

**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)	
)	
For Consent To Assign or Transfer Control of)	
Licenses and Authorizations)	

REPLY COMMENTS OF FIBERTECH NETWORKS, LLC

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Pursuant to the Public Notice issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned proceeding on April 28, 2011,¹ Fibertech Networks, LLC, on behalf of itself and its subsidiary Fiber Technologies Networks, L.L.C. (jointly referred to herein as “Fibertech”), files this Reply to the Joint Opposition of AT&T Inc. (“AT&T”), Deutsche Telekom AG (“DT”), and T-Mobile USA, Inc. (“T-Mobile,” and together with AT&T and DT, “Applicants”) to Petitions to Deny and Reply to Comments filed in the above-captioned proceeding on June 10, 2011 (“Opposition”).

¹ FCC Public Notice, *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licensees and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, DA No. 11-799 (rel. Apr. 28, 2011) (“Public Notice”). This Petition is filed in reference to the following application File Numbers referenced in the Public Notice: 0004669383, 0004673673, 0004673727, 0004673730, 0004673732, 0004673735, 0004673737, 0004673739, 0004675960, 0004703157, 6013CWSL11, 6014CWSL11, 6015ALSL11, 6016CWSL11, 0004698766, ITC-T/C-20110421-00109, ITC-214-20020513-00251, ITC-T/C-20110421-00110, ITC-T/C-20110421-00111, ITC-214-20061004-00452 ITC-T/C-20110421-00112, and ITC-214-19960930-00473.

I. Introduction and Summary

In its Comments, Fibertech, a provider of fiber-based Ethernet backhaul services to wireless carriers among other customers, argued that AT&T's acquisition of one of the largest non-BOC-affiliated backhaul customers will have anti-competitive repercussions, depressing competition in both the upstream special access market and eventually leading to competitive harms in the downstream retail wireless market. As a result of these harms, Fibertech proposed the Commission condition the merger on requirements that T-Mobile increase its backhaul spend with non-affiliated backhaul providers in the AT&T 22 state ILEC footprint, that T-Mobile extend existing contracts with third party backhaul providers by thirty-six months and that T-Mobile should not be permitted to terminate backhaul circuits or contracts that were in force when the merger was announced unless it decommissions the relevant tower.

The Applicants' opposition claims that the asserted harms are illusory and will not come to pass because i) the presence of significant competition in the backhaul market denies AT&T the ability to harm that market and ii) AT&T lacks the incentive to use whatever market power it has in the backhaul market to raise the costs of its rivals in the retail wireless market. Neither of these arguments succeeds in alleviating the concerns the Commission should have about the harms that will flow if the applications are granted without Fibertech's requested conditions.

II. The Opposition's Suggestions that the Backhaul Market is Broadly and Enduringly Competitive do not Withstand Scrutiny

In its Comments, Fibertech showed that by eliminating T-Mobile's demand for backhaul from the open market and shifting the demand to AT&T, the merged company would deny special access backhaul providers the minimum viable scale needed to justify continued investments in competitive special access (including backhaul) facilities.² Fibertech further

² Fibertech Comments at pp. 2-5.

explained that the natural result from the decreased investments by competitors would be less competition and more reliance on the ILEC — AT&T — for backhaul, increasing AT&T’s dominance in the special access market and allowing AT&T to use its market power to raise the costs its retail wireless rivals incur for backhaul in AT&T’s 22 state ILEC footprint. The Opposition would have the Commission believe that the market is overrun with competitive fiber and that competitors maintain a market and cost advantage for deploying fiber-based Ethernet services for backhaul. These claims are incorrect.

First, the Applicants make it appear that backhaul options are ready, available and awaiting for wireless providers to use on demand.³ The Commission should recognize that competitors do not deploy fiber infrastructure to cell sites on a speculative basis. The Commission has long ago recognized the fallacy of a “build it and they will come” strategy.⁴ As Fibertech explained, the “cost-effective, scalable solutions” that T-Mobile demands⁵ requires fiber infrastructure, which in turn necessitates significant capital investment.⁶ Except in circumstances where Fibertech is already serving a cell tower, Fibertech does not have facilities in place that it can easily use to provide service to a wireless carrier cell site. Instead, Fibertech responds to requests from wireless carriers for fiber-based Ethernet services and if it obtains that business, Fibertech must construct new facilities and bear the attendant costs and delays typically

³ See Mayo Decl. ¶ 5 (“T-Mobile USA has been able to choose from among backhaul options offered by various providers.”).

⁴ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18304 ¶ 39 (2005) (“*SBC/AT&T Merger Order*”) (“carriers ... are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment.”).

⁵ Mayo Decl. ¶ 4.

⁶ Fibertech Comments at p. 24.

associated with fiber construction.⁷

AT&T further claims that “no carrier, including any ILEC, has any historical head start or advantage in providing Ethernet backhaul services.”⁸ This proposition cannot withstand scrutiny.

First, the Applicants’ reliance on the *Business Ethernet Port Share Report*,⁹ is misleading as the Applicants do not indicate whether this report even covers Ethernet services deployed to cell sites. Separate analysis of fiber-based Ethernet services provisioned to cell sites, separate from “Business Ethernet Ports” is significant because many cell sites are single customer locations in remote or rural areas where the ILEC is the only carrier serving the tower, or at best there is one ILEC and 1 competitor. For cell sites where AT&T is the only backhaul provider it retains the ability to increase prices above a competitive level.¹⁰ This report is also of limited utility because it reports on national market share. Because national market share has no bearing on whether competitors have deployed fiber facilities to serve a particular cell site, however, statistics for Ethernet backhaul are irrelevant to analyzing the proposed acquisition. As Fibertech explained in its comments, the Commission has been adamant that the appropriate geographic market for special access is the customer location.¹¹ This obviously applies to wireless carrier backhaul service since the presence of a competitor in Los Angeles has little bearing on whether that competitor can supply fiber to a cell site in Houston.

⁷ *SBC/AT&T Merger Order* ¶ 39.

⁸ Casto Decl. ¶ 11.

⁹ Opp. p. 165, n. 291; Casto Decl. ¶ 11 n.6.

¹⁰ See *SBC/AT&T Merger Order*, ¶¶ 37, 40; Complaint, *United States v. SBC Comm., Inc.*, Civ. Action No. 1:05CV02102 (D.D.C. October 27, 2005) at ¶ 3; (finding AT&T’s ability to effect an anti-competitive price increase exists at locations where AT&T is the only firm that “own[s] or control[s] a direct wireline connection.”).

¹¹ Fibertech Comments at p. 12 citing *SBC/AT&T Merger Order*, ¶ 28.

Second, the Opposition fails to mention the significant historical advantages that AT&T has in the market for the provision of backhaul. In contrast to competitors, which must endure a long, arduous, adversarial, and expensive process to deploy fiber facilities to a cell site to which they have not yet extended fiber,¹² AT&T and other ILECs are virtually always able to extend fiber to a cell site not yet connected to ILEC fiber by simply overlashing a new, fiber cable to the steel support strand that is already on the poles to hold existing copper lines. Thus, the ILECs are able to avoid the delays and costs associated with make-ready work that is necessary when new pole space must be cleared. In addition, AT&T and other ILECs traditionally have joint use or joint ownership agreements with electric utilities that allow them to bypass the time-consuming process of surveying the pole plant and assessing the poles' loading capacities before they install their fiber cables.¹³

Third, AT&T and other ILECs through their ubiquitous legacy networks already have extensive fiber networks, including fiber connections to virtually all wireless carriers' cell sites and mobile switching centers. This expansive network (and the captive wireless customer that AT&T already has in the form of AT&T Mobility (to which it proposes to add T-Mobile) makes it far easier for AT&T to extend its fiber network than it is for new entrants to build competitive fiber where they lack existing infrastructure. AT&T also continues to expand the reach of its network for its other lines of business, such as residential broadband and voice and expects to

¹² See Fibertech Comments at p. 24.

¹³ *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 at ¶ 199 (rel. April 7, 2011) (ILECs have historically been “able to ensure just and reasonable rates, terms and conditions for pole attachments by negotiating ‘joint use’ agreements”); and at ¶ 203 (Commission concluded that “due to [ILECs]’ “existing joint use agreements and ... continuing pole ownership” it is not “appropriate to treat [ILECs] identically to telecommunications carriers [as defined in § 224 of the Act] or cable operator attachers in all circumstances.”).

deploy additional fiber to support its U-Verse service. As AT&T extends the reach of its network for these services it makes it more economic to serve nearby wireless carrier cell sites. Most competitors lack the embedded base of customers necessary to justify investment in a fiber network to compete with AT&T's U-Verse and other residential voice and broadband services and thus will not have access to the same economies of scale and scope that AT&T can bring to bear.

Fourth, AT&T and other ILECs have existing contract tariffs in place with the principal wireless providers and have them locked into significant take-or-pay revenue commitments that increase over time. The presence of these contracts provides the wireless carriers an additional incentive to use AT&T for backhaul despite the willingness of alternative fiber providers to compete to build new facilities. Because the wireless carriers can easily transition their revenue commitments to AT&T from TDM-based backhaul to Ethernet-based backhaul, AT&T's incumbency again works to its advantage in maintaining its dominance in the backhaul market even where wireless carriers are transitioning from copper-based TDM service to fiber-based Ethernet service.

Finally, the Applicants suggest that the Commission should give weight to AT&T's claims that the fact that it has not prevailed in all of its competitive bids for Ethernet based backhaul demonstrates AT&T's lack of market power in the provision of fiber-based Ethernet service. The only thing this proposition demonstrates is that AT&T and other ILECs have been slow to the Ethernet market, preferring to delay the cannibalization of its lucrative TDM based special access for as long as possible. This is the same model the ILECs employed when faced with the advent of CLEC-provided DSL. Once the ILECs began seriously deploying DSL technology without concern that DSL was cannibalizing their DS1 profits, CLECs rapidly lost

market share to the ILECs. The ILECs possess the same natural advantage with respect to Ethernet — especially for wireless backhaul to cell sites where the ILEC has an existing network (or owns the wireless carrier) even if that network is currently comprised of copper.

III. The Opposition Fails to Accord Proper Weight to the Impact of T-Mobile’s Demand in the Market for Competitive Backhaul

Fibertech’s comments explain how T-Mobile’s ability to use competitive special access providers for a significant percentage of its last mile links between its cell sites and its mobile switches has fostered competition in the special access market, as fiber providers are able to market competitive special access services to business that are located along or near the fiber rings that are built to serve T-Mobile’s backhaul demand.¹⁴ In addition, these competitive deployed facilities also benefit other wireless providers to the extent they are co-located on the same cell tower as T-Mobile or have cell towers near or along the competitors’ network. T-Mobile’s significant growth — and use of competitive fiber providers to serve that growth — has been a catalyst for special access competition.

The Opposition, however, maintains that T-Mobile’s marginal purchase volume is not significant to competitive special access providers. For example the opposition claims that the special access business is a \$36 billion business. Opp. p. 170. This figure is meaningless. The opposition fails to explain that this revenue figure includes demand from AT&T and its affiliates, Verizon and its affiliates and Qwest/CenturyLink and its affiliates. The Opposition simply ignores the fact that T-Mobile is one of the two largest non-BOC affiliated purchasers of special access. And even if T-Mobile is a marginal customer, it is a particularly important marginal customer, both because it is one of the few large buyers that have generated real competition for its backhaul business, and because T-Mobile has an explosively growing demand for backhaul.

¹⁴ Fibertech Comments at p. 20.

The significance of the potential loss of T-Mobile's demand from the open market is exacerbated because AT&T's use of lock-up contracts for its provision of backhaul limits the ability of competitors to replace T-Mobile's lost demand. AT&T's opposition, however, fails to acknowledge the existence of AT&T's lock up provisions. It is these lock up contracts that preclude Sprint and other large non-affiliated special access customers from seeking out competitive fiber backhaul services to the same extent as T-Mobile. Indeed, AT&T's economists state that they "are not aware of any reason that other wireless carriers would not be able to contract with a similar range of CLECs, cable firms and other access providers."¹⁵ The existence of AT&T's special access lock-up contracts is well documented. Under these lock up contract tariffs, AT&T offers discounts as long as the customer commits to buy, during the term of the lock-up contract, all or virtually all of its demand from AT&T.¹⁶ Thus, the conclusions of

¹⁵ Willig et al Decl. ¶ 118.

¹⁶ See, e.g., NRRI Report at 73 (in AT&T Ameritech Discount Commitment Plan "buyers are not free to set their preferred commitment levels. A DCP buyer can commit to no less than 90% of the number of channel terminations in service when it makes the commitment, citing AT&T Ameritech FCC Tariff No 2, § 7.4.13(B)), 74 (with Term Payment Plan with portability commitment, AT&T sets the buyer's commitment level at 100% of the number of circuits the buyer currently purchases, citing AT&T SBC Tariff No. 73, § 7.2.22(E)), Comments of Global Crossing North America, Inc., Docket No. 05-25 (August 7, 2007) at 9 n.15 (citing AT&T MVP Discount Plan: Must maintain 95% of baseline year's special access spend over a 5 year term to receive a discount on special access services; Ameritech FCC Tariff 2, section 19.3(C); Pacific Bell FCC Tariff 1, § 22.3(C)(1); SWBT FCC Tariff 73, § 38.3(C); HCTPP Discount Plan: Must commit to a base level spend on dedicated T-1s, and maintain 91% of that spend over a 5 year term to receive a discount. See PacBell FCC Tariff No. 1, Section 7.4.18. FMS/CDP discount Plans: Must maintain 90% of baseline year's switched and special access circuits (FMS Plan) and channel terminations (CDP Plan) over a five year term to receive a discount. Pacific Bell FCC Tariff No. 1, § 7.4.18 (with Term Payment Plan buyer's commitment is set at 100% of circuits the buyer purchased the month before the commitment); Nevada Bell FCC Tariff No. 1, § 7.11.5.2 (same); SNET FCC Tariff No. 39, § 2.11.1.1 (with Optional Payment Plan buyer's commitment is set at 100% of circuits the buyer purchased the month before the commitment); Pacific Bell FCC Tariff No. 1, § 33.25.4(A) (requiring 95% commitment). 33.34.4(A) (requiring 100% commitment) 33.112.5(A) (same); Southwestern Bell FCC Tariff No. 73, §§ 41.20.4(A) (same), 41.31.4(A) (same), 41.35.5 (same), 41.48.4(A) (same), 41.75.5(A) (same), 41.77.5(A) (same), 41.80.5(A) (same), 41.95.5(A) (same).

AT&T's economists that other wireless carriers are fully free to contract with competitive access providers either are not based on complete facts or are not credible.

T-Mobile's growing demand for fiber to the cell site is also significant for non-wireless special access customers locations in the vicinity of the fiber networks used to serve T-Mobile's cell sites. For those cell sites where T-Mobile has been able to obtain competitive services, T-Mobile serves a purpose similar to the anchor institutions frequently referenced in the Commission's National Broadband Plan. Once a competitive provider of special access has built out to a particular cell site, it becomes economical to serve other special access customers along the route. Thus, there would be a multiplier effect created where, as competitive special access providers no longer are able to successfully sell backhaul to T-Mobile, they will become unable to effectively offer service to other independent wireless providers, or to other special access customers. Such losses of sales result in harm both to competitive backhaul providers and to the non-wireless special access customers that otherwise would have been able to select the services offered by such providers.

The multiplier effect does not stop with the initial loss of sales to other customers of special access, because there is a feedback effect as well. Because of economies of scale, when a competitive provider of special access like Fibertech loses a customer, its per-unit costs increase. Faced with such increases, a fiber infrastructure provider may decide to exit the business or scale back on new investment. Likewise, when independent wireless providers can no longer obtain economically priced backhaul from competitive providers, their per-unit costs increase, which is likely to result in loss of wireless market share to AT&T and Verizon. As independent wireless providers lose market share, they also will lose the ability to provide competitive backhaul providers with the revenue and long term commitments needed to make construction of backhaul

facilities (which entails a sunk investment that requires a long term to recover) economic, given the financial risks involved.

Thus, while to AT&T, T-Mobile's share of the special access market may be marginal, it has a significant impact on the market for competitive backhaul and eventually on the market for retail wireless service. Fibertech and other competitive backhaul providers may perceive an increased risk in investing scarce capital in fiber facilities that will be stranded if the wireless provider exits the business or, like T-Mobile, is purchased by AT&T. As a result, the backhaul provider could choose to exit the business or increase rates. Either choice further increases the cost to independent wireless providers of one of their largest inputs, weakening them further. The result is a feedback cycle that weakens both competitive special access providers and also non-BOC affiliated wireless carriers. The ultimate result is that AT&T and Verizon may be the only providers left standing in both the wireless market and the special access market.

The conditions Fibertech proposed in its comments directly address these potential harms. By requiring T-Mobile to increase its purchases from non-BOC affiliated special access providers, the Commission would ensure that the market contains enough scale to assure competitors that there will be adequate scale to justify the capital investment in fiber. Similarly, by requiring T-Mobile to extend existing contracts, the Commission prevents the post-merger entity from prematurely terminating contracts and paying early termination fees in lieu of supporting competition in the backhaul market. The same rationale applies to Fibertech's proposed condition that T-Mobile be prohibited from terminating individual circuits with competitors except where a tower is decommissioned. This would assure fiber providers that they will not be prevented from recouping their investments in fiber for serving T-Mobile cell sites and that such investments will not be stranded.

Respectfully submitted,

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June 20, 2011

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SERVICE LIST

I, Joshua M. Bobeck, hereby certify that on this 20th day of June 2011, I have caused a copy of the foregoing Reply Comments of Fibertech Networks, LLC to be served, as specified, upon the parties listed below:

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