

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application for Consent)	WT Docket No. 11-65
To Transfer of Control Filed By)	
AT&T Inc. and Deutsche Telekom AG)	
)	
)	

**REPLY COMMENTS OF ACCESS POINT, INC.,
ACN COMMUNICATIONS SERVICES, INC., AND
GRANITE TELECOMMUNICATIONS, LLC**

Access Point, Inc. (“API”), ACN Communications Services, Inc. (“ACN”) and Granite Telecommunications, LLC (“Granite”) (jointly “Joint Commenters”), pursuant to the Commission’s Public Notice, DA 11-799 (April 28, 2011), respectfully submit these reply comments to the Opposition filed by AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“DT”) concerning the proposed acquisition of T-Mobile USA (“T-Mobile”) by AT&T. AT&T, DT and T-Mobile shall collectively be referred to herein as “Applicants.”

I. APPLICANTS FAIL TO ADDRESS OR REFUTE COMMENTS OF JOINT COMMENTERS

In their comments,¹ the Joint Commenters noted that the proposed merger would increase AT&T’s market power in the converging wireline and wireless broadband marketplace. Specifically, by acquiring the large and rapidly growing group of T-Mobile wireless broadband customers, as well as T-Mobile’s service areas and spectrum resources, AT&T will have increased incentive and power to discriminate against the Joint Commenters and other

¹ See In the Matter of Application for Consent to Transfer of Control Filed By AT&T, Inc. and Deutsche Telekom AG, WT Docket No. 11-65, Comments of Access Point Inc. and ACN Communications Services, Inc. (filed May 31, 2011) and Comments of Granite Telecommunications, LLC (filed May 31, 2011).

competitors in the broadband and voice markets. These concerns were not unique. Other carriers expressed similar fears about the power a post merger AT&T would have in the broadband market. Earthlink noted that the proposed transaction threatens wireline and intermodal broadband competition because T-Mobile will no longer be an actual and potential competitor providing and offering wireline quality wireless broadband service.² Indeed, 4G services, such as those that could be provided to the vast majority of Americans by the merged entity,³ may provide a sufficient alternative to wireline broadband services for many customers. As such, the merged entity will have an incentive to discriminate against wireline services, such as DSL, which will compete with AT&T's 4G services and but for the merger, T-Mobile might offer wholesale wireless broadband solutions to competitors like the Joint Commenters. AT&T already has demonstrated its ability and desire to discriminate against DSL competitors like the Joint Commenters, as well as others.⁴ The merged entity, with an even larger share of the broadband market, will have a greater incentive to increase their wireline competitors' costs and decrease the availability of wholesale inputs to wireline broadband service, such as DSL transmission, as AT&T's product set and customer base grows.⁵

In their Opposition,⁶ the Applicants provide, at best, a scant response to these concerns. Indeed, the Applicants simply and summarily dismiss these valid and significant points, claiming

² In the Matter of Application for Consent to Transfer of Control Filed By AT&T, Inc. and Deutsche Telekom AG, WT Docket No. 11-65, Earthlink, Inc. Petition to Deny at p. 20, filed May 31, 2011 ("EarthLink, Inc. Petition to Deny").

³ Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket 11-65, filed April 21, 2011, at pp. 55-56.

⁴ EarthLink, Inc. Petition to Deny at p. 21.

⁵ *Id.* at p. 22.

⁶ Joint Opposition of AT&T, Inc, Deutsche Telkom AG and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65, filed June 10, 2011 ("Opposition").

that they allegedly do “not address any merger-specific effect.”⁷ The Applicants further argue that it would be inappropriate to address these concerns when they are subject to other proceedings before Commission.⁸

The Applicants are wrong. Notably, the Applicants fail to provide any legal or factual support for their blanket assertion that proposed conditions do not address any merger-specific effect, nor do they identify the existing Commission proceedings where these matters are being addressed. Indeed, rather than refuting the Joint Commenters’ arguments that AT&T will have an increased incentive and power to discriminate against competing broadband providers like the Joint Commenters if the transaction is approved or addressing AT&T’s discriminatory conduct concerning its provision of DSL transmission services,⁹ the Applicants simply lump the Joint Commenters’ concerns into a laundry list of purportedly inappropriate conditions.¹⁰ The Applicants failure to address these concerns alone is telling; the lack of meaningful analysis of past merger proceedings; however, illustrates the futility of Applicants’ position.

In past merger proceedings involving AT&T, the Commission has explicitly found that incumbent providers, like AT&T, can discriminate against rivals providing competitive DSL services:

We find that the combined entity is likely to increase the level of discrimination that rivals must overcome to provide retail advanced services, interexchange services, and local exchange services. In the retail market for advanced services, incumbent LECs can engage in discriminatory conduct with respect to competitors’ provision of services such as xDSL by refusing to cooperate with competitors’ requests for the evolving type of interconnection and access arrangements necessary to provide new types of advanced services. The combined entity, controlling a larger area, will engage in more such

⁷ Opposition at 211, n. 421.

⁸ Opposition at 210.

⁹ API and ACN Comments at 5-6; Granite Comments at 7.

¹⁰ Opposition at 211, n. 421.

discrimination against a competitor such as NorthPoint Communications that is seeking to enter on a national basis, as it will realize more of the benefits.¹¹

The Commission further noted that:

... the combined entity will have an increased incentive and ability to discriminate against competitors providing retail services that rely on new technology, particularly advanced services like Sprint ION. The record reflects that competitive service providers frequently run into difficulty the first time they seek to provide a new service such as xDSL that is dependent on incumbent LEC inputs, thus giving the incumbent LECs the ability to control the pace of innovation. Examples of the types of things to which providers of xDSL services have needed access include, but are not limited to: (1) detailed loop information (such as information on loop qualification); (2) conditioned loops; (3) remote terminals; (4) the incumbent LEC's central office to collocate new technology; or (5) portions of interconnection agreements that are tailored to the needs of xDSL.¹²

And, in yet another merger proceeding, the Commission similarly found that the ability to reduce output (here, AT&T's provision of DSL transmission service) is merger specific:

Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, or in coordination with other firms.¹³

In the Ameritech-SBC merger and the AT&T-BellSouth mergers, to prevent such merger-specific discrimination and incentives to discriminate, the Commission imposed conditions concerning the merged entities' facilitation of the provision of DSL service by competitors.¹⁴ Similarly, here, the Joint Commenters have proposed a number of reasonable and

¹¹ In Re Applications of Ameritech Corp and SBC Communications For Consent to Transfer Control of Corporations Holdings Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion and Order at ¶ 196, FCC 99-279 (released October 8, 1999 (footnotes omitted) ("SBC/Ameritech Merger Order").

¹² Id. at ¶ 197.

¹³ Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Hearing Designation Order, FCC 02-84 at ¶ 97 (2002).

¹⁴ SBC/Ameritech Merger Order at ¶¶ 373-375; In the Matter of AT&T Inc. and the BellSouth Corporation Application for Transfer of Control, FCC 06-189 (rel. March 26, 2007) at pp. 153-54.

meaningful conditions concerning AT&T's provision of DSL services.¹⁵ Moreover, the Joint Commenters explicitly have demonstrated the importance of DSL services to their customers, how AT&T has in the past refused to offer DSL service on reasonable terms and the specific effects of the merger - namely, the merged entity will have both the incentive and power to further discriminate against rivals providing broadband DSL services which will directly compete with the merged entity's 4G broadband services.

Accordingly, Joint Commenters have demonstrated "merger-specific" effects and have proposed meaningful and reasonable conditions to address such effects. AT&T's failure to substantively address these concerns demonstrates that if Commission approves the transaction between AT&T and T-Mobile, such approval must include the conditions¹⁶ proposed in the comments filed ACN, API and Granite.

Respectfully submitted,

/s/ Eric J. Branfman

Eric J. Branfman
BINGHAM MCCUTCHEN, LLP
2020 K St., NW
Washington DC 20006
202.373.6000
202.373.6001
eric.branfman@bingham.com
*Counsel for Access Point, Inc. ACN
Communications Services, Inc. and Granite
Telecommunications, LLC*

June 20, 2011

¹⁵ API and ACN Comments at 6-8; Granite Comments at 7-9.

¹⁶ Applicants offer no arguments why, if conditions are needed, the ones proposed by API, ACN, and Granite are inappropriate. If they had any such argument, it should have been raised in Applicants' Opposition.

SERVICE LIST

I, M. Renee Britt, hereby certify that on this 20th day of June, 2011, I have caused a copy of the foregoing Reply Comments of Access Point Inc., ACN Communications Services, Inc. and Granite Telecommunications, LLC to be served, as specified, upon the parties listed below:

<p>Peter J. Schildkraut Kate Dumouchel Arnold & Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter.schildkraut@aporter.com kate.dumouchel@aporter.com <i>Outside Counsel to AT&T Inc.</i> (Via Electronic Mail)</p>	<p>Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com <i>Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.</i> (Via Electronic Mail)</p>
<p>Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov (Via Electronic Mail)</p>	<p>Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov (Via Electronic Mail)</p>
<p>David Krech, Policy Division International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 david.krech@fcc.gov (Via Electronic Mail)</p>	<p>Jim Bird, Office of General Counsel Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 jim.bird@fcc.gov (Via Electronic Mail)</p>
<p>Best Copy and Printing, Inc. 445 12th St., S.W. Washington, D.C. 20554 FCC@BCPIWEB.COM (Via Electronic Mail)</p>	

/s/ M. Renee Britt
M. Renee Britt