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AT&T Merger

United States Senate

WASHINGTON, DC 20510-2309

July 26, 2011

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairman Genachowski, Commissioners, and Attorney General Holder:

I am writing to encourage the Federal Communications Commission (FCC) and the Department of Justice (DOJ) to reject the proposal of AT&T, Inc. (AT&T) and Deutsche Telekom AG to transfer control of the licenses held by T-Mobile USA, Inc. (T-Mobile) and its subsidiaries to AT&T. Allowing this merger to proceed would lead to an effective duopoly in the national wireless market that would result in higher prices for consumers and potentially thousands of job losses. My examination of this transaction has led me to conclude that AT&T's acquisition of T-Mobile would substantially lessen competition in the already highly concentrated wireless communications market. In addition to my antitrust concerns, I am convinced that this type of horizontal consolidation does not serve the public interest. Consumers, businesses, regional wireless service providers, and handset manufacturers all depend on a competitive wireless market. The destruction of that competition would have grave repercussions for the economy as a whole and cannot be ameliorated by the application of conditions. I urge you to deny this proposal in its entirety. Below is a more detailed list of my specific concerns.

I. THE MERGER WOULD UNDERMINE COMPETITION IN THE NATIONAL WIRELESS MARKET

When considering an acquisition of this size, it is important to remember the history of telecommunications in this country. In the early twentieth century, AT&T convinced President Woodrow Wilson to support its monopoly using the argument that the country would benefit and telecommunications services would spread more rapidly if the services were developed and controlled by a single government-sanctioned monopoly. The DOJ began its attempts to regulate this monopoly when it entered into the 1913 Kingsbury Commitment, which purportedly facilitated competition by local service carriers. Over the next 70 years, AT&T was permitted to acquire hundreds of small companies and enjoyed a near total monopoly on long distance telephone service in the United States. This monopoly also allowed "Ma Bell" to control a majority of local telephone service, and it gave Ma Bell the ability to require customers to lease standard telephones from AT&T, rather than permitting third parties to connect telephones to AT&T's network. This monopoly came at great cost to consumers, who were charged exorbitant rates for long distance service. Eventually, after an antitrust suit that began in 1949 and a subsequent suit in 1974, the DOJ managed to secure a court order that directed AT&T to split its local service operations into seven separate companies in 1984. The clear intent of this suit was to end Ma Bell. But AT&T has managed to reacquire four of the seven companies it was forced to divest in 1984, and through a series of other acquisitions of companies and spectrum purchases, it has re-established dominance in the wired market and gone on to establish dominance in the wireless market.

AT&T and T-Mobile now request that you ignore this history and approve a transaction that will concentrate wireless competition into two enormous corporations, essentially creating a duopoly market. AT&T argues that "[t]his transaction will leave the wireless marketplace fiercely competitive."[1] This claim could not be further from the truth. On June 27, 2011, the FCC issued its annual report on competition in the mobile wireless industry. For the second year in a row, the FCC found that the market was highly concentrated.[2] The Herfindahl-Hirschman Index (HHI), a measure of market concentration, is used by both the DOJ and the FCC to measure the concentration of markets. The DOJ guidelines categorize a market with an HHI over 2,500 as "highly concentrated."[3] The FCC, employing the same guidelines, found that the HHI for the wireless market "remains above the threshold for a 'highly concentrated' market. It also appears that consumers are no longer enjoying falling prices, according to the CPI [consumer price index] for cellular services."[4] Industry analysts calculate that the merger will increase the HHI for the entire wireless market from 2,500 to 3,200,[5] and the HHI for the national post-paid wireless market could reach as high as 3,600.[6] Increasing the HHI by 700 points would transform an already highly concentrated market into an incredibly concentrated market. Furthermore, Verizon and AT&T currently own six of the seven "Baby Bells" between them, and they also control 70 percent of the postpaid national wireless market. After an acquisition of T-Mobile, economists cited by Sprint estimate that AT&T and Verizon would control 82 percent of the postpaid national wireless subscriber base.[7]

AT&T further contends that if this merger is approved, it will enable the company to deploy LTE broadband to more than 97 percent of Americans and "help fulfill this Administration's pledge to 'connect[] every part of America to the digital age.'"[8] This pledge is not unlike the promise AT&T made in the Kingsbury Commitment to interconnect its phone

[1] Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 11-65 at 1 (FCC filed April 21, 2011) ("Description of Transaction").

[2] Michael J. Copps, Statement, *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*, 15 FCC CMRS COMPETITION REP. 1, 305 (June 24, 2011), *available at* http://wireless.fcc.gov/index.htm?job=cmrs_reports.

[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (issued Aug. 8, 1997), http://www.ftc.gov/os/2010/08/100819hmg.pdf ("HORIZONTAL MERGER GUIDELINES").

[4] Copps, *supra* note 2, at 305.

[5] Sarah Barry James, *Regulatory Outlook for AT&T/T-Mobile: Cloudy with Chance for Approval*, SNL KAGAN (Mar. 24, 2011).

[6] The HHI for the national, post-paid wireless market would be 3,595 based on the estimates that AT&T would control 43% of the market, Verizon would control 39%, and Sprint would control 15%. *See also* Sprint Nextel Petition to Deny, Attachment A, Economic Analysis of the Merger of AT&T and T-Mobile, Joint Declaration of Steven C. Salop et al., Charles River Associates, WT Docket No. 11-65 at 37-8 (FCC filed May 31, 2011) ("Economic Analysis, Sprint Petition to Deny").

[7] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at 37-8. .

[8] Description of Transaction, *supra* note 1, at 1.

system with other independent companies to promote and foster universal telephone service. But as we learned during the Ma Bell era, when power is concentrated in the hands of a single company, consumers suffer. AT&T's broadband commitments are not sufficient to mitigate the competitive harms of this deal, and I am skeptical that AT&T will adhere to these commitments. Mergers in highly concentrated markets such as this have historically been rejected by both the FCC and the DOJ. For example, the proposed merger between Sprint and WorldCom was rejected because it would have concentrated the control of 80 percent of the long distance telephone service market in the hands of three companies.[9] In this case, the merger of T-Mobile and AT&T would consolidate 82 percent of the wireless market in the hands of only two companies. In the Sprint and WorldCom merger trial, the DOJ cited the facts that the merger would result in an HHI of 3,000 in the Internet backbone market and 3,800 in the long distance market as the primary reasons to reject the merger.[10] In this case, the merger would result in an HHI of 3,600 in the national, post-paid, wireless market.[11] By any metric, the proposed merger between AT&T and T-Mobile falls within the range of mergers that the DOJ and the FCC have historically rejected.

Competition is much easier to preserve than to restore once it is destroyed. After AT&T was allowed to secure a monopoly over the wired telephone market in the early twentieth century, it took the DOJ and the FCC ninety years to restore competition. Even today the market is still greatly controlled and affected by the infrastructure that was built during AT&T's monopoly years. If the limited competition that currently exists in the wireless market is shattered by approval of this deal, I fear it will take decades to recreate.

a. The Relevant Market is the National, Postpaid, Wireless Data and Voice Market

AT&T's products compete with other national, postpaid services that support both data and voice. When considering the competitive impact of this deal, I urge both the DOJ and the FCC to consider its impact on the national market in addition to its impact on local and regional markets. Analyzing the impact on the national market is important for several reasons. First, the dynamics of the wireless industry have changed dramatically in the last several years, and this is reflected in how wireless carriers manage their business and market their products. National carriers, such as AT&T, Verizon, Sprint, and T-Mobile, sell their products in the national marketplace. They promote handset deals, rate plans, and service coverage by relying on national maps and national comparisons. The national carriers generally do not differentiate prices by region or offer different packages in different regions. In fact, the advertising campaigns of the national carriers are primarily focused on the very fact that they are national. Competing ads featuring coverage maps of the United States have become the mainstay of both Verizon and AT&T. AT&T emphasizes the national size of its network by using the slogan "More Bars in More Places,"[12] while Verizon contends that it offers "America's largest and most reliable wireless network."[13] Sprint markets itself as "America's Favorite 4G Network;"[14] and

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[9] John Borland, *DOJ Files to Block WorldCom-Sprint Merger*, CNET (June 27, 2000), http://news.cnet.com/DOJ-files-to-block-WorldCom-Sprint-merger/2100-1033_3-242457.html.

[10] Complaint, U.S. v. WorldCom, No. 1:00CV02789 (Dep't of Justice filed Dec. 21, 2000).

[11] *Supra* note 6 (describing HHI calculated based on market share projections).

[12] Bryan Gardiner, *AT&T 'More Bars in More Places' is the New 'Fewest Dropped Calls'*, WIRED (Aug. 23, 2007), *available at* http://www.wired.com/epicenter/2007/08/att-more-bars-i/ (last visited June 30, 2011).

[13] *American's Most Reliable Wireless Network*, VERIZON WIRELESS, http://www.verizonwireless.com/its-the-network.shtml (last visited June 30, 2011).

T-Mobile uses the slogan "America's Largest 4G Network."[15] These advertisements run nationally and are supplemented by product placement arrangements with the national and international media. The national carriers would not spend so many resources on marketing and promoting the national nature of their networks if this was not an important and relevant factor in how consumers make purchasing decisions.

Second, national carriers are able to gain significant efficiencies as a result of their national coverage. As AT&T stated in its declaration in support of its acquisition of Centennial Communications Corporation, "[p]roviding the same plans across the country is more cost-efficient: national plans eliminate the administrative costs that were associated with local plans, which required customized training for sales and customer service personnel, and also permit AT&T to contract more easily with national retailers to sell AT&T wireless service, an additional efficiency."[16] Customers expect their phones to function across the United States, which requires regional and local carriers to enter into national roaming agreements. This places regional carriers, which struggle to negotiate reasonable roaming rates with the national carriers, at an enormous disadvantage when competing for customers who travel or business customers that have employees outside of a single region. Regional carriers cannot discipline the prices of the national carriers because those prices are part of their own costs. As Leap Wireless noted in its Petition to Deny this merger, when national carriers raise prices both on service plans and roaming, regional carriers have no choice but to raise their own prices to cover the increased roaming rates.[17]

Third, the national carriers consistently have exclusive arrangements to offer the most desirable handsets. Many mobile phone customers today select a provider based on the handsets offered. National carriers have the ability to secure exclusive agreements with the manufacturers of the most popular handsets, but regional carriers do not.[18] This puts the national carriers in a very different market. Regional carriers end up only being able to offer less desirable and less marketed mobile phones, which the national carriers have rejected or do not deem worthy of an exclusive deal.

I urge your agencies to investigate this issue thoroughly, and I strongly encourage you to meet with handset manufacturers to ask them detailed questions that will uncover more information about the nature of their negotiations and agreements with national wireless carriers. Companies like Apple are in a unique position to explain the history of their negotiations with AT&T and Verizon prior to the launch of the iPhone in 2007, and what, if any, concerns they had about entering into an exclusive deal. Handset manufacturers, including Motorola, Samsung, and Nokia, should be able to provide relevant information about why and how they

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[14] *Sprint-All Together Now*, SPRINT, http://now.sprint.com/alltogethernow/?pid=2 (last visited June 30, 2011).
[15] *Get 4G Mobile Data Plans on America's Largest 4G Network*, T-MOBILE.COM, http://t-mobile-coverage.t-mobile.com/4g-network-coverage (last visited June 30, 2011).
[16] Description of Transaction, Public Interest Showing and Related Demonstrations, Attachment, Declaration of David A. Christopher, WT Docket No. 08-246 at 2 (FCC filed Nov. 21, 2008).
[17] Petition to Deny of Leap Wireless International and Cricket Communications, WT Docket No. 11-65 at 19 (FCC filed May 31, 2011).
[18] *See, e.g., id.* at 2; Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications, WT No. 11-65 at ii (FCC filed May 31, 2011); *Tier 2 Wireless Carriers Clamoring for More Smartphones*, FIERCE WIRELESS, http://www.fiercewireless.com/special-reports/tier-2-wireless-carriers-clamoring-more-smartphones (last visited May 24, 2011).

were compelled to enter into exclusive deals with national wireless carriers. They should also be able to explain why it is not financially feasible for most manufacturers to launch their newest innovative technology with a local or regional carrier. Most of these companies have not come forward publicly, but I strongly urge your agencies to hold confidential discussions and diligently investigate how this deal will impact their future negotiations with AT&T and other national wireless companies. This understanding is critical to assess the overall impact of this merger on the national, postpaid wireless data and voice market.

Finally, prior to filing this application, AT&T has consistently acknowledged that the market it operates in is national, not regional.[19] For it to now reverse course and contend that Cellular South, Metro PCS, and Leap Wireless are true competitors[20] seems disingenuous. These and other regional carriers cannot compete with the national carriers either in terms of the handsets they offer, the national coverage they can provide their customers, their ability to set prices, or the economies of scale they can gain from marketing at a national level. The four national wireless providers inhabit a distinct market.

Furthermore, prepaid, voice only, or data only plans are very different products and are marketed and sold to very different customers. Service providers that lack either a data or a voice capability cannot support smartphones or provide the same range of features that the national providers supply. Postpaid plans require a credit check and a commitment for a term, whereas prepaid plans are month-to-month and are available to consumers with problematic credit.[21] Prepaid plans cannot subsidize handsets to nearly the extent that postpaid plans can, and as a result, they offer the least expensive and least complicated handsets. Prepaid phones generally target a low-income market while postpaid phones generally target a higher income market.

Proponents of the merger have chosen to include some or all of these ancillary markets in their analysis to alter the apparent effect on market concentration. This is misleading. The customer who is on the Internet researching the purchase of a two-year AT&T contract for an iPhone with an unlimited data plan is not simultaneously considering purchasing the voice only, regional, prepaid, "candy bar" telephone. While the market for regional, prepaid, mobile phones is substantial, AT&T and T-Mobile do not focus on this market nor does AT&T expect to see the most growth in this market in the coming years. As AT&T stated in its reply brief, "in the fourth quarter of 2010, integrated devices accounted for more than 80 percent of AT&T's device sales in connection with contract plans."[22] The national, prepaid, voice and data market must be considered in addition to the impact on the other affected markets.

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[19] *See 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. (2011) (statement of Dan Hesse, CEO, Sprint-Nextel); Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless, Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 09-104 (FCC filed May 22, 2009); Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 08-246 (FCC filed Nov. 21, 2008); Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 07-153 (FCC filed July 13, 2007).

[20] Description of Transaction, *supra* note 1, at 12-3.

[21] Sprint Nextel Petition to Deny, Declaration of William Souder, *supra* note 6, at 9-10.

[22] Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 at 20-21 (FCC filed June 10, 2011)) ("Joint Opposition").

b. The Merger Would Risk an Effective Duopoly Forming in the National Marketplace

If AT&T is allowed to acquire T-Mobile, three major national carriers will remain — AT&T, Verizon, and Sprint. Of these remaining three players, AT&T will be the largest, controlling 43 percent of the market.[23] Verizon will be the second largest provider, controlling 39 percent of the market.[24] Between the two companies, they will control 82 percent of national, postpaid, wireless subscribers. The wireless market is already highly concentrated. To allow this merger would result in a market that is effectively under the control of only two companies.

Sprint would be the third largest provider after AT&T and Verizon. Sprint would initially control 15 percent of the market.[25] Unfortunately, Sprint would be unlikely to hold on to that market share. In terms of their 4G strategies, AT&T and Verizon have both committed to LTE technology while Sprint is committed to WiMAX. With T-Mobile removed from the equation, this means that once the companies' 4G rollout plans are complete, the U.S. market would be entirely LTE except for Sprint, which would place Sprint at a significant disadvantage. Handset manufacturers and technology innovators would not be interested in developing hardware that only Sprint could use, and Sprint's customers would face significant problems when travelling because their handsets would be technically unable to roam on other networks. In addition to these disadvantages, AT&T and Verizon would be in a very strong position to use their superior resources and spectrum to push Sprint out of the business. Verizon and AT&T would each have tremendous control over the roaming agreements Sprint would need to support non-4G phones, and they would be able to substantially increase roaming rates in an effort to push Sprint out of business or make it ripe for a takeover.

I fear that if this deal is approved, Sprint will not be able to exert significant competitive pressure on either Verizon or AT&T. In all likelihood, after a merger, Sprint's market share would steadily decline until it was acquired by either AT&T or Verizon. This conclusion is supported by the fact that the day after the merger proposal was announced shares of AT&T, T-Mobile, and Verizon all showed dramatic increases, while Sprint's shares fell 14 percent in value in a single day.[26] Not only have investors recognized the threat this merger would pose to Sprint, but they also recognize that if this merger is approved, it will benefit Verizon as well as AT&T. If Sprint were to go out of business as the result of this merger, the market would become entirely uncompetitive, prices would go up, and even more jobs would be lost.

c. The Merger Would Enable AT&T and Verizon to Exclude Competitors from the Market

I am also concerned that this merger would permit AT&T and Verizon to leverage their resources to suppress competition and prevent any existing or new companies from gaining a foothold in the national wireless market. By limiting competitors' access to popular handsets,

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[23] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at 37-8.

[24] *Id.*

[25] *Id.*

[26] Ian Shapira and Jia Lynn Yang, *AT&T, T-Mobile Merger Blasted*, WASH. POST, Mar. 21, 2011, http://www.washingtonpost.com/business/economy/atandt-t-mobile-merger-blasted/2011/03/21/ABHs3Y9_story.html.

roaming agreements, and backhaul agreements, or by offering only unfavorable terms to obtain roaming or backhaul access, AT&T and Verizon would be able to further dominate the wireless marketplace to the detriment of consumers and competition.

Wireless service providers depend on access to the most popular handsets to attract and retain customers. Consumers place a high priority on access to the most desirable handsets, and extensive advertising campaigns are conducted to promote the latest, most innovative, handset technology. The national carriers often require that the manufacturers of the most popular handsets enter into exclusive agreements with them. For example, for the first three years of production, consumers wishing to use the extremely popular iPhone could only use AT&T as their service provider.[27] According to the FCC's analysis, AT&T enters into more exclusive handset agreements with manufacturers than any other national carrier.[28] In fact, AT&T has even gone so far as to demand that telephone manufacturers not support frequencies or technologies employed by their competitors so that their competitors are unable to support those handsets in the future.[29] The large market shares of the national carriers give them a great deal of leverage with manufacturers. Handset manufacturers want to work with a large, national player that will help them distribute and promote their product to a large number of customers. For this reason, at present, there is little incentive for a handset manufacturer to work with any company that is not a top four company, especially if the manufacturer is planning to roll out its best and most innovative designs. Today, a handset manufacturer like Apple could access almost the same number of potential customers by signing non-exclusive agreements with regional carriers, prepaid carriers, T-Mobile, <u>and</u> Sprint, as it could by signing a single exclusive agreement with either AT&T or Verizon. However, with T-Mobile removed from the pool of national carriers, this approach would not be nearly as strategically viable.

Roaming agreements are another tool that AT&T will be able to use to suppress competition. According to the regional and prepaid carriers, AT&T has a history of denying smaller carriers roaming agreements in order to marginalize or eliminate these carriers.[30] AT&T is especially reluctant to offer 3G and 4G roaming,[31] which forces regional or prepaid carriers to remain on outdated networks and handsets. This is particularly problematic for the GSM roaming market. Regional carriers employing GSM technology only have a choice between T-Mobile and AT&T for national roaming agreements. If this merger is approved, AT&T would have a <u>monopoly</u> on nationwide 3G GSM roaming service.[32] Even in the 15 cases where AT&T

[27] Dan Frommer, *AT&T's U.S. iPhone Exclusive Extended to 2010? Or Shortened from 2012?*, BUSINESS INSIDER (Aug. 1, 2008), *available at* http://www.businessinsider.com/2008/8/at-t-s-u-s-iphone-exclusive-extended-to-2010-or-shortened-from-2012-aapl-t-.

[28] *See* Fed. Comm. Comm'n, *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*, 14 FCC CMRS COMPETITION REP. 1, Table C-5 (May 20, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf ("14 FCC REP.") (explaining that AT&T acquired fifteen exclusive smartphone contracts between 2008 and 2009, Verizon acquired nine, T-Mobile acquired five, and Sprint acquired three).

[29] MetroPCS Communications, Ex Parte Notice, Attachment, 700 MHz Band Analysis, WT Docket No. 06-150 (FCC filed May 10, 2010).

[30] *See e.g.*, Petition of Cincinnati Bell, *supra* note 18, at 4; Petition to Deny of Leap Wireless, *supra* note 17, at 20.

[31] Petition of Cincinnati Bell, *supra* note 18, at 4.

[32] *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. (2011) (Hu Meena, Cellular South, responses to questions for the record from Senator Leahy).

has reluctantly provided 3G GSM roaming agreements to smaller carriers, those carriers have consistently accused AT&T of providing the service at unreasonably high prices, only after severe delays, or only in conjunction with anticompetitive conditions.[33] Allowing the duopoly on 3G GSM roaming service to consolidate into a monopoly would decimate competition in GSM technology and would make it impossible for a regional carrier to compete with AT&T. According to Cellular South, the limited nature of this market even today has dramatically undermined a number of regional carriers.[34]

In its opposition brief, AT&T offers a puzzling response to the concern that AT&T will not accommodate the roaming needs of smaller carriers after a merger. It points out that AT&T is a "net purchaser" of roaming service.[35] Thus, it argues, AT&T has an incentive to keep market prices for roaming low. This contention is questionable because while AT&T only relies on roaming for a small portion of its coverage, many smaller carriers rely on roaming for the vast majority of their national coverage. Hence, AT&T may be better off with high market prices for roaming as that would have only a relatively small impact on its own business, but it would likely have a devastating impact on many of its competitors. The regional carriers contend that AT&T is already extremely resistant to granting them roaming agreements. Rather than facilitating national roaming for smaller providers at reasonable rates, AT&T is actually consuming more of the smaller providers' spectrum than it is sharing with them. Regardless of whether AT&T is a net purchaser of roaming service or not, AT&T will have the ability to potentially drive some of its competitors out of business by increasing roaming fees. Consolidating ownership of even more of the nation's spectrum in the hands of a company that essentially refuses to share access to it at reasonable rates would dramatically worsen the prospects of smaller carriers.

Finally, the dominance of AT&T and Verizon's positions in the backhaul market presents yet another potential tool that could be used to exclude competitors from the wireless market. "Backhaul" refers to the services and connections that wireless towers use to connect to the Internet. Without backhaul services, it is not possible to offer data service. AT&T and Verizon currently control the vast majority of backhaul services, which wireless providers require to offer data service.[36] Independent backhaul providers have only managed to hold on to approximately 10 percent of the backhaul market.[37] Given that the bulk of the potential customer base— AT&T and Verizon— is unavailable to these alternate providers, they depend heavily on the business of T-Mobile and Sprint to survive.[38] Removing T-Mobile from the market would be a substantial blow to alternate backhaul providers. Many alternate backhaul providers have reported to the news media that a merger will force them out of business.[39] This would tighten Verizon and AT&T's stranglehold on backhaul, potentially establishing a duopoly there as well. Control over the backhaul market is effectively control over the wireless market because wireless service

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[33] Petition of Cincinnati Bell, *supra* note 18, at 4.
[34] *Id.*
[35] Joint Opposition, *supra* note 22, at 157 (FCC filed on June 10, 2011) ("Joint Opposition").
[36] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at 39.
[37] *Id.*
[38] *Id.* at 40.
[39] *See* Sara Jerome, *Backhaul Industry Fears AT&T Merger*, HILLICON VALLEY (May 11, 2011, 3:34 PM), http://thehill.com/blogs/hillicon-valley/technology/160407-backhaul-industry-fears-atatmerger (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").

providers require backhaul services to operate. AT&T and Verizon could increase charges for backhaul service in order to raise their remaining competitors' costs. The benefits AT&T and Verizon would gain by eliminating those competitors would easily outweigh any loss of backhaul revenues.

In summary, AT&T and Verizon would have extraordinary control over everything that their competitors need to operate— handsets, roaming agreements, and backhaul. Their competitors' costs, and hence their prices, would be set by AT&T and Verizon. AT&T and Verizon would have the ability to eliminate any of their competitors through the use of any one of these tools. Equipping a company with an arsenal of anticompetitive tools and simply hoping for the best would not be wise. I urge the DOJ and the FCC to consider the significant competitive advantages AT&T will gain if this merger is approved, and how those advantages could be exploited to hurt competition before approving this deal.

II. THE MERGER WOULD LEAD TO SUBSTANTIAL PUBLIC INTEREST HARMS

In addition to my concerns about the competitive impact of a horizontal merger of this size, I have no doubt that this deal will harm consumers and is a threat to the public interest. To receive approval for this merger, AT&T must demonstrate by a preponderance of the evidence that the merger will serve the public interest. Not only have the applicants failed to meet this high burden, but there is evidence that the merger will have significant anti-consumer effects that will harm—rather than serve—the public interest.

I recognize and appreciate the comments submitted by the Communications Workers of America (CWA) and other labor organizations that represent millions of working families. I have carefully considered AT&T's history of collaboration and cooperation with unions, as well as its respect for worker's rights. While I recognize that this merger may positively impact some workers and may strengthen employee rights for many T-Mobile employees, I believe there are larger public interest harms that will occur if this transaction is approved.

a. The Merger Will Result in Higher Consumer Prices

A merger between AT&T and T-Mobile would cause a significant rise in prices for wireless consumers. First, T-Mobile offers consistently lower prices than AT&T and is a strong competitive force that keeps AT&T's consumer retail prices from creeping ever higher. By eliminating T-Mobile from the market, AT&T removes a crucial "maverick." T-Mobile pressures the larger providers both to offer better products and to do so at a lower price. It provides smartphones, international roaming, voice and data service, and competitive handsets for a significantly lower price than any of the three other major carriers. T-Mobile's unlimited voice and data plan costs $25 less per month than either AT&T's or Verizon's plans,[40] and $20

[40] Tony Adam, *The Ultimate Cell Phone Plans Comparison*, BILLSHRINK (Feb. 3, 2011, 7:06 AM), http://www.billshrink.com/blog/10973/cell-phone-plans-comparison-2.

less per month than Sprint's plan.[41] This has the impact of disciplining the price of wireless service.[42]

Eliminating T-Mobile from the competitive landscape would remove the main check against an escalation in prices. Consumers Union performed a detailed price analysis of the merger and found that AT&T's existing prices are 43 percent to 64 percent higher than T-Mobile's prices for wireless services.[43] In fact, the removal of a low-cost alternative may ultimately be of more value to AT&T than the spectrum and customers it would acquire in the proposed merger. Without T-Mobile, the market would have no effective check on price increases or technological stagnation by AT&T and Verizon. Sprint places very little pressure on the prices of AT&T and Verizon, because it charges only marginally less than they do.[44] The elimination of the lowest cost national wireless option likely explains why so many T-Mobile customers are opposed to this deal.[45]

The reduction in competitive pricing pressure that follows from removing one of only four national carriers would allow the remaining carriers to raise prices. The transaction, if approved, would allow AT&T to increase its prices above what it normally could absent this acquisition. Competition helps to ensure that prices remain reasonably close to costs. In an already highly concentrated market the removal of one of only four major competitors is certain to be followed by an increase in prices. Charles River Associates did an in-depth analysis of the likely effect of the reduction in competition on consumer prices. It found that if the merger is allowed to go through, consumer prices could increase by 12.2 to 24.6 percent for T-Mobile customers, and 4.9 to 11.2 percent for AT&T customers.[46] AT&T has stated that it does not plan to raise prices for existing T-Mobile customers, but this will only stabilize T-Mobile customers' prices in the very short-term. As you know, the DOJ has defined a five percent safe harbor for

[41] Sprint Pricing Plans, SPRINT, http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?INTNAV=ATG:HE:Plans (last visited June 29, 2011).

[42] 14 FCC REP., *supra* note 28, at 11470-1; *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. 4 (2011) (responses to questions for the record from Senator Leahy, Daniel Hesse, CEO, Sprint-Nextel).

[43] *How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (testimony of Parul Desai, Policy Counsel, Consumers Union).

[44] Sprint Pricing Plans, *supra* note 41.

[45] *See* Nat Levy, *Customers Unhappy About AT&T/T-Mobile Merger*, PNW LOCAL NEWS (May 18, 2011), *available at* http://www.pnwlocalnews.com/east_king/bel/business/122171983.html (explaining that customer satisfaction dropped for both AT&T and T-Mobile customers when the merger was announced, reflecting disapproval of the merger); *Sprint Targeting T-Mobile Customers Unhappy with AT&T Deal*, TMO NEWS (May 12, 2011), *available at* http://www.tmonews.com/2011/05/sprint-targeting-t-mobile-customers-unhappy-with-att-deal (explaining that Sprint has launched an advertising campaign targeting T-Mobile customers that are leaving in anticipation of the merger). Also, a number of Facebook groups have formed for T-Mobile customers that are unhappy about the merger.

[46] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at ¶ 164-165. While AT&T has committed not to raise the prices of existing plans or contracts for T-Mobile customers, it has made no long term commitments to those customers when they renew their contracts, purchase new phones, upgrade or modify service, or add additional lines. It is unlikely that existing T-Mobile customers will be able to retain their current payment plans for long after a merger.

potential mergers.[47] Based on the above analysis, it is extremely likely the merger would raise prices above that safe harbor and may raise prices far above that limit. Mergers that increase prices above this line are not in the public interest. This calculation is based only on the reduction in competition in the wireless market itself. The probability that Verizon and AT&T will raise backhaul and roaming rates as discussed above would cause prices to rise even higher than estimated by Charles River Associates.

Government and corporate accounts are likely to experience the worst of the price hikes. These accounts differ from consumer accounts in two important ways. First, the enterprise demands of these customers limit them to choosing between the national carriers. Secondly, many corporate or government accounts require the capability to roam internationally. The only two national carriers that offer GSM service, which is by far the most dominant network globally, are AT&T and T-Mobile. After the merger, corporate or government customers that require international roaming would only have one choice for their wireless service—AT&T. With a de facto monopoly on large government and corporate accounts, it is inevitable that enterprise customers would face even larger price hikes than individual consumers.

b. The Merger Will Result in Decreased Choice and Customer Service Quality

AT&T consistently ranks last in customer satisfaction surveys.[48] This merger will only <u>reduce</u> AT&T's incentive to improve its dismal track record on customer service. In the post paid smartphone market, customers are forced to sign on to long-term contracts that contain substantial early termination fees. These early termination penalties, in combination with the desire of consumers to upgrade their handset to obtain the latest technology, create far less of an incentive for wireless companies to compete based on customer service quality. They also decrease the incentive to offer customers numerous choices and price plans.

c. The Merger Will Stifle Innovation

Allowing AT&T to eliminate T-Mobile as a competitor will significantly slow the pace of innovation in the wireless market. T-Mobile has consistently remained competitive by innovating. T-Mobile was the first provider to offer the Blackberry, the Sidekick, and the Android operating system.[49] T-Mobile has been a major driver of wireless data services, smartphone technology, and WiFi hotspot deployment and integration.[50] The U.S. market has a

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[47] HORIZONTAL MERGER GUIDELINES, *supra* note 3; Comments of the U.S. Dep't of Justice, WT Docket No. RM96-6-000 (FCC filed on May 7, 1996) (noting that "the threshold typically used for what is a 'significant' price increase is five percent above levels that likely would prevail absent the merger.").

[48] *Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier*, CONSUMER REPORTS (Dec. 6, 2010, 2:08 PM), http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html; Brad Reed, *AT&T Customer Ratings Hit New Low*, PCWORLD (Dec. 2, 2009, 8:44 PM), *available at* http://www.pcworld.com/article/183590/atandt_customer_ratings_hit_new_low.html (stating that "[AT&T] has the lowest level of customer satisfaction in the United States").

[49] Jason Notte, *5 T-Mobile Innovations and 5 More We Lose*, THE STREET (Mar. 28, 2011, 8:30 AM), http://www.thestreet.com/story/11060885/1/5-t-mobileinnovations-and-5-more-we-lose.html.

[50] Fed. Comm. Comm'n, *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*, 13 FCC CMRS COMPETITION REP. 1, 17-24 (Jan. 15, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

tendency to lag behind the rest of the world in introducing new handsets, new wireless technologies, and the adoption of mobile communications.[51] Because T-Mobile, as part of Deutsche Telekom, bridges the gap between the domestic wireless market and the European wireless market, it has been able to pressure domestic providers to keep pace with the innovation in the global market. Without this pressure, the national carriers would have less incentive to develop new technologies, and less incentive to work with handset manufacturers to develop and launch new handsets. As I mentioned above, I hope your agencies will meet with handset manufacturers and ask them whether they have concerns about how this merger may impact their ability to create and distribute innovative devices. I am concerned that the already concentrated wireless market has made it difficult for handset manufacturers and other innovators to create and distribute the most innovative technologies, and I hope your agencies will look into this further.

In addition to technological innovations, T-Mobile also has an established record of offering its customers innovative pricing plans, service packages, and discounts for customers who do not purchase subsidized handsets. Likewise, some innovations have come from smaller competitors. For example, Leap Wireless introduced an unlimited music download service.[52] By reducing the viability of the smaller competitors, a merger would stifle innovation even beyond the elimination of T-Mobile. The FCC has found on numerous occasions that a reduction in competition, particularly to a duopoly, results in less innovation.[53]

d. The Merger Will Result in Job Losses

The merger of AT&T and T-Mobile would likely involve thousands, perhaps even tens of thousands, of layoffs. Despite having been asked directly by me and several other members of Congress to provide estimates of the number of layoffs AT&T is expecting to result from the merger, AT&T has refused to release this information. According to recent reports, AT&T employs 266,590 people and T-Mobile employs 37,795.[54] AT&T has calculated that it will reap $3 billion per year in "operational savings" and "cost synergies" as a result of the merger.[55] While it will not discuss what portion of these "synergies" comes from the elimination of jobs, I think it is fair to assume that layoffs constitute a substantial portion of the cost savings AT&T is promising to its investors.

AT&T and T-Mobile operate many retail stores in the same or adjacent neighborhoods, and it is likely that many of them will be closed if the merger is allowed to proceed. We should also expect the combined company to eliminate many administrative office staff (such as overlapping accounting and legal departments), shut down some call centers, and lay off some technical support staff. The elimination of a substantial portion of the combined workforce would be entirely consistent with AT&T's track record. According to Free Press, since 2002, a

[51] *See e.g.,* WORLD ECON. FORUM, THE GLOBAL INFORMATION TECHNOLOGY REPORT 2010-2011 (2011), *available at* http://reports.weforum.org/global-information-technology-report.
[52] Petition to Deny of Leap Wireless, *supra* note 17, at 3-4.
[53] *See* Application of EchoStar Communications Corp. et al., Hearing Designation Order, CS Docket No. 01-348 at 68 (FCC filed on Oct. 9, 2002).
[54] Leslie Kwoh, *AT&T, T-Mobile Merger Could Mean Big Changes for Customers and Employees,* THE STAR LEDGER (March 22, 2011, 5:39 AM), http://www.nj.com/business/index.ssf/2011/03/att_t-mobile_merger_39_billion.html.
[55] Description of Transaction, *supra* note 1, at 9.

period during which AT&T acquired five firms with more than 180,000 employees, AT&T has seen a net job loss of well above 100,000 workers.[56] AT&T and SBC announced that the merger of the two companies would result in 13,000 lost jobs,[57] but in actuality the merged company had over 20,000 fewer employees by the end of the year and continued downsizing substantially into the next year as well.[58] AT&T eliminated 6,800 jobs as part of its merger with Cingular as well.[59] In fact, over the past eight years, AT&T has had five mergers[60] and has eliminated between 5,000 and 25,000 jobs per year for eight of those nine years.[61]

It is important to note that AT&T has a strong track record of respecting employees' right to organize, and AT&T is the only wireless company with a unionized workforce. AT&T deserves to be commended for this. I strongly considered CWA's comments, which emphasized that "T-Mobile has been hostile to unions and has opposed efforts by workers to organize and exercise their basic rights."[62] I care a tremendous amount about creating and protecting American jobs, and if this merger is approved, I recognize that T-Mobile workers will finally have the benefit of union representation, which is long overdue. I also appreciate that AT&T has publicly committed to maintain a policy of non-interference with respect to the organizing of T-Mobile employees, as sanctioned under the National Labor Relations Act.[63] However, given the current economic environment, these benefits must be weighed against a need to preserve and create jobs in the short-term and against the adverse impact that this merger will have on millions of consumers throughout the country. AT&T contends that building out infrastructure to support LTE nationwide will create jobs,[64] and CWA points to a study by the Economic Policy Institute that estimates that AT&T's increased capital expenditures from the merger will create between 54,834 and 95,959 new jobs.[65] However, as discussed below, AT&T's rollout of support for LTE is essentially unrelated to the merger. It may be true that over the longer term increased investment and growth should spur job creation at the combined company, as noted in CWA's filing.[66] But AT&T's promises to its investors indicate we should expect tens of thousands of net job cuts in the short-term.

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[56] Petition to Deny of Free Press, WT Docket No. 11-65 at 45 (FCC Files May 31, 2011).

[57] Leslie Cauley, *SBC, AT&T Merger to Cut 13,000 Jobs*, USA TODAY (Feb. 2, 2005), http://www.usatoday.com/money/industries/telecom/2005-02-01-att-sbc-jobs_x.htm (quoting SBC CEO Ed Whitacre).

[58] *Employment T-Mobile v. ATT*, SLIDESHARE (May 18, 2011), http://www.slideshare.net/sagecast/employment-growth-tmobile-v-att-05-18-2011.

[59] *After AT&T Merger, Cingular Wireless Expects to Cut 6.800 Jobs*, COMPUTERWORLD (Nov. 24, 2004, 12:00 PM), http://www.computerworld.com/s/article/97843/After_AT_T_ merger_Cingular_Wireless_expects_to_cut_6_800_jobs (quoting Cingular Wireless CEO Stan Sigman); *Cingular to Ax 10% of Jobs in Merger With AT&T Wireless*, REDORBIT (Nov. 24, 2004), http://www.redorbit.com/news/technology/105916/cingular_to_ax_10_of_jobs_in_merger_with_att/index.html (quoting Cingular Wireless CEO Stan Sigman).

[60] SBC, Bell South, Cingular Wireless, Dobson Wireless and Centennial Communications have all merged with AT&T.

[61] *Employment T-Mobile*, *supra* note 58.

[62] Reply Comments of Communications Workers of America, WT Docket No. 11-65 at 15 (FCC Files June 20, 2011).

[63] *Id.*

[64] Description of Transaction, *supra* note 1, at 1.

[65] Reply Comments of Communications Workers of America, *supra* note 62, at 12.

[66] *Id.* at 14.

I strongly encourage your agencies to look into AT&T's promises to its investors and determine exactly how AT&T anticipates achieving $3 billion in operational savings per year. I appreciate that AT&T may intend to cut as few jobs as possible, but layoffs are an inevitable consequence of a horizontal merger of this size, which will likely produce a number of redundancies. I also urge you to compel AT&T to publicly release its plans for job cuts in the first, second, and third years following the merger approval. Many proponents of this merger have acknowledged that short-term job losses may occur, but I think it is important for the American public to understand exactly what those numbers will be, especially given the weak state of the U.S. job market.

e. The Merger Would Undermine Net Neutrality

The proposed merger would also be harmful to the public interest because it would place de facto control of our nation's information infrastructure in the hands of only two companies. Verizon and AT&T already control the bulk of the wired telephony infrastructure in the United States. If this merger is approved, the same de facto duopoly would also control the wireless infrastructure. This level of control of the entire telecommunications industry would give them the capability to exclude competition not just in the wireless service market, but in other markets that involve dependent or related services. For example, the Dish Network fears that AT&T could bolster its U-Verse product, which provides video programming via the Internet, by undermining the network access of competitive products or offering bundled options that would not be available to its cable, satellite, or online video competitors.[67]

The FCC has opted to apply only very limited net neutrality rules to mobile devices. One of the primary reasons why the FCC found it unnecessary to apply the broader set of protections to wireless broadband is that "consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband."[68] As a result of the limited regulation of net neutrality in the wireless market, consumers are extremely dependent on competitive market forces to provide an open network. Currently, consumers have four options for national mobile voice and data service, so if one of them begins discriminating against competitors, consumers have the option to switch to a more neutral provider. This option would disappear in an effective duopoly. Furthermore, Verizon and AT&T have jointly backed proposals designed to block net neutrality, and individually they have violated and fought net neutrality regulations in court.[69] After a merger, AT&T and Verizon will have less incentive to cater to consumers, and we can expect that they will make more blatant attempts to monitor and discriminate against certain content, websites, or applications in order to further their own financial interests.

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[67] Petition to Deny of Dish Network, WT Docket No. 11-65 at 10-1 (FCC filed May 31, 2011).

[68] Report and Order in the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191 and WC Docket No. 07-52 at 5-6 (FCC adopted Dec. 21, 2010).

[69] *See e.g.*, Alex Chasick, *AT&T Asks Employees to Oppose Net Neutrality,* CONSUMERIST (Oct. 20, 2009, 6:46 PM), http://consumerist.com/2009/10/att-asks-employees-to-oppose-net-neutrality.html; Michael Ide, *Verizon Accused of Violating FCC Net Neutrality Rules,* ITPROPORTAL (June 7, 2011), http://www.itproportal.com/2011/06/07/verizon-accused-violating-fcc-net-neutrality-rules; M.G. Siegler, *AT&T Crying Over Net Neutrality and Wiping Their Eyes with Piles of Money,* TECH CRUNCH (Aug. 13, 2010), http://techcrunch.com/2010/08/13/att-net-neutrality; Ryan Singel, *Verizon Files Suit Against FCC Net Neutrality Rules,* WIRED (Jan. 20, 2011, 5:26 PM), http://www.wired.com/epicenter/2011/01/verizon-sues-fcc.

Americans gather their information about the world, purchase products and services, work, and communicate largely through the wired and wireless information infrastructure. Virtually every sector of the economy relies on evenhanded treatment by network service providers who supply a necessary gateway that enables small and medium sized businesses to sell and promote their products and services online. Allowing two companies to control which websites and applications are available to consumers and what content will stream at a faster speed would be very risky. We should not let an effective duopoly dictate the rules of the road for wireless networks, and I fear that will happen if this merger is approved.

III. ALLOWING AT&T TO INCREASE ITS SPECTRUM HOLDINGS DOES NOT SERVE THE PUBLIC INTEREST

The U.S. is facing a potential shortfall in developed wireless spectrum. The increased demand that smartphones place on wireless networks threatens to outpace the deployment of network infrastructure. AT&T contends that it "faces network spectrum and capacity constraints more severe than those of any other wireless provider, and this merger provides by far the surest, fastest, and most efficient solution to that challenge."[70] While I recognize that mobile data traffic has exploded in the last several years, I am not convinced by AT&T's claims, nor am I convinced that allowing AT&T to acquire more spectrum through this merger will serve the public interest.

Spectrum is a finite and precious national resource. It should be used in the most efficient way possible. The economic development of the country depends in part on maximizing the value derived from our spectrum. Once spectrum is allocated to a specific company, the public interest requires that it be developed in a quick and efficient manner. An analysis of the public interest implications of a transfer of spectrum licenses must consider what company would be the best steward for that spectrum, and I am not convinced that AT&T has effectively managed or used its available spectrum to improve service for its customers. AT&T owns more spectrum than any other company, yet AT&T has been plagued with delays in rolling out infrastructure to support spectrum it has been allocated.[71] The quality of the service it provides is consistently ranked last amongst the national carriers,[72] and it continues to use spectrum in an inefficient manner.[73] The question your agencies must consider is not how badly AT&T needs the spectrum, but how effective AT&T would be at making use of that spectrum relative to other carriers. Moreover, I believe the public interest would be far better served if AT&T was required to resolve its spectrum crunch by investing a portion of the $39 billion it plans to spend on this transaction to build out its existing spectrum and to deploy additional technologies to make more efficient use of its current spectrum holdings.

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[70] Description of Transaction, *supra* note 1, at 1.

[71] Reply of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation to Joint Opposition, WT Docket No. 11-18 at 3 (FCC filed Mar. 28, 2011).

[72] *Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier*, CONSUMER REPORTS (Dec. 6, 2010, 2:08 PM), http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html; Brad Reed, *AT&T Customer Ratings Hit New Low*, PCWORLD (Dec. 2, 2009, 8:44 PM), *available at* http://www.pcworld.com/article/183590/atandt_customer_ratings_hit_new_low.html (stating that "[AT&T] has the lowest level of customer satisfaction in the United States").

[73] Joint Opposition, *supra* note 35, at 33.

a. AT&T Bears the Responsibility for Its Spectrum Problems

Wireless consumers use much more spectrum today than they did just two years ago. A smartphone generates 24 times as much load on the network as a conventional wireless phone.[74] The enormous popularity of smartphones has placed substantial and increasing demands on the nation's finite pool of spectrum. As a result, all of the wireless carriers, and the nation as a whole, are facing potential shortfalls of spectrum. The other national wireless carriers have been aggressively preparing for this crunch. Sprint, for example, converted all of its customers off of less efficient legacy networks (such as CDMA) and on to more efficient technologies (such as WiMAX) at great expense.[75] Verizon is ramping up its infrastructure spending by about ten percent per year.[76]

AT&T, like every other wireless provider, is also facing the possibility that their existing spectrum may be inadequate to accommodate anticipated demand.[77] However, unlike the other wireless providers, AT&T has not visibly taken decisive steps to prepare for the coming crunch, despite the fact that AT&T should have recognized the need for additional investment shortly after introducing the iPhone in 2007. AT&T had first-hand knowledge that iPhone customers were consuming very large amounts of data on their devices, and it should have anticipated that it would experience congestion in urban areas where iPhones are in high demand. Despite this, AT&T only increased its spending on wireless infrastructure by 1 percent in 2009.[78] Although AT&T will point out that 1 percent is still a significant number, Verizon made the decision to increase its capital spending by 10 percent in 2009,[79] and Verizon is now in a much better position when it comes to spectrum capacity.[80] This is typical. Between 2006 and 2009, Verizon invested 14 percent more per subscriber in its wireless infrastructure.[81] Industry analysts estimate that AT&T would need to spend approximately $5 billion more per year in wireless infrastructure development to keep up with its competitors.[82] AT&T emphasizes in its opposition brief that it has made large infrastructure investments in recent years, but it does not mention that disproportionately few of these investments have been in its wireless network.[83] While AT&T draws 57 percent of its revenue from wireless service, only 34 percent of its capital

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[74] Julius Genachowski, Fed. Comm. Comm'n, *Spectrum: American Competitiveness, Opportunity, Dollars and the Cost of Delay* (Mar. 22, 2011, 11:56 PM), http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0322/DOC-305309A2.pdf.
[75] Stephen Lawson, *Sprint's IDEN Finally Heading For Sign Off*, PC WORLD (Dec. 7, 2010, 4:30 PM), http://www.pcworld.com/businesscenter/article/212782/sprints_iden_finally_headed_for_signoff.html.
[76] Marguerite Reardon, *Is AT&T a Wireless Spectrum Hog?*, CNET NEWS (Apr. 29, 2011, 4:00 AM), http://news.cnet.com/8301-30686_3-20058494-266.html.
[77] Description of Transaction, *supra* note 1, at 3.
[78] Reardon, *supra* note 76.
[79] *Id.*
[80] John Doherty et al., Transcript of Verizon Q1 2011 Earnings Conference Call (Apr. 21, 2011), at 4, *available at* http://www22.verizon.com/investor/investorconsump/groups/events/documents/investorrelation/event_ucm_1_trans.pdf ("Verizon Q1 2011 Earnings").
[81] Stephen Lawson, *Analyst: AT&T Needs to Spend U.S. $5B to Catch Up*, PCWORLD (Jan. 19, 2010, 4:50 PM), http://www.pcworld.com/businesscenter/article/187216 (quoting Gerard Hallaren, Director of Research, TownHall Investment Research).
[82] *Id.*
[83] *Id.*

expenditures are focused on its wireless infrastructure, whereas 65 percent are focused on wired infrastructure.[84]

AT&T has also failed to migrate existing customers on to more efficient network technologies. AT&T continues to support several different inefficient legacy network technologies and admits that it does not plan to discontinue support for them for years to come.[85] AT&T has made it clear that it intends to continue this approach by rolling out new devices that do not support the much more efficient LTE technology rather than deploying dual band handsets that would be able to migrate to the more efficient network as it becomes available.[86] Another example is of particular importance: AT&T has elected to continue using HSPA 7.2 technology on the iPhone rather than HSPA+ technology, despite the fact that HSPA+ is 15 percent more efficient.[87] These business decisions are difficult to explain when juxtaposed with AT&T's assertions that it has network capacity problems that cannot be alleviated without approval of this deal.

Instead of addressing these problems head on by increasing investment in infrastructure and modernizing its new and existing handsets now, AT&T proposes that the American public absorb the cost of its business decisions in the form of higher prices and less competition in our wireless market. This is unacceptable. I understand that AT&T may indeed lose a small number of subscribers to Verizon and other companies if this deal is not approved, but this is fundamentally how competitive markets should function. AT&T failed to accurately plan and invest for the data demands of its iPhone customers, but that is not a sufficient justification for a merger of this size and scope. While AT&T's interests certainly would be served by protecting it from the consequences of its investment decisions, the public interest is better served by allowing the free market to reward other wireless carriers that chose to make better investment decisions.

Moreover, even if AT&T is unable to solve its short-term network problems by investing in infrastructure and handsets, AT&T has the option of avoiding outages for AT&T customers by purchasing additional roaming agreements from other wireless carriers. AT&T contends that it requires T-Mobile's spectrum to sustain its customer base, but AT&T could acquire access to that spectrum with a roaming agreement without creating the competitive harms outlined above. While this might eat into AT&T's profit margins, it would not harm the public interest and would not meet the burden of proof required to justify this merger under antitrust or telecommunications laws. AT&T argues in its application that allowing it to control a huge portion of the spectrum would not harm Sprint or the regional carriers because they could simply rely on AT&T to sell them roaming agreements at reasonable rates.[88] If AT&T believes that roaming arrangements suffice for Sprint and regional carriers, certainly AT&T can meet its own spectrum needs with roaming agreements as well.

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[84] *Id.*
[85] Joint Opposition, *supra* note 22, at 33.
[86] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at 24 (citing *Shop, Wireless, Packages & Deals, Cell Phone Deals and Packages*, AT&T WIRELESS, http://www.wireless.att.com/cell-phone-service/packages/packageslist.jsp?wtSlotClick=1-004YXE-0-1&WT.svl=title (last visited May 24, 2011)).
[87] *Id.* at 24.
[88] Description of Transaction, *supra* note 1, at 12, 75, 83, 86, 89, 93.

b. The Deployment of an LTE Network in Rural America Does Not Require a Merger

AT&T states that this merger will give the combined company the scale, resources, and spectrum that are needed to deploy LTE to more than 97 percent of Americans. But AT&T's promise to build an LTE network in rural locations is not related to or dependent on the acquisition of T-Mobile. AT&T already owns large amounts of unused spectrum in rural locations. AT&T's network is far more extensive than T-Mobile's, so the addition of T-Mobile's network to its own would do little to expand the reach of the network to underserved areas. In fact, adding T-Mobile's network to AT&T's would only expand coverage to less than one percent of the U.S. population.[89] The challenge, as AT&T admits, is not in acquiring spectrum in rural areas, but in deploying infrastructure to utilize that spectrum in a cost effective way.[90] AT&T offers no convincing explanation for why the acquisition would help it resolve this challenge. It appears that the claim that the merger would result in the rollout of LTE service to rural America was purely the product of political calculations, not financial or technical ones.

More importantly, AT&T is likely to deploy LTE to rural America regardless of whether the merger is approved or not. AT&T's wireless network covers 97 percent of the population,[91] and AT&T has already announced plans to deploy LTE to 80 percent of the population by the end of 2013. The promise to deploy LTE to 97 percent of Americans within six years of the closing date of this transaction simply amounts to a promise to continue upgrading its network to LTE after 2013. AT&T's primary competitor, Verizon, has announced plans to roll out LTE to more than 92 percent of Americans in its initial rollout.[92] If it makes economic sense for Verizon to upgrade its rural network to LTE, it presumably makes sense for AT&T to as well. This is especially true because AT&T competes directly with Verizon for the title of the largest network, and Verizon is focusing its marketing campaigns in part on its superior LTE deployment.

In short, AT&T appears to be trying to offset the competitive damages the proposed merger would have on the public interest with a benefit that is likely only a marginal increase over what AT&T would build out on its own. More importantly, AT&T is in a position to complete this rural build out today and does not need to acquire T-Mobile's spectrum to deploy LTE to 97 percent of the country. If the Commission wants to see AT&T make good on rolling out LTE in rural areas, it should consider how to incentivize that investment independent of a merger review.

c. The Efficiency Gains from the Merger Would Be Minor

AT&T presents two rationales for how the merger could result in more efficient use of existing spectrum. First, it argues that by merging the two networks, it would be possible to eliminate redundant "control channels," which are used to transfer commands between handsets and base stations. AT&T argues this transaction will allow it to free up a portion of the spectrum

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[89] Sprint Petition to Deny, *supra* note 6, at 125.
[90] Description of Transaction, *supra* note 1, at 55-56.
[91] *See* Press Release, AT&T, AT&T Sets the Record Straight on Verizon Ads, *available at* http://www.att.com/gen/press-room?pid=14002 (last visited July 5, 2011).
[92] Dave Burstein, *CTO Dick Lynch on Verizon LTE Coverage*, DSL PRIME (Apr. 2, 2011), http://www.dslprime.com/a-wireless-cloud/61-w/4214-cto-dick-lynch-on-verizonlte-coverage (quoting Verizon CTO Dick Lynch).

in each market where the applicants both provide GSM service.[93] Secondly, it argues that by combining the networks, idle spectrum could be used by the customers of the other provider.[94] While these arguments do have some merit, the efficiency gains are unlikely to be significant and cannot justify a merger of this size.

The efficiency gains based on aggregating control channels would be fairly modest. Sprint contends that aggregating them would only diminish the crunch for voice communication bandwidth, not data capacity.[95] Data capacity is, by far, the more pressing issue. It is also unclear how quickly the channels could be aggregated given that they are spread widely across a vast infrastructure. AT&T offers no timeline for the elimination of the redundant control channels. Free Press points out that AT&T has not provided specific details outlining how the channels might be combined or which channels they believe to be redundant.[96]

Pooling the idle spectrum between the two networks is also unlikely to create major gains. According to AT&T, both T-Mobile and AT&T's networks are already nearly fully utilized.[97] This claim is an exaggeration, but to the extent that it is true, it would undermine any efficiency gains from combining the networks. Combining two fully utilized networks would yield no idle spectrum utilization efficiency gain at all. While nationally both networks do have locations where they are not fully utilized, these areas are likely to overlap. Where one network is fully utilized it is likely that the other will be as well, while in locations where one network has spare capacity, it is unlikely that the other network will need it. As a result, the efficiency gained from using the idle spectrum of the other network would likely be very small.

Furthermore, the efficiency gains that could be derived from pooling idle spectrum could also be gained simply by establishing roaming agreements without causing the anti-competitive harms outlined above. The FCC has repeatedly ruled that, "[e]fficiencies that can be achieved through means less harmful to competition than the proposed merger, therefore, cannot be considered to be true pro-competitive benefits of the merger."[98]

Both of these effects of the merger will create modest efficiency gains, but these gains will not offset the elimination of both companies' incentives to develop new spectrum or make more efficient use of their existing spectrum.

d. The Public Interest Would Be Better Served by Leaving AT&T to Develop Its Existing Spectrum Licenses and Move to More Efficient Network Technologies

Rather than simply attempting to wrest control over existing spectrum from competitors, AT&T should focus its expenditures on making better use of the spectrum licenses it already owns. Spectrum is a finite national resource that is crucial to innovation and therefore extremely valuable to our economy. The public interest depends on having as much spectrum developed

[93] Description of Transaction, *supra* note 1, at 8.
[94] *Id.*
[95] Economic Analysis, Sprint Petition to Deny, *supra* note 6, at 346.
[96] Petition to Deny of Free Press, *supra* note 56, at 56.
[97] Description of Transaction, *supra* note 1, at 29-30.
[98] In the Applications of NYNEX Corporation and Bell Atlantic Corporation, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20063-64 (Aug. 14, 1997). *See also* Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14829 (1999); HORIZONTAL MERGER GUIDELINES, *supra* note 3, at 1-2.

and efficiently used as possible. The more spectrum that is available, the lower prices will be, and the more use can be supported nationwide. In its discussion of roaming agreements, AT&T concedes that the public interest is served by building infrastructure rather than acquiring existing infrastructure. AT&T argues that rather than acquiring roaming agreements, regional carriers "should be investing in their own networks— which brings with it increased capacity and jobs."[99] The same logic applies even more forcefully to AT&T's own situation.

AT&T already owns more spectrum licenses than any other company.[100] Many of these spectrum licenses remain undeveloped, including $9 billion worth of some of the most valuable "beachfront" spectrum.[101] Concurrently with the merger application, AT&T is seeking permission to acquire an additional $1.9 billion worth of spectrum licenses from Qualcomm.[102] Given the severity of the spectrum crunch alleged by AT&T, the public interest is directly tied to how rapidly AT&T develops this unused spectrum. Allowing AT&T to solve its spectrum shortfall by acquiring T-Mobile instead relieves the pressure on it to develop the spectrum for which it already has licenses. Furthermore, the expense and effort of integrating T-Mobile's network into AT&T's would push these new development efforts even further back on the calendar. Spending $39 billion on infrastructure development, rather than on the acquisition of infrastructure that is already in use, would be of enormous benefit to the public interest.

In addition to having a large reserve of undeveloped spectrum, the spectrum that AT&T has developed is not being used in an efficient way, as discussed above. Verizon currently sustains a larger share of the market than AT&T with less spectrum than AT&T, but it is not facing a spectrum shortfall.[103] This suggests that AT&T could make much more efficient use of the spectrum it owns. Instead of attempting to increase the efficiency with which it uses its existing network, AT&T is attempting to expand the portion of the existing spectrum it controls. Inefficient use of spectrum should not be rewarded with control of additional spectrum. Spectrum is best controlled by the most efficient stewards, not by those who claim to have the greatest need for it because their use is so inefficient. The public interest depends on AT&T dramatically improving the efficiency with which it uses and develops its spectrum. Allowing it to acquire T-Mobile would remove any incentive to do that.

IV. THE FLAWS IN THE MERGER CANNOT BE ELIMINATED WITH CONDITIONS

After my thorough review of this transaction, I am convinced that any conditions would be inadequate to mitigate the serious and likely permanent competitive effects of this merger. AT&T has indicated both in its hearings before the House of Representatives and the Senate, and

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[99] *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. 6 (2011) (Timothy McKone, lobbyist, AT&T, responses to questions for the record from Senator Kohl).

[100] Martin Peers, *Spectrum of Choices Confronts AT&T Review*, WALL ST. J., Apr. 29, 2011, at C8.

[101] Reply of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation to Joint Opposition, WT Docket No. 11-18 at 3 (FCC filed Mar. 28, 2011).

[102] Maisie Ramsay, *Sprint, MetroPCS Lobby FCC on AT&T's New 700 Mhz Buys*, WIRELESS WEEK (June 13, 2011), http://www.wirelessweek.com/News/2011/06/Policy-and-Industry-Sprint-MetroPCS-Lobby-FCC-ATT-700MHz-Buys-Government.

[103] Verizon Q1 2011 Earnings, *supra* note 76, at 4.

in numerous press reports, that it is willing to make a number of substantial voluntary commitments to gain approval of this merger. But regardless of the size, scope, or duration of the conditions, the reality is that all conditions come to an end. The competitive effects of a merger of this size and scope will reverberate throughout the telecommunications sector for decades to come and will affect consumer prices, customer service, innovation, competition in handsets, and the quality and quantity of network coverage. These threats are too large and too irrevocable to be prevented or alleviated by conditions.

a. A Competitive Market Cannot be Preserved by Requiring Divestitures

The most common way to make a potentially anticompetitive merger palatable is to require the merged entity to divest itself of specific holdings in key markets where the merger would create too much concentration. That will not suffice in this case. There are two problems with this approach. First, there is no other competitor to which AT&T could divest assets that would resolve the market concentration problems. Divesting to Verizon would do nothing to alleviate the duopoly concern, as AT&T and Verizon would still have the same total market share between them after a divestiture as before, and the national HHI would be essentially unaffected by the divestiture.[104] Regional carriers would potentially be interested in acquiring portions of the network within their region, but given that the regional market and the national market are so distinct, the impact of divestitures to regional carriers would be very limited. Given the size of the market, divestitures would be insufficient to enable the entry of a new participant into the market.

Divesting to Sprint would be the most advantageous, but a divestiture to Sprint would still be very problematic and may not be possible. Sprint currently has a debt-to-equity ratio of 131 percent.[105] This would make it difficult for Sprint to purchase assets from AT&T and even more difficult for it to develop them properly. Furthermore, T-Mobile and AT&T both use dramatically different technology than Sprint. Sprint primarily uses CDMA and WiMAX whereas AT&T and T-Mobile use primarily GSM.[106] The difficult and expensive process of converting resources divested by AT&T into Sprint's network, combined with Sprint's problematic financial situation, make significant divestitures to Sprint an unrealistic solution.

Secondly, as discussed above, the market is a single, unified, national market. Even if there were an ideally situated party with sufficient resources to purchase the divestitures, isolated divestitures in individual local markets would not significantly reduce the concentration in the national market. Any divestiture smaller than the market share currently held by T-Mobile would not be large enough to offset the elimination of T-Mobile. Given that the wireless market is already highly concentrated, partially offsetting the increase in concentration would only decrease the extent of the harm of this deal. It could not turn a merger that is harmful to the public interest into one that is beneficial to or even neutral with respect to the public interest.

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[104] Rebecca Arbogast and David Kaut, "AT&T/T-Mo: Data Point to Coming Brawl, Risk; Deal Still Looks Doable," Stifel Nicholas, at 4 (Mar. 29, 2011).

[105] *Sprint Nextel Corp Ratios and Returns*, FORBES, http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=s (last visited July 5, 2011).

[106] Comments of Communications Workers of America, WT Docket No. 11-65 at 39 (FCC filed May 31, 2011).

b. The Regulation of Anticompetitive Practices Would be Insufficient to Prevent Abuse

A prohibition on exclusive arrangements with handset manufacturers and restrictions on pricing for roaming services would both be inadequate to prevent the harms of a severely concentrated wireless market. Control over access to new handsets is a major threat to competition in the wireless market. For example, in 2009 AT&T launched 15 smartphones, all of which it had exclusive contracts with.[107] Verizon, T-Mobile, and Sprint launched 17 new smartphones, but none of the regional or smaller carriers launched smartphones.[108] The use of exclusive handset agreements is a devastatingly anticompetitive tool in the wireless market, and the further consolidation of carriers would increase the potency of this tactic. Any attempt to remedy this merger proposal by including conditions would necessarily have to include a prohibition on exclusive handset agreements. However, this would not be sufficient to eliminate the threat to competition. Because the different carriers operate on different frequencies and use different technologies, handsets can be exclusive to a single carrier without formally establishing an exclusivity agreement. For example, AT&T could opt to buy only phones which solely support the frequencies and technologies they deploy and discontinue contracts with any companies that add support for another frequency.[109] While a prohibition on formal exclusivity agreements would be a positive step (and is something the Commission should consider independent of this merger), it would not be sufficient to eliminate the control over the market that a near duopoly could wield through its relationships with handset manufacturers.

Similarly, restrictions designed to ensure that competitors have reasonable access to roaming arrangements are unlikely to be effective. The FCC recently enacted measures designed to prevent the national carriers from excluding regional carriers.[110] Unfortunately, these measures will likely be inadequate to remedy the problems created by the merger. Regional carriers can only acquire national coverage from the national carriers.[111] Were AT&T and T-Mobile to merge, AT&T would be the sole provider of national GSM roaming services.[112] Prior to March 2011, AT&T refused to grant a single GSM roaming agreement to any company.[113] While the measures enacted by the FCC are designed to combat this blatant abuse of market position, they would be very difficult to enforce against an AT&T that holds a monopoly on GSM roaming. There would be no prices to measure AT&T's prices against, and the courts would be forced to rely on internal AT&T information to determine, on a case-by-case basis, whether their conduct is commercially reasonable.[114] This would be a slow and expensive mechanism for regional carriers to attempt to employ. An injunction ordering AT&T to sell roaming services to a small provider that takes two years to obtain will come two years too late to save the company.

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[107] 14 FCC REP., *supra* note 28, at Table C-5.
[108] *Id.*
[109] Petition of Cincinnati Bell, *supra* note 18, at 32.
[110] Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, WT Docket No. 05-265 at 1-2, 8 (FCC filed April 7, 2011).
[111] Petition to Deny of Leap Wireless, *supra* note 17, at 21.
[112] *Id.*
[113] Reexamination of Roaming Obligations, *supra* note 110, at 16-7.
[114] Petition to Deny of Leap Wireless, *supra* note 17, at 22.

c. AT&T Has a Long History of Evading Measures Designed to Curb Its Anticompetitive Behavior

Any condition would need to be considered in light of the reality that AT&T has historically evaded regulations and conditions that have been applied to it in attempts to restrict its anticompetitive conduct.[115] There is little reason to believe that even the most novel condition would prevent anticompetitive behavior when other attempts have met with little success. AT&T has been sued for the violation of a wide variety of merger conditions, settlements, and competitive agreements over the last several years.[116] AT&T has made it clear that its intention is to push, and even cross, the line created by the letter of the law when conditions are applied to it. AT&T appears to conduct a cost-benefit analysis of whether to comply or contest a condition, and it appears willing to accept some losses in court in order to preserve control over the market.

Fundamentally, conditions mean absolutely nothing if the corporation cannot be trusted to implement them and the regulatory agencies that enacted conditions do not have sufficient resources or capacity to police the companies' adherence to the agreed conditions. I fear that any conditions on this merger will likely be the focus of years of litigation, which ultimately will reduce the duration and effectiveness of these conditions.

d. Conditions Would Not Apply to Verizon

A de facto duopoly would not only increase AT&T's ability to abuse its market position, it would also increase Verizon's ability to do so. Conditions attached to an AT&T/T-Mobile merger could not alleviate the threat posed by the possibility of Verizon abusing its own position in an effective duopoly.

V. CONCLUSION

Thirty-three million Americans have made the decision to purchase wireless service from T-Mobile rather than AT&T.[117] These consumers prefer T-Mobile over AT&T for a wide variety of reasons. Some of them prefer T-Mobile's less expensive plans, some find its network to be superior, some prefer the handsets that T-Mobile offers, and some prefer T-Mobile's customer service. AT&T can acquire these customers at any time by offering a better product, improving its network, lowering prices, or providing better customer service. Unfortunately, competing for customers has never been AT&T's preferred method of acquiring customers. Instead, it has acquired most of its customers both in the wired and wireless markets through mergers and exclusive agreements. American consumers rely on the DOJ and the FCC to protect competition. It is only through competition that wireless spectrum usage will become more efficient, handsets more innovative, customer service more responsive, network coverage broader, and prices lower. With the expiration of AT&T's exclusive arrangement to distribute the iPhone, AT&T is perhaps realizing that it may have difficulty retaining customers, let alone acquiring new customers, in a competitive market. AT&T should tackle that challenge by

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[115] Reply of TelLAWCom Labs Inc, WT Docket No. 11-65 (FCC filed May 30, 2011) (describing dozens of incidents in which AT&T has breached various competitive agreements).

[116] *Id.*

[117] Press Release, T-Mobile, T-Mobile USA Reports Fourth Quarter 2010 Results (Feb. 25, 2011), *available at* http://www.businesswire.com/news/home/20110224007281/en/T-Mobile-USA-Reports-Fourth-Quarter-2010-Results.

building out its current spectrum holdings in rural and urban areas and by providing better customer service at a lower price, not by attempting to remove one of the few independent competitors from the wireless industry.

The merger of AT&T and T-Mobile would be a major step towards the creation of an entrenched duopoly in the wireless industry. It would concentrate enormous power over the entire telecommunications sector in the hands of only two companies, and it would incentivize AT&T and Verizon to coordinate prices to the detriment of consumers. I also fear it would only be a matter of months before Sprint is so marginalized that it becomes an acquisition target. Given the central role that telecommunications plays in the 21st century American economy as a whole, I urge you to do everything you can to protect competition in the wireless market. It would create an unreasonable risk to the economy to entrust too much power over such a crucial industry to a company that has a history of market domination. This transaction is not in the public interest. If approved, it would result in greatly reduced competition, the potential loss of thousands of jobs, higher consumer prices, and less innovation in technology. I urge the FCC and the DOJ to deny AT&T's application for approval of its acquisition of T-Mobile.

Thank you for your prompt consideration of this matter.

Sincerely,

Al Franken

Al Franken
United States Senator