

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

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

**REPLY COMMENTS OF BIRCH COMMUNICATIONS, INC.**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. BIRCH’S INTEREST IN THIS PROCEEDING .....	1
II. THE PROPOSED TRANSACTION SHOULD BE DENIED.....	3
A. Standard of Review.....	3
B. The Proposed Transaction Will Harm Competition .....	4
III. ANY APPROVAL OF THE PROPOSED TRANSACTION SHOULD INCLUDE COMMITMENTS BY THE MERGED ENTITY TO PROTECT COMPETITION.....	8
CONCLUSION.....	17
AFFIDAVIT	
CERTIFICATE OF SERVICE	

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Pursuant to the *Public Notice* issued in the above-referenced proceeding,<sup>1</sup> Birch Communications, Inc. and its subsidiaries (collectively, “Birch”) hereby file these reply comments to the initial comments filed on the applications filed by AT&T Inc. (“AT&T”) and Deutsche Telekom AG seeking authority to transfer control of the licenses and authorizations held by T-Mobile USA, Inc. and its wholly-owned, majority-owned, and controlled subsidiaries (collectively, “T-Mobile”) to AT&T (“Application”) and to the Joint Opposition of AT&T, Deutsche Telekom AG, and T-Mobile filed June 10, 2011 (“Opposition”). Like many other parties in this proceeding, Birch urges the Commission to deny the Application, or at a minimum, approve the transaction based on the merged entity’s willingness to make certain commitments to protect competition and serve the public interest, convenience, and necessity.

**I. BIRCH’S INTEREST IN THIS PROCEEDING**

Birch is a competitive local exchange carrier (“CLEC”) and since 1996 has been providing high-quality, cost-effective integrated communications services and related information technology services primarily to small and medium-sized businesses (“SMBs”).

Today, Birch offers a variety of products, services and tailored solutions including local voice,

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<sup>1</sup> WT Docket No. 11-65, *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, Public Notice, DA 11-799 (rel. April 28, 2011) (“*Public Notice*”).

long distance voice, broadband Internet, converged Internet Protocol (“IP”) solutions, and related telecommunications and IT services in 38 states.

Although Birch utilizes its own network facilities whenever possible, it also relies on service arrangements obtained from other large telecommunications carriers such as AT&T, Verizon, and Qwest to provide its competitive service offerings. Like many competitors, the wholesale services and network facilities Birch purchases from these carriers are critical components of Birch’s service offerings.<sup>2</sup> If Birch is unable to obtain the necessary inputs from these carriers on a timely and cost-efficient basis, Birch would be unable to compete effectively in the marketplace. As the Commission has recognized, wholesale services, such as special access service, are “critical input[s]” necessary for CLECs to provide services to their retail enterprise customers.<sup>3</sup>

While the majority of the Application and the Opposition focus on the wireless market, the impact of the proposed transaction on the wireline and broadband markets cannot be ignored as recognized by numerous commenters.<sup>4</sup> The Commission has repeatedly recognized that transactions such as the one contemplated here can give the merged entity increased “incentives and ability to discriminate in provisioning inputs to competitors.”<sup>5</sup> Approval of this transaction will only further frustrate the ability of Birch and other competitors dependent on “inputs” from AT&T to obtain access to the key components needed to provide competitive service offerings to consumers.

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<sup>2</sup> See, e.g., Granite at 1-2; EarthLink at 12-13; PAETEC at 18.

<sup>3</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, ¶ 27 (2007) (“*AT&T/BellSouth Order*”).

<sup>4</sup> See, e.g., Logix at 5; PAETEC at 17; EarthLink at 20-21.

<sup>5</sup> *AT&T/BellSouth Order* ¶ 26.

## II. THE PROPOSED TRANSACTION SHOULD BE DENIED

At the most basic level, the Commission must determine whether the proposed transaction will serve the public interest, convenience, and necessity.<sup>6</sup> As the initial comments reflect, the transaction will give AT&T a dominant position in the nationwide wireless market, as well as further strengthen its stronghold on the wholesale wireline and broadband markets within its incumbent local exchange carrier (“ILEC”) service territory.<sup>7</sup> Allowing a single company to have such vast market power will have a chilling effect on competition both for consumers and for other providers that rely on AT&T for critical components to their service offerings. Such a result runs counter to the public interest, convenience, and necessity. Accordingly, the Commission should deny the proposed transaction.

### A. Standard of Review

In making its public interest determination, the Commission must first determine whether the transaction “complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission’s rules.”<sup>8</sup> If the proposed transaction does not violate a statute or rule, the next step is a determination of whether the transaction “could result in public interest harms by substantially frustrating or impairing the objectives of implementation of the Communications Act or related statutes.”<sup>9</sup> A “balancing test” is used to weigh the potential public interest harms of the proposed transaction against the potential public interest benefits.<sup>10</sup>

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<sup>6</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>7</sup> See, e.g., Logix at 6-7.

<sup>8</sup> *AT&T/BellSouth Order* ¶ 19.

<sup>9</sup> *AT&T/BellSouth Order* ¶ 19.

<sup>10</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 16 (2005) (“*SBC/AT&T Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 16 (2005) (“*Verizon/MCI Order*”).

AT&T and T-Mobile, as the applicants, bear the burden of demonstrating that the proposed transaction serves the public interest.<sup>11</sup> The public interest review must take into consideration the Commission’s “deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.”<sup>12</sup> The Commission’s public interest review also evaluates the need for “narrowly tailored, transaction-specific conditions” to remedy specific harms that arise from the transaction and to ensure the public interest is served by the transaction.<sup>13</sup>

## **B. The Proposed Transaction Will Harm Competition**

There is no question that the proposed transaction will “frustrat[e] or impair[] the objectives or implementation of the Communications Act”<sup>14</sup> and will not “preserve[] and enhanc[] competition in relevant markets.”<sup>15</sup> When Congress amended the Communications Act in 1996 to open local exchange markets to competition,<sup>16</sup> the goal was to promote competition in all communications markets:

Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition. . . . Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new

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<sup>11</sup> *SBC/AT&T Order* ¶ 16; *Verizon/MCI Order* ¶ 16.

<sup>12</sup> *AT&T/BellSouth Order* ¶ 20.

<sup>13</sup> *AT&T/BellSouth Order* ¶ 22.

<sup>14</sup> *AT&T/BellSouth Order* ¶ 19.

<sup>15</sup> *AT&T/BellSouth Order* ¶ 20.

<sup>16</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996)) (“1996 Act”).

packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.<sup>17</sup>

The tools adopted by Congress in the 1996 Act were therefore intended to facilitate “[v]igorous competition,” which Congress understood “would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of [ILECs].”<sup>18</sup> The aim of the 1996 Act was to eliminate these barriers to entry to give competitors like Birch “a fair opportunity to compete” in the marketplace.<sup>19</sup> As PAETEC points out, the resulting duopoly after consummation of the transaction “is a far cry from the vision of the 96 Act.”<sup>20</sup> Specifically, the proposed merger will frustrate these goals in two significant ways.

First, the comments demonstrate that approval of the proposed transaction will give AT&T “increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors.”<sup>21</sup> AT&T provides “critical inputs” to competitors in both the wholesale wireline and wholesale broadband markets.<sup>22</sup> As the Commission has previously recognized, a vertically integrated entity “may be able to

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<sup>17</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶¶ 1, 4 (1996) (“*Local Competition Order*”) (intervening history omitted), *aff’d by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>18</sup> *Local Competition Order* ¶ 16.

<sup>19</sup> *Local Competition Order* ¶ 18.

<sup>20</sup> PAETEC at 21.

<sup>21</sup> *AT&T/BellSouth Order* ¶ 23.

<sup>22</sup> *See generally, e.g.*, EarthLink; PAETEC; Access Point; Granite; Logix; COMPTTEL; IDT; DISH Network.

increase its profits by raising prices in the downstream market, or increasing its market share in that market, or both.”<sup>23</sup>

The Commission’s review of this transaction must be viewed in light of AT&T’s overwhelming control of the wireline market, and the potential for the transaction to threaten wireline competition.<sup>24</sup> Some estimate that AT&T and Verizon control over 90 percent of the lines connecting the nation’s businesses.<sup>25</sup> It cannot be disputed that AT&T controls a vast wireline infrastructure, which allows it to obtain “critical inputs” for itself at cost. By contrast, competitors like Birch are forced to purchase those “critical inputs” from their largest competitor - AT&T.<sup>26</sup> By “controlling the availability and price” of these “critical inputs,” AT&T is therefore able to control its competitors’ “costs and quality of service.”<sup>27</sup> As Sprint points out, the current disparity between AT&T and its competitors will only worsen as result of the merger.<sup>28</sup> The proposed transaction would allow AT&T to readily act on its “incentive or ability to injure competitors,”<sup>29</sup> and therefore should be denied.

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<sup>23</sup> *General Motors Corporation and Hughes Electronics Corp., Transferors and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, ¶ 78 (2004) (“*News Corp/Hughes Order*”).

<sup>24</sup> EarthLink at 20-21.

<sup>25</sup> Jerry James, CEO of COMPTTEL, OpEd, “Don’t Let AT&T Get Bigger,” THE HARTFORD COURANT (May 10, 2011) (“COMPTTEL Editorial”).

<sup>26</sup> *See, e.g.*, “How Will the Proposed Merger between AT&T and T-Mobile Affect Wireless Telecommunications Competition?,” Testimony of Steven K. Berry, President and Chief Executive Officer, Rural Cellular Association before the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, at 6 (May 26, 2011) (“While AT&T’s proposed acquisition of T-Mobile should be rejected based on the horizontal competitive effects in the retail marketplace, it poses equal if not greater concerns based on the harm it would cause to the rural and regional providers that depend on AT&T (and, to a lesser extent, T-Mobile) for wholesale inputs.”).

<sup>27</sup> Written Testimony of Daniel R. Hesse, Chief Executive Officer, Sprint Nextel Corporation before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, at 6 (May 11, 2011) (“Sprint May 11 Testimony”).

<sup>28</sup> Sprint May 11 Testimony at 5.

<sup>29</sup> *AT&T/BellSouth Order* ¶ 23.

Second, the comments demonstrate that approval of the merger would harm competition in the retail local voice market.<sup>30</sup> Since the breakup of the Bell System in 1983, AT&T (formerly SBC) has acquired 15 companies.<sup>31</sup> If the merger is approved, AT&T and Verizon would control 80% of wireless customers in the United States.<sup>32</sup> As the FCC has recognized, the market for local voice service includes not only wireline local service, but also mobile wireless service for certain categories of customers that view wireless as a close substitute to wireline local service.<sup>33</sup> In 2006, the FCC determined that a “growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service instead of wireline local service.”<sup>34</sup> Wireless/wireline substitution is even more prevalent today,<sup>35</sup> and the proposed transaction must be viewed in light of “the ongoing and continued convergence of wireless and wireline data services.”<sup>36</sup>

Allowing a single company to have such vast market power in the wireline, wireless, and broadband markets will have a chilling effect on competition.<sup>37</sup> With its ongoing business expansion, AT&T appears emboldened to erect barriers to competition by denying, delaying, or otherwise frustrating access to the key components competitors require while maintaining and strengthening its market power. Concentration of this much market power in one entity will

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<sup>30</sup> See, e.g., Logix at 6.

<sup>31</sup> COMPTTEL Editorial (May 10, 2011).

<sup>32</sup> Sprint May 11 Testimony at 4-5; see also PAETEC at 19.

<sup>33</sup> SBC/BellSouth Order ¶ 90.

<sup>34</sup> SBC/BellSouth Order ¶ 96.

<sup>35</sup> United States Department of Health and Human Services, National Center for Health Statistics, Division of Health Interview Statistics, “Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January - June 2010,” (April 20, 2011) (noting that 24.9% of all adults lived in households with only wireless telephones, and that among households with both wireline and wireless telephones, 27.3% received all or almost all calls on the wireless telephones, with these wireless-mostly households making up 15.9% of all households).

<sup>36</sup> Granite at 8.

<sup>37</sup> See, e.g., PAETEC at 21.

discourage investment, decrease consumer choice, and negatively affect competition. Approval of the proposed transaction would move the marketplace closer to a duopoly dominated by AT&T and Verizon. Such a market structure is contrary to Congress's intent as reflected in the 1996 Act.

### **III. ANY APPROVAL OF THE PROPOSED TRANSACTION SHOULD INCLUDE COMMITMENTS BY THE MERGED ENTITY TO PROTECT COMPETITION**

For the reasons discussed above and in the initial comments of numerous parties,<sup>38</sup> the Commission should reject the proposed transaction because it will harm competition and does not serve the public interest, convenience, and necessity. If, however, the Commission were to approve the merger, it should base that approval on the inclusion of certain targeted commitments, as suggested by commenters, which are necessary to alleviate the public interest and competitive harms associated with the merger. The Commission has previously recognized that merged entities may have the incentive and ability to discriminate against competitors, which could adversely affect competitors' provision of services and may force consumers to pay more for retail services.<sup>39</sup> In these types of situations, the Commission has supported the inclusion of certain commitments by the merged entity to mitigate the potential for public interest harms. AT&T itself has acknowledged that the Commission can "condition[] approval"

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<sup>38</sup> See generally, e.g., DISH Network; EarthLink; Iowa Wireless Services; IDT; COMPTTEL; PAETEC; Access Point; Granite; Logix.

<sup>39</sup> See, e.g., *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, ¶ 173 (2000) ("BA/GTE Merger Order"); *Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214, and 310(d), of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commissions' Rules*, 14 FCC Rcd 17712, ¶ 186 (1999) ("SBC/Ameritech Merger Order").

of the transaction to the extent the Commission finds the transaction “creates a potential for anticompetitive effects.”<sup>40</sup>

As discussed above, competitors like Birch rely on AT&T for critical inputs. The merged entity’s unique position in the marketplace will create strong incentives for it to impede and delay the introduction and expansion of competitive choices and to inflate competitors’ costs to the detriment of consumers. Accordingly, “carefully targeted”<sup>41</sup> commitments as set forth below and in the initial comments should be adopted if the Commission acts to approve the transaction. None of these commitments are related to “industry-wide policy issues” as AT&T suggests.<sup>42</sup> Rather, they address “merger-specific” harms and are necessary to ensure AT&T cannot exercise its “incentive or ability to injure competitors”<sup>43</sup> as a result of the transaction.

**Structural Separation of Retail/Wholesale Wireline Operations.** This refers to the restructuring of AT&T’s wireline operations into distinctly separate wholesale and retail business operations. As CCIA points out, structural separations would be the only plausible way for the Commission to allow the proposed transaction to proceed and concurrently meet the public interest standard.<sup>44</sup> The fundamental aim of this type of structural separation would be to ensure the dominant network infrastructure operator (in this case, AT&T) permits non-discriminatory access to its wireline network on non-discriminatory terms and conditions.<sup>45</sup>

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<sup>40</sup> Opposition at 206.

<sup>41</sup> *BA/GTE Merger Order* ¶ 359; *SBC/Ameritech Merger Order* ¶ 429.

<sup>42</sup> Opposition at 210.

<sup>43</sup> *AT&T/BellSouth Order* ¶ 23.

<sup>44</sup> CCIA at iii.

<sup>45</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, ¶¶ 183, 205 (1980) (*Computer II Final Decision*) (“We also believe that the broad structural safeguards we are instituting with respect to offerings by dominant carriers will implement a scheme of indirect regulatory controls which should reduce the likelihood of undetected cross--subsidization of competition by monopoly services. . . . Although the subsidiary requirement does not alter incentives, it reduces the ability of dominant firms to engage in predation or to do so without detection.”) (subsequent history omitted).

Chronic competition problems are commonly traced to a dominant operator with a disincentive to allow free competition against its most profitable retail products. A dominant network infrastructure operator has the ability to significantly hinder competition either through active discriminatory practices or through less obvious means, such as exercising its control over the inputs competitors need to succeed.<sup>46</sup> Moreover, as Logix points out, “AT&T can and does self-deal” across market sectors and uses “its market power to engage in monopolization of” those sectors, which “can severely distort the wireline market.”<sup>47</sup> Structurally separating the wholesale and retail operations of AT&T will alleviate the competitive harms raised by the proposed transaction while serving Congress’s competitive goals.<sup>48</sup>

**Customer Conversions Generally.** Birch is significantly disadvantaged when AT&T does not act on customer conversion requests in a timely and efficient manner. In Birch’s experience, it is increasingly difficult to secure appropriate AT&T “project management” during large conversion projects, customers often lose service during the migration process, and account team contacts change frequently and without notice. Customer conversions are further complicated by AT&T’s staff reductions or its decisions to close and/or consolidate its operation centers, often without adequate notice to competitors. AT&T clearly has a vested interest in delaying customer conversions, but each of these practices, both alone and taken as a whole, have a material effect on Birch’s ability to offer service in competition with AT&T. Consumers

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<sup>46</sup> This idea is not new, and has been previously used in the United Kingdom and New Zealand. In other contexts, supporters of structural separation have stated: “Separation of a company - if not fully structural, then at least of its accounting department - is necessary to keep competition in providing Internet access alive. . . .” Peter Nowak, “Internet founder blasts ISPs for hurting national interests,” CBC News (July 23, 2008).

<sup>47</sup> Logix at 7.

<sup>48</sup> See, e.g., Computer & Communications Industry Association, “AT&T Files FCC Paperwork to Gobble Up Another Competitor, CCIA Asks FCC for Public Hearings,” Press Release (April 21, 2011) (“Support for this merger would necessarily translate into an urgent need for much stronger overall regulation in these areas, if not mandatory structural separation as the UK has wisely implemented. Policymakers simply cannot have it both ways: allowing the crushing of competition while maintaining deregulation. Deregulation can only work when disciplined by competition.”).

are less likely to exercise their competitive options or may change their minds to switch providers if the process becomes too burdensome or lengthy. Access Point likewise notes that converting customers often causes additional and unnecessary inconveniences for competitors and their newly acquired customers.<sup>49</sup> Accordingly, the merged entity should commit to a definitive interval for customer conversions and transfers, including large customer conversions resulting from a transaction, which will ensure AT&T cannot use its ability to control the customer transfer process to discriminate against competitors. Moreover, as proposed by Granite, AT&T should permit competitors to convert existing AT&T customers utilizing the same exact configuration of services AT&T currently uses for that customer.<sup>50</sup>

**DSL Resale.** Birch, like many competitors, has an agreement with AT&T, which allows Birch to resell AT&T's DSL services subject to certain qualifications and limitations.<sup>51</sup> In conjunction with this critical input, AT&T makes available to competitors a "qualification" database that permits competitors to determine whether a customer is eligible to be converted to the competitor's DSL service. In connection with other transactions, AT&T previously committed to implement and maintain these types of databases to ensure competitors can quickly and efficiently transfer customers choosing to purchase the competitor's DSL services.<sup>52</sup> This database, however, only permits competitors to "qualify" customers at much lower DSL speeds than the customer currently receives from AT&T. As result, competitors cannot compete with AT&T on the basis of DSL speed.<sup>53</sup> As Granite and Access Point argue, competitors should be

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<sup>49</sup> Access Point at 4.

<sup>50</sup> Granite at 9.

<sup>51</sup> *See, e.g.*, Granite at 4; EarthLink at 22-23.

<sup>52</sup> *See, e.g.*, *SBC/Ameritech Order*, Appendix C (Access to Loop Information for Advanced Services).

<sup>53</sup> *Cf.* Granite at 5 ("Granite faces a similar obstacle when it attempts to win an existing AT&T customer whose service it would convert to Granite. For example, Granite has lost numerous customers because it was unable to provide the same DSL Line Split service that AT&T had been providing them.").

able to obtain wholesale DSL services from AT&T that are “functionally the same as the services that AT&T offers to its own customers” and “at the same transmission speeds as the services AT&T offers to its own customers.”<sup>54</sup> Such a commitment is needed to ensure AT&T cannot use the proposed transaction to harm or injure competitors by controlling the inputs they need to offer service.

**Billing and Payment.** Some commenters raise issues with AT&T’s billing practices.<sup>55</sup> Birch faces similar problems with AT&T’s billing practices, such as billing for services not purchased, billing at non-agreed upon rates, and backbilling for services rendered months and even years in the past. The Commission has recognized that “[i]naccurate or untimely wholesale bills can impede a [competitor]’s ability to compete” because competitors “must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections.”<sup>56</sup> The Commission also acknowledged that untimely wholesale bills may cause competitors to “lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill.”<sup>57</sup> Recent reports also have accused AT&T of “systematic overbilling related to data usage,” which is now being investigated by certain members of Congress.<sup>58</sup>

In addition, AT&T often disputes competitors’ bills even though those bills reflect lawful charges (usually contained in filed and approved tariffs) that are appropriately assessed for the services AT&T obtains from the competitor. AT&T requires competitors to pay in accordance

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<sup>54</sup> Granite at 8; Access Point at 7.

<sup>55</sup> See, e.g., New Media Rights at 19-22 (discussing consumer billing issues); see also generally TelLawCom Labs.

<sup>56</sup> Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, 16 FCC Rcd 17419, ¶ 23 (2001).

<sup>57</sup> Id.

<sup>58</sup> See, e.g., “Kohl seeks AT&T transparency on billing,” THE BUSINESS JOURNAL (May 24, 2011).

with AT&T's tariffs, and there is no reason AT&T should not be held to the same standard. Resolving baseless and unsupported disputes expends time and resources that are better spent serving consumers and promoting competitive options in the marketplace. AT&T's greater bargaining position permits it to delay and interfere with competitors' legitimate business operations. The proposed transaction will only enhance AT&T's ability to exercise "control over key inputs that rivals need in order to offer retail services,"<sup>59</sup> such as timely billing and payment of lawful, legitimate charges. Certain billing and payment commitments are therefore necessary to ensure the merged entity cannot use its bad billing and dispute practices to discriminate against competitors or otherwise erect roadblocks to entry.

**Negotiation of Commercial Agreements.** Congress recognized that commercial negotiations between ILECs and new entrants would be difficult because the new entrant would have "nothing that the incumbent needs" and so "has little to offer the incumbent in a negotiation."<sup>60</sup> Thus, Congress established Sections 251 and 252 of the Communications Act, which set forth a specific procedure for CLECs to request interconnection and network facilities from the ILEC, as well as the process to arbitrate any unresolved disputes arising from the negotiations between the ILEC and the competitor.<sup>61</sup> The language and design of these provisions in the Communications Act were intended to address the very unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress's goals of increased competition in all communications markets.<sup>62</sup>

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<sup>59</sup> *BA/GTE Order* ¶ 176.

<sup>60</sup> *Local Competition Order* ¶ 134.

<sup>61</sup> 47 U.S.C. §§ 251, 252.

<sup>62</sup> *Local Competition Order* ¶ 15 (the "statute addresses this problem [of the incumbent's "superior bargaining power"] by creating an arbitration proceeding in which the new entrant may assert certain rights"); *see also id.* ¶ 134 (noting that because it is the new entrant's objective to obtain services and access to facilities from the incumbent

In the commercial agreement context, however, there are no similar checks-and-balances to remedy the unequal bargaining power between AT&T and its competitors. Competitors cannot engage in meaningful negotiations with AT&T, and any attempt to seek modifications to AT&T's template commercial agreements are almost routinely rejected without justification or explanation. For these reasons, Birch supports the comments of Logix and IDT with respect to the need for commercially reasonable wholesale services agreements.<sup>63</sup> The services and facilities made available via commercial agreements are without a doubt a "critical input" for competitors like Birch, and the merged entity will have increased incentive and ability to exercise its significant bargaining power in this regard. Commitments regarding the timely and good faith negotiation of commercial agreements are necessary to counteract AT&T's superior bargaining power, which will only increase a result of the proposed transaction. Such commitments could be similar to the commitments related to interconnection agreements reached in the AT&T/BellSouth transaction.<sup>64</sup> As Logix notes, such commitments will "accomplish[] a key policy imperative" and will ensure "that AT&T will not use its further market power to distort competition in the wireline sector."<sup>65</sup>

**Special Access Pricing.** Numerous commenters raise issues concerning the pricing of special access circuits.<sup>66</sup> The Commission has recognized that "wholesale special access service is a critical input for [CLECs] in providing services to their retail enterprise customers."<sup>67</sup> For

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and thus "has little to offer the incumbent in a negotiation," the Communications Act creates an arbitration process to equalize this bargaining power).

<sup>63</sup> Logix at 9-10; IDT at 10.

<sup>64</sup> *AT&T/BellSouth Order*, Appendix F (Reducing Transaction Costs Associated with Interconnection Agreements)

<sup>65</sup> Logix at 9.

<sup>66</sup> *See, e.g.*, Logix at 10-11; EarthLink at 11-12; COMPTTEL at 23-24; PAETEC at 11-2.

<sup>67</sup> *AT&T/BellSouth Order* ¶ 27.

this reason, prior transactions involving ILECs have included special access-related commitments designed to ensure competitors can obtain special access facilities in a timely and cost-efficient manner.<sup>68</sup> The Commission has been reviewing issues surrounding special access availability and pricing since 2005,<sup>69</sup> and recently reopened the record to obtain more information from affected competitors.<sup>70</sup> While these Commission efforts may result in beneficial changes to the special access market, many have expressed concern regarding how the proposed transaction would affect the pricing of special access circuits, which are used as “backhaul” by many competitors.<sup>71</sup> Indeed, Representative Darrell Issa pointed out that approval of the proposed transaction would be akin to “reassembling a duopoly on the backend,” which calls for protections to ensure “backhaul capabilities are delivered at a fair price.”<sup>72</sup> The comments reflect similar concerns.<sup>73</sup> Accordingly, Birch supports those commenters recommending the adoption of commitments regarding special access pricing, which will ensure AT&T cannot exercise its incentive and ability to increase competitors’ costs for this necessary input pending action by the Commission its ongoing matters.<sup>74</sup> Such commitments could be similar to the commitments related to special access reached in the AT&T/BellSouth and SBC/AT&T transactions.<sup>75</sup>

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<sup>68</sup> *AT&T/BellSouth Order*, Appendix F (Special Access); *SBC/AT&T Order*, Appendix F (Special Access).

<sup>69</sup> *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005).

<sup>70</sup> *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, DA 10-2073 (rel. Oct. 28, 2010).

<sup>71</sup> “Conyers Doubts Benefits of AT&T/T-Mobile,” COMMUNICATIONS DAILY (May 27, 2011).

<sup>72</sup> *Id.*

<sup>73</sup> *See, e.g.*, Logix at 10-11; EarthLink at 11-12; COMPTTEL at 23-24; PAETEC at 11-2.

<sup>74</sup> *See, e.g.*, Fibertech at 8-20; EarthLink at 13-14; Leap Wireless/Cricket at 25.

<sup>75</sup> *AT&T/BellSouth Order*, Appendix F (Special Access); *SBC/AT&T Order*, Appendix F (Special Access).

**Access to Network Facilities.** The proposed transaction gives AT&T greater ability to impair competitor access to wholesale facilities as Logix notes.<sup>76</sup> Given competitors' significant reliance on AT&T to obtain the inputs, services, and network facilities needed to provide competitive options to consumers, commitments to provide wireline wholesale customers ongoing access to these items is necessary as several commenters point out.<sup>77</sup> Such commitments could be similar to the commitments related to unbundled network elements under the AT&T/BellSouth and SBC/AT&T transactions.<sup>78</sup> In addition, competitors should be permitted to obtain wholesale access to the inputs and components needed to offer wireless services in competition with AT&T as IDT and others recommend.<sup>79</sup> Such a commitment would ensure that AT&T cannot use its incentive and ability to discriminate against competitors while ensuring wireline competitors can offer wireline/wireless bundles in competition with AT&T to the benefit of consumers.

**Promotions and Discounts.** As Access Point notes, AT&T's ability to offer services at discount rates puts competitors at a distinct competitive disadvantage.<sup>80</sup> For example, AT&T often offers cash rewards or other types of promotions and discounts to entice customers to remain with the company or to switch back to the company. Competitors simply cannot compete with the customer promotions and discounts offered by AT&T, especially given that these types of rewards are on top of the significant customer acquisition costs competitors face to win the business in the first place. The merged entity will have even more incentive and ability to offer

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<sup>76</sup> Logix at 13.

<sup>77</sup> See, e.g., Logix at 13; COMPTTEL at 22-23.

<sup>78</sup> *AT&T/BellSouth Order*, Appendix F (UNEs); *SBC/AT&T Order*, Appendix F (Unbundled Network Elements).

<sup>79</sup> See generally IDT; see also, e.g., Leap Wireless/Cricket at 23; Cox at 11-12.

<sup>80</sup> Access Point at 3.

such rewards to the detriment of competitors, and commitments should therefore be put in place to protect consumers and competition.

### **CONCLUSION**

For the foregoing reasons and those stated in the initial comments cited herein, the Commission should deny the Application, which does not further the public interest, convenience, and necessity. If the Commission acts to approve the proposed transaction, it should condition such approval on the merged entity's acceptance of certain targeted commitments to remedy the competitive issues as reflected in the initial comments and expanded herein. These commitments are transaction-specific and will ensure the transaction does not adversely affect competitors' provision of services or force consumers to pay more for retail services, while ensuring consumers have adequate competitive alternatives to AT&T's services.

Respectfully submitted,

**BIRCH COMMUNICATIONS, INC.**

*/s/ Christopher J. Bunce*

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Dated: June 20, 2011

**AFFIDAVIT**

I, Christopher J. Bunce, do hereby declare under penalty of perjury as follows:

1. I serve as the Vice President, Legal and General Counsel of Birch Communications, Inc. and its subsidiaries.
2. I am familiar with the facts set forth in the foregoing document.
3. Except for those facts of which official notice may be taken by the Commission, all of the facts set forth in the foregoing petition are true and correct of my own personal knowledge.



Christopher J. Bunce

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2011, I caused true and correct copies of the foregoing to be served via electronic mail upon the following:

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