

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

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

**REPLY OF LEAP WIRELESS INTERNATIONAL, INC.
AND CRICKET COMMUNICATIONS, INC.**

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

James H. Barker
Matthew A. Brill
Alexander Maltas
LATHAM & WATKINS LLP
555 Eleventh St. NW, Suite 1000
Washington, DC 20004

*Counsel for Leap Wireless International, Inc.
and Cricket Communications, Inc.*

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INTRODUCTION AND SUMMARY

The record in this proceeding demonstrates a remarkable degree of consensus within the wireless industry and among consumer interests that the proposed acquisition of T-Mobile USA, Inc. by AT&T Inc. would create significant harms to competition to the detriment of consumers. The record confirms that the proposed acquisition would increase AT&T's already sizeable market power and push the industry into effective duopoly, continuing the trend of concentrating scarce spectrum and capital in the hands of two massive carriers. There is significant evidence that the increased concentration created by the proposed acquisition would raise the prices of data roaming agreements and significantly impede the ability of smaller carriers to obtain such agreements at all. The proposed acquisition also would stifle innovation by eliminating a maverick competitor in T-Mobile, reducing AT&T's incentives to innovate, and boosting AT&T's power to squelch innovations by others. And the proposed acquisition would give AT&T monopsony power in the acquisition of handsets and devices, further enabling it to impair competitors' ability to obtain the marquee devices that consumers demand. All of these harms to competition would directly injure consumers in the form of higher prices, fewer choices, and less innovation.

Several economic analyses in the record confirm that these potential harms are likely and credible. These analyses establish that, as a matter of economics:

- The proposed acquisition would give AT&T the incentives to raise the price of its services to consumers, and smaller carriers would not be able to discipline AT&T's prices.¹

¹ Joint Declaration of Steven C. Salop, Stanley M. Besen, Stephen D. Kletter, Serge X. Moresi, and John R. Woodbury, *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*,

- Data roaming rates would likely rise as a result of the transaction.²
- The proposed transaction would further disadvantage smaller carriers from obtaining the desirable handsets that their customers demand.³
- The transaction would reduce AT&T’s incentives to innovate and would raise the costs or delay the development of new technologies.⁴
- The transaction would render the industry more vulnerable to anticompetitive coordination by AT&T and Verizon.⁵
- AT&T could achieve most of its claimed efficiencies without the transaction.⁶

Weighed against these sobering and likely outcomes, AT&T and T-Mobile’s lengthy opposition and its stack of appendices are a remarkable display of obfuscation and misdirection. A transaction that would generate enormous market power and dramatic industry concentration gets spun as a transaction that will somehow “promote competition and innovation.”⁷ A transaction that would consolidate massive amounts of scarce spectrum in AT&T’s hands becomes a transaction that will somehow enable “more efficient use of spectrum.”⁸ The small

attached to Petition to Deny of Sprint Nextel Corporation, WT Docket No. 11-65 (filed May 31, 2011) (“CRA Declaration”), at 6-7; American Antitrust Institute Comments (“AAI Comments”) at 14-15; Free Press Petition to Deny (“Free Press Petition”) at 26-31.

² CRA Declaration at 9; AAI Comments at 19-20.

³ CRA Declaration at 9; AAI Comments at 20; Free Press Petition at 34.

⁴ CRA Declaration at 9; Free Press Petition at 34-35.

⁵ CRA Declaration at 10-11; AAI Comments at 17-19; Free Press Petition at 35-37.

⁶ CRA Declaration at 11-12; Free Press Petition at 39-42.

⁷ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (filed June 10, 2011) (“Opposition”), at 93.

⁸ Opposition at 59.

market shares of Leap and others are ignored in favor of their “impressive growth.”⁹ And the applicants’ core affirmative case is that most of the asserted efficiencies “can arise only from the integration of two networks,”¹⁰ which improbably yet conveniently implies that a merger among competing wireless carriers is *always* efficient.¹¹

Even charitably portrayed, the applicants’ rhetoric about the potential benefits of this acquisition is greatly overstated. They describe and predict “vibrant” post-acquisition competition, yet point to carriers that are a tiny fraction of their size. The *combined* subscribership of MetroPCS, Leap, U.S. Cellular, Cincinnati Bell, and Cellular South would be less than 1/6th the size of post-merger AT&T, and indeed their *combined* subscribership today remains far smaller than that of T-Mobile alone. (Surely it is not a good sign for the applicants when they must resort to citing a competitor “with nearly 900,000 subscribers” as a purported constraint on a behemoth with over 131 million subscribers.)¹² The applicants also argue that any discussions of an industry duopoly are “overwrought,”¹³ without ever explaining what, exactly, is overwrought about using that term to describe two carriers that would together control 76 percent market share of subscribers and would possess 89 percent of industry EBITDA.¹⁴ Similarly, the applicants emphasize the importance of adding spectrum to “bridge the gap” to

⁹ *Id.* at 128.

¹⁰ *Id.* at 6-7.

¹¹ The applicants’ argument also is ironic because it is the *inefficiency* of AT&T’s network integration to date that requires it to address its alleged problem of “short-to-intermediate term spectrum exhaust,” through yet another proposed network integration. *See* Opposition at 191.

¹² *Id.* at 11.

¹³ *Id.* at 4.

¹⁴ *See* Leap Petition to Deny at 12. *See, e.g.,* <http://en.wikipedia.org/wiki/Duopoly> (listing AT&T and Verizon as a business example of “duopoly”).

LTE,¹⁵ as if moderating a short-term problem is a legitimate justification for a massive deal that would irreparably alter the industry to the detriment of consumers.

More fundamentally, the applicants utterly fail in their Opposition to explain how the credibility of their case for the merger, built as it is on the alleged alleviation of spectrum constraints, is not fatally undercut by the fact that AT&T will voluntarily cede billions of dollars' worth of AWS spectrum to T-Mobile as a part of the breakup fee in the event that the acquisition is not approved.¹⁶ The disconnect simply remains unexplained. They also strain credibility by continuing to claim that T-Mobile lacks a path to LTE, and that its HSPA+ network is not comparable to LTE, even as T-Mobile simultaneously announces that it is "doubling the speed of its 4G network" and already is delivering "speeds on par with LTE."¹⁷ And the applicants torpedo their credibility further in suggesting that taking thousands of private jobs and turning them into many fewer union jobs is somehow a public benefit.¹⁸

When the applicants eventually get around to discussing potential competitive harms, they present a highly misleading portrait of competition. In essence, the applicants look backward to a state of competition that may have existed years ago, but certainly no longer exists even today, let alone after this transaction. For example, the applicants argue that there will be no harm to roaming agreements because AT&T will remain an eager "net" purchaser of roaming

¹⁵ Opposition at 56.

¹⁶ See Steven M. Davidoff, *AT&T Deal Shows How Different a Private Sale Can Be*, N.Y. Times, Mar. 25, 2011, available at <http://dealbook.nytimes.com/2011/03/25/att-deal-shows-how-different-a-private-sale-can-be>; Philip Elmer-DeWitt, *AT&T-Mobile: What the Analysts Say*, CNN Money, (Mar. 21, 2011), <http://tech.fortune.cnn.com/2011/03/21/att-mobile-what-the-analysts-say>; see also Stock Purchase Agreement § 7.5 and Annex E (attached to Application).

¹⁷ See "Fact Sheet: America's Largest 4G Network Doubles Its Speed," June 16, 2011, available at <http://newsroom.t-mobile.com/articles/hspa42-fact-sheet>.

¹⁸ Opposition at 88-89.

minutes who will have the incentive to negotiate and keep prices down. That may have been true once upon a time, but the Commission *just two months ago* found that “AT&T has largely refused to negotiate domestic 3G roaming arrangements,” and is “unlikely” to offer LTE roaming agreements “at any time in the near future.”¹⁹

The applicants also claim that there is plenty of handset availability by pointing to the wide array of choices for GSM handsets. But AT&T and Verizon have taken recent steps to impair the availability and interoperability of handsets in the 700 MHz band and of LTE equipment,²⁰ and it is no coincidence that they are the only two carriers who sell the iPhone. That problem would only get worse if the proposed acquisition is approved.

Similarly, the applicants argue that there should be no concern about anti-competitive spectrum consolidation. But AT&T has been on a spectrum acquisition binge for more than a decade and, with Verizon, commands the lion’s share of the nation’s mobile wireless spectrum, dominates auction after auction, and controls most of the cash flow needed for further acquisitions. In essence, the legal and policy underpinnings of the applicants’ merger case relies on industry conditions that have not existed for years, and for good reason they do not hazard a look forward at what the competitive dynamics of the industry would be if the transaction is approved—it is not a pretty story.

¹⁹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265 (April 7, 2011) (“*Data Roaming Order*”), ¶¶ 25, 27.

²⁰ *See, e.g., Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment to Be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks*, Petition for Rulemaking, at ii-iii, RM-11592 (filed Sep. 29, 2009); D. Hyslop and C. Helzer, “700 MHz Band Analysis,” (May 6, 2010), attached to Ex Parte of MetroPCS *et al.*, WT Docket No. 06-150, PS Docket No. 06-229, GN Docket No. 09-51, RM Docket No. 11952 (May 10, 2010).

Ultimately, no one doubts that there would be *some* potential efficiencies from combining two large wireless networks. But the central question, not seriously addressed by the applicants, is at what competitive and public interest costs? The Commission has ruled that “where a proposed merger would result in a significant increase in concentration in an already concentrated market, parties advocating the merger will be required to demonstrate that claimed efficiencies are *particularly large, cognizable and non-speculative.*”²¹ The current record does not remotely satisfy that standard. The record reveals that the moderate potential improvements in AT&T’s capacity do not justify a transaction that would consolidate market power, foreclose competition, drive up retail and wholesale prices, and irreversibly injure the competitive dynamics of the industry—all of which would harm consumers. The Commission therefore should deny the applications.

DISCUSSION

I. THE PROPOSED ACQUISITION WOULD SIGNIFICANTLY INCREASE CONCENTRATION IN AN ALREADY CONCENTRATED MARKET

As Leap explained in its opening petition, multiple economists have calculated that the Hirschman-Hirfindahl Index (HHI) already is so high as to indicate a highly concentrated market, and that this transaction would increase industry concentration to unprecedented levels.²² Leap also demonstrated that in large numbers of its service markets, the transaction would dramatically alter the dynamics of competition in those markets by giving AT&T dominant

²¹ *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. Applications for Transfer of Control*, Hearing Designation Order, CS Docket No. 01-348, ¶ 103 (released Oct. 18, 2002) (emphasis added). In *EchoStar/Hughes*, the Commission concluded that any purported benefits were greatly outweighed by anticompetitive effects because the transaction would “substantially increase concentration in an already concentrated market,” reduce innovation, and ultimately harm consumers. *Id.* ¶¶ 104, 151-187, 285-287. So too, here.

²² See Leap Petition at 11-12.

market share and enormous shares of the available spectrum.²³ The applicants do not (and cannot) seriously disagree that numerous conventional metrics establish that the wireless industry already is highly concentrated, and that this transaction would greatly increase such concentration.²⁴ They instead try to divert attention to other factors that they suggest would promote a more dynamic competitive marketplace. But their arguments are misplaced.

The applicants' discussion of the supposedly "highly competitive" wireless market has an air of unreality. They point to a number of wireless companies as potential constraints on post-merger AT&T's pricing with no acknowledgement that these companies are a fraction of AT&T's size, and indeed a fraction of T-Mobile's size. Leap, for example, is one of the applicants' principal examples of vibrant competition to AT&T, yet Leap remains dramatically smaller than AT&T by any possible measurement. At the end of most recent quarter, Leap had approximately 5.8 million subscribers, compared to 97.5 million for AT&T alone, and 131.1 million for AT&T plus T-Mobile.²⁵ Many of the other competitors that the applicants cite as constraining forces are even smaller. Indeed, it is highly revealing that the applicants must resort to highlighting a competitor "with nearly 900,000 subscribers"—significantly less than one percent of the size of post-merger AT&T—to justify their argument that the industry is competitive.

The notion that a handful of small competitors, as scrappy and resilient as they may be, could have a serious impact on post-acquisition AT&T's pricing decisions is little more than wishful thinking, and consumers inevitably would pay higher prices as a result of this

²³ See *id.* at 13-14.

²⁴ Opposition at 132.

²⁵ See Leap Petition at 7.

acquisition.²⁶ And the fact that Leap added a sizeable number of subscribers last quarter does not make a meaningful difference for purposes of analyzing the competitive effects of the proposed merger.²⁷ AT&T continues to dwarf Leap by any measurement that should matter for evaluating whether Leap can discipline AT&T's pricing. The applicants are wrong to pretend that Leap's first quarter results establish that Leap would be a significant constraint on post-merger AT&T's pricing decisions.

The applicants also argue that overall general growth in the wireless industry is a sign of strong competition.²⁸ There is no question that wireless subscriber numbers have been growing as more people view mobility as a crucial component of their voice and data communications and transition from wireline to wireless communications. But there also is no question that the wireless industry has been moving steadily towards duopoly for years, even as the overall number of subscribers has grown. The Commission's most recent wireless competition report concluded that even in the midst of overall growth in the wireless industry, AT&T and Verizon—already by far the two largest carriers—continued to gain market share despite their

²⁶ The applicants' economists dismiss the concerns from wireless carriers that AT&T would raise consumer prices, on the ground that competitors actually would benefit if AT&T raised its prices. *See* Reply Declaration of Dennis W. Carlton et al., ¶ 9. The observation is inapt in this context, because the reason that virtually every wireless carrier but Verizon has so vigorously expressed concern with the acquisition is that it would give AT&T further dominance and control over essential inputs such as devices and roaming, and thereby would raise rivals' costs and hinder rivals' ability to compete. Wireless carriers such as Leap are concerned about rising retail prices because those higher prices would be caused by AT&T's efforts to cause long-term damage to the cost structure of its competitors. *Cf.* Steven C. Salop and David Scheffman, *Cost-Raising Strategies*, *Journal of Industrial Economics* (1987); David Scheffman and Steven Salop, *Raising Rivals' Costs*, *American Economic Review*, Vol. 73, No. 2, at 267-271 (May 1983). Thus, only AT&T would benefit from the market power that will allow it to charge higher prices, while competition and consumers suffer the harm.

²⁷ *See* Opposition at 11.

²⁸ Opposition at 126.

already dominant positions.²⁹ AT&T attempts to obscure its dominance by highlighting extensive advertising in the industry and multiple product/service combinations as evidence that the wireless industry is “vibrantly competitive,”³⁰ but the conclusion does not follow in this case: none of those phenomena are inconsistent with AT&T having or exacerbating significant market power. Indeed, Leap today faces challenges in securing local sponsorships and advertising placement as national carriers such as AT&T exercise their media buying leverage. AT&T’s leverage of course would increase significantly as a result of this acquisition.

II. THE RECORD ESTABLISHES THAT THE PROPOSED ACQUISITION WOULD INCREASE ROAMING RATES

The record contains extensive evidence that the proposed acquisition would increase the prices that carriers pay for wholesale voice and data roaming. As Leap and others have explained, the proposed acquisition would create a monopoly for national carriers who provide 3G GSM roaming.³¹ The applicants claim that Leap has nothing to worry about because it uses CDMA technology.³² But the transaction would create severe concentration, with AT&T controlling GSM roaming today, and AT&T and Verizon controlling LTE roaming in the future. Such concentration would give both AT&T and Verizon the incentive to raise prices, and the incentive to coordinate prices,³³ especially as the Commission’s recent Data Roaming Order

²⁹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, ¶ 4 (May 20, 2010) (“14th Wireless Competition Report”).

³⁰ Opposition at 126.

³¹ Leap Petition at 21-22; MetroPCS/NTELOS Comments at 56; Sprint Nextel Petition at 43; COMPTTEL Petition at 2; Public Interest Commenters at 3.

³² Opposition at 155-156.

³³ See Sprint Nextel Petition at 43-45; see also ERS Group, “Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic

endorses comparisons to other agreements to evaluate the reasonableness of roaming rates and terms. In other words, the transaction would likely cause prices to rise industry wide. If AT&T and Verizon are able to establish what constitutes “commercially reasonable” terms and conditions, then any carrier that relies on roaming—and most importantly its customers—would suffer the consequences.

The applicants also argue that because roaming agreements are bilateral, AT&T is unlikely to raise rates because such rates would be reciprocal.³⁴ That is a remarkable argument coming from the carrier that the Commission found has repeatedly stymied efforts by smaller carriers to reach data roaming agreements at all. It is simply impossible to square AT&T’s argument that the reciprocal nature of roaming agreements means that it would inevitably offer reasonable terms and prices when the Commission *earlier this year* found that “AT&T has largely refused to negotiate domestic 3G roaming arrangements,” and is “unlikely” to offer LTE roaming agreements “at any time in the near future.”³⁵ AT&T’s arguments about the reasonableness of its predicted negotiating conduct thus are flatly contradicted by its current behavior.

In the same vein, the applicants argue that AT&T’s own roaming requirements would provide it with built-in incentives to negotiate reasonably.³⁶ But the dynamics of AT&T’s roaming needs are quite different from those of smaller and regional carriers. Smaller and regional carriers depend on *nationwide* carriers like AT&T to achieve nationwide coverage for

Analysis, (Nov. 28, 2005), attached to Comments of Leap Wireless International, Inc., WT Docket No. 05-265 (filed Nov. 28, 2005) (describing duopoly pricing and incentives for coordination in wholesale roaming rates).

³⁴ Opposition at 158.

³⁵ *Data Roaming Order* ¶¶ 25, 27.

³⁶ Opposition at 157-158.

their subscribers, and there are only four such carriers today. AT&T, by contrast, can depend on targeted, piecemeal roaming arrangements to fill out its already extensive footprint.

Consequently, AT&T may need roaming in the aggregate, causing it still to be a net “purchaser” of roaming services (unlike Verizon), but for each individual agreement, AT&T dwarfs its negotiating partner. For each individual negotiation, AT&T has extensive leverage relative to the much smaller parties to its agreements, and, as the Commission has already determined, has repeatedly exercised that leverage to deny roaming agreements altogether.

Indeed, one of the best analyses of this issue comes from T-Mobile itself. T-Mobile in November 2010 complained to the Commission that it had “not been able to achieve a 3G roaming agreement with AT&T” despite “AT&T’s apparent willingness to provide 3G roaming to foreign carriers.”³⁷ When AT&T continued to stonewall, T-Mobile argued that “while roaming has historically been competitive and reciprocal, *i.e.*, there were multiple potential roaming partners and a mutual need for roaming, AT&T’s [refusal to negotiate] suggests that *roaming is increasingly becoming a monopoly service provided on a unilateral basis.*”³⁸ T-Mobile attributed “AT&T’s intransigence” as being “a direct result of the dominant position it now holds in the roaming marketplace.”³⁹ These are precisely the concerns that Leap and other petitioners are raising in this proceeding. Thus, T-Mobile itself understands that AT&T’s has the power and incentive to unilaterally deny roaming agreements to carriers, and does in fact exercise that power to refuse agreements or demand oppressive terms—all to the detriment of

³⁷ See Ex Parte Letter from Howard J. Symons, counsel for T-Mobile USA, Inc., to Marlene Dortch, Secretary, WT Docket No. 05-265 (filed Nov. 2, 2010).

³⁸ See Ex Parte Letter from Howard J. Symons, counsel for T-Mobile USA, Inc., to Marlene Dortch, Secretary, WT Docket No. 05-265 (filed Nov. 10, 2010) (emphasis added).

³⁹ See Ex Parte Letter from Thomas J. Sugrue, Senior Vice President, Government Affairs, T-Mobile USA, Inc., to Chairman Julius Genachowski, WT Docket No. 05-265 (filed Mar. 10, 2011).

consumers who expect nationwide coverage for voice and data services.⁴⁰ The problem will get much worse if the proposed acquisition is approved.

In addition, the Opposition emphasizes the reciprocal rate structure of data roaming agreements, but ignores the crucial concern that AT&T would gain through this transaction sufficient market power that that it would no longer tolerate reciprocal rates. There is no rule that requires roaming agreements to have reciprocal pricing, and a dominant AT&T with a broader network and greater market power would have a decreasing need for roaming and would have the ability to insist on receiving higher prices than it pays.

The applicants also make the specious claim that there would not be a monopoly in GSM roaming because AT&T and T-Mobile use different spectrum bands for GSM service, such that devices are not likely to be interoperable between their GSM networks.⁴¹ That argument already has been completely refuted by T-Mobile itself. When AT&T refused to enter into a data roaming agreement with T-Mobile and specifically raised the argument that roaming between T-Mobile and AT&T was not feasible because their respective 3G networks operate on different bands, T-Mobile stated that “this is a non-issue” because its devices were in fact capable of roaming on AT&T’s network.⁴²

⁴⁰ T-Mobile remains concerned enough about this issue that it filed a motion last week to intervene in support of the Commission in Verizon’s appeal of the *Data Roaming Order*. See Motion, T-Mobile USA Inc., *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Nos. 11-1135 and 11-1136, (D.C. Cir. filed June 13, 2011).

⁴¹ Opposition at 158-159.

⁴² See Ex Parte Letter from Thomas J. Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene Dortch, Secretary, WT Docket No. 05-265 (filed Nov. 9, 2010).

Finally, the applicants argue that the Commission's recent *Data Roaming Order* is sufficient to address these concerns.⁴³ Of course, the Commission's rules are presently being challenged in federal appellate court by Verizon, so it is premature to argue that there is a backstop of any sort to AT&T's anticompetitive behavior with respect to data roaming services. In any event, however, the applicants miss the point that a post-AT&T/T-Mobile world would be a qualitatively different competitive environment than the current roaming rules contemplated or are equipped to police. With respect to pricing, for example, the Commission will evaluate the reasonableness of terms and conditions based on comparable market arrangements. But if there is no genuinely competitive market, and AT&T and Verizon have market dominance, then the benchmark for comparison would evolve into a benchmark against duopoly imposed pricing. As many commenters recognize, the *Data Roaming Order* does not go nearly far enough to ensure that post-merger AT&T would act in good faith.⁴⁴ In sum, AT&T cannot embrace a regulatory backstop whose premise is the existence of a reasonably efficient market as it simultaneously tries to dominate that market.

III. THE PROPOSED ACQUISITION WOULD HARM COMPETITION BY CONCENTRATING SPECTRUM IN AT&T'S HANDS

The Commission has recognized that “spectrum is an increasingly pivotal input. In particular, lower-frequency spectrum possesses superior propagation characteristics that create certain advantages in the provision of mobile wireless broadband service, especially in rural areas.”⁴⁵ History and the record in this proceeding demonstrate that AT&T has been on an unprecedented spectrum acquisition binge—focusing particularly on beach-front 700 MHz and

⁴³ Opposition at 159-160.

⁴⁴ See RCA Petition at 15-17; COMPTTEL Petition at 2.

⁴⁵ *14th Wireless Competition Report*, ¶ 4.

AWS spectrum—that has already provided AT&T with the largest spectrum position of any carrier in the United States. Notwithstanding this key fact, AT&T’s central justification for the proposed transaction is that it requires yet more of this scarce input, with a gloss that it alone as a “pioneer[]” of “the mobile broadband revolution” confronts unique challenges in managing its network.⁴⁶

AT&T’s spectrum constraints, however, are not unique. AT&T does not (and cannot) dispute that all carriers today are attempting to address a rapid transition to spectrum-hungry data traffic.⁴⁷ Verizon, like AT&T, has the iPhone, multiple other smartphone offerings, and less spectrum than AT&T, yet it does not claim the spectrum and capacity constraints that AT&T does. Many carriers, including Leap, offer smart phones and mobile data services with far less spectrum than AT&T possesses, which requires intense efficiency. AT&T claims that it must support three different generations of technology, but many carriers also must support legacy generations of technology as they transition to newer ones. In short, AT&T faces the same industry dynamics as other carriers, and this fact, standing alone, cannot constitute a policy justification for merger at any cost. To the contrary, if it is true that carrier spectrum holdings in the near- to mid-term will be a zero sum game, with no new allocations on the horizon for several years, the best policy choice for the Commission is to foster an environment where AT&T, as the nation’s largest spectrum holder, is compelled to do more with its existing spectrum holdings, which are bountiful compared to the rest of the industry.

On this score, AT&T claims that opponents overstate its spectrum holdings and understate their own. But what is notable about the current record is that several different petitioners analyzed industry spectrum holdings from several different perspectives and all

⁴⁶ *Id.*

⁴⁷ *See* Opposition at 20.

reached the same conclusion: AT&T dominates the industry, and, apart from Verizon, by a tremendous margin.⁴⁸ As Leap demonstrated in its own petition, the proposed acquisition would give AT&T dramatically more spectrum than Leap possesses in numerous Leap markets. The applicants make a bizarre argument in response that Leap should have included additional bands of spectrum in the exhibits to its petition, and that its failure to do so somehow either overstates AT&T's spectrum holdings or understates Leap's.⁴⁹ The point is either not clearly articulated, uninformed, or simply mistaken. Leap's Exhibit 3 totaled AT&T's spectrum holdings in numerous bands post acquisition, and *adding* additional spectrum bands, no matter how minimal AT&T's holdings are in those additional bands, could only increase AT&T's total spectrum position. Thus, Leap's analysis if anything was conservative.⁵⁰ The bottom line is that AT&T has been utterly unable to refute the reality that it would have an overwhelming spectrum advantage over Leap in dozens of Leap markets as a result of this acquisition. The same observation is true relative to virtually every other carrier in the industry.

Finally, the applicants claim that concerns about spectrum aggregation are overblown because Clearwire and Light Squared have extensive spectrum assets.⁵¹ But AT&T itself has

⁴⁸ See, e.g., Leap Petition at 14-20; Sprint Nextel Petition at 57; MetroPCS/NTELOS Comments at 33; Rural Telecommunications Group at 16; Free Press Petition at 64.

⁴⁹ Opposition at 188.

⁵⁰ If the applicants instead had intended to refer to Leap's Exhibit 6, which demonstrates the gross disparity in spectrum holdings between AT&T and Leap in numerous Leap markets, the argument again does not support AT&T's position. Leap has minimal or zero holdings in the spectrum bands that AT&T wishes to include, so adding those bands to the calculus only would increase the disparity between Leap and AT&T.

⁵¹ Opposition at 181-186.

openly questioned the viability of Clearwire’s and LightSquared’s business models.⁵² LightSquared’s recent GPS interference problems also raise significant questions about its deployment options and timing.⁵³ As for Clearwire, it is far from clear what percentage of Clearwire’s spectrum will prove usable, and Clearwire itself disputes AT&T’s characterization of Clearwire as a “triple threat” in the wireless markets.⁵⁴ There is no evidence in the record that Clearwire or LightSquared’s spectrum holdings would mitigate the various harms to competition that Leap and other parties have identified as arising directly from AT&T’s vast spectrum holdings.⁵⁵ The absolute most that could be said about Clearwire’s or LightSquared’s respective abilities to limit the competitive harms arising from AT&T’s spectrum aggregation is that they are entirely speculative at this point—and the Commission routinely rejects speculative arguments that lack evidentiary support.⁵⁶

⁵² Sinead Carew, *AT&T: No Room For Both Clearwire, LightSquared*, REUTERS (May 13, 2011), <http://www.reuters.com/article/2011/05/13/us-summit-att-idUSTRE74C6F220110513>.

⁵³ See Amy Schatz, *More Tests Show GPS Interference from LightSquared’s Network*, Wall Street Journal, June 10, 2011. As Chairman Genachowski recently reiterated, LightSquared is not currently authorized to provide commercial service, and the Commission “will not permit LightSquared to provide commercial service until it is clear that potential GPS interference concerns have been resolved.” Letter from Chairman Genachowski to Senator Charles E. Grassley, May 31, 2011, available at <http://www.fcc.gov/document/chairman-genachowski-response-sen-grassley-regarding-lightsquareds-operation-mss-l-band>.

⁵⁴ Clearwire Comments at 3-5.

⁵⁵ See Leap Petition at 17-19.

⁵⁶ See, e.g., *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. Applications for Transfer of Control*, Hearing Designation Order, CS Docket No. 01-348 (released Oct. 18, 2002) ¶ 98 (any claimed efficiencies must be documented rather than speculative); *id.* ¶ 190 (“speculative benefits that cannot be verified will be discounted or dismissed”).

IV. THE PROPOSED ACQUISITION WOULD GIVE AT&T EVEN GREATER POWER TO FORECLOSE COMPETITORS FROM ACQUIRING DESIRABLE HANDSETS

The record demonstrates that AT&T has a history of attempting to exclude competitors from accessing desirable devices.⁵⁷ Indeed, the record indicates that AT&T already is taking steps to leverage its market power to secure exclusive devices that are not interoperable with others' systems.⁵⁸ For example, Clearwire notes that AT&T and Verizon took steps to favor LTE technology over WiMAX technology, and in doing so were able to prod vendors to cease producing WiMAX-compatible handsets.⁵⁹ The Consumer Electronics Retailers Coalition notes that if the proposed acquisition is approved, AT&T and Verizon each would possess spectrum suitable for 4G LTE networks in sufficient amounts to enable the carriers "to work with manufacturers to develop 4G handsets that work only on their 4G networks and that are offered exclusively [by] AT&T and/or Verizon."⁶⁰ RCA explains that AT&T and Verizon already have used their leverage to cause standards-setting groups to issue equipment specifications that apply to very narrow bands where their spectrum holdings are strongest, and then persuaded vendors to create equipment that operates *only* in those band classes.⁶¹ In doing so they foreclosed competitors' ability to purchase interoperable devices. AT&T's and Verizon's efforts to impede the interoperability and availability of handsets of course directly harm consumers who wish to have more choices and greater access to cutting-edge devices from their carriers.

⁵⁷ See, e.g., Rural Cellular Association Petition to Deny ("RCA Petition") at 18, Rural Telecommunications Group Petition to Deny at 20; MetroPCS/NTELOS Comments at 58.

⁵⁸ See Clearwire Comments at 10; RCA Petition at 20.

⁵⁹ Clearwire Comments at 10.

⁶⁰ Consumer Electronics Retailers Coalition Comments at 25-26.

⁶¹ RCA Petition at 19-21.

The applicants claim that device exclusivity and interoperability are not merger-specific concerns,⁶² but that is emphatically false. The proposed acquisition would give AT&T increased leverage to manipulate standards-setting organizations and secure exclusive arrangements; that *increase* in leverage would be a direct result of this transaction. The fact that AT&T had some market power that pre-exists the transaction does not mean that making things much worse is not a merger-specific harm. In addition, AT&T would be increasing its own size by eliminating a national competitor would be a national purchaser of handsets; that loss of competition would arise directly from this acquisition.

The applicants' argument that exclusive arrangements can be pro-competitive again depends critically on their assumption of a fully competitive marketplace.⁶³ But the concern raised by Leap and others is that the more the industry moves to a duopolistic environment, the more that AT&T and Verizon alone will have the leverage to secure exclusive agreements and consolidate buying power over parts and components, and they can use that leverage to foreclose competition. This transaction would give AT&T the ability and incentive to wield exclusive arrangements that harm, rather than advance, competition, and thus in this context, exclusive agreements would be anti-competitive.

CONCLUSION

For the reasons stated above and in Leap's petition to deny, the proposed acquisition would create serious harms to competition and harms to consumers that are not outweighed by public interest benefits. The Commission therefore should reject the applications for transfer of control.

⁶² Opposition at 153-154.

⁶³ *Id.* at 145.

Respectfully submitted,

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

/s/ James H. Barker
James H. Barker
Matthew A. Brill
Alexander Maltas
LATHAM & WATKINS LLP
555 Eleventh St. NW, Suite 1000
Washington, DC 20004

*Counsel for Leap Wireless International, Inc.
and Cricket Communications, Inc.*

June 20, 2011

CERTIFICATE OF SERVICE

I, Alexander Maltas, certify that on this 20th day of June, 2011, I caused the foregoing Reply of Leap Wireless International, Inc. and Cricket Communications, Inc. to be served via electronic mail upon the following recipients:

Best Copy and Printing, Inc.
445 12th Street, S.W.,
Room CY-B402
Washington, DC 20554
fcc@bcpiweb.com

Kathy Harris
Mobility Division, Wireless Bureau
Federal Communications Commission
kathy.harris@fcc.gov

Kate Matraves
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
catherine.matraves@fcc.gov

Jim Bird
Office of General Counsel
Federal Communications Commission
jim.bird@fcc.gov

David Krech
Policy Division, International Bureau
Federal Communications Commission
david.krech@fcc.gov

Peter Schildkraut
Arnold & Porter LLP
Counsel to AT&T, Inc.
Peter.Schildkraut@aporter.com

Nancy Victory
Wiley Rein LLP
Counsel to Deutsche Telekom AG
and T-Mobile USA, Inc.
nvictory@wileyrein.com

/s/ Alexander Maltas
Alexander Maltas