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May 31, 2011

VIA HAND DELIVERY

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations
WT Docket No. 11-65

Dear Ms. Dortch:

Enclosed please find two copies of the Redacted for Public Inspection version of the Comments of Cablevision Systems Corporation. A Highly Confidential version of these Comments is being submitted under separate cover.

Sincerely,

Samuel L. Feder
Partner

SLF:clo

REDACTED – FOR PUBLIC INSPECTION

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 CABLEVISION SYSTEMS CORPORATION

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TABLE OF CONTENTS

REDACTED – FOR PUBLIC INSPECTION

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	)	
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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its counsel, hereby submits 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

The Commission has long pursued a goal of promoting robust wireless competition, from the initial days of mobile voice service to today's advanced data networks. The Commission has thus enacted policies to ensure that multiple competitors can share scarce licensed spectrum, to make available and encourage the use of unlicensed spectrum, and to promote innovative technologies that allow for maximal spectrum efficiency. The Commission's policies are more important than ever today in the face of a broadly recognized spectrum "crunch." Spectrum scarcity increases the barriers to entry, and puts a premium on pro-competitive regulatory policies that will promote viable alternatives to wireless incumbents like AT&T.

Embracing the Commission's pro-competition policies, Cablevision has made substantial investments in wireless data service using unlicensed bands, and is poised to expand its service by incorporating cellular broadband to provide Cablevision customers with seamless

connectivity throughout Cablevision's service area and, with appropriate roaming arrangements, throughout the country. This high bandwidth, dual mode hybrid offering would enable Cablevision to compete aggressively against the "quad play" packages offered by AT&T and Verizon using a combination of Cablevision's own core wireless and network assets and the radio access network of cellular and roaming partners.

AT&T's proposed acquisition of T-Mobile presents a monumental challenge to the Commission's pro-competition policies. This combination would eliminate a major competitive provider from the market, increase the spectrum lead of AT&T and Verizon over existing and potential new entrants, and – most significantly from Cablevision's perspective – eliminate one of the few providers willing to provide meaningful wholesale access to its radio access network to potential retail competitors, like Cablevision. The proposed transaction is thus doubly pernicious, at once eliminating a major competitor from the retail marketplace *and* simultaneously eliminating a critical entry vehicle for others, handily increasing market concentration *and* increasing barriers to new entry in a single move.

These combined effects mean that the transaction must, in light of the Commission's own contrary policies, be viewed with extreme skepticism, and the proposed "benefits" of this transaction be considered only in light of its substantial costs. This transaction would remove one of only four national competitors in the retail wireless broadband market. And the elimination of a stand-alone T-Mobile, whose own filings prior to the transaction's announcement reflected its commitment to expanding its advanced radio access network and who has been publicly enthusiastic about providing access to its network to potential partners, mean that new rivals are substantially less likely to emerge to improve the market dynamics any time soon – to the detriment of consumers.

The proposed transaction thus presents a challenge to the Commission to act boldly, either by rejecting the proposed transaction outright or imposing significant conditions that would reshape opportunities for new entrants to bring competitive pricing and innovative products to consumers. Such conditions should include – at a minimum – expanding access to AT&T's radio access network for competitors using licensed or unlicensed spectrum and requiring AT&T to allow customers to use the devices of their choice on its network. While these regulations could not replace the competition an independent T-Mobile brings, they could mitigate some of the harm this transaction would cause.

I. CABLEVISION SEEKS TO INJECT THE VERY PROCOMPETITIVE ENTRY THAT THE COMMISSION'S WIRELESS POLICIES PROMOTE.

A. The Commission Seeks To Promote Robust Wireless Competition In The Face Of Spectrum Scarcity.

The Commission has long pursued a policy of promoting robust wireless competition. As the Commission recently emphasized in the National Broadband Plan, "Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices."[1] The Commission thus has consistently sought to make ample licensed spectrum available to accommodate multiple competitors.[2] In addition, the Commission has encouraged

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[1] *Connecting America: The National Broadband Plan*, Federal Communications Commission, at 36 (March 2010) ("National Broadband Plan").

[2] *See generally, e.g., In re Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15,289 (2007) ("*C Block Order*"); National Broadband Plan at 75-76.

competition through the use of unlicensed spectrum – recently dramatically expanding the availability of unlicensed spectrum in the white spaces proceeding.[3]

Where market structure alone is inadequate to ensure effective competition, the Commission has taken targeted regulatory steps. For example, in the *Data Roaming Order*, the Commission adopted a limited rule requiring facilities-based providers of cellular broadband to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.[4] Likewise, the Commission put in place open platform requirements on the C Block of wireless spectrum – requirements that prohibit the licensee from restricting the ability of its customers to use the devices and applications of their choice.[5] The Commission took these steps because it recognized that doing so would better facilitate competition and benefit consumers.[6]

Additionally, recognizing that spectrum will always be a critical input to competition essential to protect consumers, the Commission has sought to facilitate innovations to use spectrum more efficiently, such as cognitive radio technologies.[7] And the Commission has taken numerous steps to aid moving spectrum to its highest and best use.[8]

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[3] *See In re Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Bands*, Second Memorandum Opinion and Order, 25 FCC Rcd 18,661, 18,662, ¶¶ 1-2 (2010).

[4] *See 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, at *1, ¶ 1 (FCC 11-52, rel. Apr. 7, 2011) ("*Data Roaming Order*").

[5] *See* 47 C.F.R.§ 27.16.

[6] *Data Roaming Order,* 2011 WL 1341353 at *8, ¶ 20; *C Block Order,* 22 FCC Rcd at 15,362-63, ¶ 200.

[7] *In re Facilitating Opportunities for Flexible, Efficient, and Reliable Spectrum Use Employing Cognitive Radio Technologies*, Report and Order, 20 FCC Rcd 5486, 5487-88, ¶ 4 (2005).

[8] *See, e.g.,* National Broadband Plan at 78; *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20,604, 20,607, ¶ 2 (2003).

There is now broad recognition, however, that despite these efforts, a coming spectrum shortage inhibits opportunities for entry and expansion, and threatens the Commission's goals. The National Broadband Plan recognized that "[a]dditional spectrum is . . . required to accommodate multiple providers in a competitive marketplace, including new entrants and small businesses."[9] As Chairman Genachowski recently stated, we face a "looming spectrum crunch," in which "[d]emand for spectrum is rapidly outstripping supply."[10]

In response to this looming crisis, the Commission has developed an aggressive plan to repurpose significant swaths of spectrum for broadband use and take other steps to preserve and enhance competitive opportunities.[11] That plan includes auctioning blocks of available and soon-to-be-available spectrum in the next few years, accelerating terrestrial deployment in Mobile Satellite Spectrum, and repurposing 120 megahertz from the broadcast television bands.[12] These efforts are all aimed at enabling competitors to enter the broadband market more easily and thereby benefit consumers through lower prices and increased innovation.[13] By all accounts though, policies to make more spectrum available will take some time to implement.

B. Cablevision Is Exploring Undertaking The Very Procompetitive Entry The Commission Seeks To Promote By Expanding Into Cellular Broadband.

Cablevision is a leading telecommunications and entertainment company that has been at the forefront of providing new and innovative services to American consumers. Since its founding on Long Island, New York in 1973, Cablevision's success as an organization has

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[9] National Broadband Plan at 78.

[10] Julius Genachowski, Chairman, FCC, Remarks on Spectrum at the White House (Apr. 6, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0406/DOC-305593A1.pdf.

[11] *See* National Broadband Plan at 75-76, 84-93.

[12] *Id.* at 75-76.

[13] *See id.* at 77-78.

turned on its ability to innovate in the face of changing customer demands and expectations. Thus, over the decades, Cablevision has invested billions of dollars to construct a state-of-the-art fiber network that currently serves over three million subscribers in Cablevision's core service territory in the tri-state area of New York, New Jersey, and Connecticut. Using this network, Cablevision was one of the first providers to market a broad-based high speed Internet service, and today offers all of its customers in the tri-state area the fastest residential broadband service in the nation (101 mbps) through its Optimum Online service. Through its recent acquisition of Bresnan Communications, Inc., Cablevision has also become a leading provider of high-speed data, voice, and video service in the states of Colorado, Montana, and Wyoming.[14]

In keeping with its history of innovation, Cablevision recognized a number of years ago that consumers increasingly need, and demand, access to the same video, broadband, and voice services not only at home or work, but also while commuting, socializing outside the home, and traveling, to name only a few examples. To meet this new demand for mobile access, Cablevision responded to the Commission's promotion of unlicensed spectrum opportunities by investing hundreds of millions of dollars to develop its Optimum WiFi network.[15]

Optimum WiFi, which is available without charge to Cablevision's broadband Internet subscribers, is the largest contiguous WiFi network in North America. It comprises tens of thousands of access points that provide an instant connection to Cablevision's high-speed fiber infrastructure in urban and suburban public places – such as parks, main streets, train stations, airports and retail spaces – throughout Cablevision's tri-state service territory.[16] Customers can

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[14] Declaration of Joseph Varello, submitted herewith ("Varello Decl."), ¶ 3.

[15] *Id.* ¶ 4.

[16] *Id.* ¶ 5. Cablevision also has agreements with Time Warner Cable and Comcast that provide Optimum WiFi customers access to those providers' WiFi networks in certain areas of New York and New Jersey, respectively. *Id.* ¶ 5 n.1.

access Optimum WiFi using a variety of mobile devices, including laptop and tablet computers, and handheld devices such as smartphones. As of this filing, Optimum WiFi has served more than 50 million customer logons, is enjoyed regularly by hundreds of thousands of users, and has transported more than 3 petabytes – 3 quadrillion bytes – of broadband data. This network has made Cablevision a significant player in the mobile broadband market in the New York metropolitan area, although the network is limited geographically.[17]

Cablevision is committed to continuing to develop Optimum WiFi and to maximizing the use of public spectrum. Cablevision's mobile customers, however, increasingly demand the ability to access its services regardless of their physical location at any given time.[18]

To meet this customer demand for mobility, and also develop new markets for its products and services, Cablevision has been actively exploring expanding its mobile WiFi service to incorporate traditional cellular broadband service as a canopy to complement its existing WiFi service. Cablevision envisions offering a complete package of mobility services that would employ WiFi and cellular broadband interchangeably and seamlessly.[19]

Cablevision could accomplish its expansion into cellular broadband in two ways: first, by partnering with a creative licensed wholesale partner to lease access to the radio access network to supplement its regional WiFi service; and second, in the longer-term, by securing additional licensed or unlicensed spectrum of its own and "building out" the WiFi network to compete directly with the mobile voice and data offerings of existing cellular incumbents.[20] The proposed transaction, however, not only does direct harm to the retail market – it also damages

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[17] *Id.* ¶ 5.

[18] *Id.* ¶ 6.

[19] *Id.*

[20] *Id.* ¶ 7.

the opportunities to engage in the kind of facilities partnership that could facilitate more retail competition.

II. THE PROPOSED TRANSACTION RAISES ALREADY HIGH ENTRY BARRIERS IN CONTAVENTION OF THE COMMISSION'S COMPETITION POLICIES.

A. There Are High Barriers To Entering The Cellular Broadband Market.

There are already high barriers to entering the cellular broadband market that make entering on a facilities-based model particularly difficult. First, as mentioned above, spectrum is a significant barrier to entry, and scarcity has put a premium on any licensed spectrum held by third parties. For example, there is currently no spectrum available for a new cellular broadband service provider in the New York market at prices that make entry viable, and new auctions may not occur for some time.[21] Indeed, AT&T itself acknowledges that spectrum is the primary barrier to entry.[22]

Second, in addition to securing spectrum, a facilities-based new entrant would have to construct or negotiate access to communications towers to support a cellular broadband network. Building or securing access to the necessary infrastructure may cause significant delay, which stands as a major barrier to entry.[23] As the Commission has recognized, these kind of barriers can limit the number of firms that can enter and survive in a market.[24] This is particularly true in large cities like New York, where obtaining rights to place wireless equipment is uncertain and

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[21] *Id.* ¶ 8; *see also* Roger Cheng, *AT&T Sees Some Trade-offs*, Wall Street Journal, Mar. 23, 2011, at B5.

[22] *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 25-26 (filed Apr. 21, 2011) ("Public Interest Statement").

[23] *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Fourteenth Report, 25 FCC Rcd 11,407, 11,457-61, ¶¶ 60-67 (2010), ("*Competition Report*").

[24] *Competition Report*, 25 FCC Rcd at 11,458, ¶ 61.

particularly time-consuming. Indeed, AT&T presents the benefit from utilizing the "thousands of already operational cell sites that T-Mobile USA has built over many years" as a purported significant reason for the merger and its own way to overcome what it claims is a threat to its own expansion.[25]

Third, *de novo* entry would require a provider to develop handsets and other consumer devices. If the spectrum available were not already in wide use by other providers, there would be very few or no compatible off-the-shelf devices available, as device manufacturers do not build devices for spectrum not in use. And even if the spectrum available were already in wide use, the larger carriers like AT&T and Verizon have entered exclusive arrangements whereby popular devices are not available to other providers until long after the devices have entered the market.[26] Either way, a new entrant would have to devote considerable resources to developing devices. As the Commission has acknowledged, these kind of costs can inhibit or "delay[] the entry of potential entrants."[27]

In light of these barriers, partnering with an existing provider comprises the most viable means of near-term entry into the cellular broadband market. With access to sufficient wireless capacity through such an arrangement, a new entrant could compete aggressively with incumbents, particularly if the new entrant leveraged WiFi or other network infrastructure facilities. Cablevision has explored this kind of partnership with an array of providers, and has learned that there are currently very limited options. Indeed, as explained below, AT&T's acquisition of T-Mobile is anticompetitive because it eliminates one of the few sources for

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[25] Declaration of William Hogg (attached to Public Interest Statement), ¶ 43.

[26] *Competition Report*, 25 FCC Rcd at 11,460, ¶ 66.

[27] *Id.*

wireless broadband capacity in the country – and the most likely Cablevision partner that would facilitate swift and secure entry in the New York market.

B. The Transaction Anticompetitively Reduces Wholesale Competition And Thereby Impairs Cablevision's Ability To Enter The Market.

Presently, there are only four nationwide providers that have the capabilities needed to be effective wholesale partners for providers like Cablevision: AT&T, Sprint, T-Mobile, and Verizon. AT&T and Verizon are unwilling to engage in a meaningful wholesale partnership with Cablevision, which would compete head-to-head against those companies in areas where they also provide landline service. To Cablevision's knowledge, neither company provides retail competitors access to their highest speed mobile data networks, and, despite Cablevision's attempts, AT&T has thus far refused to provide such access to Cablevision.[28]

Of the national carriers, then, only *two* – T-Mobile and Sprint – have shown any willingness to provide meaningful access to their high-speed data networks to potential retail competitors. T-Mobile has publicly been enthusiastic about entering wholesale partnerships.[29]

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[28] Varello Decl. ¶ 8.

[29] *See* Press Release, Walmart Stores, Inc. & T-Mobile USA, Inc., "Walmart Introduces Walmart Family Mobile Powered by T-Mobile, Featuring the Lowest Priced Unlimited Talk and Text Wireless Family Plans" (Sept. 13, 2010), *available at* http://walmartstores.com/pressroom/news/10297.aspx.

[30] Varello Decl. ¶ 9.

T-Mobile and Sprint have incentives to facilitate entry that AT&T and Verizon do not, because their networks, which provide coverage to the vast majority of geographic locations,[31] cannot reach the same scale economies as the larger two carriers, if the only traffic they carry is from their own retail customers.[32] Indeed, as explained below, if it does not merge with AT&T, T-Mobile is primed not, as AT&T argues, to scale back its business, but rather to make the necessary investments in new network capacity (by adding cell sites and using newer and more efficient technology). Having committed to this strategy, T-Mobile will have a powerful incentive to attract additional retail and *wholesale* customers to enable efficient use of its infrastructure. Moreover, many of the techniques used to add capacity, such as obtaining new spectrum or adding cell sites, will add capacity by large, lumpy amounts. A robust wholesale business would allow T-Mobile to fill enough of this added capacity to spread its costs and bring down the cost per unit of output more in line with that enjoyed by AT&T or Verizon.

The Applicants argue that, in T-Mobile's absence, Clearwire and LightSquared could provide the kind of wholesale capacity Cablevision seeks.[33] But these providers face limitations that make a partnership impractical, at least in the short term. LightSquared for example, is not yet providing any service, and serious questions remain about the potential for its service to interfere with GPS devices – an issue that could delay or even undermine LightSquared's ability to provide service.[34] LightSquared also faces questions about its longer-term financial viability,

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[31] For coverage figures as of November 2009, *see Competition Report*, 25 FCC Rcd at 11,439-41, ¶ 30. *See also* Declaration of Dr. Kim Kyllesbech Larsen (attached to Public Interest Statement), ¶ 11.

[32] Varello Decl. ¶ 9.

[33] Public Interest Statement at 94.

[34] *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*

an issue also faced by Clearwire.[35] Moreover, because of the spectrum bands used by these companies, neither company can offer many popular devices that consumers desire.[36] In short, putting significant investments into establishing a partnership with either of these carriers carries substantial risk.

Similarly, Sprint cannot fill the gap created by the loss of T-Mobile. Sprint would become essentially the only provider of wholesale services, at least on the national level. As a result, Sprint may compete less vigorously for wholesale customers than if it faced competition from T-Mobile.[37] And even more troubling, Sprint's long-term viability would be in serious doubt if this merger is approved. As Sprint CEO Dan Hesse stated before Congress: "[T]he disparity between the duopolists and all other providers is likely only to worsen. Going forward, it would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce quality, raise prices charged to content sellers for access to consumers or raise prices to customers for access to voice or Internet service."[38]

2180-2200 MHz, Report and Order, ET Docket No. 10-142, 2011 WL 1325514, at *8, ¶ 25 (FCC 11-57, rel. Apr. 6, 2011) (noting concerns of U.S. GPS Industry Council).

[35] *See Strategy Analytics Releases Report on AT&T's Planned Acquisition of T-Mobile*, Financial Technology (Mar. 30, 2011), *available at* http://financial.tmcnet.com/news/2011/03/30/5410991.htm; Maisie Ramsay, *Preparing for Liftoff: LightSquared & Company*, Wireless Week (Mar. 24, 2011), *available at* http://www.wirelessweek.com/News/2011/03/Technology-Preparing-Liftoff-LightSquared-Company-Wireless-Networks/; Maisie Ramsay, *Sprint, Clearwire Feel the Heat*, Wireless Week (Nov. 8, 2010), *available at* http://www.wirelessweek.com/Articles/2010/11/Technology-Sprint-Clearwire-Feel-Heat-Wireless-Networks/.

[36] Varello Decl. ¶ 12.

[37] *Id.* ¶ 11.

[38] Proposed AT&T/T-Mobile Merger: Hearings Before the Subcommittee on Antitrust, and 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").

Finally, regional carriers do not provide a viable option for entry into the New York market. These carriers all rely on competitive access to the national carriers' networks for wholesale roaming service, the pricing of which would be controlled by AT&T and Verizon following the proposed transaction.[39] And for both domestic and international wireless users that need GSM-based air interfaces,[40] with the elimination of T-Mobile, they would now have no alternate nationwide choice other than AT&T. Additionally, if the transaction is approved, regional carriers would face the same disadvantages that Sprint faces, calling into question their longer-term competitive significance.

In contrast, if T-Mobile remains an independent actor in the U.S. wireless market, it will be an ideal partner for companies, such as Cablevision, that require wholesale wireless capacity to enter or expand their market presence. T-Mobile is the only national GSM-based carrier in the U.S. other than AT&T. The GSM air interface, and its evolving technology, is the standard used by most of the rest of the world, and it is supported by a massive eco-system of carrier equipment, handsets, and other customer equipment. Entering the wireless market using GSM-based technology is therefore cheaper and easier than entering via the CDMA standard, as the use of GSM-based technology allows for a wide range of choices of input suppliers and much greater flexibility in designing the customer experience with the wireless network.[41]

In sum, there can be no question but that the elimination of T-Mobile as an independent competitive force will harm the wholesale market, inhibiting providers like Cablevision from providing cellular broadband service. The losers are consumers, who benefit both from the

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[39] Varello Decl. ¶ 13.

[40] 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.

[41] Varello Decl. ¶ 10.

innovative products providers using wholesale inputs can provide as well as from the competition these providers bring to facilities-based carriers, leading to lower prices and better services.

III. AT&T'S ACQUISITION OF T-MOBILE DIRECTLY HARMS THE RETAIL MARKET.

The damage the transaction causes to wholesale competition is especially problematic, because it makes new entry less likely to remedy the direct harm the transaction also causes in the retail market. According to the Commission's most recent Competition Report, the weighted average of the Herfindahl-Hirschman Index ("HHI") in local markets was 2824, which well exceeds the standard Department of Justice threshold of 2500 used to characterize a market as "highly concentrated."[42] The proposed merger would take this concentration to a new level. On a nationwide basis, the effect of merging two firms with approximately 28.5% and 12.1% market shares would be to increase the HHI by about 690 points.[43] Thus, in an average local market where the HHI had already reached 2824, the merger would potentially increase HHI to nearly 3500 – far exceeding the Commission's thresholds for effects on concentration requiring particular scrutiny.[44] For this reason, numerous parties have demonstrated that AT&T's

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[42] U.S. Department of Justice and the Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 5.3, at 19 (Aug. 19, 2010).

[43] Market shares used for this example are based on percent of subscribers of AT&T and T-Mobile at Year-End 2008, *Competition Report*, 25 FCC Rcd at 11,641, Appendix C, Table C-1. The change in HHI resulting from a merger is equal to two times the product of the market shares of the two firms -- (28.5 x 12.1) x 2.

[44] The Commission subjects to additional scrutiny service areas in which (1) the post-transaction HHI would be greater than 2800 and would increase by at least 100, or (2) the post-transaction HHI would have increased by at least 250 (regardless of the absolute level of the post-transaction HHI). *See Competition Report*, 25 FCC Rcd at 11,451-52, ¶ 49; *In re 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 13,915 (2009).

acquisition of T-Mobile plainly will harm competition and consumers by bringing higher prices and less innovation.[45]

AT&T's attempts to deflect attention from these effects by arguing that T-Mobile is struggling for relevance in the market and, absent this transaction, would decline in competitive significance in the future.[46] However, this attempt to denigrate T-Mobile is contradicted by T-Mobile's own description of its commitment to build an advanced network – one it could offer in partnership with providers like Cablevision. T-Mobile's 2010 public financial report, which pre-dates the merger agreement with AT&T, states that "[T-Mobile USA] plans to expand and double the speed of its 4G network in 2011 [and] expects that 140 million Americans . . . will have access to increased 4G speeds (HSPA+ 42 Mbps) by mid-year 2011."[47] It further notes that "Data ARPU growth rates are outperforming our main competitors as we leverage our 4G network and provide rich and compelling smartphones and data plans."[48] Thus, contrary to AT&T's claims, T-Mobile appears poised to compete aggressively against its larger nationwide rivals.

IV. THE COMMISSION SHOULD EITHER REJECT THIS TRANSACTION OR PUT IN PLACE CONDITIONS TO PRESERVE COMPETITION.

As discussed above, the proposed transaction is, on its face, flatly inconsistent with the Commission's longstanding commitment to promoting robust competition in the wireless

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[45] These issues were discussed extensively by Sprint's CEO, Dan Hesse, in his congressional testimony. *See* Hesse Testimony; *see also* Cecilia Kang, *AT&T to Buy T-Mobile USA, Creating Largest Carrier in U.S.*, Wash. Post, Mar. 21, 2011, at A17 (noting criticism from other parties).

[46] Declaration of Dennis Carlton, Allan Shampine and Hal Sider (attached to Public Interest Statement), ¶ 121.

[47] Press Release, T-Mobile USA Reports Fourth Quarter 2010 Results, at 7 (Feb. 25, 2011), *available at* http://www.t-mobile.com/Company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations.

[48] *Id.* at 1.

market. Accordingly, the Commission could reasonably reject the proposed transaction outright. If, however, the Commission nevertheless decides to approve the merger, it should impose bold, enforceable conditions to preserve competition in both the retail and wholesale markets. Such a regulatory solution cannot substitute fully for the loss of T-Mobile, a firm that had actual incentives to provide wholesale access to other carriers as well as to compete vigorously in the retail market. But a set of regulatory strictures that facilitates entry and expansion into wireless markets by new players would do much to foster the level of competition that would be lost if this transaction is approved. At minimum, these conditions should include (1) a set of expanded data roaming requirements that permit wholesale or roaming access to the incumbent radio access network by licensed and unlicensed providers and (2) open network requirements that enable consumers to use AT&T's network with devices of consumers' choosing.

A. AT&T Should Be Required To Offer Data Roaming At Cost-Based Rates To Both Other Cellular Broadband And WiFi Providers.

Any approval of this transaction should be accompanied by expanded data roaming requirements. The Commission's recently announced Data Roaming Order, while important, was not designed to facilitate wholesale competition. The order states that data roaming may not be used to provide resale (which is one form of retail service that can be provided via wholesale), suggests that the high prices currently prevailing for data roaming need not necessarily be lowered, and makes unclear whether it may be reasonable in some circumstances to refuse to provide data roaming in areas where the requesting carrier has extensive facilities.[49] These

[49] *Data Roaming Order*, 2011 WL 1341353 at *12-*14, *29, ¶¶ 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); *id.* at *8, ¶ 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"); *id.* at *28, ¶ 86 (stating that one factor used in adjudicating a data roaming dispute is "whether the

limitations may have made sense in the context of the Commission's goal of addressing the limited problem before it in that proceeding – providing facilities-based carriers access to necessary data infrastructure in limited instances where they do not have facilities. However, as discussed above, the market envisioned by the Data Roaming Order, in which facilities-based carriers vigorously compete against one another, would be fundamentally altered by this transaction.

Expanding data roaming requirements to require AT&T to offer a form of data roaming to other cellular broadband carriers as well as WiFi providers at cost-based rates, both in markets where the roaming carrier has facilities and where it does not, could mitigate some of the damage that the loss of T-Mobile would inflict on competition. By allowing WiFi providers to take advantage of data roaming, the Commission could provide a means of cellular broadband wholesale access to WiFi providers like Cablevision without creating an entirely new regime. This would enable such providers to compete directly with traditional CMRS providers, as Cablevision seeks to do.

AT&T should be required to offer this expanded data roaming at cost-based rates. Rates for data roaming are typically far above cost, and many times the rate charged for voice roaming (which uses the exact same infrastructure). As a result, smaller providers without nationwide footprints cannot offer nationwide coverage at rates competitive to those offered by the larger carriers, and carriers are effectively prohibited from using data roaming as a vehicle for broader wholesale-type entry. Requiring AT&T to offer expanded data roaming at cost-based rates would not only strengthen the competitive position of regional carriers and undo some of the

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requesting provider is seeking data roaming for an area where it is already providing facilities-based service").

competitive harm the merger inflicts, but also would facilitate entry based on a wholesale model.[50]

B. AT&T Should Be Required To Allow Compatible Devices To Use Its Network.

Moreover, if the Commission approves this transaction, it should require AT&T to adhere to the open platform requirements analogous to those currently applied to the C Block – which generally prohibit the licensee from restricting the ability of its customers to use the devices and applications of their choice on the licensee's network.[51] The Commission has acknowledged that device and application-related restrictions harm consumers and have been used by incumbent providers "without an appropriate justification."[52]

This condition would facilitate an additional, important means of wholesale-like partnership that could restore some of the competition that would be lost if this transaction is approved. Specifically, the condition would enable a WiFi provider like Cablevision to provide dual-mode WiFi-Cellular Broadband devices to its customers, and certify those devices to work on AT&T's mobile cellular network as part of a wholesale or roaming relationship. Access to a robust market for devices that interoperate on the AT&T network will permit innovation by third parties, like Cablevision, in devices that meet specific consumer needs.

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[50] Cablevision does not necessarily propose *ex ante* price regulation of AT&T's wholesale service. Nevertheless, the Commission should make clear that charging wholesale prices above the cost to AT&T (including a reasonable return on investment) would be deemed a violation subject to enforcement action or complaint by the provider harmed.

[51] *See* 47 C.F.R.§ 27.16.

[52] *C Block Order*, 22 FCC Rcd at 15,363, ¶ 200.

CONCLUSION

The proposed transaction conflicts with the Commission's longstanding commitment to wireless competition. The Commission should either reject the transaction outright or put in place bold, enforceable conditions to preserve competition. If the Commission approves AT&T's acquisition of T-Mobile, AT&T should, at minimum, be required to abide by (1) a set of expanded data roaming requirements that permit wholesale or roaming access to the incumbent radio access network by providers using licensed or unlicensed spectrum and (2) open network requirements that enable consumers to use AT&T's network with devices of consumers' choosing.

Respectfully Submitted,

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May 31, 2011

REDACTED – FOR PUBLIC INSPECTION

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	)	

DECLARATION OF JOSEPH VARELLO

I, Joseph Varello, hereby declare the following:

1. I am vice president of digital voice product management at Cablevision Systems Corporation ("Cablevision"), a position that I have held since 2004. In this capacity, I am responsible for overseeing Cablevision's Optimum Voice services as well as the business market services, and coordinating our Optimum WiFi and Online services. I have also been involved in Cablevision's exploration of whether to expand its mobile wireless service to include cellular broadband service.

2. Before joining Cablevision, I served as executive director for business development at Con Edison Communications. In that role, I was responsible for new revenue creation, strategic alliances, new service development and business planning. Prior to working at Con Edison, I was executive vice president of marketing and sales for Everest Broadband Networks, a provider of high-speed Internet access, long-distance telephone service, satellite TV and related broadband applications in multi-tenant commercial and residential buildings. All together, I have spent over twenty-five years working to develop and market advanced telecommunications and entertainment services.

3. Cablevision is a leading telecommunications and entertainment company, founded on Long Island, New York in 1973. Cablevision has invested billions of dollars to construct a state-of-the-art fiber network that currently serves over three million subscribers of voice, video and Internet service in Cablevision's core service territory in the tri-state area of New York, New Jersey and Connecticut. Using this network, Cablevision was one of the first providers to market a broad-based high speed Internet service, and today we offer all of our customers in the tri-state area the fastest residential broadband service in the nation (101 mbps) through our Optimum Online service. Through our recent acquisition of Bresnan Communications, Inc., Cablevision is also a leading provider of high-speed data, voice, and video service in the states of Colorado, Montana, and Wyoming.

4. Cablevision recognized a number of years ago that consumers demand access to the same video, broadband and voice services not only at home or work, but also while commuting, socializing outside the home, and traveling, to name only a few examples. To meet this new demand for mobile access, Cablevision has invested hundreds of millions of dollars to develop our Optimum WiFi network.

5. Optimum WiFi is available without charge to Cablevision's broadband Internet subscribers. We believe it to be the largest contiguous WiFi network in North America. It comprises tens of thousands of access points that provide an instant connection to Cablevision's high-speed fiber infrastructure in urban and suburban public places – such as parks, main streets, train stations, airports and retail spaces – throughout Cablevision's tri-state service territory.[1] Customers can access Optimum WiFi using a variety of mobile devices, including laptop and

[1] Cablevision also has agreements with Time Warner Cable and Comcast that provide Optimum WiFi customers access to those providers' WiFi networks in certain areas of New York and New Jersey, respectively, to ensure coverage across the greater New York area.

tablet computers, and handheld devices such as smartphones. As of this filing, Optimum WiFi has served more than 50 million customer logons, is enjoyed regularly by hundreds of thousands of users, and has transported more than 3 petabytes – 3 quadrillion bytes – of broadband data. This network has made Cablevision a significant player in the mobile broadband market in the New York metropolitan area, although the network is limited geographically.

6. Cablevision is committed to continuing to develop Optimum WiFi and to maximizing the use of public spectrum. To meet customer demand for mobility, and also develop new markets for our products and services, Cablevision has been exploring expanding our mobile WiFi service to incorporate traditional cellular broadband service as a canopy to complement our existing WiFi service. Cablevision envisions offering a complete package of mobility services that would employ WiFi and cellular broadband interchangeably and seamlessly.

7. Cablevision could accomplish expansion into cellular broadband in two ways: first, by partnering with a creative licensed wholesale partner to lease access to the Radio Access Network to supplement our regional WiFi service; and second, in the longer-term, by securing additional licensed or unlicensed spectrum of our own and "building out" the WiFi network to compete directly with the mobile voice and data offerings of existing cellular incumbents.

8. There are high barriers to entering the cellular broadband market on a pure facilities-based model. For example, there is currently no spectrum available for a new cellular broadband service provider in the New York market at prices that make entry viable, and new auctions may not occur for some time. Partnering with an existing provider thus comprises the most viable means of near-term entry into the cellular broadband market. Cablevision has explored this kind of partnership with an array of providers, and has learned that there are currently very limited options. AT&T and Verizon are unwilling to engage in a meaningful wholesale partnership with

providers like Cablevision, which would compete head-to-head against those companies in areas where they also provide landline service. To our knowledge, neither company provides retail competitors wholesale access to their highest speed mobile data networks, and, despite our attempts, AT&T has thus far declined to provide such access to Cablevision.

9. Of the national carriers, only two – T-Mobile and Sprint – have shown any interest in providing access to their high-speed data networks to providers that might compete with them in the retail market. Both providers have incentives to facilitate entry that AT&T and Verizon do not, because their networks, which provide coverage to the vast majority of geographic locations, cannot reach the same scale economies as the larger two carriers if the only traffic they carry is from their own retail customers. **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

10. T-Mobile would be an ideal partner for a company like Cablevision, seeking wholesale wireless capacity to enter or expand its market presence. T-Mobile is the only national GSM-based carrier in the U.S. other than AT&T. The GSM air interface, and its evolving technology, is the standard used by most of the rest of the world, and it is supported by a massive eco-system of carrier equipment, handsets, and other customer equipment. Entering the wireless market using GSM-based technology is therefore cheaper and easier than entering via the CDMA standard, as the use of GSM-based technology allows for a wide range of choices of input suppliers and greater flexibility in designing the customer experience with the wireless network.

11. From Cablevision's perspective, no provider can fill the gap that would be left by the disappearance of an independent T-Mobile. Sprint is a potential alternative, but without an independent T-Mobile, we would expect Sprint to compete less vigorously for wholesale business. Also, Sprint is not a GSM-based carrier.

12. Cablevision also has concerns about the long-term viability of Clearwire and LightSquared. Moreover, because of the spectrum bands used by these companies, neither company can offer many popular devices that consumers desire. And serious questions remain about the potential for LightSquared's service to interfere with GPS devices.

13. As for regional carriers, all rely on competitive access to the national carriers' networks for wholesale roaming service, the pricing of which would be controlled by AT&T and Verizon following the proposed transaction.

14. In sum, elimination of T-Mobile as an independent competitive force would greatly reduce Cablevision's opportunities to obtain a partnership with a cellular broadband provider and thereby inhibit Cablevision's ability to offer cellular broadband service to its customers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 31, 2011 in BETHPAGE, N.Y.

Joseph Varello