enhance market power."[54] Put another way, in **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** CMAs across the country does the post-merger HHI remain below 2,500 and increase by fewer than 200 points. In sum, relying on DOJ's guidelines, the merger causes substantial and troubling consolidation.

The FCC's precedents compel the same conclusion. In prior mergers, the FCC has employed an initial market concentration screen of an increase of 100 HHI points and post-merger HHI of greater than 2,800, *or* an HHI increase of more than 250 points irrespective of the post-merger HHI.[55] Our preliminary analysis of the NRUF data indicates that **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population lives in CMAs that will exceed this screen.

The extent of the transformation of this merger at both the national and local level cannot be overstated. Currently, the HHI is below 2,500 in **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** CMAs, encompassing approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population. But if AT&T is allowed to acquire T-Mobile, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

---

[54] *Id.*

[55] *See e.g.*, *Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Licenses and Authorizations and Modify a Spectrum Licensing Agreement*, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd. 8704, ¶ 42 (2010) (*AT&T-Verizon-Alltel Divestiture Order*).

[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] CMAs will have an HHI below 2,500, representing **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population.

And while this transaction does not represent a true merger to monopoly at the national level, the NRUF data reveal serious concerns about duopoly market concentration. If the merger is permitted, approximately **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of the U.S. population will live in CMAs where the top two firms will control more than 70 percent of subscribers.[56]

ii. AT&T and T-Mobile's claims of post-merger competitive discipline are wholly without merit.

AT&T and Verizon already dominate the wireless market. AT&T and Verizon together accounted for 67 percent of the total cellular market revenue in 2010, while the top four carriers captured 94 percent.[57] And while Verizon and AT&T saw substantial subscription growth in 2010, most other post-paid carriers lost customers.[58]

---

[56] We discuss unilateral effects below, which are highly probable in highly concentrated markets where firms have as little as 30 percent market share. According to our preliminary analysis of the NRUF data, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION] [END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** percent of Americans live in CMAs where AT&T's post-merger share will exceed 30 percent. *See AT&T-Verizon Alltel Divestiture Order*, ¶ 65.

[57] SNL Kagan, *Wireless Industry Benchmarks*.

[58] *See supra* note 34.

This concentration of customers and revenues at the top is not the result of price competition, as AT&T and Verizon both implemented effective price increases in 2010[59] while carriers with lower-priced offerings continued to lose market share. Indeed, Verizon and AT&T's wireless profit margins dwarf those earned by pre-paid and other post-paid carriers.[60]

The domination of the market at the top is a strong indicator of a broken market, one that the proposed acquisition of fourth-place carrier T-Mobile by AT&T would only exacerbate.[61] The proposed concentration of nearly 80 percent of the market between two carriers, with only one remaining company with double-digit shares, will have a particularly corrosive impact on innovation and what remains of competitive incentives.[62] The lower cost offerings from the other two major national post-paid carriers have made no impact on AT&T's or Verizon's ability to grow revenues, subscribers, margins, or market share.

---

[59] *See supra* note 33.

[60] For example, in 2010, Verizon's average wireless EBITDA margin was 47 percent while AT&T's was 41 percent. By contrast, Sprint's average wireless EBITDA was 18 percent; U.S. Cellular's was 20 percent; Leap Wireless's was 21 percent; and T-Mobile's was 29 percent. *See* John Fletcher, "Verizon Wireless: The best spectrum, wireless EBITDA," *SNL Kagan*, March 16, 2011.

[61] The *Horizontal Merger Guidelines* observe that "even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings." *Horizontal Merger Guidelines* at 18. However, this is not the case in the U.S. wireless market, with Verizon and AT&T steadily growing their share through mergers, acquisitions, and capturing of customers from other carriers.

[62] *See Horizontal Merger Guidelines* at 15 ("Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does.").

In fact, AT&T and Verizon's conduct demonstrates a significant lack of competition in the present market: they raised prices relative to other carriers without sacrificing share, margins, or subscribers. Indeed, the *Horizontal Merger Guidelines* state:

> If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger.[63]

T-Mobile constitutes one of those important rivals. T-Mobile has focused on earlier rollout of higher quality HSPA+ data services at substantially lower prices than the other major national carriers.[64] Its elimination from the marketplace would further cement the division between the pre- and post-paid markets and remove a major source of what little pricing discipline currently exists on AT&T and Verizon.

Post-merger, remaining competitors in the market will not discipline the two giants at the top. In their application, AT&T and T-Mobile go to great lengths to convince the Commission that this is not a merger to duopoly; instead, they argue that the small regional and pre-paid carriers with their *single digit* aggregate national market shares represent significant competitors. This claim borders on farce.

AT&T pays particular notice to two pre-paid-only carriers, MetroPCS and Leap Wireless. But in these attempts to paint a rosy competitive picture, AT&T has twisted its logic pretzel beyond the breaking point. For example, in its application AT&T states that it "is seeing increased competitive threats from rapidly growing mavericks like MetroPCS and Leap and

---

[63] *See Horizontal Merger Guidelines* at 18.

[64] *See e.g.*, Om Malik, "In AT&T & T-Mobile Merger, Everybody Loses," *GigaOm*, March 20, 2011.

other providers."[65] But later in the filing, Applicants state that AT&T and T-Mobile "are positioned very differently in the marketplace. . . . Data usage also accounts for a far lower percentage of T-Mobile USA's revenues than AT&T's, and T-Mobile USA has a far higher share of non-contract subscribers."[66] If these attributes distinguish T-Mobile from AT&T, then they also distinguish MetroPCS and Leap from AT&T. If anything, MetroPCS and Leap "are positioned" *even more* "differently in the marketplace" because they *only* offer non-contract pre-paid service and earn much smaller relative data revenues than T-Mobile.[67]

In fact, Applicants argue *every carrier except T-Mobile* exerts substantial competitive pricing pressure upon AT&T, but these claims do not comport with common sense and fall apart upon closer examination. For example, AT&T states that Sprint "has reversed its earlier setbacks, add[ing] nearly 1.8 million net subscribers in 2010" while T-Mobile's "percentage of U.S. subscribers has been falling for nearly two years."[68] But this is a highly misleading presentation. Sprint lost 800,000 *postpaid* subscribers in 2010 (or 2.5 percent) and gained 2.6 million *prepaid* subscribers (resulting in a net gain of 1.8 million). During 2010, T-Mobile lost 400,000 postpaid subscribers (or 1.4%) and gained 350,000 prepaid subscribers. Sprint actually lost *more* as a percentage of postpaid subscribers in 2010 than T-Mobile, and Sprint's "reversal of its earlier setbacks" derived solely from gains in the low-margin prepaid market. Focusing on the bigger picture, among national and regional carriers, only AT&T and Verizon experienced

---

[65] *See AT&T-T-Mobile Application*, Description of Transaction at 13.

[66] *Id.* at 99.

[67] *See e.g.*, SNL Kagan, *Wireless Industry Benchmarks.*

[68] *AT&T-T-Mobile Application*, Description of Transaction 12-13. This misleading presentation is also repeated on page 79 and page 101 of the description of the transaction.

post-paid market growth over the past two years, and T-Mobile fared *far better* than Sprint during this recent period (see Figure 3).

Figure 3: Post-Paid Market 2008-2010

National and Regional Post-Paid Carriers	Post-Paid Subscribers			Post-Paid Share (National & Regional)	
	YE 2008	YE 2010	% Change	YE 2008	YE 2010
AT&T	59,653,000	68,041,000	14.1%	30.4%	31.3%
ATN	N/A	522,950	N/A	N/A	0.2%
Cincinnati Bell	403,700	351,200	-13.0%	0.2%	0.2%
nTelos	311,009	306,769	-1.4%	0.2%	0.1%
Sprint-Nextel	36,678,000	33,112,000	-9.7%	18.7%	15.2%
T-Mobile USA	26,806,000	26,375,000	-1.6%	13.7%	12.1%
U.S. Cellular	5,420,000	5,416,000	-0.1%	2.8%	2.5%
Verizon Wireless	66,973,000	83,125,000	24.1%	34.1%	38.3%

Source: SNL Kagan

Nor will small regional or pre-paid carriers provide sufficient competition for the two remaining duopolists. In the past, AT&T won merger approvals by convincing regulators that similarly situated companies like Dobson and Centennial were not legitimate competitive threats. If neither Dobson or Centennial was "a competitor to which [AT&T] must respond in developing or modifying its rate plans and service offerings, or to which it must respond with competitive local promotions," then neither are MetroPCS, Leap, U.S. Cellular, Cellular South, or Cincinnati Bell. These players all possess market shares at approximately the same level as Dobson and Centennial before they merged with AT&T.[69]

[69] According to subscriber counts in prior FCC CMRS reports, Dobson's share of the nation's subscribers was about 1 percent when it was acquired, while Centennial's was about one-half of one percent. Based on SNL Kagan data, MetroPCS currently has about 2.5 percent of all subscribers while Leap has about 2 percent. U.S. Cellular current has about 2 percent of all subscribers while Cincinnati Bell has a 0.2 percent share. Moreover, as noted below, MetroPCS and Leap operate in a different market because they only offer pre-paid plans.

As both AT&T and Verizon have noted in past merger pleadings, the market has trended towards a national product market and the competitive significance of regional players is non-existent. National carriers simply do not respond to regional pricing, regional carriers cannot compete effectively nationally through roaming agreements and regional carriers have no hope of obtaining popular handsets. If we take AT&T at its word — as stated in these past applications — that it competes in a national market, then the elimination of a maverick national carrier will have *substantial* competitive impacts.

Though MetroPCS and Leap have much larger reaches than all other regional carriers, they sell no contract, pre-paid carriers in a separate product market, and AT&T or Verizon do not view them as significant competitors. They also have no viable path to becoming significant competitors. Both companies lack the spectrum and buying power necessary to "replace" T-Mobile's competitive impact and have shown no desire to enter the post-paid market. They reach a small fraction of the population, and expansion of their footprint to match T-Mobile's reach is impossible.[70] In sum, none of these competitors can discipline a post-merger duopoly.

C. AT&T's Acquisition of T-Mobile Would Result in Substantial Unilateral Harms.

Though the proposed merger does not create a monopoly, it would cause substantial unilateral harms in the national post-paid smartphone cellular service market. These harms

[70] Though AT&T claims in its application that MetroPCS can reach over 200 million of the more than 300 million U.S. population, **[BEGIN HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]** **[END HIGHLY CONFIDENTIAL LNP/NRUF INFORMATION]**

include relatively reduced capital investment, reduced innovation, higher prices of certain specific services, and removal of certain products from the market.

First, AT&T explicitly states that this transaction will allow it to reduce capital investments. By acquiring T-Mobile's tower infrastructure, it avoids capital investments it certainly would otherwise make.[71] On its face, the transaction stems from an output suppression strategy. (The DOJ considers any action to refrain from building or buying capacity that would have otherwise been obtained to be an output suppression strategy).[72]

This unilateral output suppression strategy would unequivocally benefit AT&T. Post-merger, it would control a substantial portion of the smartphone service market;[73] its competitors would be unlikely to have a non-trivial supply response as they are already in a vastly inferior spectrum holding position; the near-term incremental margins earned on the capital investment would have been low; and the elasticity of demand for smartphone cellular service would be low.[74] Indeed, AT&T is paying a $29 billion "kill off the competition" premium, as the $39

---

[71] These capital investments include deploying fiber optic infrastructure to towers currently served by copper circuits, upgrading towers to HSPA+ or LTE, cell splits, purchasing excess capacity from competing carriers, and most importantly, more rapidly deploying AT&T's immensely valuable but unused AWS and 700 MHz spectrum.

[72] *See Horizontal Merger Guidelines* at 22 ("A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities.").

[73] While the *post-paid* smartphone subscriber counts are not publicly available, other data indicate that this market is even more top-heavy than the broader mobile market. AT&T has publicly stated that it has "twice as many smartphone users . . . as any other U.S. carrier." Thus, given that post-merger AT&T would have a 43 percent share of the entire post-paid mobile market, it is possible that AT&T's share of the smartphone market following this merger would exceed 50 percent. *See* "AT&T to Offer iPhone 3G S on June 19," *PR Newswire*, June 8, 2009.

[74] *See Horizontal Merger Guidelines* at 23 ("A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the

billion this transaction will cost them far exceeds the estimated $10 billion of incremental capital investment that it would need to make to deploy high-quality universal mobile data networks.[75] Further, **[BEGIN CONFIDENTIAL INFORMATION]** **[END CONFIDENTIAL INFORMATION]** Taken together, these facts clearly demonstrate that the merger is a highly inefficient allocation of capital designed to earn AT&T economic rents at the expense of competition, innovation, and investment.

Second, while a lack of adequate competition stifles innovation even the current marketplace, eliminating T-Mobile would both remove a firm with a decent track record of product innovation. It would also reduce AT&T's incentive to innovate.[76] T-Mobile has taken on the role of a maverick competitor, using product innovation to differentiate and compete. T-Mobile was the first carrier to offer the now market-leading Android platform.[77] T-Mobile also has a track record of offering its customers innovative service packages, including in-home Wi-

---

output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.").

[75] *See* AT&T, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband," March 21, 2011, slide 35, *available at* http://mobilizeeverything.com/investors.php. It is unclear from this presentation whether this $10 billion represents just AT&T's "avoided" spectrum purchases and capital investments or *both* AT&T and T-Mobile's. If it is in fact the latter, then the price of the kill-the-competition premium is even greater.

[76] *See Horizontal Merger Guidelines* at 23 ("The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.").

[77] *See* Ryan Kim, "Google, T-Mobile introduce first Android phone," *San Francisco Chronicle*, Sept. 24, 2008.

Fi service and discounts for customers who do not purchase subsidized handsets.[78] T-Mobile also upgraded capacity at its towers and deployed the more robust HSPA+ cellular standard long before AT&T began its upgrades to this "3.5G" technology.[79] The loss of this innovative competitor along with the concentration of nearly 80 percent of the broader cellular market in the hands of the former Bell companies should cause significant concern at the Commission and at DOJ.

Third, after the merger, AT&T would enjoy monopsony buying power in the market for U.S. GSM-cellular standard handsets. The abuse of this monopsony power could result in poor quality and choice in devices. AT&T's monopoly over the GSM standard, which is used in most other foreign countries, could also result in higher international service plan prices.

Fourth, AT&T plans to reduce the total number of handsets available to customers of the combined firm,[80] resulting in a clear unilateral harm.[81] Currently, AT&T's product inventory consists of 85 handsets while T-Mobile offers 60, with an overlap of just 13 devices.[82] AT&T will likely remove many handset offerings popular among T-Mobile consumers, and in the future, AT&T would be less likely to bring an innovative but risky GSM handset to market.

---

[78] *See* Marguerite Reardon, "T-Mobile's home phone service goes nationwide," *CNET News*, June 24, 2008. *See also* Devindra Hardawar, "T-Mobile makes Wi-Fi calls free — yet another reason to dread the AT&T merger," *VentureBeat*, May 16, 2011.

[79] *See* Karl Bode, "T-Mobile Launching First HSPA+ (21 Mbps) Devices," *DSLReports.com*, Feb. 16, 2010.

[80] *See supra* note 75 at slide 29 (discussing AT&T's intention to implement "device portfolio rationalization").

[81] *See Horizontal Merger Guidelines* at 24 ("If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product."). Example 21 in the *Horizontal Merger Guidelines* is particularly apt here.

[82] *See* Sascha Segan, "My Letter to the FCC About AT&T-Mobile: Time to Submit Yours," *PCMag.com*, May 3, 2011.

Removing handsets, along with the removal of certain popular service plans like the "Even More Plus" offering, should raise concerns with regulators.[83]

D. AT&T's Acquisition of T-Mobile Would Further Exacerbate Harmful Coordinated Effects.

AT&T and Verizon already benefit from coordinated interaction, and this merger would only exacerbate this harmful behavior. While assessing the potential for coordinated interaction necessarily requires prediction, the structure of the wireless marketplace leaves it particularly vulnerable to this behavior. First, competing firms can easily observe each other's prices. Unlike in the wired broadband market, carriers rarely offer new customer discounts or retention incentives, and they price their services nationally.[84]

Because of handset exclusivity, two-year contracts, high early-termination fees, lack of handset portability, and a switching customer's need to repurchase applications, it is unlikely that a firm exercising market power through increased prices would immediately lose a substantial portion of customers to competing carriers.[85] Indeed, as stated above, AT&T and Verizon continue to see the greatest gains in subscribers despite substantially higher prices and recent effective price increases. In most markets, the impact of coordination would be greatly reduced

[83] T-Mobile's "Even More Plus" plans offer customers lower-priced, contract-free subscriptions if the customer brings their own GSM handset to the network or purchases an un-subsidized handset from T-Mobile. None of the other major U.S. carriers offer this kind of European-style "BYOD" (bring your own device) plan.

[84] *See Horizontal Merger Guidelines* at 26 ("A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent.").

[85] *See id.* ("A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase.").

by smaller firms expanding output and capturing share.[86] But the smartphone cellular service market is not a typical market: Smaller firms cannot rapidly expand their sales due to handset exclusivity, other switching costs, and the lack of beachfront spectrum. Thus, the structure of the wireless market makes it particularly vulnerable to coordinated interaction.

This market is also particularly vulnerable to coordinated conduct because it is so top-heavy, with much of the subscriber base and revenues already concentrated between two firms (currently two-thirds, and four-fifths post-merger).[87] Because of this duopoly, the harms from coordination would be substantial even if most firms do not engage in the behavior.[88] Further, because demand elasticity for service is relatively low, the coordinated behavior will be more profitable, increasing the likelihood of such harms post-merger.[89]

Indeed, while this merger would exacerbate pressures for the top firms to engage in coordinating behavior, it is apparent that such activity is already occurring. The high pre-merger

---

[86] *See id.* ("This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.") But as mentioned above, the smaller regional and pre-paid firms are simply unable to rapidly expand sales, both due to supply (prime spectrum) and demand (switching costs) constraints.

[87] There is already ample evidence of coordinated conduct, most notably in text message pricing. The old AT&T Wireless Services Company (a subsidiary of the former AT&T Corp.) used to offer *free* text messaging service prior to its merger with Cingular in the fall of 2004. Two years later the major wireless providers all nearly simultaneously increased per-text prices to 15 cents, followed by another increase in 2008 to 20 cents. *See* Testimony of Joel Kelsey, Policy Analyst, Consumers Union, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, Regarding "Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market," June 16, 2010.

[88] *See Horizontal Merger Guidelines* at 26 ("Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct."

[89] *See id.* at 26 ("Coordination generally is more profitable, the lower is the market elasticity of demand.").

margins earned by AT&T and Verizon relative to all other national and regional (pre- or post-paid) carriers is strong evidence of existing coordination. It is an open secret (and preference) among Wall Street analysts that the top carriers are careful to avoid setting off any price wars.[90] That this merger would eliminate a maverick competitor and lead to "a more stable pricing environment" has been one of the main selling points of this transaction on Wall Street.[91]

E. There is No Prospect of Competitive Entry That Could Mitigate Against the Unilateral Harms and Coordinated Effects Resulting from AT&T's Acquisition of T-Mobile.

Horizontal mergers of this size raise particular concern in markets where competitors are unable to enter sufficiently and quickly. In the wireless market, and especially in the wireless data market, sufficient new entry is impossible, and the smaller firms lack the ability to quickly and efficiently expand output at levels needed to offset the unilateral and coordinated harms.

No firm has entered the cellular telephony and data market in the past decade, and with the massive amount of consolidation, many have exited.[92] The absence of new entrants combined

---

[90] The avoidance of price wars indicates coordinated interaction. *See id.* at 24 ("Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction.").

[91] AT&T readily says it plans to "improve T-Mobile ARPU" since AT&T post-paid subscribers pay on average $10.57 more per month. The five goals for AT&T listed in a recent investor presentation include "#2 Grow ARPU" and "#4 Expand Margin." *See supra* note 75 at slides 26, 26, 29.

[92] Clearwire, a firm whose majority share is controlled by Sprint, has entered the mobile data market, but not the cellular market. However, it has struggled in building a retail base and is shifting focus to the wholesale market. Lightsquared, the mobile satellite spectrum firm, has stated its intention to offer nationwide wholesale LTE services (including voice-over-LTE), but the firm's prospects for timely and sufficient entry are dubious given the serious regulatory and engineering obstacles surrounding interference concerns with its technology.

with *increasing* margins[93] indicates strongly that market entry is incredibly difficult.[94] New entrants would have to amass substantial spectrum assets, navigate local and federal regulations, and incur substantial fixed deployment costs prior to signing up a single customer. In addition, the high valuation of existing leading firms indicates intangible assets that a new entrant would not be able to sufficiently and quickly duplicate.[95]

Even if timely entry were possible, the existing market structure makes it such that this entry would not be sufficient to mitigate the unilateral and coordinated harms of this merger. In the smartphone cellular service market, AT&T and Verizon have used handset exclusivity to differentiate, and this practice, along with the substantial switching costs, creates insurmountable barriers to effective entry.[96]

Further, when considering the core market of nationwide smartphone cellular service, AT&T and Verizon are the *only* carriers with excess capacity in the form of unutilized

---

[93] See *supra* note 60. The margins of the carriers at the very top, particularly Verizon, are increasing, while the margins at other firms erode and subscribers flee. "Only four of the 12 leading carriers were able to log sequential EBITDA gains last quarter, as smaller carriers struggle to manage costs amid shrinking or flattening subscriber bases and high smartphone handset subsidies increase equipment expenses."

[94] *See Horizontal Merger Guidelines* at 28 ("Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult.").

[95] *See id.* at 28 ("Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate."). AT&T's market valuation is approximately $190 billion, far in excess of the nearly $100 billion in value of its tangible assets.

[96] *See id.* at 29 ("Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable.").

beachfront spectrum.[97] This means that sufficient output expansion by a rival firm is all but impossible.[98] Regional carriers have very little AWS and 700 MHz spectrum and rely on the national carriers for data roaming (at terms set by the national carriers). The major pre-paid carriers similarly lack prime spectrum for data services and would not be a sufficient check on the market power of the strengthened post-merger duopoly.

F. The Claimed Efficiencies of AT&T's Acquisition of T-Mobile Are Speculative, Non-Merger Specific, Non-Cognizable, and Would Not Outweigh the Adverse Competitive Impact of This Transaction.

As discussed above, AT&T's primary justification for this horizontal merger is the achievement of efficiencies through the combination of its and T-Mobile's network infrastructure. AT&T claims that it is in the midst of a "spectrum crunch" that only acquisition of T-Mobile's spectrum and infrastructure assets can solve. But this claim is misleading and contradicts prior AT&T statements about its spectrum capacity outlook[99] made at a time when

---

[97] We discuss the implications of this merger for the Commission's spectrum policy in greater detail in section IV, *infra*.

[98] *See id.* at 17 ("[A] firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable.").

[99] Following the closing of the most recent 700MHz spectrum auction, AT&T released a statement saying, "Combined with the Aloha Partners transaction, which closed earlier this year, AT&T has supplemented its holding of high-quality spectrum and continues to have a leading spectrum position in the industry. AT&T's spectrum holdings position the company to further enhance the quality and reliability of existing wireless broadband and voice services that consumers are demanding, and set the foundation for more customer choices for new, more advanced wireless broadband technologies and services. The complementary nature of the spectrum AT&T acquired through the FCC auction and from Aloha Partners gives AT&T the capacity to meet customer needs as the company moves to higher-speed 4G (fourth-generation) services." *See* "AT&T Acquires Key Spectrum to Set Foundation for Future of Wireless Broadband, More Choices for Customers," AT&T Press Release, Apr. 3, 2008.

predictions about future wireless data utilization were far higher than they are today.[100] But even if AT&T's spectrum crunch claims have some validity, this is an efficiency that is non-merger specific,[101] non-cognizable[102] and does not outweigh the competitive harms of this transaction.

While there is no doubt that mobile data services are increasingly popular and growing, AT&T has offered no actual evidence that it cannot manage this predictable growth through normal means. Indeed, AT&T has been widely criticized for under-investing in its wireless network at a time when Verizon and other carriers were expending capital at higher relative rates.[103] While T-Mobile, which is in a far worse spectrum position, worked on increasing capacity by deploying more spectrally efficient technology, AT&T focused on mergers and acquisitions. But most specious of all is AT&T's claim of spectrum poverty, when it is not only the best positioned carrier in spectrum, but has not yet deployed any of its AWS or 700 MHz

---

[100] For example, in 2008 Cisco (the leading firm for predictions about future data usage) estimated that in 2009 North American mobile data usage would reach 48 petabytes per month, and would climb to 378 petabytes by 2012. However, their 2011 report reveals that 2009 usage was actually 3 times lower (17 petabytes). The 2011 report now estimates the 2012 usage at 235 petabytes, far lower than the predictions in their 2008 study. Cisco's reports repeatedly reflect downward revisions, and industry observers should view skeptically the prognostications of a company with a direct financial stake in convincing private industry and regulators that there is a looming capacity crunch. *See* "Cisco Visual Networking Index – Forecast and Methodology, 2007–2012," June 16, 2008; *see also* "Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010–2015," Feb. 1, 2001.

[101] *See Horizontal Merger Guidelines* at 30 n.13 ("The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing.").

[102] *See Horizontal Merger Guidelines* at 30 ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

[103] During 2006-2009, AT&T's wireless capital expenditures as a percentage of revenues were 12.6 percent, versus Verizon's 14 percent. T-Mobile led the major carriers during this period, spending 15.7 percent of its wireless revenues on network investments.

spectrum.[104] Thus, AT&T's efficiency claims are non-merger specific and non-cognizable,[105] as the company could achieve these same gains either through utilization of existing assets or other methods such as licensing deals that would enable it to share capacity with other carriers.

AT&T's promises of wider 4G deployments if the merger is approved (which sound similar to those made in the 1913 Kingsbury Commitment) also need to be evaluated in context. According to FCC and NTIA data, 3G wireless services are currently available to 97 percent of the U.S. population,[106] and Verizon's LTE deployments are widely expected to reach this level of coverage.[107] AT&T has previously indicated its intention to reach at least 87 percent of the population with LTE,[108] and T-Mobile has made past statements of its intention to deploy LTE to its entire footprint by 2015.[109] So while AT&T touts its new deployment promise as a public interest benefit, it is critical that the Commission consider the high likelihood that these rural

---

[104] It is noteworthy that AT&T is claiming spectrum poverty while Verizon's CEO has been quoted as saying, "I don't think we'll have a spectrum shortage." Verizon has *less* total spectrum than AT&T (and a nearly equivalent amount of AWS and LTE spectrum). AT&T has a total of 2,122 MHz of 3G and 4G spectrum versus 1,838 MHz for Verizon. *See* Marguerite Reardon, "Is AT&T a wireless spectrum hog?," *CNET News*, April 29, 2011; "A Conversation with Ivan Seidenberg," Council on Foreign Relations, Apr. 6, 2010, *available at* http://www.cfr.org/technology-and-foreign-policy/conversation-ivan-seidenberg/p21840.

[105] These claimed efficiencies are non-cognizable because they are non-merger specific and would come at the expense of AT&T reducing efficient output by reducing capital deployment. *See Horizontal Merger Guidelines* at 30.

[106] *See* National Broadband Map, National Summary Statistics, http://www.broadbandmap.gov/summarize/nationwide (last visited May 29, 2011).

[107] *See, e.g.*, Remarks of Anthony J. Melone, Executive Vice President and Chief Technology Officer, Verizon Wireless, Internet Caucus Advisory Committee's (ICAC) 7th Annual State of the Net Conference, Jan. 19, 2011; Sara Jerome, "AT&T Subsidies an Issue in Merger," *The Hill*, May 10, 2011; Sascha Segan, "Verizon Wireless Says LTE Network Will Be Huge," *PCMag.com*, Feb. 18, 2009.

[108] *See* Comments of Ralph de la Vega, President and Chief Executive Officer, AT&T Mobility and Consumer Markets, Q3 2009 Earnings Call, Oct. 22, 2009; Dave Burstein, "AT&T LTE Result On U.S. Coverage: ~0%," *Fast Net News*, March 22, 2011.

[109] *See* Marguerite Reardon, "T-Mobile considers 4G network partnership," *CNET News*, May 4, 2010.

consumers will be able to purchase LTE service from other carriers, and that the need to remain competitive in the national market means AT&T would have likely extended their LTE coverage without this merger.

But even if these claimed efficiencies were merger-specific and cognizable, they would not outweigh the competitive harm of this transaction. AT&T has offered no evidence to suggest that the *net* benefit of these supposed efficiencies would be passed along to its customers. Indeed, AT&T is selling this deal to Wall Street by highlighting its much higher profit margins and plans to raise T-Mobile's.[110] If the DOJ and the FCC follow precedent, they will have no choice but to find that the supposed efficiencies do not offset the harms from this merger.[111]

IV. The Merger Would Cause Substantial Public Interest Harms Beyond Those Cognizable Under a Traditional Antitrust Inquiry.

The evidence is so compelling that the DOJ will have no choice but to challenge this merger.[112] The merger will significantly increase market concentration in an already highly concentrated market. The market structure is such that it is extremely vulnerable to coordinated conduct, and this merger's elimination of a maverick competitor would only exacerbate that vulnerability.

---

[110] *See* AT&T Fact Sheet, "AT&T and T-Mobile USA: The Future of Mobile Broadband," *available at* http://www.mobilizeeverything.com/documents/Factsheet.pdf.

[111] *See Horizontal Merger Guidelines* at 31 ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.").

[112] *See Horizontal Merger Guidelines* at 25 ("The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.").

But the merger would cause public interest harms over and above those traditionally considered in an antitrust analysis. The Commission's public interest standard encompasses a broader set of considerations, including but not limited to "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing spectrum in the public interest."[113] In particular, with respect to competitive impacts, "[t]he Commission's competitive analysis under the public interest standard is somewhat broader. For example, the Commission considers whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market."[114] It recognizes that a transaction "may . . . create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways."[115] This transaction would harm the public interest in numerous ways: (1) it would cause significant competitive harms, particularly harms related to vertical power and other harms over and above those cognizable under antitrust law; (2) it will cause significant job losses; and (3) it may slow the adoption of broadband by all Americans.

The merger's concentration of nearly 80 percent of the market's subscribers (and an even higher level of revenue concentration) between the legacy wireline monopoly companies, AT&T and Verizon, will have substantial impacts on competition in critical adjacent product markets that will spill over into the primary market. First, the regional and pre-paid carriers already

---

[113] *Skyterra/Harbinger Order*, ¶ 11.

[114] *Id.*

[115] *News Corp/DirecTV*, ¶ 25.

operate at a competitive disadvantage to the national carriers when it comes to buying power for exclusive handset agreements. Further concentration of this buying power will only serve to reduce competition and harm consumers. Second, AT&T and Verizon are the largest providers of special access and other backhaul services that are a critical input into the provision of mobile voice and data service. The largest non-RBOC purchasers of these services are Sprint and T-Mobile, and this merger will remove one of those buyers. This removal of a non-RBOC buyer will negatively impact the alternative backhaul providers[116] and subsequently will increase AT&T and Verizon's market power in the provision of special access and backhaul services. Third, as discussed above, the removal of a maverick competitor from the market will reduce AT&T and Verizon's innovation incentives.

This merger will also frustrate the forces of competitive discipline as it relates to customer service. In the post-paid smartphone market (where the bulk of smartphone subscriptions are), consumers are locked into long-term contracts with substantial early termination penalties. These early termination fees and the subsequent need to purchase a new access device create substantial switching barriers. As a result, they reduce carriers' incentives to compete on non-price aspects like customer service and local network quality. However, dissatisfied customers who do choose to incur the switching cost or leave once out of contract currently do have the choice of three other national post-paid carriers. This merger will remove one of those alternatives and weaken Sprint. AT&T's dismal performance in customer

[116] *See* Sara Jerome, "Backhaul industry fears AT&T merger," *The Hill*, May 11, 2011.

satisfaction surveys, especially when compared to T-Mobile's and Sprint's superior reviews, should call into question AT&T's claims that this transaction benefits consumers.[117]

AT&T's takeover of T-Mobile also threatens to destroy tens of thousands of jobs at a time when America is suffering an unprecedented lengthy period of high unemployment. Since 2002, during a period when it acquired firms with more than 180,000 employees, AT&T has seen a net job loss of well above 100,000 workers.[118] This mirrors the pattern in the overall RBOC industry following years of consolidation, where employment figures saw a net decline of nearly 40 percent.[119] In addition to the "synergies" of firing former T-Mobile workers, AT&T will substantially reduce capital expenditures relative to what they would have been absent the merger.[120] This will result in a multiplier effect of fewer jobs in adjacent industries.

Finally, the merger has the potential to impede increased broadband adoption. In the National Broadband Plan, the Commission expressed hope that technological advancements "may make wireless [service] a viable price/performance competitor to wired solutions at far higher speeds than are possible today, further increasing consumer choice."[121] Cost often impedes adoption, and the Commission suggested that wireless service may provide the vaunted "third pipe" to compete with incumbent telephone and cable companies and drive down prices for broadband service. But this merger has the significant potential to squash mobile wireless service as a meaningful competitor to wireline broadband. When the two biggest wireless

---

[117] *See* "T-Mobile beats AT&T in CR satisfaction survey," *Consumer Reports*, Apr. 11, 2011.

[118] Figures calculated based on annual company filings of AT&T and acquired firms.

[119] *See* Comments of Free Press, *Preserving the Open Internet*, GN Docket No. 09-191, Jan. 14, 2010, at fig. 6.

[120] *See supra* note 75 at slides 14, 29, 35.

[121] Federal Communications Commission, *Connecting America: The National Broadband Plan* 41 (2010).

companies, AT&T and Verizon, also have substantial share in the market for residential wireline broadband service, those companies will have little incentive to ensure that mobile and fixed offerings compete with each other. As such, because the merger allows AT&T to grow bigger and increase its share of the mobile market, it also decreases the likelihood that mobile service will emerge a substitute for fixed residential service. The price of both services will remain high and AT&T and Verizon will have every incentive to ensure their customers subscribe to both. In sum, this transaction causes significant harms to consumers.

V. Approving the Merger Would Harm the Public Interest Because One Entity Would Possess Too Much Spectrum.

Applicants are mistaken in arguing that combining the spectrum holdings of AT&T and T-Mobile would serve the public interest. In its merger analysis, the Commission must ensure that it "manag[es] spectrum in the public interest."[122] This transaction completely fails that test. First, a cursory spectrum screen analysis demonstrates that under the Commission's own framework, this transaction raises serious concerns. Second, the purported benefits of the transaction — alleviating capacity constraints and deploying an LTE network more quickly — could be achieved even if the Commission rejects the merger; therefore, they cannot be invoked to support this massive consolidation. Third, approving the merger could diminish Applicants' incentive and ability to invest in network infrastructure over the long term, potentially compromising the most effective use of the spectrum at issue. Fourth, AT&T's pending application to buy spectrum licenses from Qualcomm only exacerbates the problems associated with this transaction. Fifth, approving this merger would send a message to future merger applicants that they need not manage their spectrum efficiently because even if they fail to do so,

---

[122] *See SkyTerra/Harbinger Order*, ¶ 11.

the Commission will simply reward them with more spectrum. For all these reasons, the Commission should find that placing all of AT&T and T-Mobile's spectrum in the hands of one entity does not serve the public interest.

A. The Commission's Spectrum Screen Analysis Demonstrates That This Transaction Should Cause Grave Concern.

The Commission's spectrum screen analysis, which is designed to identify transactions that would result in harmful concentrations of spectrum holdings, demonstrates that this merger would result in problematic levels of spectrum consolidation. The screen works by identifying particular, granular markets in which spectrum holdings would exceed a specific threshold.[123] The threshold was originally set in 2004 at approximately one-third of the spectrum available for mobile broadband use.[124] Transactions that would result in one provider holding spectrum licenses in excess of the threshold trigger further review by the Commission to identify whether other providers can compete effectively with available spectrum, and if not, the Commission requires divestiture.[125] Although the Commission should assess this transaction's effect on the *national* product for post-paid smartphone mobile service,[126] a spectrum screen analysis vividly demonstrates the magnitude of the proposed consolidation.

The spectrum holdings of the proposed merged entity would *far* exceed the screen throughout the United States. The current screen threshold varies between 95 MHz of spectrum

---

[123] *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, WT Docket No. 09-66, 25 FCC Rcd. 11407, ¶ 263 (2010) (*Fourteenth Report*).

[124] *Id.*

[125] *Id.*

[126] *See supra* section III.A.

and 145 MHz.[127] The combined AT&T-T-Mobile would exceed 160 MHz in hundreds of CMAs across the country.[128] In Brevard County, Florida, AT&T would hold 195 MHz in spectrum licenses;[129] in Orange, Osceola, and Seminole Counties, it would hold 197.5 MHz.[130] In 15 different counties in Georgia, AT&T would hold 200 MHz.[131] In San Francisco, California, and several surrounding counties, AT&T would hold 201 MHz in licenses[132] — and in Kern County California, 211 MHz.[133] In four counties in Utah, AT&T would hold 210 MHz in spectrum.[134] But the "winner" in this unfortunate competition is Whatcom County in Washington State, where AT&T would hold a staggering 215 MHz in spectrum licenses.[135] Applicants state that AT&T's holdings exceed the screen in 202 of 734 CMAs;[136] however, this assessment does not include AT&T's WCS spectrum holdings, which, if included, would put the company above the screen in many more CMAs.[137]

---

[127] *See AT&T-T-Mobile Application* at 76.

[128] *See AT&T-/T-Mobile Application*, App. A (listing thousands of counties in hundreds of CMAs and giving the total AT&T holdings in several spectrum bands in each county).

[129] *Id.* at 13.

[130] *Id.* at 8.

[131] *Id.* at 3-4.

[132] *Id.* at 2.

[133] *Id.* at 11.

[134] *Id.* at 6.

[135] *Id.* at 19.

[136] *AT&T-T-Mobile Application* at 76.

[137] Applicants provide a listing of their 202 asserted CMAs in Appendix C of their application. Cursory examination of the list, compared to Applicants' Appendix A providing post-merger spectrum holdings, reveal that other CMAs not listed in Appendix C would exceed 145 MHz upon the inclusion of AT&T's WCS holdings, including CMA 29, 37, and 45 from within the first 50 CMAs alone. In five Louisiana counties in CMA 29, AT&T holds

The spectrum screen analysis becomes all the more stark when one compares the combined AT&T and T-Mobile's national spectrum position to its purported competitors. A typical assessment of national spectrum holdings is population-weighted average megahertz, designed to approximate the value of a set of spectrum licenses by factoring in the number of people covered by each.[138] This measurement has been used in past Commission reports on wireless competition.[139] If AT&T acquires the licenses of both T-Mobile and Qualcomm, it would hold a nationwide average in excess of 138 MHz,[140] not counting its WCS spectrum holdings. Nationwide, Verizon Wireless — AT&T's closest competitor — currently holds a population-weighted average of 87.7 MHz of spectrum.[141] Sprint Nextel holds an average of 52.5 MHz.[142] MetroPCS, Leap, and US Cellular — all entities that supposedly exert competitive pressure on AT&T — each hold a nationwide average of 11 MHz or less.[143] The "spectrum-

---

135 MHz of spectrum not including WCS and 25 MHz of WCS spectrum, for a total of 160 MHz. The same is true of two counties in Indiana and two in Kentucky in CMA 37. In five counties in Oklahoma in CMA 45, AT&T holds 143 MHz of spectrum not including WCS and 20 MHz of WCS spectrum, for a total of 163 MHz. CMAs 29, 37, and 45 are not listed in AT&T's Appendix C, nor included in its count of 202 CMAs.

[138] Population-weighted average holdings can be computed by adding the MHz-POP value for all of a provider's licenses, divided by the U.S. population. The MHz-POP value of a license is the amount of spectrum in the license (in frequencies) multiplied by the population covered by the geographic area of the license.

[139] *See Fourteenth Report* at 148, table 26.

[140] The FCC's most recent report on the state of wireless competition calculates AT&T's current population-weighted average to be 82 MHz, and T-Mobile's to be 50.4. *Id.* Qualcomm holds 6 MHz in one nationwide license (which consequently translates to 6 MHz population-weighted average), and 6 MHz of additional spectrum in some urban markets. The sum of these numbers is the population-weighted average of a merged entity including all three, and is greater than 138.4 MHz.

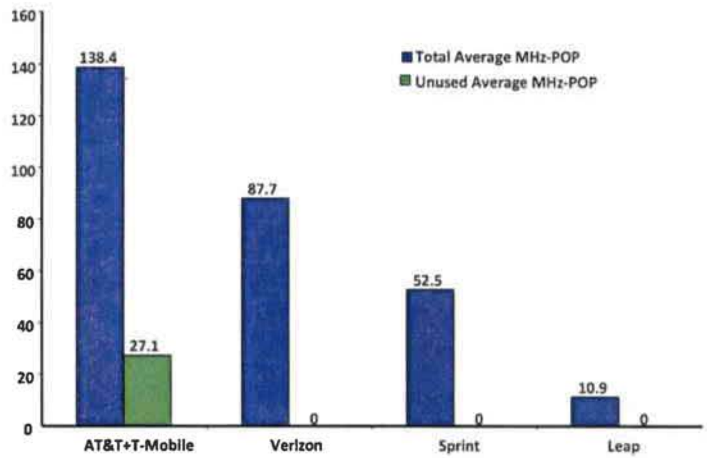
[141] *Id.*

[142] *Id.*

[143] *Id.*

rich"[144] LightSquared has 59 MHz of spectrum nationwide,[145] which represents less than half of the proposed new AT&T's holdings. Indeed, even without this transaction, AT&T already holds more spectrum than any of its competitors in the top 21 markets in the country.[146] Furthermore, much of this spectrum, including AT&T's most valuable 700 MHz spectrum holdings, is not even being used — about a third of AT&T's total current holdings.[147] AT&T holds as much unused, beachfront spectrum as many of its supposed competitors hold combined (see Figure 4).

Figure 4: Major Carrier Spectrum Holdings



Source: Fourteenth Report

---

[144] *AT&T-T-Mobile Application* at 13.

[145] *E.g.*, LightSquared, "Our Investors," *available at* http://www.lightsquared.com/about-us/our-investor/. Additionally, the GPS community is raising significant concerns over interference risks with the largest chunk of this spectrum; this controversy has put the long-term potential of the LightSquared network into serious doubt. *See, e.g.*, Stacey Higginbotham, "With LightSquared, Did the FCC Bet on the Wrong Horse?", *GigaOm*, Feb. 24, 2011, *available at* http://gigaom.com/broadband/with-lightsquared-did-the-fcc-bet-on-the-wrong-horse/.

[146] Marguerite Reardon, "Is AT&T a Wireless Spectrum Hog?", *CNet News*, Apr. 29, 2011, *available at* http://news.cnet.com/8301-30686_3-20058494-266.html.

[147] *Id.*