

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|-------------------------------------|---|---------------------|
| Applications of AT&T Inc. and |) | |
| Deutsche Telekom AG for Consent |) | |
| To Transfer Control of the Licenses |) | WT Docket No. 11-65 |
| and Authorizations Held by T- |) | |
| Mobile USA, Inc. and Its |) | |
| Subsidiaries |) | |

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Harold Feld
Legal Director

John Bergmayer
Sherwin Siy
Michael Weinberg
Staff Attorneys

Avonne Bell
Joe Newman
Law Clerks

Public Knowledge
1818 N St. NW, Ste. 410
Washington, DC 20036

June 20, 2011

TABLE OF CONTENTS

SUMMARY 1

I. BECAUSE GRANT OF THE APPLICATION WOULD VIOLATE SECTION 314 OF THE COMMUNICATIONS ACT, THE COMMISSION MUST DENY THE APPLICATION. 7

A. The Transaction Involves A Wireline Common Carrier and A Competing Wireless Common Carrier, Both of Whom Carry International Traffic As Common Carriers.....8

B. The Transaction Will Substantially Lessen Competition In the Provision of International Common Carrier Traffic And Other “Lines of Commerce.”10

 1. Foreign GSM-based providers will lose a significant international roaming partner, and in some geographic areas the number of providers will be reduced from two to one. 11

 2. In addition, the transaction will create monopoly or substantially lessen competition in other lines of commerce with international effects..... 14

II. APPLICANTS’ EFFORT TO RETREAT FROM THEIR PUBLIC COMMITMENT TO ACCEPT A USF CONDITION RAISES GRAVE CONCERN REGARDING OTHER ‘VOLUNTARY COMMITMENTS’ ON DEPLOYMENT AND JOBS..... 17

III. APPLICANTS FAIL TO ADDRESS SEVERAL ARGUMENTS MADE BY PUBLIC KNOWLEDGE. 21

A. Applicants Fail To Address That FCC Examined the Number of National Competitors In Sprint/Nextel.....22

B. Applicants Fail To Address the Argument That The Merger Will Frustrate Enforcement Of Commission Rules and Congressional Policies Favoring Competition ..23

IV. APPLICANTS FAILED TO REBUT ARGUMENTS THAT THE ACQUISITION WOULD CAUSE SUBSTANTIAL HARM, WITHOUT YIELDING SIGNIFICANT OFFSETTING BENEFITS. 26

A. The FCC Should Reject Applicants’ Claim That Traditional Concentration Measures Are Meaningless, Especially In The Absence Of Any Suggestion As To What Other Metric Might Be Appropriate.....26

B. Applicants Theoretical Argument That They Have Neither Incentive Nor Ability To Influence Handset Manufacturers, Applications Providers, Or Otherwise Exercise Monopsony Power Is Negated By The Empirical Evidence That AT&T Has Demonstrated An Ability To Exercise Such Power Even At Existing Levels of Concentration.28

C. AT&T’s Claimed “Spectrum Congestion” Problems Are Not Solved By The Merger. 31

D. T-Mobile’s Claimed “Spectrum Paucity” Problems Are Not Solved By The Merger, And Can Be Resolved In Its Absence.32

E. AT&T’s Lack of Towers And Cell Sites Is No More Likely To Be Relieved As a Result Of the Merger Than Otherwise.....34

F. The Proposed Merger Is Unlikely To Result In Net Creation Of Jobs Or Investment. 35

G. T-Mobile Is A Significant Competitor To AT&T, And Other Small Carriers Would Not Be Substantial Competitors To The Merged Entity.36

| | |
|--|-----------|
| H. The Merger Will Harm International Roaming Provision | 37 |
| CONCLUSION | 38 |
| DECLARATION OF HAROLD FELD..... | 40 |
| CERTIFICATE OF SERVICE | 41 |

SUMMARY

After an initial round of Petitions and Replies, three things have become clear. First, the Commission has sufficient evidence before it that the Application violates Section 314 on its face. The Commission should therefore deny the Application as a matter of law. Second, AT&T's retreat from AT&T President and CEO Randal Stephenson's public statement that AT&T would accept a USF commitment demonstrates the futility of relying on AT&T's "voluntary commitments" with regard to deployment, job creation, and the additional benefits of the merger. Finally, AT&T's efforts to rebut the arguments made by Public Knowledge (PK) and others against the merger have numerous flaws, and in some cases simply fail to respond to the arguments made by PK in its Petition to Deny. For all of these reasons, the FCC must deny the Application.

The Proposed Deal Violates The Law.

When a common carrier that provides international service "by any cable, wire, telegraph, or telephone line or system" seeks to acquire a wireless common carrier that provides international service, Section 314 of the Communications Act prohibits the transaction if it would "substantially lessen" competition either for international communication or in any related "line of commerce."

AT&T, Deutsche Telekom, and T-Mobile USA are common carriers, as described in the statute. Both AT&T and T-Mobile offer competing international roaming services – common carrier services of the kind the Commission has repeatedly found that Section 314 addresses. As demonstrated by numerous commenters, the proposed transaction will reduce the number of national GSM-based networks providing roaming services from

two to one. Even if one adopts the local geographic market analysis urged by the Applicants, the transaction will reduce the number of GSM-based international roaming providers from two to one in numerous markets, and in other will reduce the number of possible roaming partners from three to two.

No one can reasonably contend that a transaction that reduces the number of possible GSM roaming partners from two to one does not “substantially lessen” competition. Indeed, AT&T concedes that in numerous markets AT&T will be the only GSM roaming partner post-acquisition. Instead, AT&T offers various reasons why this GSM monopoly should not matter. But unlike the public interest standard usually employed by the Commission, Section 314 does not permit the Commission to balance the harm to competition versus the possible benefits and grant the merger where benefits outweigh harms. Section 314 is an absolute statutory bar against the transfer. In the rare cases where, as here, a transaction triggers Section 314, the Commission has no choice but to deny the Application.

The Fine Print To AT&T’s ‘Voluntary Commitments.’

Consumers familiar with the usual fine print that accompanies AT&T’s “unlimited” packages will recognize AT&T’s effort to use the last few pages of its Joint Opposition to narrow its public commitment to forgo USF funding as part of the merger. AT&T perennially sites achieving 97% LTE coverage through “private capital” rather than by “government subsidies.” As AT&T President and CEO Randal Stephenson testified before the Antitrust Subcommittee of the Senate Judiciary Committee:

So I’ll go back to the President’s comment establishing a public policy objective of 98 percent of America covered with mobile broadband capability. The elegance of this is this is a private market solution for a

major public policy objective. This is all private capital that will be used to build this capability out. There will not be any Universal Service money, any subsidies, any taxpayer money involved in making this happen.¹

Later in the hearing, Mr. Stephenson qualified this broad statement. Just as AT&T's promise of "unlimited wireless broadband" means "up to 5 GB a month, subject to whatever restrictions we chose," Mr. Stephenson clarified that AT&T would only accept as an actual condition a condition that would prohibit AT&T from accepting USF funds for "this LTE build out."²

Stunningly, even this qualification has proven too much for AT&T. In its Joint Opposition, AT&T retreated further, stating *it would not accept any USF condition, even the one to which Mr. Stephenson agreed*. Instead, AT&T "clarified" that Mr. Stephenson had offered a 'voluntary commitment,' which the FCC ought to consider just as good as an actual, enforceable condition.³ At the same time, AT&T made it quite clear that it would continue to maintain its existing right to receive the maximum amount of USF subsidy permitted under the law. Further, AT&T made clear that in the event the FCC altered the fund to permit funding for broadband deployment, AT&T intended to apply for the maximum subsidy the new rules would allow.⁴

¹ Video of Testimony before the Senate Judiciary Committee, minute 117, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16be8fe>.

² *Id.* at minute 143.

³ Acquisition of T-Mobile USA, Inc. by AT&T Inc., Description of Transaction, Public Interest Showing and Related Demonstrations (April 21, 2011) at 15 and n.15 (stressing that AT&T Inc., not AT&T Mobility, LLC, is the Applicant and will acquire Deutsche Telekom's T-Mobile USA assets) ("Application").

³ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc., to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (June 10, 2011) at 222-23.

⁴ *Id.*

Given the speed with which AT&T's lawyers rewrote a public pledge under oath before Congress to accept a merger condition to use only "private capital" for its much touted LTE deployment into a "voluntary commitment" while simultaneously asserting its right to apply for the maximum USF subsidy allowable, the FCC must ask how long it will take before AT&T rewrites its other "voluntary commitments" on deployment, network investment, and job creation. The FCC started its "bill shock" proceeding because AT&T (and other carriers) routinely promise consumers one thing in their advertising while agreeing to quite another in the fine print. The Commission, and the American people, will experience a merger "bill shock" of epic proportions if the Commission relies on AT&T's "voluntary commitments" and grants the merger.

AT&T Fails To Make Its Case

Even setting aside the legal bar to granting the transaction and, despite all evidence to the contrary, accepting AT&T's "voluntary commitments" at face value without regard to the fine print, AT&T has simply failed to make its case. As an initial matter, AT&T failed to address arguments made by PK in its Petition to Deny that permitting the transaction would render it impossible for the FCC to enforce either its recent network neutrality rules or its data roaming obligations. AT&T attempts to recast this as an argument seeking conditions, but PK clearly stated that it is *not* seeking conditions. To the contrary, it is precisely because the Commission cannot hope to adequately police AT&T's conduct post-transaction that the Commission should deny the merger. Without T-Mobile to serve as a "benchmark" for network management practices or commercial roaming agreements, the Commission will be at a severe disadvantage when trying to detect violations or enforce its decisions.

Further, PK submits a preliminary report from Information Age Economics (“IAE Report”) detailing specific instances where AT&T has failed to make its case. Instead, AT&T has relied on expert opinions grounded in theory based on assumptions that flatly contradict the real world. But even this does not quite get AT&T over the goal line. AT&T must rely on casting aspersions on all generally accepted measures of industry concentration such as the spectrum screen or the Herfindahl-Hirschman Index (HHI), without proposing any alternative measures other than its repeated mantra that the market *must* be competitive despite all evidence to the contrary.

At the end of the day, even if one could get past the legal barriers and AT&T’s consistent efforts to back away from any binding commitments or verification of the supposed public interest benefits, approving the transaction still requires too much “creative” economics. It is not enough to accept AT&T’s unsupported voluntary commitments as proven benefits of the deal; AT&T also requires the Commission to discard every single traditional tool for analyzing industry concentration, while providing no new framework beyond AT&T’s assurances that nothing could possibly go wrong in this best of all possible worlds, where AT&T will have everyone’s best interest at heart.

No doubt AT&T and its chorus of supporters believe that a return to the old AT&T’s old advertising slogan “one nation, one people: one policy, one system, universal service”⁵ can only bring benefits to everyone. But the Commission should resist this call to return to a bygone age of romanticized benevolent monopoly. The benefits

⁵ See “Ads and Brands, ‘American Telephone and Telegraph Company,’ available at <http://www.adsandbrands.com/en/sujet/at-t/american-telephone-and-telegraph-company/27889/coffset-1/0/start-1690/end-2011/brand-AMERICAN%20TELEPHONE%20AND%20TELEGRAPH%20COMPANY/sortierung1-datum/sortierung2-datum/order1-asc/order2-asc/showbrand-marke>

AT&T promises are illusory, where as the costs of concentration for consumers, competitors and innovation remain very real. For the reasons set for the below, the Commission should deny the Applications.

ARGUMENT

I. BECAUSE GRANT OF THE APPLICATION WOULD VIOLATE SECTION 314 OF THE COMMUNICATIONS ACT, THE COMMISSION MUST DENY THE APPLICATION.

As the record in this case makes clear, the plain language of Section 314 prohibits grant of the Application. Accordingly, the Application must be dismissed.

Section 314 states no entity shall:

in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.⁶

Although the Commission has, on occasion, cited Section 314 as evidence that Congress intended the FCC to encourage competition,⁷ the Commission has held that the absolute prohibition on the grant or transfer of a license occurs only in very narrow circumstances. Specifically: 1) The transaction must involve common carriers, 2) engaged in

⁶ 47 U.S.C. § 314.

⁷ *Radiofone Inc. v. BellSouth Mobility, Inc.* 14 FCC Rcd 6088 (1999) ¶33 n.73 (“*Radiofone*”).

international communication,⁸ and 3) the transaction must impact international communication, or have some other international impact.⁹ At times, the Commission has also suggested that a transfer of international assets must also be involved.¹⁰ As demonstrated by Applicant's own submissions, the proposed transaction meets all of these necessary conditions.

A. The Transaction Involves A Wireline Common Carrier and A Competing Wireless Common Carrier, Both of Whom Carry International Traffic As Common Carriers.

Applicant AT&T, in addition to other lines of business, is “in the business of transmitting and/or receiving for hire messages” as a common carrier and does so by “cable, wire, telegraph or telephone line” between various states, territories and possessions of the United States and various foreign countries. Applicant Deutsche Telekom AG is a foreign company that operates as a common carrier and controls an American subsidiary, T-Mobile USA. T-Mobile USA, pursuant to licenses granted by the Commission, owns “station[s]” and “apparatus” for the purpose of operating “system[s]

⁸ *Application of General Telephone Co. of the Northwest, Inc.*, 17 FCC.2d 654, 657 (1969) (“*General Telephone Co.*”); *American Telephone & Telegraph Co. Lease and Maintenance of Equipment and Facilities for Private Communication Systems*, 22 FCC 1220, 1223 (1957). PK notes that this limitation does not exist in the statute, which speaks of any form of transmission and that the plain language of the statute is satisfied for any communication under Title I, and PK does not waive its right to challenge the limitation of Section 314 to common carrier traffic as contrary to the plain language of the statute. However, even if the Commission limits Section 314 exclusively to Title II traffic, as discussed below, this factor is met in the pending Application.

⁹ *Applications of RCA Corp. (Transferors), and General Electric Co., (Transferee), for Transfer of Control of RCA Corporation and Its Wholly-Owned Subsidiary, National Broadcasting Company, Inc., Licensee of WNBC(AM), WYNY(FM) and WNBC-TV New York, New York; KNBC(TV), Los Angeles, California; WMAQ(AM), WKQX(FM) and WMAQ-TV, Chicago, Illinois; WJIB(FM), Boston, Massachusetts; KNBR(AM) and KYUU(FM), San Francisco, California; WKYS(FM) and WRC-TV, Washington, D.C.; and WKYC-TV, Cleveland, Ohio*, 60 Rad. Reg.2d (P&F) 563 (1986) ¶13 (“*RCA GE Transfer*”).

¹⁰ *Id.*

for transmitting and/or receiving radio communications” between places in the United States and “any place in any foreign country.” T-Mobile USA also operates as a common carrier.¹¹

While it is certainly true that the facilities in question also carry non-common carrier traffic, AT&T has stated that it intends to acquire from Deutsche Telecom all of T-Mobile’s assets and lines of business. AT&T has in no way indicated that it seeks only the non-common carrier assets, or that it would only engage in non-common carrier activities. To the contrary, Applicants forcefully reiterated in their Opposition that the Commission must evaluate the merger on the basis of its Title II voice operations and specifically argued that the Commission must exclude separate consideration of their non-common carrier information service offerings.¹² Furthermore, Applicants have stated that they will maintain their competitive eligible telecommunications carrier (CETC) subsidiaries so that they may continue to receive the maximum allowable subsidy from the Universal Service Fund.¹³ Clearly, AT&T intends to continue transmission of common carrier traffic from locations in the United States to locations in foreign countries over their combined wireline and wireless facilities.¹⁴

¹¹ See generally Acquisition of T-Mobile USA, Inc. by AT&T Inc., Description of Transaction, Public Interest Showing and Related Demonstrations (April 21, 2011) at 15 and n.15 (stressing that AT&T Inc., not AT&T Mobility, LLC, is the Applicant and will acquire Deutsche Telekom’s T-Mobile USA assets) (“Application”).

¹² Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc., to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (June 10, 2011) at 115-119 (“Joint Opposition”).

¹³ *Id.* at 222-23.

¹⁴ Nor, in any event, would an attempt to segregate the common carrier traffic from the non-common carrier traffic prevent operation of the statute. Section 314 prevents common ownership of any “facilities” or “apparatus” used for transmission of international common carrier traffic. Even if Deutsche Telekom were to agree that T-Mobile USA would continue to exist as a separate company, not transferred to AT&T, for

Although the statute makes no mention of such a requirement, certain Commission decisions have appeared to suggest that in addition to all other factors, there must also be a transfer of international assets. Again, that condition is present. According to Applicants own statements, Deutsche Telekom, AG, a German company, will receive \$39 billion in assets, including up to 8 percent of AT&T's stock and the right to nominate a one director for election.¹⁵ Separately, Deutsche Telekom, AG has stated that it will take \$25 billion provided by AT&T to pay down debt to European creditors.¹⁶

Applicants cannot seriously suggest that this does not constitute a transfer of assets to an entity outside the United States. Therefore, to the extent such an element is additionally required, it is clearly met here.

B. The Transaction Will Substantially Lessen Competition In the Provision of International Common Carrier Traffic And Other "Lines of Commerce."

Satisfied that the parties meet the statutory prerequisites, the Commission must turn to the next stage of the analysis. Section 314 will prohibit a transaction either "where the purpose is" or if "the effect thereof may be" either to "substantially lessen competition" or "restrain commerce" between any place in the United States and any foreign country, or to "unlawfully to create monopoly in any line of commerce." Over the years, the Commission has narrowed this language to effectively eliminate the "any line

the sole purpose handling T-Mobile's existing international voice traffic, such traffic would still travel over transferred or jointly owned facilities, using transferred or jointly owned apparatus.

¹⁵ Application at 16-17.

¹⁶ Deutsche Telekom, AG, "Interim Group Report, Q1 '11" at 13, available at www.download-telekom.de/dt/StaticPage/.../q1_2011_en.PDF_1022430.pdf.

of commerce” and focused exclusively on the impact on international common carrier traffic.¹⁷

1. Foreign GSM-based providers will lose a significant international roaming partner, and in some geographic areas the number of providers will be reduced from two to one.

As the record shows, even under the most cramped and restrictive reading of the statute, Section 314 prohibits the transfer of facilities and assets between AT&T and Deutsche Telekom. The Commission has received numerous submissions from foreign carriers,¹⁸ foreign governments,¹⁹ and others²⁰ that the combination of assets will “substantially lessen competition” in international roaming for GSM-based carriers. The Commission has explicitly determined that international roaming is a Title II service, requiring common carrier authorization under Section 214 of the Act.²¹ Furthermore, T-Mobile leases wholesale access to its spectrum and facilities. Several commenters have noted that they lease capacity or could potentially lease capacity on T-Mobile’s GSM

¹⁷ Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Communications Corp., *Memorandum Opinion & Order*, 21 FCC Rcd. 8203, ¶ 30, (2006) (hereinafter “Adelphia/Time Warner Order”).

¹⁸ See, e.g., Comments of Japan Communications, Inc., and Communications Security & Compliance Technologies, Inc., WT 11-65 (filed May 31, 2011) (“Japan Communications”); Comments of Vodafone Group, WT 11-65 (filed May 31, 2011) (“Vodafone”).

¹⁹ See Comments of New Zealand Ministry of Economic Development, WT 11-65 (filed May 31, 2011) (“NZ Ministry”).

²⁰ See, e.g., Petition to Deny of Rural Telephone Group, WT 11-65 (filed May 31, 2011) at 34-35 (“RTG”); Petition of MetroPCS and NTelos, Inc. to Condition Consent, or Deny Application, WT 11-65 (filed May 31, 2011) at 48 (“MetroPCS/NTelos”) (“for those customers that require a GSM handset or international roaming, particularly travelling business executives, AT&T and T-Mobile may be the only game in town.”); Comments of Cablevision Systems Corp., WT 11-65 (filed May 31, 2011) at 15 (“Cablevision”) (both domestic and international GSM users “would have no alternative” post-transaction).

²¹ Amendments of Parts 1 and 63 of the Commission’s Rules, 22 F.C.C.R. 11398, 11406 (2007) ¶¶19-22.

network for the purpose of sending and receiving common carrier signals between places in the United States and locations abroad.²²

In other words, the facilities that AT&T seeks to acquire and consolidate under common control with its competing international service – including international telephone and cable service transmissions covered by AT&T’s Section 214 authorizations – transmit precisely the type of traffic the Commission has identified in even its most limited and cramped interpretation of Section 314.

Finally, as demonstrated by the record, the transaction will significantly reduce the number of providers offering these services. In most regions where AT&T and T-Mobile have overlapping service, they are the only possible providers of international roaming and, potentially, of wholesale access to GSM-based mobile networks. Undoubtedly, a transaction that reduces the number of possible international roaming partners from two to one “has the effect” of substantially lessening competition, if not creating an unlawful monopoly, between those geographic regions and “any foreign country” in direct violation of the language of the statute. Even in those regions where a competing GSM carrier may remain, the loss of T-Mobile will “substantially lessen” competition for these services, both by removing an important provider of local roaming and by reducing the number of GSM-based networks able to provide national roaming agreements from two to one. In further support of these arguments, PK submits the attached report prepared by its experts (the “IAE Report”), describing the impact the acquisition will have on international roaming rates.

²² See, e.g., Petition of Cox Communications to Condition Consent, WT 11-65 (filed May 31, 2011) at 11; Japan Communications at 10-14; Cablevision at 10-15.

AT&T, for its part, does not deny that its acquisition of Deutsche Telekom's T-Mobile USA facilities will substantially lessen competition in the international roaming market in those regions where the elimination of T-Mobile reduces the number of possible roaming partners from two to one. Rather, AT&T argues that in other regions, it is already the sole provider of GSM roaming services,²³ and that providers are moving to LTE,²⁴ so the harm of removing T-Mobile from the market is reduced. AT&T further argues that international carriers may mitigate the loss of the one competing GSM roaming partner in other ways, such as providing their customers complimentary dual-use handsets.²⁵

Whether or not AT&T is correct that providers could mitigate the loss of competition for international roaming services – either now by dual use phones or later by conversion to LTE – is irrelevant to the application of Section 314. Section 314, on its face, creates an absolute bar to grant of the application where the effect would be to substantially lessen competition or create monopoly. By its terms, it does not permit the Commission to weigh whether the benefits of the transaction outweigh the harm of eliminating a valuable competitor.²⁶ This transaction will reduce the number of national

²³ Joint Opposition at 155-62.

²⁴ *Id.*, but see NZ at 2 (length of LTE transition insures importance of access to GSM-based networks will continue for several years into the future).

²⁵ *Id.* AT&T doesn't say they should be distributed by the carriers to their customers for free, but it is hard to understand how else AT&T anticipates the concerned carriers will force their customers to use phones capable of roaming on CDMA based networks. Perhaps AT&T envisions that concerned governments, such as New Zealand, will distribute them to departing tourists.

²⁶ *Cf. RCA Communications*, 346 U.S. at 95-96 (Reversing automatic grant of competing license under Section 314 where competition already adequate). PK recognizes that in *Mackay Radio & Tel. Co. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938), the D.C. Circuit upheld an FCC refusal to grant a competing license to a competitor on the grounds that the Commission had discretion to determine when monopoly, rather than competition, served

GSM-based roaming partners from two to one. Even if the Commission were to ignore the national market, in those regions where AT&T and T-Mobile overlap, the number of potential providers for international GSM-based roaming drops from two to one. Finally, even where a local or regional GSM provider remains, the transaction will substantially lessen competition for international GSM-based roaming. Accordingly, the Application must be dismissed as a matter of law.²⁷

2. In addition, the transaction will create monopoly or substantially lessen competition in other lines of commerce with international effects.

Section 314, by its terms, also prevents a license transfer where the joint control over the international wireline and wireless Section 214 licenses would create a monopoly or substantially lessen competition in “any line of commerce.” While this does not give the Commission broad general powers under the antitrust laws,²⁸ it must at least extend to lines of commerce connected with the combination of facilities for international common carrier traffic and other international markets. Otherwise, the words “any other line of commerce” in the statute would be rendered meaningless.

the public interest. That case is inapposite, however, for two reasons. First, *Mackay Radio* involved a decision to issue a license and whether Section 314 required the Commission to affirmatively create competition. *See RCA Communications*, 346 U.S. at 96 n.7. It is one thing to say that the Commission may issue a license to an existing monopoly provider. It is another thing entirely to approve a transfer that would eliminate an existing competitor and *create* a monopoly provider. Further, as both the FCC and the D.C. Circuit have long recognized, Congress long ago instructed the Commission to move away from the theory that regulated monopoly favored the public interest and to rely instead, wherever possible, on the forces of competition. The theory on which *MacKay* rested, that Congress gave the FCC authority to preserve *lawful* monopoly as a superior policy choice to potentially “disruptive” competition, *see General Telephone Co.*, 17 FCC.2d at 657.

²⁷ At a minimum, because AT&T and Deutsche Telecom are clearly entities subject to Section 314, the evidence in the record establishes an issue of material fact which may only be resolved by hearing.

²⁸ *Radiophone*, 14 FCC Rcd at ¶¶33-37.

As demonstrated in filings by PK and others, the acquisition would substantially lessen competition or create monopoly “between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country” for several related lines of commerce. For example, as AT&T itself asserted in Opposition, “The market for GSM handsets is *global*” (emphasis in original) that “GSM is the standard that is used around the world” and that “at least 35 companies from all over the world” design and manufacture handsets for GSM networks.²⁹ It follows logically that where AT&T’s acquisition of Deutsche Telekom’s T-Mobile USA assets reduces the number of potential GSM partners from two to one, or even from three to two, it will “substantially lessen competition” or create monopoly in these geographic regions for these international vendors, or consumers seeking to send and receive international common carrier traffic, or international providers seeking to offer competing section 214 services, in violation of the express terms of Section 314.

For example, with regard to handset vendors, the ability to sell GSM handsets in regions where AT&T and T-Mobile overlap will be substantially impacted by the loss of competition. T-Mobile outlets will be eliminated, and local retailers will be limited to AT&T-acceptable models. That these handset manufacturers and distributors may sell other phones elsewhere is not relevant to the Section 314 analysis; what is relevant is that it will substantially lessen competition or create monopoly between the foreign vendor and that specific local market, i.e., “any place in any state.”

²⁹ Joint Opposition at 149.

Similarly, as noted by several commenters,³⁰ U.S. based travelers intending to travel internationally will suffer from the substantial loss of competition. Indeed, Applicants' insistence that the relevant market for the analysis of this transaction is the local market *because that is where consumers chose to purchase phones and plans*,³¹ reinforces the analysis with regard to Section 314. AT&T cannot maintain that consumers only buy plans available to them locally and therefore the Commission must ignore national impacts, while simultaneously insisting that the Commission ignore the impact of this local monopoly on international travelers seeking to send and receive common carrier traffic between the United States and places abroad.

Finally, Japan Communications notes the loss of T-Mobile as a valuable wholesale partner for foreign providers seeking to offer service.³² The loss of one of only two potential providers of wholesale access (and indeed, the only *actual* provider of wholesale access) constitutes a substantial loss of competition not merely for the provision of international common carrier traffic, as discussed above, but in the related line of business of foreign carriers wishing to offer domestic services. Similarly, domestic providers such as Cablevision will now see the number of possible wholesale partners for purposes of providing international common carrier voice traffic and the related "line of commerce" of domestic traffic drop from two to one (and the number of partners actually offering wholesale service for these purposes drop from one to zero).

To conclude, AT&T is a provider of international common carrier services by "cable, wire, telegraph, or telephone line," Deutsche Telekom, a foreign company, seeks

³⁰ See, e.g., *Comments of Rec Networks*, WT Docket No. 11-65 (filed May 31, 2011) at 2; Cablevision at 15; MetroPCS/NTelos at 48.

³¹ Joint Opposition at 107.

³² See Japan Communications at 10-14.

to transfer licenses, and other “radio station, apparatus or system” for “transmitting and/or receiving radio communications or signals” internationally, and afterwards Deutsche Telekom will “own, control, or acquire . . . stock or other capital share” in AT&T and its facilities. This combination will “have the effect thereto” of substantially lessening competition between “any place in any state” and “any foreign country.” If the plain language of Section 314 applies in any case, and is not to be rendered an utter nullity, it applies to the proposed transaction. Accordingly, the Application must be denied as a matter of law, or be designated for hearing on the basis of the existing record.

II. APPLICANTS’ EFFORT TO RETREAT FROM THEIR PUBLIC COMMITMENT TO ACCEPT A USF CONDITION RAISES GRAVE CONCERN REGARDING OTHER ‘VOLUNTARY COMMITMENTS’ ON DEPLOYMENT AND JOBS.

In 2010, AT&T had operating revenues of more than \$124 billion dollars.³³ At the same time, it is one of the largest recipients of Universal Service subsidies. For example, according to an investigation by the House Energy and Commerce Committee, it took in more than \$1.3 billion federal dollars from 2007-2009.³⁴ A post-merger company will be even larger, with more market power and more revenue. It will need subsidies less, but without changing its practices will get more of them by adding T-Mobile’s CETC to its own. Especially in light of the continued loss of revenue to the fund,³⁵ AT&T giving up USF funds so that they could go to weaker rural providers would be considered by many a significant benefit. With this as background, policymakers have asked AT&T whether it

³³ See AT&T Inc. Financial Review 2010

http://www.att.com/Common/about_us/annual_report/pdfs/ATT2010_Financials.pdf.

³⁴ Juliana Gruenwald, *Panel Releases USF Data*, NationalJournal, July 8 2010, available at <http://techdailydose.nationaljournal.com/2010/07/panel-releases-usf-data.php>.

³⁵ Public Notice, *Proposed Third Quarter 2011 Universal Service Contribution Factor*, CC Docket No. 96-45; DA 11-1051 (June 14, 2011).

intends to continue collecting government subsidies if its merger is allowed.

Unfortunately, AT&T seems intent on telling policymakers what they want to hear without really saying anything at all. But even its careful phrasing and non-statement statements have not been enough to keep AT&T from flatly contradicting itself. And when it is not actually contradictory, it is misleading.

For example, AT&T's CEO Randall Stephenson has made promises his lawyers are unwilling to keep. When Senator Kohl asked him "Mr. Stephenson, would you accept as a condition of the merger a prohibition on AT&T from using any Universal Service Fund money for its rural broadband build out?", Mr. Stephenson responded "Yes sir."³⁶ But in AT&T's recent Opposition filing, it opposes such a condition, arguing that "The combined company will be subject to [existing rules], and any additional restrictions are unwarranted. The Commission should address CETC reform in the context of its industry-wide universal service reform proceeding, and not single out AT&T for discriminatory treatment in the context of this merger review. And while in his testimony before the Senate, Mr. Stephenson agreed that limitations on AT&T's subsidies would be a condition of the merger, the Opposition recasts this as a "voluntary commitment."³⁷

Even when they are not being contradicted by later AT&T filings, the sworn statements of AT&T's CEO seem designed to convey the impression that AT&T will forgo some portion of the USF subsidy it currently receives. However, AT&T's filings make clear it has every intention of applying for the maximum subsidy available to it under the law. For example, Mr. Stephenson stated to Congress that "So I'll go back to

³⁶ Video of Testimony before the Senate Judiciary Committee, minute 143, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16be8f>

³⁷ *Id.*

the President's comment establishing a public policy objective of 98 percent of America covered with mobile broadband capability. The elegance of this is this is a private market solution for a major public policy objective. This is all private capital that will be used to build this capability out. There will not be any Universal Service money, any subsidies, any taxpayer money involved in making this happen."³⁸

This seems to be a direct statement that AT&T will not seek any subsidies for its wireless buildout. But it is a statement that, later in his testimony, Mr. Stephenson backed away from. When Senator Kohl asked Mr. Stephenson whether it intended to seek funding for its "rural broadband buildout," Mr. Stephenson chose not to answer, instead stating that AT&T would accept a condition on its merger to not ask for subsidies "for this LTE buildout."³⁹ This leaves open whether subsidies may be used for other LTE buildouts, or to complete and maintain existing 3G deployments. In any event LTE is a narrower concept than "rural broadband buildout," which may be wireline based or use technology other than LTE. Of course, policymakers want to know if AT&T will demand subsidies to build out its networks, not whether it intends to allocate subsidy funds specifically to a particular technology.

But Mr. Stephenson's answer is misleading even forgiving these major hedges. Because money is fungible, any money that AT&T would have spent on a given non-LTE expense, but then doesn't because of the subsidy, it is free to redirect towards LTE. Any subsidies that AT&T receives for any purpose make it easier for it to deploy LTE. Thus, even if AT&T does not earmark any of its subsidies for LTE the other subsidies it receives will still help it build out LTE. But more fundamentally, AT&T's continued

³⁸ *Id.* at minute 117.

³⁹ *Id.* at minute 143.

focus on "LTE" amounts to a classic case of misdirection. While trying to give the impression it will not ask for subsidies for rural buildout, it is clear from AT&T's Opposition filing that it will.

AT&T's clever wordplay with regard to its willingness to forgo USF funds to enhance the value to the public of its commitment to deploy LTE in rural areas raises suspicions that its other touted "voluntary" commitments on investment and jobs are also no more than vague promises and rhetoric slights of hand. For example, AT&T and its supporters rely extensively on an economic analysis performed by the Economic Policy Institute (EPI).⁴⁰ The EPI report assumes that AT&T, as a result of the merger, will invest \$8 billion in network deployment.⁴¹ Nowhere in its public interest statement or elsewhere, however, does AT&T proffer any specific amount of money – let alone \$8 billion – as an actual condition of the merger. Indeed, while accepting EPI's report and conclusion, AT&T staunchly resists having even its much touted "voluntary commitment" to deployment enforced as an actual merger condition.

To be clear, Public Knowledge does *not* ask that the Commission impose a merger condition, nor suggest that even a requirement to invest \$8 billion would justify the anticompetitive impacts of the merger. Rather, Public Knowledge suggests that AT&T's clever handwaving around possible future investment should be taken for what it is – an empty and unenforceable gesture – rather than the ironclad assurances apparently accepted by the chorus of acquisition supporters.

⁴⁰ See Joint Opposition at 85-86, citing Economic Policy Institute, The Jobs Impact of Telecom Investment, Policy Memorandum #18 (May 31, 2011), available at <http://www.epi.org/publications/entry/7127/>.

⁴¹ *Id.*

III. APPLICANTS FAIL TO ADDRESS SEVERAL ARGUMENTS MADE BY PUBLIC KNOWLEDGE.

In their replies, Applicants simply fail to address arguments made by Public Knowledge. Specifically, Applicants fail to address how their insistence that the Commission must not even consider the impact of reducing the number of national competitors from four to three (and the number of national GSM-based providers from two to one) is consistent with the Commission's analysis in Sprint/Nextel.⁴² The Commission should therefore reject Applicants' insistence that precedent prohibits the FCC from considering the loss of a national competitor as false to fact.

In addition, although Applicants purport to address Public Knowledge's arguments with regard to network neutrality and benchmarking, their answers are so non-responsive that PK's actual arguments remain unanswered. PK did *not* ask for a network neutrality condition. To the contrary, PK argued that no condition could protect network neutrality in this case and that, accordingly, the merger must be denied.⁴³ Similarly, Applicants seem to misunderstand Commission precedent around the concept of a "benchmark" firm, and have therefore failed to address PK's argument that removal of T-Mobile will render certain regulations adopted by the Commission (notably roaming and network neutrality) that depend on comparisons among competitors to establish what constitutes "commercially reasonable," in particular newly adopted rules for data roaming and network neutrality, impossible to enforce due to a lack of "benchmark" competitors. Because Applicants have failed to explain how grant of the Application

⁴² Applications of Nextel Communications Inc. and Sprint Corporation, *Memorandum Opinion & Order*, 20 F.C.C. Rcd. 13967 (2005)(hereinafter "Sprint/Nextel Order")

⁴³ Petition to Deny of Public Knowledge and The Future of Music Coalition, WT Docket No. 11-65 (filed May 31, 2011) at 41-44, 65-70 ("PK/FMC Petition").

would not therefore “frustrate the goals or rules of the Commission” with regard to these rules, the Application should be denied.⁴⁴

A. Applicants Fail To Address That FCC Examined the Number of National Competitors In Sprint/Nextel.

Applicants expend considerable effort in their Reply directing the Commission away from considering the national impact of the merger.⁴⁵ Applicants insist that the Commission “has concluded in a long and unbroken line of precedent” that the relevant market for consideration is local.⁴⁶ As PK pointed out in its Petition, the Commission has, on at least one relevant and similar occasion, considered the impact in the reduction of national competitors for purposes of determining both unilateral and coordinated impacts of the merger.⁴⁷

As the Commission noted in examining the proposed combination of Sprint and Nextel, “a reduction in the number of national competitors by one may provide the remaining carriers with an increased ability and incentive to reach and enforce a coordinated strategy.”⁴⁸ Indeed, the Commission rejected the efforts of Sprint and Nextel to argue that an analysis of the reduction in the number of national players was irrelevant to the merger.⁴⁹ Only after careful consideration of the loss of a national provider from 5 to 4, including consideration that large regional providers such as AllTel and Dobson could absorb Sprint-Nextel customers in the event the combined entity raised prices, did

⁴⁴ In the alternative, sufficient evidence of an issue of material fact remains to require the Commission to hold an evidentiary hearing on the issue.

⁴⁵ See Joint Opposition at 105-115.

⁴⁶ *Id.* at 105.

⁴⁷ PK/FMC Petition at 16.

⁴⁸ Sprint/Nextel Order at ¶71.

⁴⁹ *Id.* at ¶72.

the Commission conclude that the reduction in national providers was consistent with the public interest.⁵⁰

As the Commission clearly stated:

[W]e consider variables that the general analyses in these orders have shown are important for evaluating competitive harms associated with spectrum aggregation. These include: the total number of rival service providers; the number of rival firms that can offer competitive nationwide service plans; the coverage of the firms' respective networks; the amount of spectrum suitable for the provision of mobile telephony services controlled by the combined entity; and the spectrum holdings of each of the rival service providers. In reaching determinations, we balance these factors on a market-specific basis, and consider the totality of the circumstances in each market.⁵¹

Thus, even if AT&T's outdated view of the relevant market definitions were to prevail, Commission precedent suggests that nationwide factors continue to be relevant. In this case, they are determinative. It is not "illogical conflation," therefore, for opponents of the merger to observe that this merger reduces the number of nationwide competitors from four to three.⁵² Rather, this is a reason to block the merger.

Applicants' insistence that the Commission never looks at the number of national carriers, and has only examined the impact of local markets, should therefore be rejected as simply wrong. The precedent relied upon by Applicants simply does not provide the impenetrable shield against scrutiny of national impacts for which Applicants yearn.

B. Applicants Fail To Address the Argument That The Merger Will Frustrate Enforcement Of Commission Rules and Congressional Policies Favoring Competition

In its Petition to Deny, PK argued that the transaction would “substantially frustrate or impair the Commission’s implementation or enforcement of the

⁵⁰ *Id.* at 73-114; *see also* Dissent of Commissioner Copps.

⁵¹ Sprint Nextel Corp. & Clearwire Corp., 23 FCC Rcd 17570 ¶ 79 (2008).

⁵² Joint Opposition at 107.

Communications Act” by rendering the Commission substantially unable to enforce two rules recently adopted by the Commission: a “network neutrality” rule to preserve an open internet,⁵³ and rules to require data roaming among wireless carriers on commercially reasonable terms.⁵⁴ As the Commission explained, both of these rules further the goals of the Communications Act with regard to encouraging broadband adoption, enhancing competition, and creating opportunities for innovation and diversity.⁵⁵ PK stated clearly that grant of the application would render the Commission fundamentally unable to enforce these new rules, and that the Application should therefore be denied, not conditioned.⁵⁶ To summarize briefly, permitting the merger would make it impossible for the Commission to adequately detect violations or effectively enforce the rule both because of the sheer size and complexity of the combined AT&T/T-Mobile and because of the loss of a valuable “benchmark” for what constitutes reasonable commercial practices due to the loss of T-Mobile.⁵⁷

AT&T appears not to have understood this argument when it assigned to Public Knowledge the suggestion that “the Commission [should impose] prescriptive ‘nondiscrimination’ rules on the combined company.”⁵⁸ Needless to say, the argument that follows this statement fails to address the argument actually made that it would be patently impossible for the Commission to craft a net neutrality condition that would

⁵³ *Preserving and Open Internet*, GN Docket No. 09-191, Report and Order (released December 23, 2010) (“Open Internet Order”).

⁵⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order (Apr. 7, 2011) (“Data Roaming Order”).

⁵⁵ See Open Internet Order at ¶1; Data Roaming Order at ¶9.

⁵⁶ PK/FMC Petition at 39-43, 65-70.

⁵⁷ *Id.* at 45-49.

⁵⁸ Joint Opposition at 201.

provide adequate protection to consumers post-merger. Considering the ease with which AT&T has evaded conditions precedent to mergers in the past (e.g., AT&T hid its “naked DSL” option from consumers after being required to offer it after the BellSouth merger),⁵⁹ and the fact that merger conditions tend to be limited to a set term of years, it is unsurprising that Applicants would *prefer* to sign a condition and continue with the merger. However, for the reasons actually stated in the Petition, the proposed transaction must be denied.

With regard to the loss of a “benchmark firm” for purposes of determining the commercial reasonableness of roaming agreements, AT&T’s reply borders on the nonsensical. AT&T maintains that There will be no loss of a “benchmark firm” for purposes of establishing the commercial reasonableness for roaming because: “the terms on which *AT&T itself*, as a net purchaser buys roaming from other providers can serve as benchmarks in any FCC complaint proceeding brought by its customers.”⁶⁰ In other words, AT&T proposes that the Commission may measure the fairness of its reciprocal roaming agreements by measuring them against – its own agreements.

The entire point of a “benchmark” firm, however, is to provide a point of comparison *other than* the firms involved in the complaint to ascertain whether the rates reflect an exercise of market power or reasonable commercial negotiation. One way to

⁵⁹ PK/FMC Petition at 69, citing Ben Popken, *How to Get Naked DSL Redux*, CONSUMERIST, Aug. 28, 2008, <http://consumerist.com/2008/08/how-to-get-att-naked-dsl-redux.html>; Jacqui Cheng, *AT&T offers \$20 Naked DSL, If You Know Where to Look*, ARS TECHNICA, Dec. 2007, <http://arstechnica.com/old/content/2007/12/att-offers-20-naked-dsl-if-you-know-where-to-look.ars>; Eric Bangeman, *AT&T Launches \$10 DSL It Hopes No One Signs Up For*, ARS TECHNICA, June 2006, <http://arstechnica.com/old/content/2007/06/att-launches-10-dsl-it-hopes-no-one-signs-up-for.ar>.

⁶⁰ Joint Opposition at 159 (emphasis in original).

determine whether AT&T's future data roaming rates reflect market power is to compare those rates to rates negotiated by a firm without market power in comparable circumstances. Benchmarking against itself does no good because if AT&T has market power, it will be reflected in *all* of its comparable agreements. A comparison of one AT&T agreement that includes a monopoly rent, with another AT&T agreement that includes a monopoly rent, will not demonstrate that the agreements are fair because they are substantially similar. Yet AT&T seems to be proposing this very approach in suggesting that, after the loss of T-Mobile, the Commission can benchmark the reasonableness of AT&T's roaming agreements against itself.

IV. APPLICANTS FAILED TO REBUT ARGUMENTS THAT THE ACQUISITION WOULD CAUSE SUBSTANTIAL HARM, WITHOUT YIELDING SIGNIFICANT OFFSETTING BENEFITS.

Applicants' efforts in the Joint Opposition to respond to the harms cited by PK and others fail on multiple grounds. Not only have Applicants failed to rebut showings made with regard to specific markets, the arguments they advance have several overarching flaws.

A. The FCC Should Reject Applicants' Claim That Traditional Concentration Measures Are Meaningless, Especially In The Absence Of Any Suggestion As To What Other Metric Might Be Appropriate.

AT&T is uncomfortable with standard industry metrics for measuring market concentration. It asserts that HHI statistics "prove nothing by themselves,"⁶¹ and that the spectrum screen "does not establish any presumption of a problem."⁶²

⁶¹ Joint Opposition at 99.

⁶² *Id.* at 184.

In and of itself, this disdain should not be surprising. When applied to this proposed merger, both of these tools highlight its anticompetitive nature. Perhaps more troubling is AT&T's insistence that these metrics are inadequate, while at the same time failing to suggest more helpful indicators.

AT&T dismisses the disturbingly high HHI scores that the proposed merger would produce by insisting that HHI scores are already quite high in the wireless industry. Somehow AT&T has concluded that because the Commission found the high-HHI wireless market competitive in the past, an even higher-HHI post-merger wireless market must be competitive as well.

This is an illogical proposition. As AT&T itself notes, one valuable purpose of the HHI is to “identify markets that fall outside of [the] safe harbor and should therefore be subject to further review.”⁶³ Moving further and further afield from the safe harbor vastly increases the probability that a merger will have an anticompetitive impact on the market. This merger vividly illustrates that fact.

A similar impulse to ignore warnings raised by analytical tools manifests itself in AT&T's discussion of the spectrum screen. As AT&T recognizes, in the case of this proposed merger the screen correctly flagged this merger as one capable of causing competitive harm.⁶⁴ In light of this, AT&T conveniently seeks to reset the screen at levels that would bless the outcome of the combination.

These responses to standard tools for analyzing mergers suggest a larger pattern at work. AT&T initially dismisses the metric out of hand. It then accepts the metric after

⁶³ *Id.* at 101.

⁶⁴ *Id.* at 184.

distorting an underlying premise. Finally, it declares that this new interpretation supports the proposed merger.

Unfortunately, what AT&T fails to do is to proffer any sort of independent, broadly applicable standard to fully replace either HHI or spectrum screens. It attacks existing tools that shed light on the true impact of the proposed merger and offers nothing in their place. The reason that AT&T cannot propose alternative metrics is simply because it cannot – no independent analysis of this merger would conclude that it benefits the public interest.

B. Applicants Theoretical Argument That They Have Neither Incentive Nor Ability To Influence Handset Manufacturers, Applications Providers, Or Otherwise Exercise Monopsony Power Is Negated By The Empirical Evidence That AT&T Has Demonstrated An Ability To Exercise Such Power Even At Existing Levels of Concentration.

Incredibly, AT&T asserts that the proposed merger would not harm the ability of competitors to access cutting edge handsets.⁶⁵ This statement flies in the face of past and present industry practices that AT&T has long sought to shelter from regulation.⁶⁶ Even if the marketplace for handsets is global, with almost 50 percent of the marketplace AT&T would be well positioned to dictate which of those global offerings makes it to the United States.

In a shockingly contradictory passage, AT&T simultaneously claims that it “would not remotely have enough bargaining power to force all of these competing manufacturers to forsake AT&T’s wireless competitors”⁶⁷ post-merger, while

⁶⁵ *Id.* at 143-155.

⁶⁶ See AT&T Comments concerning *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497.

⁶⁷ Joint Opposition at 150.

acknowledging that it did just that when it “obtained an exclusive arrangement for the iPhone”⁶⁸ pre-merger. In its filing, AT&T essentially claims to have learned its lesson with the iPhone. Strangely, just four days before the opposition was filed Sony and AT&T announced that AT&T would be the exclusive carrier for Sony’s new Vita gaming phone.⁶⁹ Any lessons learned from the iPhone do not appear to have stuck.

AT&T is equally insistent that it poses no threat to the general availability of apps. This defies simple logic. AT&T has a history of blocking apps and features that it does not approve of.⁷⁰ Were this merger to be approved, AT&T would control almost half of the domestic wireless market. It is unlikely that app designers hoping to reach a broad audience would bother to develop a program it knew would be unavailable for half of the market.

AT&T has already proven itself willing and able to influence handset makers and app developers at its current market power. There is nothing to indicate that the acquisition of T-Mobile, and the further expansion of that power and reduction in competition such an acquisition would bring, will change that fact.

⁶⁸ *Id.* at 151.

⁶⁹ See Adam Biessener, *Playstation Vita Detailed, AT&T Exclusive, and Price*, GameInformer, June 6, 2011, available at <http://www.gameinformer.com/b/news/archive/2011/06/06/playstation-vita-unveiled-detailed-for-real.aspx>.

⁷⁰ See, e.g. Scott Webster, *AT&T Does it Again, Restricts Non-Market Apps on HTC Aria*, AndroidGuys, June 15, 2010, available at <http://www.androidguys.com/2010/06/15/att-restricts-nonmarket-apps-htc-aria/>; Jerry Hildenbrand, *Verizon and AT&T blocking tethering apps from the Android Market*, AndroidCentral, May 2, 2011, available at <http://www.androidcentral.com/verizon-and-att-blocking-tethering-apps-android-market>; Chris Foresman, *AT&T’s move to block iPhone SlingPlayer from 3G is poppycock*, May 13, 2009, available at <http://arstechnica.com/apple/news/2009/05/atts-move-to-block-iphone-slingplayer-from-3g-is-poppycokk.ars>.

In response, AT&T offers a set of expert predictions and elegant theoretical models which purport to demonstrate that AT&T-post transaction could not possibly influence the “global” equipment and application market. However, it has been well documented since 2007 that major U.S. providers, even at 2007 levels of concentration, could require global equipment manufacturers to disable pre-existing feature and applications as a condition of entering the American market.⁷¹ Once an event has already occurred, all other possible outcomes are foreclosed.

AT&T’s reliance on theoretical models purporting to prove that it *would not* and *could not* require global equipment manufacturers to alter their equipment or offer exclusivities is rebutted by the empirical reality that AT&T already has. A theory that states that an event that has already occurred cannot occur must be wrong. This is not a matter of “anecdotal evidence” versus some other sort of evidence. It is a question of actual reality versus one of several possible theoretical models that cannot account for a pre-existing fact. A theory that no swans are black is disproven with the sighting of a black swan. A theory that AT&T could not exercise market power with even greater market share in a more concentrated market is disproven by AT&T’s pre-existing ability to exercise market power in the existing market. To the extent the declarations from AT&T’s experts rely on a set of assumptions contrary to the empirical reality, they are fundamentally flawed. When the declaration of AT&T’s experts is proven impossible, whatever remains, however inconvenient for AT&T, must be true.

⁷¹ See Tim Wu, “Wireless Net Neutrality: Cellular Carterfone and Consume Choice in Mobile Broadband,” New America Foundation (2007) available at http://www.newamerica.net/publications/policy/wireless_net_neutrality (extensively documenting alterations made by global providers to existing handsets in order to gain access to systems of AT&T and others).

C. AT&T's Claimed "Spectrum Congestion" Problems Are Not Solved By The Merger.

One major benefit that AT&T claims will result from the merger is its increased capacity to deal with spectrum congestion in the wake of rapidly increasing data usage by its smartphone customers. Acquiring T-Mobile, according to the Applicants, will allow increased capacity and efficiencies through pooling of spectrum and cell sites. However, these claims are not borne out by the current state of affairs in the market.

As demonstrated in the attached draft report from IAE,⁷² AT&T's existing spectrum depth is greatest in many of the cities where it faces the most severe congestion on its network, such as San Francisco.⁷³ Furthermore, Verizon manages to serve more customers with the same, or even less, spectrum than AT&T currently holds.⁷⁴ AT&T also claims a "spectrum crunch" in rural areas. Despite the fact that LTE deployment would be ideally suited to deploy mobile broadband in rural areas, AT&T still has not launched LTE commercially in its 700 MHz spectrum.⁷⁵ AT&T could easily provide for rural LTE deployment by leasing its 700 MHz spectrum in areas where it has not itself deployed, much as Verizon has done. AT&T has refused to do so. These facts would seem to indicate that congestion is not due to the constraints of physics or some other natural laws, but rather AT&T's own lack of investment in deployment.⁷⁶

⁷² In light of the compressed comment period, Public Knowledge has attached a draft report from IAE to these reply comments. Public Knowledge will update the record accordingly with the final version when it becomes available.

⁷³ Alan Pearce, Ph.D., Barry Goodstadt, Ph.D., and Martyn Roetter, Ph.D., *A Preliminary Analysis of the Impacts and Consequences of the Proposed AT&T/T-MOBILE Merger*, Information Age Economics at 49 (June 2011).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 49-50.

Nor would the acquisition of T-Mobile make rural deployment any more likely for the merged entity. The spectrum gained from an acquisition of T-Mobile would not likely aid in rural broadband deployment. T-Mobile holds no spectrum below 1 Ghz, meaning that any added spectrum would not be as useful for rural deployment.⁷⁷

AT&T can avail itself of any number of options for mitigating congestion problems without resorting to a vast increase in market concentration. These include: offloading traffic from the mobile network onto Wi-Fi and femtocell networks; content pre-positioning in devices; caching, device-aware content compression, and more efficient protocols.

D. T-Mobile’s Claimed “Spectrum Paucity” Problems Are Not Solved By The Merger, And Can Be Resolved In Its Absence.

Another common theme in Applicants’ filings rebutted by IAE is the doom overhanging T-Mobile due to its lack of spectrum for LTE deployment. However, T-Mobile’s current levels of spectrum are not a barrier to LTE and other wireless deployment. T-Mobile could buy or lease currently unused spectrum from SpectrumCo or Clearwire, for example, or it could expand or create new partnerships with other operators interested in the US market. In addition, T-Mobile can continue to enhance its existing HSPA/HSPA+ networks while making room for LTE deployment even within its existing spectrum holdings.

Clearwire and SpectrumCo both currently have unused spectrum in bands that are well-suited to LTE deployment, and for which equipment and devices are already

⁷⁷ *Id.*

commercially available.⁷⁸ T-Mobile could engage in a joint or shared arrangement with either or both of these entities, as T-Mobile has already done with Orange in the UK.⁷⁹

T-Mobile's existing spectrum bands also allow for current LTE deployment in a number of geographic areas. In many of its urban markets, T-Mobile could introduce LTE in its PCS bands without any additional spectrum acquisition, provided that it refarms some frequencies currently devoted to GSM.⁸⁰ In New York, for example, it could deploy LTE on a 5 MHz carrier in about 3-4 years, and even sooner on smaller carriers of 1.4 and 3 MHz.⁸¹ In San Francisco, T-Mobile should be able to deploy LTE on a 5 MHz carrier and eventually on a 10 MHz carrier.⁸² In each of these cases, GSM would remain supported on a 5 MHz carrier in the PCS band.

Improved carrier aggregation technology and improved versions of HSPA+ can also improve peak capacity, average data rate, and cell edge performance, without additional spectrum. In New York City, for instance, HSPA multi-carrier aggregation in the AWS band with three 5 MHz carriers will support a theoretical peak download data rate of 126 Mbps, compared to the current 42 Mbps rate.⁸³ Once LTE can be aggregated with HSPA then a 5MHz LTE carrier could have a theoretical peak data download rate of 163 Mbps.⁸⁴

Any of these expenditures could now be assisted in part by the breakup fee that T-Mobile would receive in the wake of a rejected merger. Not only would T-Mobile receive

⁷⁸ *Id.* at 54.

⁷⁹ *Id.*

⁸⁰ *Id.* at 54-55.

⁸¹ *Id.* at 55.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

\$3 billion in cash, it would also get additional AWS spectrum. Data roaming agreements and additional investment aided by these new gains would significantly improve T-Mobile's deployment abilities.⁸⁵

E. AT&T's Lack of Towers And Cell Sites Is No More Likely To Be Relieved As a Result Of the Merger Than Otherwise.

Another of the claimed efficiencies of the proposed merger is that the AT&T would be able to take advantage of T-Mobile's existing assets to speed deployment and create efficiencies. Notable among these assets are T-Mobile's tower holdings. AT&T has in the past cited difficulties in deployment due to a lack of access to cell sites.⁸⁶ However, as the IAE Report shows, T-Mobile had for some time planned to sell its 49,000 towers to raise an estimated \$2 billion in cash.⁸⁷ The availability of these towers at this price clearly suggests that a lack of towers or cell sites can be remedied readily through means other than a wholesale acquisition of a competitor.

Furthermore, outright purchase of the towers is certainly not the only means by which AT&T could gain access. Non-carrier tower and cell site companies, who lease access to their facilities, would have been likely purchasers of T-Mobiles assets, and AT&T, already the largest single customer of the most important US tower companies, could easily have purchased access from them.

In fact, AT&T's claimed lack of cell sites is suspect as well. As of the end of 2009, AT&T reported 51,470 cell sites, in comparison to Verizon's 45,397.⁸⁸

Furthermore, between September 2008 and September 2009, Verizon increased the

⁸⁵ *Id.* at 54.

⁸⁶ *Id.* at 48-49.

⁸⁷ *Id.* at 28, 58.

⁸⁸ *Id.* at 50.

number of cell sites it was using by 39.5%, while AT&T increased its cell sites usage by only 5.5% over the same period. Thus, not only was AT&T operating 11% more cell sites than Verizon in 2009, it had until that year 40% more.⁸⁹ This large number of cell sites counters the impression AT&T gives of urgent need to acquire more access to new sites. Although AT&T claims difficulties in gaining access to cell sites through co-location, this does not in any way differentiate it from Verizon or any other wireless provider. AT&T's specific need to merge with T-Mobile for site access is thus no more than a belated justification for poor network capacity planning and unwillingness to invest in network upgrades.⁹⁰

F. The Proposed Merger Is Unlikely To Result In Net Creation Of Jobs Or Investment.

Although some merger proponents have claimed that the merger will create up to 96,000 jobs due to an \$8 billion investment in infrastructure, these claims are not balanced by the gross loss of jobs or investment likely to result from consolidation. One of the elementary sources of efficiencies in a merger is the elimination of duplicate facilities and support services. The large number of jobs that would be rendered redundant by the merger would more than offset any increase created by the claimed amount of infrastructure investment.⁹¹ Applicants anticipate that they will incur between \$6 billion and \$7 billion in "integration costs." A large proportion of those savings likely take the form of severance packages for laid-off workers.⁹²

⁸⁹ *Id.*

⁹⁰ *Id.* at 51.

⁹¹ *Id.* at 28, 48.

⁹² *Id.* at 28.

In addition, should the merger be allowed to continue, AT&T would spend far more than \$8 billion in its consummation. If we take as a given that an \$8 billion investment in infrastructure would generate up to 96,000 jobs, then the \$25 billion that would be used to purchase T-Mobile could be put to better use generating 300,000 or so more jobs through infrastructure investment instead.⁹³ Nothing currently prevents AT&T from beginning this investment now, and nothing guarantees that it will deliver on its promised smaller investment should the merger actually be approved.

G. T-Mobile Is A Significant Competitor To AT&T, And Other Small Carriers Would Not Be Substantial Competitors To The Merged Entity.

T-Mobile is one of the most significant competitors to AT&T, with 34 million subscribers and net annual income of \$1.4 billion, as well as being the only other GSM/HSPA operator in the United States. T-Mobile is the fourth largest wireless provider in the US, behind Sprint Nextel, which has 50 million subscribers.⁹⁴

While Applicants claim that other wireless service operators may exert competitive pressure on the merged entity, the supposed competitors possess insignificant amounts of market share. Metro PCS, for example has fewer than 10% of AT&T's subscribers alone. Other emerging potential competitors cited by AT&T include Cox Communications and LightSquared. However, LightSquared currently has no customers, operating network, or sufficient funding.⁹⁵ Furthermore, LightSquared's entire business model, based on wholesale LTE, is under threat due to possible interference with GPS

⁹³ *Id.* at 48.

⁹⁴ *Id.* at 22.

⁹⁵ *Id.* at 23.

systems.⁹⁶ Cox Communications likewise poses little competitive threat, as it has recently been changing its position regarding deploying its own AWS and 700 MHz networks.⁹⁷

Non-facilities based wireless operators, MVNOs, likewise cannot form significant competition to a merged, facilities-based carrier. By their nature, MVNOs rely upon their large facilities-based competitors for access to services and capacity. MVNOs confronted with a GSM/HSPA monopoly and a wireless duopoly generally face a losing battle to preserve their margins, and will likely be eliminated from the marketplace altogether.⁹⁸

H. The Merger Will Harm International Roaming Provision

By eliminating all competition among GSM/HSPA wireless providers, the merger not only creates a monopsony with regard to compatible handset manufacturers; it creates a monopoly with which foreign wireless GSM/HSPA operators must negotiate in order to provide their customers with international roaming services. Ironically, the merger would reverse the roles played by the United States and many foreign countries several years ago, in which multiple competitive US operators had to negotiate with foreign monopoly incumbents.⁹⁹ In such cases, the monopoly can play foreign competitors against each other in order to gain asymmetric prices in its favor. The past practices of foreign monopoly providers should serve as a predictive guide to the merged entity's likely behavior.¹⁰⁰

Furthermore, even if they were able to negotiate roaming agreements with the merged entity, Canadian and Latin American carriers who operate HSPA in the AWS

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 23-24.

⁹⁹ *Id.* at 33-34.

¹⁰⁰ *Id.*

band will lose the ability to offer international data roaming for their customers with existing handsets.¹⁰¹ The planned elimination of HSPA service in AWS would leave such customers without data roaming unless they already had multiband devices.¹⁰² US-based customers of the merged entity would likewise have a reduced ability use their own handsets to roam internationally, again, unless the merged entity allowed customers to use multi-band handsets, as it would have no direct interest in providing handsets using HSPA in the AWS band.¹⁰³

US mobile customers would also have to pay higher roaming charges than their counterparts in other developed countries.¹⁰⁴ Without T-Mobile to provide competitive pressure, AT&T would have less incentive to negotiate lower international roaming prices for its customers. Foreign visitors, by the same token, would also pay higher rates, as their providers would have little choice but to accede to the roaming rates set by the newly-created GSM/HSPA monopoly operator.

CONCLUSION

The record compiled in this proceeding demonstrates that the proposed transaction is not merely contrary to the public interest, but actually contrary to law. However, even if Applicants could provide some mechanism for avoiding the absolute prohibition on the proposed license transfers under Section 314, the merger would still be contrary to the public interest. Applicants have sought to rebut the record of substantial harms demonstrated by PK and other Petitioners with a combination of “voluntary commitments” and economic models whose assumptions are contradicted by the

¹⁰¹ *Id.* at 35.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

occasional exercise of market power at existing levels of concentration. Further, as the attached IAE Report demonstrates, the promised benefits are either illusory or achievable through other means.

Wherefore, the Application must be denied, or in the alternative, designated for hearing.

Respectfully submitted,

PUBLIC KNOWLEDGE

/s Harold Feld
Legal Director
Public Knowledge

DECLARATION OF HAROLD FELD

I, Harold Feld, declare under penalty of perjury that:

1. I have read the foregoing “Reply Comments of Public Knowledge.”
2. I am the legal director for Public Knowledge (PK), an advocacy organization with members, including AT&T and T-Mobile subscribers, who, in my best knowledge and belief, will be adversely affected if the Commission approves the merger.
3. PK members use the wireless devices associated with their accounts to make and receive voice calls, send and receive text messages, and use data services when they travel to various locations throughout the United States.
4. In my best knowledge and belief, PK members will be directly and adversely affected if the Commission allows the proposed merger of AT&T and T-Mobile to proceed. They will likely face higher rates for voice, data, and text messages. Furthermore, if the merger is approved, they will be subject to more restrictive content-related policies regarding data and text messaging services, more restrictive usage plans and data caps, and will have fewer choices of wireless devices and usage plans.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s Harold Feld
Legal Director
Public Knowledge

CERTIFICATE OF SERVICE

I certify that on May 31, 2011, I sent the foregoing "Petition to Deny" by email to the following:

Nancy Victory
Wiley Rein, LLP
1776 K Street, N.W.
Washington, D.C. 20006
202-719-7344
nvictory@wileyrein.com
Counsel for Deutsche Telekom AG
and T-Mobile USA, Inc.

Kate Dumouchel
Arnold & Porter, LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
202-942-5000
kate.dumouchel@aporter.com
Counsel for AT&T, Inc.

Peter Schildkraut
Arnold & Porter, LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
202-942-5634
peter.schildkraut@aporter.com
Counsel for AT&T, Inc.

/s Michael Weinberg
Staff Attorney
Public Knowledge