SEN. KOHL'S FOLLOW UP QUESTIONS FOR THE RECORD FOR
HEARING ON "THE ATT/T-MOBILE MERGER: IS HUMPTY DUMPTY BEING PUT BACK TOGETHER AGAIN?"
For Gigi Sohn

1. Do you believe most consumers view AT&T and T-Mobile as direct competitors? Why or why not?

Yes, Public Knowledge believes that most consumers view AT&T and T-Mobile not only as direct competitors but as viable alternatives for similar services. Both companies focus their efforts towards each other in advertising, price, and coverage on a national level. During AT&T's merger with Centennial, AT&T cited T-Mobile as its competitor a number of times throughout its public interest filing.[1]

However, an increasing number of consumers are making their choice of wireless provider based on the handset options their carrier provides, restricting their options of wireless providers and shrinking the competitive landscape. For example, only two national carriers (AT&T and Verizon) provide access to Apple's iPhone 4 handset as a result of exclusive contracts. This phone in particular is one of the few handsets with a fiercely dedicated customer base that can only choose between AT&T and Verizon through normal means. Ironically, some of the most technically sophisticated consumers go through great lengths to leave AT&T's network and bring their iPhone onto T-Mobile's network by unlocking their handset through a process known as "jailbreaking" (a practice deemed permissible by the U.S. Copyright Office).[2]

2. Should this merger be approved, should we expect consumers to pay more as the number of national cell phone competitors declines from four to three, particularly with the loss of T-Mobile as the price leader?

T-Mobile customers will pay more for their wireless service if they are acquired by AT&T, and consumers across the wireless industry will pay more with the removal of T-Mobile's low-cost plans from the marketplace. AT&T currently receives 17 percent more revenue per customer than T-Mobile and will need to act accordingly to retain its higher returns.[3] In addition, a Consumer Reports price analysis survey of voice and data plans found that today T-Mobile

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[1] Merger of AT&T Inc. and Centennial Communications Corp, Description of Transaction, Public Interest Showing and Related Demonstrations, (released November 21, 2008) https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=1N6VJL5K37mPzN1G7L2XKBP7mC5jC50m96ttqVlHZr3GL1cyJSgx!-659400886!-849295342?applType=search&fileKey=843683410&attachmentKey=18355849&attachmentInd=applAttach

[2] Cohen, Adam (2010, July 28). *The iPhone Jailbreak: A Win Against Copyright Creep.* [Online] In Time. Retrieved June 6, 2011 from http://www.time.com/time/nation/article/0,8599,2006956,00.html#ixzz1On4yLO1H

[3] *AT&T and T-Mobile USA: The Future of Mobile Broadband (*2011) Retrieved from http://www.mobilizeeverything.com/documents/Factsheet.pdf

customers pay ***between $15 to $50 less a month*** for their plans than they would with comparable plans from AT&T.[4] When questioned on the fate of the voice and data plans of T-Mobile's customers during the May 11th hearing, AT&T's CEO committed to retaining prices should customers adopt "comparable" handsets, but currently AT&T and T-Mobile mutually carry only 13 devices out of 145. Lastly, with increased market power and the elimination of T-Mobile and foreclosure on new competition with the consolidation of spectrum, we see no reason why AT&T will suddenly adopt T-Mobile's aggressive pricing structure. Instead, it would be relieved of the downward price pressure that T-Mobile provided in the wireless industry. It is for these reasons why the Department of Justice starts from the "*presumption that in highly concentrated markets consumers can be **significantly harmed** when the number of strong competitors declines from four to three, or three to two.*"[5]

3. AT&T's FCC filing argues that T-Mobile is a very weak company, with "capacity constraints", facing "spectrum exhausts in a number of markets" and "no clear path to effective, economical deployment of LTE," the next generation of cell phone service. Reading this filing, it is not an exaggeration to say it portrays T-Mobile as on the verge of failure. Do you think the situation is as dire for T-Mobile as AT&T portrays it? Could T-Mobile continue as a viable competitor without this deal?

Public Knowledge does not believe that T-Mobile is on the verge of failure or qualifies as a "failing firm" as antitrust law has been interpreted in the past. In order to qualify as a "failing firm" where leeway to anticompetitive harms would be granted, T-Mobile would have to be in imminent danger of financial failure, would have to been unable to reorganize under chapter 11 of the Bankruptcy Act, and would have to been unsuccessful in good-faith efforts to find a viable alternative that would not result in anticompetitive harms. These exceptions were created to recognize the fact that if a company was to disappear from the market in its entirety regardless of a merger, then its purchase would result in very little change in the market. That is clearly not the case here as T-Mobile has remained profitable (and is still profitable today) even through the years of the financial crisis and in fact was the only national carrier that increased its employment base. It is ironic that AT&T essentially asserts that lower profits are grounds for consolidation with T-Mobile, yet simultaneously advocates that Sprint is a competitor despite having a ***$29.5 billion loss*** in 2008 and not yet having a profitable quarter since its merger with Nextel.[6]

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[4] Blyskal, Jeff (2011, April 8). *CR analysis: T-Mobile is cheaper than AT&T.* [Online] In Consumer Reports. Retrieved April 25, 2011 from http://news.consumerreports.org/electronics/2011/04/cr-analysis-t-mobile-is-cheaper-than-att.html

[5] Notice of Ex Parte Communication: Economic Issues in Broadband Competition A National Broadband Plan for Our Future, GN Dkt. No. 09-51 (released January 4, 2010) http://www.justice.gov/atr/public/comments/253393.htm

[6] Holson, Laura (2008, February 29). *Sprint Nextel Posts $29.5 Billion Loss.* [Online] In The New York Times. Retrieved June 6, 2011 from http://www.nytimes.com/2008/02/29/technology/29sprint.html

As for the fate of T-Mobile without this merger, we are very confident that T-Mobile will be highly sought after by a number of industry players when this merger is blocked, presuming that Deutsche Telekom will continue to seek its sale. Potential purchasers of T-Mobile could be a company within the cable industry or wireline phone industry, both of which have demonstrated high interest in gaining a foothold in wireless services. It is also possible that, much in the same way as Deutsche Telekom purchased Voicestream (which became T-Mobile), another international company can purchase a stake in T-Mobile. This confidence is not based on speculation, but rather supported by the historical actions of each of these sectors, whether it was the wireline industry's participation in the 700 MHz spectrum auctions, the launching of Clearwire (a jointly owned venture by Sprint, Comcast, Time Warner Cable, Intel, Google, and Bright House Networks), or British company Vodafone's decision to obtain a 45% stake in Verizon Wireless. It is also possible that T-Mobile will be strengthened enough from AT&T's $6 billion breakup fee ($3 billion in cash, $2 billion in spectrum assets, and $1 billion in roaming agreements) to the point where it can more effectively compete as a stand-alone company. Ultimately, Deutsche Telekom has every legal right to exit the U.S. market as long as that sale does not violate antitrust law.

4. AT&T argues that we need not worry about the T-Mobile merger because of the presence of smaller, local competitors like Cellular South. But many of the smaller, local cell phone companies do not have access to the most in-demand "smartphones," for example the Apple iPhone. If these companies do not have access to the devices consumers most demand, can they truly be considered competitors to the four large national cell phone companies?

Public Knowledge thinks that in order for regional carriers to be full-fledged competitors to the national carriers, they need the ability to compete on all levels rather than on some levels. Given that small providers are unable to gain access to the most popular devices, we believe prohibiting the practice outright while ensuring device interoperability would improve the competitive stance of regional carriers tremendously as more consumers migrate to smartphones. As the largest two national carriers continue to gain market share, their market power capacity to lock popular devices or an entire product line of devices (much like Apple) into exclusive contracts continues to grow leaving smaller regional players at a growing disadvantage to not only to retain their current customers, but more importantly to attract new customers.

Currently, nearly one out of three wireless consumers (approximately 100 million Americans) owns a smartphone. According to 2009 polling on consumer preferences conducted by Nielson (chart on following page), the number one factor for consumers when determining their choice in

wireless carrier is price as well as a number of factors related to price, reflecting the current economic situation of high unemployment and recovery from the financial industry collapse.[7]

Factors For Choosing A Wireless Carrier		
RANK	3rd Quarter 2006	1st Quarter 2009
1	Price	Price
2	Network Quality	Family Plan
3	Reputation / Recommendation	Payment Option
4	Previous experience with the operator	Free In-Network Calling
5	Family Plan	Network Quality
6	Payment Options	Reputation / Recommendation
7	Specific Phone	Specific Phone
8	Customer Service	Previous experience with the operator
Source: The Nielsen Company		

While the specific availability of a phone is ranked seventh among primary factors that drive wireless consumer choices on an industry wide basis, further inspection into the data reveals some critical findings. Generally the percentage of consumers who factor in what specific phone is available has increased from 2.9 percent in 2006 to 6.4 percent in 2009 representing an increase of an additional 10 million wireless customers who value what specific phone is available to them. When separating AT&T from the other carriers, the data reveals that 23 percent of new AT&T customers value the specific phone as important compared to 5 percent for the remainder of the industry. It is worth noting that in 2009, AT&T still retained the exclusivity contract with Apple leading Nielson analyst Roger Entner to conclude that the iPhone was having an effect on consumer choice with carriers completely to AT&T's benefit.[8]

5(a). AT&T argues that cell phone prices have fallen sharply over the last ten years. Does falling prices in the past mean we don't have to worry about the consequences of this merger?

(b) The available statistics on cell phone pricing mainly refer to voice pricing. But consumers increasingly rely on cell phones to connect to the Internet, so the price of data plans is now critical. Are you worried that data prices might increase in the future after the merger?

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[7] Entner, Roger. *When Choosing a Carrier, Does the iPhone Really Matter?.* Retrieved June 8, 2011, from http://blog.nielsen.com/nielsenwire/consumer/when-choosing-a-carrier-does-the-iphone-really-matter/#more-14381

[8] Hansell, Saul (2009, August 10). *What Do Cellphone Users Want Most? Cheap Service*. [Online] In The New York Times. Retrieved June 7, 2011 from http://bits.blogs.nytimes.com/2009/08/10/what-do-cellphone-users-want-most-cheap-service/

Public Knowledge does not believe that prices for wireless services (data, text, and voice for both residential and business uses) are declining to the degree AT&T has asserted. AT&T often cites a July 2010 Government Accountability Office (GAO) report titled *"Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry"* in an attempt to demonstrate how prices have fallen, but that report only focused on the price for ***voice service*** while ironically also mentioning that "*industry consolidation has made it more difficult for small and regional carriers to be competitive*."[9] In addition, the GAO report cautions that "*industry wide data masks variations in wireless plan prices. A more detailed analysis of prices charged could help better measure competition and efficiency in the market.*" In other words, the GAO recognized that mixing the lower prices of T-Mobile (potentially as much as $600 less per year than AT&T) with the higher prices of AT&T is insufficient to provide definitive data on the status of prices dropping due to competition and efficiency gains in the industry.

Furthermore, claims by AT&T on the price "per megabyte" or price "per minute" falling should be met with skepticism by policymakers on whether that truly means consumers are paying less out of pocket. To illustrate how viewing prices specifically through a "per megabyte" or "per minute" lens could actually mask price increases, policy makers should look no further than the recent changes in text message plans AT&T instituted at the beginning of this year when it eliminated its $5 for 200 texts plan and $15 for 1,500 texts plan.[10] Essentially, AT&T customers no longer have the choice to purchase a $5 or $15 plan and now must choose between a $10 for 1,000 texts and $20 for unlimited text message plan. Yes, consumers can now have more texts at a reduced "per text" cost, but every subscriber and would-be subscriber of $5 text plans (and who use less than 200 texts) effectively had their costs doubled while 1,500 text message plan customers received a 33 percent increase in cost. Both of these increases are suspect given that text messaging, as the Chairman has noted, costs the wireless carrier industry ***virtually nothing*** to provide as a service and is in fact included on an unlimited basis with all of T-Mobile's plans.[11]

Lastly, policy makers should recognize that not all price drops are the sole result of competition but rather can be related to advances in technology that lower costs. For example, the Cray 2 supercomputer of 1985 now has the same processing power as Apple's hand held tablet iPad 2.[12]

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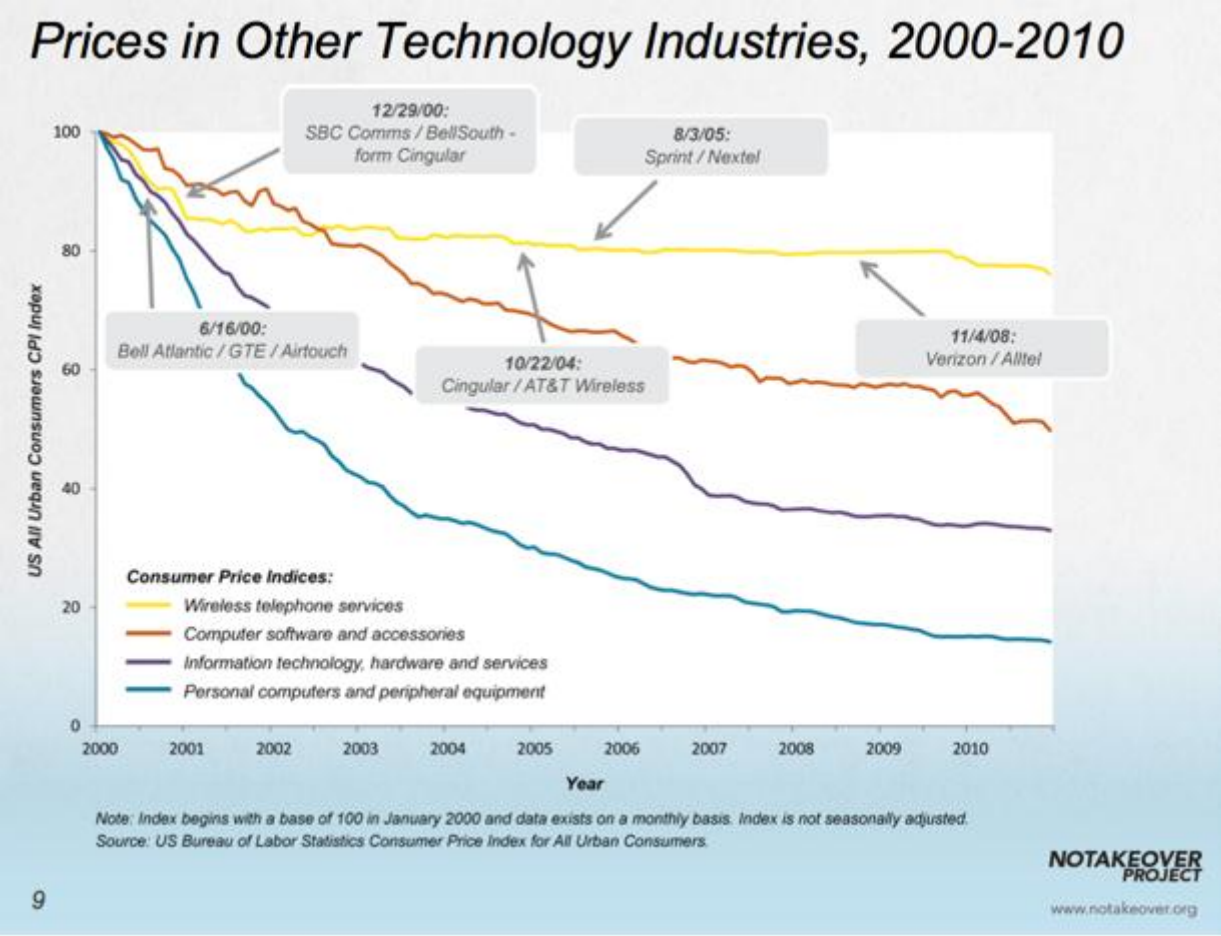
[9] *GAO Report: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry* (July 2010) Retrieved from http://www.gao.gov/new.items/d10779.pdf

[10] Weinberg, Michael. *AT&T Increases Prices on Text Messaging In the Name of Streamlining.* Retrieved June 8, 2011, from http://www.publicknowledge.org/blog/att-increases-prices-text-messaging-name-stre

[11] Stross, Randall (2008, December 26). *What Carriers Aren't Eager to Tell You About Texting.* [Online] In The New York Times. Retrieved June 8, 2011 from http://www.nytimes.com/2008/12/28/business/28digi.html?_r=2&partner=rss&emc=rss

[12] Markoff, John (2011, May 9). The iPad in Your Hand: As Fast as a Supercomputer of Yore. [Online] In The New York Times. Retrieved June 7, 2011 from http://bits.blogs.nytimes.com/2011/05/09/the-ipad-in-your-hand-as-fast-as-a-supercomputer-of-yore/

As a matter of price, the Cray 2 cost about $17 million, and the iPad 2 costs $500.[13] Given that current wireless services directly benefit from reduced costs in hardware, we note that the price of current wireless services are not at all reflective of the improvements and reductions in costs that both technology gains and competition would bring to consumers. Upon further inspection, a recent analysis by NoTakeOver.org (a coalition of consumer groups and industry opposed to the merger) has shown that the price for wireless service has essentially flat lined as the telecommunications industry began to aggressively merge ten years ago while consumer costs in other high-tech sectors have dropped precipitously by comparison (chart on following page).[14]



6. Two years ago our Antitrust Subcommittee conducted an investigation and then a hearing into price increases for text messaging on all four major national cell phone companies. The price of text messaging on a per message basis doubled in the prior two years, rising first from 10 to 15 cents per message, then from 15 to 20 cents, on all four

[13] Professor Joel Adams' Research/Scholarly Projects - Microwulf: Cost Efficiency http://www.calvin.edu/~adams/research/microwulf/PPR/

[14] No Take Over Project. *'Falling Prices' Rebuttal How AT&T is manipulating the data.* Retrieved from http://www.notakeover.org/sites/default/files/ATT-Falling-Prices-Rebuttal.pdf

carriers at around the same time. This price rise was all the more notable because the cost of delivering text messages had not risen and indeed was negligible – less than a penny a message. While we didn't find any evidence of outright collusion, these price rises seemed to us to be a warning sign of a lack of competition in the highly concentrated cell phone market.

Does the experience of these parallel text messaging price increases hold any lessons for us today in considering this merger? If the cell phone companies engaged in parallel price increases when there were four competitors, won't it be even easier for them raise prices when there are only three?

As a general rule, dramatic increases in concentration such as those found here increase the risk of coordinated action. In addition, the risk of coordinated action is further enhanced by the similarity between the post-transaction AT&T and the second largest firm, Verizon. Like AT&T, Verizon is a vertically integrated firm, with significant market share in special access markets, residential DSL, enterprise services, and the MVPD (subscription TV) market. Like AT&T, Verizon has sought to control the handset and application market, has resisted entering into reasonable roaming agreements absent a Federal Communications Commission mandate,[15] and has insisted on freedom to manage its network in an anticompetitive fashion. Unsurprisingly, although Verizon and AT&T compete for customers, the two firms have adopted similar strategies of seeking to target high-end customers. Post-acquisition, with the maverick T-Mobile eliminated, it is logical to assume that AT&T and Verizon wireless will act in a coordinated fashion to avoid potentially disruptive competition or avoid engaging in "price wars" that would undermine their profitability. Further, the fact that AT&T and Verizon have remained in lockstep on a number of regulatory issues bearing on their future business models likewise highlights the danger of future coordinated effects.

There is evidence that AT&T and Verizon already coordinate on price increases in today's market. As was noted in a letter submitted to the Chairman and Ranking Member Lee by Free Press, "*In early 2010, Verizon implemented an effective price increase by forcing all customers of feature and smartphones to purchase a data plan. AT&T shortly followed suit. Also in 2010, AT&T eliminated its unlimited data plan for smartphones, forcing new customers in capped plans with overage charges.*"[16]

Merger critics have argued that permitting the merger of AT&T and T-Mobile will create an effective duopoly with the surviving competitors unable to exercise significant competitive pressure. As the HHI analysis shows, this concern cannot be dismissed as idle speculation. When two firms control over 80% of the market, particularly a market with significant barriers to entry, there is a significant danger of coordinated effects. Where, as here, history supports this

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[15] Indeed, Verizon is challenging the validity of the FCC's data roaming rules in the US Court of Appeals for the District of Columbia Circuit

[16] (2011, May 10). *Letter to Chairman Herb Kohl and Ranking Member Mike Lee from Free Press*. Retrieved from http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf

inference, policy makers must regard the likelihood of coordinated effects as approaching certainty.

7. One justification for this merger offered by AT&T is that it is running out of capacity in major cities like New York and San Francisco. It claims that the explosive growth in advanced "4G" services used by consumers to connect their smartphones to the Internet is swamping their networks. So it says it needs the T-Mobile spectrum in order to offer its customers high quality cell phone service. What is your view of that claim? Isn't it true that the use of smartphones and data heavy applications is undergoing explosive growth, and AT&T needs to keep up with this ever increasing demand for spectrum?

While there has been an explosive growth in wireless data use by consumers across the wireless industry, the problems AT&T is encountering in New York and San Francisco and other urban markets are entirely of AT&T's own doing. By comparison, Verizon has fewer spectrum holdings compared to AT&T and has more customers, but it has clearly stated that it does not envision having capacity issues until 2015 at the earliest.[17] It is also worth noting that Verizon has invested more in wireless infrastructure than AT&T both as a matter of total funding and as a percentage of the company's total revenues over the last three years. AT&T can simply utilize the $39 billion that it is committing to European investment with its proposed merger with T-Mobile and invest that funding here in America to modernize its infrastructure and improve its network.

AT&T still has significant amounts of unused spectrum capacity available and has not taken full advantage of technologies that would make more efficient use of its existing spectrum. There is a very clear difference between spectrum assets and capacity. For example, one wireless tower serving a city block must provide connections to all users within that city block. However, if a carrier built two towers for the same city block (requiring additional investment) it effectively has doubled its capacity by splitting the users while retaining the same amount of spectrum. This trend of smaller wireless sites for greater spectrum capacity is the future for the wireless industry and is already occurring. But AT&T is not making use of these "femtocells" and "picocells" to the same extent that other carriers are. Buying T-Mobile's towers simply is a means for AT&T to bypass years of underinvestment by increasing the number of available towers. That being said, Public Knowledge is skeptical that combining two congested networks would result in substantial gains in spectrum capacity at all.

Furthermore, the solution to increased mobile data demand on networks is not simply to consolidate spectrum assets into fewer hands. If this was the solution, then eventually there should be a monopoly controlling all available spectrum for wireless broadband. Rather, Public

[17] Final Transcript Q1 2011 Verizon Earnings Conference Call, Retrieved May 5, 2011, from http://www22.verizon.com/investor/investor-consump/groups/events/documents/investorrelation/event_ucm_1_trans.pdf

Knowledge believes AT&T simply needs to increase its network investment (given that it has $39 billion available) to increase the reuse of spectrum in smaller cell sites through a combination of unlicensed and licensed spectrum. Currently, wireless carriers are aggressively "offloading" data to local Wi-Fi networks utilizing unlicensed spectrum. Ironically, unlicensed spectrum has been historically opposed by the wireless industry in favor of additional auctions and consolidation, but now serves as the wireless broadband backbone for all of the national carriers and the preferred means of providing wireless broadband access to smartphones. In fact, the most recent data shows that in the third quarter of 2010, AT&T customers made a total of 106.9 million connections on AT&T's U.S. Wi-Fi network, alleviating significant congestion on AT&T's wireless network.[18]

Separate from network capacity is whether AT&T is using its spectrum assets efficiently or at all in many cases. Currently, AT&T has not yet built out arguably the most valuable spectrum in the top 21 markets, the 700 MHz band, which is "beachfront" spectrum reclaimed from broadcasters after the transition to digital television.[19] The company also supports legacy and inefficient networks, and it has been reported that potentially ***70 percent to 90 percent of AT&T's current spectrum capacity is unused*** as a result.[20] The company "divide[s] its spectrum portfolio among three different generations of technology…."[21], but it need not do so. While the company is behind the curve on efficiency today by its own choice of under investing for greater quarterly profit (the highest among all wireless carriers), AT&T is also the most capable with its superior revenues and profits to aggressively migrate its users to modernize its network and deploy its network. Indeed, AT&T will be compelled to do so if this merger is blocked if it wishes to remain competitive.

Such a modernization process requires difficult decisions and long term planning, but every single wireless provider will be forced to confront this challenge, and Sprint has demonstrated that even with substantial hurdles it can be done. Today, Sprint is shutting down its legacy networks and focusing on a strong migration to next generation technology.[22] Sprint did not achieve this change by continually purchasing additional networks and spectrum to bring into a dysfunctional system. Instead, Sprint focused on investing in upgrading its own network and

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[18] PR Newswire (2010, October 22) *Third-Quarter Wi-Fi Connections on AT&T Network Exceed Total Connections for 2009* [Press release]. Retrieved from http://www.prnewswire.com/news-releases/third-quarter-wi-fi-connections-on-att-network-exceed-total-connections-for-2009-105520733.html

[19] Reardon, Marguerite (April 29, 2011). *Is AT&T a wireless spectrum hog?* [Online] In CNet News. Retrieved May 6, 2011 from http://news.cnet.com/8301-30686_3-20058494-266.html

[20] Burnstein, Dave (March 22, 2011). *70-90% Of AT&T Spectrum Capacity Unused* [Online] In DSLPrime.com Retrieved April 25, 2011 from http://www.dslprime.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused

[21] AT&T Public Interest Statement at 22.

[22] Stephen Lawson, "Sprint's IDEN Finally Heading For Sign Off," PC World (December 7, 2010), available at: http://www.pcworld.com/businesscenter/article/212782/sprints_iden_finally_headed_for_signoff.html

internal processes. Competitive pressure—of a type that would be severely reduced with the elimination of T-Mobile from the market—drove Sprint to innovate and improve. Allowing AT&T to merge with T-Mobile will do little to change the reality that AT&T's only real path forward is to focus on consolidating its network protocols, not to allow inefficient practices to spill over into larger and larger swaths of spectrum.

8. I understand that you oppose the merger and believe that it should be blocked. However, if the Justice Department and FCC do not decide to block it, are there any conditions that you think they should impose in order to approve the merger?

Public Knowledge does not see how this merger can be conditioned in a manner that addresses the antitrust harms it creates. This is because the harms come from the creation of a wireless duopoly and conditions can only apply to the merged entity, and not to the other duopoly carrier, Verizon. Should the wireless market become a duopoly, Public Knowledge as an organization will need to retool its advocacy from improved competition policy designed for a competitive wireless market to advocating regulations meant for a wireless duopoly reminiscent of the 1980s.

Moreover, not only is the government is ill-equipped to enforce the many conditions that this merger would require, AT&T has a poor history of compliance. For example, it recently entered into a $2 million civil settlement with the Department of Justice because it failed to comply with the Dobson Consent Decree.[23]

Lastly, no divestiture will permit entry by a new participant. The best divestiture would do is increase the ability of surviving competitors to compete effectively, a result that increases market concentration overall and is therefore traditionally regarded as inadequate. Indeed, existing market concentration has generally meant that the dominant players, AT&T and Verizon, have captured the divested licenses intended to promote competition.[24] And, in any event, any divestiture sufficient to mitigate the harms of increased concentration would be so significant that they would effectively eliminate any of the alleged merger benefits.

[23] Justice Department Settles Civil Contempt Claim Against AT&T Inc., Jan. 14, 2009, http://www.justice.gov/atr/public/press_releases/2009/241435.htm

[24] Christopher Stern, Cingular to Sell Cellular Spectrum, WASHINGTON POST, May 26, 2004, http://www.washingtonpost.com/wp-dyn/articles/A55682-2004May25.html; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of License and Authorizations, *Memorandum Opinion & Order*, 19 FCC Rcd 21,522 ¶ 141 (2004); T-Mobile USA to End Network Venture with Cingular and Acquire California/Nevada Network and Spectrum, May 25, 2004, http://newsroom.t-mobile.com/articles/t-mobile-cingular.