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September 30, 2011

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *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*

Dear Ms. Dortch:

On September 28, Charles McKee, Vice President, Government Affairs – Federal & State Regulatory, of Sprint Nextel Corporation (“Sprint”) and I met with Mark Stone, Chief of Staff to Commissioner Copps, and, on September 29, we met separately with Louis Peraertz, Wireless Legal Advisor to Commissioner Clyburn, and Angela Giancarlo, Chief of Staff & Senior Legal Advisor Wireless to Commissioner McDowell, about AT&T’s proposed takeover of T-Mobile. In each of the meetings, we emphasized that the exhaustive record before the Commission demonstrates that the takeover would result in substantial harms to consumers, competition, and the public interest and cannot be cured with conditions – it’s unfixable.

The Communications Act prohibits the Commission from granting its consent to the license transfer applications where, as here, the merger applicants have not proven by a preponderance of the evidence that their proposed transaction would serve the public interest. Consistent with this statutory obligation, and to the extent the Commission does not deny the applications outright under section 314 of the Act,¹ we urged the

¹ See Letter from Harold Feld, Legal Director, Public Knowledge, to Julius Genachowski, Chairman, FCC, WT Docket No. 11-65 (Sep. 1, 2011) (asking the Commission to immediately deny the proposed transaction as violative of Section 314 of the Act, which prohibits the Commission from granting any license transfers that would have the effect of substantially reducing competition in any market with international components).

Commission to act promptly to designate AT&T's proposed takeover of T-Mobile for a hearing before an administrative law judge.

Consistent with Sprint's pleadings, and as described in more detail in the attached, we discussed the substantial harms to the public interest that would result if the takeover were approved. We also commended the Commission for its thorough and intensive review of the transaction. The pleading cycle in this proceeding closed on June 20, and the staff and Commissioners have conducted dozens of meetings to analyze the competitive and other public interest harms as well as the claimed benefits of the proposed merger. As we discussed in our meetings, the detailed, fact-based record before the Commission demonstrates that approval of AT&T's takeover would harm consumers and tip the wireless industry inexorably toward duopoly.

Pursuant to section 1.206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), this *ex parte* notification and the attachment are being filed electronically for inclusion in the public record of the above referenced proceeding.

Respectfully submitted,

/s/ Regina M. Keeney
Regina M. Keeney

Attachment

cc: Mark Stone
Louis Peraertz
Angela Giancarlo
Jim Bird
Stacy Ferraro
Kathy Harris
David Krech
Kate Matraves
Best Copy & Printing, Inc.

AT&T'S PROPOSED TAKEOVER OF T-MOBILE IS CONTRARY TO THE PUBLIC INTEREST AND SHOULD BE DENIED

HARM TO CONSUMERS AND COMPETITION

Substantial Competitive Harm. AT&T's proposed takeover of T-Mobile would greatly increase concentration and cause serious anti-competitive effects in the wireless industry.

- **Geographic Markets** - The relevant geographic markets for evaluating the effects of the proposed takeover are national and local. (PTD¹ at 16-27; Reply² at 5-9; July 11 *Ex Parte* Presentation at 6³)
- **Product markets** - The proposed takeover would adversely affect multiple product markets, including all wireless, post-paid retail, and corporate and government accounts. (PTD at 9-16; Reply at 9-10; July 11 *Ex Parte* Presentation at 5)
- **HHI** - Even if the retail markets were local, a significant number of these markets would exceed the HHI screen. (PTD at 26-27)

Higher Prices. The proposed takeover would lead to higher prices and lower quality service.

- **Unilateral effects** - AT&T would unilaterally increase prices for all wireless retail and post-paid wireless retail as a result of the proposed transaction. (PTD at 28-29; Reply at 16-24)
- **Coordinated effects** - The proposed transaction likely would lead to increased coordination between AT&T and Verizon. (PTD at 30-34; Reply at 24-27)
- **Corporate & Government** - AT&T would increase prices for corporate and government accounts as a result of the proposed transaction. (PTD at 34-35; Reply at 9-10)
- **Tippling to Duopoly** - The proposed takeover would exacerbate the disparity between the Twin Bells and other carriers and further diminish competition over time. (PTD at 35-36; Reply at 15-16)
- **AT&T Competes with T-Mobile** - AT&T's claims that T-Mobile is not competitively significant are belied by the record evidence. (PTD at 47-53; Reply at 18-21)
- **Small, regional carriers** - Small and regional wireless carriers have only seven percent of the wireless market and do not constrain the pricing strategies of national

¹ Sprint Nextel Corporation Petition to Deny (May 31, 2011) ("PTD"):
<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675883>

² Reply Comments of Sprint Nextel Corporation (June 20, 2011) ("Reply"):
<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021688803>

³ *Ex Parte* Presentation attached to Letter from Regina M. Keeney to Marlene H. Dortch, WT Dkt. No. 11-65 (July 11, 2011) ("July 11 *Ex Parte* Presentation"):
<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021691724>

providers and cannot “fill any competitive gap” post-transaction. (PTD at 53-55; Reply at 10-14)

Ability to Raise Competitors’ Costs. AT&T’s proposed takeover of T-Mobile would enable AT&T to raise its rivals’ costs.

- **Backhaul** - The proposed takeover would increase the incentive and ability of AT&T and Verizon to raise backhaul rates, leading to higher prices. (PTD at 39-43; Reply at 35-39; July 11 *Ex Parte* Presentation at 12, 14)
- **Roaming** - The proposed takeover would give AT&T a GSM roaming monopoly and likely would raise roaming costs. (PTD at 43-45; Reply at 32-35; July 11 *Ex Parte* Presentation at 12, 15)

Harm to Innovation. The proposed transaction would stifle innovation in the wireless marketplace.

- **Innovative Competitor** - AT&T’s takeover of T-Mobile would eliminate an innovative competitor that has a strong track record of introducing new devices. (PTD at 36-37)
- **Exclusive handset deals** - Following the proposed transaction, the Twin Bells with their increased market share would have an even greater ability to enter into exclusive handset arrangements with equipment manufacturers. (PTD at 38; Reply at 28-30; July 11 *Ex Parte* Presentation at 13)
- **Other carriers’ devices** - AT&T’s post-merger size and scale would make it more difficult for Sprint and other carriers to compete in the Twin Bell duopoly marketplace by offering innovative new handsets and other devices. (PTD at 37-38; Reply at 30-32)

Unprecedented Spectrum Aggregation. AT&T’s proposed takeover would provide it with unprecedented control over spectrum ideally suited for mobile broadband service.

- **Licensed Mobile Telephony/Broadband Spectrum** - Following the transaction, AT&T would have far more nationwide licensed spectrum suitable for mobile telephony/broadband services than any other CMRS carrier; AT&T would have nearly *three times* Sprint’s nationwide spectrum holdings, and more than *five times* the *combined* holdings of MetroPCS, Leap, and U.S. Cellular. (PTD at 57-60; Reply at 39-43)
- **Spectrum Screen** - AT&T’s post-transaction spectrum holdings would exceed the spectrum screen threshold in over one-quarter of local markets. (PTD at 61-63; Reply at 43-44)
- **Spectrum Value** - In analyzing the competitive effects of the proposed transaction, the Commission must account for the high value of AT&T’s spectrum. (PTD at 63-70; Reply at 45-46)
- **Harm** - AT&T’s unprecedented concentration of spectrum would cause serious competitive harm. (PTD at 70-72; Reply at 46-47)

LOSS OF JOBS

Substantial Job Loss at Difficult Time. The proposed transaction would result in significant job loss just as the United States is struggling to emerge from the recession.

- **Fewer Jobs** - AT&T's takeover of T-Mobile would likely result in reduced capital expenditure and therefore fewer investment-related jobs; according to one recent estimate, the combination of AT&T and T-Mobile could lead to the loss of as many as 20,000 jobs as redundant positions are eliminated.⁴ (PTD at 76-78; Neumark Report⁵ at 3-5)
- **History of Cuts** - AT&T's historical track record demonstrates that its acquisitions have led to reductions in wireless industry jobs. (PTD at 76; Neumark Report at 7-11)
- **Own Statements** - AT&T's public statements about the T-Mobile merger indicate that it intends to repeat history by cutting wireless jobs. (PTD at 77; Neumark Report at 12-14)

NO PUBLIC INTEREST BENEFITS TO OUTWEIGH TRANSACTION'S HARMS

Network Capacity Claims Insufficient. AT&T's network capacity claims do not provide a public interest justification for the proposed transaction.

- **Not Unique** - The Applicants provide no evidence demonstrating that AT&T faces unique demands on its network. (PTD at 84-85, Reply at 50-58; July 11 *Ex Parte* Presentation at 20-21; July 28 *Ex Parte* Letter at 2 and July 28 *Ex Parte* Presentation at 3-6⁶)
- **Lagging Investment** - AT&T's failure to properly invest in its network, not a lack of spectrum, is the cause of any alleged capacity constraints. (PTD at 85-88; Reply at 54-56; July 11 *Ex Parte* Presentation at 22-23, 30; July 28 *Ex Parte* Letter at 2 and July 28 *Ex Parte* Presentation at 4, 17)
- **Self-Help** - AT&T can meet its alleged network capacity needs without the proposed anti-competitive transaction, by utilizing its voluminous unused spectrum, upgrading its networks to LTE, and deploying small cell technology and other spectrally

⁴ See David Sarno & David Savage, *U.S. Fears Lost Jobs If AT&T Merger is Approved*, L.A. TIMES, Sept. 1, 2011 (available at <http://articles.latimes.com/2011/sep/01/news/ct-biz-0901-att-justice-20110901>).

⁵ "The AT&T/T-Mobile Merger: A Recipe for Reducing Jobs for American Workers, David Neumark, (August 2011) (filed on September 15, 2011) ("Neumark Report"): <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021709589>

⁶ Letter from Regina M. Keeney to Marlene H. Dortch, WT Dkt. No. 11-65 (July 28, 2011) ("July 28 *Ex Parte* Letter") and attached Presentation ("July 28 *Ex Parte* Presentation"): <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698494>

- efficient network infrastructure. (PTD at 89-93, 98-109; Reply at 61-18; July 11 *Ex Parte* Presentation at 25-29; July 28 *Ex Parte* Presentation at 10-12, 14-20)
- **Speculative, Unsupported Claims** - The Applicants' alleged efficiencies in combining their two networks are speculative and unsupported. (PTD at 112-117; Reply at 59-61; July 11 *Ex Parte* Presentation at 31; July 28 *Ex Parte* Letter at 2-3 and July 28 *Ex Parte* Presentation at 8-9, 13, 22-23)

LTE Plans a Ploy. AT&T's LTE deployment plans are simply a "sleeves off my vest" ploy.

- **97% already a goal.** AT&T has already announced that it plans to deploy HSPA+ service to 97% of the U.S. population. (July 11 *Ex Parte* Presentation at 32; July 28 *Ex Parte* Presentation at 21)
- **Likely to match Verizon anyway.** Even without the proposed transaction, AT&T is very likely to deploy LTE to virtually the entire population within the next few years to match Verizon's plan to deploy LTE nationwide. (PTD at 129; Reply at 68-71; July 11 *Ex Parte* Presentation at 32-34; July 28 *Ex Parte* Presentation at 21)

TRANSACTION NOT FIXABLE THROUGH CONDITIONS

Denial the Only Remedy. No remedy short of blocking the transaction will preserve competition and protect the public interest.

- **Unfixable** - Conditions and *ad hoc* local divestitures cannot create a new competitor with the key attributes needed to be effective (*e.g.*, a nationwide facilities-based network). (Reply at 72-73; July 11 *Ex Parte* Presentation at 17-18)
- **Regulation Can't Fix the Anti-Competitive Effects** -The Commission has recognized that it cannot replace competition with regulation in the face of a merger that will result in so many anti-competitive effects. (Reply at 73-74)

HEARING APPROPRIATE FOR SUCH AN ANTI-COMPETITIVE MERGER

Hearing in most recent similar case. The last time the FCC reviewed such an anti-competitive merger application, it sent the application to a hearing.

- **EchoStar-DirecTV Merger.** In 2002, the FCC designated the EchoStar – DirecTV merger application to a hearing before an administrative law judge because, as is the case here, the applicants failed to demonstrate that any cognizable public interest benefits would outweigh the serious anti-competitive effects of the proposed transaction.⁷ The parties in that case ultimately withdrew their application.

⁷ See *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd 20559 (2002).

FCC Filings Referenced Above, With Links:

Sprint Nextel Corporation Petition to Deny (May 31, 2011) (“PTD”):

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