



REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Applications of AT&T Inc. and)
Deutsche Telekom AG)
)
for Consent to the Transfer of Control of)
Commission Licenses and Authorizations)
Pursuant to Sections 214 and 310(d) of the)
Communications Act)

WT Docket No. 11-65

FILED/ACCEPTED

MAY 31 2011

Federal Communications Commission
Office of the Secretary

**PETITION OF
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.
TO CONDITION CONSENT, OR DENY APPLICATION**

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SUMMARY

The proposed merger of the second largest national broadband carrier with the fourth largest national broadband wireless carrier would create the largest national broadband wireless carrier in the United States based on number of subscribers. The transaction upsets the delicate competitive equilibrium that has evolved in the broadband wireless industry and must be approved with substantial conditions, or in the alternative denied. This careful balance has led to lower prices, more competitive choices for consumers, and substantial innovation. The proposed acquisition would be transformative and game-changing for the wireless industry, the telecommunications industry as a whole and consumers and would cement, once and for all, the consolidation of the wireless industry into a true and unequivocal duopoly comprising of AT&T on the one hand and Verizon on the other. The rise of this duopoly is confirmed by any conceivable measure of market concentration: subscribers, revenue, profits, EBITDA and spectrum holdings, all will be highly concentrated in AT&T's and Verizon's hands following the merger. If the transaction proceeds without conditions that foster and preserve competition, the proposed merger will allow these duopolists to enjoy dominant market power, raise prices and profits to supracompetitive levels, strangle competition, squeeze out smaller competitors, stifle innovation, all of which will severely harm consumers.

AT&T's arguments in favor of the merger are eerily reminiscent of the early-twentieth century arguments that telecommunications is a natural monopoly – which sustained AT&T in its historical domination for many decades. In the previous days of market domination by AT&T, there was a regulatory regime in place for dominant carriers that was designed to constrain excessive prices and the extraction of monopoly rents. Now, after thirty years of evolution, wireless regulation has been reduced in favor of robust competition to control

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anticompetitive behavior. It would be both sadly ironic and quite dangerous to allow market dominance to be reestablished in the wireless markets, which has rapidly become the most important sector of the telecommunications industry. If the merger is not adequately conditioned, the duopolists' market power will not only increase the prices that consumers ultimately pay for services, but also reduce the availability of, and dampen innovation in, wireless products and services.

AT&T holds out mid-tier, rural and regional carriers, such as Petitioners, as "mavericks" which will keep the wireless market fiercely competitive even in a post-AT&T/T-Mobile merger world. Flattered as Petitioners are to be so characterized by AT&T, in order for the Petitioners to be able to compete effectively, the Commission must impose strict remedial conditions on the proposed merger. Without such conditions, the Petitioners will have inadequate spectrum resources and tools to effectively cause the combined AT&T/T-Mobile to pass through the proposed merger synergies to its customers and to continue to innovate.

The relevant market for Commission consideration is national, not local. Sales, advertising, marketing, pricing, equipment offerings and procurement, and management are all carried out nationally. Moreover, any carrier who wishes to compete even for end-users based in a specific region must offer those end users nationwide service, including roaming where necessary. Regional competitors thus cannot hope to constrain the behavior of the nationwide carriers without conditions that allow them to offer nationwide service on terms that place them on a level playing field with the large national carriers. Accordingly, the Commission must be cognizant of the fact that the merger will result in a virtual duopoly, with only two healthy nationwide carriers remaining, and the only way to constrain it is to condition the merger with substantial conditions.

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The merger cannot be justified by the public interest benefits claimed by AT&T.

AT&T's "spectrum crunch" is a problem entirely of its own making, caused by years of bad decisions and clinging to inefficient technologies. AT&T can solve this problem the same way its mid-tier, regional and rural competitors have, by using ever more innovative techniques to squeeze greater and greater efficiencies out of existing spectrum. These competitors are in many cases more than twice as efficient in using spectrum as AT&T, and AT&T should emulate them, rather than be allowed to amass ever-increasing hoards of spectrum in an effort to overwhelm them. It is not for the Commission to bail out AT&T by permitting it to squander ever-increasing amounts of spectrum, such as by acquiring T-Mobile. This would simply disincent AT&T from finding the efficiencies that its competitors have been forced to find by their relative paucity of spectrum. Rather, the Commission must find ways to equitably balance spectrum among all competitors, especially the mid-tier, regional and rural carriers, which AT&T holds out as its greatest competitive threat going forward.

As for the other "benefits" alleged by AT&T, each and every one of them can be accomplished by AT&T alone and does not require the merger of AT&T with T-Mobile. AT&T could invest the \$39 billion it proposes to spend on buying T-Mobile in a much more constructive manner, by building out infrastructure to enable the more efficient use of spectrum and expand rural coverage, by accelerating the swap-out of legacy handsets which retard the growth of efficiency, by rolling out new pricing plans, and by speeding up its deployment of 4G LTE service. All of these are benefits AT&T claims from the merger, yet all, while valuable, are objectives AT&T could equally well accomplish in the same way its competitors have – by innovating and investing. Moreover, if the merger is permitted without adequate conditions, the economic benefits of all these measures would flow solely to AT&T, since competition would

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not be sufficient to force AT&T to pass them on to consumers. Since these would not be public benefits, and are not merger-dependent in any event, they cannot properly be counted in the plus column for this merger.

The post-merger duopolists would not only have market power in the sale of service to consumers, they would also have a stranglehold on essential inputs need by their competitors, especially roaming, backhaul, spectrum, and handsets. Without conditions to address these issues, their direct control over the first three would allow them to compromise their competitors' ability to competitive service at competitive prices. Their buying power in the handset market would allow them to dictate to manufacturers exclusive deals denying state-of-the-art devices to smaller competitors. Indeed, by imposing conditions of non-interoperability on manufacturers, and, indirectly, by dwarfing their competitors' scope and size, the duopolists post-merger will be able ultimately to deny their competitors' *any* handsets that work with their services.

All of this shows that the merger will cause grievous injury, not benefit to the public interest unless adequately conditioned to protect against these harms. The merger can only be approved, if at all, with the following conditions at a minimum:

- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;
- Roaming obligations which would allow carriers which do not have the benefit of national spectrum to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and

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- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively and to foster interoperability in equipment.

These conditions are directly tied to the harms that consumers will suffer from the increase in market dominance resulting from the proposed merger. Without these conditions, the merger must be disallowed.

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**PETITION OF
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.
TO CONDITION CONSENT, OR DENY APPLICATION**

MetroPCS Communications, Inc. (“MetroPCS”)¹ and NTELOS Inc. (“NTELOS”)² (collectively, “Petitioners”), by their undersigned counsel and pursuant to the Federal Communications Commission’s (“Commission”) April 28, 2011 *Public Notice* in the above-captioned proceeding, hereby respectfully petition the Commission to condition the above-captioned applications (the “Applications”) of AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“DT”) (collectively, the “Applicants”) with conditions that would ameliorate the significant harm to the public interest that the merger would otherwise cause and in the alternative, if such conditions are not imposed, to deny the Applications. In support, the Petitioners respectfully show as follows:

¹ For purposes of this Petition, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its Commission-licensed subsidiaries.

² For purposes of this Petition, the term “NTELOS” refers to NTELOS Inc. and all of its Commission-licensed subsidiaries.

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I. INTRODUCTION AND SUMMARY

The Applicants seek the Commission's consent to transfer control of various common carrier and radio licenses and authorizations held by T-Mobile USA and various of its affiliates (collectively, "T-Mobile") in connection with a proposed acquisition of T-Mobile USA by AT&T. As this proposed acquisition evidences, AT&T finds itself with \$39 billion to spend. But AT&T does not propose to use this money to buy additional spectrum from the FCC at auction (which would reduce the deficit),³ to invest in new infrastructure, or – even more importantly in this era of greater and greater demands on spectrum – to invest in technologies which will allow it to more efficiently use its vast store of existing spectrum. Rather than investing in spectrum capacity or technology, AT&T instead proposes to spend \$39 billion to buy up one of its only three remaining genuine nationwide competitors – and its *only* nationwide competitor in GSM.⁴

The proposed acquisition would be transformative and game-changing for consumer, the wireless industry, and the telecommunications industry as a whole. The proposed merger of the second largest national broadband carrier with the fourth largest national broadband wireless carrier would create the largest national broadband wireless carrier in the United States based on number of subscribers. The transaction upsets the delicate competitive equilibrium that has evolved in the broadband wireless industry.⁵ This competitive equilibrium has led to lower prices, more competitive choices for consumers, and substantial innovation.

³ Indeed, AT&T has been a supporter of reallocating 700 MHz D Block CMRS spectrum from CMRS to public safety.

⁴ See *Applications of AT&T Inc., Deutsche Telekom AG and T-Mobile, Inc.*, WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations (filed April 21, 2011) ("*Public Interest Statement*").

⁵ This competitive equilibrium has been under attack for some time. However, this transaction, rather than incrementally changing the balance, wholesale destroys the balance and requires radical changes in order to reestablish some competitive balance.

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This transaction is not comparable in scope or importance to any wireless acquisition approved in the past few years, and the potential impact on the industry and consumers is much more harmful. Unlike prior approved mergers which primarily expanded the acquiring party's footprint, this transaction would not expand AT&T's geographic footprint, but rather would give AT&T considerably more customers, spectrum and infrastructure in each existing market. While the prior transactions marked an alarming trend toward higher market concentration, the AT&T/T-Mobile merger -- by taking out a *national* competitor and the only other national carrier using GSM -- would cement, once and for all, the consolidation of the wireless industry into a true and unequivocal duopoly comprised of AT&T on the one hand and Verizon on the other. And, the negative consequences of the merger do not end there: it could very well lead ultimately to even further consolidation in the industry.⁶

In its inquiry into whether the public interest will be served by the proposed merger, one important focus of the Commission must be on whether consumers will be better off after the proposed merger than before. But this test cannot be met by AT&T's bare unfounded claims that it would enjoy increased economies of scale and scope or lower costs by virtue of the merger, or that competition will flourish and innovation will continue unabated. The determinative question is whether the post-merger market will remain sufficiently competitive after the proposed merger that consumers will reap the benefits of increased efficiency and continued innovation. If the transaction proceeds without conditions that foster and preserve competition, the proposed merger will allow these duopolists to severely harm consumers, enjoy dominant market power,

⁶ Daniel Hesse, the Chairman of Sprint, has mentioned that this acquisition could lead to the acquisition of Sprint by Verizon Wireless. *See e.g.*, Written Testimony of Daniel R. Hesse, Chief Executive Officer, Sprint Nextel Corporation, Re: Proposed AT&T/T-Mobile Merger Before The Senate Judiciary Committee, Subcommittee On Antitrust, Competition Policy and Consumer Rights, May 11, 2011 at 5 ("*Hesse Testimony*"); Sara Jerone, "AT&T, Sprint spar on merger," *The Hill*, April 17, 2011 (quoting Dan Hesse as saying, "We just cannot let this happen. If the proposed AT&T and T-Mobile merger is allowed to go forward, it can also push the wireless industry from competition to duopoly.>").

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raise prices and profits to supracompetitive levels, strangle competition, squeeze out smaller competitors, and stifle innovation.

In essence, this transaction represents the end-game of industry consolidation that began in the middle of the last decade. It rolls back the competitive tide that began to rise with the original divestiture of AT&T and progressed with the growth of the wireless industry beyond the duopoly of the original cellular allocation. Step by step, AT&T and Verizon have been busy reassembling the old duopoly. Approving this transaction without the appropriate conditions would place the keystone on their preferred market structure and will have profound implications for the future of the wireless industry and the US economy as a whole.

The Petitioners agree with the Commission – and, for that matter, with AT&T⁷ – that broadband data service is the future for the wireless industry and that today there is insufficient spectrum for the projected growth in demand for broadband data service in the immediate future. The industry faces a serious timing problem – there is insufficient additional spectrum *currently* available to support the ongoing explosion of wireless data. The Commission, however, cannot allow this spectrum scarcity challenge to justify a transaction which will allow two dominant competitors to effectively corner the market with an oversupply of the essential necessary raw materials – spectrum – when more efficient competitors also need spectrum to compete effectively as well. Carriers who secure spectrum first will be in a position to build unassailable beachheads against those who acquire spectrum later when the Commission finally is able to make it available. The public interest is not served when carriers are able to build dominant spectrum positions and aggregate spectrum holdings that foreclose effective competition. The only true solution is for the Commission to impose conditions that re-establish the competitive

⁷ *Public Interest Statement* at 1, 54.

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equilibrium and allow other proven carriers to remain effective competitors against the merged AT&T/T-Mobile. In the absence of such conditions, the Commission should deny the merger.

AT&T's arguments in favor of the merger are nothing more than a series of variations on the theme "bigger is better." Indeed, AT&T's arguments are eerily reminiscent of the early-twentieth century arguments that telecommunications is a natural monopoly – which sustained AT&T in its historical domination for many decades.⁸ In those days, at least, there was a regulatory regime in place for dominant carriers that was designed to constrain excessive prices and the extraction of monopoly rents by AT&T. Now, after thirty years of evolution, wireless regulation has been reduced in favor of robust competition to control anticompetitive behavior. It would be both sadly ironic and quite dangerous to allow market dominance to be reestablished in the wireless markets, which has rapidly become the most important sector of the telecommunications industry.⁹ This market power affects not only the price that consumers ultimately pay for services, but also the availability of and innovation in products and services. The market power of the largest two carriers already has led, for example, to a situation where certain highly sought after products – such as the iPhone – are available only to customers of the largest two carriers.¹⁰ And the merger will only increase the Big 2's ability to create these situations. Without appropriate conditions, the competitors AT&T identifies who will remain after the merger will be unable to cause the combined AT&T/T-Mobile to pass along to

⁸ Arguably, a monopoly can be the most efficient business structure, but, without competition, the government must assume the role of actively regulating the monopolist to ensure that the innovation continues and cost efficiencies are passed along to the consumer – something from which this Commission recently has shied away.

⁹ The Commission needs to recognize that if it approves the proposed transaction it should examine whether it is now appropriate to start differentiating in its regulation of the industry between the dominant carriers – AT&T and Verizon Wireless – and the rest of the industry.

¹⁰ In response to requests by thousands of its customers, both NTELOS and MetroPCS have persistently attempted over the course of many months to open a dialogue to obtain the ability to offer the iPhone, but to no avail.

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consumers the efficiencies and additional innovation that AT&T claims will result from the merger. Further, reduced competition will break the virtuous cycle of innovation and development that has propelled the wireless market to its current state.

Notwithstanding AT&T's arguments to the contrary, Sprint is not an effective competitor against this duopoly as it will have barely a quarter of the subscribers of the two largest carriers combined and merely a pittance in terms of free cash flow.¹¹ If the merger of AT&T/T-Mobile goes through without imposing conditions that address the resulting market power and spectrum concentration of the combined AT&T/T-Mobile, then consumers across this nation will suffer as competition withers.

Ultimately, there are only two possible solutions: condition the merger in a manner that creates an environment where competition can flourish or, if these conditions are not imposed, disapprove the proposed merger. If the Commission decides to move forward with the proposed merger, the Commission *must* do so only under a framework of conditions that adequately address the competition issues. This will allow competitors such as the Petitioners to effectively compete with the combined AT&T/T-Mobile so that consumers get the benefits of competition – lower prices, increased innovation, and choice. If the Commission chooses to proceed, it cannot take a business as usual approach where the only conditions imposed are those offered up by the acquiring party, which only affect the margins of the transaction.

So what are the conditions that at minimum must be imposed to ensure that consumers get the benefit of continued competition, innovation and choice? The Petitioners propose that the merger can only be approved, if at all, with the following minimum conditions:

¹¹ Credit Suisse, "Tremendous Upside Potential; Too Many Unknowns; We Remain on the Sidelines Pending Clarity on Funding and Strategic Relationships," at 113 (Feb. 6, 2011) ("*Credit Suisse Report*").

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- Significant spectrum divestitures prior to closing of paired 700 MHz, 850 MHz, PCS or AWS spectrum to the non-national carriers, which AT&T itself has identified as viable competitors, in sufficient amounts to allow the remaining non-national carriers to have adequate spectrum to be an effective competitive check on the combined AT&T/T-Mobile for *all* of the services which will be or could be offered by the combined AT&T/T-Mobile;
- Roaming obligations which would allow carriers which do not have the benefit of national spectrum to roam on the combined AT&T/T-Mobile network at prices which allow such carriers to effectively compete with the combined AT&T/T-Mobile; and
- Obligations on the combined AT&T/T-Mobile not to purchase wireless devices exclusively.

These conditions are common sense and are directly tied to the harms that consumers will suffer from the increase in market dominance resulting from the proposed merger. Without these conditions, consumers will suffer because the remaining carriers in the market will not be able to mount any effective competition to the combined AT&T/T-Mobile and innovation will suffer.

The Petitioners are flattered by the extent to which AT&T holds out mid-tier, rural and regional carriers, such as Petitioners, as “mavericks” and fierce competitors that will keep the wireless market competitive even in a post-AT&T/T-Mobile merger world. AT&T seeks to soothe concerns over its rising dominance by saying that companies like MetroPCS, for example, are “mavericks” which “will continue winning consumers with their low-priced service plans after this transaction closes.”¹² The Petitioners are indeed “mavericks” and fierce competitors and plan to compete vigorously against the combined AT&T/T-Mobile. However, in order for the Petitioners to be “mavericks” and able to compete effectively, the Commission must, at a minimum, impose the proposed conditions on the proposed merger to allow this to happen. Without such conditions, the Petitioners will have inadequate spectrum resources and tools to

¹² *Public Interest Statement* at 13, 12; *see also id.* at 82-85.

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effectively cause the combined AT&T/T-Mobile to pass through the proposed merger synergies to its customers and to continue to innovate.¹³ Since AT&T claims to place enormous importance on carriers such as the Petitioners serving as a continuing competitive check on the combined AT&T/T-Mobile, it is essential that the concerns, needs and comments of Petitioners be given great weight.

II. INTEREST OF PETITIONERS

Both Petitioners have a substantial interest in maintaining the competitiveness of the wireless market.

A. MetroPCS

MetroPCS is the fifth largest facilities based carrier in the United States, based on number of subscribers served. MetroPCS has been an active participant throughout many Commission proceedings dealing with wireless, roaming and spectrum issues. MetroPCS owns or has access to licenses covering a population of approximately 149 million people in 14 of the 25 largest metropolitan areas in the United States. As of March 31, 2011, MetroPCS had approximately 8.9 million subscribers and it currently offers service in the New York, Boston, Miami, Orlando, Tampa, Atlanta, Dallas, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, and Sacramento metropolitan areas.

¹³ For example, the combined AT&T/T-Mobile will have in excess of 183 MHz on average in each of MetroPCS' major metropolitan areas whereas MetroPCS on the other hand has only 22 MHz on average – or only about one-eighth AT&T's post-merger holdings – across its major metropolitan areas. As a result, MetroPCS is constrained in its ability to offer certain services – such as laptop cards, tablets and connected devices – and will therefore not be an effective competitive check against the combined AT&T/T-Mobile unless additional spectrum becomes available to MetroPCS. Similarly, in the most populous markets serviced by NTELOS in the Norfolk-Virginia Beach BTA, NTELOS has 20 MHz and AT&T/T-Mobile will have over 120 MHz. The only way to effectively ensure that competition continues after the consummation of the merger is to require AT&T to divest adequate spectrum to those carriers in each market which now have inadequate spectrum, so that those competitors will be able to provide an effective check on *all* of the services the combined AT&T/T-Mobile plans to offer.

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MetroPCS' services are a flexible, low-cost alternative to the plans offered by the large national wireless carriers. MetroPCS' services allow customers to place unlimited calls from within MetroPCS' service area and to receive unlimited calls from any area while in MetroPCS' service area, under simple, affordable, and flexible service plans starting as low as \$40 per month. For an additional \$5 to \$20 per month, MetroPCS' customers may select a service plan that offers additional services, such as unlimited voicemail, caller ID, call waiting, enhanced directory assistance, unlimited text messaging, unlimited mobile Internet browsing, push e-mail, mobile instant messaging, picture and multimedia messaging, GPS-based friend-finding and the ability to place unlimited long distance calls from within MetroPCS' service area to any number in the continental United States and to a number of international locations. For additional fees, MetroPCS provides unlimited international long distance, unlimited international text messaging, ring tones, ring back tones, downloads, games and content applications, location services, unlimited directory assistance and other value added services. In January 2010, MetroPCS introduced a new family of service plans that include all applicable taxes and regulatory fees and offer nationwide voice, text and web access services on an unlimited basis for a low flat rate beginning as low as \$40 per month.

Existing and future data services offered by MetroPCS – over a network which is already 4G LTE-based in its core areas – include:

- Unlimited mobile Internet access, including web browsing and streaming audio and video;
- Services provided through the Binary Runtime Environment for Wireless, (or “BREW”), Blackberry, Windows and Android platforms, such as ringtones, ringback tones, games, applications and content;

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- Unlimited text messaging services (domestic and international), which allow the customer to send and receive alphanumeric messages that the handset can receive, store and display on demand;
- Location based and social networking services;
- Multimedia messaging services, which allow the customer to send and receive messages containing photographs; and
- Push e-mail.

MetroPCS has been and remains an innovator in the wireless industry and an efficient user of spectrum. For example:

- MetroPCS pioneered the ‘no long term contract unlimited service for a flat fee’ business model;
- In 2002, MetroPCS was the first carrier in the United States to launch an all 1xRTT CDMA network;
- MetroPCS pioneered the widespread use of six sector cell sites to more effectively utilize existing spectrum;
- MetroPCS pioneered the use of distributed antenna systems (“DAS”) as a method of constructing networks over significant portion of metropolitan areas, including constructing the entire core of Philadelphia using DAS;
- MetroPCS was the first carrier in North America to deploy commercial 4G LTE services; and
- MetroPCS was the first provider worldwide to launch a combined CDMA/4G LTE handset, the Samsung Craft, and the first worldwide to launch a combined CDMA/4G LTE Android handset, the Samsung Galaxy Indulge.

Finally, MetroPCS is a highly efficient user of spectrum. Based on third party information, MetroPCS, in all but four of its markets, is the most efficient user of spectrum.¹⁴

¹⁴ See Table 1 in Section V.B. In San Francisco, MetroPCS is the second most efficient user of spectrum. The spectrum efficiency is determined by dividing the number of subscribers in a metropolitan area by the amount of spectrum held by the carrier in the metropolitan area. AT&T’s spectrum includes the proposed acquisition of spectrum by AT&T of Qualcomm spectrum and WCS spectrum. As is demonstrated *infra*, AT&T is among the least efficient user of spectrum and the combined AT&T/T-Mobile will be no better.

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MetroPCS is a relatively new entrant which brings competition to existing markets and also is expanding the market for wireless services by attracting new customers to wireless services. MetroPCS estimates that a significant number of its users are first-time wireless users. Further, because of its pricing approach, the MetroPCS service has become a substitute for landline service for many of its customers. MetroPCS' data indicate that a substantial portion of MetroPCS subscribers use their MetroPCS wireless phone as their primary or exclusive telecommunications service.

Because MetroPCS is a relative newcomer to the wireless market, with fewer financial and other resources than the largest incumbents, MetroPCS has been unable to assemble a nationwide footprint of licenses. In order to compete, MetroPCS must rely upon roaming arrangements with other carriers to able to provide a competitive nationwide service to its customers.¹⁵ At present, MetroPCS is party to certain automatic roaming agreements which cover broadband voice services and some broadband services, but do not include 4G LTE, and in many cases the rates for broadband data from those carriers willing to offer it are at rates that make offering 3G data prohibitive.¹⁶

Because the proposed merger will have severe consequences for the state of competition in the wholesale wireless marketplace and will allow AT&T, together with its new co-duopolist

¹⁵ The Commission has recognized this reality in *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶¶ 3, 27-28 (2007) (“*Automatic Roaming Order*”), *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 15 (2011) (“*Data Roaming Order*”), and *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81, WT Docket No. 09-66, ¶ 125 (2010) (“*Wireless Competition Fourteenth Report*”).

¹⁶ The specific rates, terms and conditions of MetroPCS' roaming contracts are confidential, and MetroPCS is therefore unable to provide any specificity with respect to them in this Petition, even under seal, absent consent of the other party. The Commission should request that AT&T and T-Mobile turn over all of its roaming agreements to the Commission so the Commission can examine the differences between each carrier's approaches to roaming and the potential impact on competition in the future. *See also* nn. 36, 106.

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Verizon, to dominate the retail market, MetroPCS and its customers stand to be substantially adversely impacted by the proposed acquisition.

B. NTELOS

NTELOS holds PCS licenses to operate in twenty-nine basic trading areas (“BTAs”) clustered in Virginia and West Virginia with a total licensed population of approximately 8.8 million. NTELOS has built out its network in twenty of those BTAs and covers 5.2 million POPs. As of March 31, 2011, NTELOS’ wireless retail business had approximately 429,500 NTELOS retail subscribers, representing a 7.3% penetration of its total covered population. As of the same date, 1,093 (approximately 83%) of NTELOS’ total cell sites contain Evolution Data Optimized Revision A (“EVDO”) technology, which provides NTELOS with the technical ability to support high-speed mobile wireless data services.

NTELOS began acquiring PCS spectrum in western Virginia and West Virginia in the early 1990s and began operations in Virginia in late 1997, in West Virginia in late 1998, and in eastern Virginia (Richmond, Hampton Roads, Norfolk, Virginia Beach) in 2000. Much of NTELOS’ PCS Spectrum was acquired through the partition of licenses awarded to Primeco (in western Virginia) and from GTE (in West Virginia) in the first broadband PCS auction. Indeed, NTELOS obtained two of the first three partitioned PCS spectrum licenses approved by the Commission. The larger carriers sold their entire PCS spectrum holdings in these markets to NTELOS. It was clear at the time that these carriers were focused on the urban areas and were not interested in building out or serving a more rural geography. NTELOS, by contrast, has been steadily building out mountainous and relatively sparsely populated communities for many years.

In August of 2007, NTELOS announced that it would upgrade virtually its entire network for mobile broadband services using EVDO. In order to accomplish the EVDO upgrade,

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NTELOS replaced the wireless switches in its western Virginia and West Virginia networks, and upgraded existing switches in eastern Virginia, as well as deploying equipment at over 1,000 cell sites. The EVDO deployment has been the largest capital project in the company's history, and has enabled NTELOS to provide mobile broadband services to its customers in nearly all its Virginia and West Virginia markets. EVDO data services are 10 times faster than those available on NTELOS' legacy 2G network – the wireless equivalent of moving from dial-up to DSL.

NTELOS, however, has not rested on its laurels. NTELOS is continuing to make network improvements, particularly within its existing service coverage areas, including network expansion and cell site additions. Additionally, NTELOS is continuing to improve its handset offerings and refine the plans, features and communication it offers to customers. NTELOS is also analyzing its options for taking its network from 3G to 4G and has recognized that, without additional spectrum, 4G will be difficult or impossible for it to offer.

NTELOS offers a wide array of voice and data plans to meet the varying needs of postpaid and prepaid customers. Plans that offer unlimited calling on the NTELOS network are available to any customer. NTELOS also offers national plans to all of its customers. Some of these plans are unlimited, and others feature buckets of daytime, mobile-to-mobile, and night and weekend minutes. NTELOS customers can choose from a variety of added-value features like integrated voicemail and data services such as location based services, text and picture messaging, games, ring-tones, ring-back tones, news, entertainment and hundreds of BREW applications. NTELOS prides itself on being part of the communities it serves, with numerous retail stores in its footprint and local customer care call centers in Waynesboro, Daleville and Covington, Virginia.

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For the same reasons as cited above for MetroPCS, NTELOS and its customers also stand to be substantially adversely impacted by the proposed acquisition.

III. STANDARD OF REVIEW

In deciding whether to grant the Applications, the Commission must determine, pursuant to Sections 214(a) and 310(d) of the Communications Act, “whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.”¹⁷ It is the Applicants who bear the burden of proof that the proposed merger is in the public interest.¹⁸ In making this determination, the Commission must “consider whether [the merger] could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes [and] then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”¹⁹

The key factors in the Commission’s analysis of a merger of this sort are set forth in the Commission’s *Verizon-Alltel Order*. They include:

a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.²⁰

The Commission has stressed that its review is broader than the Department of Justice’s review under antitrust laws in that, unlike the DOJ, the Commission “consider[s] whether a

¹⁷ *Verizon Wireless and Atlantis Holdings LLC (Transfer of Control)*, FCC 08-258, 23 FCC Rcd 17444, released: November 10, 2008 (“*Verizon-Alltel Order*”) at ¶ 26 (citations omitted).

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.* (citations omitted).

²⁰ *Id.* at ¶ 27 (citations omitted).

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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.”²¹

Particularly important is the awareness that a transaction may have both good and ill consequences, and that these must be weighed against each other: “[C]ombining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.”²² Thus, it is not unusual that merger applicants claim that the merger will enable them to achieve new efficiencies and roll out new products, as Applicants have done here. Indeed, it is virtually impossible to think of a significant merger in this industry in which the applicants did *not* make such claims. But it is vital that the Commission both examine these claims carefully to see how real they are, assess carefully the harms to the public interest that the merger threatens, and weigh the negative consequences of any merger against any positive effects and, if appropriate -- which is the case here -- impose merger conditions to address any public interest harms resulting from the merger.

Because the Applicants have not met their burden to clearly show that the benefits of the transaction to the public interest outweigh the harms, the application must be denied *unless* conditions are imposed that would prevent the harms to the public interest that would otherwise arise. As the Commission has stressed: “unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall

²¹ *Id.* at ¶ 28 (citations omitted).

²² *Id.* at ¶ 29 (citations omitted).

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public interest benefits.”²³ Thus, if the Commission can find and impose such conditions here, it can permit the merger to go forward.

As Petitioners show below, if approved without conditions, this merger will patently be contrary to the public interest. However, Petitioners believe that the merger can go forward if – but only if – the Commission carefully constructs a set of stringent, enforceable conditions, including at a minimum those set forth in detail below, that are adequate to prevent the merger from causing the harms to the public interest identified in this Petition.

IV. THE RELEVANT MARKET FOR COMMISSION CONSIDERATION IS NATIONAL, NOT LOCAL

In this proceeding, AT&T asserts (contrary to prior positions it has taken) that the market for wireless services is local, not national.²⁴ As an initial matter, focusing on local markets only may lead to inaccurate predictions about the likely effects of the merger. For example, Professor Gavil illustrates the problem as follows:

Consumers purchase major appliances and automobiles locally, but we would not analyze a merger of Whirlpool and General Electric or General Motors and Chrysler solely through local market data. In both examples, the firms are obviously national rivals, as is also obviously the case with AT&T, Verizon, Sprint Nextel and T-Mobile. In such cases, exclusive reliance on local market analysis would ignore too many dimensions of the merger that could impact competition. That is why a formalistic, market definition-driven approach, rather than an effects-driven approach, could lead to inaccurate predictions about the likely effects of the merger.²⁵

²³ *Id.*

²⁴ As is shown *infra* this is a change in position to one that AT&T has historically taken with the Commission. At least one economist has argued that this change in position may be to elicit negotiations on divestitures rather than examine the greater economic impacts of the merger on the market. See Written Testimony of Andrew I. Gavil, Professor, Howard University School of Law, “How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?” presented before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition, and the Internet, May 26, 2011, at 19 (“An illustration of my concern is glaring back at us in AT&T’s insistence that the relevant markets for purposes of evaluating the merger are local. [T]hat strategy may reflect a strategic choice designed to [elicit] a posture of negotiation from the Justice Department and the FCC that would likely lead to divestitures.”) (“*Gavil Testimony*”).

²⁵ *Id.* at 11.

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In effect, AT&T is asking the Commission to consider the effect of this merger on competition (and spectrum concentration) using a market based approach focused solely on a local market-by-market basis rather than nationally.²⁶ Such an approach would miss the many additional effects of the merger on such important matters as spectrum, roaming, backhaul, and handsets. While such a definition of the relevant market might be appropriate when the merger does not include two national carriers, here AT&T and T-Mobile compete in virtually every metropolitan area and offer nationwide services, and so the effect on the market from a consumer perspective must be examined on a national basis.

A. The market for wireless services has changed from being local to being national in scope

The market for wireless services has changed dramatically over the past several years in at least two respects. First, in the past, the national market boasted four substantial nationwide competitors. This merger would disturb that market structure. One of the four is being acquired by the second largest carrier, and another, Sprint, has indicated that the proposed transaction will effectually remove it from the mix as a viable competitor.²⁷ Accordingly, the Commission can no longer afford to focus its attention solely on individual markets when the nationwide competitive equilibrium has been disturbed at its core.

Second, the services being provided by wireless carriers have changed from being predominantly a local or regional services to a national service. Over the last several years, consumer perception has changed. The first hand experience of MetroPCS proves this point. When MetroPCS first started service in 2002, service outside of the local MetroPCS footprint was of only limited interest to MetroPCS customers. In the last several years, however, the

²⁶ *Public Interest Statement* at 72-75.

²⁷ *See supra* n.6.