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**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 JAPAN COMMUNICATIONS INC. AND COMMUNICATIONS
SECURITY & COMPLIANCE TECHNOLOGIES, INC.**

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Japan Communications Inc. (“JCI”) and Communications Security & Compliance Technologies, Inc. (“CSCT”), by their counsel, hereby submit comments on the applications filed by AT&T Inc. and Deutsche Telekom AG (“Applicants”) for consent to assign or transfer control of certain licenses and authorizations, which are the subject of the above-captioned docket.

INTRODUCTION AND SUMMARY

For more than a decade, JCI has been a leader in bringing innovative wireless communications solutions to consumers and businesses in Japan by combining its own facilities with leased access to the last-mile wireless facilities of incumbent carriers. This arrangement enables JCI to provide unique end-to-end services that are not provided by the incumbents. JCI’s experience in Japan highlights what innovations are possible with Government policies that encourage competition from Mobile Virtual Network Operators (“MVNOs”). JCI has tried to duplicate its business model in the United States through its subsidiary CSCT, but has found the market for access to incumbent wireless facilities in the United States to be very challenging, as

very few carriers are willing to offer their facilities to potential retail competitors in any meaningful fashion.

If AT&T is permitted to acquire T-Mobile, the market for wholesale wireless facilities may cease to function at all. T-Mobile is currently one of the few carriers willing to offer meaningful wholesale access and is one of only two nationwide carriers using GSM-based technology,¹ the standard throughout most of the rest of the world. The proposed transaction would make it virtually impossible for providers like CSCT to secure facilities to provide innovative services, and would essentially give AT&T monopoly control of roaming agreements for carriers with international customers. Accordingly, if the Commission approves this transaction, JCI and CSCT urge the Commission to put in place rigorous, enforceable conditions that require the merged company to preserve some level of wholesale competition. At a minimum, AT&T should be required to offer wholesale access to, as well as roaming on, its most advanced data facilities at cost-based rates and without onerous carrier-specific device certification or other discriminatory requirements.

I. JCI AND CSCT HAVE A VITAL INTEREST IN THIS PROCEEDING.

JCI provides a range of innovative wireless services and products in Japan through the use of incumbent wireless carrier facilities, and, through its U.S. subsidiary CSCT, has sought to do the same thing in the United States. Unlike in Japan, where government regulations guaranty access to incumbent wireless facilities, in the United States CSCT has had to rely entirely on commercial negotiations to gain such access. JCI and CSCT thus have a keen interest in ensuring that the proposed AT&T-T-Mobile transaction does not worsen an already challenging market for access to incumbent carrier facilities.

¹ We use the term “GSM-based” to refer to GSM and its evolution, *i.e.*, GSM, GPRS, EDGE, WCDMA, HSPA, HSPA+, LTE, LTE-Advanced, etc.

A. JCI Has A Long History Of Bringing Innovative Products And Services To Market.

JCI has operated in Japan since 1996. Initially, JCI functioned largely as a reseller of voice services, as many MVNOs in the United States currently operate.² Although JCI's business grew rapidly, JCI recognized that reselling voice services has limited horizons for increased innovation and profitability. Thus, in 2001, JCI partnered with Japan's largest Personal Handy-Phone System ("PHS") service provider, a company now known as WILLCOM Inc., and launched the world's first data communications MVNO. JCI's data MVNO differed from the standard MVNO model in that JCI did not function simply as a reseller of another carrier's products. Instead, JCI offered unique and independent services, controlling the marketing, billing, and customer experience.³

Since 2001, JCI has built on this model and greatly expanded its services. JCI currently partners with wireless incumbents in Japan to provide JCI's customers with unparalleled access to advanced data services. Today, all of JCI's retail customers have access to multiple network types – 3G and PHS networks, as well as Japan's most comprehensive network of public wireless LAN spots – providing the widest mobile coverage in Japan. To provide these services, JCI uses its own facilities in combination with interconnection to and use of incumbent wireless last-mile facilities. Under these arrangements, JCI controls all traffic, Internet Protocol ("IP") addressing, routing, authentication, and billing. Thus, JCI is no longer an MVNO, and is instead a facilities-based carrier and Mobile Virtual Network Enabler ("MVNE") for other new entrants.⁴

² Declaration of James Marcus Winn, submitted herewith ("Winn Decl."), ¶ 4.

³ *Id.*

⁴ *Id.* ¶ 5.

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For individual customers in Japan, JCI offers a flexible and convenient mobile data service called b-mobile3G. This service allows customers to purchase a USB device that they insert into their laptop computers. The device provides wireless data connectivity anywhere in Japan and allows customers to purchase service based on the number of hours or minutes of desired use. JCI also allows customer to pay different rates that depend on the desired speed of connectivity. At slower speeds, customers pay a lower fee per minute of usage, and at faster speeds, they pay higher fees. And JCI offers volume-metered billing, for which customers pay a fee based on the amount of data they want to use (*e.g.*, 1GB). JCI requires no contracts or monthly billing for any of these products. Customers can buy what they need on a pay-as-you-go basis, rather than what the carrier wants them to have.⁵

For business customers in Japan, JCI offers a custom-designed service called InfinityCare, which addresses all of a corporation's mobile voice and data services through a single end-to-end framework that combines JCI's expertise in wireless handhelds, wireless mobile network connectivity, device and user authentication, network security, and customer service. JCI services roam and switch seamlessly between a variety of different networks, giving customers uninterrupted coverage with no need to change configurations.

JCI also provides machine-to-machine ("M2M") applications. For example, JCI offers a Private Wireless Leased Line ("PWLL") service, which is an end-to-end private network solution that ensures financial data cannot be stolen or compromised while in transit. This service can reduce ATM operators' average cost for connectivity from over \$800 per month to around \$30 per month, while maintaining security standards for financial transactions. In multiple cases, subsidiaries of the incumbent carriers from whom JCI leases last-mile facilities

⁵ *Id.* ¶ 6.

have requested that JCI offer its products and services to those carriers on a wholesale basis because these entities cannot develop services of the same quality themselves.⁶

In addition, as Japan’s preeminent MVNE, JCI has enabled its MVNO partners to define their own wireless data pricing and integrate mobile wireless features into their own unique products. JCI provides back-office, development, and support services specific to those products, so other companies can enjoy the benefits of Japan’s MVNO structure.⁷

B. Japan’s Regulatory Scheme Has Facilitated This Kind Of Innovation.

JCI’s success has been due in large part to Japan’s adoption of policies that encourage MVNOs to flourish. The Ministry of Internal Affairs and Communications (“MIC”) recognized that the growth rate of Japan’s wireless industry had begun to slow in 1998, and that, by 2003, the industry had fully matured. MIC determined that wireless innovation was a key element in its goal to reinvigorate the Japanese economy and of strategic value to the country, and examined various options for encouraging that innovation. After considerable study, MIC concluded that opening the door to meaningful competition by smaller carriers to address the needs of customers that were not being adequately served by incumbents was the best means of encouraging innovation and spurring growth in the wireless market.

As MIC recognized, MVNOs can play a critical role in both innovation and in maximizing efficient use of spectrum. The advent of high-speed data networks allows MVNOs to package and market a wide variety of data services – involving varied forms of mobile commerce, from banking to entertainment – that traditional carriers are simply not positioned to provide.

⁶ *Id.* ¶ 10.

⁷ *Id.* ¶ 11.

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Accordingly, MIC issued initial MVNO Guidelines in 2002, with further refinement in 2007, establishing rules under which incumbent wireless carriers are required to interconnect their networks to MVNO networks. MIC’s Guidelines have three important elements:

- (1) Interconnection at the Data Link level on the Open Systems Interconnection model – so-called “Layer-2” connectivity⁸ – between facilities-based carriers and MVNOs is required. In other words, MVNOs must be provided a deep connection to facilities-based carriers’ networks in order for MVNOs to deliver differentiated, innovative products and services. Incumbent carriers cannot encumber or interfere with this interconnection.
- (2) Pricing of that Layer-2 connectivity should be cost-based. This approach incentivizes the MVNO to use incumbent carriers’ network resources most efficiently, and it allows the MVNO to create its own rate plans – plans that can be custom built for each customer or offered as a standard service.
- (3) Device certification on individual carrier networks is an unnecessary impediment. Carriers must allow any PTCRB⁹ certified device to operate on their networks, as carrier-specific certification can be used for anticompetitive purposes.

In the brief time since adoption of these guidelines, Japan has seen some notable innovation and increases in subscriptions to products that incumbent carriers would not or could not have offered. For example, in 2009 SONY became a JCI partner in Japan, offering customers SONY notebook computers that come preprogrammed for immediate wireless internet access using DoCoMo’s data network.¹⁰

⁸ See <http://www.itu.int/rec/T-REC-X.200-199407-I/en>.

⁹ PTCRB is a global organization created by Mobile Network Operators. See <http://www.ptcrb.com/>. CTIA-The Wireless Association® is the administrator for the PTCRB certification process.

¹⁰ Winn Decl. ¶ 7.

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Also in 2009 Hewlett Packard became a registered telecommunication service provider, introducing laptops, netbooks, and touchscreen tablets in Japan that come with pre-paid Internet airtime built-in, and feature a one-click, pay-as-you-go system for wireless access, with software and network services developed and supported by JCI. Hewlett Packard customers have no contracts and no fixed monthly fees.¹¹

At the same time, JCI's time-billed consumer service has dramatically increased sales since it has gained access to higher-speed data networks. Particularly given how recently Japan adopted its MVNO guidelines, it is believed that these kinds of service offerings are just the tip of the iceberg.

C. The United States Presents A Much More Challenging Environment To Bring This Kind of Innovation.

JCI entered the U.S. market in 2006, through its subsidiary CSCT. Like JCI, CSCT provides service by combining its own facilities with leased last-mile wireless connections from incumbent carriers. CSCT provides a range of services, including M2M applications for ATMs, kiosks, and Point-of-sale systems.¹² For example, CSCT offers a service similar to JCI's PWLL service, providing a PCI certified private network¹³ – requiring no data encryption – for financial transactions.¹⁴ CSCT typically offers services and pricing models not found elsewhere in the marketplace.

In JCI and CSCT's experience, there are currently very few options available for access to incumbent wireless facilities in the United States. CSCT has encountered significant reluctance from national carriers to provide the Layer-2 interconnection necessary to provide

¹¹ Winn Decl. ¶ 8.

¹² *Id.* ¶¶ 12-13.

¹³ See <https://www.pcisecuritystandards.org/index.php>.

¹⁴ Winn Decl. ¶ 13.

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innovative data services. These carriers generally offer either no wholesale access to their high-speed data networks or else only a one-size-fits-all package that limits a lessee to reselling the incumbents' services on terms that mimic those of the incumbents. CSCT has successfully negotiated interconnection agreements with only one national carrier in the United States, as well as one regional carrier.¹⁵

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CONFIDENTIAL]¹⁶

In addition to difficulty in securing access to incumbent wireless facilities, CSCT has found that the roaming practices of carriers in the United States are highly discriminatory. CSCT needs roaming agreements for three reasons. First, roaming allows CSCT to use arrangements with a regional carrier to serve an area broader than the regional carrier's territory. This is very important, as it is extremely difficult to build a business without broader reach. Second, a number of the products CSCT offers require access to redundant networks. Every network has some dead spots, and some applications – like critical M2M security services – cannot function without the ability to switch to another network when a dead spot is encountered. Third, CSCT seeks to serve JCI's Japanese customers when they are in the United States as well as other

¹⁵ *Id.* ¶ 14.

¹⁶ *Id.* ¶ 15.

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international travelers. This requires the ability to roam throughout the United States on networks that are compatible internationally.¹⁷

It is extremely difficult to obtain reasonable data roaming agreements in the United States. Carriers in the United States generally set data roaming rates at extremely high levels – typically at approximately \$.50 per megabyte for domestic roaming and \$20.00 per megabyte for international roaming.¹⁸ This rate is much higher than a carrier’s cost of providing service, and in many cases higher even than its retail rates. A comparison with the pricing of voice roaming makes that clear, as the same carrier infrastructure used for voice (*e.g.*, towers, base stations, etc.) is also used for data. Depending on network speed and technologies deployed, between one and 40 megabytes of data can be transmitted from a wireless terminal each minute. This means that, using the same infrastructure used for voice at top *retail* rates of \$.10/minute, a minute of data usage would have a wholesale, inter-carrier cost of *between 5 and 200 times that of a voice application*.¹⁹

Carriers in the United States also generally require that a device be subjected to carrier-specific certification requirements before that device can be connected to their networks. These requirements can be quite onerous and, at the least, can cause significant delay in providing service. This is particularly problematic for M2M providers like CSCT, who tailor the devices

¹⁷ *Id.* ¶ 16.

¹⁸ *Id.* ¶ 17.

¹⁹ JCI and CSCT applaud the Commission’s recent data roaming order for making clear that carriers must offer data roaming. *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, 2011 WL 1341353 (FCC 11-52, rel. Apr. 7, 2011) (“Data Roaming Order”). That order, however, appears to indicate that the rates currently charged in the market are acceptable. *See id.* ¶ 21 (noting that “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carrier’s network”). As explained in these comments, JCI and CSCT believe these rates are the product of a dysfunctional market, and urge the Commission to take steps to address them.

they use for different customers.²⁰ And there is little reason to believe that such certification requirements serve a valuable purpose. U.S. carriers routinely allow foreign carriers' customers to roam on their networks, even though foreign carriers' devices have not been certified on any U.S. carrier's network, and, in most instances, have been subject only to generic certification from PTCRB. It makes little sense to subject domestic devices to a more stringent standard.

Finally, some national carriers insist on a "no-parking" provision in their roaming contracts, meaning a device found roaming on the home carrier's network for a long period can be kicked off the network. This makes it very difficult to offer certain applications – particularly M2M applications that require reliability – via data roaming.²¹ It also makes little sense given that roaming rates are much higher than the rates charged to retail customers.

For all of these reasons, CSCT has faced considerable challenges pursuing its business model in the United States, but has nevertheless achieved success. If the proposed acquisition is approved, however, the currently limited market for wholesale access in the United States may disappear altogether.

II. APPROVAL OF THIS TRANSACTION WOULD CAUSE GRAVE HARM TO THE WHOLESALE MARKET IN THE UNITED STATES.

If the proposed acquisition is allowed to proceed, there will be only three nationwide carriers in the United States, with two of them controlling a combined 75% of all wireless customers and nearly 90% of industry profits, and the third indicating that it may not survive in a post-merger world. Moreover, only one of those carriers – AT&T – uses the GSM-based standard used by most of the rest of the world. Because of the high barriers to entry in the wireless market and the extremely high level of concentration that would exist if this transaction

²⁰ Winn Decl. ¶ 18.

²¹ *Id.* ¶ 19.

were approved, the effective competition necessary to protect consumer welfare must necessarily come in large part from providers using other carriers' facilities. Yet absent regulatory intervention, such providers would be unlikely to survive if the merger is approved.

A. Wholesale Access Via Carrier Interconnection To Incumbent Wireless Facilities Becomes Even More Crucial If This Transaction Is Approved.

There are extremely high barriers to enter the wireless market on a traditional facilities-based model.²² First, there is limited to no spectrum available in most markets, and if and when spectrum is available, it is often far too expensive for smaller providers and new entrants. Indeed, according to AT&T, the primary reason for this proposed transaction is to obtain scarce spectrum.²³ Second, a new entrant must build or negotiate access to communications towers to support its network. And third, entry as a traditional facilities-based provider requires development of end-user equipment such as data cards and handsets. The loss of one of only four nationwide competitors, therefore, would be extremely hard to replace through facilities-based entry.

As other commenters explain in this proceeding, if this transaction is approved, the level of concentration in the wireless market will far exceed any measure of healthy competition. Additionally, post-merger, AT&T and Verizon would have massive scale and scope advantages with regard to market share, spectrum holdings, infrastructure control, and the ability to invest.²⁴ AT&T and Verizon also dominate the wireline market, which among other things, allows them

²² Even providers commonly referred to as "facilities-based providers" routinely lease facilities from other providers for services such as backhaul. And carriers like JCI and CSCT provide service using a combination of their own facilities and leased access to incumbent facilities.

²³ *In re Applications of AT&T, Inc. and Deutsche Telekom, AG for Consent to Assign or Transfer Control of Certain Licenses and Authorizations*, WT Docket No. 11-65, Description of Transaction, Public Interest Statement and Related Showings, at 2-6 (Apr. 21, 2011) ("Public Interest Statement").

²⁴ *Proposed AT&T/T-Mobile Merger: Hearings; Before the Senate Judiciary Committee Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. On the Judiciary* (May 11, 2011) (Written Testimony of Daniel R. Hesse, Chief Executive Officer Sprint Nextel Corp.) ("Hesse Testimony").

to obtain backhaul – a critical input for wireless service – at much lower prices than their rivals.²⁵ And handset manufacturers may be reluctant to partner with providers other than AT&T and Verizon, because of their access to nearly 80% of the market’s customer base and demands for exclusive equipment contracts.²⁶

In this kind of environment, meaningful competition to AT&T and Verizon from providers relying on primarily their own wireless facilities is considerably less likely to occur. Absent vigorous competition from MVNOs and other providers leasing incumbent wireless facilities, consumers will suffer from higher prices and less innovation.

B. The Market For Wholesale Access To Incumbent Facilities Would Be Harmed By This Transaction.

Just as traditional facilities-based competition would be diminished if this transaction is approved, the market for wholesale access to incumbent wireless facilities would be gravely injured. Providers currently have very limited options for obtaining wholesale access. Of the four national carriers, AT&T and Verizon have both been unwilling to provide meaningful wholesale access to their facilities to provide data services. Indeed, AT&T has largely refused to negotiate even roaming agreements on its 3G network, and Verizon has similarly been quite resistant.²⁷ These carriers are the market leaders in a highly-concentrated market, and it is not in their interest to offer wholesale facilities on reasonable terms, since this would help rivals overcome what could otherwise be significant barriers to entry. The likelihood that these carriers will cooperate would only lessen if this transaction is approved, as their control of the market would be considerably strengthened.

²⁵ *Id.*

²⁶ *Id.*; Howard Buskirk, *DoJ Said to Investigate Anti-Competitive Wireless Practices*, *Communications Daily* vol. 29 No. 128 (July 7, 2009).

²⁷ Data Roaming Order ¶ 25.

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Post-merger, Sprint would be the only national carrier willing to provide wholesale access to its facilities, and thus could be expected to offer less competitive terms than it does when competing with T-Mobile. Equally important, Sprint's viability would be threatened if the proposed transaction proceeds, as Sprint would be dwarfed in size by post-merger AT&T and Verizon. Indeed, Sprint's Chief Executive Officer has acknowledged that, if the acquisition is approved, Sprint would be vulnerable to a takeover by Verizon, and that even without such a takeover, it would be very difficult for Sprint to compete against Verizon and AT&T.²⁸

Approval of the transaction would also make reliance on regional carriers for wholesale access to facilities – a challenging model in the current market – significantly more difficult. Relying on these carriers alone to provide service across the country, and with redundant backup networks necessary for high-reliability-intensive applications, is impossible. Rather, arrangements with regional carriers must be supplemented with roaming from national carriers. Obtaining roaming arrangements is challenging enough currently.²⁹ And this transaction would remove one of only four national carriers and one of only two national GSM-based carriers in the country. Moreover, as with Sprint, given the barriers competitors will face due to AT&T and Verizon's scope and scale post-merger, regional carriers' competitive role going forward would be unclear at best.³⁰

²⁸ Hesse Testimony.

²⁹ While the Commission's Data Roaming Order may ameliorate some of these problems, it casts doubt on whether carriers relying on wholesale access like CSCT can take advantage of them. *See* Data Roaming Order at ¶¶ 34, 38 & n.116, 41 & n.122, 88 (stating repeatedly that data roaming rules cannot be used to require a carrier to offer its services for resale – one form of service using wholesale access). Moreover, as mentioned above, that order does not address problems such as the high price for roaming.

³⁰ By contrast, Japan has three carriers covering a population of approximately 130 million people, and Ireland has five carriers covering approximately 4.5 million people. *Mobile - Q2 2011 BMI Telecommunications Report*, Japan Telecommunications Report, Business Monitor International Ltd. (April 2011); Commission for Communications Regulation, *Irish Communications Market Quarterly Key Data Report* (2010), 45, 62, available at <http://www.comreg.ie/fileupload/publications/ComReg10106.pdf>.

Finally, approval of the merger would further hinder companies like Clearwire and LightSquared,³¹ carriers that aim to provide wholesale services. These companies face significant challenges to begin with, including access to sufficient financing, and, in LightSquared's case, vocal claims that its service interferes with GPS-based services.³² If the merger is approved, these companies would also have to face the same competitive challenges that Sprint has already made clear would be exceedingly difficult to overcome.

C. AT&T Would Have A Particularly Dominant Role If The Transaction Is Approved.

AT&T would have a particularly dominant role in the market if the transaction is approved. Not only would it be the largest carrier in the United States, it would be the only national GSM-based carrier. GSM-based networks serve 80% of the global mobile market.³³ Thus, AT&T would have a monopoly on most international roaming in the United States. This is a crucial market segment – a market targeted by JCI and CSCT.

Additionally, because GSM-based technology is the worldwide standard and equipment makers around the world produce GSM-based handsets and equipment, a GSM-based network is cheaper to deploy than a CDMA-based network.³⁴ This pricing discrepancy is further exacerbated by the fact that CDMA-based networks use proprietary technology owned by Qualcomm, which charges substantial licensing fees for its use. For retail services that require very low monthly fees – for example, M2M data connectivity for gas or electric meters – the

³¹ See Public Interest Statement at 92-94.

³² See *In re Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz*, Report and Order, ET Docket No. 10-142, 2011 WL 1325514 (FCC 11-57 rel. April 6, 2011); Marguerite Reardon, *LightSquared: The answer to U.S. wireless competition?*, CNET (April 21, 2011), available at http://news.cnet.com/8301-30686_3-20055922-266.html.

³³ See <http://en.wikipedia.org/wiki/GSM>.

³⁴ We use the term “CDMA-based” to refer to CDMA and its evolution, *i.e.*, CDMA, CDMA 2000 1x, CDMA 2000 1xEV-DO, etc.

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difference in pricing between CDMA- and GSM-based equipment can render CDMA-based services much less competitive. Thus, the Commission must carefully consider the implications of effectively making AT&T a monopoly provider of GSM-based services.

III. ANY APPROVAL OF THIS TRANSACTION SHOULD BE ACCOMPANIED BY ENFORCEABLE CONDITIONS TO PRESERVE THE MARKET FOR WHOLESALE ACCESS VIA CARRIER INTERCONNECTION TO INCUMBENT FACILITIES.

As discussed above, if the Commission were to approve this transaction, it would inflict significant harm on the wholesale market in the United States, further injuring consumers who would be damaged by the transaction's impact on the retail market. The Commission thus should not approve this transaction without imposing rigorous conditions on AT&T to preserve the market for wholesale access to incumbent facilities. Specifically, if the Commission approves this transaction, it should, at minimum, require AT&T to offer wholesale access to, as well as roaming on, its most advanced data facilities at cost-based rates and without onerous device certification or other discriminatory requirements. These conditions are necessary to ensure that the proposed transaction would not mean the end of competition in the market for wholesale access in the United States.

A. If The Transaction Is Approved, The Commission Should Require AT&T To Provide Cost-Based Interconnection And Access To Its Facilities Based On Japan's Model.

Because approval of this transaction would remove one of the few outlets currently available to obtain meaningful wholesale access to incumbent wireless facilities, any approval should be accompanied by a condition requiring AT&T to provide that access. Japan's MVNO Guidelines should serve as the template for such a condition, as they are a proven means of

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ensuring meaningful wholesale access.³⁵ As discussed above, the essential elements of these regulations are: (1) incumbents must provide interconnection at the Data Link level (Layer 2), (2) pricing of this connectivity is cost-based, and (3) incumbents must allow any PTCRB certified device to operate on their networks.

1. AT&T should be required to offer the Layer-2 connectivity required by Japan and obtained via negotiation with other carriers in the United States. This level of interconnection allows for deep access to the network, enabling an interconnecting provider to have substantial control over the services it provides. Layer-2 connectivity enables providers using incumbent facilities to innovate, rather than merely reselling incumbent services. Providers can create new services and create vastly different user experiences than incumbent carriers provide.

2. AT&T should be required to offer Layer-2 connectivity at cost-based rates (including a reasonable return on capital). As Japan found, this approach incentivizes MVNOs to use the incumbent network resources most efficiently, and allows MVNOs to create their own rate plans. While Japan determined appropriate rates through an extensive proceeding, that is not essential here. Instead, the Commission can rely on enforcement actions and complaint proceedings if a provider is unable to negotiate an appropriate rate with AT&T. The Commission should make clear however, that wholesale interconnection prices for access to AT&T's data network that are higher than AT&T's retail rates for data service would be per se unreasonable, as would rates above what AT&T charges for comparable bandwidth for voice services.

As Japan has recognized, cost-based interconnection is also beneficial to incumbent carriers. Excess capacity is present in every wireless network, at least at certain times or in

³⁵ This model is also particularly appropriate given that, if the proposed transaction is approved, the United States would have a market structure very similar to Japan's, where two providers control approximately 80 percent of the market. *See Mobile - Q2 2011 BMI Telecommunications Report*, Japan Telecommunications Report, Business Monitor International Ltd. (April 2011) (top two providers in Japan control approximately 74 percent of the market).

certain locations. With cost-based interconnection, incumbent carriers can earn a financial return on this excess capacity. Indeed, since the implementation of the MVNO Guidelines in Japan in 2007, NTT DoCoMo continues to invest heavily in its network, and continues to grow its subscriber base.³⁶

3. AT&T should not be allowed to require certification for devices used by carriers leasing connectivity from it, so long as those devices are certified by PTCRB. Carrier-specific certification requirements are a common means of thwarting entry and expansion, and for that reason prohibited by the Japanese Government.³⁷ Moreover, as discussed above, AT&T currently allows customers from other countries to roam on its network using equipment that AT&T has not certified. This undercuts any notion that carrier-specific device certification requirements are necessary.

B. If The Transaction Is Approved, AT&T Should Be Required To Offer Data Roaming At Cost-Based Rates And Without Anticompetitive Restrictions.

In addition to wholesale connectivity conditions, any approval of this transaction should be conditioned on requirements regarding data roaming. These requirements should ensure that providers leasing wholesale connectivity from other carriers, such as regional carriers, will be able to roam on AT&T's network. This would further aid in preserving the wholesale market that would be gravely threatened by AT&T's absorption of T-Mobile.

As with wholesale access, AT&T should be required to offer data roaming – on all of its data networks – at cost-based rates. As described above, the rates charged by providers like AT&T for data roaming are, where data roaming is offered at all, prohibitively expensive and far

³⁶ In fact, the competition from JCI and has led DoCoMo to provide innovative products that it would not have otherwise released.

³⁷ This Commission has also recognized that device restrictions have been used by incumbent providers “without an appropriate justification.” *In re Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15, 289, 15, 363, ¶ 200 (2007).

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in excess of their costs. If the transaction is approved, AT&T would have even more leverage to demand high rates for data roaming, and the Commission should ensure that AT&T cannot do so. Also as with wholesale access, AT&T should be prohibited from enforcing carrier-specific certification requirements to roam on its network for the reasons explained.

Finally, AT&T should be prohibited from maintaining “no-parking” provisions – which allow a carrier to kick off its network devices found permanently or even often roaming – in its roaming contracts. These provisions makes it very difficult to offer certain applications – particularly M2M applications requiring reliability – that may need to utilize data roaming extensively. They are also plainly designed to thwart providers using wholesale connectivity.

CONCLUSION

If the Commission approves AT&T's acquisition of T-Mobile, it should condition that approval on enforceable conditions to mitigate the harms caused to the wholesale market. At minimum, the Commission should require AT&T to provide cost-based wholesale and roaming access to its facilities and prohibit AT&T from enforcing carrier-specific device certification or other discriminatory requirements.

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Respectfully submitted,

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