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

In the Matter of Application for Consent To Transfer of Control Filed By AT&T Inc. and Deutsche Telekom AG	)))))))	WT Docket No. 11-65

COMMENTS OF ACCESS POINT, INC. AND ACN COMMUNICATIONS SERVICES, INC.

Access Point, Inc. ("API") and ACN Communications Services, Inc. ("ACN") (API ands ACN, jointly "Joint Commenters"), pursuant to the Commission's Public Notice, DA 11-799 (April 28, 2011), respectfully submit these comments concerning the applications of AT&T, Inc. ("AT&T") and Deutsche Telekom AG ("Deutsche Telekom") concerning the proposed acquisition of T-Mobile USA ("T-Mobile") by AT&T.

I. BACKGROUND ON API AND ACN

API, a North Carolina corporation formed in 1996, is a complete business communications provider offering multiple services nationwide. In addition to Local and Long Distance services, API offers VoIP, Integrated, Internet and Managed Data services.

Since its inception, ACN has positioned itself to be an alternative for consumers and businesses that want superior, personalized attention and responsive customer service along with competitive market pricing. ACN, a privately-held company founded in 1993, is a global conglomerate providing telecommunications and home services to customers in 23 countries spanning North America, Europe, Asia and Asia-Pacific. ACN is the world's largest direct selling telecommunications and home services provider.

As non-facilities-based CLECs, API and ACN serve their customers predominantly through commercial agreements with the largest incumbent LECs, including AT&T.

II. THE PROPOSED MERGER WOULD INCREASE AT&T'S MARKET POWER IN THE BROADBAND MARKETPLACE

AT&T and T-Mobile are both broadband providers. AT&T provides both fixed broadband and wireless broadband, while T-Mobile provides only wireless broadband. For many purposes, wireless broadband and fixed broadband are now interchangeable. For example, while at one time, wireless broadband did not offer speeds high enough to stream video content, a recent T-Mobile press release asserts that T-Mobile offers download speeds of up to 42 Mbps in 55 markets, including Atlanta, Ga.; Chicago, Ill.; Denver, Colo.; Detroit, Mich.; Dallas and Houston, Texas; Los Angeles, Calif.; Miami, Fla.; New Orleans, La.; Phoenix, Ariz.; Pittsburgh, Pa.; Portland, Ore.; and San Francisco, Calif.[1]

The Application is strangely silent as to the current market shares of AT&T and T-Mobile in the broadband market. As the Commission has established, "applicants carry the burden of showing that the proposed merger will not eliminate potentially significant sources of competition," including in related markets.[2] Applicants' failure to provide market share or other data regarding the broadband and wireless data markets denies the Commission the means of determining, as it must, that the merger will not eliminate significant competition in those markets.

Nevertheless, some relevant data is publicly available. AT&T's 2010 Annual Report reflects that AT&T had 17,755,000 broadband landline connections and 68,041,000 postpaid wireless customers, of which 61% (approximately 41,500,000) had data plans.[3] T-Mobile's 2010 Annual Report does not contain similar data, although the Annual Report states that T-Mobile USA derived 16.1 billion Euros in total revenue.[4] Confidential data provided in ¶ 125 of the Carlton Declaration regarding the percentage of T-Mobile's wireless revenue that is data

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[1] See Attachment A.

[2] *Merger of NYNEX and Bell Atlantic*, 12 FCC Rcd 19985 (August 14, 1997) at ¶ 3.

[3] AT&T's 2010 Annual Report at 26, 30, 34. The Annual Report does not disclose how many of AT&T's 11,645,000 reseller wireless customers also had data plans. *See id.* at 34.

[4] T-Mobile Annual Report at 89.

revenue would enable the Commission to estimate T-Mobile's data revenues, demonstrating that there are currently a very large number of T-Mobile data customers. While despite this, Applicants try to downplay T-Mobile's volumes in data, T-Mobile declarant Larsen asserts that T-Mobile's data traffic is expected to grow by at least 2000% between 2010 and 2015, a rate of growth that is more than twice as fast as AT&T's.[5]

By acquiring the large and rapidly growing group of T-Mobile broadband customers, AT&T will have increased incentive and power to discriminate against its competitors in the broadband market, such as competitors offering or seeking to offer DSL. In any event, it is clear that the merged entity will have power and leverage in the broadband marketplace that significantly exceeds the power and leverage that either AT&T or T-Mobile has today.

III. BROADBAND DSL SERVICES ARE CRITICALLY IMPORTANT TO JOINT COMMENTERS

Broadband DSL service, resold from incumbent LECs other than AT&T, is one of the most important products that Joint Commenters provide to their customers. To compete for and win the business of such customers, Joint Commenters find it very important to be able to offer competitive voice and data services. AT&T, which is Joint Commenters' principal rival in its 22-state region, markets to consumers and businesses by bundling voice services with DSL.[6] AT&T's ability to bundle DSL service with its wireline voice at discount rates offering puts competitors at a distinct competitive disadvantage, not only with respect to DSL service, but also with respect to voice service.

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[5] *Compare* Larsen Declaration, ¶ 15 ("By 2015, T-Mobile USA expects data traffic on its network to be at least 20 times that of the 2010 level") *with* Moore Declaration, ¶ 6 ("By 2015, AT&T estimates that mobile data traffic on its network will reach eight to ten times what it was in 2010").

[6] For example, the following link reflects AT&T's offering of bundles of wireless, DSL, and voice services to small businesses in the former BellSouth region: http://smallbusiness.bellsouth.com/bundles_services.html. AT&T makes similar bundled offers to residential and small business customers throughout AT&T's 22-state wireline territory.

IV. AT&T'S REFUSAL TO OFFER DSL SERVICE

Throughout the country, Joint Commenters have been able to obtain DSL for services for resale on a financially viable basis from RBOCs, with the notable exception of AT&T. Indeed, while Verizon and CenturyLink provide viable resale solutions for DSL, AT&T has no such offering. For Joint Commenters to purchase AT&T's wholesale DSL product they are forced to purchase two lines, one for voice and one for data, as opposed to being able to purchase a single line with both voice and data services. This makes the combined offering (voice and broadband) uncompetitive from a price and customer convenience perspective when compared to AT&T's bundled voice and DSL offering using a single line.

This additional line is not only wasteful and inefficient, but in many instances, it causes additional and unnecessary inconveniences for Joint Commenters' customers, who endure longer downtime related to the installation and provisioning of the additional line. Moreover, some customers do not have existing facilities that will permit adding the additional line for DSL services. As such, if the customer wants to use API or ACN as its provider for voice and DSL services, additional facilities would need to be constructed for the DSL service. If AT&T were to sell API or ACN a single line that included voice and DSL services (as do the other RBOCs), the additional facilities would not need to be constructed.

By bundling DSL and voice service, AT&T has improperly enhanced its substantial market power in the voice market and has significantly impeded Joint Commenters' ability to sell voice and data services to residential and business customers. AT&T's refusal to make its line split DSL offering available via a wholesale agreement not only stifles competition in the wireline voice market, but is also incompatible with the Commission's goal of promoting widespread availability of broadband at affordable prices.

AT&T voluntarily sells line split DSL service to its voice customers. It may therefore be presumed that AT&T earns a profit selling this service. It could earn that same profit by selling the same line split DSL service to end users served by Joint Commenters or other CLECs using a single AT&T loop. Further support for the inference that selling line split DSL is profitable is found in the fact that other RBOCs, including Verizon and CenturyLink, sell this service without voice service.[7]

The fact that AT&T is foregoing this short-term profit from selling line split DSL implies that AT&T expects to recoup this lost short term profit over the long run by driving competitors like API and ACN out of the business for customers that wish to purchase bundled voice and broadband services. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985), the Supreme Court found that exclusionary conduct not justified by any normal business purpose violated the antitrust laws. Upholding a jury verdict in favor of the plaintiff, the Supreme Court opined that "[t]he jury may well have concluded that [the defendant] elected to forgo … short-run benefits because it was more interested in reducing competition … over the long run by harming its smaller competitor."

This is precisely the case here. AT&T's refusal to sell DSL to CLECs is characterized by the same type of turning away of short-term profits in favor of driving out competitors and earning increased long-run profits. The profits that AT&T makes in selling DSL to end users that purchase voice service from AT&T would not disappear simply because the end user purchases voice service from a CLEC. It is inescapable that AT&T's refusal to sell line split DSL sacrifices AT&T's short-term profits " it was more interested in reducing competition … over the long run by harming its smaller competitor," such as API and ACN. The Commission should not allow these anticompetitive tactics that are designed to impede competition in the market for voice services, particularly in the market for voice services.

V. THE MERGER WILL ENHANCE AT&T'S INCENTIVE AND ABILITY TO EXCLUDE COMPETITION FROM THE BROADBAND MARKETPLACE

The increased broadband market share that the merged company will have will increase

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[7] Indeed, Verizon offers DSL service to wholesale customers to resell on a "White Label" basis. See http://www. Prnnewswire.com/news-releases/verizon-global-wholesale-expands-high-speedinternet-portfolio-with-white-label-options-98921929.html. CenturyLink similarly offers CLECs a combined voice and DSL product over a single line. http://embarq.centurylink.com/Business/BundledServicesBusinessBundle.

both AT&T's *incentive* and its *ability* to exclude competition from the broadband marketplace. Today, T-Mobile has the *ability* to offer its broadband service on a wholesale basis to Joint Commenters and other CLECs in competition with AT&T. If, however, the merger is allowed and no conditions prevent it from doing so, T-Mobile will surely take the same approach as AT&T, enhancing AT&T's efforts to withhold broadband from wholesale customers. The merger also increases AT&T's *incentive* to withhold broadband from CLECs. This is because the broadband customer that the CLEC gains by wholesale purchase from AT&T may mean a lost broadband customer, not only for AT&T, but also for T-Mobile.

While it is true that as shown above, AT&T is already discriminating against wholesale purchasers of broadband, the Commission has recognized that by providing an increased incentive to discriminate, a merger can increase discrimination because the merging parties:

> may not be discriminating to the full extent of their ability. For example, the benefits of increased levels of discrimination may not justify the increased financial costs and corresponding risks of detection and punishment. . . . the merger, by increasing the incentive to discriminate, probably will result in the merged entity further exploiting its ability to discriminate against retail rivals.[8]

VI. IF THE COMMISSION APPROVES THE TRANSACTION, THE MERGED COMPANY MUST BE SUBJECT TO MEANINGFUL CONDITIONS ON THE PROVISION OF DSL SERVICES

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.

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[8] *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 191 (1999).

It is of great importance that Joint Commenters and 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 Commission approve the transaction, Joint Commenters request 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.

VII. CONCLUSION

For the foregoing reasons, Joint Commenters request that, if the Commission approves the transaction between AT&T and T-Mobile, such approval include the conditions discussed herein.

Respectfully submitted,

/s/ Eric J. Branfman

Eric J. Branfman
BINGHAM MCCUTCHEN, LLP
2020 K St., NW
Washington DC 20006
202.373.6000
202.373.6001
eric.branfman@bingham.com
Counsel for Access Point, Inc. and ACN Communications Services, Inc.

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SERVICE LIST

I, M. Renee Britt, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Comments of Access Point Inc. and ACN Communications Services, Inc. to be served, as specified, upon the parties listed below:

Peter J. Schildkraut Scott Feira Arnold & Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter_schildkraut@aporter.com scott_feira@aporter.com *Outside Counsel to AT&T Inc.* **(Via Electronic Mail)**	Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com *Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.* **(Via Electronic Mail)**
Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov **(Via Electronic Mail)**	Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov **(Via Electronic Mail)**
David Krech, Policy Division International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 david.krech@fcc.gov **(Via Electronic Mail)**	Jim Bird, Office of General Counsel Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 jim.bird@fcc.gov **(Via Electronic Mail)**
Best Copy and Printing, Inc. 445 12th St., S.W. Washington, D.C. 20554 FCC@BCPIWEB.COM **(Via Electronic Mail)**	

/s/ M. Renee Britt
M. Renee Britt