

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**COMMENTS OF FIBERTECH NETWORKS, LLC**

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Fibertech Networks, LLC, on behalf of itself and its subsidiary Fiber Technologies Networks, L.L.C. (jointly referred to herein as “Fibertech”), submits the following comments (“Comments”) regarding the application of AT&T Inc. and Deutsche Telekom AG to transfer control of T-Mobile USA, Inc. to AT&T.

Fibertech Networks, through its various operating subsidiaries, has constructed and operates high-capacity metro area networks, including fiber rings, to meet the communications and broadband needs of telecommunications carriers, other business entities, and educational, governmental, and health-care institutions.

Fibertech is a leader in designing, installing, and operating high-capacity metro fiber optic networks in the Eastern and Central United States. Fibertech currently operates networks in 22 U.S. cities and has deployed approximately 7,000 route miles of fiber. Fibertech builds diverse-route “open access” networks that connect ILEC central offices, carrier hotels, data centers, and other traffic aggregation points, enabling numerous telecommunications and Internet service providers to offer facilities-based services. It also installs “last mile” facilities to bring all-fiber connections directly to its retail customers and as metropolitan Ethernet loops to permit other telecommunications companies to serve their customers cost-effectively over an all-fiber network. Fibertech is focused on bringing its service to underserved mid-sized cities that lack the range of fiber services often available in major metropolitan centers. Fibertech today serves all major long distance carriers, many CLECs, wireless carriers and a growing list of enterprise customers. Within its general business, Fibertech currently provides fiber-based bandwidth to T-Mobile, primarily for cell site backhaul. Fibertech has invested a great deal of capital to extend fiber networks out to T-Mobile cell towers across a number of markets to facilitate T-Mobile’s rapidly growing mobile data requirements.

**I. Introduction and Summary— Absent Imposition of Conditions Designed to Prevent and Offset Competitive Harms, the Proposed Merger Would Permit AT&T Unlawfully to Control the Special Access Market to the Detriment of Competition in the Special Access Market and the Retail Wireless Market**

AT&T's proposed acquisition of the nation's fourth largest wireless carrier will provide AT&T an opportunity to maintain and increase its monopoly power. While the Commission's primary focus will likely be on a competitive analysis of the retail wireless market, it must also consider the merger's impact on the closely related upstream market for backhaul of wireless calls from the cell tower to the wireline network. This backhaul is also known as special access. As described below, any such impact on the market for backhaul services is significant not only because healthy competition in the special access market is important in itself but also because competition in special access is a critical factor in preserving a competitive retail wireless market.

The special access market in the 22-state AT&T ILEC region is affected by this merger because T-Mobile is currently a large purchaser in this market, primarily from AT&T but also from a number of third party providers, including Fibertech. Post-merger, T-Mobile can be expected to buy backhaul exclusively from AT&T throughout AT&T's 22-state ILEC territory, thus foreclosing Fibertech and other third parties from competing for T-Mobile's business in that territory. Indeed, AT&T cites the cost savings the merged company will realize "from a reduction in interconnection and toll expenses as a result of switching to existing AT&T facilities where possible for transport."<sup>1</sup>

Because AT&T, as seller of wireless backhaul, is acquiring what is likely one of the two largest independent buyers of wireless backhaul, this is a vertical merger in which AT&T is adding to what is already a monopoly share of the overall special access market in its ILEC

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<sup>1</sup> Moore Declaration at ¶ 34.

territory, that is likely in the range of 90%, by acquiring one of the largest customers. This increase of an already monopolistic market share by merger is not in the public interest. The disappearance of T-Mobile's demand from the competitive market is likely to deny competitive providers of special access the minimum viable scale that they need to compete with AT&T in the special access market in AT&T's 22-state region. Competitive special access providers likely will significantly scale back their investment in competitive fiber infrastructure deployment to serve both wireless customers and other business that they pass along the way or exit that market altogether. As a result, the few remaining customers for independent special access services (including the handful of remaining independent wireless providers that will be, post-merger, dividing up the approximately 20% of the market not controlled post-merger by AT&T and Verizon) will have reduced choices for their special access needs and in AT&T's 22-state territory will have little alternative to AT&T's monopoly services for infrastructure. This will begin a vicious cycle: as more customers commit more of their special access needs to AT&T, the supply of competitive special access providers and facilities will dry up, furthering the flight of special access customers into the arms of the monopoly provider AT&T. In short, this is a classic vertical merger case that has the potential to harm competition by radically altering the acquired downstream company's purchasing pattern.

These changes will also affect the downstream wireless market. In addition to directly increasing its market share by purchasing one of its largest competitors,<sup>2</sup> AT&T's tightening control of the special access market will enable AT&T to raise the costs of its rivals in the

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<sup>2</sup> The Applicants have said that T-Mobile has an 11% share of the wireless market. AT&T's market share is approximately 30% according to the Commission's Fourteenth Wireless Competition report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to*

wireless market. The Commission has expressed its concern for such possibility, explaining that “cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace.”<sup>3</sup>

Backhaul is a critical upstream input into the wireless market. The Commission has confirmed this in its most recent annual wireless report. T-Mobile has also provided ample evidence that backhaul is a critical input to its wireless service, and its availability “at reasonable rates, terms, and conditions” is a precondition to the existence of “choice among [wireless] service providers.”<sup>4</sup> And Sprint has explained that one-third of its cost of running a cellular site is backhaul.<sup>5</sup>

By denying competing providers of backhaul services the minimum viable scale needed to compete in the backhaul market, the merger threatens to vest AT&T with absolute control in its 22-state region over this critical input into wireless service that comprises approximately one-third of its rivals' costs. That AT&T already has significant market power in the provision of special access is demonstrated by the fact that it has been able to charge special access prices that have yielded a rate of return of 138% according to the latest available ARMIS data.<sup>6</sup> T-Mobile,

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*Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81 at p. 31, Table 3 (rel. May 20, 2010) (“*Fourteenth Report*”).

<sup>3</sup> *Id.* ¶ 296.

<sup>4</sup> Reply Comments of T-Mobile, USA, Inc., WC Docket No. 05-25 (February 24, 2010) (T-Mobile 2010 Reply Comments”), at 2; *see id.* at 5 (“without sufficient and reasonably priced backhaul, no network can provide the types of mobile data and voice that customers are increasingly demanding . .”).

<sup>5</sup> Roger Cheng, *AT&T/T-Mobile Deal Reviving Debate Over Special Access*, Wall Street Journal, May 24, 2011 (quoting Paul Schieber, network executive for Sprint, that “a third of the expense to run a cellular site goes to purchasing special access for the backhaul connection.”) found at <http://online.wsj.com/article/BT-CO-20110524-712717.html>.

<sup>6</sup> Economics and Technology, Inc., “Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS,” Attachment A to Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25 (January 19, 2010), at p. 3.

among others, has recognized that the lack of both competition and regulation has led to what it has described as “extremely high,” “supra-competitive” backhaul prices.<sup>7</sup> Following the deregulation of AT&T’s rates, terms and conditions for DS1 and DS3 services<sup>8</sup> and its OCn and Ethernet special access services used for backhaul,<sup>9</sup> AT&T is poised to increase its dominance of the special access market if it is allowed, by acquiring T-Mobile, to take from its few, relatively small competitors in the supply of backhaul, a major part of their backhaul business.

Remove or weaken some of those few competitors by denying them minimum viable scale and the result is that AT&T may well have the power to squeeze out Sprint and the remaining smaller wireless competitors by charging ever increasing prices for backhaul. The result will be a duopoly, in which only AT&T and Verizon are likely to remain viable as the result of lack of competition among backhaul providers that will be available to competitive wireless firms.

## **II. Legal Standard**

The FCC’s “competitive analysis ... forms an important part of the public interest evaluation” the Commission undertakes in its merger review and “is informed by but not limited to traditional antitrust principles.”<sup>10</sup> Under this competitive analysis, “the Commission considers whether a transaction will enhance, rather than merely preserve, existing competition.”<sup>11</sup> One

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<sup>7</sup> Reply Comments of T-Mobile, USA, Inc., WC Docket No. 05-25 (August 15, 2007) (“T-Mobile 2007 Reply Comments”) at 2; T-Mobile 2010 Reply Comments at 2.

<sup>8</sup> *Access Charge Reform*, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”).

<sup>9</sup> *Petition of AT&T Inc. for Forbearance Under 47 USC Section 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705 (2007).

<sup>10</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4, at ¶ 24 (rel. Jan. 20, 2011) (“*Comcast/NBCU Order*”).

<sup>11</sup> *Comcast/NBCU Order*, ¶ 24.

step in the competitive analysis in cases in which the merging parties buy from or sell to each other is the assessment of “the potential competitive harms from the vertical aspects of the transaction.”<sup>12</sup>

The Commission’s competitive analysis – particularly the analysis of vertical harms – requires an examination of AT&T’s existing market power and the impact of the merger on that market power. Market power is typically defined as a firm’s ability to “exclude competition or control prices.”<sup>13</sup> The Commission’s assessment of whether an ILEC has market power does not rest solely on market share,<sup>14</sup> although high market share can be indicative of market power.<sup>15</sup> Antitrust jurisprudence has, however, long established that high market share alone is enough to indicate the existence of monopoly power.<sup>16</sup> The courts have long held that under a traditional antitrust analysis, a high market share demonstrates monopoly power.<sup>17</sup> Nonetheless, because the Commission’s analysis under the public interest standard is not a pure antitrust evaluation, the Commission “has never viewed market share as an essential factor.”<sup>18</sup>

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<sup>12</sup> *Id.* ¶ 26.

<sup>13</sup> *Id.* ¶ 29, citing *DOJ/FTC Horizontal Merger Guidelines*; see also *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

<sup>14</sup> See *AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001)

<sup>15</sup> See *United States v. General Dynamics*, 415 U.S. 486, 498, (1974).

<sup>16</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (holding that the existence of monopoly “power ordinarily may be inferred from the predominant share of the market” and that the fact that one participant in the market held a market share of 87% left “no doubt” that it possessed “monopoly power.”).

<sup>17</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (80% market share established monopoly power); *Weiss v. York Hospital*, 745 F.2d 786, 827 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985) (market share of 80% was sufficient to establish monopoly power); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over two-thirds of the market is a monopoly).

<sup>18</sup> *AT&T v. FCC*, 236 F.3d at 729.

The Commission’s inquiry therefore examines other factors in addition to market share.<sup>19</sup> The Commission’s market power analysis begins “by defining the relevant product markets and relevant geographic markets,” then identifying “market participants and examin[ing] market concentration,” and “whether entry conditions are such that new competitors could likely enter” and defeat any attempt of the dominant carrier to impose price increases and other anti-competitive conditions.<sup>20</sup>

### **III. Market Analysis**

#### **A. Product Market**

The Commission’s competitive analysis, consistent with recognized principles of antitrust law, examines the merger’s impact on competition in relevant product markets. Under applicable precedent, a “relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a ‘small but significant and nontransitory’ increase in price.”<sup>21</sup>

The Commission analyzes the appropriate product market “from the perspective of customer demand.”<sup>22</sup> The Commission has typically recognized that “competition depends on consumers having choices between products that are fairly good substitutes for each other.”<sup>23</sup> In markets in which such choices exist, “a single provider cannot raise its prices above a

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<sup>19</sup> *Id.* at 737.

<sup>20</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18304 ¶ 23 (2005) (“*SBC/AT&T Merger Order*”).

<sup>21</sup> *Id.* at n. 83, *citing* Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (Horizontal Merger Guidelines); *see also Application of Echostar Communications Corp.*, 17 FCC Rcd 20559, 20605-6, ¶ 106 (2002) (“*Echostar*”).

<sup>22</sup> *SBC/AT&T Merger Order*, ¶ 83.

<sup>23</sup> *Echostar*, 17 FCC Rcd at 20603 ¶ 97.

competitive level because consumers will switch to a substitute.”<sup>24</sup>

Under these principles, a specific service or specific set of services represents a distinct product market if a hypothetical monopoly provider of those specific services could profitably sustain a non-transient, nontrivial price increase — that is, if the monopolist’s profits after the price increase would exceed the monopolist’s profits before the price increase.<sup>25</sup> If the price increase caused enough buyers to shift their purchases to a second product to render the increase unprofitable, then the second product should be considered to be part of the same product market. Moreover, absent a quantitative determination of whether two services are part of the same product market, courts have generally included products in the same market if they are “reasonably interchangeable” in their use.<sup>26</sup> Thus, where “one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market.”<sup>27</sup>

### **1. Special Access Market**

The primary product at issue is special access. Wireless carriers use special access services as “backhaul connections” that “link [their] cell sites to wireline networks, carrying wireless voice and data traffic for routing and onward transmission.”<sup>28</sup> Wireless providers “purchase special access services, including DS1s and DS3s, from third parties for backhaul.”<sup>29</sup>

The Commission has recognized that costs for backhaul “currently constitute a significant

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<sup>24</sup> *Id.*

<sup>25</sup> Horizontal Merger Guidelines, at 20,572 § 1.0 (defining the relevant product market as “a product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products (‘monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price”).

<sup>26</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

<sup>27</sup> *Echostar*, 17 FCC Rcd at 20606 ¶ 106.

<sup>28</sup> *Fourteenth Report*, ¶ 293.

<sup>29</sup> *Id.* ¶ 295.

portion of a mobile wireless operator's network operating expense"<sup>30</sup> and that access to "sufficient backhaul for wireless service" will "become more critical over time" because of the explosion in data services such as streaming video and Internet browsing.<sup>31</sup> These data-intensive services "have lead to increased demands on backhaul capacity, making access to sufficient backhaul an increasingly central component of a mobile wireless provider's overall performance."<sup>32</sup> According to an article in the *Wall Street Journal*, Sprint has stated that backhaul is one third of its expense in running a cellular site.<sup>33</sup>

With the growing importance of wireless backhaul and the increased demand for wireless backhaul capacity, wireless providers are the largest special access customers for both AT&T and also its third party competitors, and their importance as buyers of special access is growing rapidly, and is expected to continue to grow rapidly.<sup>34</sup> T-Mobile states that "[b]y 2015," it "expects data traffic on its network to be at least 20 times that of the 2010 level."<sup>35</sup>

As the Commission held in the *SBC-AT&T Merger Order*, there "is significant evidence that supports separate analysis of several special access product markets."<sup>36</sup> Pursuant to such an analysis, the Commission has established that the special access service market typically consists of separate segments, including local transport mileage and a "'last mile' connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user

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<sup>30</sup> *Id.* ¶ 296.

<sup>31</sup> *Id.* p. 17.

<sup>32</sup> *Id.* ¶ 297.

<sup>33</sup> n. 5 *supra*.

<sup>34</sup> *Id.* ¶ 296 n. 785 citing Verizon Wireless Comments at 95-96 that according to a market analyst "the size of the backhaul market will grow from \$3 billion annually to \$8 to \$10 Billion in the next three to five years.").

<sup>35</sup> Larsen Decl. ¶ 13.

<sup>36</sup> *SBC/AT&T Merger Order*, 20 FCC Rcd at 18305, ¶ 25.

customer.”<sup>37</sup>

**a. The Commission Should Consider Separate Product Markets Based on Capacity**

In addition to examining loops and transport as separate product markets, the Commission must separately evaluate product markets by capacity level. The Commission has found that “different capacity circuits are likely to constitute separate relevant product markets.”<sup>38</sup> While the Commission previously has elected, for administrability reasons,<sup>39</sup> not to evaluate distinct capacity levels as separate product markets, it would be fundamentally at odds with sound principles of product market analysis to fail to perform such evaluations when administratively feasible.

A DS1 loop, for example, is not a substitute for a DS3 loop, which has far more capacity. Similarly, because of the significant price difference, a DS3 loop cannot reasonably be considered a substitute for a DS1 loop. This same capacity level analysis should be applied in the transport market as well. In addition, because Fibertech proposes that the Commission eliminate the forbearance granted the BOCs for Ethernet and OCn level special access services,<sup>40</sup> the Commission’s market-power analysis should separately analyze competition for OCn level services (at least OC3, OC12 and OC48) and Ethernet services. The Ethernet market should also distinguish between mid-band Ethernet and high capacity Ethernet. Finally, because competitors with access to dark fiber can reasonably deploy their own services by leasing dark fiber and deploying their own optronics, the Commission’s evaluation should consider whether dark fiber is available to competitors and consider that in its competitive analysis.

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<sup>37</sup> *Id.*

<sup>38</sup> *SBC/AT&T Merger Order*, 20 FCC Rcd at 18306, n.90.

<sup>39</sup> *Id.*

## 2. The Competitive Analysis of the Special Access Market Should not Include Fringe Competitors

In its market analysis, the Commission need not consider fringe competition from so-called nascent services, such as Wi-Max, fixed wireless, satellite, and broadband over powerline. Although the applicants are likely to point to such services, the market shares of these competitors is infinitesimally small. T-Mobile has informed the Commission in WC Docket 05-25 that its use of alternative technologies “amount to approximately one percent of T-Mobile’s special access needs.”<sup>41</sup> As the Department of Justice (“DOJ”) has recognized, because none of these services has ever been shown to generate a “substantial share” of the market, it is likely that their presence in the market will not impede the ILEC’s “ability to raise prices without losing sufficient sales.”<sup>42</sup> In addition to their lack of substantial market presence, the lack of brand presence by these competitors and the “superior capacity and coverage” of AT&T’s network renders these “fringe” competitors unlikely to “prevent anticompetitive behavior” that otherwise would occur in a monopoly market.<sup>43</sup> In the special access market, and even among wireless providers that use special access for backhaul, these nascent technologies do not provide significant competition.<sup>44</sup>

Sprint, for example, has explained that “[m]icrowave backhaul cannot completely replace wireline special access services,” because of concerns regarding topology, economic efficiency,

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<sup>40</sup> See n. 9 *supra*.

<sup>41</sup> T-Mobile 2007 Reply Comments at 3; see T-Mobile 2010 Reply comments at 4 (“self-provisioning, using fixed microwave links or otherwise” is not “a viable alternative.”)

<sup>42</sup> See *MCI-Sprint* DOJ Complaint, ¶ 70.

<sup>43</sup> *Id.* at ¶ 71.

<sup>44</sup> See Clearwire Reply Comments, WC Docket No. 05-25 (August 15, 2007) (explaining how WiMax is not a viable backhaul competitor).

equipment costs and service availability.<sup>45</sup> It is Fibertech’s experience that compared to fixed wireless backhaul, retail wireless providers continue to favor the security, reliability and scalability of fiber-based services to support their customers’ rapidly expanding use of mobile data services.

**B. The Geographic Market Consists of Customer Locations and Transport Routes Within the AT&T 22 State ILEC Footprint**

The Commission has previously defined a geographic market for purposes of analyzing competition as the market “in which the seller operates, and to which the purchaser can practicably turn for supplies.”<sup>46</sup> The Commission has further determined that “the relevant geographic market for wholesale special access services is a particular customer’s location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a ‘small but significant and nontransitory increase in the price of special access service.’”<sup>47</sup>

The Commission should, consistent with precedent, analyze competition in the transport market on a route by route basis. The Commission recognized the need for a route-by-route analysis in the *Triennial Review Remand Order*,<sup>48</sup> and the same logic applies here. The

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<sup>45</sup> See *Ex parte* Letter from Charles W. McKee, Sprint to Marlene H. Dortch, FCC, WC Docket No. 05-25 (filed April 6, 2010).

<sup>46</sup> *Echostar*, 17 FCC Rcd at 20609, ¶ 117 citing *Grinnell*, 384 U.S. at 588-89 (1966) and *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

<sup>47</sup> *SBC/AT&T Merger Order* 20 FCC Rcd at p. 18307, ¶ 28; see T-Mobile 2010 Reply Comments, WC Docket No. 05-25 at 3 (competition in backhaul “can vary dramatically in very small areas because the geographic markets for such connectivity are inherently local.”).

<sup>48</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533 ¶ 80 (2005), *aff’d sub nom. Covad Comm’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“*TRRO*”).

Commission has long identified “transport as a link between two points.”<sup>49</sup> As the Commission correctly observed, “individual routes, even within the same larger geographic area, may have very different economic characteristics.”<sup>50</sup> Thus, each “point-to-point market constitute[s] a separate geographic market.”<sup>51</sup>

MSAs are an inappropriate geographic market for the special access analysis because they are prone to overbroad analysis.<sup>52</sup> The Commission correctly concluded that the “wide variability in market characteristics within an MSA” that usually includes both rural and urban populations, “MSA-wide conclusions would substantially over-predict the presence of actual deployment.”<sup>53</sup>

While the building and the route remain the appropriate geographic markets for the analysis of the merger’s impact on the special access market, this analysis should be limited to buildings and routes in AT&T’s 22-state ILEC footprint. It is in these markets, where AT&T maintains its monopoly, that AT&T has the ability to impede competition in the special access market and, through its control of the upstream special access market for backhaul, raise the costs of its rivals in the downstream wireless market.

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<sup>49</sup> *TRRO* ¶ 80 citing *LEC Classification Order*, 12 FCC Rcd 15756, 15762 ¶ 5, 15793 ¶ 65 (1997).

<sup>50</sup> *Id.* Thus, it would make little sense to evaluate whether competition exists on a point to point route by examining only one end point, even though that is what is required under the Commission’s existing pricing flexibility analysis which looks solely at collocation in a single central office instead of examining whether a competitor offers service between two BOC central offices.

<sup>51</sup> *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 20016-17 ¶ 54 (1997).

<sup>52</sup> *Id.* ¶ 82.

<sup>53</sup> *Id.*

### C. Market Share

Market share, while not indispensable to market power analysis, is an important component of the Commission's market power analysis because it examines the level of concentration in a market, and "concentration in the relevant markets is one indicator" of the potential for anti-competitive conditions.<sup>54</sup>

Although courts "have not yet identified a precise level at which monopoly power will be inferred,"<sup>55</sup> a 75% share is generally considered sufficient to raise a presumption of monopoly.<sup>56</sup> Some sources place the threshold at 66%<sup>57</sup> or lower. AT&T's share of the special access market within its ILEC footprint far exceeds any of these thresholds. AT&T is not merely dominant, as might be argued for a firm at the lower side of the threshold, but super-dominant, with 90%-plus shares that have remained stable over long periods of time.

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<sup>54</sup> See *Echostar*, 17 FCC Rcd at 20614 ¶ 133.

<sup>55</sup> SECTION OF ANTITRUST LAW, AM. BAR ASS'N, MARKET POWER HANDBOOK 19–20 (2005) (footnote omitted).

<sup>56</sup> See, e.g., *U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187-188 (3d Cir. 2005) ("[A] persistently high market share between 75% and 80% on a revenue basis" is "more than adequate to establish a prima facie case of power"); *U.S. v. Microsoft Corp.*, 253 F.3d 34, 51-53 (D.C. Cir. 2001) ("Monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers" and was present where Microsoft possessed a share of computer operating systems that was either 80% or 95%, depending upon whether one did or did not count Apple computers (in the 1990s) as part of the market); see also *Microsoft*, 253 F.3d at 54 (citing *Grinnell*, 384 U.S. at 571 (87% is presumed dominant); *Eastman Kodak*, 504 U.S. at 481 (80%); *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (75%).

<sup>57</sup> In its 2008 Single-Firm Conduct Report, the DOJ concluded that "[i]f a firm has maintained a market share in excess of two-thirds for a significant period and the firm's market share is unlikely to be eroded in the near future, the Department [of Justice] believes that such facts ordinarily should establish a rebuttable presumption that the firm possesses monopoly power." U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), at p. 30 (collecting cases and commentary showing that this is a consensus view). This Report was withdrawn in May 2009 but this particular conclusion was not rejected. In fact, DOJ leadership stated that the reason for the withdrawal was that the Report was not sufficiently aggressive toward monopolists, and that DOJ believed it needed

Whether measured by buildings served, Herfindahl-Hirschman Index concentration measurements, responses to requests for bids, or other indicia of market share, AT&T has a market share in the vicinity of 90% or higher in each of the product markets defined above. In 2003 the Commission found that “between 3% and 5% of the nation’s commercial office buildings are served by competitor-owned fiber loops.”<sup>58</sup> In 2010 Sprint Nextel, a major wireless company and a large buyer of special access for backhaul, stated that 98% of all of its DS1 backhaul traffic is purchased as special access circuits from ILECs.<sup>59</sup> In 2005, Nextel reported that when it issued a Request for Information for the provision of high capacity circuits to its 1,500 cell towers in the New York City metropolitan area, it received offers from CLECs covering only 43, or less than 3%.<sup>60</sup> And those were merely offers, not successful bids. By contrast, T-Mobile advised the Commission in May 2010 that it “has contracted for alternative backhaul services” at “approximately 20 percent of its cell sites today.”<sup>61</sup> Thus, T-Mobile’s purchases of special access from independent backhaul providers appear to be substantially greater than those of Sprint or other purchasers of special access.

#### **D. There Are Significant Barriers to Entry in the Special Access Market**

The Commission examines entry barriers to determine whether a new entrant could

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more flexibility to allege monopoly conduct – leadership statements suggesting that current DOJ practice may support a presumption of monopoly at a level even lower than 66%.

<sup>58</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17155, n.856 (2003).

<sup>59</sup> Sprint Nextel Comments WC Docket 05-25 at ii (filed Jan 19, 2010).

<sup>60</sup> Declaration of Bridger M. Mitchell and John R. Woodbury, Attachment 1 to Reply Comments of Nextel Communications, Inc., WC Docket No. 05-25 (July 29, 2005) (“Mitchell-Woodbury Declaration”), at p. 24 ¶ 62.

<sup>61</sup> *Ex parte* Letter from Kathleen O’Brien Ham, T-Mobile USA Inc., to Marlene Dortch, FCC, WC Docket No. 05-25. (May 6, 2010) (“T-Mobile May 6, 2010 *Ex Parte*”).

efficiently enter the market and begin serving customers fleeing the incumbent's service if the incumbent were to raise its prices above a certain threshold.<sup>62</sup> Indeed, the Commission has found that deployment of loops is a “costly and time consuming” undertaking.<sup>63</sup> Further, the Commission has found that “carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.”<sup>64</sup> Because of these high barriers, the Commission has determined that it is “unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment.”<sup>65</sup> Therefore, the Commission has concluded that “carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment,”<sup>66</sup> and that even in those cases “where there is adequate retail demand, the costs of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry.”<sup>67</sup> Thus, “for many buildings, there is little potential for competitive entry.”<sup>68</sup>

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<sup>62</sup> *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) (“*AT&T Non-Dominance Order*”).

<sup>63</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17107 ¶ 205 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) *vacated in part, remanded in part on other grounds*, *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

<sup>64</sup> *SBC/AT&T Merger Order*, 20 FCC Rcd at 18310, ¶ 39.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

The Commission has previously harmonized its analysis of entry barriers with the DOJ's competitive analysis.<sup>69</sup> For example, in the evaluation of the merger between SBC and AT&T Corp., the DOJ found that “in certain buildings where ‘SBC and AT&T are the only firms that own or control a direct wireline connection to the building,’ the merger was ‘likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those buildings.’”<sup>70</sup> Further, the DOJ recognized the entry barriers that precluded competitors from deploying their own facilities, determining that “although other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process.”<sup>71</sup> Such barriers include physical barriers, such as rivers and railbeds between the CLEC's network and the customer's location, and the need for consents from building owners and municipal officials.<sup>72</sup> These barriers impose costs that result in a single connection costing tens or hundreds of thousands of dollars, and as a result “CLECs will typically only build in to a particular building after they have secured a customer contract of sufficient size and length to justify the anticipated construction costs for that building.”<sup>73</sup>

These conclusions regarding the existence of entry barriers are supported by the

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<sup>69</sup> *Id.* ¶ 40.

<sup>70</sup> *See id.*

<sup>71</sup> *United States v. SBC Communications, Inc. and AT&T Corp.*, Civil Action No. 1:05CV02102 (D.D.C. Nov. 16, 2005), *Competitive Impact Statement* at p. 8. (“*US v. SBC/AT&T Competitive Impact Statement*”).

<sup>72</sup> Complaint, *United States v. SBC Comm., Inc.*, Civ. Action No. 1:05CV02102 (D.D.C. October 27, 2005) at ¶ 27 (“*U.S. v. SBC Complaint*”); Complaint, *United States v. Verizon Comm. Inc.*, Civ. Action No. 1:05CV02103 (D.D.C. October 27, 2005) at ¶ 27 (“*U.S. v. Verizon Complaint*”). *See* AT&T Petition, RM-10593, at p. 31 (contrasting the high transaction costs that a CLEC incurs in obtaining rights-of-way from local governments with the “minimal transaction costs” that the Bells incurred as “first movers.”)

<sup>73</sup> *US v. SBC/AT&T Competitive Impact Statement* at p. 8.

conclusions in reports by the GAO and National Regulatory Research Institute.<sup>74</sup> The NRRI Report analyzed the costs to deploy competitive special access facilities and the potential revenues available in the market, and concluded that the revenue that a CLEC could obtain by selling a DS-1 that required construction of 1/4 mile would be only 4% of the revenue needed, even if the CLEC could find buyers at the RBOC's rack rate prices.<sup>75</sup> And the GAO Report emphasized that obtaining governmental consents may impose delays as well as costs on an entrant, that landlords may demand a percentage of a competitor's revenue for allowing it to enter the building, and that even if a competitor is located within a given building, it may be "unable to connect to businesses on all floors within that building."<sup>76</sup>

Entrants encounter common barriers when seeking to enter the markets for transport or local loops. In both cases, deployment involves considerable sunk and fixed cost,<sup>77</sup> including the costs associated with undergoing the pole licensing and make-ready process controlled by the ILECs,<sup>78</sup> obtaining governmental consents and paying associated fees, purchasing the fiber-optic

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<sup>74</sup> United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services," November 2006 ("GAO Report"), at 26-27; National Regulatory Research Institute "Competitive Issues in Special Access Markets," January 21, 2009 at pp. 54-55 ("NRRI Report").

<sup>75</sup> NRRI Report at 54. A Declaration submitted on behalf of AT&T, before it was acquired by SBC, asserted that deployment of transport facilities to a particular point of aggregation (Local Dedicated Interoffice Circuits) is only economic when there are at least 18 DS-3s of traffic available. Reply Declaration of Janusz A. Ordover and Robert D. Willig on behalf of AT&T Corp., *In the Matters of Special Access Rates for Price Cap Local Exchange Carriers and AT&T petition for rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Special Access Services*, WC Docket No. 05-25; RM 10593, at ¶ 29.

<sup>76</sup> GAO Report at 22, 27.

<sup>77</sup> See *TRRO* ¶ 72.

<sup>78</sup> By means of its order in *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. April 7, 2011) ("*Pole Order*"), the Commission has taken an important step that should reduce significantly the cost of obtaining access to utility

cables and optronic equipment, and physically installing the fiber. The fixed costs are high, particularly in urban centers where fiber must be deployed underground.<sup>79</sup> While the cost to deploy fiber is generally lower in less populated areas, the revenue opportunities are typically insufficient to justify such deployment.<sup>80</sup> Moreover, such costs represent especially high barriers when associated with deployment of fiber to remote or isolated cell sites, because such network extensions are significantly less likely to be used by additional customers than are fiber facilities installed along routes dense with heavy users of telecommunications.

Large customers for special access services, such as wireless providers, typically need connectivity among large numbers of locations, creating another entry barrier. As a result of their ubiquitous networks — a legacy of their previously state-sanctioned monopolies, AT&T and other ILECs gain market power from ubiquity that is unavailable to competitors.<sup>81</sup> The GAO Report put it this way: “a bank may have 30 or 40 locations in 12 states in one region of the country that require dedicated access. To serve that customer wholly over its own facilities, a competitor would need to extend its network to all of those locations,” and because the percentage of buildings in the MSAs examined with a competitor “appears to be relatively small, it is unlikely that a single competitor would have very many of its own facilities to serve such a

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right-of-way facilities. Nevertheless, even where the Commission regulates pole attachments, those cost reductions are not likely to be broadly realized over the next several years because utility resistance will undoubtedly arise, both in court and in the innumerable daily encounters in the field among representatives of the pole owners and the attachment license applicants. Moreover, the new access rules will not have immediate or direct effect in the numerous states that have certified that they regulate pole attachments.

<sup>79</sup> *TRRO* ¶ 73.

<sup>80</sup> *See id.*

<sup>81</sup> *See* Declaration of Lee L. Selwyn, Attachment A to Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25 (filed January 19, 2010), at ¶¶ 2-8.

customer.”<sup>82</sup>

Consistent with the conditions found by the Commission, the DOJ, the GAO and NRRI, in their respective reviews of competition in the special access market, including reviewing other mergers, the barriers to entry for providing backhaul to wireless providers are high. The major wireless providers are now implementing metro Ethernet to backhaul mobile wireless traffic from their cell towers to their switches and other aggregation points.<sup>83</sup> Based on Fibertech’s experience, the high speed, scalable metro Ethernet backhaul the wireless companies demand requires fiber infrastructure and thus requires significant capital investment, particularly because of the combination of geographic dispersal of cell sites and the increasing bandwidth need at each cell site. Once a backhaul supplier extends its fiber network to serve wireless carrier cell sites, the fiber infrastructure can benefit the businesses and institutions along the fiber route by providing those businesses with competitive choice for their local bandwidth needs.

**E. Supply Is Inelastic Because Competitive Special Access Providers Lack The Ability to Add Capacity Readily if They Do not Already Have Facilities at the Customer Location**

Supply elasticity “refers to the ability of suppliers in a given market to increase the

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<sup>82</sup> GAO Report at 22, 23. The fact that the Local Private Line assets of MCI and AT&T that were divested pursuant to consent decrees when they were merged into Verizon and SBC were sold at has been described as “rummage sale prices” is evidence that these isolated assets do not benefit from network externalities that are possessed by the RBOCs. *See* Declaration of Lee L. Selwyn, submitted on behalf of the National Association of State Utility Consumer Advocates (NASUCA), in *United States v. SBC Comm., Inc.*, Civ. Action No. 1:05CV02102 (D.D.C.) and *United States v. Verizon Comm. Inc.*, Civ. Action No. 1:05CV02103 (D.D.C.) (Sept. 5, 2006).

<sup>83</sup> *See* Sean Buckley, *Infonetics: IP/Ethernet dominated wireless backhaul spending in 2010*, *FierceTelecom*, April 12, 2011 available at [http://www.fiercetelecom.com/story/infonetics-ipethernet-dominated-wireless-backhaul-spending-2010/2011-04-12?utm\\_medium=rss&utm\\_source=rss](http://www.fiercetelecom.com/story/infonetics-ipethernet-dominated-wireless-backhaul-spending-2010/2011-04-12?utm_medium=rss&utm_source=rss) (“Infonetics’ new Mobile Backhaul Equipment and Services market share and forecast report revealed that 89 percent of the money spent on mobile backhaul equipment in 2010 was for IP/Ethernet platforms”); *see e.g.* T-Mobile May 6 Ex Parte (T-Mobile uses Ethernet backhaul for 3G cell sites).

quantity of service supplied in response to an increase in price.”<sup>84</sup> The Commission examines supply elasticity to “determine the ability of alternative suppliers in a relevant market to absorb a carrier’s customers if such a carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response.”<sup>85</sup> The Commission examines two factors in assessing supply elasticity, first the “supply capacity of existing competitors” — in other words whether existing competitors “have or can relatively easily acquire significant additional capacity” — and second, “entry barriers” that indicate whether new competitors can easily enter the market even where existing competitors lack spare capacity.<sup>86</sup> Where entry barriers are low, supply elasticity is high, which in turn suggests the market is competitive. That is not the case with special access, where entry barriers are high and supply elasticity is low.

Supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period.<sup>87</sup> The cost structure of the facilities-based local telecommunications market is, however, marked by the pervasive fixed and sunk costs and economies of density and scale necessary to compete and serve customers in local markets. Serving local telecommunications markets requires significant investments in infrastructure, particularly in last mile facilities to provide special access services. Given this complex economic backdrop, any AT&T claims regarding its competitors’ ability to add significant additional capacity in a short time period must be viewed with a heavy dose of

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<sup>84</sup> *Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14123 ¶ 78 (1998).

<sup>85</sup> *Id.*

<sup>86</sup> *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) (“*AT&T Non-Dominance Order*”).

<sup>87</sup> *Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, Order, 11 FCC Rcd 17963, 17980-1 ¶ 48 (1996) (“*AT&T International Non-Dominance Order*”).

skepticism. The Commission should not give weight to generalized claims and anecdotal evidence that facilities-based wireline competitors have the ability to add significant capacity rapidly. For many of the same reasons that new entry is unlikely, discussed above in section III.D, existing competitors are also unlikely to be able to add new capacity quickly to serve locations where they have not already deployed facilities.

In an effort to show that it lacks market power in the special access market, AT&T has argued that its special access services are subject to significant intramodal competition from CLECs that have constructed competing wireline facilities or use AT&T's resold special access service.<sup>88</sup> The DOJ has recognized, however, that CLEC resale of special access purchased from AT&T "would not be effective as a competitive constraint" because the AT&T "would control the price of the resold circuits."<sup>89</sup>

AT&T has also pointed to the purchase by CLECs of high capacity circuits in the form of unbundled network elements (UNEs) at cost based prices.<sup>90</sup> This argument is not applicable here where the focus is on the wireless market because UNEs are not available for the link between the ILEC wire center and the wireless carrier cell site.<sup>91</sup>

Moreover, as the result of various Commission rulings in the 2003-05 time frame, CLECs are not permitted to use DS-1 and DS-3 UNEs in a large number of locations.<sup>92</sup> The list of unavailable locations grows over time, making it difficult for a purchaser to offer a long-term

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<sup>88</sup> See *ex parte* letter of Christopher A. Heimann, General Attorney, AT&T Services, to Ms. Marlene Dortch, WC Docket No. 05-25 (March 7, 2011) ("AT&T March 7 *Ex Parte*").

<sup>89</sup> *U.S. v. SBC Complaint* ¶ 25; *U.S. v. Verizon Complaint*, ¶ 25.

<sup>90</sup> See *AT&T March 7 Ex Parte*.

<sup>91</sup> See *TRRO* ¶ 34 n.99.

<sup>92</sup> See Reply Comments of Nextel Communications, Inc., WC Docket No. 05-25 (July 29, 2005) at 20 n. 70.

price quote to an end user, for fear that the UNE will become unavailable during the term of the contract and the cost to the carrier will increase.

There is also no validity in AT&T's claims that cable and fixed wireless are effective substitutes for special access.<sup>93</sup> Such services do not meet the performance and reliability standards for telephony carriers and do not serve most locations.<sup>94</sup> Moreover, while some of the Cable MSOs have started to offer Ethernet service, they do not offer TDM service at the DS-1 and DS-3 level, which constitutes the majority of current demand,<sup>95</sup> and the locations where they can offer service are limited to the geographic markets where they have cable franchises and have deployed an Ethernet architecture.

Although the Commission has taken important steps recently to promote the deployment of fiber network facilities by competitive telecommunications providers,<sup>96</sup> the practical effect of these steps likely will not be felt in any widespread way until years of dispute between pole owners and license applicants have settled questions concerning how the principles and standards enunciated by the Commission should be applied in specific contexts. In states where the *Pole Order* does not directly apply, its effects are likely to take even longer to appear, as regulators, pole owners, and competitive telecommunications providers debate what, if any changes, in policy and rules should be adopted in such states in response to the rule changes promulgated by

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<sup>93</sup> See AT&T March 7 *Ex Parte*.

<sup>94</sup> Mitchell-Woodbury Declaration at 11-12; see *Ex Parte* letter of Thomas Jones to Ms. Marlene H. Dortch, WC Docket 05-25 (July 9, 2009) at 17-18.

<sup>95</sup> See Reply Comments of T-Mobile USA, Inc., WT Docket No. 10-133, at pp. 7-8 (filed August 16, 2010) (explaining that while “mobile providers, including T-Mobile, are transitioning away from purchasing traditional time-division multiplexed (“TDM”) services (*e.g.*, DS1s and DS3s), and instead are purchasing higher-bandwidth Ethernet services, Ethernet likely will not be available for several years in many markets, and all providers will continue to rely on TDM for voice services in the short term.”)

<sup>96</sup> See n. 78, *supra*.

the Commission in the *Pole Order*. At least during the period before the *Pole Order* takes full effect, deployment of competitive facilities will remain a long, arduous, and adversarial process; such deployment always will be expensive and will continue to represent a fairly long and capital intensive process afterwards, although to a lesser degree.

#### **IV. Vertical Harms**

The pending application presents a classic case of a vertical merger that should be allowed only with sufficient conditions to protect the markets that will be adversely impacted. Through its adverse impact on non-ILEC providers of special access, this merger will affect not only wireless providers but also other buyers of special access. The harms that the upstream special access market suffers will, as shown above, harm the downstream market of retail wireless service because the costs to the remaining independent wireless carriers of a critical and costly input to their service will increase.

The DOJ has described vertical mergers as

those that occur between firms at different stages of the chain of production and distribution. Vertical mergers have the potential to harm competition by changing the merged firm's ability or incentives to deal with upstream or downstream rivals. For example, the merger may give the vertically integrated entity the ability to establish or protect market power in a downstream market by denying or raising the price of an input to downstream rivals that a stand-alone upstream firm otherwise would sell to those downstream firms.<sup>97</sup>

This precisely describes the harms that are likely to result if the Commission approves the application without appropriate conditions to guard against harm in the special access market. The combination of T-Mobile, a large independent buyer of special access services used for backhaul, with AT&T, the dominant supplier of special access connections in its 22-state ILEC

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<sup>97</sup> *U.S. et al., v. Comcast Corp*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), Competitive Impact Statement at p. 20.

footprint, will have serious adverse consequences for the upstream special access market. T-Mobile, although it buys approximately 80% of its special access from ILECs, takes advantage of competitive special access offering from competitive carriers for the remaining 20% of its special access needs.<sup>98</sup> If the proposed merger is allowed to occur without government intervention, T-Mobile's incentive to deal with upstream rivals – competitive special access providers — will certainly change.<sup>99</sup>

The merger with AT&T will eliminate T-Mobile as one of the few large buyers of special access in AT&T's 22-state ILEC territory that is not affiliated with an RBOC and that is willing to buy from independent providers of special access. In fact, given the evidence shown in Section III.C., above, that less than 10% of special access is purchased from independent providers and T-Mobile's assertion that it buys 20% of its backhaul from independent providers,<sup>100</sup> T-Mobile may well be the single largest buyer of backhaul from independent providers in AT&T's 22-state territory. As a result of the loss of this very large independent third party customer, competitive entrants will be penalized to the extent they have invested considerable sums of scarce capital to serve T-Mobile. Absent government intervention, there will be nothing to stop AT&T from withholding from competitive bidding T-Mobile's considerable special access demand within AT&T's 22-state region and instead directing all of T-Mobile's purchases of special access to AT&T's ILEC facilities.

The removal of T-Mobile's very large purchase volume from the market within AT&T's 22-state territory would reduce the incentive of potential competitors to AT&T in the provision of special access, such as Fibertech, to invest in special access facilities in those states. Having

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<sup>98</sup> See T-Mobile May 6, 2010 *Ex Parte*.

<sup>99</sup> See discussion *supra*, at p. 2.

<sup>100</sup> T-Mobile May 6, 2010 *Ex parte*.

lost from the market one of the largest buyers of special access in those states, these actual and potential competitors may lack the minimum viable scale needed to compete. Moreover, as T-Mobile has observed, “because of their dominance in the special access marketplace,” AT&T and Verizon “have both the ability and the incentive to discriminate against competitors in favor of their wireless affiliates.”<sup>101</sup>

In addition, competitive providers such as Fibertech that have invested in facilities to serve T-Mobile may be unable to recoup their investment. While the fiber deployed will be made available to other entities along the routes and the competitive carriers that might serve them, the fiber infrastructure that Fibertech has deployed to T-Mobile’s cell sites often extends out into residential or rural areas that would not typically offer opportunities for use in serving other customers: as is typical of wireless providers, T-Mobile’s cell sites likely are often located in remote areas apart from other wireless providers’ cell sites and other potential customers. Similarly, to the extent Fibertech or other independent providers of special access have invested capital to build facilities into T-Mobile’s switching centers, those facilities will not be of use to anyone other than T-Mobile. Thus, Fibertech and other T-Mobile backhaul suppliers have invested capital to construct facilities for serving T-Mobile but may be penalized for having invested in facilities that are not yet fully paid for and, absent regulatory or judicial intervention, those investments will be stranded as quickly as AT&T can transfer T-Mobile’s facilities to its own special access services.

Thus, both the threat that this acquisition poses to the viability of other independent wireless providers, such as Sprint, MetroPCS, Leap Wireless, and U.S. Cellular (that they suffer financially or be swallowed up by AT&T or Verizon) and also the experience of having

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<sup>101</sup> Comments of T-Mobile USA, Inc., WC Docket No. 05-25 (August 8, 2007) (“T-

investment stranded as the result of losing T-Mobile as a wireless backhaul customer would reduce the willingness of independent providers of special access to build out backhaul for any remaining independent wireless providers. Because of the business risk inherent in providing special access to these independent wireless providers, competitive backhaul providers may be inclined to demand more favorable rates, terms, and conditions than they do today. This would further handicap these smaller wireless providers in their efforts to compete with AT&T and Verizon in the wireless market.

As described generally in the DOJ's Competitive Impact Statement in *U.S. v. Comcast*, the harms in the upstream market flow to the downstream wireless market. While AT&T is directly increasing its market share in the downstream wireless market by purchasing one of its largest competitors, its tightening control of the special access market described above will enable AT&T to raise the costs of its rivals in the wireless market. As T-Mobile has advised the Commission, "wireless providers and other [special access] customers are hindered in their ability to negotiate reasonable arrangements in those areas where the ILECs are the sole suppliers of special access."<sup>102</sup> The Commission has recognized that a merger may be subject to challenge because it facilitates the raising of rivals' costs.<sup>103</sup> Indeed, the Commission has shown acute awareness of the threat to the wireless market from the lack of competitive choice among backhaul suppliers for independent wireless companies, explaining that "cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless

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Mobile 2007 Comments") at 5.

<sup>102</sup> T-Mobile 2010 Reply Comments at 11.

<sup>103</sup> See *Comcast/NBCU Order*, ¶ 34 & n. 77 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209, 234-38 (1986)).

marketplace.”<sup>104</sup>

The end result of unconditionally allowing the merger to go through will be less competition and more need for regulation, which, as T-Mobile has recognized, is precisely the opposite of what is needed.<sup>105</sup> Once AT&T and Verizon have an entrenched duopoly, the Commission will be forced to impose rate regulation on wireless service in an effort to preserve for American consumers at least some of the benefits that would have flowed from a competitive wireless marketplace.

## **V. The Merger Will Harm Innovation**

Antitrust law is also concerned with protecting innovation. In other words, the Commission need not find that the merger will eliminate competition in the special access market. Instead if the merger’s impact “only delays nascent competition, an increase in the duration of a firm’s market power can result in significant competitive harm.”<sup>106</sup> By “delaying the progress of rivals that attempt to introduce new products and technologies, the merged firm could slow the pace of innovation in the market and thus harm consumers.”<sup>107</sup>

The likelihood of such harm is acute in the wireless backhaul market. As discussed above, competitors such as Fibertech are deploying Ethernet connections over fiber infrastructure to wireless carrier cell sites to meet the demand for increased backhaul capacity.<sup>108</sup> The increased deployment of fiber infrastructure increases the efficiency of the wireless networks as well as the wireline networks used to serve wireless customers. As more carriers deploy fiber

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<sup>104</sup> Fourteenth Report ¶ 296.

<sup>105</sup> See T-Mobile 2010 Reply Comments at 7 (having “true competitive alternatives . . . is far superior to relying on regulatory mandates”).

<sup>106</sup> *U.S. v. Comcast, Comp. Impact Statement*, p. 21.

<sup>107</sup> *Id.* p. 22.

<sup>108</sup> See *Fourteenth Report*, ¶ 289 n. 789.

networks to provide backhaul, those fiber networks can provide competitive fiber-based services to other customers where network laterals can be cost-efficiently extended. In the absence of independent wireless companies such as T-Mobile that have been at the forefront of using fiber to the cell site, those additional competitive last mile networks will never be built. If they are never built, or their build out is delayed, innovation will be delayed and the public interest will be harmed.

## **VI. Remedy**

Fibertech believes that the vertical harms from this merger are too great to permit this merger to proceed without imposing conditions that would eliminate the vertical harms. To begin, the Commission should require T-Mobile for 60 months after closing of the merger to maintain at least the level of backhaul purchases from non-BOC affiliated backhaul providers within the AT&T 22 state ILEC region and increase that level of purchases by the same annual percentage as the percentage of growth in backhaul usage by the merged company. This condition should also not depend on whether AT&T decides to integrate T-Mobile's network into the AT&T Mobility network or transfer the T-Mobile assets to AT&T Mobility or any other AT&T entity. The effectiveness of this remedy depends on maintaining the level of T-Mobile's purchases from independent suppliers of special access, even if T-Mobile's cell towers are transferred to another AT&T entity. In addition, T-Mobile should be required to extend its current contracts with non-BOC providers of special access by an additional thirty-six months. As part of this condition, neither T-Mobile nor any successor or assign would be allowed to terminate circuits except where it decommissions a cell tower and no longer has any need for facilities between the designated end-points. Lastly, T-Mobile should not be permitted to terminate circuits or contracts for special access that were in force at the date when the merger was announced unless it no longer has any need for facilities between the designated end-points.

pursuant to the terms of its contract, but if it continues to use a tower, it should not be permitted to terminate circuits in order to groom the line over to AT&T's facilities.

Respectfully submitted,

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May 31, 2011

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**SERVICE LIST**

I, Joshua M. Bobeck, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Comments of Fibertech Networks, LLC to be served, as specified, upon the parties listed below:

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