



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Applications of AT&T Inc. and Deutsche Telekom AG)	WT Docket No. 11-65
)	DA 11-799
)	ULS File No. 0004669383
For Consent to Assign or Transfer Control of Licenses and Authorization)	
)	
)	

**Comments of the Competitive Enterprise Institute
June 10, 2011**

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The Competitive Enterprise Institute¹ hereby (CEI) submits this reply comment regarding the applications by AT&T Corp. (AT&T) and Deutsche Telekom AG (T-Mobile) seeking FCC approval of the transfer of licenses held by T-Mobile to AT&T. CEI believes that it is in the public interest that the FCC promptly approve the AT&T – T-Mobile merger without conditions.

A number of petitioners opposed to the merger argue that it will harm consumers by undermining competition in the wireless industry.² In all likelihood, however, the proposed deal will benefit consumers in several ways, fuel economic growth, and advance the public interest. An array of market forces renders it highly unlikely that the deal will increase the incentive or ability of AT&T to engage in anticompetitive conduct.

I. The Nebulous Public Interest Standard

The Commission has statutory authority under Sections 214(a) and 310(d) of the Communications Act of 1934 to review the proposed merger on the basis of whether it will “serve the public interest, convenience and necessity.”³ However, the public interest standard utilized by the Commission is nebulous and subject to broad ranges of interpretation.⁴ As former FCC Chairman Michael Powell observed, the standard has come to be used “as a fairly broad mandate to shift the public interest burden to the applicants and to review the benefits and harms of the transaction itself.”⁵ Another scholar concluded that “the standard is a non-standard: it has no fixed meaning.”⁶ Indeed, Benjamin Compaine noted that, “[i]n democracies, there is no universal ‘public interest.’ Rather there are numerous and changing ‘interested publics...’”⁷

¹ CEI is a non-profit public policy organization that works on a broad range of regulatory issues, including telecommunications and technology policy. CEI has a long history of promoting consumer welfare by analyzing alternatives to government regulation of the dynamic communications marketplace.

² See e.g. comments of Sprint at 2 <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675883>

³ 47 U.S.C. §§ 214(a), 310(d) (Supp. 1999).

⁴ Sara Jerome, Commissioner McDowell discusses FCC’s ‘public interest standard,’ The Hill, Apr. 8, 2011, available at <http://thehill.com/blogs/hillicon-valley/technology/154917-commissioner-mcdowell-discusses-the-fcc-public-interest-standard>.

⁵ Statement by Michael K. Powell, Commissioner of the FCC, before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, Mar. 14, 2000, available at <http://transition.fcc.gov/Speeches/Powell/Statements/2000/stmkp005.txt>.

⁶ Adam D. Thierer, “Is the Public Served by the Public Interest Standard?” The Freeman, Sep. 1996, available at <http://www.thefreemanonline.org/featured/is-the-public-served-by-the-public-interest-standard/>.

⁷ Benjamin Compaine, The myths of encroaching global media ownership, Nov. 26, 2001, <http://www.opendemocracy.net/content/articles/PDF/87.pdf>.

The Commission has on numerous occasions used the standard to “[impose] conditions on mergers that go far beyond the existing requirements of the statute or its own rules.”⁸ This is due in large part to the vagueness of the standard, which enables the inclusion of any number of factors that may or may not have any substantial link to the inquiry in question. To the extent that the standard must nonetheless be used, it should be done so in a circumscribed manner. Hence, a wise approach is to look at specific harms that may arise from the merger – and, in particular, harms to consumers, as Commissioner Robert McDowell has suggested.⁹ The relevant question, therefore, is as follows: will the merger likely result in better service, expanded coverage and greater consumer satisfaction, or will it instead yield higher prices and poorer service quality? Viewing the merger through that lens, it is clear that the proposed merger would benefit, rather than harm, consumers, and as such is ultimately in the public interest.

Consumer Benefits Achieved Through the Merger

Nielsen estimates that there are 223 million mobile phone users in the United States, including 60.7 million who use their phones to access the World Wide Web.¹⁰ Smart phones continue to proliferate, and with them the use of bandwidth for high quality media continues to increase.¹¹ Applications such as Facebook, Twitter, and Foursquare continue to gain new mobile users, thereby putting greater strains on network capacity.

To accommodate this ever increasing demand, carriers must work harder than ever to expand their coverage areas and improve service. AT&T in particular has seen an 8,000 percent increase in mobile traffic in the last four years, and demand for bandwidth is expected to continue to grow.¹² The merger will allow AT&T to better address the expected increase in traffic and, therefore, provide better service to consumers by putting existing infrastructure to more efficient use and increasing spectrum efficiency. This will be accomplished by integrating T-Mobile cell sites into the existing AT&T network, including cell sites that are located within weak areas of

⁸ Randolph May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 Fed. Comm. L.J. 427 (2001).

⁹ Jerome, *supra* note 2.

¹⁰ The Nielsen Company, 2010 Media Industry Fact Sheet, *available at* <http://blog.nielsen.com/nielsenwire/press/nielsen-fact-sheet-2010.pdf>.

¹¹ *Id.*

¹² Hal J. Singer, *Should Regulators Block AT&T's Acquisition of T-Mobile?* Harvard Business Review's The Conversation, Mar. 22, 2011, *available at* http://blogs.hbr.org/cs/2011/03/should_regulators_block_att_a.html.

AT&T's network,¹³ and through making use of underutilized spectrum in particular markets.¹⁴ The merger will also enable AT&T to expand LTE coverage to underserved rural areas throughout the country, thereby benefiting those consumers and in turn encouraging other competitors to follow suit.¹⁵

Despite concerns that the merger will result in price increases for consumers¹⁶, the existing evidence suggests a contrary conclusion. Wireless prices have been decreasing over the last decade. In particular, "the same basket of wireless services in January 2011 cost consumers 12 percent less than what it cost in January 2001, and 40 percent less than what it cost in January 1998."¹⁷

It is clear that the merger, rather than harming consumers and threatening a vibrant wireless market, will provide consumers with better service, increased coverage and more innovation.

Mobile Ecosystems as Multi-Sided Markets

Wireless carriers face ever-growing discipline from other major players in the mobile ecosystem. Many wireless consumers increasingly care a great deal about the type of device they own, the operating system it runs, and the apps they can use. While cell phones have long varied in terms of features, design, and capabilities, the level of differentiation among competing devices and platforms is greater than ever before. For consumers in the market for a new mobile phone, the device type is often the most important factor, while the carrier is often a secondary concern. When AT&T secured an exclusive arrangement with Apple to offer the iPhone in 2007, millions of consumers who previously subscribed to competing carriers flocked to AT&T so they could own a coveted iPhone.¹⁸

¹³ AT&T, Description of Transaction, Public Interest Showing and Related Demonstrations 34, *available at* <http://mobilizeeverything.com/pdfs/PUBLIC-PIS%20FINAL.pdf>.

¹⁴ *Id.* at 39.

¹⁵ AT&T, Description of Transaction, Public Interest Showing and Related Demonstrations, Declaration of John Donovan, at 23. *See also*, David Ure, Rural America Needs Better Broadband Service, Salt Lake Tribune, Jun. 6, 2011, *available at* <http://www.sltrib.com/sltrib/opinion/51934312-82/rural-broadband-america-coverage.html.csp>.

¹⁶ John Bergmayer, Why the FCC Should Block the AT&T/T-Mobile Merger: The Director's Cut, Public Knowledge, May 31, 2011, *available at* <http://www.publicknowledge.org/blog/why-fcc-should-block-attt-mobile-merger-direc>.

¹⁷ Singer, *supra* note 9.

¹⁸ <http://gigaom.com/2009/04/22/why-att-is-desperately-addicted-to-the-iphone/>

In recent years, various mobile OS vendors and wireless carriers have on numerous occasions forged major partnerships. Such partnerships have been a boon for not only for carriers and OS vendors but also for consumers. Examples of highly successful partnerships include Apple's deal with AT&T to distribute the iPhone¹⁹, Google's deal with Verizon to collaborate closely to create a suite of Android mobile devices,²⁰ and Microsoft's decision to make AT&T its "premier partner" for its Windows Phone 7 platform.²¹ More recently, Google and Sprint Nextel unveiled a partnership to offer a near-field communications-based mobile payment system.²²

This evolving market structure imposes substantial limitations on the ability and incentive of wireless carriers to engage in conduct that would harm consumers or otherwise undermine the public interest. The largest mobile platform vendors now possess a substantial amount of influence over the decisions of wireless carriers, which now routinely court mobile OS vendors.²³ While no single personal mobile phone user possesses the bargaining power to meaningfully negotiate terms with a major wireless carrier, popular mobile platform vendors with sizable market shares carry a great deal of weight in their negotiations with carriers.²⁴

As many economists have noted, exclusive arrangements providing for popular handsets to be sold on particular networks are an increasingly crucial – and pro-competitive – differentiating tactic employed by carriers.²⁵ Carriers that do not invest adequately in enhancing their networks, providing good customer service, and offering reliable service risk alienating not only their customers, but also device manufacturers and mobile operating system vendors. If carriers fall out of good graces with device manufacturers or mobile OS vendors, they may lose out on exclusivity deals to their competitors. As economists Dave Heatley and Bronwyn Howell argued in a recent paper²⁶ in the peer-reviewed journal *COMMUNICATIONS & STRATEGIES*:

¹⁹ http://www.computerworld.com/s/article/9216004/Apple_breaks_iPhone_sales_record_again

²⁰ http://www.msnbc.msn.com/id/33192558/ns/technology_and_science-tech_and_gadgets/t/verizon-google-android-partnership/

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http://www.pcworld.com/businesscenter/article/189452/microsoft_anoints_atandt_as_preferred_windows_phone_7_carrier.html

²² <http://thenewschronicle.com/googlesprint-partnership-mobile-payment-system-unveiled-26/0525014365/>

²³ <http://arstechnica.com/apple/news/2009/10/verizon-were-interested-in-iphone-ball-in-apples-court.ars>

²⁴ <http://www.idc.com/getdoc.jsp?containerId=prUS22871611>

²⁵ <http://www.pff.org/issues-pubs/testimony/2009/090617-Esbin-Exclusive-Handset-Testimony.pdf> at 6

²⁶ http://repec.idate.fr/RePEc/idt/journal/CS7504/CS75_HEATLEY_HOWELL.pdf at 98

Network operators and handset manufacturers are not in a strong position to offer comprehensive bundles. Their market power in the mobile ecosystem can be expected to diminish over time.

The market power of mobile OS vendors in disciplining wireless carriers obviates many of the concerns expressed by opponents of the AT&T – T-Mobile deal. Analyzing the likely effects of the deal through the lens of traditional monopolistic competition, as several petitioners have done, is ill-suited to judging the actual welfare effects of the acquisition. Indeed, the economic literature on multi-sided markets suggests that consolidation in the wireless industry is a natural and beneficial response to the diminishing market power enjoyed by carriers and the increasing importance of scale in building out robust, nationwide mobile broadband networks.

Special Access

Several petitioners argue that the proposed takeover would lead to higher prices for backhaul, or special access services.²⁷ AT&T and Verizon, the argument goes, would charge Sprint and other carriers higher prices for special access if T-Mobile were to cease to exist as an independent entity participating in the market for purchasing backhaul. This argument rests on the flawed premise that AT&T and Verizon will invariably remain the dominant players in the market for providing special access services.

Recent market developments paint a very different picture of the backhaul market. Indeed, incumbents must contend with a growing number of effective competitors, including major cable companies (e.g. Comcast, Cox, Time Warner Cable) and several microwave backhaul providers (e.g. AboveNet, AirBand, Windstream).²⁸ Many of these providers have grown dramatically in just a few years' time, fueled by technological advances in wireless communications that have rendered point-to-point wireless backhaul increasingly cost-effective and robust.²⁹

²⁷ Sprint at 48 <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675883>

²⁸ http://news.cnet.com/8301-1035_3-20065545-94.html?tag=topStories2

²⁹ Georgios T. Pitsiladis, Athanasios D. Panagopoulos, and Phillip Constantinou. "Multi-Hop Wireless Backhaul Networks above 10 GHz: Connectivity and Critical Density Evaluation," October 2009. Journal of Infrared, Millimeter and Terahertz Waves <http://www.springerlink.com/content/9771535371064333/>

T-Mobile obtains 75% of its special access service from firms other than Verizon and AT&T.³⁰ Sprint is also investing heavily in reducing its reliance on traditional backhaul providers.³¹ To the extent that special access pricing is generating supra-competitive returns for AT&T and Verizon, these firms' profitability has arguably benefited innovation and investment in the backhaul market while spurring entry by newcomers.³² The contestable nature of the backhaul market obviates concerns over incumbents' market power.

No Conditions

Competition in the wireless industry, the threat of market entry, and mobile OS vendors all exist to rectify any theoretically harmful outcomes of the AT&T – T-Mobile merger. An array of market forces stands ready to deter and punish anti-competitive conduct by AT&T (or by any other major wireless carrier). Imposing conditions on the deal will likely do more harm than good, undermining many of the efficiencies and other benefits that the proposed deal will make possible. Requiring AT&T to divest spectrum holdings or other assets as a condition of the deal gaining approval will also dissuade other firms in the telecom industry from exploring creative economic arrangements involving vertical or horizontal integration.

The FCC's process of merger review can be very costly. The more conditions the Commission insists upon, the longer the delay for the completion of review. Such delays are detrimental to consumer welfare and the public interest.³³ Rather than spending another six months or longer reviewing the deal and demanding more information from the merging parties, the Commission should complete its review (and approval) of the deal quickly. The sooner AT&T completes its T-Mobile acquisition, the sooner the combined entity can begin integrating its operations. The

³⁰ <http://attpublicpolicy.com/government-policy/mythbusters-part-2-sprint%E2%80%99s-unthinking-reflex-on-wireless-backhaul/>

³¹ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9ODQwMjZ8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1> at 27 (“As Network Vision is implemented, the size and power required to operate cell sites used by Sprint is expected to be reduced. Sprint expects the plan to bring financial benefit to the company through convergence to one common network, which is expected to reduce network maintenance and operating costs through capital efficiencies, reduced energy costs, lower roaming expenses, backhaul savings and the eventual reduction in total cell sites and also by reducing the cost of handling expanded data traffic.”)

³² See Herbert Giersch, “The Age of Schumpeter,” *The American Economic Review*, Vol. 74, No. 2, Papers and Proceedings of the Ninety-Sixth Annual Meeting of the American Economic Association (May, 1984), pp. 103-109.

³³ See Jerry Ellig, “Costs and Consequences of Federal Telecommunications and Broadband Regulations,” Mercatus Center, George Mason University, Feb. 2005, for the proposition that government telecommunications regulation has cost consumers up to \$105 billion annually in higher prices and foregone services, available at <http://www.mercatus.org/pdf/materials/1074.pdf>

current uncertainty surrounding the proposed deal discourages AT&T and T-Mobile from committing to risky long-term decisions.