



Testimony of Gigi B. Sohn, President
Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Hearing On:
“The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?”

Washington, DC
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Chairman Kohl, Ranking Member Lee, and Members of the Subcommittee, thank you for this opportunity to discuss the significant consumer harms the AT&T and T-Mobile merger would cause if allowed. My name is Gigi Sohn and I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in a competitive and affordable telecommunications market.¹

Introduction

In 1993, only the wealthiest Americans could afford cellular phone service. Remember super-rich Gordon Gekko in the movie *Wall Street* carrying his brick-sized handset? At that time, just two companies ruled the cellular phone market, resulting in high prices and little innovation. But that year, Congress and the Clinton Administration decided that wireless communications was the wave of the future. The result was the passage of the Omnibus Budget Reconciliation Act of 1993, which included a provision that authorized the Federal Communications Commission (FCC) to initiate spectrum auctions and create a competitive wireless market.

¹ I would like to thank my Public Knowledge colleagues Ernesto Falcon, Harold Feld, John Bergmayer, Michael Weinberg, Andrew Lomeli, and Rashmi Rangnath for assisting me with the researching and drafting of this testimony.

The effects of this decision were extraordinarily beneficial to consumers. Competition for wireless services expanded greatly, and as a result, the service went digital. Innovation exploded, resulting in smaller handsets and new applications. Prices dropped precipitously.

The merger of AT&T and T-Mobile threatens to undo what Congress so wisely initiated in 1993 and return the United States to a duopoly market marked by higher prices and less innovation. If this merger is consummated, two vertically integrated companies will control nearly **80 percent of the wireless market**, and leave Sprint, with just 16 percent of the market, considerably weakened. This is a market that is already considered heavily concentrated based on the Department of Justice (DoJ) 2010 Horizontal Merger Guidelines and current Herfindahl-Hirschman Index (HHI) measurements. In this type of market environment, the DoJ has found that “based in large part on its extensive experience in evaluating horizontal mergers, the Department 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.”² The DoJ guidelines also state that mergers in highly concentrated markets that involve an increase in the HHI of more than 100 points raise competitive concerns and more than 200 points are presumed to enhance market power.³ This merger stands to increase the national HHI **by an additional 650-700 points.**⁴

It is particularly striking that every single public interest benefit AT&T has claimed as a result of the merger can be accomplished without removing a competitor. Expansion of 4G coverage to

² 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>

³ U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines (August 19, 2010)

⁴ Stifel Nicolaus, Washington Telecom, Media, and Tech Insider (March 29, 2011). *AT&T/T-Mo: Data Point to Coming Brawl, Risk; Deal Still Looks Doable*

overlap their current 2G and 3G network coverage of 97 percent⁵ and improving their network capacity are already possible and therefore are not merger-specific benefits. I do not dispute AT&T's assertion that this merger would be an enormous benefit to AT&T's profit margins and its stockholders. However, the merger between AT&T and T-Mobile will result in higher prices, reduced competition, and less innovation in America's wireless marketplace. Antitrust law seeks to prevent these three outcomes and Public Knowledge believes that is only possible if this merger is blocked. For that reason we also believe that no remedies can alleviate the level of anticompetitive harm the merger represents.

The merger will result in jobs lost in every area where AT&T and T-Mobile have redundant staffing, competing retail stores, overlapping call centers, and other facilities at a time of 9 percent national unemployment. Such a trend would only be status quo for AT&T, which has shed approximately 28,000 jobs over the last 21 months or approximately 9.7 percent of its workforce. In all my research, I have not found one single reputable analyst in the telecommunications field that will attest that this merger will create new jobs for AT&T. Although the jobs picture is not completely bleak: on the announcement of the merger news accounts reported that this may be a boon for the IT industry...in India⁶.

This merger is the ultimate test of whether antitrust law has any teeth left at all. Previous mergers have steadily increased market concentration to the point where we have a heavily concentrated market with very few competitors remaining, making this next merger the tipping

⁵ AT&T (2009) AT&T Sets the Record Straight on Verizon Ads [Press release]. Retrieved from <http://www.att.com/gen/press-room?pid=14002>

⁶ ET Bureau (2011, March 22). *AT&T, T-Mobile deal: Indian IT cos to benefit*. [Online] In The Times of India. Retrieved May 4, 2011 from http://articles.timesofindia.indiatimes.com/2011-03-22/infrastructure/29173875_1_t-mobile-at-t-outsourcing

point back into a duopoly market. There is nothing in the merger of AT&T and T-Mobile that will benefit consumers and it will lead to less competition, higher prices and less innovation.

I urge the members of the Subcommittee to view this deal with great skepticism and then after reviewing the facts to oppose it.

Congress Decided That a Duopoly Market Was Not Competitive

The history of the wireless industry demonstrates that the entry of additional providers results in consumers paying less, increases in innovation, and better quality services. In the 1970s, the FCC initially only planned to have one cellular system operated by the local telephone companies. In 1981, to promote competition in the wireless market, the FCC issued licenses for two competing cellular systems in every area.

During the decade of duopoly market structure, competition and innovation were stagnant and high prices ensured that only wealthy Americans could afford cellular service. In 1992 the Government Accountability Office found that in two-thirds of the market, carriers not only had similar pricing but identical pricing as well.⁷ After deeming the market less than fully competitive, Congress acted decisively in 1993 by enabling the FCC through legislation to auction additional spectrum to create competition and break up the duopoly market.

In the following decade consumers received the benefits of competition as prices for voice service fell to rates the general public could afford, innovation increased with the launch of new

⁷ GAO Report: *Concerns About Competition in the Cellular Telephone Service Industry* (July 1992) Retrieved from <http://archive.gao.gov/d33t10/147125.pdf>

technologies such as texting and mobile Internet access, and existing cellular providers invested into their facilities in order to remain competitive. The following are some examples of what competition brought to the wireless market:

- AT&T Wireless introduced the first digital one rate plan in 1998 and the first family plan in 1999.
- Sprint launched the first wireless web service in 1999
- VoiceStream (present day T-Mobile) introduced two-way text messaging in 2000
- Cingular launched the first unlimited night and weekend minutes plan in 2001.

In recent years the level of competition has begun to recede. But it is possible to bring the market back to what Congress envisioned by moving forward with new competition policies many of which T-Mobile has advocated), and by blocking this merger outright.

Consumers Will Pay More as a Direct Result of the Merger

The earliest impact on what consumers pay will be for the 33.6 million Americans who are currently T-Mobile customers. A recent Consumer Reports price analysis survey of voice and data plans found that today T-Mobile customers pay *between \$15 to \$50 less a month* for their plans than they would with comparable plans from AT&T.⁸ When looking at the postpaid average revenue per user of these companies, AT&T obtains approximately 17 percent more

⁸ 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>

revenue per customer than T-Mobile does and certainly will act to preserve its higher returns.⁹ When questioned on the fate of the voice and data plans of T-Mobile's customers, AT&T has stated publicly that it does not intend to retain T-Mobile's pricing structure for newly acquired customers indefinitely.¹⁰ Essentially this means that the month-to-month subscriber as well as the longer term contract subscriber of T-Mobile cannot keep the plans they prefer and will have to either pick the higher priced AT&T plans or simply downgrade to a less competitive alternative that does not provide them the same service as T-Mobile.

Over the long term, the disappearance of T-Mobile will result in accelerated price increases for consumers across the board. As the Chairman has recognized within the text messaging market,¹¹ prices have trended upwards at rates unrelated to costs even with four national competitors. With T-Mobile out of the picture and no longer competing on lower prices and applying at least some restraint on price increases, the remaining three national carriers will have fewer reasons to compete on price.

T-Mobile itself has raised concerns on its own ability to compete on price due to the fact that vertically integrated companies like AT&T are artificially charging it non-competitive rates in the Special Access market.¹² As of last year, T-Mobile claimed that it purchased backhaul support from the Incumbent Local Exchange Carriers (largely AT&T and Verizon) in most of its 3G coverage areas and has further claimed that in some markets T-Mobile must contend with a

⁹ *AT&T and T-Mobile USA: The Future of Mobile Broadband* (2011) Retrieved from <http://www.mobilizeeverything.com/documents/Factsheet.pdf>

¹⁰ Kang, Cecilia (2011, April 12). *AT&T, T-Mobile file merger application; Q&A with James Cicconi*. [Online] In Washington Post. Retrieved April 26, 2011 from http://www.washingtonpost.com/blogs/post-tech/post/atandt-t-mobile-file-merger-application-ganda-with-james-cicconi/2011/04/11/AFhzCTQD_blog.html

¹¹ Office of Senator Herb Kohl (2008) *Kohl Calls on Cell Phone Companies to Justify Skyrocketing Texting Rates* [Press release]. Retrieved from http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=1920

¹² *Notice of Ex Parte Communication: Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25 (released May 6, 2010) <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020448643>

monopoly. Public Knowledge has long asserted that the Special Access market is in dire need of reform because it has allowed AT&T and Verizon to raise costs on T-Mobile and Sprint and directly limit their ability to compete with lower prices. Simply put, without reform in this market, it has been extraordinarily difficult for even the third and fourth largest carriers to compete with lower prices while simultaneously, as T-Mobile asserts, they are “subsidizing [their] two largest competitors.”

For rural areas, prices will increase due to the creation of a new GSM roaming monopoly for regional providers who rely on a GSM network for roaming coverage.¹³ They will be forced to negotiate roaming agreements with only AT&T and such an environment will lead to regional and local GSM providers paying higher than competitive rates for roaming and passing those costs onto their subscribers. A merged entity will have no GSM competitor in this market and can raise rates with impunity.

The Wireless Geographic Market is National

The wireless marketplace is national in scope and any antitrust analysis should recognize that national market forces are critical to competition and innovation when assessing this merger. The evidence of this is apparent when one looks at the advertising campaigns of AT&T, Verizon, Sprint, and T-Mobile. In every advertisement, one of the national carriers is competing for the customers of the other national carrier and not once is AT&T advertising against a regional or local carrier. If these carriers represented the competitors to AT&T, one would have to ask why AT&T never believes it is necessary to advertise for their customers as directly as it does for the

¹³ Rural Cellular Association. (2011). *RCA Opposes AT&T Acquisition of T-Mobile* [Press release]. Retrieved from <http://rca-usa.org/press/rca-press-releases/rca-opposes-att-acquisition-of-t-mobile/914758>

customers of its true national rival Verizon.

Furthermore, if the market is as localized as AT&T asserts (although even looking exclusively at local markets cannot hide the anticompetitive nature of this merger), why do none of the national carriers have localized pricing plans tailored for local markets? Every national carrier has only one set of plans available on a national basis for the simple reason that consumers subscribe to their services to gain national coverage. Recognizing this trend Verizon, during its merger with Alltel, stated in its FCC filings that “the Applicants have documented empirical pricing and marketing evidence showing that, increasingly, the national market forces should be predominant when assessing competition.”¹⁴

It should be noted by this Committee that AT&T itself agreed with Verizon in its own subsequent merger with Centennial Communications Corp. where it argued that “*the evidence shows that the predominant forces driving competition among wireless carriers operate at the national level*” and that AT&T develops “its rate plans, features and prices in response to *competitive conditions and offerings at the national levels*.”¹⁵ AT&T initially began articulating that the geographic market for mobile services was national in scope as far back as March 2004 during its merger with Cingular where it stated “the geographic scope of competition in the provision of wireless calling plans *should be analyzed as national*.”¹⁶ AT&T recognized, until very recently,

¹⁴ *Joint Opposition to Petitions to Deny and Comments*, WT Docket No. 08-95 (released August 19, 2008)
<http://fjallfoss.fcc.gov/ecfs/document/view?id=6520038630>

¹⁵ 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=1N6VJL5K37mPzN1G7L2XKBP7mC5jC50m96ttqVHZr3GL1cyJSgx!-659400886!-849295342?applType=search&fileKey=843683410&attachmentKey=18355849&attachmentInd=applAttach>

¹⁶ Cingular and AT&T Wireless Public Interest Statement (March 2004)
<https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=PyXyNLwTQNpJPpBY9cjWzc9lQFmBgzQlhKRnFn7zrmwjzpJHnlpHt!600859641!425962567?attachmentKey=17917140&affn=017917140401330>

that the geographic market was becoming national as pricing plans switched from what truly were local and regional to national plans for national coverage.

Questionable Claim of Strong Competition in Every Local Market

In its April 22, 2011, public interest filing at the FCC, AT&T contends that the merged entity will face strong competition from many sources, but Members of this Committee should be wary of this claim. Such strong “competitors” range from companies that are 4/10ths of one percent the size¹⁷ of AT&T (Cincinnati Bell), to a company reported to be exiting the retail wireless broadband market (Clearwire),¹⁸ to a wholesale company (LightSquared) that *does not exist* today and may never exist as a competitor.¹⁹ By AT&T’s standard of what constitutes a competitor, I might as well qualify as a competitor given that I have zero market share like LightSquared. It is essential that an antitrust analysis simply does not stop at counting the number of companies in a market but rather looks at market share and market power, both of which AT&T holds in substantial amounts.

It is remarkable that AT&T on its website (www.mobilizeeverything.com) dedicated to taking over T-Mobile actually lists T-Mobile as one of the five competitors consumers may choose from in any market as an example of how “fiercely competitive” the market is today.²⁰ The claim of

[0694756609](http://www.fcc.gov/0694756609)

¹⁷ Acquisition of T-Mobile USA, Inc. by AT&T Inc. WT Docket No. 11-65 (p. 91)

<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240421>

¹⁸ Bode, Karl (2011, February 10). *Clearwire Ditching Retail, Going Wholesale Only? Multiple Sources Say An Announcement Is Coming*. [Online] In Broadband DSL Reports. Retrieved April 25, 2011 from <http://www.dslreports.com/shownews/Clearwire-Ditching-Retail-Going-Wholesale-Only-112659>

¹⁹ Goldstein, Phil (2011, April 15). *Lawmakers urge review of LightSquared GPS interference concerns*. [Online] In Fierce Wireless. Retrieved May 3, 2011 from <http://www.fiercewireless.com/story/lawmakers-urge-review-lightsquared-gps-interference-concerns/2011-04-15>

²⁰ U.S. Market is Fiercely Competitive and will Remain So (2011). Retrieved from

strong competition becomes tortured logic when in its FCC public interest filing AT&T states that “T-Mobile USA and AT&T are not close competitors”²¹ and T-Mobile is “not a significant competitive constraint on AT&T.”²² How is it possible that a company – T-Mobile -- with more market share than every single regional provider from the 5th largest to the smallest *combined* is not considered a competitive constraint or close competitor to AT&T yet competition remains strong with the elimination of T-Mobile?

The answer to this question is simple. The wireless market today is not fiercely competitive and in fact is becoming less competitive as consolidation takes its place. In its May 2010 Commercial Mobile Radio Services report, the FCC for the first time in its fourteen years of collecting data did *not find the wireless market to be competitive*.²⁴

While Deutsche Telekom is free to sell T-Mobile to invest more aggressively overseas, that does not absolve the DoJ from enforcing antitrust laws. T-Mobile does not constitute a “failing firm” where leeway to anticompetitive harms would be granted under antitrust law. For that to be the case, T-Mobile would have to be in imminent danger of financial failure, would have to be unable to reorganize under chapter 11 of the Bankruptcy Act, and would have to be unsuccessful in good-faith efforts to find a viable alternative that would not result in anticompetitive harms. That is clearly not the case here. While T-Mobile’s profits declined in the Q1 of 2011, they still were \$135 million.²⁵ And according to numerous industry reports, there are other willing

<http://www.mobilizeeverything.com/competition.php>

²¹ AT&T Public Interest Statement at 70

²² AT&T Public Interest Statement at 71

²⁴ Federal Communications Commission, Fourteenth Report Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (2010)

²⁵ Deutsche Telekom First Quarter Report 2011

purchasers of T-Mobile's assets that do not raise the same competitive concerns as AT&T.²⁶

A Merger Would Stifle Competitive Entry and Harm Related Markets

According to the American Antitrust Institute, if granted, this merger would give AT&T a “government-assisted competitive advantage over its rivals in providing nationwide wireless broadband service” by granting it additional public spectrum at a time when every carrier is addressing spectrum congestion as more users switch to smartphone and other mobile devices.²⁷ Given that additional allocations of spectrum are far off in the horizon, AT&T would receive government provided relief by obtaining a scarce public resource that its competitors could not obtain on their own by any other means. This harms the market in two ways: 1) it reduces competitive entry and 2) it raises costs on related markets through increased market power.

First, a new entrant must have access to spectrum that is of relatively equivalent quality and amount to provide an equivalent service. Access to spectrum is dependent on an FCC license and the availability of spectrum in the market. With the exception of unlicensed uses of spectrum such as Wi-Fi and White Space Devices, which must contend with interference issues that license holders do not, a vast majority of spectrum is already licensed for a variety of uses. In short, there is no substitute for T-Mobile's spectrum if removed from the market and given to AT&T, and therefore no alternative route for a new competitor to enter the market in the same way as T-Mobile. Such a foreclosure on future competitive entry raises market power concerns

²⁶ E.g., Serena Saitto, et al. *Sprint, Deutsche Telekom Said to Discuss T-Mobile USA Deal*, retrieved from <http://www.bloomberg.com/news/2011-03-08/deutsche-telekom-is-said-to-discuss-sale-of-t-mobile-usa-to-sprint-nextel.html> (March 8, 2011).

²⁷ The American Antitrust Institute. *The Acquisition of T-Mobile by AT&T Mobility: Merger Review Issues and Questions*. [Online] Retrieved April 25, 2011 from http://www.antitrustinstitute.org/sites/default/files/AAI_Brief%20on%20ATT-T-Mobile.pdf

according to the DoJ's Horizontal Merger Guidelines because the merged entity would be able to raise prices without fear of new competition.²⁸

Second, the wireless industry is a significant input cost in a whole range of related markets outside of the traditional retail consumer market. Such markets include but are not limited to handset manufacturers, retail stores, wholesale access to voice/text and data, mobile payment transactions, and competitive wireline companies. The short code market, a market Public Knowledge has long advocated for reform²⁹, is one example of how far reaching, and how much a cost driver, the wireless industry can be.

Members of the Committee are probably most familiar with short codes as the five or six digit numbers that are used to text donations for disaster relief or vote for favorites on American Idol. Carriers have created an almost indescribably opaque labyrinth that anyone interested in using short codes must successfully navigate. This process is expensive both in time and money and many who have attempted to negotiate with the carriers are outright rejected and prevented from using short codes and empowering their business. Even those who have successfully obtained their short code, whether it is for political issues, local health services, or commercial products, live under a constant threat of disconnection. In addition, the pricing that carriers charge can and do change at any time, and the companies and organizations who rely on these codes have limited power to prevent increases. Further carrier consolidation will only exacerbate these problems as carrier options for small businesses dependent on short codes continues to shrink.

²⁸ U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines (August 19, 2010) (p. 27)

²⁹ Public Knowledge Text Message Petition (2007) Retrieved from <http://www.publicknowledge.org/issues/text-message-petition>

Increases in Market Power From this Merger Threaten Innovation

Preserving innovation is critical to economic activity and creating jobs in America. A dramatic increase in market power for AT&T threatens the status of innovation in many markets where the wireless industry acts as a gatekeeper, specifically the smartphone and applications markets. In the wireline world, the FCC’s famous *Carterfone* ruling severed the customer equipment market from the network provider. In wireless, where the FCC never adopted a “wireless *Carterfone*” rule, device competition and network competition remain linked. Indeed, AT&T and T-Mobile both have argued against adopting wireless *Carterfone* rules precisely *because* they compete with each other to offer the most innovative devices and applications.

However, with the removal of T-Mobile and the enhancement to AT&T’s market power, the type of innovation we have seen in the handset market will be reduced. Members of this Committee should look back at the status of the wireless market during the launch of Apple’s iPhone, the industry catalyst for the smartphone market, and note (chart below) that it was much more competitive with no clear dominance by any one carrier.

FCC 2006 estimates			Post-merger market		
AT&T/Cingular	26.80%	60.9 million	AT&T	44%	135.9 million
Verizon Wireless	26%	59 million	Verizon Wireless	30.50%	94.4 million
Sprint Nextel	22.90%	52 million	Sprint Nextel	16%	49.6 million
T-Mobile	11%	25 million	MetroPCS	2.60%	8.1 million
Alltel	5%	11.8 million	US Cellular	1.90%	6 million
US Cellular	2.60%	5.8 million	Leap Wireless	1.80%	5.5 million

Prior to the iPhone, wireless carriers dictated the entire design and functionality of devices that ran on their networks. Apple’s iPhone itself was rejected by Verizon on the grounds that Apple

wanted too much control over the fate of the device.³⁰ Even during negotiations with its exclusive partner, Apple had to consistently fight with AT&T over what innovative features would be allowed. Such features include how and when YouTube would function on its network, video calling (which is allowed in Europe and Asia as well as on T-Mobile, but not on AT&T), and tethering the device.³¹ If Apple, the world's largest technology company, had problems in a less concentrated market, imagine the prospects of smaller technology companies who want to bring new innovative ideas to a post-merger market.

Handset manufacturers are dependent on wireless carriers for access to their customer base and the merged entity will have enough market power to dictate the entire destiny of future smartphones. Manufacturers will be forced to do business with the largest company if they are to establish a business model in the United States and should the two largest providers decline the next great innovation, then that innovation will not happen. It should be noted that AT&T and T-Mobile are also the only two national wireless carriers using the GSM standard forcing the *entire* smartphone manufacturing market that relies on GSM to do business with one entity.

Remember, if AT&T had its way with the iPhone back in late 2006, consumers would not be able to perform the simplest of activities such as access YouTube. Likely, every new innovative service that may require additional investment by the carrier due to new data demands will simply be rejected to maximize profits.

This merger will also negatively affect innovation in the applications market. AT&T has the most restrictive data policies among the four national carriers and is the only carrier who

³⁰ Cauley, Leslie (January 29, 2007). *Verizon rejected Apple iPhone deal* [Online] In USA Today. Retrieved April 25, 2011 from http://www.usatoday.com/tech/news/2007-01-28-verizon-iphone_x.htm

³¹ Vogelstein, Fred (July 19, 2010). *Bad Connection: Inside the iPhone Network Meltdown* [Online] In WIRED. Retrieved April 25, 2011 from http://www.wired.com/magazine/2010/07/ff_att_fail/

punishes consumers financially for high data usage. T-Mobile³² currently only slows down high capacity users and Sprint³³ offers completely unlimited access. However, AT&T³⁴ fines a consumer for using too much of their wireless data and this practice will be adopted by Verizon³⁵ in the coming months. With close to 80 percent of the wireless market under these more restrictive data plans in a post-merger environment, application and hardware developers will need to curtail next generation services to work in a more restricted ecosystem in order to reach their customers.

AT&T is at Fault for Capacity Issues, not Consumers

How exactly did AT&T intend to address all of the capacity and network issues they will encounter before Deutsche Telekom contacted them earlier this year to offer them T-Mobile? Was AT&T's original business plan simply to let its network deteriorate and never increase capital expenditures to keep up with network demand? Why is it that Verizon, the nation's largest wireless carrier, shares virtually none of the doomsday network scenarios that AT&T reports in its public interest statement? The answer lies within the investment choices the companies have made in preparing for the future.

In its public interest statement, AT&T touts the benefits of acquiring T-Mobile's towers to expand its infrastructure more quickly. In fact, it would gain so many towers, that it would no

³² Perez, Marin (2010, October 13). *T-Mobile Will Throttle Your Data After 5 GB*. [Online] In IntoMobile.com. Retrieved May 5, 2011 from <http://www.intomobile.com/2010/10/13/tmobile-throttle/>

³³ Sprint. (2011). *Sprint CEO Dan Hesse defines "unlimited" in new TV ad* [Press release]. Retrieved from http://newsroom.sprint.com/article_display.cfm?article_id=1818

³⁴ AT&T data plans (2011) Retrieved from <http://www.att.com/shop/wireless/plans/data-plans.jsp>

³⁵ Hamblen, Matt (2011, March 1). *Verizon data caps coming, probably by mid-summer*. [Online] In ComputerWorld. Retrieved May 3, 2011 from http://www.computerworld.com/s/article/9212378/Verizon_data_caps_coming_probably_by_mid_summer

longer be in the business of investing capital in building towers in America, but rather in taking thousands of towers down.³⁶ I do not disagree that purchasing towers directly is faster than actually investing to build the towers, but how is helping AT&T make up for its investment mistakes of not building enough towers on its own a sufficient reason to raise prices, reduce competition, and reduce innovation? Perhaps we should simply allow AT&T's competitors the opportunity to win AT&T's customers who will be disgruntled with the fact that despite paying substantial subscription fees, AT&T simply chose to invest less and profit more.

Reviewing the investment choices by the two largest carriers between 2008 and 2010, AT&T has spent \$21.1 billion to upgrade its wireless network while Verizon has spent about \$22.1 billion. To further highlight this difference, AT&T has been reported to have “only increased wireless capital expenditures by *one percent in 2009* compared with an increase in capital spending from Verizon Wireless by about 10 percent.”³⁷ In addition, Verizon has also already committed to replacing its entire existing nationwide 3G footprint with 4G LTE by the end of 2013, which already satisfies the level of national 4G coverage AT&T commits to with this merger.³⁸ Lastly, when questioned by investors after hearing AT&T's doomsday scenario of a spectrum crunch, Verizon's CFO stated that they are in a “good position until about the year 2015.”³⁹

Put simply, AT&T has not invested aggressively enough and has instead put its capital into acquiring existing and potential competitors making the capacity issues the company will face in the near future a self-inflicted wound.⁴⁰ Eliminating T-Mobile as a competitor will hardly cure

³⁶ AT&T Public Interest Statement at 51

³⁷ 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

³⁸ Verizon Wireless 4G Coverage map. Retrieved from <http://network4g.verizonwireless.com/#/coverage>

³⁹ 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

⁴⁰ Nobody questions, nor does AT&T refute, that it has the resources to upgrade its networks in the absence of a

this lack of foresight but rather will simply reward AT&T for its failings. Raising prices, reducing competition, and reducing innovation hardly seem worthy trade-offs to help AT&T avoid the inevitable result of customers voting with their feet.

Consolidating Spectrum Assets is Not Efficient

AT&T claims it needs T-Mobile's spectrum in order to avoid “spectrum exhaust” and that combining the spectrum assets of both companies would be the most efficient approach to address this problem.⁴¹ If you accept AT&T’s argument that consolidating spectrum assets into fewer and fewer hands is the most efficient way forward then arguably the most efficient use of spectrum assets ultimately is to have a monopoly that holds all of the spectrum assets. However, given the unique properties of spectrum in that it is both scarce but infinitely renewable, we have seen time and time again that innovation can and will solve the mobile demand problems.

Overall, the public does benefit from arguably redundant uses of spectrum by multiple competing companies because it forces research and investment into more efficient and innovative uses of spectrum. The evolution from first generation to fourth generation wireless (and eventually fifth generation and beyond) has been driven both by spectrum scarcity and the need to respond to competitive pressures by offering new advance services. However, it should be noted that AT&T has yet to deploy many of its spectrum assets; for example, it has not yet

merger. The mere fact that they are willing to pay \$39 Billion, including \$25 Billion in cash, is evidence of that fact. Moreover, Institutional investor-ranked analyst Craig Moffett of Bernstein Research recently concluded that AT&T Wireless gets a return on capital more than 5 percentage points higher than its cost of capital, and that gap is increasing. Bernstein Research, *U.S. Telecommunications and Cable & Satellite: Capital Punishment*, at 135-148. So clearly, AT&T has the means to upgrade its network, and does not need the alleged synergies of this merger to do so.

⁴¹ In its public interest statement, AT&T states that the merger will “push back the date of expected spectrum exhaust in many markets....” This is a remarkable admission that at best, the merger would only result in very temporary synergies for AT&T. AT&T Public Interest Statement at 9.

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.⁴² In fact, AT&T currently holds the most in spectrum assets in the top 21 markets out of all of the wireless carriers and as part of its \$3 billion breakup fee will transfer spectrum licenses to T-Mobile.⁴³

AT&T has attempted to counter this argument by its claim that it needs 20 MHz of contiguous spectrum to achieve maximum efficiency in its deployment of next generation LTE. This ignores both the development of new “channel bonding” technologies that allow companies to aggregate non-contiguous spectrum as well as other new technologies that improve spectrum efficiency generally.⁴⁴ It also ignores AT&T’s ability to reconfigure its networks to provide 20 MHz contiguous for LTE.

AT&T also continues to support 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.⁴⁵ The company “divide[s] its spectrum portfolio among three different generations of technology...”⁴⁶, but it need not do so. The company can simply upgrade its customers to more efficient technologies to improve its capacity by switching out of the handsets of its legacy

⁴² 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

⁴³ Saitto, Serena & McCracken, Jeffrey (March 21, 2011). *AT&T Cash, Breakup Fee Were Said to Clinch T-Mobile USA Over Sprint Nextel* [Online] In Bloomberg News Retrieved May 9, 2011 from <http://www.bloomberg.com/news/2011-03-21/at-t-cash-breakup-fee-were-said-to-clinch-t-mobile-usa-over-sprint-nextel.html>

⁴⁴ Higginbotham, Stacey (April 27, 2011). *7 Technologies to Solve the Spectrum Crisis*. [Online] In GigaOM Retrieved May 6, 2011 from <http://gigaom.com/broadband/7-technologies-to-solve-the-spectrum-crisis/>

⁴⁵ 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>

⁴⁶ AT&T Public Interest Statement at 22.

customers. Such a challenge is not unique to AT&T, as eventually every wireless carrier must have a plan in place to migrate its users to new networks. Rather than eliminate a competitor, AT&T can use a portion of the \$39 billion it has committed to purchasing T-Mobile back into making its own network more efficient.

As for the claim that merging with T-Mobile will allow AT&T to suddenly deploy in rural areas where it already owns vast swathes of unused spectrum, I encourage Members of this Committee to heed the advice of former FCC Chairman Reed Hundt, which was to “ignore it” as such an exchange would be the equivalent to a “state-authorized bribe.”⁴⁷ Rural America has never had a spectrum congestion problem and it never will have a spectrum congestion problem. Rural America simply has an infrastructure and investment problem as a result of the business model challenges encountered by every wireless provider.

The wireless business model is dependent on customer density and the size of the coverage area, whereas the more densely populated and smaller the territory, the more profitable it is to do business. The challenge with rural areas is that they provide the exact opposite of what a wireless company needs for its business model, but many smaller rural providers still are deploying in these markets. If the federal government wants build out of wireless broadband in rural America by the largest companies who have actively neglected rural investment, it can simply establish build out rules on spectrum licensees as a requirement of holding valuable public property.

⁴⁷ Zapler, Mike & Boliek, Brooks (2011, April 22). *AT&T/T-Mobile deal offers risk, reward for Obama*. [Online] In Politico. Retrieved May 4, 2011 from <http://www.politico.com/news/stories/0411/53580.html>

Divestitures and Conditions Will Not Save this Merger

Former FCC Chairman Reed Hundt once called a proposed merger between SBC and AT&T “unthinkable.” I call this merger between AT&T and T-Mobile “unfixable.” There is no way to both allow this merger and protect competition. Only an independent T-Mobile would preserve what little competition remains in an extraordinarily concentrated national wireless market. If anything, the market needs more competitors, not fewer.

Divestitures of spectrum cannot save this merger. AT&T already commands a vast amount of spectrum and supporting properties, such as tower sites. Like its biggest competitor Verizon, it is a vertically integrated company that controls a large wired infrastructure that competitors such as Sprint must interconnect with through Special Access. Its size and multiple lines of business give it the means and motive to discriminate against competitors, block new entry, and to disadvantage other actors in the value chain. Policymakers should not allow it to increase its market power and size by the large amount likely even with aggressive divestiture.

Policymakers should not allow it to increase its market power and size by even a small amount.

The metropolitan areas where AT&T wants new licenses the most are the very areas where competition is most needed. After all, AT&T has been successful in some cities in spite of the poor performance of its network. This is because its customers lack sufficient competitive options by companies with a comparable range of services. And who would buy its divested licenses? If any of the other two remaining national carriers purchased them, the market would still remain very concentrated in terms of spectrum control. Indeed, when Verizon was forced to divest spectrum as a condition of its merger with Alltel, AT&T purchased 79 of 105 licenses. If a

regional carrier purchased them the result would be a national market with even less spectrum available. There are only so many ways that the spectrum can be divided up. As it is, if AT&T were to acquire T-Mobile it would be acquiring licenses it had actually ironically divested in its past merger with Cingular⁴⁸. Divestiture is not a sustainable strategy in a concentrated market subject to artificial, government-created resource constraints.

It is also important to note that this merger is not just about AT&T's acquisition of more spectrum. It is also about AT&T's acquisition of nearly 33.6 million T-Mobile customers, which would result in a wireless behemoth with nearly 136 million customers. There are no merger conditions that can ameliorate that kind of market power.

No other conditions on this merger could protect the public interest. Likely conditions would attempt to ameliorate some of the worst effects of the merger, by requiring AT&T to behave fairly towards its customers and competitors. But these kinds of conditions treat the symptoms and not the disease. Policymakers should be focused on moving toward an industry structure that protects the public interest, by encouraging new entry by new competitors, and adopting industry-wide rules of the road, such as open Internet and bill shock standards. It is the Department of Justice's job to enforce the antitrust laws and take actions relating to mergers that come before it. But Congress and the FCC should not have to wait for AT&T to propose a massively anticompetitive merger to be reminded of their duty to protect the public and ensure continued innovation and competition in the wireless sector.

⁴⁸ Stern, Christopher (2004, May 26). *Cingular to Sell Cellular Spectrum*. [Online] In Washington Post. Retrieved May 8, 2011 from <http://www.washingtonpost.com/wp-dyn/articles/A55682-2004May25.html>

Conclusion

I urge this subcommittee, the Department of Justice and the FCC, not to allow the wireless market to go back to 1993, back to duopoly.

Each and every benefit AT&T promises can be achieved through a competitive market and each and every challenge the company faces in meeting America's mobile data demands can be addressed through increased investment and improving, not reducing competition. If AT&T fails to provide its customers with quality service, Senators, you can rest assured that a competitor will do everything it can to pick up the slack. However, competition will not be possible if mega-mergers are continued to be allowed to be given a pass by antitrust authorities.

The AT&T and T-Mobile merger is not your run of the mill telecommunications merger like so many that have proceeded before it. What the merger represents is a cross roads for American competition policy in the telecommunications marketplace and ultimately a test of antitrust law.

Allowing this merger will reward AT&T for pursuing a path of acquisition for customers rather than a path of competing for customers. Acquiring even a handful of the 33.6 million T-Mobile customers will increase AT&T's profits substantially while denying consumer choice. It will set the market on a path back towards a duopoly market structure where prices will be high, innovation will be stagnant, and companies no longer competed. It will require monopoly era regulations, such as price controls, that were discarded after the breakup of AT&T as the only means to ensure that wireless services remains affordable to the general public.

However, if the DoJ blocks this merger and Congress, the FCC, and the DoJ begin the hard work of reinvigorating competitive forces and enacting new forward thinking competition policy, as was done in 1993, the competitive landscape in the wireless marketplace can be improved.

Public Knowledge has long advocated that proper scrutiny over issues such as handset exclusivity, special access reform, data roaming, and spectrum consolidation can vastly improve competition. But all of this is dependent on whether or not this merger is blocked and competition is given a chance.

Thank you again for inviting me to testify before the Subcommittee. I look forward to your questions.