

REDACTED - FOR PUBLIC INSPECTION

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May 31, 2011

VIA HAND DELIVERY

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

FILED/ACCEPTED

MAY 31 2011

Federal Communications Commission  
Office of the Secretary

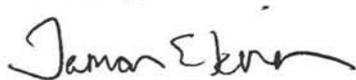
Kathy Harris  
Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street S.W.  
Room 6329  
Washington, DC 20554

**Re: Applications of AT&T Inc. and Deutsche Telekom AG For Consent  
To Assign or Transfer Control of Licenses and Authorizations\**  
**WT Docket No. 11-65**

Dear Ms. Dortch and Ms. Harris:

On behalf of EarthLink, Inc. and certain of its operating subsidiaries, enclosed please find information related to company revenues, expenses, operations, and other highly confidential information. This information is being filed pursuant to the Protective Order issued in this proceeding. Please contact the undersigned if you have any questions.

Sincerely,



Tamar E. Finn

Counsel for EarthLink, Inc.

Attachments

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Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20534

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Office of the Secretary

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Washington, DC 20554

**Re: Applications of AT&T Inc. and Deutsche Telekom AG For Consent  
To Assign or Transfer Control of Licenses and Authorizations  
WT Docket No. 11-65**

Dear Ms. Dortch and Ms. Harris:

Pursuant to the Protective Order issued in the above-referenced proceedings on April 27, 2011,<sup>1</sup> please find attached in Exhibit A an Affidavit of Steven Brownworth in support of the Petition to Deny of EarthLink, Inc., dated May 31, 2011, which contains certain confidential and proprietary information related to EarthLink, Inc. and its subsidiaries DeltaCom, Inc., Business Telecommunications, Inc. and One Communications Corp. (collectively, "EarthLink"). Specifically, to assist the Commission's review of the above-referenced Applications, EarthLink provides certain confidential revenue, expense, business operation, and other highly confidential information.

EarthLink seeks confidential treatment of the information provided in Exhibit A under the Protective Order. Notwithstanding the Protective Order, the information provided in Exhibit A is entitled to confidential, non-public treatment under the Freedom of Information Act (FOIA) and related provisions of the Commission's rules. See 47 C.F.R. §§ 0.457 and 0.459; 5 U.S.C. § 552, et seq. The attached information contains

<sup>1</sup> See *Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-753 (rel. Apr. 27, 2011) ("Protective Order").

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**REDACTED - FOR PUBLIC INSPECTION**

EarthLink's highly sensitive revenue, expense, business operation, and other highly confidential information. The Commission has consistently held that such data satisfy the requirements of FOIA Exemption 4 (trade secrets or commercial/financial information).<sup>2</sup>

EarthLink treats the revenue, expense, business operation, and other highly confidential information in Exhibit A as highly confidential and does not customarily release such information to the public. EarthLink also limits the internal circulation of this information to only those persons with a legitimate need for such information. Moreover, information in the possession of a public entity is considered to be "confidential" if disclosure is likely to substantially harm the competitive position of the person from whom the information was obtained.<sup>3</sup>

EarthLink is subject to actual and potential competition with respect to communications products and services. The information in Exhibit A provides a roadmap detailing certain information concerning the company's revenues, expenses, and operations. The cumulative nature of this information is also such that competitors reviewing the data could gain access to EarthLink's confidential market strategies, revenue targeting, and other operational business plans. Release of the information contained in Exhibit A will give EarthLink's competitors an unfair advantage by providing them a picture of EarthLink's business strategies. As a result, the information in Exhibits A is sensitive and commercially valuable, and its disclosure would substantially harm EarthLink's competitive position.

In support of its request for confidential treatment of Exhibit A, EarthLink submits the following more specific information pursuant to FCC Rule 0.459:

(1) Identification of Confidential Materials: EarthLink seeks confidential treatment for certain figures (for example, prices and circuit counts) in Exhibit A, which contains confidential and proprietary information related to EarthLink's revenue, expense, business operation, and other highly confidential information. Pursuant to the Protective Order, EarthLink has marked each page of the non-redacted version of this filing with the legend: **"CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 11-65 BEFORE THE FEDERAL**

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<sup>2</sup> See, e.g., *Cox Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,160, ¶6 (2004); *Comcast Cable Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,165, ¶6 (2004); *Time Warner Cable; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,170, ¶ 5 (2004); *Altrio Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,176 ,¶¶ 4-5 (2004).

<sup>3</sup> See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 873 (D.C. Cir. 1992).

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**COMMUNICATIONS COMMISSION.”** Each page of the redacted version of this filing is marked with the legend “**REDACTED - FOR PUBLIC INSPECTION.**”

(2) Circumstances Giving Rise to Submission of Information: See the above-referenced Commission docket. To provide relevant market information to the Commission in order to facilitate its review of the Applications, EarthLink hereby voluntarily provides the confidential information provided in Exhibit A.

(3) Degree to Which Information is Commercial or Financial: The information in Exhibit A includes particularized expense, revenue, and operational data. This information is highly sensitive financial, trade and commercial information as it contains data and information concerning EarthLink’s revenues and financial condition. The information is granular and considered highly confidential. EarthLink treats this data as a confidential trade secret and would not submit the data to the Commission without assurances that the information will be kept confidential. It would be highly inappropriate for the data to be disclosed to the public or third parties absent the protection of a non-disclosure agreement.

(4) Degree to Which the Information Concerns a Service Subject to Competition: The highly confidential information contained in Exhibit A contains information on the level of EarthLink’s business activities and operational plans. Such information is directly related to EarthLink’s service offerings which are subject to substantial competition from numerous other communications service providers, including but not limited to IP-enabled service providers, wireless providers, CLECs and ILECs.

(5) How Disclosure Could Result in Substantial Harm: Disclosure of EarthLink’s financial information and related highly confidential information would enable EarthLink’s competitors to determine sensitive information concerning the Company’s business and operational status, trends, projections, and plans. Public disclosure could give competitors a significant competitive advantage.

(6) Measures Taken to Prevent Disclosure: EarthLink holds the information provided in this submission in strict confidentiality. EarthLink has limited the number of persons with access to this information in order to lessen the chance of inadvertent or unauthorized disclosure. The document has also been specifically labeled as described above to prevent inadvertent disclosure.

(7) Public Access to Information, Third Party Disclosure: EarthLink has not made this information publicly available through previous disclosures.

(8) Justification of the Period During Which the Material Should Not be Publicly Available: EarthLink requests that the Commission hold this information out of public view for five years. Release of this information before that time would cause substantial harm to EarthLink as it would detail the Company’s confidential financial information.

Based on the foregoing, EarthLink requests confidential treatment of Exhibit A pursuant to FCC Rules 0.457 and 0.459 and the Protective Order. Pursuant to the Protective Order,

**REDACTED - FOR PUBLIC INSPECTION**

EarthLink is delivering two copies of the confidential version of this filing, via courier, to Kathy Harris with the Mobility Division of the Commission's Wireless Telecommunications Bureau. One copy of the confidential version and two public, redacted versions of this filing are also being filed by courier with the Commissions Secretary's Office. One copy of the public version of this filing is being filed electronically through the Commission's Electronic Comment Filing System. Finally, one copy of the confidential version of this filing is being transmitted by courier to the Commissions Secretary's Office for time-stamp return by courier to EarthLink.

Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Tamar E. Finn".

Tamar E. Finn

Counsel for EarthLink, Inc.

Attachments

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

In the Matter of	)	
	)	
Applications of AT&T Inc. and	)	
Deutsche Telekom AG	)	WT Docket No. 11-65
	)	DA 11-799
For Consent To Assign or Transfer Control	)	
of Licenses and Authorizations	)	

**PETITION TO DENY OF EARTHLINK, INC.**

Jerry Watts  
Vice President Government  
and Industry Affairs  
EarthLink, Inc.  
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May 31, 2011

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## **Executive Summary**

The proposed merger raises vertical and horizontal concerns, promises to restrict rather than promote competition, and is contrary to the public interest. The underlying purpose of the Telecommunications Act of 1996 was to promote competition. Just over one year ago, the FCC's seminal National Broadband Plan, endorsing this overarching theme, recommended that the Commission take "expedited action" to reform its wholesale competition regulations and "ensure widespread availability of inputs, [such as cost effective unbundled network elements and special access facilities,] for broadband services."<sup>1</sup> EarthLink agrees with these objectives and respectfully submits that, as a matter of sound public policy, the Commission should first complete pending reform of such regulations before beginning its consideration of whether to allow AT&T to complete yet another merger that will exacerbate the current anti-competitive conditions in both the wireline and wireless sectors.

In its 22-state incumbent territory, AT&T already dominates the upstream market for backhaul facilities that the Commission has long recognized is a critical input to the success of mobile broadband. The proposed combined company, with a wireless market share of 40% and plans to offer "wireline-quality" wireless broadband to 97% of Americans, would have even greater incentive and ability to undermine competition in the downstream wireless and wireline markets by, among other things, raising the price of its competitors' backhaul. This is a real concern for emerging competitive wireless carriers, which may not be able to offer a competitive wholesale wireless broadband product without the vertical integration and economies of scale that a combined AT&T/T-Mobile would enjoy. It is also an unacceptable situation for competitive broadband providers such as EarthLink, which must (1) purchase from AT&T viable

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<sup>1</sup> FCC, *Connecting America: The National Broadband Plan*, at 36 (2010) ("*National Broadband Plan*").

wholesale mobile broadband inputs in order to compete for retail customers and (2) rely heavily on AT&T's wireline wholesale products—whether special access, unbundled network elements, or “deregulated” high capacity offerings—as last mile connections to offer broadband to end users.

As the importance of wireless broadband within AT&T's product set and customer base grows, its wireline incumbent LECs will have even greater incentive and ability to increase their wireline and wireless competitors' costs (including special access backhaul) and decrease the availability of wholesale inputs to wireline broadband services (such as copper loops, DSL transmission and the limited access today to fiber last mile facilities). Even today, before considering the cumulative consequences of the proposed merger, EarthLink has experienced such discrimination first hand. For example, EarthLink's subsidiary DeltaCom has been unable to market a 4MB broadband product because AT&T's price for the wholesale input is three times AT&T's standard retail price for its 6MB broadband service and eleven times its current promotional rate. Because the proposed merger would further enhance AT&T's incentive and ability to discriminate against its competitors, it fails to promote competition and fails to satisfy the threshold public interest standard necessary for the Commission to endorse the merger.

Time-limited and narrowly calibrated merger conditions do not and cannot correct the underlying problems that exist in the wholesale market today and will be exacerbated by the proposed merger. For example, the Commission's long-delayed special access reform has provided AT&T with supra competitive profits and the ability to engage in a variety of anticompetitive conduct against its wireline rivals. The prolonged delay has effectively deprived EarthLink, its customers and other ratepayers of their statutory right to just and reasonable rates, which, by some estimates, could result in savings totaling \$5 billion per year. Similar concerns

exist as to the longstanding requests pending before the Commission seeking to prevent AT&T and other incumbents from abandoning copper facilities, rather than make them available to competitive carriers.

Rather than consider adopting time-limited, merger-specific wholesale access or pricing conditions that will relatively quickly expire, the Commission should, as a first principle and rational administrative sequencing, complete reform of its pending wholesale competition reforms, before considering AT&T's request for further horizontal and vertical integration. EarthLink calls upon the Commission to finalize its wholesale reforms prior to consideration of the proposed merger. Moreover, because the consequences, both intended and unintended, of the continued concentration of the largest players in the communications industry are yet to be determined, the public interests will benefit from delaying consideration of this merger until the Commission completes its pro-competitive broadband reforms and has more data to review from prior mergers.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Applications of AT&T Inc. and	)	
Deutsche Telekom AG	)	WT Docket No. 11-65
	)	DA 11-799
For Consent To Assign or Transfer Control	)	
of Licenses and Authorizations	)	

**PETITION TO DENY OF EARTHLINK, INC.**

Pursuant to the Public Notice issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned proceeding on April 28, 2011,<sup>2</sup> and for the reasons noted below, EarthLink, Inc., on behalf of its operating subsidiaries,<sup>3</sup> (“EarthLink” or “Petitioner”), petitions the Commission to deny the above-captioned applications (the “Applications”) of AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“DT”) for consent to the transfer of control of the licenses and authorizations held by T-Mobile USA, Inc. and its wholly-owned, majority-owned, and controlled subsidiaries (“T-Mobile,” and together with AT&T and DT, the “Applicants”) to AT&T, for the reasons set forth in this Petition.

**I. STATEMENT OF INTEREST OF EARTHLINK**

EarthLink is a leading provider of Internet Protocol (“IP”) and telecommunications infrastructure and services to businesses, enterprise organizations and retail consumers across the

<sup>2</sup> FCC Public Notice, *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, DA No. 11-799 (rel. Apr. 28, 2011) (“Public Notice”). This Petition is filed in reference to the following application File Numbers referenced in the Public Notice: 0004669383, 0004673673, 0004673727, 0004673730, 0004673732, 0004673735, 0004673737, 0004673739, 0004675960, 0004703157, 6013CWSL11, 6014CWSL11, 6015ALSL11, 6016CWSL11, 0004698766, ITC-T/C-20110421-00109, ITC-214-20020513-00251, ITC-T/C-20110421-00110, ITC-T/C-20110421-00111, ITC-214-20061004-00452 ITC-T/C-20110421-00112, and ITC-214-19960930-00473.

<sup>3</sup> EarthLink, Inc.’s operating subsidiaries include New Edge Networks, Inc., DeltaCom, Inc., Business Telecom, Inc., and the operating subsidiaries of One Communications Corp.

United States.<sup>4</sup> EarthLink's Consumer Services segment is an Internet service provider ("ISP"), providing nationwide Internet access and related value-added services to individual and small business customers in competition with, among other providers, AT&T and T-Mobile.<sup>5</sup> Among other products, EarthLink's consumer service offerings are narrowband and broadband (high speed) Internet access, search, advertising and VoIP services. EarthLink provides its portfolio of services to approximately 1.5 million U.S. customers through a nationwide network of dial-up points of presence and a nationwide broadband footprint.<sup>6</sup>

EarthLink's Business Services segment provides integrated communications services to a wide variety of businesses, enterprise organizations and communications carriers. These services include data services, including managed IP-based network services and broadband Internet access services; voice services, including local exchange, long-distance and conference calling; mobile data and voice services; and web hosting.<sup>7</sup> The Company's Business Services segment also sells transmission capacity to other communications providers on a wholesale basis. EarthLink operates its Business Services segment through its regulated operating companies.<sup>8</sup> These regulated companies must necessarily interconnect in extensive locations with AT&T, purchase special access services from AT&T, sell special access services to T-Mobile and the few other non-Bell wireless carriers, purchase wholesale wireless products to complement their wireline offerings, and compete directly with AT&T and T-Mobile in multiple retail markets,

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<sup>4</sup> Confidential Affidavit of Steven Brownworth, at 1-2, attached hereto as Exhibit A ("Brownworth Affidavit").

<sup>5</sup> *Id.*, at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

both wireline and wireless.<sup>2</sup> The proposed merger, for many reasons, could therefore negatively impact EarthLink's ability to compete in both retail broadband markets and wholesale special access markets.

## **II. INTRODUCTION**

The information the Applicants provide about the actual and potential competition between AT&T and T-Mobile on the one hand, and other market participants on the other, shows that substantial harms to competition will result from the proposed merger. Such harms include the removal of one of a very small number of independent facilities-based wireless carriers that are actual competitors (and backbone facility purchasers) in AT&T's incumbent wireline and wireless territories as well as increased incentive and ability of the Applicants to discriminate against their rivals post-merger.

The proposed merger raises vertical and horizontal concerns. As the Commission recently stated in the *Comcast/NBC Universal Merger Order*:

A vertical transaction involves firms and their suppliers, customers, or other sellers of complements. A horizontal transaction involves firms that sell products or services that are substitutes to buyers. The same transaction can have both vertical and horizontal elements. Both types of transactions can reduce competition among the firms participating in a relevant market, potentially leading to higher prices to buyers, a reduction in product quality, or a reduced likelihood of developing new, better, or cheaper products and services.<sup>10</sup>

The proposed merger raises vertical concerns because AT&T is, among other things, a primary supplier of wireline special access service to T-Mobile that is used as an input in T-Mobile's voice and broadband data wireless services. At the same time, it raises equally disturbing horizontal concerns because AT&T and T-Mobile are direct competitors in the

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<sup>2</sup> *Id.*, at 2.

<sup>10</sup> *Application of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 27 (rel. Jan. 20, 2011) (footnotes omitted).

residential and enterprise retail markets for wireless broadband Internet access services and the reduction in the number of nationwide competitors in this market from four to three is presumed on its face to harm consumers. Based on the increasing substitution of wired and wireless broadband data services, and the importance of a provider's capability to offer anytime, anywhere voice and broadband capabilities to its enterprise customers, it also raises significant horizontal concerns in the retail market for enterprise voice and data services generally.

For the reasons discussed herein, the Commission cannot now conclude that grant of the application as filed would serve the public interest. Rather, before reviewing, let alone considering granting the proposed merger, the Commission must first complete reform of its pending wholesale competition regulations. As T-Mobile has itself previously argued, time-limited merger conditions do not and cannot correct the underlying problems caused by the Commission's failure to correct deficiencies in its existing regulatory regime.<sup>11</sup> It is only rational and sound administrative decision-making that the Commission addresses its wholesale competition reforms prior to considering an unprecedented merger that will exacerbate anti-competitive conditions in the broadband market.

### **III. STANDARD OF REVIEW**

As a threshold standard, the Commission must determine whether the proposed transfer of control of Commission licenses will further the public interest, convenience and necessity.<sup>12</sup> As part of that determination, it must consider whether the transfer of control could result in public interest harms by substantially frustrating or impairing the objectives or implementation

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<sup>11</sup> See *infra* Section IV.B.

<sup>12</sup> *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, ¶ 16 (rel. Nov. 17, 2005) ("*SBC/AT&T Merger Order*").

of the Communications Act.<sup>13</sup> Its public interest evaluation includes “a deeply rooted preference for preserving and enhancing competition in relevant markets.”<sup>14</sup> Competition is not only national legislative policy overarching the telecom market, it is also, as a practical matter, clearly in the public interest because it lowers rates for consumers, increases efficiency, and spurs the introduction of new services, packages, and features by existing competitors and new entrants.

In determining the competitive effects of the proposed merger, the Commission is informed by, but not limited to, traditional antitrust principles.<sup>15</sup> It is well established that among the issues to be considered is “whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger’s effect on future competition.”<sup>16</sup>

The Commission has long recognized that:

the same consequences of a proposed merger that may be beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.<sup>17</sup>

As the Commission has held, “the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.”<sup>18</sup> If “the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, at ¶ 17.

<sup>15</sup> *Id.*, at ¶ 18.

<sup>16</sup> *Id.*

<sup>17</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, ¶ 12 (rel. Mar. 26., 2007) (“*AT&T/BellSouth Merger Order*”).

<sup>18</sup> *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, FCC 10-87, ¶ 9 (rel. May 21, 2010) (“*Frontier/Verizon Merger Order*”).

record presents a substantial and material question of fact, [the Commission] must designate the applications for hearing.”<sup>19</sup>

The Commission “considers whether a transaction will enhance, rather than merely preserve, let alone denigrate, existing competition.”<sup>20</sup> In evaluating merger applications, the Commission asks “whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination.”<sup>21</sup> Significantly, claimed benefits must be transaction-specific or merger-specific.<sup>22</sup> The claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>23</sup> “Efficiencies that can be achieved through means less harmful to competition than the proposed merger ... cannot be considered to be true pro-competitive benefits of the merger.”<sup>24</sup> Claimed benefits must also be verifiable.<sup>25</sup> The Applicants must demonstrate that the proposed merger “is a reasonably necessary means” to achieve the purported benefits.<sup>26</sup> “A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *SBC/AT&T Merger Order*, ¶ 182.

<sup>22</sup> *Id.*, ¶ 184.

<sup>23</sup> *Id.* (citing *Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 189 (2002) (“*EchoStar/DirectTV Order*”)).

<sup>24</sup> *Id.* n.517 (citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 158 (1997) (“*Bell Atlantic/NYNEX Merger Order*”)).

<sup>25</sup> *Id.* ¶ 184.

<sup>26</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 267 (1999) (“*SBC/Ameritech Merger Order*”).

show that such a benefit is merger specific.”<sup>27</sup> “[S]peculative benefits that cannot be verified will be discounted or dismissed.”<sup>28</sup> The Commission applies a sliding scale approach under which substantial and likely harms require that claimed benefits show a higher degree of magnitude and likelihood than it would otherwise demand.<sup>29</sup>

The proposed merger fails this standard. Rather than enhancing competition, it would only further strengthen AT&T’s dominant market position in both wireline and wireless sub-markets, thereby diminishing competition and increasing AT&T’s incentive and ability to discriminate against its rivals in retail markets for wireline and wireless, voice and data services. Unless and until the Commission moves decisively to reform and update its fiber and copper UNE, and special access regulatory regime to constrain AT&T’s ability to engage in such anti-competitive discrimination, the Commission should not consider the proposed merger. To do so will make any future effort to reform UNE and special access considerably more difficult to accomplish. EarthLink urges the Commission to finalize its Special Access and other local competition dockets promptly.

#### **IV. THE COMMISSION MUST COMPLETE REFORM OF ITS WHOLESALE COMPETITION POLICIES PRIOR TO CONSIDERING THE MERGER**

The proposed merger will increase AT&T’s incentive and ability to leverage its control over wholesale inputs to discriminate against its wireline and wireless competitors in retail broadband markets. Because these harms cannot be cured or ameliorated by time-limited or narrowly calibrated merger conditions, the Commission must take steps to ensure that AT&T’s wholesale access offerings are just, reasonable, and non-discriminatory and its wholesale prices

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, ¶ 185; *see id.*, ¶ 256 (1999) (citing *Bell Atlantic/NYNEX Merger Order*, ¶ 157).

are cost-based. In fact, AT&T has recently demonstrated that time-limited merger conditions will not constrain it from undertaking anti-competitive conduct over the long term, and disrupting the telecommunications market in the process. For example, as part of the term limited conditions following the acquisition of BellSouth, AT&T was required by the FCC to provide pricing flexibility in Full Service Relief and Limited Service Relief MSAs effective April 5, 2007 through June 30, 2010. AT&T pricing in these MSAs was restored to the original FCC rates effective July 1, 2010.<sup>30</sup> During this period AT&T offered no changes to its pricing or discount structure with DeltaCom.<sup>31</sup> This increase impacted a significant number of DeltaCom's subsidiaries DS1 loops, DS1 interoffice circuits, and DS1 interoffice miles, with significant resulting economic impacts.<sup>32</sup>

**A. The National Broadband Plan Recommended “Expedited Action” to Complete Wholesale Reforms**

Just over one year ago, the Commission's National Broadband Plan recognized the fundamental value of competition in broadband markets:

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.<sup>33</sup>

Independent analysis confirms that in markets in which customers have more choices from suppliers, prices are lower. In the residential broadband market, for example, in markets where customers have a choice of three providers, subscribers pay 18% more than subscribers

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<sup>30</sup> Brownworth Affidavit, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *National Broadband Plan*, at 36.

with a choice of four or more providers.<sup>34</sup> In markets where there are only two providers, the price differential as compared with markets where there is a choice of four providers increases to 33%.<sup>35</sup> This evidence is consistent with the development of additional competition in the MVPD market as incumbent cable operators have been subject to increased competition from ILECs and direct broadcast satellite providers,<sup>36</sup> as well as in the mobile wireless market once the Commission licensed personal communications systems to compete with the cellular duopoly.<sup>37</sup>

The Plan therefore recommended that the Commission take “expedited action” to ensure wholesale inputs to broadband services are made available to competitive carriers:

- The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.
- The FCC should ensure that special access rates, terms and conditions are just and reasonable.
- The FCC should ensure appropriate balance in its copper retirement policies.
- The FCC should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection where efficient.<sup>38</sup>

To date, of the above list, the Commission has only clarified interconnection rights by issuing a declaratory ruling affirming that rural LECs are obligated to comply with their section

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<sup>34</sup> Pew Internet & American Life Project Home, *Broadband Adoption 2009*, at 27 (2009), available at <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx>.

<sup>35</sup> *Id.*

<sup>36</sup> *See Ex Parte* of DOJ, GN Doc. No. 09-51, at 15-16 (filed Jan. 4, 2010) (“DOJ 1/4/10 *Ex Parte*”).

<sup>37</sup> *Id.* at 17-19.

<sup>38</sup> *National Broadband Plan*, at 36.

251(a) and (b) duties.<sup>39</sup> The Commission has yet to complete action on the IP-IP interconnection issue, special access, and copper retirement.

**B. The Commission Should Complete Wholesale Competition Reforms before Reviewing the Merger**

EarthLink agrees with T-Mobile that because “merger-specific conditions are time-limited,” “[t]hey provide only limited relief from anticompetitive activities and do not address the underlying problems of the existing regulatory framework or special access marketplace failure.”<sup>40</sup> Rather than adopt time-limited merger conditions that will expire and return the industry to today’s unacceptable status quo (if not worse), the Commission must first complete its reform of wholesale competition regulations prior to consideration or approval of yet another AT&T merger.

Although the National Broadband Plan put forth an ambitious agenda and action plan, the groundwork for completing the wholesale competition reforms has already been laid. For example, earlier this year, the Commission requested comment on how to incent the transition to IP-IP interconnection, the second interconnection recommendation. EarthLink and a number of other competitors showed the need and legal basis for a Commission ruling that incumbent LECs are required to offer IP-IP interconnection under sections 251/252 today.<sup>41</sup> The Commission has other open dockets with developed records on issues such as copper retirement and the need for

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<sup>39</sup> See *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, A National Broadband Plan for Our Future, Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, FCC 11-83 (rel. May 26, 2011).

<sup>40</sup> T-Mobile USA, Inc. Comments, WC Docket 05-25, at 4 (filed Aug. 8, 2007).

<sup>41</sup> See, e.g., Reply Comments of EarthLink, Inc., WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, at 2-5 (filed May 23, 2011).

regulated, wholesale broadband offerings such as network elements offered under section 271.<sup>42</sup> With such developed records, these pending dockets are ready for Commission action.

Lowering BOC special access prices to just and reasonable rates is a prime example of a developed and fulsome record awaiting Commission action. In 2002, AT&T Corp. (then an IXC with no BOC affiliates) filed a petition for rulemaking requesting that the Commission revoke pricing flexibility rules and revisit the CALLS plan because competition had not emerged to discipline price cap LECs' special access rates.<sup>43</sup> In 2005, the Commission initiated the *Special Access Proceeding* seeking comment on whether to maintain or modify the Commission's pricing flexibility rules for special access services and what interim relief, if any, was necessary to ensure that special access rates remain reasonable. The Commission again sought comment on the reasonableness of special access rates again in 2009.<sup>44</sup> As EarthLink's subsidiary, New Edge, demonstrated in early 2010:

The record fully shows that the BOCs' special access rates far exceed a benchmark comparison of forward-looking TELRIC-based rates for functionally equivalent DS1 and DS3 services that would exist if the marketplace were truly competitive. The BOCs' rates also significantly exceed the rates Competitive Access Providers (CAPs) offer for similar services. In fact, "price cap and pricing flexibility rates are typically two to three times higher" than what competitive carriers offer for an equivalent service. Moreover, the rates exceed rate-of-return special access rates of NECA member companies that do not enjoy the BOCs' economies of scale... If anything, these forward-looking rates are on the high end of any zone of reasonable rates for DS1 or 1.544 Mbps services that Section 201 would allow. Record evidence shows that Verizon and

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<sup>42</sup> See FCC, Public Notice, *Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, RM-11358, DA 07-209 (rel. Jan. 30, 2007); FCC, Public Notice, *Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222, DA 09-2590 (rel. Dec. 14, 2009).

<sup>43</sup> *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

<sup>44</sup> See FCC Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, DA 09-2388 (rel. Nov. 5, 2009).

AT&T are charging their *retail customers* between \$54.99 and \$35.00 per month for services reaching much higher speeds of 15 Mbps and 6 Mbps, respectively. A forward-looking cost structure that applies to the BOCs' DS1 special access services should result in wholesale rates that are *lower, not higher* than what the BOCs currently charge their retail customers for comparable services.<sup>45</sup>

Indeed, according to one economist, for every year that passes without rate reform, price cap ILECs are able to assess \$5 billion in excessive special access charges.<sup>46</sup>

While the Applicants provide no discussion of the effect of the proposed merger on special access rates (let alone copper or fiber UNE rates), it is clear that special access rates will be impacted adversely by the merger because of the negative effect that the combined company will have on the special access market through its vertical integration and the loss of a significant special access purchaser in the market. Given that rates that are already unreasonable, the strain the proposed merger will place on special access rates, and its ensuing impact on competition, the Commission must, as a first priority, reduce AT&T's special access rates to just and reasonable levels promptly, and before it even considers whether to approve the proposed merger.

### **C. The Proposed Merger Would Harm Competition in Retail Broadband Markets**

#### *1. The Role of Wholesale Inputs in Retail Broadband Markets*

A merger may be subject to challenge because it facilitates the raising of rivals' costs.<sup>47</sup>

As the Commission has explained, "cost-efficient access to adequate backhaul will be a key

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<sup>45</sup> Reply Comments of PAETEC, TDS, TelePacific, Masergy, and New Edge, WC Docket No. 05-25, RM-10593, at 63-64 (filed Feb. 24, 2010) (citations omitted).

<sup>46</sup> Ad Hoc Comments. WC Docket 05-25, at Attachment B - LONGSTANDING REGULATORY RULES CONFIRM BOC MARKET POWER: A defense of ARMIS, at A-1 (filed Jan. 19, 2010).

<sup>47</sup> See *Comcast/NBC Universal Order*, ¶ 34 & n. 77 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209, 234-38 (1986)).

factor in promoting robust competition in the wireless marketplace.”<sup>48</sup> In short, AT&T’s ability to impose high backhaul costs on independent wireless companies threatens competition in the wireless market.

Because special access is a key input in retail wireless broadband offerings, the proposed combined entity will have an even greater incentive and ability to use special access pricing to discriminate against its competitors. As T-Mobile itself explained:

T-Mobile, like many other mobile providers, attempts to use alternative backhaul suppliers where available. Nonetheless, in many rural markets especially, independent mobile providers like T-Mobile still must rely extensively on special access services provided by the ILECs for backhaul. In these areas, competition is insufficient to discipline the prices and conditions for special access imposed by the ILEC. This ultimately thwarts competition in the special access market as the largest, vertically integrated mobile providers, AT&T and Verizon, supply special access to competing mobile providers through their ILEC operations. Earlier Commissions’ premature deregulation of special access services has only exacerbated the problem.<sup>49</sup>

In its comments in the AT&T/BellSouth merger proceeding, T-Mobile accurately predicted that the merger would give AT&T “strong incentives and great ability to discriminate against wireless competitors and their customers in providing special access services on which those competitors rely.”<sup>50</sup> Likewise, the proposed AT&T/T-Mobile merger threatens wireless and wireline competitors with the same problem, but in a more consolidated market.

As part of its advocacy in the special access docket, AT&T has repeatedly pointed to T-Mobile as a carrier that purchases non-ILEC special access facilities and claimed these

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<sup>48</sup> *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, FCC 10-81 ¶ 296 (rel. May 20, 2010) (“*Fourteenth Report*”).

<sup>49</sup> T-Mobile USA, Inc. Comments, WT Docket No. 09-66, at 27 (filed Sept. 30, 2009).

<sup>50</sup> T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 4 (filed Oct. 24, 2006).

competitive purchases place pricing pressure on the ILECs' special access offerings. For example, AT&T argued:

The record shows that AT&T, Verizon, Qwest, Sprint, T-Mobile, and others are already purchasing tens of thousands of special access lines from cable operators throughout the country, and that AT&T, Verizon and Qwest, all are lowering prices and taking other measures to retain customers and to win back customers lost to this increasingly intense competition.<sup>51</sup>

T-Mobile is one of the largest purchasers of BOC special access and it appears to be one of the two largest purchasers of special access that is not affiliated with a BOC. T-Mobile purchases approximately 8-10% of its special access services from non-ILEC providers.<sup>52</sup> But if the Commission approves the merger, AT&T will no longer need to lower prices and take other measures to win back T-Mobile's business from independent backbone providers, such as EarthLink. One of the Applicants' claimed public interest benefits is "a reduction in interconnect and toll expenses as a result of *switching to AT&T where possible for transport.*"<sup>53</sup>

As explained above, this proposed consolidation is likely to increase T-Mobile's nominal costs given that competitive special access is typically priced lower than BOC special access. Of course, because of vertical integration, the T-Mobile cost increase should be more than offset by the supra competitive profit AT&T makes by selling its special access services. Applicants are presumably planning to make the switch, notwithstanding this nominal cost increase, "where possible" in order to drive out the small and limited competitors in the special access market.

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<sup>51</sup> AT&T *Ex Parte*, WC Docket No. 05-25, at 13 (filed Feb. 21, 2008).

<sup>52</sup> Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 2 (filed Feb. 24, 2010) ("T-Mobile 2010 Reply Comments").

<sup>53</sup> *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, Application Public Interest Statement, at 52 (filed Apr. 22, 2011) (emphasis added) ("Public Interest Statement").

The proposed merger will eliminate T-Mobile as one of the few large buyers of special access from non-BOC sellers, such as EarthLink, that invested in facilities to serve T-Mobile cell sites and mobile switching centers. T-Mobile recently told the FCC that it “has contracted for alternative backhaul services at only approximately 20 percent of its cell sites today.”<sup>54</sup> Sprint, by contrast, said last year that it buys only 2% of its DS-1 backhaul from independent providers.<sup>55</sup> Thus, the loss of T-Mobile is much greater than reflected by its share of the wireless market. Today, T-Mobile is the third largest customer of EarthLink’s EarthLink Carrier service business.<sup>56</sup> Even if some of T-Mobile’s special access is outside of AT&T’s 22-state incumbent region, because a merger with T-Mobile would increase AT&T’s nationwide market share to 40%, it may give AT&T greater incentives to self-provide backhaul it may have previously purchased from third parties out-of-region. Both actions will reduce the number of special access circuits purchased from independent providers, thus diminishing the claimed pressure on BOC special access pricing and harming the ability of independent backhaul providers to maintain revenue and invest in new facilities.

When combined with AT&T’s anti-competitive policies of using long-term contracts and tariffs to lock-up special access customers—its existing special access market share is over 90% in its 22 state territory<sup>57</sup>—the merger would make it increasingly difficult for independent special

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<sup>54</sup> T-Mobile *Ex Parte*, WC Docket No. 05-25, at 1 (filed May 6, 2010).

<sup>55</sup> Sprint Nextel Comments WC Docket 05-25 at ii (filed Jan 19, 2010).

<sup>56</sup> Brownworth Affidavit, at 3.

<sup>57</sup> See GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 12 (Nov. 2006) (“GAO Report”) (“In the 16 major metropolitan areas we examined, facilities-based competition for dedicated access services exists in a relatively small subset of buildings. Our analysis of data on the presence of competitors in commercial buildings suggests that competitors are serving, on average, less than 6 percent of the buildings with at least a DS-1 level of demand.”); Comments of PAETEC Holding Corp., WC Docket No. 05-25, at 5 (May 28, 2010) (“Indeed, nearly every measure of (1) the physical connections to commercial buildings shows that incumbent LECs control over 90 percent of those connections, (2) the Type 1 DS3 services market