marketplace. While the near-term result of the transaction will increase AT&T's power in the wireless broadband marketplace, the distinction between wireless broadband and fixed broadband is relatively insignificant, given the convergence of wireless and fixed broadband services. In a converged broadband world, its purchase of T-Mobile will facilitate AT&T's dominance of the broadband marketplace.

386. It is of great importance that other CLECs continue to be able to compete for broadband services, which will not only bring choice to the residential and business customers that both AT&T and CLECs compete to serve, but will also facilitate competition in the voice marketplace. Should the Tribunal approve the transaction, Claimant requests that such approval include the following conditions related to AT&T's provisions of wholesale DSL services to other carriers:

- For a period of 60 months after the closing date, AT&T will be required to offer DSL transmission services to other carriers that are functionally the same as the services that AT&T offers to its own customers.
- These wholesale DSL services shall include services at the same transmission speeds as the services that AT&T offers to its own customers.

- The wholesale DSL services shall be offered without any line of business or resale restrictions. Such restrictions include but are not limited to restrictions on the types of customers that may be served (e.g. restrictions requiring service only to residential customers and not to business customers) or types of services that may not be offered (e.g., restriction against offering VoIP services).
- AT&T shall not require that a carrier that wishes to purchase a wholesale DSL service also purchase circuit switched voice grade telephone service, whether such service is provided on the same line or by requiring the purchasing carrier to purchase two separate lines – one with voice service and one with DSL service.
- Carriers that purchase a wholesale DSL service shall be permitted to order a single line with only DSL service provided over that line. For avoidance of doubt, AT&T may not require carriers to purchase a single line with both voice and DSL services.
- AT&T shall permit purchasing carriers to convert existing AT&T customers to become customers of the purchasing carrier using exactly the same configuration of services. For example, if an existing AT&T customer has service that includes 2 voice lines and a third line that includes voice and data capability, AT&T must permit the purchasing carrier to serve that customer using the same exact configuration of lines.
- For a period of 60 months from the closing date, any AT&T wholesale DSL offering shall be at a reasonable discount from the rate charged by AT&T to retail customers for functionally similar services, including any promotional rate offered for a period of six months or longer.

- AT&T/T-Mobile will not provide to its wireline affiliates DSL or functionally similar transmission services that are not available to other similarly situated customers on the same terms and conditions.

XV. CONCLUSION

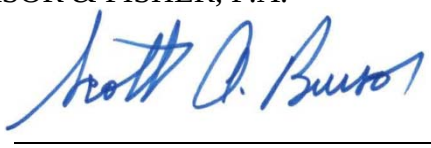
387. If the Proposed Transaction is approved, anyone who wants service from a national wireless carrier will be left with 3 choices: AT&T, Verizon, and Sprint. However, Sprint would be approximately one-third of the size of the new AT&T-T-Mobile conglomerate and far less competitive overall. Due to the disparity between carriers, the prices of the U.S. mobile market will be essentially controlled by the top two cellular service providers: AT&T and Verizon. With a market dominated by an AT&T and Verizon duopoly, it will be far easier for the nation's top two cellular companies to coordinate their prices. T-Mobile customers will no longer have access to unlimited data plans and all customers of the new conglomerate would have access to fewer devices overall, due to the likely elimination of most, if not all, of T-Mobile's devices. If the Proposed Transaction is approved, not only would consumers, such as Claimant, lose the more affordable player in the wireless market in T-Mobile, but it would create a giant telecommunications conglomerate, one-third larger than Verizon, the current largest carrier, and over twice the size of Sprint, the third largest telecommunications provider. A myriad of problems would arise in the entire telecommunications industry, many of which would have a direct impact upon consumers such as Claimant, pricing aside. For example, the combination of AT&T and T-Mobile would effectively result in just one national carrier of GSM services, the dominant global wireless technology, especially in Europe. The result will mean that U.S. travelers to Europe will be required to submit themselves to a single carrier- AT&T.

388. For the foregoing reasons, AT&T's takeover of T-Mobile will substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Tribunal should enjoin the Proposed Transaction under Section 16 of the Clayton Act, 15 U.S.C. § 26, or in the alternative, should impose the alternative remedies detailed in Part XIV, above.

Dated: July 22, 2011

Respectfully submitted,

BURSOR & FISHER, P.A.

By: 

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INDEX OF ATTACHMENTS

A	AT&T Wireless Customer Agreement
B	Joint Declaration of Steven C. Salop, Sanley M. Besen, Stephen D. Kletter, Serge X. Moresi, and John R. Woodbury (referenced as the "CRA Declaration")
C	Declaration of William Souder
D	Declaration of John Dupree
E	Declaration of Paul W. Schieber
F	Declaration of Scott Kalinoski
G	Declaration of Steven Stravitz

Exhibit 7

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Emily C. Komlossy a partner in Faruqi & Faruqi, LLP's Hollywood, Florida office, has devoted her entire legal career to the practice of complex class action securities fraud and shareholder litigation. With a wealth of experience in this field, Ms. Komlossy has also provided portfolio monitoring services to institutional and hedge fund clients to enable them to identify and determine an appropriate course of action when potential misconduct affects the client's portfolio holdings.

Ms. Komlossy has represented clients in a number of high profile actions. Recently, she successfully represented the Genesee County Employees' Retirement System in a class action securities fraud case against Transaction System Architects which claims included very complex accounting principles. This action ultimately resulted in a $24.5 million settlement on behalf of the class.

In addition, a substantial portion of Ms. Komlossy's litigation has been in the shareholder merger litigation area. She has litigated cases for her shareholder clients against companies such as Daniel Industries, Inc., Pennaco Corp. and AMC Entertainment, Inc.

Ms. Komlossy's skills have been noted favorably by the courts. In Yud v. Saf T Lok, 98 CV 8507 (S.D.Fla.), a case in which she played a major role, Magistrate Judge Linnea R. Johnson noted "the attorneys have done an outstanding amount of work in a short period of time to bring this class action to resolution in a successful fashion."

Ms. Komlossy earned a B.A. from the State University of New York at Oneonta in 1983 and a J.D. from New York Law School in 1989. She is admitted to practice in New York and Florida and the United States District Courts for the Southern District of New York, Southern District of Florida and Western District of Michigan.

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Christopher Marlborough joined Faruqi & Faruqi, LLP as an associate in January, 2007.

Since joining Faruqi & Faruqi, Mr. Marlborough has actively participated in such cases as: Brocade Communications Systems, Inc. Derivative Litig., No. C05-02233 (N.D.C.A.) (action for damages to company as a result of backdating employee stock options) and Thomas v. Global Vision Products, Inc., No. RG03-091195 (Sup. Ct. Cal.) (consumer class action for the false and misleading advertising of the Avacor hair care system).

Before joining Faruqi & Faruqi, LLP, Mr. Marlborough was associated with the firm of McCoyd, Parkas and Ronan, LLP, where he concentrated in the areas of estate litigation and trusts.

Mr. Marlborough earned a Bachelor of Arts from the State University of New York at Purchase (magna cum laude, 1991) and a Juris Doctor from Brooklyn Law School (magna cum laude, 2003). As an undergraduate, Mr. Marlborough was a President's Merit Scholar and on the dean's list. In law school, he was a member of the Brooklyn Law School Journal of Law and Policy and the Jerome Prince Memorial Evidence Competition, Moot Court Writing Team. He was also an Edward V. Sparer Public Interest Fellow and a Judge Moses M. Weinstein Scholar. He authored "Evolution, Child Abuse and the Constitution" which was published in the spring 2003 edition of the Brooklyn Law School Journal of Law and Policy. Mr. Marlborough is admitted to practice in the courts of New York, New Jersey and Florida, as well as the United States District Courts for the Eastern and Southern Districts of New York and the Southern District of Florida.

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Juan E. Monteverde is a partner in Faruqi & Faruqi, LLP's New York office. Mr. Monteverde has concentrated his legal career advocating shareholder rights and has appeared before Delaware Chancery Court on numerous occasions on behalf of shareholders in mergers and acquisitions class actions.

Before joining Faruqi & Faruqi, LLP, Mr. Monteverde gained extensive experience litigating over 50 mergers and acquisitions class actions from inception to conclusion. In particular, Mr. Monteverde acted as lead counsel or co-lead counsel for shareholders in In re Bear Stearns Litigation, Index No. 600780/08 (N.Y. Sup. Ct. 2008) (challenging acquisition of Bear Stearns for $2.00 per share by JP Morgan, price increased to $10.00 per share); Sullivan v. Gorog, et al., Case Number BC398258 (Cal. Super. Ct. 2008) (prosecution of preliminary injunction seeking to enjoin tender offer by Best Buy Co. Inc. of Napster, Inc., resulting in post-tender offer settlement for the enlargement of appraisal rights of Napster shareholders); In re Metavante Shareholder Litigation, Consolidated Case No. 09-cv-5325 (Wis. Cir. Ct. 2009) (obtained significant supplemental disclosures to shareholders to enable an informed vote regarding the acquisition of Metavante by Fidelity); In re Candela Corporation Shareholders Litigation, Lead Civil Action No. 09-4092-BLS1 (Mass. Sup. Ct. 2009) (obtaining settlement of additional disclosures pertaining to the acquisition of Candela Corporation by Syneron Medical Ltd. and reformation of merger agreement to reduce termination fee by approximately 20%); and Ubaney v. Rubinstein, et al., Civil Action No. 5459-VCL (Del. Ch. Ct. 2010) (obtaining supplemental disclosures in connection with the acquisition of Palm, Inc., including complete disclosure of Palm Inc.'s financial projections and free cash flows for 2010 through 2015).

At Faruqi & Faruqi, LLP, Mr. Monteverde continues to protect shareholder rights. He has acted as lead counsel or co-lead counsel in In re Valeant Pharmaceuticals International Shareholders Litigation, Consolidated Case No. 5644-VCS (Del. Ch. Ct. 2010) (negotiating significant supplemental disclosures regarding the acquisition of Valeant by Biovail); In Re Cogent S'holder Litigation, CA No. 5780-VCP(Del. Ch. Ct. 2010) (prosecuting preliminary injunction as well as continuing to litigate action zealously post-closing of merger) and McGowan v. ICx Technologies, Inc., et al., C.A. No. 1:10CV1013 (E.D. Va. 2010) (achieving a class action settlement for additional disclosures pertaining to the tender offer of ICX Technologies, Inc. and extending the appraisal rights period for ICX Technologies shareholders by 20 days).

Mr. Monteverde has taught a New York CLE course regarding the financial and legal fundamentals underlying the valuation of mergers and acquisitions of publicly traded companies, Valuations Issues in Mergers and Acquisitions, October 20, 2010. Mr. Monteverde has also been a panel speaker in the session for "Don't Get Caught in the Past" at the 2011 Corporate Counsel CLE Seminar in Naples, Florida, where he discussed the current corporate governance developments in the mergers and acquisitions law practice and new trends in corporate governance law and practice at the start of the new decade.

Mr. Monteverde graduated from California State University of Northridge (B.S. Finance 2002) and St. Thomas University School of Law (J.D. cum laude 2006). While at St. Thomas University School of Law, Mr. Monteverde was a staff editor of law review and the president of the law school newspaper. Mr. Monteverde is admitted to practice in the courts of New York, the United States District Court for the Southern District of New York and the United States District Court for the Eastern District of Wisconsin.

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Richard W. Gonnello is a partner in the Firm's New York office. Mr. Gonnello focuses his practice on shareholder litigation and class actions. Prior to joining the firm, Mr. Gonnello was a partner at Entwistle & Cappucci LLP and an associate at Latham & Watkins LLP.

Mr. Gonnello has represented institutional and individual investors in obtaining substantial recoveries in numerous class actions, including In re Royal Ahold Sec. Litig., No. 03-md-01539 (D. Md. 2003) ($1.1 billion) and In re Tremont Securities Law, State Law and Insurance Litigation, No. 08-cv-11117 (S.D.N.Y. 2011) ($100 million+). Mr. Gonnello has also obtained favorable recoveries for institutional investors pursuing direct securities fraud claims, including cases against Qwest Communications International, Inc. ($175 million+) and Tyco Int'l Ltd ($21 million).

Mr. Gonnello has co-authored the following articles: "'Staehr' Hikes Burden of Proof to Place Investor on Inquiry Notice," New York Law Journal, December 15, 2008; and "Potential Securities Fraud: 'Storm Warnings' Clarified," New York Law Journal, October 23, 2008.

Mr. Gonnello graduated summa cum laude from Rutgers University in 1995, where he was named Phi Beta Kappa. He received his law degree from UCLA School of Law in 1998, and was a member of the UCLA Journal of Environmental Law & Policy.

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Beth A. Keller joined Faruqi & Faruqi, LLP as an associate in 2003 and became a partner in 2008.

Since joining Faruqi & Faruqi, Ms. Keller has been actively involved in numerous complex cases in which the firm, as sole or co-lead counsel, achieved substantial corporate governance enhancements and/or financial recoveries for the corporation and its shareholders, including In re Tenet Healthcare Corp. Derivative Litig., Lead Case No. 01098905 (Cal. Sup. Ct. 2002); In re Advanced Mktg. Srvs., Inc. Derivative Litig., No. CIC824845 (Cal. Super. Ct.); In re Ligand Pharm. Inc. Deriative. Litig., Lead Case No. GIC834255 (Cal. Super. Ct.); and In re Novastar Fin., Inc. Derivative Litig., Lead Case No. 04-CV-212685 (Cir. Ct. Mo. 2004).

Ms. Keller graduated from Hobart & William Smith Colleges in 1999 with a Bachelors of Arts in Political Science and English and from the State University of New York at Buffalo Law School in 2002. Ms. Keller participated in the Desmond Moot Court Competition while at law school. She is a member of both the New York and New Jersey Bars and is admitted to practice in the United States District Courts for the Southern, Eastern and Western Districts of New York.

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Sandra G. Smith joined Faruqi & Faruqi, LLP as an associate of the firm in December of 2009.

Ms. Smith focuses her practice on areas of complex commercial litigation, including securities class action litigation in the context of mergers and acquisitions, shareholder derivative litigation, and antitrust matters.

Ms. Smith earned her Juris Doctorate degree from Temple University School of Law (1999), where she was Editor-in-Chief of the Temple Environmental Law & Technology Journal, and a Bachelor of Arts degree in History from St. Joseph's University. Ms. Smith is admitted to practice law in the Commonwealth of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHYLLIS SCARPELLI, ALEXIS JUSTAK, and LEONORA ULITSKY, on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, v. CONAGRA FOODS, INC., Defendant.	Civil Action No. **COMPLAINT and DEMAND FOR JURY TRIAL**

Plaintiffs, by their attorneys, make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class action against ConAgra Food, Inc. ("ConAgra") for passing off genetically modified oils as "100% natural." ConAgra's Wesson Oil Brands include Canola Oil,

Corn Oil, Vegetable Oil and Best Blend (hereafter, the "Mislabeled Wesson Oils"). ConAgra's labels for each of these products bears the phrase "100% Natural" in large, prominent type. In fact, the Mislabeled Wesson Oils are not "100% Natural."

2. The Mislabeled Wesson Oils are made from genetically engineered or genetically modified plants and grains. Genetic engineering ("GE") or genetic modification ("GM") of food involves the laboratory process of artificially inserting genes into the DNA of food crops or animals. The result is called a genetically modified organism ("GMO"). GMOs can be engineered with genes from bacteria, viruses, insects, animals, or even humans. The primary purpose in genetic modification is to make the plants tolerant of pesticides and herbacides. Due to such genetic modification, residues of herbacides and pesticides are often found in GMO plants and grains, and in the oils derived therefrom. The resulting product, thus, is not "100% natural," because both the genetic mutations and the chemical residues are artificial.

3. Studies have shown that most Americans say they would not eat products made from GMOs if accurately labeled. Therefore, ConAgra misled consumers to believe that Wesson Oils were high quality and healthy all "Natural" oils when they were not, to command a premium price for their cooking oils, take away market share from its competitors and increase its own profits.

4. Throughout its marketing, and indeed in its own self styled 2010 Corporate Responsibility Report, ConAgra claimed "[w]hen it comes to biotech foods, we respect our consumers' preferences." In the same report ConAgra boasted "[w]e want nothing more than to make safe, delicious and nutritious foods ***while providing the information you need to make choices for a healthy lifestyle.***" Instead, by misrepresenting Wesson Oils as being "100%

Natural," when, in fact, they were not, ConAgra actively deprived consumers of the information they needed to make their own choices for a healthy lifestyle.

5. ConAgra's marketing of these genetically modified oils is like a rigged gas pump that charges the higher price for *premium* gasoline but secretly pumps *regular* gasoline into your car's tank. By passing off lower quality oils as being "100% Natural," ConAgra is able to charge substantially higher prices for the mislabeled cooking oils.

6. A customer cheated by a rigged gas pump is unlikely to discover the ruse, since very few customers are able to measure the octane of the gasoline at the point of sale. Similarly, customers cheated by ConAgra's mislabeling of its Wesson Oils cannot investigate or test the Company's marketing claims regarding the composition, nutritional value and health qualities at the grocery store to determine they are actually made from GMO's rather than natural ingredients.

7. Plaintiffs seek relief in this action individually, and as a class action on behalf of all purchasers of Wesson Oils labeled and marketed as being "100% Natural", for ConAgra's violations of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et. seq.*, for unjust enrichment, breach of express warranty, fraudulent concealment, violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 58:8-1, *et seq.*, violation of the California Consumer Legal Remedies Act ("CLRA"), Civil Code §§ 1750, *et. seq.*, Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200 *et seq.*, False Advertising Law ("FAL"), Business & Professions Code §§ 17500 *et seq.* and Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.* ("FDUTPA").

THE PARTIES

8. Plaintiff Phyllis Scarpelli is a citizen of the State of New Jersey, residing in Port Reading, New Jersey. Ms. Scarpelli purchased Wesson Oil brand Wesson Canola Oil, which

was represented as being "100% Natural" from a retail store in New Jersey. Plaintiff saw and read ConAgra's misrepresentations that Wesson Oils are "100% Natural," and relied on such misrepresentations in deciding to purchase Wesson Oil. Plaintiff would not have purchased Wesson Oil had she known that it was made from GMOs.

9. Plaintiff Alexis Justak is a citizen of the State of Florida. Ms. Justak purchased the Wesson Oil brand Best Blend Oil, which was represented as being "100% Natural" from a retail store in Florida. Plaintiff saw and read ConAgra's misrepresentations that Wesson Oils are "100% Natural" and relied on such misrepresentations in deciding to purchase Wesson Oil. Plaintiff would not have purchased Wesson Oil had she known that it was made from GMOs.

10. Plaintiff Leonora Ulitsky is a citizen of the State of California and is a consumer as defined in California Civil Code §1761(d) in that she purchased Wesson Oil "for personal, family or household purposes." Ms. Ulitsky purchased Wesson Oil brand Vegetable and Corn Oil, which was represented as being "100% Natural" from a retail store in California. Plaintiff saw and read ConAgra's misrepresentations that Wesson Oils are "100% Natural," and relied on such misrepresentations in deciding to purchase Wesson Oil. Plaintiff would not have purchased Wesson Oil had he known that it was made from GMOs.

11. Defendant ConAgra is a Delaware corporation with its principal place of business located at One ConAgra Drive, Omaha, Nebraska 68102-5001. ConAgra manufactures, markets and sells Wesson Oils.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question). This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

13. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest, fees, and costs, and at least one Class members is a citizen of a state different from Defendant.

14. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District. Plaintiff Scarpelli, a citizen of New Jersey, purchased Wesson Oil from a retail store in this District, and Defendant ConAgra distributed, advertised and sold Wesson Oils, which are the subject of the present complaint, in this District.

FACTS COMMON TO ALL CLAIMS

A. ConAgra's Representations That Wesson Oils Are "100% Natural"

15. Throughout ConAgra's marketing materials, advertising, website, labeling, packaging and point of sale materials, ConAgra represents that each of its four Wesson Oils are "Pure" and "100% Natural."

16. The label for each of the four Wesson Oils prominently features in large type "Pure Wesson 100% Natural."

17. ConAgra also maintains a website for the purposes of marketing Wesson Oils. With respect to its Wesson brand Canola Oil, the website proclaims both the purity and the health benefits of its Canola Oil stating:

> Canola Oil
> Good for your Heart
> ***Pure Wesson 100% Natural Canola Oil*** is the most versatile type of vegetable oil and it provides the best nutritional balance of all popular cooking oils.
>
> Wesson Canola's light, delicate taste makes it the perfect oil to be used in every recipe that calls for vegetable oil.

• Pure Wesson 100 percent Natural Canola Oil is good for your heart.

• Wesson's canola oil has the same health benefits as olive oil without the strong taste allowing for the food's taste to come through in cooking.

• Canola oil provides a source for healthy fat (monounsaturated fat) that is essential for every diet.

• According to the U.S. Food & Drug Administration (USDA), Wesson Canola Oil now comes with a qualified health claim on its ability to reduce the risk of coronary heart disease (CHD) due to its unsaturated fat content.

18. Similarly, with respect to the Wesson Oil brand Corn Oil, ConAgra represents on its website:

> The ideal oil for crisp tender fried foods
> ***Pure Wesson 100% Natural Corn Oil*** is the best oil to ensure a crispy coating on your fried foods while retaining moistness on the inside.
>
> Wesson Corn Oil brings out a ***natural*** rich flavor in fried foods and in flavorful ethnic dishes.

19. Likewise, with respect to the Wesson brand Vegetable Oil, ConAgra's website represents that its Vegetable Oil is made of soybean oil and is:

> A great, versatile all-purpose oil
> ***Pure Wesson 100% Natural Oil is the perfect*** all-purpose cooking and baking vegetable oil.
>
> Wesson Vegetable Oil can be used for baking or frying and has a light taste that lets your cooking flavors shine through.

20. Finally, with respect to the Wesson brand Best Blend Oil, ConAgra's website proclaims that Best Blend Oil is a blend of "100% Natural" soybean oil and canola oil, stating:

> A great oil for frying with the added benefits of Canola oil
> ***Pure Wesson 100% Natural Best Blend Oil*** is highly versatile.
>
> ***Wesson Best Blend Oil is a perfect combination of two great oils*** that makes it just right for everything from grilling and frying to salad dressings.

21. ConAgra also recognizes that consumers are increasingly concerned about the "types of foods they put into their bodies" and "the role of biotechnology and food production." To meet these twin consumer concerns, ConAgra promised to provide consumers with the information needed "to make choices for a healthy lifestyle."

22. For example, on the ConAgra website, with respect to the use of "biotechnology" in its products, ConAgra states:

> Biotechnology
> In the past two decades, biotechnology has been used to improve yield, nutrition, resistance to drought and insects, and other desirable qualities of several common food crops, including corn and soy. ***As consumers grow more conscious about the types of foods they put in their bodies, some have asked about the role of biotechnology in food production and health.***
>
> As such, ConAgra Foods only purchases and uses ingredients that comply with the U.S. Department of Agriculture and Food and Drug Administration (FDA) regulations for food safety and nutrition. Both the U.S. Environmental Protection Agency and the FDA have concluded that biotech foods that are approved for human consumption are as safe and nutritious as other foods that are developed through more conventional methods. ***However, we understand the field of food biotechnology is constantly shifting as advancements are made in the world of science, and will continue to reevaluate our internal policies, relying heavily on evolving science, consumer and customer expectations, and regulatory decisions.***
>
> ***Ultimately, consumers will decide what is acceptable in the marketplace based on the best science and public information available. We will continue to listen carefully to our customers and consumers about biotechnology and provide alternatives for those who demand products without biotechnology ingredients.*** For example, our Lightlife refrigerated soybean-based vegetarian products do not contain ingredients that were produced using biotechnology, and we require our ingredient suppliers to guarantee that no genetically engineered soybeans are used. The Lightlife Quality Assurance team has established a monitoring program to routinely test finished products for the presence of soybeans produced using biotechnology; all test results have been negative since we implemented the program more than eight years ago.

http://company.conagrafoods.com/phoenix.zhtml?c=202310&p=corp_consumers#Biotechnology

23. Similarly, in an attempt to convince consumers that ConAgra is a model corporate citizen which produces products that are "Right for You, Right for the Community, Right for the Planet," ConAgra produces a Corporate Responsibility Report. A central plank of this self promotion is that ConAgra products, such as Wesson oils are "Right for You." With respect to biotechnology, ConAgra's 2010 Corporate Responsibility Report states:

> We're talking about you, the person who loves our food. ***We want nothing more than to make safe, delicious and nutritious foods while providing the information you need to make choices for a healthy lifestyle.***
>
> Biotechnology
>
> ***When it comes to biotech foods, we respect our consumers' preferences.*** We believe that biotechnology can benefit global food production, and ConAgra Foods only uses ingredients that comply with regulations for food safety and nutrition. We regularly review our policies to ensure they reflect evolving science, consumer expectations and regulatory decisions. ***Through our diverse portfolio of consumer and commercial food products, we provide alternative options for those who prefer products without biotech ingredients.***
>
> (http://www.socialfunds.com/shared/reports/1305052527_ConAgra_2010_CR_Report.pdf)

24. Moreover, even when specially asked by one consumer whether Wesson Vegetable Oil is made from GMO soybeans (but not whether Wesson Oil is "organic"), ConAgra refused to provide the consumer with this information, instead answering:

> Dear Mrs. Ritter,
>
> Thank you for your email concerning our Wesson® Vegetable Oil.
>
> The formulas we are using for our products have been around for quite some time now and, as always, we use only ingredients that are fully approved by the USDA and the FDA. To be labeled "organic", the USDA requires that the organic ingredients cannot be derived from biotech (genetically modified) seeds. We thank you for contacting us and will pass your comments on to others in our organization.

Thanks again for your feedback. We're listening!

Sincerely,

Jenny
Consumer Affairs
Ref: 052819107A

(http://www.facebook.com/topic.php?uid=97259066994&topic=13119)

25. Based on the investigation of Plaintiffs' counsel, however, Wesson Oils are not "100% Natural," but rather are made from GMO plants and seeds which are susceptible – if not likely – to contain trace amounts of herbicides.

B. Genetic Modification

26. Genetic modification involves the insertion or deletion of genes. When genes are inserted, they usually come from a different species. To do this artificially may require attaching the genes to a virus, which is a small infectious agent that can replicate only inside the living cells of organisms. Alternatively, extra genetic material in some instances may be inserted into the nucleus of the intended host with a very small syringe, or with very small particles fired from a gene gun. Other methods of genetic modification exploit natural forms of gene transfer, such as the ability of agrobacterium, a genus of gram-negative bacteria, which uses horizontal gene transfer to cause tumors in plants, resulting in GMOs.

27. Monsanto is considered the mother of agricultural biotechnology. Mosanto's website recognizes that there is nothing "natural" about GMO crops, defining "Genetically Modified Organisms (GMO)" as "***Plants or animals that have had their genetic makeup altered to exhibit traits that are not naturally theirs.*** In general, genes are taken (copied) from one organism that shows a desired trait and transferred into the genetic code of another organism." (http://www.monsanto.com/newsviews/pages/glossary.aspx#g)

28. One of the most common uses of genetic modification or engineering is to make crops resistant to herbicides, such as Monsanto's weed killing product named Roundup. Monsantos' "Roundup Ready" or "Roundup Ready 2" ("RR System") crops have been genetically engineered to permit direct, "over the top" application of the Monsanto herbicide glyphosate (the active ingredient in Roundup) allowing farmers to drench both their crops and crop land with the herbicide so as to be able to kill nearby weeds (and any other plant the herbicide touches). Rather than the traditional tilling of the ground to control weeds the RR System relies on its herbicide to control them. Similar genetic modification has been performed with respect to other brands and types of herbicides, such as Bayer's LibertyLink herbicide.

29. In fact, the RR System, which has been applied to rape-seed (source of canola oil), soybeans, and to the "SmartStax" system for corn, was specifically designed to require the exclusive use of Monsanto's herbicide, Roundup. Consequently, David Ehrenfield, Professor of Biology at Rutgers University has concluded that:

> Genetic Engineering is often justified as a human technology, one that feeds more people with better food. Nothing could be further from the truth. With very few exceptions, the whole point of genetic engineering is to increase sales of chemicals and bio-engineered products to dependent farmers.

The widespread adoption of Roundup Ready crops in the United States combined with the emergence of glyphosate-resistant weeds has driven a more than 15-fold increase in the use of glyphosate on major field crops from 1994 to 2005.

30. Testing has shown that even when concentrations of herbicides such as Roundup below those permitted or recommended by the FDA are applied to crops, a residue of Roundup and other similar types of herbicides remain in the crops when harvested. This fact, along with the widespread usage of Roundup, has led biochemist Gilles-Eric Séralini, a member for years of the French Commission on Biomolecular Genetics to conclude that, while Roundup and similar

products were originally used against weeds, "***they have become a food product, since they are used on GMOs, which can absorb them without dying.***"

31. Moreover, testing to determine the existence of GMOs in food and feed is routinely done using molecular techniques like DNA microarrays or real-time polymerase chain reaction ("qPCR"). Such sophisticated testing is not available or economically feasible for consumers to conduct on the foods which they purchase.

32. Thus, since at least 2005, ConAgra has engaged in a uniform marketing and advertising program representing that Wesson Oils are "100% Natural," which was designed to induce consumers to purchase Wesson Oils in reliance upon these representations. These representations were prominently displayed on Wesson Oils label, and within ConAgra's advertisements, promotional materials and website.

33. Simultaneously, ConAgra represented to consumers that it would provide consumers the information necessary to make fully informed decisions pertaining to their "healthy lifestyle." By mislabeling Wesson Oil made from GMO plants and seeds as "100% Natural," ConAgra has concealed from consumers not only that Wesson Oils are made from GMO plants and seed, but that this genetic engineering made Wesson Oils susceptible – if not likely – to contain trace amounts of herbicides.

34. ConAgra's representations that its Wesson Oils were "100% Natural" are material to consumers of food products. Indeed, ConAgra has admitted that "***consumers [have] grow[n] more conscious about the types of foods they put in their bodies, some have asked about the role of biotechnology in food production and health***."

35. ConAgra's representations that Wesson Oil is "100% Natural" pertained to the composition, attributes, characteristics, nutritional value, health qualities and value of Wesson

Oil. Therefore, Plaintiffs and members of the Class purchased products that they would not have purchased or paid more than they otherwise would have been willing to pay if the Wesson Oils they purchased had been labeled accurately.

CLASS ACTION ALLEGATIONS

36. Plaintiffs bring this class action pursuant to Fed.R.Civ.P. 23 (a), (b)(1), (b)(2), and (b)(3) on behalf of all purchasers of Mislabeled Wesson Oils in the United States (the "Class").

37. Plaintiff Scarpelli also seeks to represent a subclass defined as all members of the Class who purchased Wesson Oils in New Jersey ("the New Jersey Subclass").

38. Plaintiff Justak also seeks to represent a subclass defined as all members of the Class who purchased Wesson Oils in Florida ("the Florida Subclass").

39. Plaintiff Ulitsky also seeks to represent a subclass defined as all members of the Class who purchased Wesson Oils in California ("the California Subclass").

40. Members of the Class, New Jersey Subclass, Florida Subclass, and California Subclass are so numerous that their individual joinder herein is impracticable. Members of each of these classes number in the thousands. The precise number of Class members and their identities are unknown to Plaintiffs at this time but will be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of ConAgra and third party retailers and vendors.

41. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

(a) whether ConAgra violated the Magnuson-Moss Act, 15 U.S.C. § 201, *et seq.*,

(b) whether ConAgra was unjustly enriched by its conduct;

(c) whether ConAgra breached an express warranty made to Plaintiffs and the Class;

(d) whether ConAgra breached the implied warranty of merchantability made to Plaintiffs and the Class;

(e) whether ConAgra advertises, or markets Wesson Oils in a way that is false or misleading;

(f) whether Wesson Oils fail to conform to the representations, which were published, disseminated and advertised to Plaintiffs and the Class;

(g) whether ConAgra concealed from Plaintiffs and the Class that Wesson Oils did not conform to its stated representations;

(h) whether, by the misconduct set forth in this Complaint, ConAgra has engaged in unfair, fraudulent or unlawful business practices with respect to the advertising, marketing and sales of Wesson Oils;

(i) whether ConAgra violated New Jersey Consumer Fraud Act;

(j) whether Class members suffered an ascertainable loss as a result of the ConAgra's misrepresentations;

(k) whether ConAgra violated the Consumer Legal Remedies Act;

(l) whether ConAgra violated the Unfair Competition Law;

(m) whether ConAgra violated the False Advertising Act; and

(n) whether, as a result of ConAgra's misconduct as alleged herein, Plaintiffs and Class members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

42. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by ConAgra's wrongful conduct. Plaintiffs have no interests antagonistic to the interests of the other members of the Class. Plaintiffs and all members of the Class have sustained economic injury arising out of ConAgra's violations of common and statutory law as alleged herein.

43. Plaintiffs are adequate representatives of the Class because their interest does not conflict with the interests of the Class members they seek to represent, they have retained counsel competent and experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and their counsel.

44. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish ConAgra's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of ConAgra's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I
(Violation of Magnuson-Moss Act (15 U.S.C. § 2301, *et seq.*)

45. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

46. Plaintiffs bring this claim individually and on behalf of the members of the Class, New Jersey Subclass, the Florida Subclass, and California Subclass against defendant ConAgra.

47. The Wesson Oils are consumer products as defined in 15 U.S.C. §2301(1).

48. Plaintiff and Class members are consumers as defined in 15 U.S.C. §2301(3).

49. Defendant ConAgra is a supplier and warrantor as defined in 15 U.S.C. §2301(4) and (5).

50. In connection with the sale of the Wesson Oils, ConAgra issued written warranties as defined in 15 U.S.C. §2301(6), which warranted that the products were "100% Natural."

51. By reason of ConAgra's breach of the express written warranties stating that the Wesson Oils were "100% Natural," ConAgra has violated the statutory rights due Plaintiff and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.*, thereby damaging Plaintiff and Class members.

COUNT II
(Unjust Enrichment)

52. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

53. Plaintiffs bring this claim individually and on behalf of the members of the Class, New Jersey Subclass, the Florida Subclass, and California Subclass against defendant ConAgra.

54. "Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was *unjustly* enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state." *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. Apr. 24, 2009), *quoting Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007).

55. "Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn," *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. at 58, New Jersey law applies to those claims.

56. Plaintiffs and Class members conferred a benefit on ConAgra by purchasing Wesson Oils.

57. ConAgra has been unjustly enriched in retaining the revenues derived from Class members' purchases of Wesson Oils, which retention under these circumstances is unjust and inequitable because ConAgra misrepresented that Wesson Oils were "100% Natural" when in fact they were not, which caused injuries to Plaintiffs and Class members because: (a) they would not have purchased the Wesson Oils on the same terms if the true facts concerning their actual composition had been known; and (b) they paid a price premium due to the mislabeling of the Wesson Oils.

58. Because ConAgra's retention of the non-gratuitous benefit conferred on it by Plaintiffs and Class members is unjust and inequitable, ConAgra must pay restitution to Plaintiffs and the Class members for its unjust enrichment, as ordered by the Court.

COUNT III
(For Breach Of Express Warranty)

59. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

60. Plaintiffs bring this claim on behalf of the nationwide Class under Nebraska law and on behalf of New Jersey Subclass under New Jersey law, on behalf of the Florida Subclass under Florida law, and on behalf of the California Subclass under California law.

61. ConAgra, as the designer, manufacturer, marketer, distributor, or seller expressly warranted that the Wesson Oils were "100% Natural."

62. In fact, Wesson Oils were made from GMO plants and seeds that contained a genetic makeup not found in nature which made them susceptible – if not likely – to contain trace amounts of herbicides also not found in nature.

63. Plaintiffs and Class Members were injured as a direct and proximate result of ConAgra's breach because: (a) they would not have purchased the Wesson Oils on the same terms if the true facts regarding the plants and seed from which they were manufactured had been known; (b) they paid a price premium due to the mislabeling of Wesson Oils; and (c) Wesson Oils did not have the composition, attributes, characteristics, nutritional value, health qualities or value as promised.

COUNT IV

(Violation Of The New Jersey Consumer Fraud Act, N.J.S.A. § 58:8-1, *et seq.*)

64. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

65. Plaintiffs bring this claim on behalf of the New Jersey Subclass under New Jersey law.

66. ConAgra misrepresented that Wesson Oils were "100% Natural" when in fact they were not.

67. ConAgra's misrepresentation that Wesson Oils were "100% Natural" constitutes an unconscionable commercial practice, deception, fraud, false promise and/or misrepresentation as to the nature of the goods, in violation of the New Jersey Consumer Fraud Act.

68. Plaintiffs and Class members suffered an ascertainable loss caused by ConAgra's misrepresentations because: (a) they would not have purchased Wesson Oils on the same terms if the true facts concerning their actual composition had been known; (b) they paid a price premium due to the mislabeling of the Wesson Oils.

COUNT V
(Violation Of The Consumer Legal Remedies Act ("CLRA"),
Civil Code §§ 1750, *et. seq.*)
(Injunctive Relief Only)

69. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

70. Plaintiffs bring this claim on behalf of the California Subclass under California law.

71. At all relevant times, Wesson Oils constituted "goods," as that term is defined in Civ. Code §1761(a).

72. At all relevant times, ConAgra was a "person," as that term is defined in Civ. Code §1761(c).

73. At all relevant times, Plaintiff Ulitsky's purchase of Wesson Oils constituted a "transaction," as that term is defined in Civ. Code §1761(e).

74. The policies, acts, and practices described in this Complaint were intended to and did result in the sale of Wesson Oils to Plaintiffs and the Class. ConAgra's practices, acts, policies, and course of conduct violated the California Consumers Legal Remedies Act, *California Civil Code* §1750 *et seq.*, (the "CLRA"), in that, as described above:

(a) ConAgra represented that Wesson Oils have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have in violation of *California Civil Code* §1770(a)(5);

(b) ConAgra represented that Wesson Oils were of a particular standard or quality, when ConAgra was aware that they were of another in violation of §1770(a)(7) of the CLRA; and

(c) ConAgra advertised Wesson Oils with intent not to sell them as advertised in violation of §1770(a)(9) of the CLRA.

75. Plaintiffs and the California Consumer Subclass members suffered injuries caused by ConAgra's misrepresentations because: (i) Plaintiffs and the Class were induced to purchase

a product they would not have otherwise purchased if they knew that Wesson Oils were made from GMO plants and seeds and were not "100% Natural;" and (ii) Plaintiffs and the Class were induced to pay substantially more for Wesson Oils than they would have paid if its true characteristics had not been concealed or misrepresented.

76. On July 13, 2011, prior to the filing of this Complaint, a CLRA notice letter was served on ConAgra, which complies in all respects with California Civil Code § 1782(a). Plaintiff Ulitsky sent ConAgra a letter *via* certified mail, return receipt requested, advising ConAgra that it is violation of the CLRA and must correct, repair, replace or otherwise rectify the goods alleged to be in violation of California Civil Code § 1770. ConAgra was further advised that in the event that the relief requested has not been provided within 30 days, Plaintiffs will amend this Complaint to include a request for monetary damages pursuant to the CLRA. A true and correct copy of Plaintiff's CLRA letter is attached hereto as Ex. A.

77. Wherefore, Plaintiffs seek only injunctive relief for this violation of the CLRA.

COUNT VI
(For Violation Of The Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et seq.*)
(Injunctive Relief And Restitution Only)

78. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

79. Plaintiffs bring this claim on behalf of the California Subclass under California law.

80. ConAgra is subject to the Unfair Competition Law ("UCL"), *Bus. & Prof. Code* § 17200 *et seq.* The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising ...." The Act also provides for injunctive relief and restitution for violations.

81. Throughout the Class Period, ConAgra committed acts of unfair competition, as defined by §17200, by using false and misleading statements to promote the sale of Wesson Oils, as described above.

82. ConAgra's conduct is unfair in that the harm to Plaintiffs and the Class arising from ConAgra's conduct outweighs the utility, if any, of those practices.

83. ConAgra's conduct, described herein, violated the "fraudulent" prong of the UCL by representing that Wesson Oils were "100% Natural" when in fact they were not.

84. Plaintiffs and members of the Class have suffered injury and actual out of pocket losses as a result of ConAgra's unfair, unlawful, and fraudulent business acts and practices because: (i) Plaintiffs and the Class were induced to purchase a product they would not have otherwise purchased if they knew it was made from GMO plants and seeds and was not "100% Natural;" and (ii) Plaintiffs and the Class were induced to pay substantially more for Wesson Oils than they would have paid if its true characteristics had not been concealed or misrepresented.

85. Pursuant to California Business & Professions Code § 17203, Plaintiffs and the Class are therefore entitled to: (a) an Order requiring ConAgra to cease the acts of unfair competition alleged herein; (b) an Order requiring corrective disclosures; (c) full restitution of all monies paid to ConAgra as a result of their deceptive practices; (d) interest at the highest rate allowable by law; and (e) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, *California Code of Civil Procedure* § 1021.5.

COUNT VII
[False Advertising]
(False Advertising Act, Business & Professions Code § 17500 *et seq.*)

86. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

87. Plaintiffs bring this claim on behalf of the California Subclass under California law.

88. California's False Advertising law (Bus. & Prof. Code § 17500, *et seq.*) makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, . . . in any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement, concerning . . . personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

89. Throughout the Class Period, ConAgra committed acts of false advertising, as defined by §17500, by using false and misleading statements to promote the sale of Wesson Oils, as described above.

90. ConAgra knew or should have known, through the exercise of reasonable care that the statements were untrue and misleading.

91. ConAgra's actions in violation of § 17500 were false and misleading such that the general public is and was likely to be deceived.

92. As a direct and proximate result of these acts, consumers have been and are being harmed. Plaintiffs brings this action pursuant to § 17535 for injunctive relief to enjoin the practices described herein and to require ConAgra to issue corrective disclosures to consumers.

COUNT VIII
Violation Of the Florida Deceptive and Unfair Trade Practices Act,
Fla. Stat. § 501.201, et seq

93. Plaintiffs repeat the allegations contained in the above paragraphs as if fully set forth herein.

94. Plaintiffs bring this claim on behalf of the Florida Subclass under Florida law.

95. The Defendant's actions, as alleged herein, constitute the "conduct of any trade or commerce" within the meaning of FDUTPA, Fla. Stat. §§ 501.201, et. seq.

96. Plaintiffs and the Class members have sustained an ascertainable loss as a result of ConAgra's unfair, deceptive and misleading conduct related to its handset locking practices, and seek injunctive relief in order to force ConAgra to alter its conduct related to its handset locking practices and its termination penalty practices.

97. Plaintiffs and the Classes are entitled to actual damages, injunctive relief and reasonable attorneys' fees, pursuant to FDUTPA, Fla. Stat. §§ 501.201 et. seq.

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against ConAgra, as follows:

A. For an order certifying the nationwide Class, the New Jersey Subclass, and the California Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as Class Representatives and their attorneys as Class Counsel to represent the Class members;

B. For an order declaring the ConAgra's conduct violates the statutes referenced herein;

C. For an order finding in favor of the Plaintiffs, the nationwide Class, the New Jersey Subclass, and California Subclass on all counts asserted herein;

D. For an order awarding compensatory, treble, and punitive damages in amounts to be determined by the Court and/or jury;

E. For prejudgment interest on all amounts awarded;

F. For an order of restitution and all other forms of equitable monetary relief;

G. For injunctive relief as pleaded or as the Court may deem proper; and

H. For an order awarding Plaintiffs and the Class and subclasses their reasonable attorneys' fees and expenses and costs of suit.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
Attorneys for Plaintiffs

By: /s/ James E. Cecchi
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Dated: July 14, 2011

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JURY DEMAND

Plaintiffs hereby demand a trial by jury on all claims so triable in this action.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
Attorneys for Plaintiffs

By: /s/ James E. Cecchi
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Exhibit 14

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RICHARD J. COLOSIMO, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. AT&T MOBILITY, LLC and DOES 1-100, Defendants.	No. **CLASS ACTION COMPLAINT** **DEMAND FOR JURY TRIAL**

Plaintiff Richard J. Colosimo ("Plaintiff" or "Mr. Colosimo") by his attorneys, makes the following allegations based upon information and belief, except as to allegations specifically pertaining to himself and his counsel, which are based on personal knowledge:

NATURE OF THE ACTION

1. This is a class action lawsuit filed to redress the unfair and wrongful practice inflicted by defendants on consumers by imposing of unlawful, arbitrary penalty clauses in connection with the early termination of AT&T Wireless Data Service Plan service contracts ("Service Contracts") for AT&T Mobility, LLC ("AT&T") wireless data card devices.

2. Plaintiff seeks relief in this action pursuant to the Federal Communications Act, 47 U.S.C. § 201, *et seq.*, and the common, statutory and administrative law of the New Jersey, on behalf of the following Classes and Subclasses:

National ETF Payer Class

All persons in the United States who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T for use with a wireless data card device, were charged an early termination fee within the relevant limitations period, and whose service was activated prior to May 25, 2008.

National ETF Subscriber Class

All persons in the United States who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T for use with a wireless data card device that includes a provision for an early termination fee, and whose service was activated prior to May 25, 2008.

New Jersey ETF Payer Class

All persons in New Jersey who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T for use with a wireless data card device, were charged an early termination fee within the relevant limitations period, and whose service was activated prior to May 25, 2008.

New Jersey ETF Subscriber Class

All persons in New Jersey who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T for use with a wireless data card device that includes a provision for an early termination fee, and whose service was activated prior to May 25, 2008.

JURISDICTION, VENUE AND APPLICABLE LAW

3. Jurisdiction is conferred by 28 U.S.C. § 1331 and 47 U.S.C. § 201, *et seq.*

4. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over claims based on state law.

5. Venue is proper in this Court pursuant to 15 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district. Defendants do business in this district and have received substantial revenue from residents of this district from the unlawful practices described herein.

THE PARTIES

6. Plaintiff Richard J. Colosimo has, at all relevant times, been a resident of New Jersey. He entered into a Service Contract prior to May 25, 2008 to receive wireless data services from AT&T for use with his wireless data card device, which included a termination fee provision. Mr. Colosimo later discontinued the AT&T service and was charged a $175 termination fee.

7. Defendant AT&T Mobility, LLC ("AT&T"), formerly known as Cingular Wireless, LLC, is a Delaware limited liability company with its principal place of business in Atlanta, Georgia, and is authorized to do business and is doing business in New Jersey. The sole member of AT&T Mobility, LLC is AT&T, Inc., a Delaware corporation.

8. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the defendants designated herein as a Doe is legally responsible in some manner for the events and happenings herein referred to and caused, or is responsible in some proportion for, the damages sustained by Plaintiff herein. Plaintiff may seek leave to amend this Complaint to show the true names, capacities, actions and responsibilities of said defendants so fictitiously named whenever the same shall have been ascertained. At that time, Plaintiff will seek leave to include appropriate charging allegations as to said defendants.

9. At all relevant times alleged in this matter, each defendant acted in concert with, with the knowledge and approval of and/or as the agent of the other defendants within the course and scope of the agency, regarding the acts and omissions alleged.

AT&T'S WIRELESS DATA SERVICE PLANS

10. Plaintiff and the members of the Classes and Subclasses at some point prior to May 25, 2008, have been subscribers to AT&T's wireless data services and entered into a "Service Contract" with AT&T for use with a wireless data card device.

11. AT&T sells Internet access to customers through its Wireless Data Service Plans, subject to the terms and conditions of its Service Contract.

12. Purchase of a Service Contract permits customers to access the Internet through wireless data card devices that can be connected to their computer, such as AT&T's LaptopConnect Card.

EARLY TERMINATION PENALTIES

13. AT&T distributes its Service Contracts on preprinted standardized forms that are not subject to modification or negotiation and are presented to prospective subscribers on a "take it or leave it" basis. Each of AT&T's Service Contracts is a contract of adhesion.

14. For consumers who activated their service prior to March 25, 2008, the Service Contract includes a provision requiring subscribers to pay flat-fee early termination penalties if for any reason they seek to terminate service after thirty days from the start of the Service Contract to the expiration of the contract period. Typically, AT&T expressly requires, as a term and condition of service, that customers terminating service before the expiration of a specified term pay penalties of approximately $175.00.

15. Plaintiff is informed and believes that the vast majority of AT&T's wireless data card users commit to a Service Contract for a term of one or two years. Hence, should Plaintiff and the Class members terminate service before expiration of the contract period for any reason (including, for example, because a consumer is unable to obtain wireless data services in certain

locations as needed), the consumer must pay an early termination penalty of approximately $175.00 or, alternatively, continue paying for the unwanted service until the expiration of the term, longer than he or she otherwise would have if not for the early termination penalty.

16. The early termination penalty for services activated prior to May 25, 2008 is not a reasonable estimate of damages suffered by AT&T upon the early termination of a subscriber's Service Contract (if, indeed, AT&T suffers any damages at all in the event of such early termination) but instead is designed to tether AT&T's subscribers to AT&T's service and serve as a disincentive to prevent AT&T's subscribers from switching to competing services in the event they become dissatisfied with the service provided by AT&T.

17. If and to the extent that AT&T suffers any damage upon early termination of a subscriber's Service Contract, it is neither impracticable nor extremely difficult to fix the actual damage. Furthermore, if and to the extent that AT&T suffers any damage upon early termination of a subscriber's Service Contract, the flat-fee early termination charge is not a reasonable measure or approximation of such damages. The early termination fees were not negotiated or discussed with Plaintiff.

18. The early termination penalties imposed by defendants are unconscionable, void, and unenforceable penalties.

19. Plaintiff and the class members are informed and believe that AT&T's early termination penalty provisions have permitted defendants to collect significant revenues from Plaintiff and the Class as a result of: (a) the payment of the early termination penalties themselves and (b) the revenue generated by tethering Class members to AT&T's Wireless Data Service Plans for at least the original contract period, and, in most cases, for additional years.

NO ENFORCEABLE AGREEMENT TO ARBITRATE

20. Defendants, during the time period relevant hereto, inserted language in AT&T's "Terms and Conditions" notice that purport to impose mandatory arbitration of consumers' claims and/or waive the right to bring a class action. However, these provisions are unenforceable and void under the laws of this Circuit and the State of New Jersey.

21. Indeed, these provisions are used as a shield to insulate the defendants from their own wrongful conduct. The defendants do not arbitrate claims against consumers. Rather, they rely on lawsuits or collection agencies to prosecute claims against their customers.

CLASS ALLEGATIONS

22. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated, comprised of two Classes and two Subclasses. The Classes are: the **National ETF Payer Class** – "All persons in the United States who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T, were charged an early termination fee within the relevant limitations period, and whose service was activated prior to May 25, 2008"; and the **National ETF Subscriber Class** – "All persons in the United States who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T that includes a provision for an early termination fee, and whose service was activated prior to May 25, 2008".

23. The Subclasses are: the **New Jersey Payer Subclass** -- All persons in New Jersey who purchased or acquired a Wireless Data Service Plan Service Contract with AT&T, were charged an early termination fee within the relevant limitations period, and whose service was activated prior to May 25, 2008"; and the **New Jersey Subscriber Subclass** – "All persons in New Jersey who purchased or acquired a Wireless Data Service Plan Service Contract with

AT&T that includes a provision for an early termination fee, and whose service was activated prior to May 25, 2008".

24. The Classes and Subclasses are each composed of thousands of people, whose joinder in this action would be impracticable. The disposition of their claims through this class action will benefit both the parties and this Court. The identities of individual members of the Classes are ascertainable through AT&T's billing records.

25. There are numerous questions of law and fact common to the members of the Classes and Subclasses. They include, but are not limited to, the following:

(a) Whether the termination penalty clause common to all AT&T Service Contracts prior to May 25, 2008 for its Wireless Data Service Plans is unlawful, unfair, void or unenforceable;

(b) Whether defendants charged class members the termination penalties;

(c) Whether defendants are or were unjustly enriched by the imposition of the termination penalties;

(d) Whether Plaintiff and the Class members are entitled to restitution of all amounts acquired by AT&T by enforcing the early termination penalties;

(e) Whether Plaintiff and Class Members are entitled to disgorgement of all early termination penalties by AT&T; and

(f) Whether Plaintiff and Class members are entitled to recover compensatory and punitive damages, as a result of AT&T's unfair, unlawful and unconscionable penalties, and/or otherwise.

26. Plaintiff asserts claims that are typical of the claims of the Classes, and Plaintiff will fairly and adequately represent and protect the interests of the Classes. Plaintiff has no

interests antagonistic to the interests of the Classes. Plaintiff has retained counsel who are competent and experienced in the prosecution of class action litigation.

27. Questions of law and fact common to the Classes predominate over questions which may affect only individual class members.

28. Absent a class action, AT&T and John Does' 1-100's practices will irreparably injure the members of the Classes by enforcing the illegal penalty clauses and collecting illegal charges from its consumers. Because of the size of the individual class members' claims, few, if any, class members could afford to seek legal redress on an individual basis for the wrongs complained of herein. Further, absent a class action, the class members will continue to suffer losses and the violations of law described herein will continue without remedy and AT&T and John Doe's 1-100 will retain the proceeds of their misdeeds. AT&T and Doe's 1-100 continue, to this day, to engage in the unlawful and unfair conduct with respect to the Classes which is the subject of the Complaint.

29. The prosecution of individual suits would be inefficient and would risk inconsistent adjudications.

30. There are no significant difficulties that would preclude the prosecution of this case on a class-wide basis.

COUNT I

Termination Penalties
Violation of 47 U.S.C. § 201, *et seq.*
Brought on Behalf of the Classes and the Subclasses

31. Plaintiffs incorporate all prior paragraphs of this Complaint as if fully set forth herein.

32. This count is asserted by Plaintiff Colosimo on an individual basis on behalf of himself and on a class-wide basis on behalf of the Classes and the Subclasses.

33. AT&T is a common carrier engaged in interstate or foreign communication by wire or radio, and is subject to the common carrier regulation set forth at 47 U.S.C. § 201, *et seq.*

34. AT&T's termination penalties, described above, are charges and/or practices in connection with communication service, subject to the requirements of 47 U.S.C. § 201(b).

35. AT&T's termination penalties are unjust, unreasonable and unlawful under 47 U.S.C. § 201(b).

36. Plaintiffs and members of the Classes and Subclasses have been injured and damaged by AT&T's termination penalties.

37. Plaintiffs seek recovery for the full amount of such damages, pursuant to 47 U.S.C. § 206, and also seek equitable and declaratory relief, together with a reasonable counsel or attorney's fee.

COUNT II

Termination Penalties
Violation of The New Jersey Consumer Fraud Act, N.J. Rev. Stat. § 56:8-1, *et seq.*
Brought on Behalf of the New Jersey Subclasses

38. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

39. This count is asserted by Plaintiff on an individual basis on behalf of himself and on a class-wide basis on behalf of the New Jersey Subclasses.

40. AT&T's imposition of termination penalties is a "commercial practice" within the meaning of the NJCFA, N.J. Rev. Stat. § 56:8-1 *et seq.* The NJCFA, N.J. Rev. Stat. § 56:8-2 provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

41. AT&T's imposition of termination penalties is an unconscionable, unfair, deceptive, misleading and unlawful practice which violates the NJCFA.

42. Plaintiff and members of the Subclasses have suffered an ascertainable loss as a result of AT&T's imposition of termination penalties.

43. Wherefore Plaintiff demands and is entitled to relief as hereinafter set forth.

COUNT III

Termination Penalties
Violation of New Jersey Common Law
Brought on Behalf of the New Jersey Subclasses

44. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

45. This count is asserted by Plaintiff on an individual basis on behalf of himself and on a class-wide basis on behalf of the New Jersey Subclasses.

46. AT&T's imposition of termination penalties violates New Jersey common law concerning liquidated damages because the amount of the termination penalty is not reasonable in light of the anticipated or actual loss caused by the breach. The parties did not fix the amount of the penalty as a reasonable forecast of just compensation for that harm caused by a breach. The harm caused by a breach is not incapable or very difficult of accurate estimation, and the amount of the penalty bears no reasonable relation to actual damages and cannot be considered as liquidated damages.

COUNT IV

Termination Penalties
Unjust Enrichment/Common Law Restitution
On Behalf of the New Jersey ETF Payer Subclass

47. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

48. This count is asserted by Plaintiff on an individual basis on behalf of himself and on a class-wide basis on behalf of the New Jersey ETF Payer Subclass.

49. By imposing the illegal termination penalties referenced hereinabove, defendants have charged New Jersey ETF Payer Subclass members for such penalties in violation of statutory and common law. Plaintiff and members of the New Jersey ETF Payer Subclass have suffered harm as a proximate result of the violations of law and wrongful conduct of the defendants alleged herein.

50. If defendants are permitted to keep monies collected under such illegal and void penalty clauses, they will be unjustly enriched at the expense of the Subclass members.

COUNT V

Termination Penalties
Common Law Count for Money Had and Received
On Behalf of the New Jersey ETF Payer Class

51. Plaintiff incorporate all prior paragraphs of this Complaint as if fully set forth herein.

52. This count is asserted by Plaintiff on an individual basis on behalf of himself and on a class-wide basis on behalf of the New Jersey ETF Payer Subclass.

53. Defendants have improperly charged Subclass members for termination penalties in violation of statutory and common law. Plaintiff and the members of the New Jersey ETF

Payer Subclass have suffered harm as a proximate result of the violations of law and wrongful conduct of the defendants alleged herein.

54. Defendants are legally obligated to pay over and remit those sums paid by the class members as early termination penalties.

COUNT VI

Termination Penalties
Declaratory Relief Pursuant to 28 U.S.C. § 2201
On Behalf of the Nationwide ETF Subscriber Subclass

55. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

56. This count is asserted by Plaintiff on an individual basis on behalf of himself and on a class-wide basis on behalf of the Nationwide ETF Subscriber Subclass.

57. There is an actual controversy between AT&T and all members of the Nationwide ETF Subscriber Subclass concerning the enforceability of the early termination fee provisions contained in the AT&T customer service agreements to which they are all parties.

58. Pursuant to 28 U.S.C. § 2201, this Court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Plaintiff and members of the Nationwide ETF Subscriber Subclass are interested parties who seek a declaration of their rights and legal relations vis-à-vis AT&T with regard to early termination fee provisions contained in the AT&T Wireless Data Service Plan Service Contracts to which they are all parties. Specifically, Plaintiff seeks a declaration that such provisions are unenforceable penalties.

59. Plaintiff also seeks a reasonable counsel or attorney's fee.

COUNT VI

Arbitration Clause
Declaratory Relief Pursuant to 28 U.S.C. § 2201
On Behalf of the Nationwide ETF Subscriber Class

60. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

61. The form contract imposed upon consumers by Defendants includes provisions which purport to require arbitration and/or prohibit participation in class actions.

62. An actual and justiciable controversy exists between the parties with respect to their rights and obligations under these form contacts.

63. Specifically, plaintiff alleges that the above-referenced provisions are procedurally and substantively unconscionable and are therefore unenforceable.

64. Plaintiff seeks a judicial declaration under federal law to that effect.

65. Plaintiff also seeks a reasonable counsel or attorney's fee.

COUNT VII

Arbitration Clause
Declaratory Relief Pursuant to the New Jersey Consumer Fraud Act
On Behalf of the New Jersey ETF Subscriber Class

66. Plaintiff incorporates all prior paragraphs of this Complaint as if fully set forth herein.

67. The form contract imposed upon consumers by Defendants includes provisions which purport to require arbitration and/or prohibit participation in class actions.

68. An actual and justiciable controversy exists between the parties with respect to their rights and obligations under these form contacts.

69. Specifically, plaintiff alleges that the above-referenced provisions are procedurally and substantively unconscionable and are therefore unenforceable.

70. Plaintiff seeks a judicial declaration under New Jersey state law to that effect.

71. Plaintiff also seeks a reasonable counsel or attorney's fee.

RELIEF DEMANDED

WHEREFORE Plaintiff, on an individual basis on behalf of himself, and on a class-wide basis on behalf of the members of the Classes and Subclasses defined above, requests relief as follows:

A. A declaration that this action to be a proper class action pursuant to Fed. R. Civ. P. Rule 23;

B. An award of injunctive and/or declaratory relief requiring AT&T to cease and desist all deceptive, unjust, and unreasonable practices described herein;

C. An award of monetary damages and/or restitution for the injuries caused by the unlawful conduct described above, including all damages provided for by statute and all consequential and incidental damages and costs suffered by Plaintiff and the other class members due to AT&T's wrongful conduct;

D. Declarations that the arbitration and class action waiver clauses imposed on consumers are unenforceable under federal and New Jersey state law;

E. An award of reasonable attorneys' fees and costs of this suit, including fees of experts;

F. An award requiring AT&T to disgorge all revenues received from the imposition of its illegal termination penalty;

G. An award of pre- and post-judgment interest; and

H. An award of such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all claims properly triable to a jury.

Dated: March 24, 2010

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Exhibit 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TODD BAZZINI, GREGORY LEONARCZYK, NOAH ALLEN, and JOHN MARKIEWICZ, Individually and on Behalf of All Other Persons Similarly Situated,

Civil Action No. 1:08-cv-4530

Plaintiffs,

-against-

CLUB FIT MANAGEMENT, INC., JEFFERSON VALLEY RACQUET CLUB, INC., DAVID SWOPE, BETH BECK and BILL BECK,

Defendants.

----------X

CONSENT TO SUE FORM

I am a current or former employee of the defendants in *Bazzini et al. v. Club Fit Management, Inc.*, Case No. 1:08-cv-4530, pending in the United States District Court for the Southern District of New York. As such, I hereby consent to join and be a part of the case as a plaintiff.

I hereby authorize the law firm of Faruqi & Faruqi, LLP to represent me in this action.

I understand that if my claim is successful, the fees of my lawyers will be paid by a percentage of any settlement obtained or monetary judgment entered in favor of the plaintiffs, and/or by any attorneys' fees which the defendants may pay pursuant to any settlement or court order. If my claim is not successful, I understand that I will not owe my lawyers any fees.

Signature

Name (Please print)

Address

City State Zip

Date

Exhibit 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TODD BAZZINI, GREGORY LEONARCZYK, NOAH ALLEN, and JOHN MARKIEWICZ, Individually and on Behalf of All Other Persons Similarly Situated,

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I am a current or former employee of the defendants in *Bazzini et al. v Club Fit Management, Inc.*, Case No. 1:08-cv-4530, pending in the United States District Court for the Southern District of New York. As such, I hereby consent to join and be a part of the case as a plaintiff.

I hereby authorize the law firm of Faruqi & Faruqi, LLP to represent me in this action.

I understand that if my claim is successful, the fees of my lawyers will be paid by a percentage of any settlement obtained or monetary judgment entered in favor of the plaintiffs, and/or by any attorneys' fees which the defendants may pay pursuant to any settlement or court order. If my claim is not successful, I understand that I will not owe my lawyers any fees.

Jared M. Pope — Signature

Jared M. Pope — Name (Please print)

PO Box 654 — Address

Millwood, NY — City State Zip

_____ — Date