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

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

COMMENTS OF
CONSUMER ELECTRONICS RETAILERS COALITION

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Pursuant to the Commission's April 28, 2011 Public Notice[1] in the above-captioned proceeding, the Consumer Electronics Retailers Coalition ("CERC"),[2] through its undersigned counsel, hereby submits these comments on the Applications[3] of AT&T Inc. ("AT&T") and Deutsche Telekom AG (collectively, the "Applicants") for consent to transfer control of the licenses and authorizations held by T-Mobile USA, Inc. ("T-Mobile") to AT&T.

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[1] *See AT&T Inc. and Deutsche Telecom 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 11-799 (rel. Apr. 28, 2011).

[2] CERC is a public policy organization consisting of the major retailers of consumer electronics products and the leading industry trade associations. CERC members have combined to focus their unique and expert market perspective on the critical policy issues facing the consumer electronics retail industry and their customers. CERC members operate in all 50 states and territories, employing well over three million people combined nationally.

[3] *See* Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign Control of Licenses and Authorizations, WT Dkt. No. 11-65 (filed Apr. 21, 2011) ("Applications"); *see also id.*, Attachment, "Acquisition of T-Mobile USA, Inc. by AT&T Inc., Description of Transaction, Public Interest Showing and Related Demonstrations" ("Public Interest Statement").

I. INTRODUCTION AND SUMMARY.

Over the past several years, independent retailers have played an increasingly important role in the mobile wireless marketplace. Independent retailers have lowered consumers' transaction costs by providing consumers with a single location at which they can choose from a range of different carrier device and service offerings. Independent retailers have also expanded the range of competitive options in the marketplace by working with mobile wireless carriers, manufacturers, operating system designers, and applications developers to create device and service offerings not otherwise available.

Independent retailers provide these benefits in a challenging environment controlled to a significant degree by the four national mobile wireless carriers. The four national carriers serve approximately 93 percent of mobile wireless subscribers nationwide. The national carriers have extended this market position into the retail sale of devices and services. For example, by the end of 2009, carrier-branded stores accounted for approximately 70 percent of all mobile wireless handsets sold in the U.S., whereas independent retailers accounted in the aggregate for less than 20 percent of such sales and other distribution channels accounted for the remaining sales.[4] Independent retailers hold a small share of retail sales in part because, in order to compete with carrier-branded retail stores, independent retailers must rely to a significant degree on the cooperation of mobile wireless carriers to make their services and devices available to independent retailers on reasonable rates, terms and conditions. Competition among the four national carriers is critical to ensuring this cooperation.

[4] *See Retail Hardliners*, Barclays Capital, at 1 (June 11, 2010).

AT&T's proposed acquisition of T-Mobile poses a serious threat to competition in the mobile wireless marketplace generally and to independent retailers' ability to serve consumers in particular. The proposed transaction will result in the aggregation of approximately 75 percent of the market share in the retail mobile wireless services market in the hands of AT&T and Verizon. In addition, the proposed transaction, along with AT&T's acquisition of spectrum from Qualcomm, will cause AT&T and Verizon to have far superior and more substantial spectrum holdings than other mobile wireless carriers. In fact, there is a significant risk that, at least for 4G service, the proposed transaction would produce a duopoly in which AT&T and Verizon dominate the market and other competitors, including even Sprint, are relegated to the role of fringe competitors.

The Commission should undertake a detailed assessment of the anticompetitive harms posed by the proposed transaction. In that assessment, the Commission should focus not only on the harms to competition in the provision of mobile wireless services and devices but also on the significant harms the proposed transaction could cause to independent retailers' ability to serve consumers. All of these harms are likely to be significant. T-Mobile has often been a leader in lowering mobile wireless service prices and in deploying network upgrades. In addition, T-Mobile has been an aggressive competitor in the development of innovative mobile wireless devices and operating systems. For example, T-Mobile partnered with several manufacturers, including with Nokia, Samsung and Sony Ericsson, to develop the first devices suitable for AWS spectrum. T-Mobile also partnered with Google and HTC to bring to market the first Android-based device. T-Mobile has also supported devices without exclusive distribution arrangements. Eliminating T-Mobile as an independent competitor would deprive consumers of these forms of competition.

Finally, T-Mobile has been willing to offer its wireless service at wholesale on reasonable terms and conditions. Mobile Virtual Network Operators ("MVNOs"), which rely on wholesale service provided by facilities-based competitors such as T-Mobile, have played a significant role in the mobile wireless marketplace by introducing innovative and differentiated service offerings to consumers. If T-Mobile is eliminated as an independent competitor, it is less likely that MVNOs will be able to obtain wholesale service on reasonable terms and conditions.

The smaller, regional or niche mobile wireless carriers face significant obstacles in seeking to replace T-Mobile as a competitor to AT&T, Verizon and Sprint. Those obstacles would be extremely difficult to overcome in the absence of appropriate merger conditions. The relevant obstacles include less established or valued brands, less ability to develop innovative new handsets, a limited ability to ensure that their customers can use handsets developed by the national carriers, and more limited spectrum holdings than the national carriers.

Importantly, the Merged AT&T/T-Mobile would also likely have the incentive to diminish the extent to which independent retailers can lower transaction costs and expand the range of competitive offerings available to consumers. There are many ways in which the Merged AT&T/T-Mobile could act on this incentive. For example, the Merged AT&T/T-Mobile could use various strategies to favor its own retail channels and/or otherwise limit the extent to which independent retailers can offer the Merged AT&T/T-Mobile's service plans and supported devices. The Merged AT&T/T-Mobile could also restrict the extent to which mobile wireless devices and applications developed by or at the direction of third parties can operate on the Merged AT&T/T-Mobile network. It could also restrict the extent to which wireless devices and applications developed by, or at the direction of, the Merged AT&T/T-Mobile can function on other carriers' networks.

Accordingly, if the Commission decides to approve the proposed transaction, it should consider conditioning such approval on requirements that mitigate the anticompetitive harms posed by the transaction. Independent retailers can play a key role in diminishing such harms both on their own and by working with smaller, regional and niche mobile wireless carriers, device manufacturers, operating system designers, and applications developers. Among other things, well-crafted merger conditions would enable independent retailers to assist the small, regional and niche carriers to overcome some of the obstacles to competing with the Merged AT&T/T-Mobile. The following categories of conditions would yield these benefits:

- **Non-Discriminatory Distribution Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that enable independent retailers to lower transaction costs for consumers in the mobile wireless marketplace. The Merged AT&T/T-Mobile should be required, among other things, to make the mobile wireless service plans and devices it offers in its stores and on its website available to independent retailers on a nondiscriminatory basis.

- **Right To Attach Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that allow devices developed by third-party manufacturers to function on the Merged AT&T/T-Mobile network without discrimination.

- **Content/Application Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that allow third-party manufacturers and independent retailers to develop content and applications for devices to function on the Merged AT&T/T-Mobile network without any restrictions or filters established by the Merged AT&T/T-Mobile.

- **Wholesale Conditions**—The Merged AT&T/T-Mobile should be required to make its mobile wireless service available on a wholesale basis on reasonable rates, terms and conditions to ensure the continued viability of MVNOs in the future.

- **Divestiture Conditions**—The Merged AT&T/T-Mobile should be required to divest sufficient spectrum to enable existing competitors and new entrants to compete with the Merged AT&T/T-Mobile in the provision of 4G mobile wireless services.

II. INDEPENDENT RETAILERS PLAY AN IMPORTANT ROLE IN LOWERING TRANSACTION COSTS FOR CONSUMERS AND EXPANDING THE RANGE OF COMPETITIVE OFFERINGS AVAILABLE TO CONSUMERS IN THE MOBILE WIRELESS MARKETPLACE.

While mobile wireless carriers—and the four national carriers in particular—exert substantial control over virtually all aspects of the mobile wireless industry today, over the past several years, independent retailers have played an increasingly important role in delivering distinct consumer welfare benefits to consumers of mobile wireless services. They have done so by offering a dramatically different retail experience compared to the one offered by carrier-branded retail stores and websites, by enabling consumer choice among carrier and device options, and by pro-actively developing and offering new service and device options for consumers. Independent retailers have done this despite the fact that mobile wireless carriers continue to control the vast majority of retail distribution outlets for their products and services,[5] thereby giving such carriers a powerful ability to limit the degree to which independent retailers can successfully compete with those same carrier products and services in a competitive retail environment.

In contrast to carrier-branded retail stores and websites, in which a consumer only has the option of purchasing services and devices from a single carrier, independent retailers offer consumers the opportunity to purchase services and devices from a range of different carriers. By providing consumers with a single location at which to choose from multiple competitive offerings, independent retailers lower the costs consumers incur to identify the service plans and devices that best suit their needs. Better informed consumers are able to make more informed

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[5] *See* Brian Polino, *Should Cell Phone Makers Start Cutting Retail Exposure?*, Seeking Alpha, May 25, 2010, available at http://seekingalpha.com/article/206761-should-cell-phone-makers-start-cutting-retail-exposure (stating that the four national carriers have 7,600 retail stores as compared to relevant independent retailers which have 5,600 retail stores).

decisions among the available options, thereby increasing the level of actual competition among mobile wireless carriers.

Independent retailers lower consumers' transaction costs, such as the costs consumers incur to switch mobile wireless carriers, in a variety of ways. Many of the innovations introduced by independent retailers would not have been developed and/or deployed by carrier-branded retailers because the incumbent carriers have little incentive to lower the costs of switching carriers or to increase competition more generally.[6] For example, independent retailers offer consumers the following:

- a variety of mobile wireless devices and service plans in a single location (i.e., in-store or online) (where possible, independent retailers offer mobile wireless devices and service plans from smaller, regional and niche carriers that a consumer might not otherwise consider because of their smaller advertising budgets and less-developed brand recognition);

- well-trained sales associates that listen to customers and act as knowledgeable sources of unbiased advice on the devices and service plans (including pricing) that are best suited to customers' needs;

- the opportunity to walk into their retail stores and compare and contrast devices (e.g., compare and contrast the iPhone on AT&T's network as well as Verizon's network or compare and contrast Android devices on various networks);

- education on how to get the most out of their devices and service plans (e.g., how to connect to mobile wireless broadband networks for less by using mobile hotspots or "Mi-Fis" and how to connect their mobile devices with other devices in their homes in order to access photos, music, movies, or other stored content on the go);

- notification as to eligibility for device upgrades available with their existing service plans;

- device setup including transfer of contacts from the customer's old device to his or her new device (this process is similar to number portability in the telephone service environment because it lowers the costs associated with switching service providers and devices); and

[6] Indeed, mobile wireless carriers have demonstrated this lack of incentive by, for example, challenging the FCC's requirement that they provide local number portability. *See generally Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502 (D.C. Cir. 2003).

- device trade-in/buy-back programs that enable consumers to hedge against changes in technology.

In addition, some independent retailers are developing systems to enable sales associates to analyze, with prior customer consent, usage information on customers' past bills and advise them on how they can save money by, for example, eliminating services (e.g., texting) that they have not been using.

Independent retailers also deliver consumer welfare benefits by expanding the range of competitive offerings available to their customers. *First*, some independent retailers offer consumers differentiated service plans through arrangements with underlying carriers (sometimes referred to as "white label" offerings). For instance, Walmart has an arrangement with T-Mobile to offer the Walmart Family Mobile Plan for budget-conscious families. This post-paid plan includes unlimited data and texting, is available without a contract and with low-cost, unsubsidized devices, and enables families to share megabytes of data among their devices.

Second, independent retailers provide a distribution channel for MVNOs that would not otherwise be available. For instance, but for independent retailers, an MVNO such as Virgin Mobile would not have been able to introduce its innovative and differentiated service offerings into the retail market.

Third, some independent retailers work with smaller carriers, device manufacturers and/or mobile operating system developers to develop devices and service plans that fill their customers' needs. For example, in response to customer requests during the recession for high-end, sophisticated devices without contracts or credit checks, Best Buy worked with MetroPCS and RIM to bring to market the first Blackberry for prepaid customers. Based on input from its sales associates, Best Buy also partnered with Virgin Mobile to bring to market the first prepaid mobile broadband service plan, which proved to be popular with students. Additionally, Best

Buy partnered with Google to establish an independent retail channel for the Google Nexus S, an unlocked phone that runs on T-Mobile's network.

Fourth, some independent retailers offer innovative and value-added services such as cloud-based backup of data and content on customers' devices and device protection that allows the retailer to locate a customer's lost device using GPS.

Fifth, independent retailers have been more willing than mobile wireless carriers to load applications from entities unaffiliated with mobile wireless carriers (e.g., Google Voice) as well as content and applications from providers owned by independent retailers (e.g., Vudu and Napster), onto the devices they sell to consumers.

While independent retailers have increased competition among existing carrier services and devices, and even expanded the range of competitive offerings available to consumers, independent retailers remain critically dependent on the cooperation of the underlying carriers (and on the four national carriers in particular). As a general matter, the carriers have agreed to enter into contracts permitting independent retailers to sell their services and devices. Under these contracts, independent retailers generally receive commissions from mobile wireless carriers to subsidize devices and commissions for in-store and online device activations. Independent retailers also often receive funding for marketing and advertising the carriers' mobile wireless service plans and devices.

In addition, independent retailers purchase handsets directly from mobile wireless carriers or their affiliates at prices set by the carriers. Independent retailers set their own retail prices for devices and often use their commissions from mobile wireless carriers to subsidize devices in order to offer consumers lower prices.

Finally, with respect to billing, independent retailers give mobile wireless carriers access to their customers for billing purposes and in some cases, independent retailers' services can be included on the carrier bill as a line item subject to carrier approval.

Unfortunately, mobile wireless carriers can and do place some limits on the extent to which independent retailers can lower transaction costs for consumers and expand the range of competitive choices available to them. For example, independent retailers are restricted by some mobile wireless carriers in the number of postpaid carriers whose service plans and devices independent retailers can offer in their stores. In addition, because carriers often require that the handsets sold with their service plans are "locked" so as to work solely with their networks, independent retailers are effectively forced to carry multiple versions of the same device (e.g., the AT&T iPhone and the Verizon iPhone) in order to accommodate each carrier's versions of a common device. This practice increases independent retailers' costs, diminishes the extent to which they can reduce the prices of the handsets they offer to consumers, and prevents independent retailers from expanding consumers' options by matching any device with any service plan.

III. THE PROPOSED TRANSACTION THREATENS CONSUMER WELFARE AND THE ABILITY OF INDEPENDENT RETAILERS TO SERVE CONSUMERS.

AT&T's proposed acquisition of T-Mobile poses the threat of harms to consumer welfare, and those harms are exacerbated by AT&T's proposed acquisition of 700 MHz spectrum from Qualcomm. In particular, substantial harm to consumer welfare is likely in (1) the retail market for mobile wireless data and voice services; (2) the markets for mobile devices and mobile applications; and (3) the wholesale market for mobile wireless data and voice services. Additionally, the proposed transaction will likely increase the Merged AT&T/T-Mobile's incentive to limit the extent to which independent retailers are able to serve consumers.

A. The Proposed Transaction Is Likely To Harm Consumer Welfare In The Market For Mobile Wireless Data And Voice Services.

1. *The Proposed Transaction Will Increase Market Concentration And, Accordingly, the Commission Should Conduct A Detailed Assessment Of The Potential Anticompetitive Harms Posed By The Transaction.*

In analyzing the effect of a proposed transaction on the level of competition in relevant markets, the Commission relies on a two-part competitive "screen."[7] If a geographic market meets the criteria of either part of the screen, the FCC conducts a detailed inquiry as to the anticompetitive harms posed by the transaction.[8]

In the first part of the competitive screen, the FCC considers changes in the Herfindahl-Hirschman Index ("HHI") in relevant geographic markets in order to identify those markets in which a proposed transaction may harm competition and consumer welfare.[9] The Commission most recently applied the HHI screen in the *2009 AT&T-Centennial Merger Order*. As explained in that *Order*, the FCC subjects a geographic market to further analysis of the potential anticompetitive effects of the transaction where, post-transaction, "the HHI would be greater than 2800 and the change in HHI will be 100 or greater, or the change in HHI would be 250 or

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[7] *See, e.g., Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd. 13915, ¶ 34 (2009) ("*AT&T-Centennial Merger Order*"); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17444, ¶ 41 (2008) ("*Verizon-ALLTEL Merger Order*").

[8] *See, e.g., id*.

[9] *See, e.g., AT&T-Centennial Merger Order* ¶ 34; *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd. 11407, ¶ 49 (2010) ("*Fourteenth Competition Report*") (explaining that the HHI "is the most widely-accepted measure of concentration in competition analysis").

greater, regardless of the level of the HHI."[10] Here, based on Standard & Poor's national market share data as of the end of the third quarter of 2010, the change in the nationwide HHI as a result of the proposed transaction would be 756—approximately three times more than the change in HHI that triggers a more detailed inquiry of anticompetitive effects under the Commission's screen.[11] Even if the Commission determined that the relevant geographic market is local (e.g., a Cellular Market Area ("CMA") or Component Economic Area), it is likely that the proposed transaction warrants a detailed inquiry regarding anticompetitive effects in most markets across the country.

In the second part of the competitive screen, the FCC examines whether the aggregation of spectrum by the acquiring carrier in a geographic market is significant enough to require a more detailed inquiry as to the anticompetitive effects of the transaction.[12] Here, the proposed transaction, along with AT&T's pending acquisition of Lower 700 MHz spectrum from

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[10] *See, e.g., AT&T-Centennial Merger Order* ¶ 46.

[11] "The HHI is calculated by summing the squares of all provider subscriber shares" in the relevant geographic market. *Fourteenth Competition Report* n.105. According to Standard & Poor's, as of the end of the third quarter of 2010, Verizon Wireless ("Verizon") had a 32.4 percent share of mobile wireless subscribers, AT&T had a 32.3 percent market share, Sprint Nextel ("Sprint") had a 17.0 percent market share, and T-Mobile had an 11.7 percent market share). *See* James Moorman, *Industry Surveys, Telecommunications: Wireless*, Standard & Poor's, at 11, Jan. 20, 2011 ("*S&P 2011 Wireless Industry Report*"). Therefore, the sum of the squares of AT&T and T-Mobile's market shares as of the end of the third quarter of 2010 is 1180 while the square of the Merged AT&T/T-Mobile's market share as of that date is 1936, a difference of 756.

[12] *See, e.g., AT&T-Centennial Merger Order* ¶¶ 34, 43; *Verizon-ALLTEL Merger Order* ¶ 41. In the *AT&T-Centennial Merger Order*, the Commission's spectrum screen identified those markets in which "the Applicants would have, on a market-by-market basis, a 10 percent or greater interest in 95 megahertz or more of PCS, SMR, and 700 MHz spectrum, where neither BRS nor AWS-1 spectrum is available; 115 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 125 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 145 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available." *AT&T-Centennial Merger Order* ¶ 46.

Qualcomm,[13] will enable AT&T to further increase its already substantial spectrum holdings[14] in numerous markets across the country. Indeed, AT&T concedes that, following the Qualcomm and T-Mobile transactions, it would meet or exceed the spectrum screen used by the Commission in the *AT&T-Centennial Merger Order* in 202 out of 734 of the CMAs nationwide.[15] Accordingly, there is a significant risk that competitors will be unable to access sufficient spectrum to compete effectively in these markets. Furthermore, as discussed below, the Merged AT&T/T-Mobile and Verizon will hold the vast majority of the spectrum needed to provide robust 4G LTE services, making it increasingly difficult for smaller carriers to compete with these national carriers.

Thus, application of the two-part competitive screen yields the conclusion that the Commission should engage in a detailed analysis of the potential anticompetitive effects of the proposed transaction throughout the country. As discussed below, there is a distinct possibility that the Merged AT&T/T-Mobile and Verizon's superior spectrum position and overwhelming share of subscribers would cause Sprint and other competitors to be relegated to the fringe and that the market for mobile wireless data and voice services will effectively become a duopoly.[16]

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[13] *See AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, Public Notice, WT Dkt. No. 11-18, DA 11-252 (rel. Feb. 9, 2011).

[14] *See Fourteenth Competition Report* ¶¶ 266-267, Tables 25-26 & Chart 40; *see also* Petition to Deny of Dish Network L.L.C., WT Dkt. No. 11-18, at 9 (filed Mar. 11, 2011) (stating that "AT&T's CMRS holdings already constitute close to, or more than, one-third of the available spectrum in the cellular, PCS, 700 MHz, AWS and WCS bands").

[15] *See* Public Interest Statement at 76; *see also id.*, Appendix A, n.1.

[16] *See* Parts III.A.3 & III.A.4 *infra*; *see also* Letter from Charles W. McKee, Vice President – Government Affairs, Federal and State Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 11-65, at 1-2 (filed May 25, 2011) ("Eliminating T-Mobile and increasing the size of AT&T in a market that is dependent upon scale would marginalize the

The Commission should give this possibility careful consideration in light of the serious harms to consumer welfare that duopoly market structures can cause. As the Commission has found, duopoly markets are likely to yield increased prices[17] and can also result in decreased innovation.[18]

Moreover, because Commission approval of both the T-Mobile and Qualcomm transactions will effectively institutionalize a barrier to any meaningful competitive entry in the U.S. market for 4G mobile wireless services, the Commission should consider adopting conditions to mitigate this harm. In particular, any Commission approval of the proposed transaction should contemplate a partial divestiture of spectrum to at least leave open the possibility that a new competitor can enter the market and compete against the Merged AT&T/T-Mobile and Verizon.

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ability of Sprint and the remaining local and regional carriers to influence innovation and downward pricing and leave an effective duopoly in place.").

[17] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶¶ 30-31 (2010) ("*Qwest Phoenix MSA Forbearance Order*"). For example, the FCC has recognized that prices in the mobile wireless industry during its duopoly period were significantly above competitive levels, and importantly, "that such prices dropped dramatically as new PCS competitors began to launch service." *Id.* ¶ 31; *see id.* n.93 ("In the *Cingular/AT&T Wireless Order*, the Commission stated that '[t]he Commission's first broadband PCS auction in 1995 marked the beginning of the transition from a cellular duopoly to a far more competitive market in mobile telephony services,' and that '[a]fter stabilizing at a plateau in the final years of the cellular duopoly, the price per minute of mobile telephony service started to decline shortly before the first commercial launches of PCS service and subsequently dropped sharply and steadily.'") (quoting *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Services Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶¶ 61, 67 (2004)).

[18] *See Application of EchoStar Communications Corp. et al.*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶¶ 175-177 (2002) ("*EchoStar-DirecTV Merger Order*") (finding that the cable operator-DBS operator duopoly or the DBS operator monopoly that would result in each local market as a result of the proposed merger would cause a "reduction in the magnitude of future innovation").

2. *The Proposed Transaction Will Negatively Impact Price Competition.*

T-Mobile has often offered among the lowest retail prices among the four national carriers.[19] Most recently, the company introduced a $79.99 unlimited data, calling and texting plan that "allows customers to save more than $350 per year . . . compared to similar plans from AT&T, Verizon and Sprint."[20] In addition, T-Mobile has been among the leaders in introducing innovative pricing features. For example, T-Mobile was the first of the four national carriers to introduce an unlimited "calling circle" option called "myFaves."[21] Moreover, as the Commission recognized last year, T-Mobile's price changes in late 2009 "appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service

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[19] *See, e.g.*, *S&P 2011 Wireless Industry Report* at 5 ("[T-Mobile] continues to offer low-cost price plans and has undercut the major carriers in its pricing of mobile data."); *see id.* at 15 ("Most carriers offer unlimited text, picture, and video messaging packages for $20 a month (T-Mobile is the lowest, at $10)."); *id.* ("Most carriers['] [family plans] offer 700 minutes for $69.99 a month for two phones, although T-Mobile charges $59.99 for 750 minutes and charges $5 to add an additional line."); Russ Wiles, *AT&T Merger with T-Mobile May Cut Competition*, azcentral.com, Mar. 22, 1011, *available at* http://www.azcentral.com/business/articles/2011/03/22/20110322att-t-mobile-merger-concerns.html ("*Consumer Reports* research indicates that T-Mobile charges less than many competitors on various plan types.").

[20] T-Mobile, Press Release, *T-Mobile Introduces News Unlimited Data, Calling and Texting Plan for Only $79.99 Per Month*, Apr. 13, 2011, *available at* http://newsroom.t-mobile.com/generate-pdf.php?article_code=11UDKQQ33RY7RF9T; *see also* Jonathan Spike, *T-Mobile launches news $79.99 Even More unlimited data, calling and texting plan*, Broadband Expert, Apr. 13, 2011, available at http://www.broadbandexpert.com/blog/wireless-carriers/t-mobile-launches-new-79-99-even-more-unlimited-data-calling-and-texting-plan/ ("You can save between $30 and $39.99 per month over other unlimited data plans offered by Sprint, AT&T and Verizon.").

[21] *See T-Mobile introduces myFaves*, FIERCE WIRELESS, Oct. 1, 2006, *available at* http://www.fiercewireless.com/story/t-mobile-introduces-myfaves/2006-10-02. Verizon introduced its "Friends and Family" calling circle plan in February 2009 and AT&T launched its "A-List" calling circle feature in September 2009. *See Fourteenth Competition Report* ¶ 90; *see also* Eric M. Zeman, *AT&T Introduces Its Own "MyFaves" Plan, Dubbed "A-List,"* Phone Scoop, Sept. 9, 2009, *available at* http://www.phonescoop.com/news/item.php?n=4808.

offerings."[22] If AT&T acquires T-Mobile, AT&T, Verizon and Sprint will no longer be subject to this competitive pricing pressure.

3. *The Proposed Transaction Will Likely Diminish Network Quality Competition.*

In addition to competing on price, T-Mobile has aggressively deployed its HSPA+ network, thereby allowing it to compete with the other three national carriers based on the quality of its network.[23] For example, a recent speed test conducted by *PC World* and Novarum in 13 cities nationwide demonstrated that, of the four national carriers, T-Mobile's network is the fastest for smartphones.[24] Based on these results, the authors concluded that "T-Mobile has proven . . . it can deliver speeds that are competitive with the 4G networks of its rivals."[25] In addition, T-Mobile has begun upgrading its HSPA+ network to reach theoretical download speeds of 42 Mbps.[26] T-Mobile's Chief Technology Officer has stated that this network will

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[22] *Fourteenth Competition Report* ¶ 92.

[23] T-Mobile upgraded its 3G network to HSPA+ 7.2 in 2009 and HSPA+ 21 in 2010. *See, e.g.*, Stephen Lawson, *T-Mobile USA Finishes Upgrade to HSPA 7.2*, PC WORLD, Jan. 5, 2010, *available at* http://www.pcworld.com/businesscenter/article/185916/tmobile_usa_finishes_upgrade_to_hspa_72.html; T-Mobile, Press Release, *T-Mobile USA CEO and President Philipp Humm Highlights the Company's Network Leadership and Focus on Fueling Data Adoption*, Jan. 6, 2011, *available at* http://newsroom.t-mobile.com/generate-pdf.php?article_code=83JBZEN8KZWEUVWG (stating that, as of January 2011, T-Mobile's HSPA+ 21 network reached approximately 200 million people in 100 major metropolitan areas).

[24] *See* Mark Sullivan, *4G Wireless Speed Tests*: *Which Is Really The Fastest?*, PC WORLD, Mar. 13, 2011, *available at* http://www.pcworld.com/article/221931/4g_wireless_speed_tests_which_is_really_the_fastest.html ("[I]n our tests T-Mobile had the speediest results for smartphones. The T-Mobile HTC G2 we used for testing produced a 13-city average download speed of almost 2.3 mbps, that's about 52 percent faster than the second-fastest phone, Sprint's HTC EVO 4G, which had an average download speed of 1.5 mbps.").

[25] *Id.*

[26] *See* T-Mobile, Press Release, *America's Largest 4G Network Now Twice As Fast in More Than 50 New Markets*, May 24, 2011, *available at* http://newsroom.t-mobile.com/articles/t-

deliver speeds comparable to Verizon's LTE network.[27] Again, if AT&T acquires T-Mobile, AT&T, Verizon and Sprint will no longer be subject to the network quality competition spurred by T-Mobile.

Moreover, if AT&T is permitted to acquire both T-Mobile's AWS spectrum licenses and Qualcomm's 700 MHz spectrum licenses, it is unlikely that any competitor other than Verizon will be able to compete with AT&T in the provision of high-quality 4G mobile wireless services. To begin with, following the proposed transaction with T-Mobile, AT&T and Verizon will hold 53.7 percent of all AWS spectrum.[28] In addition, AT&T and Verizon *already* hold 67 percent of all 700 MHz spectrum.[29] According to consumer advocacy groups, if AT&T acquires Qualcomm's 700 MHz licenses, "AT&T would hold more spectrum licenses below 1 GHz"—spectrum considered to be "beachfront" property due to its superior propagation characteristics for mobile broadband use[30]—"than every company other than AT&T and Verizon Wireless – combined."[31] In other words, "[t]he sub-1 GHz market would be a near duopoly."[32]

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mobile-increase-4G-network-speed; *see also id.* ("By midyear, T-Mobile expects that more than 150 million Americans will have access to [these] increased 4G speeds as T-Mobile upgrades its 4G network.").

[27] *See* Mike Dano, *T-Mobile: We'll match Verizon's LTE speeds with HSPA+ 42*, FIERCE WIRELESS, Jan. 6, 2011, *available at* http://www.fiercewireless.com/ceslive/story/t-mobile-well-match-verizons-lte-speeds-hspa-42/2011-01-06.

[28] *See Fourteenth Competition Report*, Table 25.

[29] *See id*.

[30] *See id.* ¶ 269.

[31] Petition to Deny of Free Press et al., WT Dkt. No. 11-18, at 12 (filed Mar. 11, 2011).

[32] *Id.*

4. *It Is Unlikely That Any Of The Non-National Carriers Will Be Able To Fill The Gap Left By T-Mobile Absent Appropriate Merger Conditions.*

It is unlikely that any of the non-national carriers will, on their own and without the assistance of robust merger conditions, be able to replace T-Mobile as a competitor in the retail market. Although regional and niche market competitors have delivered significant benefits to consumers in particular geographic or demographic markets, they will face substantial obstacles to competing against the Merged AT&T/T-Mobile, Verizon, and even Sprint.

As the GAO has found, industry consolidation has *already* made it more difficult for small and regional carriers to be competitive.[33] For example, "[t]he size and scale of large national carriers gives them the advantage of being able to deploy faster networks ahead of their competitors, thus reinforcing their competitive advantage."[34] In addition, smaller carriers lack the spectrum necessary for them "to expand networks and develop faster networks, making the carrier a more attractive choice for consumers."[35] The obstacles associated with acquiring more spectrum are significant.[36] Smaller carriers also lack access to the latest, most advanced handsets, making it more challenging for such carriers to add new subscribers,[37] retain existing

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[33] *See Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, Government Accountability Office, GAO-10-779, at 17, July 2010, *available at* http://www.gao.gov/new.items/d10779.pdf ("*GAO Wireless Industry Competition Report*").

[34] *Id.* at 19.

[35] *Id.* at 21.

[36] *See, e.g.*, *Fourteenth Competition Report* ¶ 62 (concluding, based on the prices paid in recent auctions of AWS-1 and 700 MHz spectrum, that "aggregating a significant regional spectrum footprint would involve an outlay of hundreds of millions of dollars and a national footprint would require billions of dollars"); *see also* Jeffrey Silva, *Bandwidth in Balance*, Medley Global Advisors, at 1, May 25, 2011 (discussing the "political and technical obstacles that could hinder the infusion of additional spectrum into the marketplace in the near-to-medium term").

[37] *Id.* at 18.

subscribers,[38] and "take as much advantage of new data revenue streams" as the national carriers.[39] Furthermore, smaller carriers generally lack their own distribution channels and do not enjoy the same marketing and distribution efficiencies as the national carriers. For instance, the cost to a national independent retailer of offering multiple regional carriers on a market-by-market basis is significantly higher than the costs of assorting and marketing a single national carrier such as T-Mobile.

A brief examination of each of the following non-national carriers confirms that none of these carriers will become a viable alternative to the Merged AT&T/T-Mobile, Verizon, or Sprint in the retail market for mobile wireless data and voice services:

- ***Leap.*** Leap is a niche player that offers prepaid service in and around major metropolitan areas and targets underserved markets, including youth and low-income consumers, that are often overlooked by the large, national carriers.[40] Leap's mobile wireless voice and broadband networks have significantly less coverage than those of the national carriers, and Leap has significantly fewer spectrum holdings than the national carriers.[41] Furthermore, Leap lags far behind AT&T and Verizon in its 4G LTE deployment plans. Leap plans to deploy an LTE network "over the next few years, with a commercial trial market scheduled to be launched in late 2011."[42] Indeed, accordingly to one industry analyst, "Leap doesn't have a defined 4G strategy

[38] *Id.* at 19.

[39] *Id.* at 22. For instance, Verizon and AT&T each reported average revenue per user (ARPU) from data services for the fourth quarter of 2009 in the mid-teens, while U.S. Cellular reported ARPU from such services of approximately $10. *Id.*

[40] *See* Imari Love, *MetroPCS Posts Record Subscriber Growth and Churn Rates in 1Q*, Morningstar, at 1, May 3, 2011.

[41] *See Fourteenth Competition Report*, Tables 1 & 2 (showing that Leap's mobile wireless voice network has only approximately one-third of the coverage of the national carriers' mobile wireless voice networks and that Leap's mobile wireless broadband network has less than one-third of the coverage of Verizon's mobile wireless broadband network); *see id.*, Table 25 (showing that Leap holds no 700 MHz spectrum, only 2.3 percent of all PCS spectrum and 8.8 percent of all AWS spectrum).

[42] Leap Wireless 2010 Annual Report, Form 10-K, at 3 (filed Feb. 25, 2011).

and likely will be one of the last carriers to upgrade," thereby increasing the carrier's risk of losing existing customers.[43]

- ***MetroPCS.*** MetroPCS is also a niche player whose customer base and rate plans resemble Leap's.[44] Like Leap, MetroPCS lacks the network coverage and the spectrum holdings of the national carriers.[45] Indeed, based on the Commission's most recent data, MetroPCS holds only 0.5 percent of all 700 MHz spectrum while AT&T and Verizon hold 67 percent of all such spectrum.[46] Moreover, while MetroPCS has deployed a 4G LTE network in most of its markets,[47] there are risks associated with the carrier's provision of 4G LTE services. *First*, because MetroPCS holds a 700 MHz license in a different spectrum block than the 700 MHz licenses held by AT&T and Verizon and some equipment manufacturers are focusing their equipment development efforts on the channel blocks held by those two carriers, there is a risk that devices made by these manufacturers "will not be cross-compatible for use on the 700 MHz channel block [MetroPCS] hold[s]."[48] *Second*, MetroPCS is deploying 4G LTE on PCS and AWS spectrum and unless its customers' handsets are capable of using the 700 MHz spectrum on which AT&T and Verizon are deploying 4G LTE, MetroPCS' customers will not be able to roam on those carriers' networks for 4G LTE services.[49]

- ***U.S. Cellular.*** U.S. Cellular is a Midwest-based regional carrier that provides service in only half of the states.[50] Based on the Commission's most recent data, U.S. Cellular's mobile wireless broadband network has *one-tenth* of the coverage of Verizon's mobile wireless broadband network,[51] and like Leap and MetroPCS, it has

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[43] Imari Love, *Another Solid Leap Forward*, Morningstar, at 3, May 5, 2011.

[44] *See S&P 2011 Wireless Industry Report* at 12.

[45] *See Fourteenth Competition Report*, Table 1 (showing that MetroPCS' mobile wireless voice network has about one-third of the coverage of the national carriers' mobile wireless voice networks); *see id.*, Table 25.

[46] *See id.*

[47] *See* MetroPCS 2010 Annual Report, Form 10-K, at 11 (filed Mar. 1, 2011).

[48] MetroPCS Quarterly Report for the Period Ending March 31, 2011, Form 10-Q, at 36 (filed May 6, 2011).

[49] *Id.*

[50] *See* U.S. Cellular 2010 Annual Report, Form 10-K, at 1 (filed Feb. 25, 2011).

[51] *See Fourteenth Competition Report*, Table 2.

few spectrum holdings relative to the national carriers.[52] In addition, according to one industry analyst, U.S. Cellular lacks not only the coverage and scale, but also the "handset portfolio to differentiate itself from the major U.S. carriers."[53] Furthermore, while U.S. Cellular plans to launch LTE service in late 2011, the deployment will only cover approximately one-fourth of the carrier's subscriber base.[54]

- ***Cincinnati Bell.*** Cincinnati Bell provides service in parts of only three states (Ohio, Kentucky, and Indiana)[55] and therefore lacks the scale and coverage needed to compete effectively with the Merged AT&T/T-Mobile and Verizon.

- ***Cellular South.*** Cellular South serves customers in Mississippi and only portions of four other southeastern states.[56] Thus, it also lacks the scale and coverage necessary to compete effectively with the Merged AT&T/T-Mobile and Verizon.

- ***Cox.*** Cox, the cable operator, offers wireless services in only seven states,[57] and it does not provide such services over its own facilities.[58] Moreover, Cox has stated

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[52] *See id.*, Table 25 (showing that U.S. Cellular has 2.7 percent of all 700 MHz spectrum, 4.3 percent of all cellular spectrum, 1.8 percent of all PCS spectrum, and 2.0 percent of all AWS spectrum).

[53] *See* Imari Love, *First-Quarter Results for TDS and USM in Line with Expectations*, Morningstar, at 1, May 10, 2011.

[54] *Id.*

[55] *See* Cincinnati Bell 2010 Annual Report, Form 10-K, at 5 (filed Feb. 28, 2011).

[56] *See Testimony of Victor H. "Hu" Meena, President & Chief Executive Officer, Cellular South, Inc., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, regarding "The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?*" at 1, May 11, 2011, *available at* http://judiciary.senate.gov/pdf/11-5-11%20Meena%20Testimony.pdf.

[57] *See* Cox Communications, Press Release, *Cox Launches Wireless in Rhode Island, Connecticut, Cleveland*, May 17, 2011, *available at* http://cox.mediaroom.com/index.php?s=43&item=543.

[58] *See* Todd Spangler, *Cox To Stop Building Its Own 3G Wireless Networks*, MULTICHANNEL NEWS, May 24, 2011, *available at* http://www.multichannel.com/article/468738-Cox_To_Stop_Building_Its_Own_3G_Wireless_Networks.php ("Cox Communications will decommission the 3G wireless networks it was building in a few markets, deciding instead to focus on rolling out voice and data service via its wholesale agreement with Sprint Nextel. Cox never put its own 3G CDMA networks into service.").

that it plans to target its existing cable customer base and is "'not looking at going after the wireless market in total.'"[59]

- ***Clearwire.*** While Clearwire has deployed 4G mobile wireless broadband services in numerous markets across the country, it faces a number of significant obstacles to competing effectively with the Merged AT&T/T-Mobile and Verizon. To begin with, it does not offer interconnected mobile wireless *voice* service.[60] Additionally, it relies on WiMAX rather than LTE technology, which is "likely to become the global standard" for 4G services.[61] As Clearwire has conceded, LTE "may deliver performance that is similar, to, or better than, or may be more widely accepted than the mobile WiMAX technology [it is] currently deploying."[62] Moreover, Clearwire lacks financial stability. Among other things, the company's aggressive network expansion plans have resulted in funding shortfalls[63] and forced Clearwire to lay off employees,[64] scale back marketing campaigns and the opening of retail stores,[65] and most recently, outsource management of its network.[66] The company has also

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[59] *See* Janice Podsada, *Cox Communications Launches Wireless Cell Phone Service in Connecticut*, HARTFORD COURANT, May 16, 2011, *available at* http://www.courant.com/business/hc-cox-launches-wireless-phone-servic20110516,0,6936581.story (quoting company spokeswoman).

[60] *See* Clearwire 2010 Annual Report, Form 10-K, at 7 (filed Feb. 22, 2011) ("Clearwire 2010 Form 10-K"); *see also Fourteenth Report* ¶ 69.

[61] Michael Hodel, *Clearwire Under Review as Intel Sale Sends Shares Lower*, Morningstar, at 1, May 12, 2011 ("*Clearwire Under Review*").

[62] Clearwire 2010 Form 10-K, at 16-17.

[63] *See, e.g., Clearwire Under Review* at 5 (discussing uncertainties regarding Clearwire's funding plans); *see also* Brad Reed, *Sprint still losing money despite adding 1.1 M customers; Sprint postpaid subscriptions still falling despite surge in prepaid numbers*, NETWORK WORLD, Apr. 28, 2011, *available at* http://www.networkworld.com/news/2011/042811-sprint-losing-money.html ("[Clearwire] says that the vast majority of its capital expenditures over the past three years were incurred from network build-outs that have helped Clearwire bring its WiMAX services to every major market in the U.S. Even so, Clearwire's revenue has failed to keep up with the increased operating costs, resulting in a $2.3 billion loss in 2010, nearly double the $1.25 billion loss posted in 2009.").

[64] *See* Stephen Lawson, *Clearwire to lay off 15 percent to save cash; The WiMax carrier will also hold off on retail and marketing efforts in some cities where its network goes live*, NETWORK WORLD, Nov. 4, 2010, *available at* http://www.networkworld.com/news/2010/110410-clearwire-to-lay-off-15.html.

[65] *See id.*

abandoned plans to sell Clearwire-branded smartphones,[67] a decision which will make it even more difficult for Clearwire to compete with the Merged AT&T/T-Mobile and Verizon in the retail market.

B. The Proposed Transaction Is Likely To Harm Consumer Welfare In The Market For Mobile Devices As Well As The Market For Mobile Applications.

As both the Commission and the GAO have recognized, handsets used with mobile wireless service comprise a critical part of the mobile wireless ecosystem.[68] In some cases, mobile wireless carriers develop handsets with manufacturers and/or with mobile operating system designers, and carriers generally offer those handsets pursuant to exclusive distribution arrangements.[69] In other cases, such as AT&T's initial offer of the iPhone, wireless carriers offer handsets pursuant to exclusive distribution arrangements even though the carriers had no role in the development of the handsets.[70] Finally, mobile wireless carriers also sometimes support handsets for which they do not have exclusive distribution arrangements.[71]

T-Mobile has participated in the mobile wireless ecosystem in several ways. *First*, it has developed handsets pursuant to exclusive distribution arrangements with manufacturers. For

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[66] *See* Clearwire, Press Release, *Clearwire Selects Ericsson for Managed Services*, May 18, 2011, *available at* http://corporate.clearwire.com/common/download/download.cfm?companyid=CLWR&fileid=469326&filekey=ef27bb19-98b8-41f8-bbab-44dc26e8765a&filename=578764.pdf (emphasizing Clearwire's goal of "reduc[ing] operating costs").

[67] *See* Greg Bensinger & Amy Thomson, *Clearwire Shelves Rollout of Its Own Branded Smartphones*, Bloomberg, Mar. 24, 2011, *available at* http://www.bloomberg.com/news/2011-03-24/clearwire-shelves-rollout-of-clear-branded-phones-chairman-says.html.

[68] *See Fourteenth Competition Report* ¶ 299; *see also GAO Wireless Industry Competition Report* at 18-19.

[69] *See Fourteenth Competition Report* ¶ 143.

[70] *Id.*

[71] *Id.* ¶ 135.

example, "T-Mobile partnered with Nokia, Samsung, and Sony Ericsson to develop the first handsets to operate on [AWS] spectrum."[72]

Second, T-Mobile has developed handsets in coordination with mobile operating system developers and manufacturers and offered those handsets pursuant to exclusive distribution arrangements. For instance, T-Mobile invested heavily—"with more than one year of work and millions of dollars in research and development"—"in its partnership with Google to develop the G1, the first handset to employ Google's open source mobile software platform, Android."[73] T-Mobile also worked with HTC to develop the G1[74] and offered the G1 pursuant to an exclusive distribution arrangement with that manufacturer.[75] These partnerships benefitted consumers in that the success of the G1 "paved the way" for future Android-based handsets that became available on the networks of other carriers as well as T-Mobile.[76] Indeed, as the Commission has recognized, "in January 2010, Google began selling its own version of an Android-based smartphone, the Nexus One, directly to end users as a reseller of wireless network services."[77]

Third, T-Mobile has also been willing to support devices without exclusive distribution arrangements. For example, in 2009, T-Mobile introduced its "Even More Plus" plan, which

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[72] *See* Reply Comments of T-Mobile USA, Inc., RM-11497, at 9 (filed Feb. 20, 2009) ("T-Mobile Feb. 20, 2009 Comments").

[73] *Id.* at 7.

[74] *See* T-Mobile, Press Release, *T-Mobile Unveils the T-Mobile G1 – the First Phone Powered by Android*, Sept. 23, 2008, *available at* http://newsroom.t-mobile.com/articles/t-mobile-QWERTY-Google-touchscreen.

[75] *See id.*; *see also* Lance Ulanoff, *Google, T-Mobile Launch 'Game Changing' G1 Phone*, PC MAGAZINE, Sept. 23, 2008, *available at* http://www.pcmag.com/article2/0,2817,2331007,00.asp.

[76] T-Mobile Feb. 20, 2009 Comments at 8; *see also Fourteenth Competition Report* ¶ 141.

[77] *Fourteenth Competition Report* ¶ 141.

offered lower monthly service plans for subscribers that use unsubsidized handsets.[78] As the Commission has recognized, this was "the first attempt by a national provider to change the incentives associated with device subsidies and service plan rates in a way to encourage mass market customers to use an unsubsidized device."[79] As another example, T-Mobile permits consumers to "'bring their own device'" provided that it is compatible with T-Mobile's GSM network.[80] In addition, T-Mobile "does not lock unsubsidized devices and allows subscribers to unlock subsidized handsets after only 40-60 days, depending on the customer's service plan."[81]

If AT&T is allowed to acquire T-Mobile, consumers will lose the benefit of both T-Mobile's independent development of devices with manufacturers and mobile operating system designers made available pursuant to exclusive distribution arrangements. More importantly, consumers will likely lose the benefit of T-Mobile's willingness to support handsets for which it does not have an exclusive distribution arrangement. Indeed, the Commission has found that of 67 selected smartphone launches in 2008 and 2009, 32 were launched by one of the four national carriers on an exclusive basis and almost half of those were by AT&T.[82] Therefore, it seems likely that, post-transaction, legacy T-Mobile will be less interested in supporting handsets for which it does not have exclusive distribution arrangements.

Furthermore, as explained, if AT&T is able to acquire both T-Mobile's spectrum and Qualcomm's 700 MHz spectrum, AT&T and Verizon would have similar spectrum holdings

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[78] *Id.* ¶ 315.

[79] *Id.*

[80] Comments of T-Mobile USA, Inc., GN Dkt. No. 09-191 et al., at 13 (filed Oct. 12, 2010).

[81] *Id.*

[82] *Fourteenth Competition Report* ¶ 143 & Chart 9.

(AWS and 700 MHz) for which to develop 4G LTE networks that the FCC essentially acknowledges would be distinctly superior to those of other carriers.[83] These spectrum holdings, along with AT&T and Verizon's vastly larger customer bases, will enable the two carriers to work with manufacturers to develop 4G handsets that work only on their 4G networks and that are offered exclusively with AT&T and/or Verizon service. In fact, as discussed above, MetroPCS already faces the risk that 4G devices made for AT&T and Verizon will not work on its network.[84] The increase in horizontal market concentration as a result of the proposed transaction will only increase AT&T's incentive to engage in this conduct.

Thus, the elimination of T-Mobile as an independent competitor in the market and AT&T's acquisition of T-Mobile and Qualcomm's spectrum will likely diminish the number of handsets developed. The proposed transaction and the AT&T-Qualcomm transaction will also increase AT&T's incentive to use exclusive distribution arrangements to limit the availability of the handsets that are developed.

Finally, it is worth noting that there is an increased likelihood that the proposed transaction will also reduce competition in the provision of mobile applications. As the Commission has recognized, "[t]he emergence of web-friendly smartphones and a handful of smartphone operating systems with application stores have influenced the ability of mobile wireless service providers to differentiate themselves based on mobile applications."[85] But mobile broadband service providers have sometimes blocked third-party applications that have the potential to cannibalize their existing revenue streams. For example, "AT&T reported in

[83] *See supra* Part III.A.3.

[84] *See supra* Part III.A.4.

[85] *Fourteenth Competition Report* ¶ 150.

August 2009 that Apple had agreed not to allow the iPhone to use AT&T's 3G network for VoIP calling without first obtaining AT&T's consent."[86] While AT&T later dropped this requirement, the increase in AT&T's market power as a result of the proposed transaction will likely increase its incentive to engage in such conduct.

C. The Proposed Transaction Is Likely To Harm Consumer Welfare In The Wholesale Market For Mobile Wireless Data And Voice Services.

MVNOs rely on wholesale agreements with facilities-based mobile wireless carriers to provide consumers with differentiated service offerings. As the Commission has recognized, "MVNOs may target their service and product offerings at specific demographic, lifestyle, and market niches that have particular needs or interests."[87] In addition, MVNOs make new and innovative service offerings available to consumers, thereby increasing competition. For example, Virgin Mobile's offering of the first prepaid mobile wireless broadband plan prompted AT&T and Verizon to offer similar plans.[88]

In order for MVNOs to make these service offerings available to consumers, they must have access to wholesale mobile wireless data and voice services on reasonable rates, terms and conditions. In a market with four national carriers, there is a greater chance that one of the carriers will offer wholesale service on reasonable rates, terms and conditions. Stated differently, if T-Mobile is eliminated as a competitor, it is less likely that any of the remaining three national carriers will have the incentive to offer MVNOs wholesale service on reasonable rates, terms and conditions. As the Commission has found, where a transaction "would reduce

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[86] *See id.* ¶ 151.

[87] *Id.* ¶ 31.

[88] *See* Phil Goldstein, *AT&T launches prepaid mobile broadband offerings*, FIERCE WIRELESS, Nov. 23, 2009, *available at* http://www.fiercewireless.com/story/t-launches-prepaid-mobile-broadband-offerings/2009-11-23.

the number of genuine competitors to three or fewer," the transaction "may result in a significant likelihood of successful [anticompetitive conduct]."[89] The remaining carriers could exercise their market power by, for example, unilaterally raising prices above competitive levels or tacitly or explicitly coordinating to raise prices above competitive levels.[90] This potential for supra-competitive prices is a particular concern in a market dominated by a few firms where, as here, the barriers to entry are high.[91] Thus, the proposed transaction will likely make it more difficult for MVNOs to obtain reasonably priced wholesale service.

For example, the proposed transaction will also make it more difficult for independent retailers seeking to enter the retail market for mobile wireless data and voice services via resale to obtain such agreements on reasonable rates, terms and conditions. For example, as discussed above, T-Mobile has provided the underlying mobile wireless service for Walmart's white label offering. If T-Mobile is acquired by AT&T, it is not clear that any of the remaining three national carriers will have the incentive to offer Walmart wholesale service on reasonable rates, terms and conditions.

Moreover, if, as seems likely, AT&T's and Verizon's LTE networks emerge as superior to other mobile wireless networks, a viable resale strategy could well depend on the ability to resell AT&T or Verizon's LTE service. If there are effectively only two competitors, it is almost certain that neither will be willing to offer wholesale service on reasonable rates, terms and

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[89] *Verizon-ALLTEL Merger Order* ¶ 101.

[90] *See id.*; *Qwest Phoenix MSA Forbearance Order* ¶ 30.

[91] *See Qwest Phoenix MSA Forbearance Order* ¶ 29.

conditions. Indeed, as the Commission has held, a substantial body of both theoretical and empirical evidence demonstrates that a duopoly is unlikely to yield competitive outcomes.[92]

Finally, while the Applicants suggest that the Merged AT&T/T-Mobile will face strong competition in the wholesale market from Clearwire and LightSquared,[93] it is not entirely clear that this is the case. *First*, there are significant questions about Clearwire's long-term viability because, as discussed above, Clearwire is in financial "turmoil"[94] and it does not currently use the technology (i.e., LTE) that will likely become the standard for 4G mobile wireless services.[95] *Second*, while LightSquared's business model holds considerable promise, the company has several significant obstacles to overcome. For example, LightSquared must resolve interference concerns raised by the GPS industry and Federal agencies to the Commission's satisfaction before it can begin offering commercial service.[96] In addition, as a condition of the *Harbinger-SkyTerra Transfer Order*, LightSquared must construct a terrestrial network that ultimately covers 260 million people nationwide by the end of 2015.[97] Furthermore, LightSquared must comply with the Commission's costly "gating" requirements for Mobile Satellite Service

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[92] *See Qwest Phoenix MSA Forbearance Order* ¶¶ 30-31.

[93] *See* Public Interest Statement at 92-94.

[94] *Clearwire Under Review* at 1.

[95] *See supra* Part III.A.4.

[96] *See LightSquared Subsidiary LLC, Request for Modification of its Authority for an Ancillary Terrestrial Component*, Order and Authorization, 26 FCC Rcd. 566, ¶¶ 40-41 (2011).

[97] *See SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 3059, Attachment 2 (2010) (Condition 2).

licensees with Ancillary Terrestrial Component authority, including providing continuous satellite service in specified geographic areas and maintaining spare satellites.[98]

It is therefore unlikely that competition from Clearwire or LightSquared will be sufficient to constrain the exercise of market power by the Merged AT&T/T-Mobile (and Verizon) in the wholesale market in the near future. Indeed, the head of AT&T Business Solutions recently suggested that Clearwire and LightSquared should merge because "[t]here really isn't a profitable wholesale model in wireless today."[99]

D. The Proposed Transaction Will Likely Diminish Independent Retailers' Ability To Serve Consumers.

As explained above, independent retailers have the ability to lower mobile wireless consumers' transaction costs and to expand the range of competitive options available to these consumers. Elimination of T-Mobile from the wireless marketplace will make it more difficult for independent retailers to serve consumers because independent retailers will no longer have the ability to assist them in understanding the comparative benefits offered by T-Mobile in terms of price, network quality, handsets and other dimensions of competition. In addition, it is likely that the Merged AT&T/T-Mobile would have the incentive to restrict independent retailers' ability to serve mobile wireless consumers in other ways.

First, the Merged AT&T/T-Mobile would likely have the incentive to prevent independent retailers from reducing consumers' transaction costs. For example, if independent retailers are free to offer, and advise consumers regarding, a wide range of competitors' service

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[98] *See* 47 C.F.R. § 25.149(b).

[99] Sinead Carew, *AT&T: No Room For Both Clearwire and LightSquared*, Reuters, May 16, 2011, *available at* http://www.reuters.com/article/2011/05/16/us-summit-att-clearwire-idUSTRE74F3MG20110516 (quoting John Stankey, President and CEO, AT&T Business Solutions).

plans and devices as alternatives to the Merged AT&T/T-Mobile's offerings, some consumers that would have chosen a service plan from the Merged AT&T/T-Mobile will instead choose the Merged AT&T/T-Mobile's competitors' service plans. To the extent that such competitors offer lower prices, innovative pricing options, or other advantages, the availability of such offerings at independent retailers could increase the pressure on the Merged AT&T/T-Mobile to offer its own, similar offerings. Stated differently, if independent retailers were not able to sell the offerings of competitors to the Merged AT&T/T-Mobile, the customers in question might never consider such competitive carriers' offerings. This is particularly likely with regard to smaller, regional and niche mobile wireless carriers that lack the national carriers' brand recognition and advertising budgets.

There are many ways in which the Merged AT&T/T-Mobile could act on this incentive to prevent independent retailers from lowering consumers' transaction costs. For example, the Merged AT&T/T-Mobile could do the following:

- condition the availability of its service offerings in independent retail stores on the independent retailers' agreement not to carry some (e.g., regional/niche) or all other carriers' offerings;

- limit the number of low-priced service plans sold by independent retailers by, for example, making corporate discounts or special price discounts available to consumers only at Merged AT&T/T-Mobile stores or on the Merged AT&T/T-Mobile's website;

- place restrictions, such as unreasonable voice or data usage caps, on lower-priced plans when sold by independent retailers; and/or

- require that independent retailers sell unrelated products (e.g., Merged AT&T/T-Mobile video or wireline broadband services) bundled with mobile wireless services.

Second, the Merged AT&T/T-Mobile would likely have the incentive to prevent independent retailers from lowering the price of the Merged AT&T/T-Mobile's mobile wireless offerings. As explained above, independent retailers sometimes "share" their commissions from mobile wireless carriers with consumers in the form of lower priced devices. Where independent retailers lower prices in this manner, the Merged AT&T/T-Mobile may be required to lower the prices it charges via other retail channels. If so, the Merged AT&T/T-Mobile would likely have the incentive to limit or prohibit the extent to which independent retailers may use commissions to lower retail prices offered to consumers.

Third, the Merged AT&T/T-Mobile would likely have the incentive to restrict the extent to which independent retailers can proactively increase consumers' choice of service plans, devices and applications. This is because the introduction of alternatives in the market would likely cause the Merged AT&T/T-Mobile to lose customers or respond to competition by lowering prices or introducing new service options. The Merged AT&T/T-Mobile would have the incentive to avoid these outcomes.

Again, there are many ways in which the Merged AT&T/T-Mobile could act on this incentive to diminish the extent to which independent retailers could themselves introduce new competitive alternatives in the marketplace. For example, the Merged AT&T/T-Mobile could do the following:

- limit the extent to which wireless devices or applications developed by or at the direction of third parties, including independent retailers themselves, can operate on or are supported by the Merged AT&T/T-Mobile network;
- limit the extent to which wireless devices or applications developed by or at the direction of the Merged AT&T/T-Mobile can be used by subscribers to other mobile wireless carrier services, including the services offered by independent retailers pursuant to a resale agreement with an underlying wholesale mobile wireless carrier; and/or
- limit the extent to which independent retailers can tailor the suite of applications and functionalities available that run on the Merged AT&T/T-Mobile network by, for example, adding applications or disabling undesirable applications or features.

Finally, and more generally, the Merged AT&T/T-Mobile's may also have the incentive to limit the extent to which independent retailers can divert business and profits from the Merged

AT&T/T-Mobile's affiliated retail stores and website. There are many ways in which the Merged AT&T/T-Mobile could seek to make independent retailers less effective competitors to the Merged AT&T/T-Mobile's stores and web sites. For example, the Merged AT&T/T-Mobile could do the following:

- allocate device inventory to the Merged AT&T/T-Mobile's affiliated stores on preferential terms and in greater volumes than is the case with independent retailers;
- prevent manufacturers from selling iconic wireless devices, such as Apple's iPhone or iPad, to independent retailers; and/or
- reduce commissions paid to independent retailers.

By reducing the effectiveness of independent retailers in this manner, the Merged AT&T/T-Mobile could capture a larger share of the higher prices that the Merged AT&T/T-Mobile could charge as a result of the proposed transaction.

IV. THE FCC SHOULD CONSIDER ADOPTING CONDITIONS THAT MITIGATE THE HARMS POSED BY THE PROPOSED TRANSACTION.

As explained above, the proposed transaction will likely harm consumers by reducing competition in the mobile wireless marketplace. Significantly compounding these risks is the likelihood that the Merged AT&T/T-Mobile will have the incentive to reduce the extent to which independent retailers are able to facilitate competition by lowering consumers' transaction costs and increasing the range of competitive offerings available to consumers.

Accordingly, if the Commission approves the proposed transaction, it should consider conditioning such approval on requirements that mitigate the anticompetitive harms posed by the transaction and enhance the ability of independent retailers to diminish such harms both on their own and by working with smaller, regional and niche mobile wireless carriers, device manufacturers, operating system designers, and applications developers. In particular, if independent retailers are able to assort all of the Merged AT&T/T-Mobile's service and device offerings on the same terms and conditions as Merged AT&T/T-Mobile's owned and operated retail channels, independent retailers will be able to assist consumers in choosing the lowest cost service plan of the Merged AT&T/T-Mobile that meets the consumers' needs. If independent retailers are able to offer the service and device offerings of the Merged AT&T/T-Mobile's smaller competitors, independent retailers can assist such smaller, regional and niche carriers in overcoming some of the obstacles associated with competing with the Merged AT&T/T-Mobile. In addition, if independent retailers are able to work freely with device manufacturers, operating system designers, and applications developers (including those that develop devices, operating systems and applications developed for the Merged AT&T/T-Mobile) in addition to competitive mobile wireless carriers, independent retailers can expand the range of service offerings available to consumers by matching devices with service offerings in ways that would not otherwise be possible. Again, this will make the smaller, regional and niche carriers more effective competitors to the Merged AT&T/T-Mobile. Finally, if the Merged AT&T/T-Mobile's services are made available at wholesale on reasonable rates, terms and conditions, MVNOs will continue to be able to partner with independent retailers to offer innovative white label service offerings that again can broaden the range of competitive offerings in the mobile wireless marketplace.

The Commission therefore should consider adopting the following categories of conditions on any approval of the proposed transaction:

- **Non-Discriminatory Distribution Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that enable independent retailers to lower transaction costs for consumers in the mobile wireless marketplace. The Merged AT&T/T-Mobile should be required, among other things, to make the mobile wireless service plans and devices it offers in its stores and on its website available to independent retailers on a nondiscriminatory basis.

- **Right To Attach Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that allow devices developed by third-party manufacturers to function on the Merged AT&T/T-Mobile network without discrimination.

- **Content/Application Conditions**—The Merged AT&T/T-Mobile should be required to comply with conditions that allow third-party manufacturers and independent retailers to develop content and applications for devices to function on the Merged AT&T/T-Mobile network without any restrictions or filters established by the Merged AT&T/T-Mobile.

- **Wholesale Conditions**—The Merged AT&T/T-Mobile should be required to make its mobile wireless service available on a wholesale basis on reasonable rates, terms and conditions to ensure the continued viability of MVNOs in the future.

- **Divestiture Conditions**—The Merged AT&T/T-Mobile should be required to divest sufficient spectrum to enable existing competitors and new entrants to compete with the Merged AT&T/T-Mobile in the provision of 4G mobile wireless services.

V. CONCLUSION

For the foregoing reasons, the Commission should adopt the conditions described herein.

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CERTIFICATE OF SERVICE

I, Matthew Jones, do hereby certify that on this day, May 31, 2011, I caused to be served a true and correct copy of the foregoing Comments of the Consumer Electronics Retailers Coalition to the following:

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