

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications of AT&T Inc. and)	
Deutsche Telekom AG)	WT Docket No. 11-65
)	
for Consent to the Transfer of Control of)	
Commission Licenses and Authorizations)	
Pursuant to Sections 214 and 310(d) of the)	
Communications Act)	

**PETITION OF CINCINNATI BELL WIRELESS LLC
TO CONDITION CONSENT OR DENY APPLICATIONS**

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SUMMARY

The merger of AT&T and T-Mobile will turn back the clock back thirty years, to a time of minimal competition, limited choices for consumers, higher retail prices, and slow innovation. With the elimination of T-Mobile as a viable national wireless carrier, this country will see the re-establishment of a wireless duopoly in AT&T and Verizon, which will hold great market power and will have no competitors able to provide competitive checks on their pricing or drive them to innovate and improve. The multiple acquisitions of smaller and regional carriers by national carriers in recent years has set us on this path and allowed the national wireless carriers to dominate the market through the use of (1) anti-competitive roaming agreements, (2) exclusive handset arrangements and (3) massive spectrum holdings. If granted, the merger of AT&T and T-Mobile, the second and fourth largest national carriers, will decimate competition, innovation, and efficiency, and the market will revert to the bygone days of high prices and reduced consumer choices.

The shrinking of the national market to only two strong national carriers – AT&T and Verizon since Sprint has indicated it will no longer be able to compete – will be devastating to competition and consumers. Even more dramatic, however, will be the impact on the GSM wholesale roaming market, which will decline from the duopoly that currently exists (AT&T and T-Mobile) to a monopoly of a single national carrier (AT&T). This means that GSM-based regional carriers, like CBW, will have exactly *one* national carrier from which they can obtain roaming services. AT&T's total control of this market will allow it to impose unreasonable terms and rates upon access to roaming and thereby upon the customers of carriers who must rely on such roaming.

Even prior to the proposed merger, AT&T acted repeatedly to marginalize and harm regional carriers through anti-competitive behaviors including: charging unreasonable roaming rates; denying *roaming* access on its advanced data networks and opening access only after severe delays, at unreasonably high rates, and upon anticompetitive conditions; preventing access to contiguous or quality *spectrum* by buying it up through both auctions and merger; and denying access to new and innovative *handset technology* by tying manufacturers into exclusive arrangements and specifying “single carrier” handset designs developed for use only on its network. The merger with T-Mobile, if consummated, will allow AT&T a free hand to expand and intensify these practices, since its market power will be even greater and its ability to harm its competitors will be even stronger. The merger should therefore be permitted *only* if the Commission takes strong and enforceable steps, including rigorous and enforceable conditions, to assure that regional carriers can provide a viable, competitive alternative for consumers to the duopoly of national carriers.

Specifically, the Commission must protect access by regional carriers to three critical resources that are essential to their ability to compete:

- Regional carriers must have access to *roaming*, and this access must be assured in a manner that allows them to offer competitive nationwide service to their customers including just and reasonable rates and access to all voice and data services.
- Regional carriers must have access to sufficient amounts and types of *spectrum* to allow them to compete effectively. AT&T must be required to swap, divest and/or lease spectrum as appropriate to make this happen; and
- Regional carriers must have access to cutting-edge, innovative *handsets* and AT&T must no longer be permitted to tie up these handsets through exclusive deals with manufacturers, or to use its buying power to cause manufacturers to focus their development on products that will serve only AT&T and not regional carrier networks.

The essentiality and interdependency of *all* of these conditions is most starkly illustrated by an unprecedented feature of this merger – AT&T’s announced plan to shut down the T-Mobile 3G network post-merger, an outcome that clearly would not occur but for the merger. For the first time in any similar merger, competitors are faced with the certain prospect that the acquiring company plans to shut down an essential service currently offered by the acquired company, to the extreme competitive detriment of its remaining GSM competitors. Unless AT&T provides a clear path to enable *roaming* by GSM carriers on the AT&T network at just and reasonable rates, access to additional *spectrum* to enable the transition to occur without causing major disruptions of service to their existing customers, and access to *handsets* that will enable CBW and other GSM carriers’ customers to communicate using the AT&T network, the merger and resulting shut-down of the T-Mobile 3G network will result in the destruction of a major segment of post-merger competition.

The Commission must act on *all three* of these issues, roaming, spectrum and handsets, otherwise competition from carriers like CBW will wither and the supposition upon which AT&T’s application is based – that vigorous competition from these carriers will survive the merger – will not come to pass. Thus, the Commission must disapprove the merger if it cannot craft and impose conditions that are sufficient to protect competition in these areas.

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Cincinnati Bell Wireless LLC (“CBW”), by its undersigned counsel, pursuant to the Commission’s Public Notice in the above-reference proceeding,¹ hereby petitions the Commission to condition consent to the above-referenced applications (“Applications”) of AT&T, Inc. (“AT&T”), Deutsche Telekom AG and T-Mobile USA, Inc. (“T-Mobile”) (collectively, “Applicants”) as set forth herein, or absent such conditions, to deny the applications.

I. INTRODUCTION

For nearly thirty years, the Commission has addressed the high prices and low penetration of the early wireless duopoly market by allocating spectrum to create a far more robust competitive environment, and the marketplace validated those efforts: subscribership shot up exponentially and prices declined in similar dramatic fashion. But in the last several of those

¹ *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.*, Public Notice, DA 11-766 (rel. Apr. 28, 2011).

years, competition in the wireless market has taken a substantial turn for the worse as a result of multiple mergers and consolidations that have amassed significant market power in four national carriers – and, in particular, in two national carriers who can dominate the market through use of (1) anti-competitive roaming agreements, (2) exclusive handset arrangements, and (3) massive spectrum holdings. The proposed acquisition of T-Mobile by AT&T would, if approved, consolidate the second and fourth largest of the four national carriers and complete the industry rollback to a virtual wireless duopoly as though the last thirty years had not happened.

The impact on the GSM² market is even more extreme – the stark reality of such a combination is perhaps best illustrated by the fact that the merger would result in AT&T, as the largest GSM carrier, having over *250 times* as many subscribers as its next nearest GSM competitor: using reported year-end 2010 subscriber counts, AT&T would have roughly *129 million* subscribers and CBW, the second largest GSM carrier post-merger, would have roughly *509 thousand* subscribers.³

Although the disparity in numbers is dramatic and already affords the current four largest national carriers the usual types of economies of scale typical of marketplaces dominated by a handful of very large entities, there is an additional advantage given these carriers by virtue of their size and scope. The wireless business is one in which customers are not tethered to a particular geographic location and must be able to use their phones away from their home market. This gives the large national carriers an additional – and unique – competitive advantage

² GSM herein refers to services deployed by the traditional GSM carriers using the family of technologies including GSM, GPRS, EDGE, WCDMA, HSPA and HSPA+.

³ See AT&T Inc., U.S. Securities and Exchange Commission Form 10-K, at 2 (filed Mar. 1, 2011), available at: <http://www.sec.gov/Archives/edgar/data/732717/000073271711000014/ex13.htm> T-Mobile USA Reports Fourth Quarter 2010 Results, at 2 (rel. Feb. 25, 2011), available at: <http://s.tmocache.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/5657114502E70FF3012B5A79D454F2C8/file/TMUSQ42010PressReleaseFinalv2.pdf>; Cincinnati Bell Inc., U.S. Securities and Exchange Commission Form 10-K, at 5 (filed Feb. 28, 2011), available at: <http://www.sec.gov/Archives/edgar/data/716133/000119312511048808/d10k.htm>.

over their regional competitors such as CBW, since regional carriers must give their customers the ability to roam out of the local region onto the networks of other carriers. For a regional GSM carrier such as CBW, there is quite simply no alternative for a roaming partner in most markets other than AT&T and T-Mobile today. If these regional carriers are to fulfill their competitive role in the marketplace – a role AT&T claims is critical to its public interest showing in support of the proposed merger⁴ -- then there is an absolute need to protect the ability of the smaller GSM carriers to roam on AT&T's network at just and reasonable rates and terms for all of their voice and data service needs, regardless of technology. As the only other national GSM carrier, T-Mobile today plays a critical role in the GSM roaming market – for example, its rates, although significantly higher than what would be available in a fully competitive market, are virtually half those of AT&T, and it has been willing to include advanced data roaming services over its 3G network in its roaming contracts with CBW and other GSM carriers, something that AT&T has only recently ever offered to do, albeit with significantly higher prices and unreasonable terms and conditions. T-Mobile's absorption into AT&T would, unless the Commission protects against it, give AT&T monopoly power in this segment of the market.

These harms to the GSM marketplace will ripple more broadly through the wireless market as a whole, and AT&T's argument that the presence of regional carriers will mitigate the overall competitive harms attendant to combining the second and fourth largest national carriers blinks reality. Even though it has swallowed up numerous smaller and mid-sized carriers over the past several years, thereby solidifying its market power and amassing enormous spectrum holdings, AT&T claims to believe, and repeatedly touts, that regional and smaller carriers will continue to provide effective competition to the national carriers and goes so far as to cite this

⁴ See Applications of AT&T Inc., Deutsche Telekom AG and T-Mobile, Inc., WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations, at 78-94 (filed April 21, 2011) ("*Public Interest Statement*").

competition as a major justification for the merger. Earlier this month, AT&T CEO Randall Stephenson informed Congress that regional providers provide competition to AT&T and, in its Application, AT&T asserts that “MetroPCS, Leap and other regional providers are increasing competitive threats.”⁵ In its Public Interest Statement, too, AT&T relies heavily on the presence of regional carriers to make its case that vigorous competition will still exist even after it has eliminated one of its biggest competitors.⁶ This merger will not create a duopoly, AT&T claims, because the regional carriers can readily fill the gap left by the loss of T-Mobile.

AT&T’s statements are misleading if not downright disingenuous: AT&T has repeatedly acted in various systematic ways to harm or stifle the competitive strength – and even the very existence – of these regional competitors. Its ongoing and historic campaign to marginalize or eliminate these competitors has repeatedly included:

- denying **roaming** access on AT&T’s 3G and 4G networks and/or making such access available only after severe delays, at unreasonably high rates, and upon anticompetitive conditions;
- preventing access to contiguous or quality **spectrum** by buying it up through both auctions and merger -- of which the current proposal is only the latest but most egregious example; and
- denying access to new and innovative **handset technology** by tying manufacturers into exclusive arrangements and specifying “single carrier” handset designs developed for use only on its network.

It is particularly ironic in light of this pattern of behavior that AT&T now makes regional carriers the poster children for the vigorous competition that it claims will survive the AT&T/T-Mobile merger.

For these reasons, the merger should be permitted *only* if the Commission takes strong and enforceable steps to assure that AT&T’s claims that “increasing competition from regional providers” will impose market discipline on it can be made a reality both today and into the

⁵ *Id.* at 98.

⁶ *Id.* at 11-13.

future. To ensure this, the Commission must impose conditions that will enable regional carriers to compete effectively with the national wireless duopoly the merger will create. There are at least three critical outcomes which must occur to allow regional carriers to fulfill this market role:

- (1) Regional carriers must have access to *roaming*, and this access must be assured in a manner that allows them to offer competitive nationwide service to their customers. This means that AT&T must charge only just and reasonable – i.e., cost-based – roaming rates rather than the rates it charges today, which are a large multiple of cost-based rates. It also means that AT&T must make *all* its voice and data services available for roaming, and that it should cease from imposing terms that, by design and actual effect, prevent regional carriers from carrying out their vital competitive function;
- (2) Regional carriers must have access to sufficient amounts and types of *spectrum* to allow them to compete effectively. AT&T must be required to swap, divest and/or lease spectrum as appropriate to make this happen; and
- (3) Regional carriers must have access to cutting-edge, innovative *handsets* and AT&T must no longer be permitted to tie up these handsets through exclusive deals with manufacturers or to use its buying power to cause manufacturers to focus their development on products that will serve only AT&T and not regional carrier networks.

All three of these essential competitive inputs must be addressed to ensure that regional carriers such as CBW can effectively compete on a national scale. No one, or even two, of the inputs alone will be sufficient; they are, in effect, three legs of a competitive platform and without any

one of them the platform will not stand, for lack of roaming, lack of spectrum or lack of handsets will certainly eliminate regional carriers as viable competitors.

The essentiality and interdependency of *all* of these conditions is most starkly illustrated by an unprecedented feature of this merger – AT&T’s announced plan to shut down the T-Mobile 3G network, an outcome that clearly would not occur but for the merger.⁷ For the first time in any similar merger, competitors are faced with the certain prospect that the acquiring company plans to shut down an essential service currently offered by the acquired company to the extreme competitive detriment of its remaining GSM competitors. For CBW and the other GSM-based carriers who roam on T-Mobile’s 3G network, and for their customers, this would be catastrophic unless AT&T provides a clear path to enable *roaming* by these same parties on the AT&T network. This is not a foregone conclusion because today these customers roam on T-Mobile’s 3G service using the AWS band, while AT&T’s 3G service is provided using the 850 MHz and 1900 MHz bands (Bands II & V). As will be shown herein, a path to such roaming arrangements can be provided *only* if additional *spectrum* is made available to CBW (and probably other GSM carriers) to allow the transition to occur without causing major disruptions of service to their existing customers. Finally, even the best roaming arrangements and optimal spectrum environment will be worthless unless *handsets* are available that will enable CBW and other GSM carrier’s customers to communicate using the AT&T network. Even if AT&T is required to offer voice and data roaming at just and reasonable rates, it will be critical to the remaining GSM carriers and their customers that the transition from the existing T-Mobile 3G service to an Long Term Evolution (“LTE”) network be undertaken in a way that permits for the

⁷ See *Public Interest Statement* at 40 (AT&T will migrate T-Mobile’s current 3G users of AWS spectrum to AT&T’s 3G services); see also, e.g. Yahoo Finance, “AT&T: T-Mobile 3G phones will need to be replaced,” March 21, 2011, available at: <http://finance.yahoo.com/news/ATT-T-Mobile-3G-phones-will-apf-862423457.html>.

foreseeable future the interoperability of GSM handsets with LTE. To avoid the destruction of a major segment of post-merger competition, the Commission must assure that AT&T does not shut down the T-Mobile 3G network unless and until *all* of these conditions are met.

As further discussed below, these same issues – *roaming*, *spectrum*, and *handsets* – crop up again and again, inseparably, with regard to many aspects of the merger. Unless the Commission acts on all three of these issues, competition from carriers like CBW will wither and the supposition upon which AT&T's application is based – that vigorous competition from these carriers will survive the merger – will not come to pass. Thus, the Commission must disapprove the merger if it cannot craft and impose conditions that are sufficient to protect competition in these areas.

II. STATEMENT OF INTEREST

CBW is a regional, facilities-based, wireless service provider which holds Broadband PCS and AWS licenses covering the greater Cincinnati and Dayton metropolitan areas as well as several counties in northern Kentucky and Indiana. Currently, CBW competes with five other facilities-based providers – AT&T, Verizon, T-Mobile, Sprint and Cricket – to provide retail services to approximately 509,000 subscribers using GSM and 3G technologies. CBW offers both domestic and international voice and data roaming to these subscribers, relying upon roaming agreements with both AT&T and T-Mobile, the only two national GSM-based carriers, to provide nationwide service to its customers. As described in detail in this pleading, in order for CBW to effectively compete with the post-merger AT&T entity, it must have access to voice and data roaming at reasonable rates, contiguous spectrum from which it can deploy advanced services, and new, innovative and interoperable handsets. Unless it has all of these, CBW cannot effectively compete in the marketplace.

Unless the Commission adopts stringent conditions to preserve competition, the proposed merger will harm CBW's ability to obtain all three of these crucial inputs and will therefore have a significant and negative impact on CBW's business and its customers. Accordingly, CBW has a direct interest in ensuring that the merger is either denied or sufficiently conditioned to avoid harm to the public interest and the effective elimination of CBW and other regional providers as competition in this market.

III. THE COMMISSION MUST PREVENT AT&T FROM HARMING THE WIRELESS MARKET BY REQUIRING IT TO PROVIDE VOICE AND DATA ROAMING THROUGHOUT ITS POST-MERGER TERRITORY AT JUST AND REASONABLE RATES AND TERMS

A. Voice and Data Roaming Access is Essential to Ensuring Competition By Regional Carriers

Over the last fifteen years, the Commission has repeatedly found that roaming capabilities are "important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications."⁸ It has also recognized that having a competitive wholesale roaming service market is essential to ensure a competitive retail market for consumers.⁹ The proposed merger, however, will thwart these critical goals and effectively eliminate competition in the wholesale GSM market, thereby resulting in higher retail prices and reduction in retail choices for the customer. To prevent this harm, CBW urges the Commission to impose reasonable requirements on the merged entity that will protect other carriers and the public from competitive harm and, if conditions cannot be agreed upon, to deny the application as contrary to the public interest.

⁸ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, ¶ 2 (1996).

⁹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) ("Automatic Roaming Order").

The Commission has recognized that “consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area.”¹⁰ By adopting automatic roaming requirements, the Commission has sought to “safeguard wireless consumers’ reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming.”¹¹ In order to remain competitive, CBW *must* be able to provide nationwide coverage to its customers at just and competitive rates. If CBW is unable to meet these consumer expectations, it simply cannot compete with carriers who can and, as a result, it cannot provide the type of competition that is essential for the Commission to find that the public interest permits the consolidation of AT&T and T-Mobile into an even more dominant carrier over 250 times larger than CBW, which will become the second largest GSM carrier,¹² or that it is served by turning the industry into an effective duopoly.

As a regional wireless carrier, roaming is essential to CBW’s ability to compete against nationwide carriers. In its licensed markets in Cincinnati and Dayton, Ohio, CBW’s traffic is transported using its own facilities-based network. However, outside of the CBW footprint, CBW’s customers must be able to use their wireless service by roaming on other carriers’ networks. If CBW cannot offer national roaming at retail rates comparable to those of its larger competitors, particularly its national competitors, customers will choose to leave CBW to take service from those competitors. The ability to provision comparable roaming services at competitive rates is therefore critical if CBW is to continue to be a competitor to nationwide carriers in the Cincinnati and Dayton markets and survive as a full service wireless provider that

¹⁰ *Id.* at ¶ 3; *see also id.* at ¶ 27 (finding that “most wireless customers expect to roam automatically on other carriers’ networks when they are out of their home service area”).

¹¹ *Id.* at ¶ 3.

¹² *See supra* n.3.

can compete with a combined AT&T/T-Mobile. But CBW cannot hope to charge competitive retail rates for roaming unless the wholesale rates it pays its roaming partners are commensurate. As will be shown below, this will not happen following the merger unless the Commission imposes appropriate conditions to assure that it does.

From a consumer perspective, the competition offered by CBW in its markets – and by other regional carriers in their markets – is even more important if the Commission permits two of the four largest nationwide carriers to combine.¹³ AT&T acknowledges, as it must, the importance of roaming in its public interest statement. Indeed, AT&T seizes upon the existence of roaming agreements between smaller and regional carriers as supposedly strong evidence of viable competition that will survive the merger.¹⁴ But AT&T’s implicit theory that the presence of regional carriers somehow obviates the need for roaming on AT&T’s network wholly ignores the fact that such options are unavailable to CBW for its GSM network: the *only* meaningful U.S. roaming partners for CBW and other regional GSM operators that provide anything close to nationwide coverage are AT&T and T-Mobile. Indeed, because today there are only these two national roaming partners available to CBW, it is already true that neither AT&T nor T-Mobile has had to offer truly competitive – i.e., cost-based – roaming rates to CBW.

But of the two, T-Mobile has been far more favorable. For quite some time, AT&T would not even offer 3G to CBW. After months of delay, AT&T offered to provide 3G roaming to

¹³ *Fourteenth Report and Order*, at ¶ 125 (finding that “roaming can be particularly important for small and regional providers with limited network population coverage to remain competitive by meeting their customers’ expectations of nationwide service”); *See also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 15 (“Providers with local or regional service areas need roaming arrangements to offer nationwide coverage, and there may be areas where building another network may be economically infeasible or unrealistic”) (“*Data Roaming Order*”).

¹⁴ *See Public Interest Statement*, at 12 (noting that MetroPCS and Leap have entered into a long-term roaming agreement and “will continue winning consumers with their low-priced service plans”), and 93 (noting that Leap has entered into a 4G roaming agreement with LightSquared).

CBW, but both its 2G roaming agreement and 3G roaming proposal to CBW include data and voice rates that are nearly double those of T-Mobile. AT&T's roaming arrangements also make unreasonable technical demands on CBW's own system and impose unreasonable restrictions on CBW's ability to use the roaming services to compete with AT&T. Thus, taking away the T-Mobile option and leaving CBW and other even smaller GSM-based operators at the mercy of AT&T would have a disastrous effect on those carriers' ability to compete in their respective markets.

While the technological differences that currently limit CBW's meaningful roaming alternatives to AT&T and T-Mobile will someday be vitiated to some extent upon full nationwide deployment by multiple carriers of new technologies such as LTE, even that deployment will not mitigate the harm of the AT&T/T-Mobile merger to regional carriers. At the threshold, there will remain at most three alternatives for nationwide roaming even after LTE deployment: AT&T, Verizon and (perhaps) Sprint. However, because of the need for LTE networks to support fall-back to a compatible 3G network, LTE roaming on Verizon or Sprint would not be practical in the near-term for a GSM carrier. AT&T's unrealistic implication that after the merger small regional carriers can simply cobble together a patchwork of roaming coverage¹⁵ to avoid the market power of these nationwide carriers post-merger flatly ignores reality. First, the ability of CBW and other non-national providers to roam within this patchwork would require, as a prerequisite, that such technologies are in fact deployed by all such carriers throughout their networks – a proposition that will clearly not occur until some unknown time in the future, and may well not occur at all if one or more of the regional carriers that are needed to assemble a national footprint should fail to survive in the post-merger period. Second, the scenario assumes that all such carriers will deploy the same technology and/or that handsets will

¹⁵ *Id.* at 12, 93.

be available that will be compatible with differing technologies and therefore have roaming compatibility across all these networks. And third, it assumes that the network coverage of such carriers, once a compatible, ubiquitous deployment is completed, will cover a seamless nationwide geographic footprint. The facially remote likelihood that these three prerequisites can all be met is simply insufficient to outweigh the competitive harms that will certainly occur in the here and now if AT&T is permitted to acquire T-Mobile without adequate roaming conditions.

Roaming is far too important to the competitive marketplace to allow AT&T to use its national market power – which will only be further solidified by the merger – to prevent its smaller competitors from offering nationwide roaming at competitive rates. Moreover, data roaming is an increasingly critical component of the competitive marketplace and AT&T must not be permitted to use its market power to exclude the regional providers from this lucrative and rapidly growing market.¹⁶ In adopting the *Data Roaming Order*, the Commission found that “mobile data services provided over advanced mobile broadband technologies are an increasingly significant part of the lives of American consumers ... [and] are used for a variety of both personal and business purposes, including back-up communications during emergencies and for accessibility.”¹⁷ As AT&T has touted in its most recent commercials, customers value the ability to move seamlessly between voice and data services or even to access both voice and data services simultaneously.¹⁸

¹⁶ See, Chetan Sharma, *Mobile Cloud Computing 2011*, projecting that data service revenue will account for over 50% of mobile service revenue in the US market by 2013, available at: <http://www.chetansharma.com/mobilecloudcomputing.htm>.

¹⁷ *Data Roaming Order*, at ¶ 14.

¹⁸ The AT&T commercial, titled the “Answer” shows a man utilizing the iPhone’s voice and data services at the same time to make a telephone call and dinner reservations simultaneously. See AT&T “Answer” Commercial at <http://www.youtube.com/watch?v=AIsdkOvySkk>.

In addition, the Commission has previously noted that “consumers are increasingly substituting among voice, messaging, and data services, and, in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communications needs.”¹⁹ Without affordable access to data roaming, including 3G, 4G, and LTE, consumers will be frustrated by their inability to access data services outside of their home territory even though their voice services continue to operate.²⁰ This would almost certainly result in the steady and rapid migration of most customers from small and regional carriers to larger national carriers who can provide both voice and data services throughout the country. Thus, in order to effectively compete, CBW and other regional carriers must be able to provide customers with data services everywhere in the nation and around the world at competitive prices.

Ensuring access to advanced broadband roaming capabilities at just and reasonable rates and terms will also help advance the Commission’s larger policy goal of increasing access to broadband services. As set forth in the National Broadband Plan, the Commission has established the goal of having the United States lead the world in mobile innovation, with the fastest and most extensive wireless network in the world.²¹ With wireless broadband networks covering over 98% of the U.S. population²² and more than 25 million mobile high-speed wireless subscribers and 86 million high-speed capable devices in the country,²³ the importance of advanced wireless services is undeniable. It is equally incontrovertible that access to data

¹⁹ *Fourteenth Report and Order*, at ¶ 8.

²⁰ *Data Roaming Order*, at ¶ 15 (“As more and more consumers use mobile devices to access a wide array of both personal and business services, they have become more reliant on their devices. These consumers expect to be able to have access to the full range of services available on their devices wherever they go.”).

²¹ *National Broadband Plan*, Goal No. 2, p. 9.

²² *Id.* at ¶¶ 120-123.

²³ *Id.* at Table C-6.

service roaming is vital. In adopting a data roaming obligation, the Commission found that such a requirement would “help ensure that, as consumers become increasingly reliant on wireless devices, continuity of spectrum-based services is preserved across networks and geographic regions”²⁴ and that such regulations will support the goals of the National Broadband Plan.²⁵

However, the Commission’s *Data Roaming Order* and its reliance on the presence of competition to provide a workable framework in which to assure “commercially reasonable” roaming rates, did not foresee the combination of by far the largest and second largest GSM carriers in the GSM roaming market (and the second and fourth largest of only four national wireless carriers in the wireless market overall). Because a GSM-based carrier’s customers can today roam only on another GSM-based network, only AT&T and T-Mobile have been available as nationwide roaming partners for these carriers. If AT&T is allowed to take T-Mobile out of the market without effective regulatory oversight of AT&T’s roaming rates and other terms, the already fragile competitive roaming framework in the GSM market, which to date has not been successful in producing reasonable roaming rates from AT&T, will disintegrate.²⁶ Accordingly, the Commission must not permit the merger to occur without meaningful conditions that compel AT&T to offer voice and data roaming at just and reasonable rates and terms.

The merger will also, unless conditions are imposed to prevent it, allow AT&T to further leverage its market power to negotiate roaming agreements with international carriers to effectively prevent smaller U.S. carriers from being able to offer international roaming at

²⁴ *Data Roaming Order*, at ¶ 15.

²⁵ *Id.* at ¶ 16 (finding that the new data roaming regulations “will promote mobile broadband network deployment, investment and competition, consistent with the goals of the National Broadband Plan, by helping to ensure the viability of new data network deployments”).

²⁶ Indeed, it is not even clear that the limited protection offered by the Commission’s data roaming order will be available given Verizon’s recently filed appeal of that order. *See* Cecilia King, “Verizon sues FCC on data-roaming rule,” *The Washington Post* (May 17, 2011) (reporting that Verizon filed an appeal of the data roaming order with the U.S. Court of Appeals for the District of Columbia on May 13, 2011).

competitive rates. AT&T uses its market power to induce international carriers to enter into exclusive or *de facto* exclusive roaming arrangements that effectively foreclose the development of reciprocal roaming agreements between the U.S. regional wireless carriers and international wireless carriers. The resulting unilateral agreements that the regional carriers must enter into increase international roaming rates for these U.S. regional carriers and deny them the ability to compete for international roaming revenue. The effect of such tactics has been significant. The unilateral nature of the roaming agreements between the regional U.S. carriers and the international carriers has enabled the international carriers to command exorbitant rates for international roaming. These rates are often in excess of \$20 per megabyte. In other words, through market manipulation, AT&T has succeeded in imposing on CBW a cost of doing business for these roaming services that hampers CBW's ability to offer its customers competitively priced international roaming and in denying CBW the opportunity to receive roaming revenue from the international carrier. The anticompetitive effect of such behavior is patent and AT&T's ability to control this market will only be solidified by this merger.

B. AT&T Has Repeatedly Shown That It Will Impose Unreasonable Conditions and Rates Upon Competitors for Access to Voice Roaming and Will Prohibit Access to Advanced Broadband Data Services

By a huge margin, AT&T and T-Mobile are the largest and second largest GSM-based national wireless carriers. Neither of the two other nationwide carriers utilize GSM-based technology. Indeed, with this merger, CBW will become the second largest GSM-based carrier in the country even though it has only *509 thousand subscriber lines* as compared to AT&T's roughly *95.5 million* and T-Mobile's *33.7million* subscribers.²⁷ If the merger is approved, there will be one national GSM-based carrier with over *129 million* subscribers, more than 250 times

²⁷ Year-end 2010 subscriber counts as reported in Cincinnati Bell's 2010 Form 10-K, AT&T's 2010 Form 10-K, and T-Mobile USA's Report of Fourth Quarter 2010 Results.

the size of CBW. Likewise, CBW's network is made up of 455 total base stations. Post-merger, AT&T will have over 100,000 base stations in its network – 220 times as many.²⁸

Notwithstanding that T-Mobile's current wholesale voice and data rates far exceed the retail rate that it charges its customers for similar services (*see* Section II.B. below), AT&T's rates for voice and data roaming are even higher – in the range of double those of T-Mobile.²⁹ When customers roam to areas not served by T-Mobile, CBW is captive to AT&T's roaming rates.³⁰ And although the Commission's rules prohibit AT&T from flatly refusing to enter into voice and data roaming agreements with other carriers,³¹ the market power wielded by AT&T will give it a significantly increased ability to impose anti-competitive terms and conditions in its roaming agreements with both GSM-based regional and international carriers.

Moreover, AT&T has used its already-dominant GSM market power to extract other types of anti-competitive roaming terms and conditions in addition to merely charging exorbitant

²⁸ See, Steel In The Air, *AT&T and T-Mobile Merger - Impact on Cell Site Leases*, available at: <http://steelintheair.com/att-tmobile-merger.html>.

²⁹ Many in the wireless industry have expressed concern about access to data roaming at reasonable rates and terms. In fact, T-Mobile specifically asserted that “without Commission oversight, roaming for data services will not be provided at reasonable rates, terms and conditions and may be withheld altogether, diminishing competition at a retail level and harming consumers.” See Comments of T-Mobile USA, Inc., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66 (filed Sept. 30, 2009).

³⁰ Indeed, until late 2009, virtually all of CBW's roaming traffic was subject to AT&T's unreasonable rates because AT&T insisted as a condition of its roaming agreement that CBW agree to a “primary carrier” provision that gave AT&T's network priority for all roaming traffic. Because it is essential that CBW have access to AT&T roaming in areas not served by any other GSM carrier, CBW had no choice but to agree to this provision. On information and belief, AT&T has maintained similar provisions in place with most if not all other regional GSM operators. This means that those other operators have been foreclosed from roaming on CBW's network even though CBW's roaming rate would be much lower than AT&T's. Thus, CBW could not enter into reciprocal agreements with these carriers and was forced to pay the higher rate typical of unilateral agreements. As a result, even after the AT&T restriction was lifted, CBW was constrained from assuring that where possible, its customers would roam onto a low cost network.

³¹ See 47 C.F.R. § 20.12.

rates.³² For example, as noted previously, AT&T has been able to wield its market power to constrain the ability of both domestic and international carriers to seek competitive alternatives by requiring carriers that need to roam on its network to enter into exclusive or *de facto* exclusive roaming contracts with AT&T. This tactic effectively precludes CBW and other similar carriers from competing for that traffic and from reaching reciprocally reasonable roaming rates with other carriers. This both denies CBW roaming revenues from these carriers and increases the cost to CBW of roaming on these carriers' networks, for no reason other than AT&T's anticompetitive behavior. The merger will enable AT&T to engage in such behavior with even greater impunity, further weakening the competitive landscape that AT&T touts as a formidable force.

Similarly, while acknowledging that carriers must offer national and even worldwide service to compete effectively, AT&T has conducted its roaming negotiations in a manner designed to directly thwart such competition. For example, AT&T has used the fact that CBW must have the ability to roam on AT&T's network in order to offer fully national coverage to demand terms that preclude CBW from providing services to enterprise customers based in its Cincinnati and Dayton markets, by prohibiting CBW from using AT&T's roaming services to provide wireless services to enterprise customers' locations in other states.³³ Indeed, AT&T has threatened to terminate CBW's roaming agreement based on allegations that CBW was competing for business that would use roaming to provide such service to an enterprise customer. Because enterprise customers, even when headquartered in Cincinnati or Dayton,

³² Due to confidentiality provisions in the AT&T and T-Mobile agreements, CBW is unable to provide copies of the agreements to the Commission without a specific request and protective order from the Commission.

³³ It is ironic that AT&T points to CBW as a provider that "also offer[s] nationwide wireless service plans with marked success" while at the same time preventing CBW from using AT&T roaming services to provide that same successful nationwide wireless service to enterprise customers based in Cincinnati. *See Public Interest Statement*, at p. 12.

typically have users based in other areas, this restriction means that CBW cannot offer roaming outside its home area to the out-of-area users and so cannot serve the enterprise customers' comprehensive needs, which increasingly rely upon advanced wireless technology to increase operational efficiency.³⁴ AT&T labors under no such constraint and of course targets such enterprise users intensively. Thus, these terms directly and severely limit CBW's ability to effectively compete for enterprise customers in its own home markets.³⁵

Moreover, AT&T has a whole arsenal of anticompetitive rates and unreasonable terms for data roaming access that it will be able to force upon its competitors with even greater impunity with the elimination of T-Mobile as an alternative. An example is the manner in which AT&T has finally begun to offer 3G roaming. While AT&T has finally offered to open roaming access to its 3G network, the proposed terms and rates for such access are unreasonable. First, it has tied the offering of 3G to a change in the structure of its voice rates in a manner that would materially increase CBW's costs of obtaining voice roaming – and these rates were already double the rate currently available from T-Mobile. Second, the 3G data roaming rate is nearly double the T-Mobile rate and, as will be seen below, far in excess of AT&T's retail rates for these same services, imposing a classic price squeeze on CBW as its wholesale customer and retail competitor.

³⁴ Business use of wireless technology for such purposes as inventory tracking and remote monitoring is a rapidly expanding segment of the wireless market. In fact, AT&T's Annual Report at 6 indicates that its connected device customer base nearly doubled from 2009 to 2010, available at: <http://www.sec.gov/Archives/edgar/data/732717/000073271711000014/ex13.htm>.

³⁵ AT&T may suggest that CBW can provide services to enterprise customers under a mobile virtual network operator ("MVNO") agreement. However, this would require that CBW set up entirely separate and duplicative provisioning and billing systems for customers served under the MVNO agreement, and thus would impose significant unnecessary costs upon CBW by requiring it to pay duplicatively for services that it already handles in-house as a regional facilities-based carrier. In fact, the services that CBW would need to serve enterprise customers' users based outside CBW's area are exactly the same services that are provided with roaming services, and so there is no legitimate economic reason why AT&T could not provide them under CBW's roaming agreement. The only reason to force CBW into an MVNO arrangement would be to increase CBW's costs, complicate its operations, and prevent it from competing effectively for enterprise customers.

Even if the rates alone did not disable CBW from offering competitive 3G roaming to its customers, AT&T has also required unreasonable technical conditions. AT&T has explicitly stated that it has no intention, much less any timetable, to roam on CBW's network. But, as a condition of entering into a 3G agreement, AT&T would require CBW to modify CBW's own 3G network in its home market *right now* to make it technically compatible with AT&T's network and handsets *just in case* AT&T should ever want to roam on it at some future time. Requiring a regional carrier to undertake significant technical modifications, leading to downtime in service and the incurrence of significant costs, to its network for *no legitimate reason* is by definition an anticompetitive term or condition.³⁶

Even after the issuance of the Commission's *Data Roaming Order*, Bob Quinn, AT&T's Senior Vice President of Federal Regulatory, stated that AT&T "continue[s] to believe that a data roaming mandate is unwarranted and will discourage investment and build out of broadband facilities for both those seeking regulated roaming rates and those forced to wholesale facilities at those rates."³⁷ Based on AT&T's public statements against providing access and its current unreasonable proposal for 3G roaming access, it must be assumed that AT&T will not provide just or reasonable data roaming terms or rates to regional carriers without further Commission action. This behavior will only be exacerbated if AT&T is allowed to gain a monopoly as to GSM roaming. As such, the Applicants' assertion that smaller carriers offer meaningful competition that countervails the anticompetitive impact of AT&T's acquisition of T-Mobile can be supported *only* if the Commission assures that AT&T will make voice and data roaming for all existing and future services available on just and reasonable terms. Absent such meaningful

³⁶ This demand would require CBW to provide 3G service on 1900 MHz Band II spectrum, which CBW does not currently provide.

³⁷ See "AT&T Statement on FCC Data Roaming Mandate," FierceMobile Content, April 8, 2011, available at: <http://www.fiercewireless.com/story/att-verizon-attack-fccs-data-roaming-rules/2011-04-08>.

and enforceable conditions, the merger will eliminate the ability of such smaller regional carriers to offer any meaningful competition to AT&T.

Moreover, the Commission can no longer rely on the eventual deployment of new technologies such as LTE to provide sufficient roaming competition. Prior to the announcement of AT&T's proposed acquisition of T-Mobile, CBW had hoped that deployment of LTE by multiple carriers throughout substantially all of the country would loosen AT&T's grip on the roaming market by eliminating the technology-delimited character of the roaming marketplace.³⁸ However, such expectations were premised upon the prospect that there would be at least four nationwide carrier networks with the capacity and the scope to offer robust roaming to smaller regional carriers.³⁹ But at least in the near term, technical issues definitively preclude the possibility of GSM carriers roaming on Verizon and Sprint even with LTE. Because LTE is being deployed in three different 700 MHz bands and the AWS band and current equipment is not interoperable between those bands, the devices CBW could procure would only operate on one nationwide carrier's network and not the others, and then may not even work on CBW's own LTE network. Furthermore, LTE will not be built out ubiquitously for many years, so LTE equipment must be built with fall-back capability to the legacy 3G networks. To be compatible with CBW's network, LTE devices must fall-back to GSM/WCDMA/HSPA. Any such device will not be able to roam seamlessly and will have limited or no service on an LTE network that is

³⁸ See, e.g., Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Application, *In re Applications of Centennial Communications Corp. and AT&T, Inc. for Consent to Transfer of Control of Commission Licenses, Leasing Arrangements and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-246 (filed Jan. 15, 2009).

³⁹ Sprint does not have any significant holdings of Spectrum in the AWS Band (Band IV) or the 700 MHz Bands (Bands XII, Band XVII, or Band XII), where existing LTE technology is currently deployed or targeted for deployment in the US. Sprint/Clearwire uses WiMAX on non paired (TDD) spectrum that is not compatible with LTE or LTE devices that can be used on CBW's network. Sprint and Verizon use CDMA2000 and EVDO for 2G/3G network technology and CBW devices can not fallback to this technology, which would be necessary for CBW users to roam on these carriers' 4G network.

deployed to fall-back to CDMA200/EVDO. As a result, if this merger is approved, CBW will be left with AT&T as the only possible LTE roaming option for the foreseeable future.

Indeed, even if AT&T fully deploys LTE to 97% of the country as it has promised to do, it is not clear from publicly available records *when* such access will be available.⁴⁰ Further, even when (and if) AT&T and Verizon complete a nationwide upgrade and the interoperability hurdles are overcome, there will still be only *two* available nationwide carriers from whom CBW may obtain roaming services. Time and time again, economic history has demonstrated that duopolies do not provide sufficient competition and result in higher prices and less innovation. The Commission therefore should not rely on AT&T's hypothetical promises about the deployment of LTE – even assuming they are kept – to assure access to roaming at fair rates and under just and reasonable terms and conditions.

C. The Commission Must Regulate the Wireless Roaming Rates of the Post-Merger AT&T Entity

Without access to roaming at competitive and reasonable rates on the only GSM-based national carrier, CBW will simply be economically unable to provide roaming service to its customers and the competitive marketplace will be irreparably harmed. CBW fully appreciates the need to compensate AT&T and other carriers for roaming access on their networks, but if Applicants are going to rely on the presence of regional competitors to justify allowing the two largest GSM carriers in the market (not to mention the second and fourth largest competitors overall) to merge, then AT&T must be required to provide roaming at just and reasonable rates and other terms of service.

After this transaction, there will be no constraints on AT&T's wholesale pricing since it will be the only GSM-based provider and thus will be able to control voice and data roaming

⁴⁰ *Public Interest Statement* at 10.

pricing as a monopolist. As a result, the premise of the Commission's *Automatic Roaming Order* that market forces will constrain voice roaming prices, and the notion in the *Data Roaming Order* of a "commercially reasonable" roaming agreement, will be without any real commercial basis whatsoever. As noted above, AT&T's current voice and 2G data roaming rates to CBW are nearly double that of T-Mobile and the data rate is several multiples of the 16 cent per MB retail rate for roaming cited by AT&T Chief Executive Randall Stephenson.⁴¹ In fact, the 16 cents cited by Mr. Stephenson is almost certainly much more than AT&T's retail subscribers pay for data service. At \$55 for 5 GB on AT&T's retail data plan, AT&T customers are paying a mere 1.1 cents per MB for their data service when they use their allowed 5 GB; even if they only use half of that on average, they pay 2.2 cents per MB.⁴² The roaming rate that AT&T charges Cincinnati Bell is well over 50 times greater than the amount AT&T charges its retail customers for data service at full usage by those retail customers and is many times the retail rate even at much less than full usage.⁴³

These discrepancies have a dramatic effect on the ability of a regional carrier to compete with AT&T even in the regional carrier's home market. For example, if a CBW customer in Cincinnati were to spend the month of January in Florida and use 5 GB of data access, AT&T's price for that data roaming to CBW would be in the thousands of dollars. Thus, CBW must lose

⁴¹ "AT&T Chief disputes higher prices after T-Mobile deal," *Reuters*, March 30, 2011. CBW notes that if AT&T were charging 16 cents per MB to its retail customers, then the currently available 5 GB data plan would cost retail customers \$160 per GB for a total of \$800 for 5 GB. Since AT&T currently charges only \$55 for its 5 GB data plan, this figure is clearly misleading.

⁴² AT&T provides a 4GB data plan for \$45 to its retail customers, which includes a \$10 additional charge if the customer exceeds that amount up to 5 GB. See AT&T Wireless Pricing Plans, *available at*: <http://www.att.com/shop/wireless/plans/data-plans.jsp>. At \$55 for 5GB of data access, the customer is paying \$11 per GB or 1.1 cent per MB.

⁴³ Congress expressed concern about the astronomical roaming rates paid by regional carriers and the impact on their ability to compete during a hearing with AT&T and T-Mobile regarding the merger. Senator Herb Kohl questioned whether regional carriers could effectively compete if they "have to pay AT&T and Verizon millions of dollars in roaming fees." *Channel Partners*, May 12, 2011, *available at*: <http://www.channelpartnersonline.com/news/2011/05/at-t-t-mobile-merger-senators-question-impact-on.aspx>.

huge amounts of money on such roaming, raise its rates to its customers for such roaming by a large multiple, or take steps to keep its customers from using those services – none of which is a viable strategy for competing with AT&T. Unfortunately, CBW has been forced to do just that and limit customers’ use of data services while roaming. It is clearly not just and reasonable to require competitors to pay for data roaming at rates that are magnitudes higher than the retail rates paid by consumers when, if anything, the cost to AT&T of providing such roaming on a wholesale basis is less than that of providing its retail service because CBW incurs all of the cost of sales and marketing, billing, bad debt and the like.

The Commission’s attempt to resolve problems of data roaming access and unreasonable rates for access in the *Automatic Roaming Order* and the *Data Roaming Order* do not adequately protect against the harms of the proposed merger. As noted above, both orders were issued at a time when the market was significantly different than it will be if AT&T is permitted to acquire T-Mobile. Moreover, the *Data Roaming Order* is currently under appeal by Verizon and its future enforceability is therefore not guaranteed. Even assuming that the order survives this legal challenge, it will be impossible to determine if AT&T is providing “commercially reasonable terms and conditions” including reasonable rates,⁴⁴ when AT&T is a monopoly provider in the wholesale GSM roaming market.

In order for the Commission to approve a merger with such huge negative implications for the competitive market, the Commission must impose a direct and unequivocal obligation on AT&T to provide voice and data roaming at reasonable and nondiscriminatory prices. Unless the Commission does so, there will be no possibility that regional carriers will be able to provide

⁴⁴ See 47 C.F.R. § 20.12(e) (“A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions.”); *Data Roaming Order* at 21 (adopting “a general requirement of commercial reasonableness for all roaming terms and conditions, *including rates*”) (italics added).

any meaningful competitive constraints on the retail service and pricing of AT&T. Absent such a guarantee, the wireless market will return to the non-competitive duopoly that the Commission has worked hard to eliminate over the past two decades, and GSM-based providers such as CBW will be forced to deal with a monopoly of a single GSM-based national carrier for roaming access.

The roaming rates must be cost-based and provide AT&T a reasonable – but not grossly anticompetitive – return on its investment. One way to achieve this outcome would be to impose a price cap on roaming services at the lower of (a) the lowest rate AT&T or T-Mobile charges anyone else (including retail customers) for roaming services, or (b) a rate that provides AT&T a fair opportunity to recover its costs as well as a reasonable profit. CBW is confident that AT&T will be able to recover the costs associated with roaming services, as well as a profit, if its prices for voice roaming are capped at two cents (\$0.02) per minute. Based on CBW’s own costs of providing voice service, which given AT&T’s economies of scale, are surely higher than AT&T’s costs, CBW is confident that a two cent per minute rate for voice roaming will more than cover AT&T’s costs. Even more importantly, the Commission must establish a price cap for data roaming services, because the current costs to competitors are grossly disproportionate to the costs to the underlying carrier. Since AT&T retail customers are paying only \$0.011 to \$0.022 per MB under AT&T’s current pricing plan, CBW believes that a price cap of \$0.03 per MB is quite sufficient to allow AT&T to recover its costs and earn a profit, especially considering the lower cost to AT&T of providing wholesale roaming as compared to the costs associated with a retail customer. In addition, AT&T must be required to revisit these rates as technological advances lower the cost of providing the services.

Finally, the Commission must condition the merger by requiring that AT&T either (i) not shut down T-Mobile's 3G network at all until LTE is fully deployed and made practically available to CBW and others who now rely on the T-Mobile 3G network⁴⁵ or (ii) shut down the T-Mobile network only in an orderly fashion that allows CBW and the other small and regional GSM providers a smooth glide path to offer all their customers 3G roaming on the AT&T network. If AT&T elects the former path, the Commission should require AT&T to coordinate with all carriers currently using the T-Mobile 3G network to assure that those carriers' customers are able to roam on AT&T's 4G service with no disruption and upon fully competitive rates, terms and conditions. Among other things, this will require AT&T to coordinate closely with each of the carriers as well as handset manufacturers. If AT&T elects the latter course, this too will require close coordination with other affected parties. In addition, it will require AT&T to take specific steps with regard to spectrum and handsets, which are more fully described below.

IV. THE COMMISSION MUST ENSURE THAT AT&T'S COMPETITORS HAVE ADEQUATE SPECTRUM TO COMPETE.

The combination of AT&T and T-Mobile, the second and fourth largest wireless carriers (and largest and second largest GSM-based carriers), will create a wireless carrier with overwhelming market power and control of vast swathes of spectrum. Nationally, the combined entity will hold an average of approximately 150 MHz of spectrum in the major metropolitan markets.⁴⁶ Based upon its past actions and this application, it appears that AT&T plans to overcome its purported spectrum shortage by expanding through acquisitions instead of developing technological and other methods to better utilize its existing spectrum. In the last

⁴⁵ The Commission must also ensure that while the T-Mobile network remains intact, that AT&T continue to transmit the T-Mobile PLMN so that carriers know whether their roaming traffic is being carried on the legacy T-Mobile network or the pre-merger AT&T network.

⁴⁶ J.P. Morgan, North American Equity Research, *Wireless Services, Overview of Carrier Spectrum Holdings*, Mar. 30, 2011.

four years, AT&T has acquired numerous small carriers such as Dobson, Aloha, and Centennial, and is now poised to acquire Qualcomm's 700 MHz spectrum as well as T-Mobile, to further cement its market share and spectrum holdings. These acquisitions, along with mergers undertaken by Verizon, have significantly consolidated the wireless market and placed both competitors and consumers at a disadvantage.

Yet while AT&T has already used its significant capital to acquire larger and larger amounts of spectrum holdings, it nevertheless continues to claim that it is suffering from a spectrum crunch and will be unable to provide advanced broadband services without acquiring even *more* spectrum through this merger. In fact, much of AT&T's current spectrum limitations have developed due to its own lack of planning and development.⁴⁷ The addition of T-Mobile's spectrum will not solve this problem either, as it will simply reduce the pressure on AT&T to innovate and move its customers to more efficient technologies. The Commission should not continue to hand more and more spectrum to AT&T. Instead, the Commission should require that AT&T's existing spectrum be used more efficiently and effectively.

Through this merger, AT&T and T-Mobile will control far more spectrum in the Cincinnati market than CBW. Specifically, the combined AT&T and T-Mobile will hold 117 MHz of spectrum in this market as compared to the 50 MHz held by CBW. While this total amount of combined spectrum for the market is not as high as it will be in other markets, it is important that the Commission review what *type* of spectrum will be controlled and how to best to use it efficiently. While the Commission traditionally uses a spectrum screen to determine if

⁴⁷ In order to justify the merger, AT&T admits that its spectrum capacity problems are "exacerbated by AT&T's need to divide its spectrum portfolio among three different generations of technology" and that its "need to support multiple generations of technology severely constrains its flexibility to use its spectrum with optimal efficiency." *Public Interest Statement*, at 22, 24.

spectrum holdings in a specific market are unduly concentrated, that type of review of the Cincinnati market would perversely focus on the forest but fail to see the trees.

AT&T's inefficient use of spectrum is particularly profound in the Cincinnati market. The post-merger AT&T, together with Verizon, will control all of the "beachfront" spectrum in the 850 MHz cellular and 700 MHz bands, which will provide them with great advantages for cost-effectiveness, quality and speed of service. In addition, AT&T will hold significant portions of the AWS and PCS 1900 MHz bands. At this time, AT&T holds the AWS B1, B2 and C blocks as well as the PCS A3 block in Cincinnati. If the merger is approved, it will also acquire T-Mobile's 30 MHz of PCS in the B1, B2 and F blocks, and 10 MHz in the E block of AWS. However, spectrum can be used far more efficiently as carriers hold larger *contiguous* blocks of similar spectrum; contiguity allows carriers to more readily deploy faster technologies, take advantage of efficiencies, and manage interference to other users. AT&T's historic failure to take advantages of opportunities to create larger and more efficient contiguous blocks of spectrum within the Cincinnati market is just another example of its failure to act efficiently with its spectrum holdings and belies its claim that its capacity issues are the result of a spectrum shortage.⁴⁸

For example, AT&T holds the PCS A3 block, while CBW holds the PCS A1, A2 and E blocks. By swapping the CBW's PCS E block for AT&T's A3 block, both companies would maintain their respective amount of spectrum holdings in the market, but each would greatly benefit from increasing their contiguous blocks of spectrum. In addition, this swap would not require any new capital investment or cost and would be invisible to consumers while benefiting

⁴⁸ Even to the extent AT&T faces a spectrum shortage, this is no different from the spectrum shortage faced by AT&T's competitors. The Commission must certainly address this problem, but in a way that is fair to all competitors, such as by allocating new, and reallocating existing spectrum and making it available to all who need it, not by letting AT&T simply buy up one of its last remaining national competitors.

them with more efficient and higher speed service. Therefore, the Commission should insist that AT&T undertake this swap with CBW, thereby allowing both carriers to better use limited spectrum resources and should also require that AT&T affirmatively seek out and enter into similar arrangements in other markets. This swap is also in the public interest as it will help CBW remain viable as a competitor by allowing it to more efficiently deploy advanced services at higher speeds that would be enabled with 30 MHz of contiguous spectrum.

Second, AT&T should be required to divest the B1 block of its AWS spectrum in the Cincinnati market. As of today, this spectrum is dormant and is not even being used by AT&T. This type of warehousing of spectrum further demonstrates AT&T's lack of innovation and failure to efficiently use its spectrum. As such, it should divest this property -- to a carrier other than Verizon, which is similarly likely to be hoarding spectrum -- and allow competitors the opportunity to better utilize this limited resources. For example, this block would align with CBW's AWS holdings and allow it to develop a contiguous block of spectrum for advanced broadband services. Undoubtedly, similar situations must exist in many markets throughout the country. The Commission should look beyond requiring AT&T to divest spectrum in markets that exceed the spectrum screen. As a condition of the merger, the Commission should also require AT&T to undertake an analysis of the spectrum available in all markets to identify opportunities that will enable the small or regional carriers in those markets to obtain spectrum that will enhance their ability to deploy advanced wireless broadband service in their markets. This is particularly critical since little or no additional spectrum is likely to be available for auction for some time.

Finally, if AT&T chooses to shut down T-Mobile's 3G network, CBW will need to reband its own 3G services. This will require CBW to replace hundreds of thousands of

customer handsets with 3G devices that support AT&T'S 3G frequencies (Bands II and V). Further, handsets that support both CBW's band (Band IV) *and* both AT&T bands (Bands II and V) are currently not widely available and are considerably more expensive than widely available models. Thus, when the T-Mobile network is shut down CBW will need to reband its 3G base stations and move them from Band IV to Band II at major expense. This would require upgrading 255 sites, at a cost of tens of thousands of dollars per site, and a total of several million dollars. Further, during this migration, CBW must maintain its existing GSM services in the 1900 MHz band (Band II) for some period of time and CBW will need additional spectrum for an interim period to allow users to be moved without experiencing service disruptions. Specifically, CBW will need a 2 x 5 MHz block or a total of 10 MHz in the 1900 MHz band (Band II) to complete such a migration.

Following the merger, AT&T will have ample spectrum in this band both to meet its foreseeable needs and to make spectrum available to CBW for this interim period. Accordingly, as a condition to the merger, the Commission should require AT&T to either divest this spectrum outright to CBW or to lease it to CBW on just and reasonable terms and conditions for its interim use.

V. THE AVAILABILITY OF HANDSETS TO SMALL REGIONAL CARRIERS IS ESSENTIAL TO THEIR ABILITY TO PROVIDE THE TYPE OF COMPETITION TO AT&T THAT WOULD JUSTIFY APPROVAL OF THE MERGER, AND THE COMMISSION MUST TAKE STEPS TO ASSURE THEIR CONTINUING AVAILABILITY AFTER THE MERGER.

Exclusive handset arrangements by AT&T and other national carriers have made it nearly impossible for carriers like CBW to obtain the latest technology and most desirable handsets for their subscribers. Only the largest national providers have the critical mass of customer base necessary to demand exclusive arrangements with handset manufacturers, thus harming competition. While basic economics should, in theory, drive handset manufacturers to sell as

many handsets as possible, exclusive contracts expressly prevent manufacturers from selling handsets with the newest technology to smaller carriers for a significant period of time.

Furthermore, these exclusive arrangements ensure that the new handsets will only be compatible with the technologies employed by the largest carriers.

AT&T and T-Mobile have used their existing market power to develop a large number of exclusive arrangements with handset manufacturers.⁴⁹ The Commission found in the *Fourteenth Report* that, just in 2008-2009, AT&T had *fifteen* exclusive smartphone launches and T-Mobile had *five*. The other dominant carrier, Verizon Wireless, had *nine*,⁵⁰ while Sprint had only *three*. No other carrier is shown as having had any *at all*.⁵¹ The merger of AT&T and T-Mobile will significantly expand the ability of the combined entity to engage in such anticompetitive arrangements to the additional detriment of small regional carriers like CBW. Yet CBW is the very type of company whose presence AT&T and T-Mobile tout as providing the competition necessary to counterbalance the anticompetitive effects of their proposed merger. Clearly, the Commission must take steps to enhance the ability of CBW and similar wireless providers to compete with the merged entity by ensuring them access to the most advanced types of handset equipment. Simply put, the Commission must, at the threshold, condition the merger by forbidding AT&T to enter into exclusive handset arrangements henceforth and requiring it to waive exclusivity in its existing agreements.

⁴⁹ See Reply Comments of T-Mobile USA, Inc., *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497 (filed Feb. 20, 2009).

⁵⁰ *Wireless Competition Fourteenth Report* at Table C-5.

⁵¹ *Id.*

CBW has clearly seen that these arrangements directly harm its business and thus impair competition.⁵² When new and highly popular handsets are announced, CBW's experience shows a dramatic surge in customer churn. Specifically, when the 3G iPhone was released by AT&T and the Blackberry Storm was released by Verizon, there was a significant and corresponding increase in customers leaving CBW for those carriers in order to obtain the new handsets. Moreover, CBW's share of gross subscriber additions has steadily declined since that time due in large part to its limited access to the most desirable handsets.

Exclusive arrangements are also harmful to customers. In order to obtain the newest phones, customers must switch providers, pay higher prices for services and agree to high termination charges and other harsh terms and conditions for service simply because there is no competing provider who can offer access to the same handset. The situation is even more dire for consumers who live in rural communities that do not have coverage from these "national" carriers; these customers are completely denied access to the most innovative and popular handsets.

Verizon, AT&T's primary national competitor, has paid lip service to the importance of handset availability to smaller carriers like CBW when, as part of the *Verizon-Alltel* merger review, Verizon promised to limit exclusive agreements with handset makers to six months and to make handsets available to small wireless carriers with less than 500,000 customers thereafter.⁵³ However, that proposal does not mitigate the harm of the AT&T and T-Mobile exclusive arrangements since it is for CDMA and not GSM handsets. In any event, CBW

⁵² See Comments of Cincinnati Bell Wireless LLC, *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM No. 11497 (filed Feb. 2, 2009).

⁵³ See Letter from Lowell C. McAdam, President and CEO of Verizon Wireless to Senator John F. Kerry, July 17, 2009, as filed in WT Docket No. 08-246. Note that even Cincinnati Bell, at 1/250th the size of the combined AT&T/T-Mobile, would still apparently have too many subscribers to qualify for this exemption.

understands that although the proposal was publicly offered by Verizon, its practical impact has been marginal at best. Specifically, smaller carriers have found that it generally takes several months for a manufacturer to develop and test a compatible handset. Since these small carriers cannot begin working with the manufacturers until after the six month expiration of the exclusivity arrangement with Verizon and are required to wait at least an additional three or four months for receipt of the handsets, the design has often become obsolete and outdated by time it is manufactured and reaches those carriers' store shelves. In addition, even after expiration of the exclusivity period, many manufacturers simply refuse to work with smaller carriers on redesign of handsets since by the time those carriers are able to request them, the larger carriers – and therefore the manufacturers assembly lines – have moved on to newer models. Therefore, the six-month “solution” offered by Verizon (which in any event has not been offered by AT&T) is inadequate. Merely opening up exclusive arrangements to the smallest carriers after a specified time period will not reduce the competitive harm of exclusive agreements.

Indeed, even a simple blanket prohibition on exclusive agreements will not be enough to protect competition and consumers because AT&T can accomplish *de facto* exclusivity against smaller carriers by insisting as a condition of its procurements that manufacturers make and supply to it only handsets that are not interoperable on the spectrum of other carriers.⁵⁴ Since, as AT&T boasts, its footprint post-merger will obviate any further need to roam on small carriers (which is already *de minimis*), it can get away with deploying handsets that are not interoperable with other carriers to its users. Because of AT&T's enormous market share, research and development dollars by manufacturers will concentrate on development for AT&T specifications

⁵⁴ Even without formal exclusive contracts, on information and belief, AT&T has successfully used its buying power to pressure manufacturers not to sell to CBW. Several manufacturers have refused to sell some product lines to CBW, citing such pressure from AT&T. Others facing such pressure have simply refused to sell any of their products *at all* to CBW. The merger will only increase AT&T's ability to engage in this anticompetitive behavior.

(and perhaps similar development for Verizon, the only remaining carrier with comparable clout). Manufacturers will have virtually no incentive to manufacture equipment that even works with smaller carriers' spectrum, let alone is interoperable between networks. And even if they manufacture such equipment, the fixed costs of doing so will be spread over a much smaller number of units (remember again that the combined AT&T/T-Mobile will have more than 250 times the subscribers of CBW). This merger will accelerate and make absolute the trend the Commission has already found that "many handset models are produced to the specifications of a single wireless service provider to enable certain functionalities unique to that service provider" and that most handsets are "locked" in order to prevent them from working on competing carrier networks.⁵⁵ Such "single carrier" handsets are inefficient, limit the ability of customers to change providers, discourage carriers from developing and using new technologies and will ultimately strengthen and perpetuate the AT&T/Verizon duopoly.

AT&T has acknowledged that this limitation increases the cost and time requirements of moving customers even to more efficient technologies within the same carrier. As John Stankey, CTO of AT&T, stated in connection with AT&T's plan to move existing T-Mobile customers off of T-Mobile's UMTS services that runs on AWS spectrum and onto AT&T's 1900 MHz spectrum, "T-Mobile customers with 3G handsets will eventually have to purchase new devices that work with AT&T's frequencies."⁵⁶ If AT&T handsets deployed to those customers do not also accommodate AWS spectrum, then they will be of no use to other GSM carriers like CBW whose 3G networks run on AWS spectrum. Therefore, even if AT&T does not require exclusive agreements for such handsets and they are therefore theoretically available for purchase by other

⁵⁵ *Fourteenth Report and Order*, at ¶ 240.

⁵⁶ Phil Goldstein, "AT&T/T-Mobile merger scrambles long-term handset picture," *FierceWireless*, March 21, 2011, *available at*: <http://www.fiercewireless.com/story/att-mobile-merger-scrambles-long-term-handset-picture/2011-03-21>.

carriers, there is no guarantee they will actually work on CBW's network unless AT&T assures that its handset designs incorporate dual-mode capability to work on CBW's and other GSM providers' networks.

AT&T's proposed shutdown of the T-Mobile 3G network renders this need particularly acute. As discussed above, during the transition period, CBW will be required to obtain handsets (as well as base station equipment) that are interoperable on both the AT&T and CBW bands. As of today, it is far from clear that such equipment will be available. The Commission should require AT&T as a condition of the merger to work with manufacturers to assure that such equipment is available at reasonable cost to CBW and other carriers who use T-Mobile for 3G roaming today.⁵⁷

Clearly, the Commission needs to take strong action in this proceeding to make sure that AT&T is subject to meaningful – and enforceable – conditions that assure that handsets are available to smaller carriers such as CBW. This should take the form of both forbidding exclusive handset arrangements outright and forbidding AT&T to enter into arrangements that encourage or require manufacturers to make and provide equipment that will work only on AT&T's network, as well as an affirmative requirement that AT&T cooperate with manufacturers and other carriers to assure the widespread availability of interoperable equipment.

VI. CONCLUSION

If allowed to proceed without conditions, this merger would be a disaster for competitors and consumers alike. It would cement a market in which AT&T and its fellow duopolist Verizon could and would charge monopolistic prices, slow-roll innovation and use well-honed

⁵⁷ Additionally, to prevent AT&T from taking advantage of its monopsony buying power to the detriment of competitors, the Commission should require that AT&T include in its equipment agreements a "tag-along" right enabling smaller carriers to acquire the same handsets on the same terms and conditions as AT&T.

anticompetitive tactics to drive their few remaining competitors from the market. Thus, if the Commission decides to allow this merger, it *must* impose detailed and enforceable conditions to avoid the harm to the public interest that would otherwise occur. These conditions are:

- (1) ***Roaming:*** AT&T must be required to charge only just and reasonable – i.e., cost-based – wholesale roaming rates rather than the rates it charges today, which are a large multiple of reasonable cost-based rates. AT&T must also make *all* its voice and data services available for roaming and must cease imposing terms that, by design and actual effect, prevent regional partners from carrying out their vital competitive function;
- (2) ***Spectrum:*** AT&T must be required to swap, divest and/or lease spectrum as appropriate to assure that its competitors have sufficient spectrum in both quantity and quality to provide competitive and cutting edge services; and
- (3) ***Handsets:*** AT&T must no longer be permitted to tie up handsets through exclusive deals with manufacturers or to use its buying power to cause manufacturers to focus their development on products that will serve only AT&T and not regional carriers.

As further detailed above, the Commission should impose these conditions on AT&T's operations generally going forward but also should give particular attention to assuring that AT&T's projected shutdown of the T-Mobile 3G network does not have anticompetitive and anticonsumer effects. *All* of these conditions are required if the merger is to go forward; no one, or even two, of them will be sufficient alone. If the Commission is unwilling, or for some reason finds itself unable, to impose any of these conditions, it must deny the Applications.

Respectfully submitted,

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Dated: May 31, 2011

VERIFICATION

I, Michael S. Vanderwoude, declare that I am Vice President and General Manager of Cincinnati Bell Wireless LLC; that the foregoing Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications ("Petition") was prepared under my direction and supervision; and that the facts set forth in the Petition are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 2011



Michael S. Vanderwoude