

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Applications of AT&T Inc. and
Deutsche Telekom AG for Consent to
Transfer Control of the Licenses and
Authorizations Held by T-Mobile USA,
Inc. and Its Subsidiaries

WT Docket No. 11-65

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

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The California Public Utilities Commission and the People of the State of California (California or CPUC) submit these comments in response to the application filed by AT&T with the Federal Communications Commission (FCC or Commission) on April 21, 2011.¹ In its application, AT&T seeks to acquire control over T-Mobile and its subsidiaries via a transfer of licenses from Deutsche Telekom to AT&T.

On June 9, 2011, by public vote, the CPUC issued an *Order Instituting Investigation (OII)* into the proposed merger of the operations of AT&T and T-Mobile in California.² As is explained below, and in the attached copy of the OII, the CPUC opened the Investigation to ask questions and obtain information about the merger and to ensure that the merger is in the public interest of California.³ In these Comments, California seeks to bring to the attention of the FCC issues of interest to the CPUC in connection with the proposed merger. The CPUC further recommends that the FCC address the same issues in its review of that merger of national operations.

I. BACKGROUND

Article 6 of the California Public Utilities (P.U.) Code, §§ 851-857, requires the CPUC to review transfers of utility property. However, pursuant to P.U. Code § 853(b),

¹ *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries*, WT Docket No. 11-65 (April 21, 2011) (*Application*).

² *Order Instituting Investigation on the Commission's Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy*, I.11-06-009, adopted June 9, 2011. The *OII* is available electronically at the following address: http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/137257.htm

³ The attached *OII* is being submitted minus the extensive appendices, including several data requests and a protective order. Those documents are available on the CPUC website, at the address shown in footnote 1.

the CPUC may exempt a public utility or class of public utilities from the requirements of Article 6. In 1995, the Commission examined its ongoing authority over wireless carriers in light of the 1993 Omnibus Budget Reconciliation Act (1993 Act), which amended § 332 of the 1934 Communications Act to pre-empt, in part, state authority over certain activities of Commercial Mobile Radio Service (CMRS or wireless) providers.

Specifically, the 1993 Act pre-empted state authority over wireless rates and entry, but preserved state authority over the terms and conditions of wireless service.⁴ In its 1995 decision addressing the change in state jurisdiction over CMRS providers, the CPUC concluded that "[t]he transfer of ownership interests in a CMRS entity is not tantamount to [market] entry, and [CPUC] jurisdiction over such transfers is not preempted" (D.95-10-032, Conclusion of Law (CoL) 9.) However, although the CPUC determined that its jurisdiction over transfers of ownership was "not preempted," the CPUC decided as a matter of public policy to "forbear from exercising such authority," except where such review or further analysis is "necessary in the public interest."⁵

Thus, the CPUC established procedures whereby, as a general matter, wireless telecommunications service providers are required to give the CPUC 30-days' advance notice of certain types of proposed transfers via an informational letter to the Director of the Communications Division. The types of transfers the CPUC contemplated in its 1995 decision included any proposed transactions involving a change of ownership in which an

⁴ See 47 U.S.C. 332(c)(3).

⁵ (*Id.* at CoLs 15, 18; Ordering Paragraph (OP) 3; see also *id.* at p. 16 [standing merger approval process "could inhibit the growth of competition to impose more restrictive requirements on CMRS providers than is necessary to discharge our responsibilities to protect the public interest"].)

entity acquires a larger ownership share than the largest holding of any current owner.⁶ A critical component of the process the CPUC envisioned in D.95-10-032, consistent with its goal of fostering competition in the wireless market, was that the applicant(s) need not obtain preapproval of the transaction unless the CPUC notifies the service provider within the 30-day period that further information is needed or that a formal application is required.⁷

On April 21, 2011, AT&T submitted to the CPUC an initial notice of the proposed transfer of T-Mobile to AT&T. AT&T's submittal of this initial notice, rather than filing a formal request for approval of the merger, was consistent with the less formal wireless merger review process set forth in CPUC D.95-10-032.

On May 3, 2011, AT&T vacated its initial notice and provided the CPUC with a revised notice pursuant to the CPUC's rule governing information-only filings, set forth in CPUC General Order (GO) 96-B, Rule 6.1. The Director of the CPUC's Communications Division (CD) designated the May 3rd notice as Advice Letter (AL) 160 for tracking purposes only. On May 19, 2011, Sprint submitted to the CPUC a "protest" to AL 160.⁸

At its May 26, 2011 public meeting, the CPUC directed CD staff to notify AT&T that AT&T's 30-day notice was suspended on the basis of staff's earlier requests for further information. The Commission also directed staff to draft and present to the

⁶ See D.95-10-032, OP 3.

⁷ *Id.*

⁸ Pursuant to Rule 6.2 of General Order 96-B, since information-only filings do not seek relief, they are not subject to protest, as provided for applications and advice letters.

Commission an OII that would launch a review of the merger to gather facts and analyze data relevant to whether the proposal complies with applicable California law. In addition, the Commission directed staff to prepare comments to file at the FCC regarding the Commission's preliminary investigation of this merger and its *OII* process. On May 27, 2011, the Director of CD sent AT&T a letter informing AT&T that its information-only letter was suspended.

On June 9, 2011, at its regularly-scheduled public meeting, the CPUC issued *Order Instituting Investigation (I.) 11-06-009*, a copy of which is appended to these comments.⁹ As is discussed below and in more detail in the attached *OII*, in issuing the *OII*, the CPUC concluded that further review and analysis of the AT&T/T-Mobile merger is in the public interest.

II. THE CPUC'S INVESTIGATION

A. Review of the Proposed Merger is Merited

In the *OII*, the CPUC noted that from 2002 to 2010, the wireless telecommunications industry has consolidated from seven national wireless carriers to four. If the proposed merger of AT&T and T-Mobile were approved, only three national wireless carriers would remain. The CPUC noted also that a number of smaller, regional wireless carriers exist, but together, they comprise approximately 9.7% of the national market share, and their combined share is smaller in California. The CPUC acknowledged the existence of wireless resellers, but still recognized that post-merger

⁹ Also attached to this pleading is a copy of the *Order Correcting Error*, which the CPUC issue on June 15, 2011; *see* fn. 9; *supra*.

market concentration in the wireless industry would be greater in California than in the national market.

At the same time, the CPUC cited the dynamism in the wireless market, which has added more than 100 million customers since 2002. In addition, the CPUC noted that wireless devices and network capabilities have revolutionized communications, fueling a drive towards regulatory policies that facilitate innovation, service, and competition.

Despite these positive developments, the CPUC found it reasonable to gather facts and take comment in the context of its *OII*, in light of the anticipated decreased competition the wireless market, greater in California than nationally, that would result from the proposed merger. In particular, the CPUC intends to assess the effects of this anticipated market consolidation on California customers and the California economy.

B. Respondents

The CPUC identified New Cingular Wireless PCS and T-Mobile West as respondents to the *OII*. In addition, the CPUC named six service providers as parties to the *OII*: AT&T (ILEC), Verizon (ILEC), Verizon Wireless, Sprint PCS, Metro PCS, and Cricket Communications.¹⁰

C. Scope of the CPUC's OII

The CPUC identified the following issues as the scope of the proceeding.¹¹

¹⁰ On June 15, 2011, the CPUC issued an Order Correcting Error, D.11-06-019, changing “interested parties” to “parties” and clarifying that, while parties must respond to data requests, only respondents would be bound by the outcome of the proceeding.

¹¹ Pursuant to the CPUC’s Rules of Practice and Procedure, the assigned Administrative Law Judge may modify the scope of issues via a Scoping Memo

1. *Is this proposed merger in the public interest?*
 - a. Would the merger, which is planned as a nationwide transaction, have specific or different effects in California? For example, would the merger result in less competition in the California marketplace for wireless telephone customers as compared to wireless telephone customers nationally?
 - b. How should the relevant market(s) be defined? How should the product market(s) be defined, as wireless telephone carriers, as smart phone carriers, or some other way? How should the relevant geographic market(s) be defined? Locally according to carriers available to consumers in a locality, regionally, by the state, or nationally?
 - c. Would the merger give the resulting entity monopsony power or increase the tendency to monopsony power including market power over equipment suppliers? If yes, then what impact would the merger have on choice and competition in handsets and related equipment?
 - d. How long, and to what extent, would the lower-priced T-Mobile plans continue to be available after the merger? Would the merger serve Californians who depend on low-priced wireless plans?
2. *What merger-specific and verifiable efficiencies would likely be realized by the merger?*
3. *Would innovation be promoted or constrained by the merger? For example, would the merger increase, maintain or diminish facilities and competition for wireless transmission services such as distributed antenna systems (DAS) and open distributed antenna systems (O-DAS)?*
4. *What impact would the merger have on the market for special access or backhaul services?*
 - a. What alternatives to incumbents' special access backhaul facilities currently exist, and what alternatives would exist after the merger, for independent, competitive wireless carriers?
 - b. Would the smaller post-merger pool of independent, competitive wireless carriers purchasing special access backhaul from local exchange carriers affect the market power of those special access backhaul customers? Would the merger increase the market power of

the local exchange carriers and/or their wireless affiliates with respect to special access backhaul services?

- c. Would the merger increase the ability of the merging parties to impose exclusive or requirements contracts on purchasers of backhaul services? Would the merger increase the ability of the merging parties or their wireline affiliates to require that the entity seeking backhaul services buy a certain percentage of their backhaul services from the wireline affiliates of the merging parties?

5. *Would the merger maintain or improve the quality of service to California consumers?*

- a. Is acquisition of T-Mobile's spectrum necessary to extend AT&T's service area or improve AT&T's existing service? Is AT&T using the spectrum it now has? Does it have concrete plans to build out the spectrum licensed to it? We note that in February 2011, AT&T filed an application with the FCC to acquire the 700 mhz wireless spectrum currently licensed to Qualcomm including the licenses to serve Los Angeles and San Francisco. How would these combined spectrum holdings, if approved, affect AT&T's wireless service, competition, and the California market? Is acquisition of both T-Mobile's and Qualcomm's California spectrum necessary to achieve the benefits AT&T plans to bring about through these transactions?
- b. Is the merger necessary to provide T-Mobile customers with advanced services, such as LTE (Long Term Evolution) services that facilitate data transfers and offer greater speed?

6. *What California utility(ities) would operate the merged properties in California? Would the merger preserve the jurisdiction of the Commission and the capacity of the Commission to effectively regulate those utility operations in the state?*

7. *How does this merger affect the merging companies' employees, shareholders, subscribers, communities in which they operate, and the State as a whole?*

8. *Would the benefits of the merger likely exceed any detrimental effects of the merger?*

9. *Should the Commission consider conditions or mitigation measures to prevent significant adverse consequences which may result from the merger? What, if any, should those conditions or measures be?*

D. Procedures for the OII

1) The CPUC established the following timetable for the proceeding.

June 20, 2011 - Deadline for parties to suggest additional data requests in letters to the Director of Communications Division, with service on all parties.

June 24, 2011 - Deadline for AT&T to file in this proceeding its application filed at the FCC in WT Docket No. 11-65 and for Respondents and Interested Parties to file responses already provided to Commission staff data requests regarding the proposed merger.

June 24, 2011 - Deadline to file responses to Data Requests in Appendix A and any remaining responses to staff Data Requests in Appendix B.

July 1, 2011 - Deadline to file Opening Comments and factual showings in Declarations. Comments may include legal analyses and must be limited to 50 pages. Each Declaration must be verified, consistent with Rule 1.11, by a representative knowledgeable about its contents.

July 7 or 8, 2011 - Public Workshop in San Francisco re: facilities-based competition issues, with a particular focus on special access backhaul, lease and other contract arrangements, interconnection, and related issues. A public participation hearing will also be held in San Francisco.

July 15 or 29, 2011 - Public Workshop in Silicon Valley re: innovation issues. This shall include, but is not limited to, handsets; distributed antenna systems, broadband, data transfer, etc.

July 20 or 21, 2011 - Public Workshop in Los Angeles re: customer issues, including, but not limited to, price, service quality, customer service - small/individual, small business, and large enterprise customer representatives. A public participation hearing will also be held in Los Angeles.

July (dates TBD) - Public participation hearings in Orange County and the Central Valley

August 5, 2011 - Deadline for filing Reply Comments (limited in scope to matters raised in Opening Comments and workshops, and limited to 25 pages), and supplemental factual showings in verified Declarations.

August 10-30, 2011 - Staff may submit the Investigation's record to the FCC.

September 2, 2011 - Target date for proposed decision, with subsequent comments (limited to 25 pages) and reply comments (limited to 5 pages) consistent with Rule 14.3.

October 6, 2011 - Target date for Commission vote on a proposed decision.

2) The CPUC's Communications Division has issued two data requests to various parties in connection with the *OII*. Some service providers have submitted responses to the CPUC, while other responses are pending. In the *OII*, the CPUC adopted a protective order for treatment of confidential data already submitted to the CPUC as well as for data expected to be submitted to the CPUC in the course of its investigation.

III. THE FCC'S INVESTIGATION

The CPUC is providing to the FCC, via this filing, the plan for California's investigation into the proposed merger. California is mindful that the FCC's review of the merger is on a separate procedural track, and will incorporate a much broader review of issues than those included in the CPUC's *OII*. The FCC has full authority over CMRS providers, while state authority is more limited. However, consistent with the California undertaking, the CPUC urges the FCC to focus its investigation, in part, on the same issues as are raised in the CPUC's *OII*. In addition, California anticipates that the FCC will address issues related to rate plans and deployment of facilities, which are beyond the scope of the CPUC's review. California also anticipates that the FCC, in concert with the U.S. Department of Justice, will be reviewing any potential effects of the proposed merger on the state of competition not only in the wireless market, but in the wireline backhaul market that is a critical underpinning of the wireless market.

IV. CONCLUSION

The CPUC submits these comments and the attached *Order Instituting Investigation* to inform the FCC in its review of the proposed merger. Consistent with the timetable for the CPUC's *OII* set forth in section III.D of these comments, the CPUC anticipates submitting at least one additional filing to the FCC in WT Docket 11-65. That additional filing will include material the CPUC obtains in the course of its own investigation of the proposed merger's potential effects on California consumers and the California economy.

Respectfully submitted,

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