HOW WILL THE PROPOSED MERGER BETWEEN AT&T AND T-MOBILE AFFECT WIRELESS TELECOMMUNICATIONS COMPETITION?

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MAY 26, 2011

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HOW WILL THE PROPOSED MERGER BETWEEN AT&T AND T-MOBILE AFFECT WIRELESS TELECOMMUNICATIONS COMPETITION?

THURSDAY, MAY 26, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:35 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Smith, Quayle, Sensenbrenner, Coble, Chabot, Issa, Pence, Jordan, Poe, Chaffetz, Griffin, Marino, Adams, Watt, Conyers, Deutch, Sánchez, Nadler, Lofgren, Jackson Lee, and Waters.

Staff present: (Majority) Holt Lackey, Counsel; Olivia Lee, Clerk; and Stephanie Moore, Minority Counsel.

Mr. GOODLATTE. Good morning and welcome to this hearing of the Subcommittee on Intellectual Property, Competition, and the Internet.

This hearing poses the question: How will the proposed merger between AT&T and T-Mobile affect wireless telecommunications competition?

Companies merge and acquire one another every day in America. In a free market economy like ours, companies are generally free to organize themselves and their assets as they see fit. While there is general freedom for companies to merge, even if the merger forms a large company, the antitrust laws do place some limits on these transactions. The specific limit is set by section 7 of the Clayton Act which prohibits mergers that substantially lessen competition or tend to create a monopoly.

This strikes the right balance. Competition is the backbone of a successful, free market. Competition spurs innovation and ensures that the market allocates resources efficiently. A free market cannot work without competition, and a merger that decreases competition weakens the free market.

The Department of Justice is in the process of reviewing the proposed merger between AT&T and T-Mobile to determine if it is anticompetitive. In general terms, the Department will block the merger if it believes that after the merger AT&T or Verizon would have enough market power to raise prices, decrease output, or diminish innovation without being held to account by competition.

AT&T and T-Mobile argue that this merger will improve competition. They believe that the merger will let them increase their spectrum capacity and network range so that they can increase output and compete more vigorously for customers.

Past mergers in the wireless industry have not led to price increases, output reductions, or less innovation. Over the past decade, the wireless market has been marked by innovation, expansion, and lower prices despite a series of mergers that significantly consolidated the industry.

But there are legitimate questions about whether this merger could move the wireless market past an anticompetitive tipping point. This merger results in more concentration than any previous merger in the wireless market. The merger combines the second and fourth largest wireless carriers to create the largest carrier which will control over 40 percent of the wireless market. Unlike previous mergers, this merger is between two nationwide wireless networks, and it will reduce the number of nationwide wireless networks from four to three.

Can the wireless industry remain competitive with this level of concentration?

AT&T, like Verizon, controls much of the wireline telephone networks that were originally built by the old Bell monopoly. Other wireless carriers have to pay AT&T and Verizon to carry their calls and data over this wireline network. This service is called "backhaul." Will AT&T and Verizon be able to manipulate their power in the backhaul market to raise prices on other wireless companies and stifle competition?

Smaller providers who only have regional networks have to enter roaming agreements so that their customers can have service when they venture beyond network range. Will this merger give AT&T market power to raise roaming prices?

Increasingly wireless companies enter into agreements with mobile device manufacturers to be the exclusive service provider for a new device. Famously, for years after its introduction, the iPhone was only available with AT&T service. Will AT&T and Verizon be able to leverage their wireless market share to deny the best devices to their competitors or to stifle handset innovation?

It is ultimately the Department of Justice's job to answer these and other questions raised by this merger. The Department should follow the facts and the law in an evenhanded manner and block the merger only if they conclude that it is anticompetitive.

Congress has no formal role in the DOJ or FCC merger review process, but hearings like this provide a public venue to ask, answer, and debate these questions which are of great importance to American consumers. I look forward to the testimony of the witnesses, the debate among the Members of the Committee, and in the end, a wise decision by the Department of Justice that ensures a competitive future for wireless communications in America.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. I thank you, Mr. Chairman.

The proposed merger between AT&T and T-Mobile raises important issues of competition policy in the wireless space. Over the last 2 decades, the wireless industry has grown exponentially from just over 3 million subscribers in the late 1980's to almost 300 million today.

In the current wireless market, four major carriers provide service throughout the country: Verizon, AT&T, Sprint, and T-Mobile, in order of market share. Therefore, when the horizontal merger between the second and fourth largest wireless carriers was announced in late March, a predictable frenzy of concerns about the probable impact of the merger on competition and consumers erupted in the press and in general discussion.

Will the proposed merger result in an unregulated or heavily regulated duopoly of Verizon and AT&T with a combined share of almost 76 percent of the market?

What, in fact, is the relevant market definition?

Will prices increase?

What are other potential impacts on consumers, short- and long-term?

What will be the impact on innovation?

Will Verizon and AT&T corner the market on handsets, applications, and other devices?

How will access to roaming and backhaul services be impacted?

Will future spectrum auctions be less competitive or otherwise negatively impacted?

How will the merger impact younger and poorer customers, disproportionately minority based on recent reports, who rely on their wireless service to access the Internet?

What about jobs? Are the synergies identified by the merger participants a euphemism for massive job loss?

These are all legitimate and complicated questions, and they are precisely why the Federal Communications Commission and the Department of Justice are conducting independent, fact-intensive investigations into the public interest and competitive implications of the deal.

The Department of Justice conducts its review under the antitrust laws, while the FCC acts pursuant to the Communications Act to assess whether an industry merger is within the public interest. Presumably what will be the impact on consumers? The Department of Justice's evaluation alone is projected to last up to 1 year.

My belief in this context is that we should allow these agencies to do their jobs unfettered by political pressure from Congress. While I believe this hearing will educate Members of Congress and the public, I also know that we will never have access to all the facts and data on which the agencies base their determination of whether to approve or disapprove the merger with or without conditions.

I appreciate the Chairman's scheduling the hearing, however, because I believe it enables the public to learn more about what is at stake, and an informed public is an incentivized public and an educated and active public is good for democracy. So it is in the spirit of acquiring as much information as we can in this limited forum to develop a publicly available record that I look forward to hearing from our panel today.

And with that, Mr. Chairman, I yield back the balance of my time.

Mr. GOODLATTE. I thank the gentleman.

And now it is my pleasure to recognize the Chairman of the Judiciary Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

The past 2 decades have seen astonishing growth and innovation in wireless communications. In 1989, just over 3 million Americans had wireless telephones. Today there are nearly 300 million wireless subscribers. A cell phone is no longer just for making voice calls. Americans now use wireless technology to download books and music, send email and text, surf the Web, and stream movies and TV shows. This wireless revolution, together with the Internet revolution, promises to transform the spread of ideas and information more than any development since the printing of the Gutenberg Bible.

We can thank competition for this world-changing innovation. Competition has spurred invention and improvements at every level of the wireless economy. It has led to new devices, applications, and networks that were the stuff of science fiction not long ago. Wireless competition has produced miracles in the recent past. Today's hearing is about wireless competition's future.

The Department of Justice is currently reviewing the proposed merger between AT&T and T-Mobile to determine if it will lessen competition. This proposed merger means tremendous change for the wireless industry and millions of consumers. That is why it is important to proceed carefully and make sure we get it right.

A merger of this size, which would concentrate over 40 percent of the wireless market in one company, raises some questions. AT&T and T-Mobile argue that the merger will actually increase competition. They say the merger will allow them to unleash the next generation of wireless service more efficiently than either could alone.

And AT&T says that it is facing a spectrum crunch brought about by the advent of smart phones and tablet computers that transmit large amounts of data. AT&T argues that its spectrum shortage will limit its ability to compete effectively unless the merger is approved. AT&T and T-Mobile argue that the merger will solve both AT&T's spectrum crunch and T-Mobile's lack of a 4G LTE network.

Combined, AT&T and T-Mobile hope to improve service, innovate, and expand their network into underserved rural areas. In their vision wireless companies, including upstarts like MetroPCS and LightSquared, will continue to compete, innovate, and decrease prices.

Opponents of the merger paint a different picture. Many wireless competitors and consumer advocates believe that a more concentrated wireless industry will reduce competition, stifle innovation, and raise prices. In particular, merger opponents worry about access to new devices, roaming agreements, and backhaul services.

It is the Department of Justice's job to predict which of these very different pictures of the merger is more likely. The Department should make this prediction based on a fair analysis of the facts, economics, and the law.

A single congressional hearing cannot examine all of the detailed economic evidence that is needed to accurately predict the effects of this merger, but this open forum should serve to clarify and illuminate the issues presented by this merger. The Americans deserve the full picture.

Thank you, Mr. Chairman. I will yield back.

Mr. GOODLATTE. I thank the gentleman.

The Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Chairman Goodlatte.

I applaud the comments that have been made before me, and I particularly agree with Chairman Smith in suggesting that we may need more than this hearing to continue our examination of the merger.

Now, as one who is widely known for having an open mind about issues, I want to confess that I have never met a merger that I liked. They always cost jobs and they create less competition and they hurt consumers.

That being said, that is what makes the hearing so important here because we will never know what the Justice Department and FCC did to come to their agreements. At least we will get a glimpse of what the corporate leaders claim their rationale is for this merger.

There are a lot of people that need to be heard here: Communications Workers of America and Sprint, labor, the president of the UAW, Bob King.

Now, we concede that AT&T has a unionized workforce. That makes them good corporate people, and they are more responsible than some of their competitors. We give them all that kind of credit.

But here is the concern here. Everything that we are talking about that is going to happen that is so great from this merger is really already accomplishable. You don't need a merger to do what you claim you need the merger for to accomplish. What are the two-page ads going on on the Hill papers today? We need the merger to reach 97 percent of Americans instead of the 80 percent that would be covered under the current plan.

Industry analysts and competitors point to the fact that AT&T currently has spectrum holdings to already accomplish this laudable goal. They do not need T-Mobile to do it. If the acquisition is allowed by the regulators, the deal would give AT&T and Verizon over 70 percent of the wireless market.

And what about the little guys? Where does creation come from in this business? It doesn't come from the biggest people unless they buy up the small people. It comes from the small people. And so we are missing a big opportunity here if we don't look very carefully at what is going to happen.

And what is the other result? The next biggest people have got to do the same thing that they are proposing here today. This won't be the last one. If this gets through, there is another one on the drawing boards already. Who doesn't know that?

And so I will submit the rest of my statement so we can hear the witnesses.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr.
"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

Thursday, May 26, 2011, at 10:30 a.m.
2141 Rayburn House Office Building

I have never met a merger I liked. They always cost jobs and result in less competition.

Which is why it is important for this Committee to have hearings – the proceedings before the Justice Department and FCC never see the light of day. Only here can we get a glimpse of how corporate leaders will at least try to make the case to our government.

I would ask Chairman Goodlatte and Ranking Member Watt to make this the first hearing we have on this subject. We need, at the very least, to hear from the Communications Workers of America, who support this merger, and Sprint, who will be the third major national carrier left.

On the one hand, proponents make good arguments that AT&T, when it comes to the unionized workforce, is the most responsible corporate citizen of the major wireless service providers. AT&T should be commended for respecting unions.

But I am concerned that this merger is bad for consumers, bad for business, and bad for creativity and developing new products. Mergers always eliminate more jobs than they create.

There is every likelihood that the proposed acquisition of T-Mobile by AT&T could lead to both higher prices and decreased consumer choices. Less competition in the wireless industry could mean a return to higher prices and worse choices. As Americans rely more and more on their handheld devices, the economic stakes of this merger are even higher.

This acquisition is no doubt a "mega-merger" in an already concentrated industry. These sorts of "mega-mergers" can significantly harm competition and consumers. Corporations with market power can dictate prices and drive their rivals out of business.

Moreover, creating corporations of this size can become a liability to the government as they become "too big to fail." If AT&T or Verizon ever became too over-leveraged and faced default, would the government have to bail-out the companies so that 70% of the United States could keep their cell-phone service?

These unhealthy dynamics can lead to higher prices, a lower rate of development of new and better products, and a reduction in product variety and consumer choice.

Creating a near duopoly in the telecommunications market also has civil liberties implications. As the Bush Administration engaged in illegal wiretapping, it was Qwest, a comparatively small company, that stood up to the U.S. government to protect its customers' privacy.

In a highly concentrated market, who can customers turn to when the large providers, like AT&T and Verizon, have a history of complying with abusive civil liberties practices.

AT&T tells us that they need the merger in order to reach 97% of Americans – instead of the 80% that would be covered under their current plan, or 55 million more people. Industry analysts and competitors point to the fact that AT&T currently has the spectrum holdings to already accomplish this laudable goal – they do not need T-Mobile in order to do it.

If the acquisition is allowed by federal regulators, the deal would give AT&T and Verizon over 70% of the wireless market.

This merger would remove a lower-price option for wireless customers. A Consumer Reports price analysis survey found that T-Mobile customers pay between $15 to $50 less a month for their plans than they would for a similar plan from AT&T.

AT&T argues that companies like MetroPCS, US Cellular, and Leap are competitive in local markets. But we know that the wireless cellular industry will consolidate from four major national players to three – with the top two, AT&T and Verizon, controlling more nearly 80% of the market.

The remaining player, Sprint, would be less than half the size of its competitors and face major disadvantages in terms of its cell phone offerings and the size of its network. Many have even speculated that Sprint will either have to close down or be bought out by Verizon.

For the tiny carriers – like Leap and MetroPCS –

the specter of nearly 80% market concentration among AT&T and Verizon only makes it more likely that they will have to merge in order to survive.

Despite the newly unionized workforce, the merger will no doubt lay-off the 'overlaps' between the two companies – including customer service and retail jobs. AT&T has a particularly poor track record on layoffs: the company, as it has undergone merger after merger, has shed nearly 200,000 jobs during the past decade according to analysis of its financial records.

The need for more rigorous antitrust enforcement has never been more critical. We need aggressive enforcement of antitrust laws to ensure that we keep our markets open, free, and fair.

Although a merger of this magnitude has not been before proposed in the wireless market, the past decade has seen a steady stream of consolidation. Since the Justice Department broke up AT&T in 1983, 4 of the 7 "Baby Bells" have been re-acquired by AT&T. On the wireless front specifically, the company has amassed several smaller companies like Cellular One and Wayport to boost it's marketshare and increase its spectrum holdings.

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Mr. GOODLATTE. I thank the gentleman.

Without objection, all other opening statements will be made a part of the record.

We have a very distinguished panel of witnesses today. Each of the witnesses' written statements will be made a part of the record in its entirety. And I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

It is the custom of this Committee to swear in our witnesses before their testimony. So at this time, I would ask them to stand and be sworn.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you and please be seated.

Our first witness is Randall Stephenson, Chairman, CEO, and President of AT&T, Inc.

Our second witness is René Obermann, CEO of Deutsche Telekom AG, the German-based parent company of T-Mobile USA.

Our third witness is Steven Berry, President and CEO of the Rural Cellular Association, a trade association made up of nearly 100 wireless carrier companies ranging from small, rural carriers to larger carriers like Sprint.

Our fourth witness is Parul Desai, Communications Policy Counsel for Consumers Union, publisher of Consumer Reports magazine.

Our fifth witness is Professor Joshua Wright of George Mason School of Law. Professor Wright focuses academic work on antitrust law and holds a J.D. and Ph.D. in economics from UCLA.

Our sixth and final witness is Professor Andrew Gavil of Howard University School of Law where he has taught antitrust law since 1989. Professor Gavil received his J.D. from Northwestern University School of Law.

We will be pleased to start with Mr. Stephenson. Welcome.

TESTIMONY OF RANDALL STEPHENSON, CHAIRMAN, CHIEF EXECUTIVE OFFICER, AND PRESIDENT, AT&T, INC.

Mr. STEPHENSON. Thank you, Chairman Smith and Chairman Goodlatte and Ranking Member Conyers and Ranking Member Watt, other Members of the Subcommittee.

I am Randal Stephenson, Chairman and CEO of AT&T, and I do want to thank you for the opportunity to talk with you about the consumer benefits of AT&T's acquisition of T-Mobile USA from Deutsche Telekom because, first and foremost, this transaction is about consumers. It is about specifically keeping up with consumer demand. It is about having the capacity to drive innovation and competitive prices. It is about giving consumers what they expect and that is fewer dropped calls, faster speeds, and access to high-speed fourth generation LTE mobile Internet service, and that is whether they live in a large city, in a small town, or out in the country.

It is about achieving these benefits purely with private capital, helping to deliver a private market solution to a very important public policy objectives, as we take fourth generation LTE to more than 97 percent of all Americans.

And I would underscore the fact that this means good jobs, good jobs for employees of the combined company, good jobs for the vendors who support our efforts, and good jobs in the communities served by the network that will result from this investment.

Over the past 4 years, we have seen a revolution in wireless. Smart phones and mobile apps have exploded. Innovation has cycled at an amazing pace. Consumers and the economy have all benefitted, and our network, more than any other network, has carried the load. In fact, over the past 4 years, data volumes on our mobile network have shot up by 8,000 percent.

To meet this demand, over this same 4-year period, AT&T invested more in the United States than any other public company, $75 billion in capital. And we continue to invest at a very aggressive pace because the next wave is now already upon us and it is in the form of tablets and it is in the form of services like mobile high-definition video. In 2015, just 4 years from now, by the time we get to February of 2015, we estimate our network will have already carried as much mobile traffic as we carried for the entire year in 2010. And that is how fast the mobile Internet is growing.

Just about the only thing that we know of that can slow down this cycle is the lack of capacity to meet the demand. As FCC Chairman Genachowski has said—and I would like to quote him—if we do nothing in the face of the looming spectrum crunch, many consumers will face higher prices as the market is forced to respond to supply and demand and frustrating service. End quote. None of us want that, and I do applaud the FCC and Members of Congress for their leadership on this issue, but the fact is even with everyone's best efforts, it will be several years before significant amounts of new spectrum are placed into service.

So to meet growing consumer demand we have to find more ways to get more capacity from the existing spectrum, and that is exactly what this combination will do. Our two companies have very complementary assets and spectrum, which means combining them will create much more network capacity than we have operating independently. More capacity means improved service. And it is a very basic concept. In any industry, greater capacity is the fundamental driver of sustained vigorous competition, innovation, and pricing.

The U.S. wireless marketplace is among the most competitive in the world and it will remain so. Over the past decade U.S. wireless prices have steadily and dramatically come down, and this transaction allows that trend to continue.

With this transaction, we are also committed to providing LTE mobile Internet service to more than 97 percent of the U.S. population. That is nearly 55 million more Americans than our premerger plans and millions more than any other provider has committed to at this point. We all understand the benefits this will bring to small towns and rural communities in areas like education, health care, and economic development. And we will deliver these benefits with the only unionized workforce of any major wireless carrier in America.

Current T-Mobile customers will be able to retain their existing rate plans, and they will gain access to LTE service which is something T-Mobile had no clear path to offer on a standalone basis.

So, Mr. Chairman, that is a quick overview. It is some of the reasons this transaction has won strong support from unions, minorities, local representatives, as well as industry experts.

So, again, I thank you for the opportunity and I look forward to your questions.

[The prepared statement of Mr. Stephenson follows:]

Written Statement of Randall Stephenson, Chairman, CEO, and President, AT&T Inc.

House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet: "How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

May 26, 2011

Thank you, Chairman Smith, Chairman Goodlatte, Ranking Member Conyers, Ranking Member Watt and Members of the Subcommittee.

I'm Randall Stephenson, Chairman and CEO of AT&T, and I appreciate this opportunity to address the consumer benefits of AT&T's acquisition of T-Mobile USA from Deutsche Telekom.

This transaction is all about consumers. It's about keeping up with consumer demand. It's about having the capacity to drive innovation and competitive prices for consumers. And most important, it's about giving consumers what they expect – fewer dropped calls, faster speeds and access to state-of-the-art mobile broadband Internet service – whether they live in a large city, a small town, or out in rural areas.

This transaction will benefit consumers in many ways: improving service quality and network capacity, fostering innovation, increasing competitive pressure, and helping to ensure that America remains the global leader in mobile broadband. Consumers all across the nation will share in these benefits as the transaction will allow the combined company to build out an advanced new 4G LTE network and bring state-of-the-art mobile broadband to over 97 percent of the American population – more than any other provider and far more than AT&T alone was planning before the transaction.

This represents a private market solution to effectively address the important public policy objective of bringing high-speed mobile broadband to rural, suburban and urban communities across the nation – all without any subsidies or taxpayer dollars. This means private capital investment, much of which would not occur but for this transaction, will drive substantial benefits -- including private sector jobs in the combined company, in the vendors who support its efforts, in the communities served by the expanded LTE coverage, and in the larger ecosystem of innovative firms whose services will ride on the network.

Spectrum Capacity, Call Quality and the Provision of Advanced Services

We and Apple launched the first iPhone just four years ago. In the short time since then, smartphones and mobile apps have exploded. Mobile Internet usage and innovation have soared. A U.S. wireless marketplace that was already the world's most competitive and innovative has become more so – to the great benefit of consumers and our economy as a whole.

Because of our early leadership in smartphones and supporting mobile apps, our company and network have carried the load more than any other. In fact, over the past four years, data volumes on our mobile network have shot up by 8,000%.

To meet this demand, we've invested aggressively. Over the past four years, AT&T has invested more in the United States than any other public company – some $75 billion – to upgrade and expand our wireless and wireline networks. And we continue to invest at a torrid pace because the next wave is already on us – in the form of tablets, mobile HD video and more. We estimate that in 2015 we will carry the same amount of mobile data traffic by mid-February that we carried for the *entire* year in 2010. That's how fast the mobile Internet is growing.

Just about the only thing that can slow down this cycle of innovation, investment and growth is lack of capacity to meet this demand – and that's why there is such a focus on spectrum. The mobile wireless industry needs more spectrum and soon. I applaud the FCC and members of Congress for their leadership on this issue.

As FCC Chairman Genachowski recently cautioned, "[i]f we do nothing in the face of the looming spectrum crunch, many consumers will face higher prices – as the market is forced to respond to supply and demand – and frustrating service."[1] None of us wants those things. But the fact is that even with everyone's best efforts, it will be <u>years</u> before significant amounts of new spectrum are made available and placed into service. That is just the reality we face.

So, to meet the ever increasing demand by consumers, we have to find ways to get more capacity from existing spectrum. That is exactly what the combination of AT&T and T-Mobile will do. Our two companies have very complementary assets, which means that combining them will create much more service-enhancing network capacity – the equivalent of new spectrum – than the two companies could have done operating separately. That, in turn, means more room for growth and innovation, fewer dropped and blocked calls, and a faster, more reliable mobile Internet experience.

<u>Next Generation Services for Rural Areas</u>

This combination also helps us address another critical issue. Many people and many communities today don't have access to the full capabilities of the mobile Internet economy.

With the scale, resources and synergies this transaction provides, we can and have committed to provide cutting-edge LTE mobile Internet service to more than *97 percent of the U.S. population* – nearly 55 million more Americans than our pre-merger plans and millions more than any other provider has committed to serve. And, you know as well as I the benefits this kind of deployment will bring to small towns and rural communities in education, health care and economic development.

[1] *Prepared Remarks of FCC Chairman Julius Genachowski,* CTIA Wireless 2011 (March 22, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0322/DOC-305309A1.pdf.

In particular, LTE networks deliver higher speeds and much-reduced latency, which means that we will see many new innovative wireless services that offer real-time interaction. LTE will give businesses located in rural America the same powerful tools enjoyed by those located in major cities. And, rural consumers will particularly benefit from real-time access to a wide range of resources that would not otherwise be as readily available. This will revolutionize telemedicine, allowing doctors to have real-time interactions with patients remotely and providing much more robust, accurate and immediate assessments of information from monitoring devices and data-intensive tools like MRIs. It also will make distance learning initiatives much more effective.

LTE will also support revolutionary new capabilities like cloud computing, which will give wireless consumers access to far greater computing power and data storage from handsets that are thinner, lighter and have much longer battery life. We have only started to think of the possibilities, but the transaction will allow us to bring these benefits to rural and urban areas alike, creating the information infrastructure needed to improve education, health care and public safety and to boost businesses, create jobs, and lower costs.

Widespread Recognition of the Transaction's Consumer and Economic Benefits

We will deliver these benefits with the only unionized wireless work force of any major carrier in America, which explains why the Communications Workers of America, AFL/CIO and other unions have strongly endorsed this merger.

Indeed, the benefits for consumers and especially rural Americans have led an extremely wide range of organizations and experts to immediately recognize the manifest consumer and economic benefits of this transaction. Support for the transaction is broad and deep, and includes unions, minority groups, many local representatives, and industry experts.

Continuing to Set the Pace in Wireless Services Innovation

Consumers also benefit from AT&T's continued role in promoting U.S. leadership in wireless innovation – a role this transaction ensures will continue. The wireless communications industry is one of America's great and ongoing success stories – ever faster services, powerful new handheld devices, applications that expand daily, lower prices, and the personal and professional benefits that come from consumers being able to connect to information located anywhere from virtually everywhere.

AT&T is proud to have played a leadership role in the cycle of innovation that has produced this mobile broadband revolution: our world-class research institution AT&T Labs, our industry-leading outreach to and support of developers, manufacturers and others throughout the wireless ecosystem to speed the design, testing and introduction of the best new wireless devices and applications; our unparalleled research collaborations with and support of more than 80 public and private universities across the country; and, of course, our networks upon which entire new and growing sectors of the economy depend.

But we are just getting started.

With the right resources, we can combine robust new network capabilities with the immense storage and processing power of the "cloud" to give consumers and businesses instant and seamless mobile access to everything on their home and work computers or on any other Internet-connected device or machine – applications, data, e-mail, video, *everything*. We will truly be able to "mobilize everything."

The increased efficiency in spectrum use, which is at the heart of this transaction, is also crucial for maintaining the virtuous cycle of wireless innovation. With the spectrum and network capacity lift provided by this transaction, AT&T and its partners can continue to develop, introduce and aggressively promote innovative, but capacity-consuming services, devices and applications.

Manufacturers and software developers can be assured of access to the combined company's customer base and improved networks as they design and launch their products, spreading the cost and risk over more potential customers for their innovations. And, by continuing to improve service quality and product offerings, AT&T can keep the pressure on its competitors to innovate and introduce new and better services.

Instead of the inevitable slowing of innovation that would take place in the absence of a solution to impending spectrum exhaust, the transaction will produce a series of positive ripple effects throughout the economy as AT&T, its partners, users of its networks, and its competitors are all driven to innovate more aggressively and creatively.

Increased Competition Among Many Competitors

Some have suggested that the extraordinary consumer and economic benefits would come at the cost of reduced competition and increased prices. That is simply not true. All T-Mobile customers will have the choice of retaining their existing rate plans or switching to an AT&T rate plan, and they will thus have *more* choices than before, including a state-of-the-art LTE service that T-Mobile had no clear path to offer on a standalone basis.

The combination of AT&T and T-Mobile could not possibly derail the powerful forces of competition in one of the nation's most competitive industries. Wireless industry output is exploding and is on track to increase many times over by 2015. The pace of innovation is even more remarkable. Prices have dropped rapidly, whether measured on a revenue per voice minute or per megabyte basis. Advertising is among the most robust and aggressive of any industry. None of that will change: output will continue to rise, prices will continue to fall, new companies will continue to enter, all of these competitors will continue to wage fierce marketing campaigns to attract and retain customers, and the U.S. wireless marketplace will remain the most competitive in the world.

The vast majority of American consumers have a choice of at least five facilities-based wireless providers – and that does not even count new mobile broadband providers like Clearwire and LightSquared that are building nationwide 4G networks or the many successful wireless resellers. Certain critics may attempt to create a myth that only a few national competitors exist, but wireless competition occurs primarily on the local level.

Those local competitors often include Sprint, Verizon, and AT&T, but there are many other strong competitors in the marketplace. No-contract, "all you can eat" service providers like Leap and MetroPCS have been competing aggressively and rapidly expanding their service areas, and are poised to offer more advanced devices and services more widely. Regional carriers like U.S. Cellular, Cellular South, Allied Wireless (formerly Alltel), and nTelos compete aggressively in their core markets and offer nationwide service through roaming arrangements. Incumbent cable television and telephone companies such as Cox Communications and Cincinnati Bell offer wireless service to their large customer bases. And, there are new, well-financed entrants that are poised to enter the wireless marketplace.

Moreover, T-Mobile does not exert strong competitive pressure on AT&T, and other providers already fill—or could easily move to fill—whatever competitive role T-Mobile occupies today. Sprint has re-emerged with aggressive pricing plans and a successful 4G platform. Regional or locally focused carriers have achieved estimated customer shares in excess of T-Mobile's in particular markets. And MetroPCS and Leap have expanded into new markets and are offering inexpensive, no-contract service with nationwide coverage, including in 22 of the top 25 markets (between them).

Any concern that the wireless industry is or could be dominated by AT&T, Verizon and Sprint merely because they have the largest subscriber bases today should be put to rest by 1Q 2011 results recently reported by MetroPCS and Leap, which together gained more than a million net customers in the last quarter alone.

Increased Call Quality, New Services, and Competition

Let me close by underscoring a very important point. This transaction will increase overall network capacity beyond what the two companies had separately, because it allows for more efficient use of existing spectrum and network assets. Our two companies have extraordinarily complementary assets. We use the same technologies. We hold spectrum in the same bands. We have network grids and cell site locations that mesh together extremely well. As a result, the network synergies of this transaction will allow us simultaneously to improve the quality of existing services (reducing dropped calls and enhancing broadband data speeds) and to create new capacity to carry more mobile Internet traffic.

In this industry – in any industry really – it is a fundamental concept that increased capacity is the foundation for sustained, vigorous competition and innovation. The U.S. wireless marketplace is the most competitive in the world, and it will remain so following this transaction. Over the past decade, U.S. wireless prices have steadily and dramatically come down; this transaction allows that trend to continue.

So, to summarize, this merger will help us meet fast growing traffic volumes. It will deliver the network quality and the new services that customers are demanding. It will bring more families and towns into our high-tech future. And, it will enhance competition and innovation.

That's a quick overview of this transaction's benefits. Again, I thank you for the opportunity to present our views to you this morning.

Mr. GOODLATTE. Thank you, Mr. Stephenson.

Mr. Obermann, welcome.

TESTIMONY OF RENÉ OBERMANN, CEO, DEUTSCHE TELEKOM AG

Mr. OBERMANN. Thank you, Chairman Goodlatte, Chairman Smith, Ranking Member Watt, Ranking Member Conyers, and Members of the Subcommittee. My name is René Obermann and I am Chief Executive Officer of Deutsche Telekom AG based on Bonn, Germany. I appreciate the opportunity to testify today on behalf of Deutsche Telekom.

First of all, I fully agree with Mr. Stephenson's introductory comments, and I firmly believe that this transaction is the best possible outcome not only for DT, for our group, for T-Mobile USA, and for AT&T, but for our customers and for wireless competition and for innovation in the United States.

Before I discuss the substantial benefits of this transaction for T-Mobile's customers, I would like to first provide some background on our decision to proceed with the sale of T-Mobile.

Since Deutsche Telekom's acquisition of VoiceStream almost exactly 10 years ago, our U.S. business has faced intense and evolving competition in the wireless sector. In recent years, in particular, T-Mobile USA has faced increasingly fierce competition from a growing number of players, including not only large facility-based competitors but also smaller "no contract" value players, including not only large facility-based but value players and others such as virtual network operators, mobile virtual network operators, regional wireless carriers, and so-called over-the-top providers that include mobile voice-over-Internet solutions such as Skype which is now being acquired by Microsoft.

T-Mobile has been caught in the middle of this dynamic marketplace and has had an increasingly difficult time competing. We have lost market share over the past 2 years. In the most recent quarter alone, we lost 471,000 contract customers while other competitors are growing rapidly, and while other competitors are moving quickly to build out and to develop their new LTE networks, T-Mobile lacks a clear path to LTE deployment.

To meet the exponential growth in demand for bandwidth and network capacity, T-Mobile will need to move to LTE to remain competitive, but the company simply does not have access to the wireless spectrum needed to deploy LTE effectively. T-Mobile has already dedicated its existing spectrum resources to its less spectrally efficient GSM and HSPA+ networks. As it is, the company is likely to face a spectrum crunch in several key markets in the coming years on those technologies alone, even without the move to LTE.

With this backdrop, T-Mobile and Deutsche Telekom had to make some difficult decisions. Remaining a competitive force in the U.S. wireless marketplace was going to require a very significant additional capital investment, both in spectrum and in infrastructure. However, it has become increasingly apparent that the prospect of additional spectrum becoming available for acquisition is uncertain at best. Even if available, such an acquisition would force Deutsche Telekom to reallocate funds from our core European operations into T-Mobile USA, which would be very difficult for us given our overall group debt situation and our high capital investment needs in Europe.

This transaction resolves these issues in a manner that delivers more value with substantially less execution risks both to Deutsche Telekom and to T-Mobile's customers than any other alternative which is theoretically available to us. It allows DT to advance its international business strategy while making available the necessary resources to modernize and upgrade our core businesses in Europe. And as a significant shareholder of AT&T after the transaction, this transaction will also mean that Deutsche Telekom maintains an interest in and can continue to contribute to the rapidly growing and highly competitive United States wireless business.

At the same time, the transaction will mean significant benefits for our U.S. T-Mobile customers, and let me highlight just a few of these benefits.

First, T-Mobile customers will enjoy substantial improvements in their coverage through access to AT&T's low-band 850 megahertz spectrum. In particular, this will mean significantly improved deep in-building and rural coverage.

Second, the transaction will result in near-term network quality improvements for T-Mobile customers. Merging the companies' complementary networks and polling their spectrum will very quickly lead to significant operating efficiencies which will mean better coverage, fewer dropped and blocked calls, and faster and more consistent data downloads, particularly at peak times and in high-demand locations.

Third, the transaction will further give the combined company the resources and spectrum it needs to broadly deploy next generation 4G-LTE service to more than 97 percent of Americans. T-Mobile on its own simply did not have the spectrum to roll out its own competitive nationwide LTE network.

And fourth, the transaction will allow the combined company to increase capacity and to reduce costs significantly which will drive prices down and enhance opportunities for innovation, making the U.S. an even more competitive and innovative marketplace. As I have already described, the U.S. wireless marketplace is extremely dynamic and competitive today and it will become even more so with the capacity growth and cost savings which are made possible by this transaction.

To conclude, Deutsche Telekom sale of T-Mobile USA to AT&T is a true win-win solution. It not only advances Deutsche Telekom's business strategy but also directly addresses T-Mobile USA's strategic challenges and delivers significant benefits to T-Mobile customers and the wireless competition in general.

Thank you for your time. I welcome the questions.

[The prepared statement of Mr. Obermann follows:]

Introductory Remarks by René Obermann, CEO Deutsche Telekom AG

Thank you Chairman Goodlatte, Chairman Smith, Ranking Member Watt, Ranking Member Conyers, and Members of the Subcommittee. Good morning, my name is René Obermann; I am Chief Executive Officer of Deutsche Telekom AG. I appreciate the opportunity to testify today on behalf of DT.

I fully agree with Mr. Stephenson's introductory comments and I firmly believe that this transaction is *the* best possible outcome – not only for DT, T-Mobile USA and AT&T – but for our customers and for wireless competition and innovation in the United States. Before I discuss the substantial benefits of this transaction for T-Mobile's customers, I will first provide some background on our decision to proceed with the sale of T-Mobile.

Since Deutsche Telekom's acquisition of VoiceStream almost exactly 10 years ago today, our U.S. business has faced intense and evolving competition in the wireless sector. In recent years, in particular, T-Mobile USA has faced increasingly fierce competition from a growing number of players, including not only large facilities-based competitors, but also smaller "no contract" value players, and others such as MVNOs (Mobile Virtual Network Operators), regional wireless carriers, and so called "over-the-top providers" that include increasing number of mobile voice-over-IP solutions, such as Google Voice and Skype (which is now being acquired by Microsoft).

T-Mobile has been caught in the middle of this dynamic marketplace and has had an increasingly difficult time competing. We have steadily lost market share over the past two years. In the most recent quarter alone, we lost 471,000 contract customers, while other competitors are growing rapidly. While other competitors are moving quickly to build out and develop their LTE networks, T-Mobile lacks a clear path to LTE deployment. To meet the exponential growth in demand for bandwidth, T-Mobile will need to move to LTE to remain competitive but the Company simply does not have access to the spectrum needed to deploy LTE effectively. T-Mobile has already dedicated its existing spectrum resources to its less spectrally efficient GSM and HSPA+ networks. As it is, the company is likely to face a spectrum crunch in several key markets in the coming years on those technologies alone, even without the move to LTE.

With this backdrop, Deutsche Telekom had to make some difficult decisions. Remaining a competitive force in the U.S. wireless marketplace was going to require a very significant capital investment in both spectrum and infrastructure. However, it has becoming increasingly apparent that the prospect of additional spectrum becoming available for acquisition is uncertain at best. Even if available, such an acquisition would have forced Deutsche Telekom to reallocate funds from our core European operations into T-Mobile USA – which would have been very difficult for us given our overall group debt situation and our capital investment needs in Europe.

This transaction resolves these issues in a manner that delivers more value with substantially less execution risk both to Deutsche Telekom and to T-Mobile's customers than any other alternative theoretically available to us. It allows DT to advance its global business strategy, while making available the resources necessary to modernize and upgrade Deutsche Telekom's core businesses in Europe. As a significant shareholder of AT&T after the transaction, this transaction will also mean that Deutsche Telekom maintains an interest in and can continue to contribute to the rapidly growing and highly competitive United States wireless business.

At the same time, the transaction will mean significant benefits for our U.S. T-Mobile customers. To highlight just a few of these benefits:

- ***T-Mobile customers will enjoy substantial improvements in their coverage through access to AT&T's low-band 850 MHz spectrum.*** In particular, this will mean significantly improved deep in-building and rural coverage.

- ***The transaction will result in near-term network quality improvements for T-Mobile customers.*** Merging the companies' complementary networks and pooling their spectrum will very quickly lead to significant operating efficiencies, which will mean better coverage, fewer dropped and blocked calls, and faster and more consistent data downloads – particularly at peak times and in high-demand locations.

- ***The transaction will further give the combined company the resources and spectrum it needs to broadly deploy next generation 4G-LTE service to more than 97% of Americans.*** T-Mobile, on its own, simply did not have the spectrum to roll out its own competitive nationwide LTE network.

- ***Fourth, the transaction will allow the combined company to increase capacity and to reduce costs significantly, which will drive prices down and enhance opportunities for innovation – making the U.S. an even more competitive and innovative market.*** As I have already described, the U.S. wireless marketplace is extremely dynamic and competitive today – and will become even more so with the capacity growth and cost savings made possible by this transaction.

To conclude, Deutsche Telekom's sale of T-Mobile USA to AT&T is a true win-win solution. It not only advances Deutsche Telekom's business strategy, but also directly addresses T-Mobile USA's strategic challenges and delivers significant benefits to T-Mobile customers and wireless competition generally. Thank you for your time. I welcome any questions you have.

Mr. GOODLATTE. Thank you, Mr. Obermann.
Mr. Berry, welcome.

TESTIMONY OF STEVEN K. BERRY, PRESIDENT AND CEO, RURAL CELLULAR ASSOCIATION

Mr. BERRY. Good morning, Chairman Goodlatte, Ranking Member Watt, Chairman Smith, and Ranking Member Conyers. Thank you for the opportunity to testify today.

The AT&T takeover of T-Mobile is a game-changer. This anticompetitive shock wave will reverberate through the entire wireless industry. If approved, this merger virtually guarantees a wireless duopoly. It harms competitive carriers and consumers. It frustrates the goal of mobile broadband deployment across our Nation and will require re-regulation of the wireless industry.

RCA represents competitive carriers, rural, regional, urban, and suburban carriers, all across the Nation. Today I testify on behalf of nearly 100 carrier members and 145 vendor/supplier members of RCA, many of which are small businesses who compete for customers with robust service offerings, own and build their own wireless networks, and remain involved in their local communities. The David versus Goliath competition against the largest national carriers is nothing new, but if this proposed takeover is approved, it will be a bridge too far. The advantages of size, scale, vertical integration in the wireless value chain will overwhelm our Nation's local competitive carriers.

Let me offer five specific reasons why this transaction should not happen.

It eliminates meaningful competition. This takeover would consolidate the industry to the extreme: two large carriers, AT&T and Verizon, who control almost 80 percent of the market. Such consolidation would leave these consumers at the mercy of a duopoly, and history tells us the results. Customers, consumers will face price increases, reduced innovation, and fewer choices.

It disrupts data roaming. Voice roaming and now data roaming are fundamental building blocks of our Nation's wireless networks. "Roaming" is just another word for "national mobility." Without it, some customers will not have service. Ask yourself which of your constituents would want to buy a phone that only works in your congressional district. That is why wireless is a national market.

AT&T operates a digital technology called GSM and is proposing to buy the only other national GSM provider, T-Mobile. Therefore, if this deal is approved, small GSM providers face an AT&T roaming monopoly immediately. If you use the other technology, CDMA technology, you have only two roaming choices, Verizon Wireless or Sprint Nextel. If this deal is approved, how long before Verizon attempts to buy Sprint Nextel? This does not look or sound like a competitive marketplace for the future.

Three, it limits innovation technology and interoperability. Just as all consumers want service nationwide, they also want new, innovative devices. Imagine the market power when two big companies control 80 percent of the wireless market. Will any of the smaller wireless carriers who serve rural towns across our Nation have a fair shot at getting these new, latest devices? Well, I think not. Apple will tell you that the iPhone is not exclusive, but yet only AT&T and Verizon offer the iPhone after 4 years.

Number four, it concentrates spectrum. This takeover will concentrate spectrum in the hands of AT&T and will do nothing in itself to bring 4G broadband services to rural America. T-Mobile owns few licenses in rural markets. AT&T already holds the prime low-band spectrum needed to serve rural areas. Today without this deal, AT&T could build out the low-band spectrum it already owns and commit to support ubiquitous data roaming and harmonization across the 700 megahertz band, and that would help rural America. Bringing wireless broadband to rural America should not be held hostage in an attempt to win regulatory favor for this anticompetitive deal.

And finally, eliminating competition means additional regulation. Today's light touch regulatory regime is founded on the presence of vigorous competition. Turn competition into a duopoly and Congress and the FCC will have to reevaluate this light tough regulatory regime. The FCC will seek to increase regulatory involvement to artificially maintain the benefits competition should bring to your constituents.

Please recognize this proposed takeover for what it is: a horizontal merger. It entirely eliminates a national competitor and it threatens the ability of all other carriers to provide competitive services. This takeover cannot be conditioned into acceptance and must be stopped.

And I welcome any questions that you may have. Thank you.

[The prepared statement of Mr. Berry follows:]

"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

Testimony of Steven K. Berry
President and Chief Executive Officer,
Rural Cellular Association

before the

House Committee on the Judiciary,
Subcommittee on Intellectual Property, Competition, and the Internet

May 26, 2011

Chairman Goodlatte, Vice Chairman Quayle, Ranking Member Watt, and members of the Subcommittee, thank you for inviting me to testify about AT&T's proposed takeover of T-Mobile. I appreciate the opportunity to testify on behalf of the RCA, the competitive carriers association. The Rural Cellular Association is the nation's leading association of competitive wireless carriers with nearly 100 carrier members, including many smaller rural and regional providers. RCA and its members are deeply concerned that AT&T's proposed takeover of T-Mobile would deal a mortal blow to competition and cause significant harm to consumers. The acquisition would further consolidate an industry already teetering on the brink of duopoly and would amass an unprecedented amount of spectrum in a single carrier's hands. For the first time, this horizontal merger would eliminate a national carrier from the competitive map. The transaction would not only diminish competition among the largest national providers, but also undermine the ability of rural and regional carriers to compete by making it more difficult – if not impossible – to secure roaming rights and to offer cutting-edge, interoperable handsets. As for the so-called "efficiencies" AT&T touts, let me quote from a recent article about the deal in the *Economist*, "Beware of habitual monopolists bearing gifts."[1]

The net result of this transaction would be a far less vibrant wireless marketplace, marked by higher prices, lower service quality, and less innovation than if AT&T and T-Mobile remained separate competitors. The merger also would result in diminished infrastructure investment and fewer jobs, as AT&T would devote $39 billion toward gobbling up a competitor and eliminating overlaps, rather than toward building out the broadband spectrum it won at auction while T-Mobile pursues its own investments and expansion. For all these reasons, we have called on the Department of Justice and the Federal Communications Commission to block

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1 The Economist, "Not So Fast, Ma Bell," (March 24, 2011).

the proposed transaction, and I hope this Subcommittee will convey its concerns as those agencies conduct their investigations.

RCA and Its Interest in the Proposed Transaction

RCA is the voice of the competitive wireless industry, representing the interests of nearly 100 carriers. Nearly all of our members are rural and regional carriers, most of whom serve fewer than 500,000 customers. The vast majority of RCA's carrier members fall under the Small Business Administration's definition of a small communications business, having 1,500 or fewer employees. RCA's members are part of their communities, and are energetic, entrepreneurial contributors to the wireless industry. Their customers count on them to deliver high-quality service on popular devices at affordable prices. Just as in urban areas, rural consumers increasingly are seeking access not only to mobile phone service but to the latest smartphones, tablets, and other mobile broadband devices. RCA's members are doing all they can to give consumers choices and meet this demand, consistent with the national policy goal of making mobile broadband services ubiquitous and bridging the digital divide.

Across the country, RCA's members face challenges in competing with all of the four national wireless providers, but particularly with the two "super-carriers" – AT&T and Verizon. Our members obviously attempt to compete against AT&T and Verizon in the *retail* marketplace, where we hope to offer superior network coverage at attractive prices. But we are also forced to compete with the "Big Two" in accessing critical *wholesale* inputs, and it is there that we are the most disadvantaged. For example, small providers must contend with the "super carriers" in bidding on spectrum at auction, in purchasing devices that consumers desire, and in attempting to attract capital from investors. Obviously, these inputs are vital to our members' abilities to build out their networks and to satisfy consumers' demands.

Congress authorized and the FCC auctioned spectrum for smaller, non-national carriers to have licenses to serve particular geographic areas. Smaller carriers may build out their entire licensed areas but still not have national coverage. Congress encouraged these smaller carriers to buy spectrum and build their businesses, and RCA members have done so to great effect and benefit to consumers.

Because of the substantial cost of obtaining spectrum and of building out networks, and given the massive resource advantages of the existing national carriers, RCA's members cannot realistically expect to offer nationwide coverage on their own. Rather, our members are forced to depend on AT&T and Verizon for access to other key inputs, and thus have a vertical relationship with the "super-carriers." Most significantly, RCA's members must obtain roaming rights from at least one nationwide carrier – AT&T or T-Mobile, for GSM carriers, and Verizon or Sprint, for CDMA carriers – if they are to give consumers the network coverage they demand as consumers travel outside their home networks. Just last week, FCC Chairman Julius Genachowski explained that "smaller carriers need to be able to offer national service 'to have any chance of competition in today's market.'" RCA's members must rely on and pay the largest carriers for access to their national networks. Our members must also turn to AT&T and Verizon, as the two largest *wireline* providers, to purchase backhaul or "special access" services to connect their cell towers to the public switched telephone network.

With smaller carriers literally at the mercy of the Big Two, many of our members are wary of publicly opposing AT&T's attempt to acquire T-Mobile, for fear that AT&T could retaliate in the marketplace – for instance, by denying or delaying roaming agreements, by making certain devices unavailable through exclusive deals with manufacturers, or by refusing to provide backhaul services on reasonable terms. In fact, such concerns are a major reason why I am here today on behalf of RCA. Small carriers' fear of reprisals is emblematic of the David vs. Goliath nature of today's wireless industry – a competitive imbalance that would grow far worse if AT&T were allowed to acquire T-Mobile.

The Proposed Transaction Would Bring Unprecedented Levels of Consolidation to the Modern Wireless Industry

After years of robust competition that led to falling prices and rapid network expansion, today's wireless industry is unfortunately veering toward duopoly, even without the proposed acquisition. As of 2010, AT&T and Verizon together served more than 65 percent of all subscribers, and they are continuing to gain share. A recent report from the Government Accountability Office showed that in a span of only three years, from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent.[2] Economists also warn that the industry's HHI value, a common indicator of consolidation, *already* exceeds the thresholds used by DOJ and FCC to determine whether an industry is highly concentrated.[3] In fact, because of these troubling signs of concentration, the FCC's 2010 Wireless Competition Report marked the first time the agency was unable to certify that the wireless industry is characterized by effective competition.[4]

This consolidation has, in turn, led to higher prices for consumers than would have prevailed in a more competitive marketplace. Despite everything we learned in our economics

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2 Government Accountability Office, *Telecommunications: Enhanced Data Collection Could Help FCC Better Competition in the Wireless Industry*, Report to Congress, GAO-10-779 at 10, 13 (July 2010).

3 Roger G. Noll and Gregory L. Rosston, *Competitive Implications of the Proposed Acquisition of T-Mobile by AT&T Mobility*, SIEPR Policy Brief, Apr. 2011, at 2, *available at* siepr.stanford.edu/system/files/shared/documents/pb_04_2011.pdf.

4 *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 ¶ 4 (2010).

textbooks, AT&T claims that industry consolidation has driven prices down faster than competition would have. The fact of the matter is that a once-rapid decline in prices leveled off almost completely once consolidation took hold in the industry.

AT&T's proposed takeover of T-Mobile is the latest and by far the biggest example of industry consolidation run wild and is clearly a horizontal merger that exceeds all thresholds for acceptable consolidation. This time a major national competitor would be eliminated from the marketplace. It would lead to an outright duopoly, in which AT&T and Verizon would each enjoy more market share than all other carriers combined. It would also give AT&T a *monopoly* in both wholesale and retail markets for GSM wireless services by eliminating T-Mobile as the only other nationwide GSM carrier – monopoly power that would exceed even Verizon's dominance among CDMA carriers. As such, the deal presents DOJ and the FCC with two starkly different visions of the future. Rather than responding to competitive pressures by providing high-quality, low-priced services, AT&T can dramatically diminish those pressures by buying a key competitor – indeed, the rival that offers the lowest prices among the four nationwide providers. Rather than innovating to make more efficient use of the vast spectrum it already has, AT&T can gobble up T-Mobile's spectrum while continuing to warehouse its own. Rather than partnering with smaller carriers to provide vital roaming and backhaul services at reasonable rates, AT&T can steamroll smaller carriers by denying these essential facilities. And rather than creating jobs by investing in new infrastructure, AT&T can cut jobs wherever T-Mobile personnel are redundant. The choice should be clear: Our regulators should insist on competition over consolidation, as Congress as a whole and this Subcommittee have consistently championed.

The Proposed Transaction Would Undermine the Competitiveness of Rural and Regional Carriers in Particular

While AT&T's proposed acquisition of T-Mobile should be rejected based on the horizontal competitive effects in the retail marketplace, it poses equal if not greater concerns based on the harm it would cause to the rural and regional providers that depend on AT&T (and, to a lesser extent, T-Mobile) for wholesale inputs. While RCA is concerned about the transaction's overall harms, obviously my greatest worry stems from the adverse effects on my members. As I explained above, RCA's members are in the precarious position of having to compete with the large nationwide carriers, while also being at their mercy in seeking roaming agreements and in attempting to obtain the latest handsets from equipment suppliers that are forced to defer to AT&T's and Verizon's wishes.

On top of this structural concern, AT&T already has demonstrated a penchant for anticompetitive conduct. It has aggregated a vast amount of spectrum at the expense of smaller carriers; it has flatly refused to deal with small carriers that seek roaming rights on its nationwide network; and it has forced manufacturers to limit the availability of their handsets to these carriers and has consistently refused to seek interoperable solutions to encourage wireless industry coverage and new services throughout the nation. In several different respects, the proposed transaction would greatly exacerbate these competitive harms to rural and regional carriers.

Spectrum Aggregation

Even before it announced the T-Mobile transaction, AT&T had spent the previous months and years engaged in a spectrum-acquisition binge. Over the past decade, AT&T has aggregated spectrum in the cellular and PCS bands through its acquisitions of Telecorp, Highland Cellular, BellSouth, Dobson, Edge Wireless, McBride Spectrum Partners, and most recently Centennial Communications. In the AWS band, AT&T purchased 48 licenses at auction in 2006 covering nearly 200 million POPs. And in the 700 MHz band, AT&T bought spectrum from Aloha covering three-quarters of the major markets in 2007, bid billions at auction to acquire 227 more 700 MHz licenses in 2008, and just this year announced a deal with Qualcomm to acquire an entire nationwide footprint in the 700 MHz band.

As a result, AT&T's spectrum stockpile is already the largest of any of the four major national carriers. A recent study by J.P. Morgan estimated that AT&T currently holds 100 MHz on average in the top 100 markets nationwide, without counting T-Mobile's spectrum licenses towards AT&T's total.[5] AT&T's next closest competitor, Verizon, holds just over 90 MHz—10 percent less spectrum on average than AT&T.[6] All of this makes it simply impossible to credit AT&T's claim that it is facing debilitating spectrum constraints. Indeed, Verizon—with less spectrum—has said it is "extremely confident" in its spectrum position for rolling out a nationwide 4G network.

And now, AT&T wants to take over T-Mobile and raise its spectrum holdings to an average of 150 MHz in the top 100 markets. Such a move—designed to tighten AT&T's grip on an essential input for wireless services—would wreak havoc on competition from rural and regional providers. Spectrum that AT&T amasses for itself is spectrum that smaller rivals cannot use to compete. As AT&T's spectrum portfolio grows while the holdings of competitive carriers remain constant, these carriers would become less effective competitors relative to AT&T. If AT&T raises prices, RCA's members would face significant spectrum limitations when trying to expand service offerings to recruit AT&T customers. And as smaller carriers become less

5 J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings*, Mar. 30, 2011, at 1, *available at* https://mm.jpmorgan.com/stp/t/c.do?i=62A4E-B32&u=a_p*d_569842.pdf*h_-ifi22f3 ("*J.P. Morgan Spectrum Study*").

effective competitors, they become less able to retain subscribers, less able to maintain a consistent revenue stream, and less able to attract sufficient capital to invest in infrastructure, devices, and service quality.

Voice and Data Roaming

As I mentioned earlier, many of RCA's members also are customers of AT&T and T-Mobile in the wholesale market for GSM voice roaming. AT&T and T-Mobile are the only two carriers in the industry that can offer nationwide roaming to rural and regional GSM carriers. Nationwide roaming is indispensible to our members' ability to compete. As wireless customers increasingly demand nationwide service, the market for wireless services has become truly national in scope. RCA's members simply cannot cobble together the nationwide coverage that their customers demand absent a nationwide roaming partner. Their future viability depends on their ability to obtain 3G GSM and 4G LTE roaming from AT&T and T-Mobile. And yet, to date, AT&T has consistently rebuffed our members when they seek to negotiate GSM roaming arrangements on fair and reasonable terms, as the FCC recently confirmed.

The takeover of T-Mobile would make AT&T the *only* option for nationwide GSM roaming. Giving AT&T monopoly control over a key input for rural and regional carriers would have disastrous competitive consequences. A strengthened AT&T would be able to withhold roaming altogether to restrict competition from the dozens of RCA members with GSM networks. And even if the combined AT&T/T-Mobile were willing (or required) to negotiate a roaming arrangement, it could charge monopoly rents without fear of price competition. The FCC's recently adopted rules on roaming, even assuming they withstand the appeal that Verizon has filed, simply require "commercially reasonable" roaming rates based on marketplace

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[6] *Id; see also id.* (estimating that "Sprint and T-Mobile USA each have ~50 MHz").

benchmarks, and thus would not prevent AT&T from gouging smaller carriers when there are no longer other nationwide GSM roaming providers to use as a point of comparison.

Nor would the problem go away with the passage of time; as the nation transitions to 4G networks, T-Mobile would not be available as a major source of 4G roaming, leaving small carriers at the mercy of the AT&T-Verizon duopoly. As noted, AT&T has flatly refused to enter into 3G roaming agreements, leaving no reason to believe it will change its approach with respect to 4G roaming. And Verizon's decision to appeal even the FCC's modest roaming requirements, which fail to subject AT&T or Verizon to traditional dominant carrier safeguards, likewise offers little hope that it will be a willing partner in granting 4G roaming rights on reasonable terms and condition

Device *Exclusivity and Interoperability*

The proposed transaction would also give AT&T monopsony power as a buyer of devices, and the leverage to force device manufacturers to accept anticompetitive terms. AT&T has a long track record of extracting agreements from manufacturers for exclusive rights to cutting-edge devices. The most notable example – but certainly not the only one – is the iPhone, which AT&T managed to tie up for nearly four years. Even following the end of exclusivity for the iPhone, it is still unavailable through over 95% of domestic carriers, as it is offered only through AT&T and Verizon Wireless. Device exclusivity severely limits the set of handsets RCA's members can offer, and puts them at a distinct disadvantage in the marketplace. If the takeover of T-Mobile goes forward, AT&T's ability to insist on device exclusivity will only increase. Indeed, as the sole nationwide provider of wireless services over a GSM network, AT&T would be able to exert tremendous leverage when dealing with GSM device manufacturers.

AT&T would also exert this power to prevent devices from being interoperable on competitive carriers' networks. Device interoperability is a prerequisite to a well-functioning wireless marketplace; it encourages innovation, gives consumers more choices, reduces costs to end users, and enables smaller carriers to provide stronger competition to major carriers like AT&T. AT&T has succeeded in the past at preventing interoperability for certain devices, but as its buying power increases with the purchase of T-Mobile, AT&T would be able to make it even harder for rural and regional carriers to offer cutting-edge devices, or devices that can roam seamlessly. The stronger AT&T becomes, the fewer devices will be interoperable, and the harder it will be for smaller carriers to compete.

Interoperability was a fundamental principle when the FCC issued the first cellular licenses, where only two licenses were available in each market. During this early period of the industry, interoperability was mandated by the FCC. With the onset of spectrum auctions and the introduction of competition in the industry, interoperability remained the practice across the entire industry, as no carriers had the dominance to demand their own standards and non-interoperable equipment. It is only in the most recently auctioned 700 MHz band that we have returned to a point where two dominant carriers have the size and scale to insist on their own specifications, and for the first time the industry does not have interoperability within a spectrum band, to the detriment of competitive carriers and the development of a public safety broadband network alike. If AT&T is allowed to become even more dominant through this takeover, these interoperability problems will only grow more significant.

Other Competitive Concerns

Spectrum, roaming, and interoperability are not the only competitive concerns from this deal. The deal would also undermine the ability of RCA's members to get adequate and reasonably priced "backhaul" services to connect their cell towers to the public switched telephone network. By vertically integrating T-Mobile's wireless business with AT&T's extensive wireline backhaul business, AT&T would be in a position to discriminate in favor of T-Mobile's traffic *in addition to* its own traffic and affiliated traffic. While excessive special access rates have been a major concern for competitive carriers in recent years, this merger would strengthen AT&T's ability to leverage its backhaul network by discriminating against unaffiliated traffic.

As we have mentioned, such anticompetitive conduct would increase prices and limit choices for all consumers. Many minority, low-income, and younger mobile users are the most likely to rely exclusively on mobile wireless services. These users will be the first to see the impact of fewer competitors, particularly in the "value" priced markets. T-Mobile has been a leader in this market segment, and its exit would deal a significant blow to the critical effort to make mobile broadband available to more users at lower costs.

In addition, by weakening competition from smaller carriers, the deal would impair their access to capital. As RCA's members become less able to obtain sufficient spectrum, secure voice and data roaming rights, offer competitive and interoperable devices, and gain access to backhaul at reasonable rates, they would become less able to retain subscribers and post healthy revenues. These financial red-flags would translate into lower investor confidence in RCA's members—and therefore higher capital costs.

We should not lose sight of the fact that competition has been good not only for the consumer, but also for the wireless industry. With a very active, competitive wireless marketplace, there has been less need for regulation. The market has been free to respond to consumer needs and to innovate to win new customers, all without the fear of one or two dominant players restricting free market choice. But if this acquisition were approved, a light regulatory touch will no longer be possible, because the market forces that allow for less regulation will be on life support. The FCC would have to consider new regulatory policies to emulate the prices that would prevail in a genuinely competitive wireless industry and to ensure that the two dominant providers permit competitive connectivity on just and reasonable terms and conditions. Barriers to market entry for new entrants would become huge problems and would stifle innovation without the creative juices of a healthy market. In short, a merger of this magnitude would change the marketplace for decades and might forever alter the character of the competitive wireless sector that has been such a boon for consumers.

Conclusion

In conclusion, if the deal is approved, consumers would lose, competition would lose, and only AT&T would win. The deal would lead the industry down the path toward a true wireless duopoly, a GSM monopoly in the hands of AT&T, greater spectrum aggregation, higher roaming and special access fees, less device availability and interoperability, less access to capital for smaller carriers, and fewer jobs. AT&T's audacious plan to eliminate a major competitor under the banner of purported "efficiencies" should be roundly rejected. Indeed, if competition policy is to continue having any meaning, this combination of two of four nationwide wireless providers cannot be allowed to occur.

Thank you again for the opportunity to be here today, and I look forward to discussing these important issues with you this morning.

Mr. GOODLATTE. Thank you, Mr. Berry.

Ms. Desai, welcome.

TESTIMONY OF PARUL P. DESAI, POLICY COUNSEL, CONSUMERS UNION

Ms. DESAI. Thank you, Chairman Goodlatte, Ranking Member Watt, and Members of Congress for this forum and for this opportunity to talk a little bit about how this transaction will affect consumers.

For 75 years, Consumers Union has been working to ensure that consumers do have access to a fair marketplace for all consumers. However, we do have great concerns about the negative effect that this will have on consumers and in the fair marketplace, especially the effect that it will have on meaningful choice, consumers' pocketbooks, quality service, and access to innovative products.

My written testimony goes into detail on all those factors, but for the remainder of my 5 minutes, I will focus on two main issues: prices and choice.

Mobile devices and mobile broadband are becoming integral in people's lives. Mobile broadband is especially a critical entry point and sometimes the only entry point to the Internet for many communities such as rural communities, communities of color, and low-income communities. The last thing consumers need right now is a takeover that will result in higher prices for consumers, many of whom are already struggling in a very tight economy. Our magazine, Consumer Reports, has compared the plans between AT&T and T-Mobile and for comparable plans, our magazine has found that T-Mobile offers up to $15 to $50 a month plans that are cheaper than AT&T's. For most Americans these days, $15 to $50 a month can go a long way. $15 can be a child's school lunch for a week. $50 could be the price of filling up a tank of gas.

It is inevitable that T-Mobile customers who are already paying lower prices than they would on AT&T's plan will see rate hikes, but we are also concerned about the ripple effect this will have on all consumers. If two companies are allowed to control 80 percent of the market with little to no consumer protections, there is very little reason to believe that these two companies will discipline each other when it comes to prices. We already see that Verizon and AT&T don't discipline each other when it comes to prices. So there is no reason why they would do so moving forward.

So faced with higher prices, consumers will have difficult choices to make. Do they just forgo access to mobile broadband or do they pay the higher prices and continue to make even more sacrifices than they do now to make ends meet?

This leads me to my second point, choice. Under this merger, if consumers are unhappy with the prices or the services that they are getting from the two big providers, where can they go? Well, first, the consumer would have to finish his or her long 2-year term wireless contract or be willing to pay the early termination fee to break that contract. Long-term contracts and ETF's discourage consumers from one day just taking their phone to another service provider.

But even if you get over that hurdle, you have to assume that the consumer can get the phone that they want from a different carrier. We know today that more and more consumers are choosing their wireless provider based on the handset that they are able to get from a provider. However, due to exclusive contracts and the inability of phones to operate from one network to another, many carriers, especially those represented by Steve here today, cannot get the latest and greatest devices that consumers actually want. And that trend would only be exacerbated by the merger. With AT&T and Verizon able to control 80 percent of the market, more than ever they will be able to force handset makers, who have to rely on economies of scale to reach customers to succeed—they will be forced into exclusive deals. So if the consumer wants that latest popular device, she will have no choice but to stick with AT&T or Verizon.

On top of this, AT&T and Verizon will have more power over which devices they allow on their network, what features they allow on these devices, or what applications are available in the App Store. So consumers will find themselves with limited choices for applications and probably face less innovative products.

We have seen this story before. Back in 1982 when the FCC first made cell phone licenses available, it decided to award two licenses in each cellular market. One license was awarded to the local incumbent telephone company, the Bell Companies. The other license wasn't awarded until 9 years later, in 1991. By that time, the incumbent Bell Company served 80 percent of the population, had received half the spectrum, and had a 9-year head start in the cellular market for most of the country. The Bell Companies had little incentive to develop a new technology that would compete with their wireline services. Mobile wireless developed much more quickly after the FCC made additional licenses available and companies without legacy wireline investments had entered the market.

To me this merger is a lot like deja vu. Going back to the anti-competitive 1980's is not the future we should be aspiring to. The FCC and DOJ should not allow this merger to proceed. Instead, we urge Congress and regulators to focus on ways to foster true and healthy competition in the market so that consumers can benefit from fair prices in the wireless marketplace.

Thank you and I look forward to any questions that you have.

[The prepared statement of Ms. Desai follows:]

Consumers Union
Nonprofit Publisher of Consumer Reports

Testimony of Parul P. Desai
Policy Counsel
Consumers Union

Regarding

"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

before the

House Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

May 26, 2011

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Chairman Goodlatte, Ranking Member Watt, and members of Congress, thank you for this opportunity to discuss the impact on consumers if AT&T Inc. (AT&T) is permitted to purchase one of its major competitors, Deutsche Telekom's T-Mobile USA (T-Mobile). For 75 years, the mission of Consumers Union, the nonprofit publisher of *Consumer Reports*® magazine, has been to work for a fair, just, and safe marketplace for all consumers and to empower them to protect themselves. As part of that mission, Consumers Union has been working to promote a truly competitive wireless market, which will provide consumers with meaningful choice, affordable prices, quality service, and access to innovative products. However, we have grave concerns about AT&T's purchase of T-Mobile because of the negative effect it will have on consumers' pocketbooks product and service choices and innovation.

Introduction:

Wireless technology is evolving and, more and more, consumers are using mobile devices to access the Internet. For many, especially rural consumers, low-income consumers, and consumers of color, a mobile device is the first – and sometimes only – entry point to access the Internet. Vigorous competition must exist in the wireless industry in order to ensure affordable access, quality service, choice, and innovation. However, the wireless market is already a concentrated one and just last year, the Federal Communications Commission (FCC) opted not to declare it a competitive market. As discussed below, the proposed acquisition of T-Mobile by AT&T will be harmful to consumers, and the benefits promised by AT&T can be achieved without eliminating a competitor from the market. Now is not the time to approve a combination between two of the four nationwide wireless carriers in America. Instead, lawmakers and policy makers must work towards creating a wireless marketplace that allows competitors and new entrants to fairly and meaningfully compete, which will ultimately benefit consumers.

Impact on Market Concentration:

Combining the second and fourth largest wireless carriers would further consolidate market share among the top four carriers, resulting in a "highly concentrated" market as defined by the 2010 Department of Justice (DOJ) and Federal Trade Commission (FTC) *Horizontal Merger Guidelines*. The *Guidelines* use the Herfindahl-Hirschman Index (HHI) as the measure of market concentration and potential market power. As of 2008, the FCC estimated the HHI to be 2,848,[1] which already exceeds both the DOJ (2,500 HHI) and FCC (2,800 HHI) definition of a heavily concentrated market. According to the DOJ, if an acquisition creates a highly concentrated market and if the HHI is increased by over 100 points, the acquisition will raise significant competitive concerns that warrant scrutiny.[2] It has been estimated this acquisition will increase the national HHI by an additional 650-700 points, which means that scrutiny over the proposed acquisition should be increased, with a presumption that the acquisition will enhance market power.[3]

Further, there is no evidence to suggest that other providers will be able to challenge the market shares of the largest carriers. The true nationwide service networks are Verizon, AT&T, Sprint, and T-Mobile. If the acquisition is approved, AT&T, Sprint, and Verizon would control over 90% of the wireless market.[4] AT&T and Verizon alone would control close to 75% of the wireless market, essentially creating a duopoly.[5]

In fact, GAO noted that while the economies of scale of the large, national carriers "can facilitate the continued growth of the top carriers, they can also create challenges to the growth and competitiveness of small and regional carriers."[6] Furthermore, the GAO report cited the difficulty of small and regional carriers in "securing subscribers, network investments…and handsets."[7] In other words, the national providers are in a different league than the small and regional carriers.

Specifically, the GAO data show that it is the top national carriers that have been able to add the greatest number of net subscriber additions annually.[8] The GAO also notes that one of the national carriers' biggest competitive advantages their ability to retain their current customers better than their small or regional competitors. One major problem for these carriers' when it comes to gaining and retaining subscribers is that they are limited in the their ability to offer the newest and latest advanced handsets because of the exclusivity agreements device manufacturers typically enter into with top national carriers. The GAO reports that stakeholders have "consistently noted that consumers are increasingly basing their wireless decisions on the availability of particular advanced handsets."[9] According to one stakeholder, "some consumers do not consider these small and regional carriers as options because"[10] they do not have access to the newest and most advanced handsets.

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[1] *See* Report, *14th Annual Report on Mobile Wireless Competition*, 25 FCC Rcd 11407, ¶51 (2010).
[2] *See* DOJ and FTC *Horizontal Merger Guidelines*, pg. 19, Aug. 19, 2010.
[3] *See* Stacey Higginbotham, "AT&T, T-Mobile Merger: A Regulatory Quagmire?," *GigaOm*, Mar. 20, 2011, http://gigaom.com/2011/03/20/att-tmobile-regulators/. Last viewed on May 10, 2011.
[4] *See* Government Accountability Office, "Report to Congressional Requesters: Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry," pg. 13, July 2010, http://www.gao.gov/new.items/d10779.pdf. Percentage derived from adding together market share from Figure 3 with the 2009 data.
[5] *See id.*
[6] Government Accountability Office, "Report to Congressional Requesters: Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry," pg. 17, July 2010, http://www.gao.gov/new.items/d10779.pdf.
[7] *Id.*
[8] *Id.* at 18.
[9] *Id.* at 23.
[10] *Id.*

Additionally, small and regional carriers have fewer funds to acquire spectrum and invest in improvements and expansion of their own networks.[11] Smaller and regional carriers are already at a distinct competitive disadvantage with the larger, national carriers. Further consolidation in the market will only make it more difficult for the remaining carriers to compete with a market-dominating duopoly.

Moreover, "special access" rates continue to be a barrier to entry and growth for smaller and regional carriers.[12] Special access rates "are a significant expense for wireless carries because connections to backhaul provided by special access are an integral component of wireless networks."[13] In most circumstances, carriers rely mainly on their competitors - AT&T and Verizon - to purchase special access, further aggravating the ability of smaller and regional carriers to effectively compete. Wireless carriers, including T-Mobile, have long sought relief on the high special access rates that have to pay to AT&T and Verizon.

Thus, while MetroPCS, US Cellular, and Cricket/Leap are all strong regional carriers, they cannot really be considered equals to the nationwide carriers. According to first quarter 2011 subscriber numbers, these three regional carriers would constitute less than seven percent of the entire wireless market, including wholesale and retail customers.[14] Even if Clearwire, a wireless data provider, is included in the mix, those four providers would still control only nine percent of the market, while LightSquared, which is attempting to be a wholesale provider, currently has no market shares and still faces obstacles before it can be cleared to enter the market.

Consequently, it remains unclear whether the regional and smaller carriers have the necessary resources to gain enough market share to truly compete with the national carriers. Acquiring spectrum is a challenge, regional and smaller carriers do not have the economies of scale or the influence of the nationwide carriers when making deals for handsets, and such carriers still rely on AT&T and Verizon to purchase key inputs to broadband service such as special access.

Impact on Price:

A combined AT&T and T-Mobile will likely lead to higher prices not just for T-Mobile customers but for all consumers.

T-Mobile is considered the largest low-cost competitor to AT&T, and the merger would essentially eliminate it from the marketplace. The deal would also make AT&T the only significant GSM carrier in the U.S. wireless market. Consumers who require the interoperability of GSM technology for global travel, particularly businesspeople, would be left with nothing but a monopoly carrier in the U.S.

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[11] *Id.* at 21.

[12] Government Accountability Office, "Report to Congressional Requesters: Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry," pg. 41, July 2010, http://www.gao.gov/new.items/d10779.pdf.

[13] *Id.*

[14] "Grading the top 10 U.S. carriers in the first quarter of 2011," *Fierce Wireless*, http://www.fiercewireless.com/special-reports/grading-top-10-us-carriers-first-quarter-2011. Last viewed on May 10, 2011.

Moreover, a recent *Consumer Reports®* price analysis revealed that T-Mobile pricing plans are typically between $15 and $50 cheaper than AT&T's comparable plans.[15] Furthermore, T-Mobile customers have the option for "unlimited" data plans, whereas AT&T customers do not. That means T-Mobile subscribers who eventually migrate to AT&T plans will likely pay more for service than they would have under a T-Mobile plan.

For example, T-Mobile charges $60 per month for unlimited talk and text on an individual "Even More Talk" two-year contract plan, while AT&T charges $90 per month for the same deal "Nation" contract plan. AT&T thus costs $30 more per month or $360 more per year. Additionally, T-Mobile's two-line, unlimited "Even More Talk + Text" + 200MB data two-year contract plan for smart phones costs $120 per month. The equivalent AT&T "Family Talk Nation Unlimited" plan costs $180 per month, after adding data and messaging to the base price. This AT&T plan costs $60 more per month or $720 more per year.

The price premium charged by AT&T widens further, in two out of three cases, for a family that buys the above plan and needs the following amounts of data per phone:

Amount of data	**T-Mobile**	**AT&T**	**Annual savings with T-Mobile**	**AT&T Price Premium**
200MB	$120/mo	$180/mo	$720	50% higher
2GB	$140/mo	$200/mo	$720	43% higher
5GB	$160/mo	$260/mo	$1,200	63% higher
10GB	$220/mo	$360/mo	$1,680	64% higher

The above calculations take into account the fact that T-Mobile provides, for example, 2GB per phone for the $140 "2GB" 2-line family plan, whereas AT&T charges for data as an add-on for each phone line. So, on the T-Mobile 2GB family plan, $140 actually buys 4GB of data total, whereas with the AT&T plan, a customer must pay $25 a month per phone for 2GB x 2 = $50. Regarding the 5GB and 10GB amounts, AT&T charges $45 a month for 4GB plus $10 for each additional GB, or $60 for 6GB per phone.

It is also worth nothing that the T-Mobile metered plans are advertised as "unlimited" because the first 2GB, on the 2GB plan operates at 4-G network download speeds of up to 21 MBps, average 5-7 MBps, and if one uses more than that, there is no extra charge, but T-Mobile reduces the download speed to the level of its 3-G network: up to 15 MBps, average 2-4 MBps.

While AT&T has said it will honor T-Mobile's current contracts, those will likely end after two years, or even sooner. Presumably, those customers will either have to enter into a contract with AT&T or find a new carrier. If customers decide to stay with AT&T after their T-Mobile contract ends, they will likely need to purchase a new phone that is compatible with AT&T's network, as well as pay more per month for a similar plan.

While it is apparent this transaction will impact T-Mobile customers, it is also likely prices for all consumers would increase. There is little reason to believe that the two largest carriers –

[15] *See* Jeff Blyskal, "CR analysis: T-Mobile is cheaper than AT&T," *Consumer Reports*, Apr. 8, 2011, http://news.consumerreports.org/electronics/2011/04/cr-analysis-t-mobile-is-cheaper-than-att.html. Last viewed on May 24, 2011.

controlling over 75% of the market - would try to compete on price. The carriers with the most influence, AT&T and Verizon, already tend to set the pricing scheme for the entire industry. Further consolidation in the wireless industry indicates that prices will likely go up. As former Consumers Union Counsel Chris Murray testified in 2008, "[t]he way carriers continue to raise prices on text messaging services is a clear example of the negative ramifications of market power in this industry."[16] Murray noted that carriers have charged high rates for text messaging, yet it costs the carriers little to run. In fact, he pointed out that text messaging rates had increased 150% in a four year period solely because the major players figured out that they could inflate such prices and reap huge profit benefits.

Another example of industry closely following its competitors' moves are rates related to early termination fees for smart phones. In 2009, Verizon increased its early termination fees (ETFs) for smart phones to $350.[17] Less than a year later, AT&T followed suit and more than doubled its ETFs to $325.[18] Further concentration of the wireless industry raises serious questions about pricing, since the two largest companies already tend to steadily – in lockstep - raise prices on services.

Finally, this year, three main players in the wireless industry – AT&T, Sprint, and Verizon – have all either raised prices or have eliminated cost saving plans or benefits.[19] For example, AT&T and Verizon both eliminated their discount programs for existing customers that provided for additional discounts on top of handset subsidies. Sprint raised the pricing for data plans. T-Mobile was the only major carrier that did not announce price increases at the beginning of the year, demonstrating that its elimination from the market will almost certainly hurt consumers' pocket books and eliminate the only low-priced carrier from the national market.

In all, T-Mobile's departure from the wireless market would remove a relatively low-cost carrier, which will likely result in higher prices for all consumers.

Impact on Service:

A combined AT&T and T-Mobile is not likely to result in improved service. AT&T is continuously rated as having the worst customer satisfaction of any major wireless carrier. A recent *Consumer Reports®* survey found that consumers considered AT&T a worse wireless carrier than T-

[16] Chris Murray, "Competition in the Wireless Industry," *Before the* U.S. House of Representatives Subcommittee on Communications, Technology and the Internet, Committee on Energy and Commerce, pg. 2, May 7, 2010.
[17] *See* Andrew Munchbach, "Confirmed: Verizon Wireless to Charge up to $350 Early Termination on 'Advanced Devices,'" *Boy Genius Report*, Nov. 4, 2009, http://www.bgr.com/2009/11/04/confirmed-verizon-wireless-to-charge-up-to-350-early-termination-on-advanced-devices/. Last viewed on May 24, 2011.
[18] *See* Rosa Golijan, "AT&T Jacking Up Early Termination Fees To $325," *Gizmodo*, May 21, 2010, http://gizmodo.com/5544851/att-jacking-up-early-termination-fees-to-325. Last viewed on May 24, 2011.
[19] *See e.g.,* Tom Moccia, "Carriers Will Raise Rates This Year," *Techno Buffalo*, Jan. 25, 2011, http://www.technobuffalo.com/news/business/carriers-will-raise-rates-this-year/. Last viewed on May 20, 2011.

Mobile in a wide range of areas from contract service to prepaid service, from customer service to call quality.[20]

For example, while less satisfying than Verizon and Sprint, T-Mobile was still meaningfully better than AT&T at providing service with a contract plan. Indeed, AT&T got lower marks than T-Mobile on almost every attribute that was rated. It was comparable with T-Mobile only on texting problems, where both AT&T and T-Mobile rated below average. The gap between AT&T and T-Mobile was larger still for service without a contract ("prepaid" plans). There, T-Mobile was more satisfying overall than Verizon, Virgin, and AT&T (with its Go Phone prepaid brand).

The gap between the carriers in satisfaction was highest when it came to customer support, especially for service provided by phone. That is mostly because of AT&T's sub-par scores in every aspect of customer service, from support on various modes (phone, e-mail, website) to success in solving problems and staff knowledge. Additionally, when it comes to customers who are considering quitting their carrier, AT&T and T-Mobile had the most subscribers weighing such a switch. But by 10 percentage points, AT&T subscribers said they were seriously thinking about making a move.

Importantly, T-Mobile has been essentially stable in *Consumer Reports®* national reader score, reflecting overall satisfaction, and in many other attributes. AT&T, by contrast, has seen a marked slide in reader score and some other attributes between the surveys *Consumer Reports®* published in 2010 and 2011, respectively. AT&T has become significantly less satisfactory to readers in resolving issues and has prompted a startling jump (of a full 13 percentage points) in the proportion of its customers who say they want to quit the carrier.

Despite the poor rankings in service (and higher prices), AT&T's current churn rate is 1.15% while T-Mobile's is 2.50%,[21] giving AT&T no incentive to improve its service after the merger. Thus, the survey data suggests that T-Mobile customers will face poorer service and does not suggest that AT&T's purchase of its competitor will improve service for current customers of either AT&T or T-Mobile.

Impact on Innovation:

With a merged AT&T/T-Mobile and Verizon controlling over 75% of the market, the success of handset makers and application developers will be determined by a merged AT&T/T-Mobile and Verizon. The top two wireless providers will be more able to exert their market power when dealing with device manufacturers and application developers. Moreover, with such little competition in the market, there would be little incentive for the larger carriers to make efficient use of their own networks.

[20] *See* Paul Reynolds, "T-Mobile beats AT&T in CR satisfaction survey," *Consumer Reports*, Apr. 11, 2011, http://news.consumerreports.org/electronics/2011/04/t-mobile-beats-att-in-cr-satisfaction-survey.html. Last viewed on May 24, 2011.
[21] *See* AT&T, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband," *Mobilize Everything*, pg. 27, http://www.mobilizeeverything.com/documents/AT&T_T-Mobile%20A%20World%20Class%20Platform%20for%20the%20Future%20of%20Mobile%20Broadband.pdf.

For example, in 2007, Verizon passed on the chance to be the exclusive distributor of the Apple iPhone because it did not approve of the financial terms Apple was seeking. Some of the terms that Verizon refused included allowing Apple to share in monthly fees, allowing Apple to determine how and where iPhones could be sold, and allowing Apple to continue a relationship with iPhone customers.[22] Apple ended up awarding exclusive carrier rights to AT&T for its iPhone, though some have suggested that AT&T retained some influence over which applications Apple would allow in its app store.[23] This demonstrates the kind of market power the two large wireless companies have over device manufacturers, even those manufacturers that are considered heavyweights like Apple.

With more market power concentration in the wireless industry, the largest carriers will be able to dictate which devices they will allow to attach to the network and will be able to dictate exactly what kind of control device manufacturers have over their own technology. This has the potential to greatly stifle innovation as device manufacturers could start developing devices aimed at meeting carrier expectations rather than trying to create the most innovative products they can. Moreover, there is a good chance AT&T will allow fewer devices to attach to its network; AT&T has stated it will improve upon T-Mobile's margins through "device portfolio rationalization"[24] which likely means limiting the number of devices available to consumers. As a result, fewer device manufacturers would have the ability to bring their product to market.

Application developers will face similar obstacles due to AT&T's and Verizon's duopoly market power. For example, RIM recently introduced its new PlayBook tablet which offers some free applications designed to interact with other RIM BlackBerry devices. However, AT&T has blocked the most anticipated application for the PlayBook, BlackBerry Bridge.[25] BlackBerry Bridge allows email, contacts, calendar, and other applications to be accessed on the PlayBook via other BlackBerry devices. This is vaguely like tethering, which AT&T offers as a paid monthly service. This very recent example shows the market power of the top national carriers to stifle application makers' ability to offer innovative tools and products.

Open-platform operating system creators, like Google's Android, will also likely be negatively impacted by the merger. Android is an operating system that allows users to access an application market where applications developers do not have to go through as burdensome of an approval process as most other application platforms require, like with Apple's iOS. However, there is a possibility that with only two major, post-merger carriers, Verizon and AT&T, both will be able

[22] Leslie Cauley, "Verizon Rejected Apple iPhone Deal," *USA Today*, Jan. 29, 2007, http://www.usatoday.com/tech/news/2007-01-28-verizon-iphone_x.htm. Last viewed on May 10, 2011.

[23] *See e.g.*, Daniel Ionescu, "Google Voice iPhone App Rejected by Apple" *PC World*, July 28, 2009, http://www.pcworld.com/article/169151/google_voice_iphone_app_rejected_by_apple.html. Last viewed on May 24, 2011.

[24] *See* AT&T, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband," *Mobilize Everything*, pg. 29, http://www.mobilizeeverything.com/documents/AT&T_T-Mobile%20A%20World%20Class%20Platform%20for%20the%20Future%20of%20Mobile%20Broadband.pdf.

[25] *See* Chris Davies, "AT&T blocks BlackBerry Bridge app for PlayBook," *Slashgear*, Apr. 19, 2011, http://www.slashgear.com/att-blocks-blackberry-bridge-app-for-playbook-19146896/. Last viewed on May 10, 2011.

to exert pressure on Google and other open operating system developers to tailor their systems to allow only certain applications.[26]

Even if application blocking remains uncommon, there is still the possibility that the major wireless carriers will be able to utilize their market power to raise data prices or begin lowering data caps.[27] This will effectively limit the types of applications available, since consumers will be weary of downloading applications that require massive amounts of data consumption. Increased market concentration post-merger would give Verizon and AT&T even more power to raise data prices, thus squelching innovative applications.

No Impact on AT&T's Ability to Address Congestion and Deployment in Rural Areas:

AT&T claims the purchase of T-Mobile will give it the spectrum it needs to deal with increased traffic on its network and to deploy its wireless broadband network in rural areas. However, AT&T does not need to purchase T-Mobile to address these issues.

AT&T's claim that it needs more spectrum is slightly dubious. Some analysts have stated that AT&T is significantly underutilizing its current spectrum capacity.[28] Moreover, AT&T holds similar spectrum holdings as Verizon Wireless.[29] Nonetheless, while AT&T is making claims of a spectrum shortage, and its customers continually suffer from poor service, Verizon's customers are not experiencing the same problems and Verizon is not complaining about spectrum constraints.[30] In fact, a 2010 report by Validas found that Verizon's smart phone customers actually use more data than AT&T's iPhone customers.[31]

Since AT&T has similar spectrum holdings as Verizon, AT&T's current network service problems do not appear to be the result of a lack of spectrum holdings. In fact, in 2009, despite already experiencing congestion issues because of the iPhone, AT&T only increased its capital expenditures by 1%.[32] On the other hand, Verizon increased its capital expenditures by 10%, and generally, AT&T had lower capital expenditures than Verizon.[33]

[26] *See* Om Malik, "In AT&T & T-Mobile Merger, Everybody Loses," *GigaOm*, Mar. 20, 2011, http://gigaom.com/2011/03/20/in-att-t-mobile-merger-everybody-loses/. Last viewed on May 16, 2011.
[27] *See* Om Malik, "What AT&T and T-Mobile Merger Means for Innovation," *GigaOm*, Mar. 21, 2011, http://gigaom.com/2011/03/21/what-att-and-t-mobile-merger-means-for-innovation/. Last viewed on May 16, 2011.
[28] *See e.g.,* Dave Burstein, "70-90% Of AT&T Spectrum Capacity Unused," *Fast Net News*, Mar. 21, 2011, http://www.fastnetnews.com/a-wireless-cloud/61-w/4193-70-90-of-atat-spectrum-capacity-unused. Last viewed on Apr. 1, 2011.
[29] *See* Charles B. Goldfarb, "The Proposed AT&T/T-Mobile Merger: Would It Create a Virtuous or a Vicious Cycle?" *Congressional Research Service*, May 10, 2011, pg. 14.
[30] *See id.*
[31] *See* "Validas Reports Verizon Wireless Smartphones Consume More Data Than iPhones," *PR Newswire*, July 26, 2010, http://www.prnewswire.com/news-releases/validas-reports-verizon-wireless-smartphones-consume-more-data-than-iphones-99234019.html ("Average monthly wireless data consumption for Verizon Wireless Smartphones is 421 megabytes per month, versus 338 megabytes per month for iPhones.").
[32] *See* Charles B. Goldfarb, "The Proposed AT&T/T-Mobile Merger: Would It Create a Virtuous or a Vicious Cycle?" *Congressional Research Service*, May 10, 2011, pg. 15.
[33] *See id.*

Moreover, the Congressional Research Service found that with more network investment, a carrier's already obtained spectrum "can handle more traffic…and that it is possible to innovate around spectrum constraints" in order to support more traffic.[34] Indeed, the CRS warned that "throwing spectrum at a perceived shortage might relieve a short-term problem but it also might provide a disincentive for investment in efficient network facilities and for innovation that increases the productivity of existing spectrum and facilities."[35] Therefore, if AT&T invested more in its network, for example by adding more cell towers, its network would likely be able to handle more traffic without the need to purchase T-Mobile. However, allowing for further consolidation of valuable spectrum holdings could actually lead to less efficient use, continued spectrum constraints, and minimal gains for consumers.

It also does not appear that AT&T needs to purchase T-Mobile to build out broadband to rural areas. Indeed, AT&T was already expected to build out its 4G network at the same level as Verizon to compete with Verizon, which is expected to reach 96-98% of the country in the next few years.[36] Moreover, access to T-Mobile's spectrum does not necessarily help with rural build out, since there has been no demonstration that T-Mobile holds spectrum in rural areas where AT&T lacks coverage. Even if AT&T lacks its own spectrum holdings to reach certain rural areas, there is no evidence that there is a lack of available spectrum in rural areas. Indeed, AT&T could find other ways to access the spectrum it needs to fill in gaps in coverage in rural areas, such as partnering with other carriers or enter into data roaming agreements to reach rural areas where it may be lacking suitable spectrum.

Moving Forward:

There are several ways that competition within the entire industry can flourish while still expanding the reach of broadband build out. For example, lawmakers should continue to consider ways in which spectrum can be made available and distributed in equitable ways. Additionally, some carriers – including T-Mobile – have sought reforms to help ensure a marketplace that allows for more competition. For example, the FCC has pending proceedings on competition issues such as special access.[37] These inputs are generally controlled by AT&T and Verizon, and fair access to them would provide a more level-playing field for competitors.

In addition, as all carriers move towards LTE technology, the FCC has been asked to examine the issue of interoperability, which would ensure that competing wireless services have access to popular handheld devices that consumers want and ensure consumers can roam on other carriers' networks.[38] An April 2011 national poll by Consumers Union found that 73% of cell phone owners

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[34] *Id. at 11.*
[35] *Id.*
[36] *See* Dave Burstein, "AT&T LTE Result On U.S. Coverage: ~ 0%," Fast Net News, Mar. 22, 2011, http://fastnetnews.com/a-wireless-cloud/61-w/4192-atat-lte-result-on-us-coverage-0. Last viewed on Apr. 1, 2011.
[37] *See* Order and Notice of Proposed Rulemaking, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005).
[38] *See* Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, *In the Matter of Rural Cellular Association,*, RM-11497 (filed May 22, 2008).

said they would support a government rule that requires handsets to be compatible with all U.S. cellular services.

If phones are interoperable, consumers can easily switch networks when their contracts are up. As of now, it is nearly impossible to take that phone to another network if the customer is unsatisfied with his current network. Also, having devices available to all other carriers – rather than devices being subject to exclusive deals with one carrier - could open up an entire new market for device developers to create highly innovative products.

Carriers could also be required to eliminate or greatly reduce early termination fees. Sizing down early termination fees to directly correlate with the phone subsidies is another way to enable consumers to easily switch networks if they are unsatisfied. The ability to switch networks puts more pressure on the carriers to effectively compete for consumers based on service and price.

Overall, rather than approve AT&T's bid for T-Mobile, lawmakers and policymakers should move forward to resolve these issues in a way that will foster competition, consumer choice, innovation, and fair prices.

Conclusion:

There is a great deal of data and evidence to suggest that this transaction will lead to a highly concentrated market, which will likely lead to higher prices and less choice for consumers. While the FCC and DOJ will be reviewing this transaction in the months ahead, Consumers Union urges Congress to carefully scrutinize this proposed transaction and the effect it will have on consumers' pocketbooks, choice, service, and innovation.

Ms. DESAI. And, Mr. Chairman, if possible, I would like to introduce this recent antitrust analysis by Alan Grunes and Maurice Stucke regarding how this merger is presentably anticompetitive.

Mr. GOODLATTE. Without objection, it will be made a part of the record. Thank you, Ms. Desai.

[The information referred to follows:]

ANTITRUST REVIEW OF THE AT&T/T-MOBILE TRANSACTION

Allen P. Grunes[*] & *Maurice E. Stucke*[**]

> *Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.*[1]

In this Essay, we review AT&T Inc.'s proposed $39 billion acquisition of T-Mobile USA, Inc., the U.S. wireless operation of Deutsche Telekom AG, under federal merger law, under the U.S. Department of Justice and Federal Trade Commission's 2010 Horizontal Merger Guidelines, and with a focus on possible remedies. We find, under a rule of law approach, that the proposed acquisition is presumptively anticompetitive, and the merging parties in their public disclosures have failed to overcome this presumption. Next we find that under the Merger Guidelines, there is reason to believe that the transaction may result in higher prices to consumers under several different plausible theories. Finally, we turn to the question of possible remedies. We conclude that there is a high likelihood that divestitures will not solve the competitive problems, and make the case for enjoining the acquisition.

I. STANDARD FOR EVALUATING THE MERGER

The starting point for any evaluation is the statute itself. Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect of

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The authors previously investigated mergers and other anticompetitive conduct while at the U.S. Department of Justice, Antitrust Division. The views expressed in this Essay are the authors' own, and do not reflect those of any other person or entity. We would like to thank Peter C. Carstensen, Bernard M. Hollander, Daniel E. Lazaroff, Roger G. Noll, Barak Y. Orbach, and Christopher L. Sagers for their helpful comments.
[1] F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

the transaction "may be substantially to lessen competition, or to tend to create a monopoly."[2]

Merger law is inherently predictive. Uncertainty and errors of both over-enforcement and under-enforcement are inevitable. Some observers counsel for lenient merger review, as they believe the market will invariably correct any mistakes. New firms will enter. Market power will quickly disappear. But the lessons from the financial crisis call into question these empirically suspect beliefs. Markets do not always self-correct. Most mergers do not yield significant efficiencies (which, if they did, would warrant a light touch approach to merger review).

Instead, in the current era of Too-Big-and-Integral-To-Fail, we can see how Congress in the aftermath of World War II got it right. In amending the Clayton Act, Congress saw the dangers of concentrated economic and political power, and sought to arrest these threats in their incipiency. Thus, when evaluating mergers, the enforcers and the courts should respect Congress's desires and err, if anything, on the side of enforcement. Enforcement under the Clayton Act must also consider whether there is a trend toward concentration. "Long-term trends in HHI changes," the Fifth Circuit recently noted, "can be used to examine the structure of markets and are used to determine the effect of mergers on the market."[3] Where the market trends show that the merging parties "have been the dominant players in the relevant markets and do not indicate any trend of reduced concentration," then a merger should be enjoined.[4] An immediate danger of monopolization is not needed for a merger to be unlawful.[5]

The merger law, by its own language and Congress's intent, requires heightened scrutiny of mergers, especially those in already concentrated industries with entry barriers. Thus the outcome for merger review should significantly differ than the outcome for evaluating antitrust restraints generally under the Sherman Act.

II. THIS MERGER IS PRESUMPTIVELY ANTI-COMPETITIVE

Under well-established U.S. law, there is a strong presumption of illegality when the merging firms' market shares are significant in an

[2] 15 U.S.C. § 18.
[3] Chicago Bridge & Iron Co. N.V. v. F.T.C., 534 F.3d 410, 432 n.12 (5th Cir. 2008).
[4] *Id.*
[5] Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L. J. 875 (2001).

industry with high entry barriers. As the Supreme Court said, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[6] Consistent with the legislative intent of the Clayton Act, courts have regarded a transaction that would lead to further concentration in an already highly concentrated market as presumptively illegal under Section 7.[7] In *United States v. Philadelphia National Bank*, the Court held that a merger resulting in a single firm controlling 30 percent of a market trending toward concentration in which four firms controlled 70 percent of the sales was presumptively illegal.[8] Unless the merging parties "meet their burden of rebutting this presumption, the merger must be enjoined."[9] That presumption applies to the AT&T/T-Mobile merger in an already highly concentrated industry with high entry barriers.

A. AT&T's Post-Merger Market Share Would Exceed 40 Percent

The likely candidate product market is the market for "mobile wireless telecommunications services." This was the market definition used in prior DOJ cases such as *United States v. AT&T and Dobson Communications* (2007)[10] and *United States v. Verizon and Rural Cellular* (2008).[11] In those cases, DOJ noted that there were no cost-effective

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[6] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 363 (1963).

[7] *See, e.g.*, United States v. Continental Can Co., 378 U.S. 441, 461 (1964) (aggregate market share 35%; acquired firm's market share 3.1%; four-firm concentration ration 64.7%); United States v. Alcoa (Rome Cable), 377 U.S. 271, 278, 280 (aggregate market share 29.1%; acquired firm's market share 1.3%; four-firm concentration ratio 76%); F.T.C. v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000); F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 53 (D.D.C. 1998) (finding that "[r]egardless of how one were to define the relevant drug wholesale market, whether it would include business to all or only some of its customers, the merged firms would control a significant share of all of the markets"); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1419 (W.D. Mich. 1989).

[8] 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."). Subsequent cases have lowered the presumption somewhat to even 25% or less. *See* United States v. Aluminum Co., 377 U.S. 271 (1964); United States v. Continental Can Co., 378 U.S. 441 (1964).

[9] R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 108 (2d Cir. 1989); *see also* F.T.C. v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000).

131 F. Supp. 2d 151 (D.D.C. 2000); Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995).

[10] United States v. AT&T Inc. and Dobson Communications Corp., Case No. 1:07-cv-01952, *available at* http://www.justice.gov/atr/cases/f227300/227306.pdf.

[11] United States and State of Vermont v. Verizon Communications Inc. & Rural Cellular Corp., Case No. 1:08-cv-00993, *available at*

alternatives to mobile wireless telecommunications services, and it is unlikely that a sufficient number of customers would switch away from mobile wireless telecommunications services to make a small but significant non-transitory price increase in those services unprofitable.

This candidate product market includes voice, text messaging and data services. The data component of mobile wireless services has been rapidly growing in the past few years. There has been a high smartphone adoption and upgrade rate (close to 50% in 2009 according to the FCC's latest Mobile Wireless Competition Report[12]). There has also been an expansion in the number of non-smartphone handsets that are subject to mandatory data plans. Data plans for mobile phones are typically sold as part of a bundle. At the end of the day, the DOJ's likely product market candidate, which includes voice, messaging and data, is defensible.

The candidate geographic markets potentially include both local and national markets. Historically, viewed from the consumer perspective, geographic markets were local. This was because consumers purchasing mobile wireless telecommunications services chose among the providers that offered services where they lived, worked and traveled on a regular basis. Historically, providers offered different promotions, discounts, calling plans, and equipment subsidies in different geographic areas, varying the price for customers by geographic area.

However, by the end of 2008, there were four facilities-based mobile wireless service providers that industry observers typically described as "nationwide": AT&T, Sprint Nextel, T-Mobile, and Verizon Wireless.[13] In 2008, all the nationwide operators launched unlimited national flat-rate calling plans.[14] Consumers increasingly have shifted away from restricted plans that included separate roaming charges and into these unlimited service options, and the focus of price competition has shifted accordingly.[15] It now appears that pricing is for the most part set nationally by the four nationwide carriers, and regional and local competitors do not act as significant constraints on national pricing.

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http://www.justice.gov/atr/cases/f233900/233928.pdf.

[12] Fed. Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services at ¶ 137 & Chart 6 (May 20, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf [hereinafter "14th Mobile Wireless Competition Report"].

[13] *Id.* at ¶ 27.

[14] *Id.* at ¶ 88.

[15] *Id.* at ¶ 90.

Indeed, in its FCC public interest statements in the both the Dobson[16] and Centennial[17] acquisitions, AT&T acknowledged that the geographic market is national precisely for these reasons. As AT&T wrote in its Centennial statement, supported by a declaration from its Chief Marketing Officer, "[i]n the mainland U.S., AT&T establishes its rate plans and pricing on a national basis, without reference to market structure at the CMA [Cellular Market Area] level."[18] AT&T's statement continues: "One of AT&T's objectives is to develop its rate plans, features and prices in response to competitive conditions and offerings at the national levels [*sic*] – primarily the plans offered by the other national carriers."[19]

Although pricing by the four nationwide operators appears to be largely national, there may be promotions or discounts (*e.g.*, of handsets) that occur on a local basis. How much of these promotions and discounts are driven by competition, and how big a factor they play in the overall pricing picture, needs to be looked at. For example, if a 2-year wireless plan costs $1200/year, but there is a $50 discount available in some cities on a new phone, that would amount to about a 2% discount over 2 years and would probably be small enough not to undercut the overall national pricing picture.

Viewed from the standpoint of business customers, where travel capabilities are important and contracts are negotiated, the same conclusion appears likely: the geographic market is national. Similarly, viewed from the standpoint of suppliers (*e.g.*, handset manufacturers), the geographic market is undoubtedly national. It is interesting to note that, according to an AT&T executive, Apple apparently approached Verizon, Sprint, AT&T, and T-Mobile about the original iPhone.[20]

Consequently, under this proposed market definition, the merging

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[16] Merger of AT&T Inc. and Dobson Communications Corporation, Description of Transaction, Public Interest Showing and Related Demonstrations (July 13, 2007), *available at* https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=688206512&attachmentKey=18223538&attachmentInd=applAttach.

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

[18] *Id.* at 28.

[19] *Id.*

[20] *See* http://www.youtube.com/user/lafayettepolicystds#p/u/0/j6Pqp40rigo, approximately 17-18 minutes into talk.

parties will have a significant market share. As Senator Herb Kohl observed at the recent hearings on this merger, "The proposed merger between AT&T and T-Mobile will bring together two of the four remaining national cell phone carriers to create the nation's largest cell phone network, with an estimated 43 percent market share. Should this deal be approved, AT&T and Verizon will control close to 80 percent of the national cell phone market."[21]

B. Entry Barriers Are High

Entry into the market of mobile wireless telecommunications services requires either (a) building out a network and obtaining spectrum rights, a slow process with high capital costs, or (b) piggy-backing on an existing provider, which is quicker but potentially more constrained (since network access, contract terms, and growth are all subject to a competitor's willingness to contract).

The inputs necessary to enter include spectrum, towers, network equipment, and backhaul facilities. We doubt there can be a serious claim that entry is easy. Moreover, as Tim Wu discusses in his book, *The Master Switch*, there is apparently reason to be skeptical of AT&T's willingness to grant competitors reasonable access to its network.[22]

C. The Incipiency Standard

For the past thirty years or so, the DOJ has looked at deals one at a time, and has not made use of section 7's "incipiency" standard, which requires the antitrust enforcers to nip concentration in the bud. Nor has the DOJ examined trends toward concentration, and the likely impact that such concentration would have on the overall competitiveness of an industry. The 2010 revisions to the Horizontal Merger Guidelines have changed this approach. The Guidelines now refer to the Congressional intent "that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[23]

Indeed, ignoring the Clayton Act's incipiency standard raises

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[21] Statement of U.S. Senator Herb Kohl on the AT&T/T-Mobile Merger (May, 11, 2011), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=4452.

[22] TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 245-249 (2010).

[23] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

significant rule-of-law concerns. Congress, in passing section 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, "was concerned with arresting concentration in the American economy, whatever its cause, in its incipiency."[24] To halt the "'rising tide' of concentration in American business," Congress decided "'to clamp down with vigor on mergers.'"[25] Congress's premise was that mergers tend to accelerate concentration in an industry:

> The use of these words ("may be") means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed (sic) effect * * *. The words "may be" have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.[26]

With the rise of the Chicago School in the late 1970s, it became fashionable among antitrust economists and lawyers to dismiss the incipiency standard as outdated. Before the financial crisis, the conventional wisdom was that antitrust enforcers and courts could (and should) use concentration only as a screen: the antitrust agencies would challenge only those few mergers that, under the prevailing economic thinking, would demonstrably lead to a post-merger price increase.[27] It came to the point where the agencies seemed obligated not only to prove that a merger would cause prices to rise post-merger, but also explain the chain of events that would lead to the post-merger price increase (either unilateral or coordinated effects) and the likely magnitude of the price increase.[28]

It is difficult to imagine how a DOJ or FTC attorney, even one with an MBA, could be expected to meet this burden. For some industries, anticompetitive effects may be relatively easy to predict; but in other

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[24] United States v. Pabst Brewing Co., 384 U.S. 546, 551 (1966).

[25] *Id.*, quoting United States v. Von's Grocery Co., 384 U.S. at 276.

[26] Brown Shoe Co. v. United States, 370 U.S. 294, 323, n. 39 (1962).

[27] Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159.

[28] *See, e.g., United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1165 (N.D. Cal. 2004) (misconstruing the Clayton Act's incipiency standard, the trial court held that "[w]ithout the benefit of presumptions, the burden remains upon plaintiffs to come forward with evidence of actual anticompetitive effects").

industries, making such predictions is a fool's errand. The merging parties' documents may be useful, but repeat players before the agencies can be expected to know what to put into, and what to leave out of, their planning documents. Indeed, any well-counseled firm that plans to continue to grow through mergers knows this lesson very well.

The revised Merger Guidelines now state, in discussing coordinated effects, that this level of predictive causation is not called for:

> Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.[29]

This recognition does much to bring the agencies back into line with the law. Congress and the courts have recognized that some economists and lawyers might believe that the disappearance of smaller competitors and greater industry concentration are bound to occur whether mergers are prohibited or not. But this is not their decision to make. As the Supreme Court noted, "it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden, which in effect the courts would be doing should they now require proof of the congressional premise that mergers are a major cause of concentration."[30] Nor should it be left to the whim of the particular court or agency official whether a trend toward concentration in an industry, whatever its causes, is a relevant factor in deciding whether the merger violates the Clayton Act. Congress determined that the trend toward concentration is a highly relevant factor.

Under the incipiency standard, the AT&T/T-Mobile merger is highly problematic. The typical local market for mobile wireless services is already highly concentrated and the trend prior to this acquisition has been toward greater concentration. The FCC states that concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available (2009).[31] The weighted average HHI (weighted by "Economic Area" population which is an aggregation of counties including the "node" and the surrounding areas economically related to the node) was 2848 in 2008, an increase from 2674 in 2007.[32] The weighted average HHI

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[29] 2010 Horizontal Merger Guidelines § 7.1.

[30] United States v. Pabst Brewing Co., 384 U.S. 546, 551 (1966).

[31] *See* 14th Mobile Wireless Competition Report at 6.

[32] *See* 14th Mobile Wireless Competition Report at 15. The Herfindahl-Hirschman Index ("HHI") of market concentration is calculated by summing the squares of the individual firms' market shares. 2010 Horizontal Merger Guidelines § 5.3. So the HHI of

has increased by nearly 700 since the FCC first calculated this metric in 2003. On a national basis, the trend toward concentration is equally apparent.

To see the impact of the incipiency standard on merger review, take, as an example, Aluminum Co. of America's acquisition of a small competitor, Rome Cable Corporation. The Court noted that the acquisition gave the dominant firm Alcoa only 1.3% additional control of the aluminum conductor market. Indeed, although Rome was an aggressive competitor, it was unlikely that Alcoa could significantly increase its market power. If the agencies or courts ignored the incipiency standard and required proof of the specific anticompetitive effects post-merger, then the dominant firms could acquire their smaller rivals one at a time, notwithstanding the federal antitrust law. It is unlikely that the DOJ could prove why and how prices would increase as a result of this merger, or the magnitude of the price increase. But this standard, besides being unrealistic, contravenes the legislative intent. In the Alcoa-Rome Cable merger, the Court did not ramble through the wilds of economic theory. Instead, the Court turned to the statute and its legislative history: the Committee Reports on Section 7 show, with respect to the Celler-Kefauver amendments in 1950, that "the objective was to prevent accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act test against them.'"[33] Thus under the incipiency standard,

> It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors.[34]

While, for some, *Alcoa* may be an extreme example, it illustrates a valid point. Incipiency is not a novel concept for the courts.[35]

Indeed, the incipiency standard places antitrust on surer footing under rule-of-law principles, than having the agencies or generalist courts

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a market with 10 firms each with a 10% market share would be 1000.

[33] U.S. v. Aluminum Co. of America, 377 U.S. 271, 280 (1964), quoting S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5; U.S. Code Congressional Service 1950, p. 4297; see H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3.

[34] *Id.*, 377 U.S. at 280.

[35] Section 8 of the Clayton Act, which prohibits interlocking directorates, also employs an incipiency standard. Courts have long recognized that the purpose behind Section 8 was "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

trying to predict what in many industries is unpredictable. As the Court has long recognized, the relevant economic data are "both complex and elusive."[36] If the legality of a merger rises and falls on the ability of the agencies to prove the nature and magnitude of the post-merger anticompetitive effects, then business executives do not know which mergers would likely be blocked. Such a vague, fact-specific rule of reason analysis would benefit antitrust lawyers and economists (and data production teams to comply with the onerous Second Request for "additional information and documentary material relevant to the proposed acquisition"[37]). But merger law is now nothing more than haphazard merger prediction, which raises significant rule-of-law concerns. "And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded."[38] Under the current incipiency standard and presumption, the merging parties (and antitrust agencies to the extent they permit such mergers to go through) must produce evidence clearly showing that the merger is unlikely to have anticompetitive effects. The evidence should be so clear that citizens and Congress are confident that the risks inherent in the transaction are insignificant, and the procompetitive benefits are significant. If the merging parties (and antitrust agencies) fail to overcome this presumption, then there is little confidence that the law is being enforced as it should be.

The *Philadelphia National Bank* presumption is not only consistent with congressional intent (in preventing a too-broad economic investigation), but it provides firms, especially those in concentrated industries, some guidance as to whether they or their competitors can merge (without running afoul of the Clayton Act). Indeed, it can rechannel some of the wasted costs in lobbying policymakers (and fees to investment bankers) that arise from merger waves. Knowing that the merger is presumptively illegal, and knowing that the evidentiary showing to overcome this presumption is significant, many large firms in concentrated industries recognize that neither they (nor their significant competitors) can further increase industry concentration with another merger. This can increase their incentives to grow organically through superior internal efficiencies, technologies, services, and offerings.

Consequently, under well-established U.S. law, there is a strong presumption of illegality when the merging firm's market share exceeds 30 percent in a highly concentrated industry with high entry barriers. As we examine below, the merging parties (through their public disclosures at least) have not overcome this strong presumption of illegality.

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[36] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963).
[37] 15 U.S.C. § 18a(e)(2).
[38] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963).

III. The Merging Parties Have Not Overcome the Presumption of Illegality

A. The Merging Parties Have Not Established That Consumers Will Overall Benefit With Merger Specific Efficiencies.

Although the Supreme Court has not sanctioned the use of the efficiencies defense in a section 7 merger case, the trend among lower courts is to recognize the defense.[39] Based on the publicly available information, it is unlikely that AT&T will overcome this presumption of anti-competitive harm with an efficiencies defense. Instead we find:

(i) many of the efficiencies that AT&T is claiming are not "merger specific," and thus not "cognizable" under the agencies' Horizontal Merger Guidelines, and

(ii) to obtain efficiencies in one part of the merged company (i.e., on the AT&T side), the company will need to cause harm somewhere else (i.e., on the T-Mobile side).

The merger does not really expand wireless coverage area for customers. Apparently the coverage profiles of AT&T and T-Mobile are fairly similar, so it is unlikely that combining the companies will create significant improvements in coverage area. To the extent that the merger allegedly gives T-Mobile a "clear path" to 4G services,[40] this is not merger-specific. Just giving customers of one of the merging parties access to something that the other party offers is not a merger-specific efficiency. Customers who value that feature could switch to the other provider absent the merger. Moreover, if there is evidence that T-Mobile was independently working on the equivalent of 4G (and there is here), then this undercuts the efficiency defense. The argument that T-Mobile has "no clear path" towards 4G only begs the question: In a competitive environment, under the rigors of competition, T-Mobile needs to find such a path. The lack of a "clear path" is an incentive to innovate and compete harder. The asserted benefit of the merger, from T-Mobile's standpoint, is that AT&T can migrate T-Mobile users to its network. This is not a true efficiency because the choice is already part of a price-quality tradeoff for consumers.

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[39] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).

[40] The International Telecommunications Union considers 4G wireless technologies as offering theoretical download speeds of 100Mbps, with the technology based on OFDM (orthogonal frequency-division multiplexing). Marguerite Reardon, *Which 4G Service Is Right For You? (FAQ)*, cnet, Dec. 3, 2010, http://news.cnet.com/8301-30686_3-20024511-266.html#ixzz1Muvdpsuq http://news.cnet.com/8301-30686_3-20024511-266.html#ixzz1Muv2dld2.

To the extent that the merger gives AT&T needed spectrum, there are less anticompetitive alternatives for AT&T to get more spectrum. One argument in favor of the merger is that AT&T is running out of spectrum as data-hungry users are using what AT&T currently offers. But there are other ways for AT&T to get needed spectrum that would not harm competition. The irony should not be lost on anyone that the video and music needs of a segment of AT&T customers appears to be the driving force of this merger. In order to satisfy those needs, AT&T is proposing to restructure the industry.

One efficiency that may be associated with the acquisition is that it will give the merged firm more spectrum options, which will allow it to deploy spectrum most efficiently. Not all spectrum is created equal, and thus there may be benefits to both T-Mobile and AT&T if they are able to redeploy spectrum. As the FCC noted:

> . . . spectrum resources in different frequency bands have distinguishing features that can make some frequency bands more valuable or better suited for particular purposes. For instance, given the superior propagation characteristics of spectrum under 1 GHz, particularly for providing coverage in rural areas and for penetrating buildings, providers whose spectrum assets include a greater amount of spectrum below 1 GHz spectrum may possess certain competitive advantages for providing robust coverage when compared to licensees whose portfolio is exclusively or primarily comprised of higher frequency spectrum. As discussed above, holding a mix of frequency ranges may be optimal from the perspective of providing the greatest service quality at low cost.

The spectrum holdings in the industry as of 2Q09 were as follows:

Table 25

Percentage Spectrum Holdings, Measured on a MHz POPs Basis by Provider, by Frequency Band* (Providers Listed by Number of Subscribers as of 2Q 2009)

Licensee	700 MHz	Cellular (850 MHz)	SMR (800/900 MHz)	PCS (1.9 GHz)	AWS (1.7/2.1 GHz)	BRS (2.5 GHz)	EBS Leases (2.5 GHz)
Verizon Wireless	42.7%	48.5%	0.0%	15.4%	15.0%	0.0%	0.0%
AT&T	24.3%	42.3%	0.0%	25.9%	11.2%	0.0%	0.0%
Sprint Nextel	0.0%	0.0%	93.0%*	26.8%	0.0%	0.0%	0.0%

T-Mobile	0.0%	0.0%**	0.0%	19.7%	27.5%	0.0%	0.0%
MetroPCS	0.5%	0.0%	0.0%	2.6%	5.9%	0.0%	0.0%
US Cellular	2.7%	4.3%	0.0%	1.8%	2.0%	0.0%	0.0%
Leap	0.0%	0.0%	0.0%	2.3%	8.8%	0.0%	0.0%
Other	29.8%	4.9%	7.0%*	5.5%	29.6%	13.7%*	38.0%*
Clearwire	0.0%	0.0%	0.0%	0.0%	0.0%	86.3%*	62.0%*
Grand Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

* These are estimates based on the available data.
** T-Mobile holds a very small amount of Cellular spectrum.

T-Mobile's spectrum holdings are almost entirely above 1 GHz. This suggests, at a minimum, that AT&T's commitment to build out its network in rural areas is largely independent of anything it is getting in the acquisition. T-Mobile's spectrum holdings are not well-suited for rural build-outs. Rather, this promise seems to be politically driven and aimed at Senators and Representatives from largely rural states. As a cost of getting support for the transaction, AT&T is willing to spend more on rural markets. Merger critics point out that Verizon already plans to cover more than 90% of the U.S. population with 4G LTE service by 2013, and competition, rather than promises, is what is likely to cause AT&T to increase its own coverage.

On the other hand, at least parts of T-Mobile's spectrum, licenses, and probably towers are valuable in the urban areas where AT&T is apparently having network difficulties. The likely argument is that both firms will benefit by redeployment of assets. Of course, this same argument can be used whenever firms have to compete for scarce inputs, and no firm wins all the auctions. Critics have contended that AT&T could take the money it is spending on the acquisition and spend it for network improvements, and that would be a more pro-competitive outcome.

AT&T's efficiency argument essentially comes down to this: what is good for AT&T is good for the United States. It equates its increase in dominance, and its elimination of a significant competitor, as somehow pro-consumer, pro-innovation, and pro-investment. Its apocryphal predictions if its (or future) mergers in this highly concentrated industry are blocked include consumers confronting "lower output, worse quality, and higher prices."[41] The dominant telecommunications company warns that preventing its acquisition of T-Mobile would risk "degrading service for millions of American consumers," undermine innovation, and imperil U.S.

[41] Acquisition of T-Mobile USA, Inc. by AT&T Inc., Description of Transaction, Public Interest Showing and Related Demonstrations, filed with the Fed. Communications Commission, at 71 (Apr. 21, 2011) [hereinafter AT&T Submission].

technological leadership overall.[42] It warns that prohibiting its merger will cause AT&T to have capacity problems, which "could have ripple effects throughout the broadband system."[43] It warns that absent the merger, consumers would face even "more dropped and blocked calls, slower speeds, and access to fewer and less advanced applications."[44]

It is entirely rational for AT&T to equate what serves its corporate interests also serves America's interest. Indeed this attitude suggests that America is already too dependent upon AT&T, and thus must allow the company to grow even bigger. But this is not the mindset of consumers or the society. Rather what is good for America is good for AT&T. And what is good for America generally means more, rather than less, competition. If spectrum is, as AT&T argues, a scarce resource, then all competitors are confronted with this scarcity. While AT&T argues that dominant firms should grow bigger by acquiring its competitors' spectrum, that is not necessarily in our country's best interest. Instead, the fundamental belief is that competition forces companies to better allocate scarce resources. AT&T complains that, unlike its competitors, it supports multiple generations of technology, and this "severely constrains its flexibility to use its spectrum with optimal efficiency."[45] It claims that migrating its customers to new handsets takes too much time.[46] But the remedy for AT&T's dilemma is not to acquire its competitors to address its own inefficiencies. Instead, AT&T must do better, and finds better ways to innovate to service its customers. In a competitive environment, if AT&T falls behind, it risks losing customers to more nimble competitors. In a less competitive environment, these customers have correspondingly fewer options.

There is another reason to be wary of AT&T's belief that what serves its corporate interests benefits Americans. Notwithstanding its claims of being an innovation pioneer, AT&T was "the lowest-scoring cell-phone carrier in the U.S., according to a satisfaction survey of 58,000 ConsumerReports.org readers."[47] Of all the carriers rated, AT&T was the only one to drop significantly in overall satisfaction. While AT&T points out that it introduced Apple's iPhone,[48] Consumer Reports recently found

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[42] *Id.* at 14.
[43] *Id.* at 62.
[44] *Id.* at 6.
[45] ATT Submission at 24.
[46] ATT Submission at 24.
[47] Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier, Consumer Reports, Dec. 6, 2010, http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html.
[48] AT&T Submission at 2.

"iPhone owners were, by far, the least satisfied" with AT&T.[49]

Given the high market concentration levels and the trend toward concentration in this case, the lower court case law requires that AT&T and T-Mobile provide "proof of extraordinary efficiencies," which the merging parties have failed to supply. Efficiencies are almost never justify a merger to monopoly or near-monopoly.[50] Moreover, given the high concentration levels and the business and behavioral economics literature on the failure of many mergers to provide any significant value to shareholders or consumers, the courts should, and likely would, "undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[51]

B. AT&T and T-Mobile Have Not Rebutted the Presumption that the Significant Increase in Concentration in an Already Highly Concentrated Industry Will Increase the Likelihood of Tacit Collusion.

As the D.C. Circuit said, "The combination of a concentrated market and barriers to entry is a recipe for price coordination."[52] AT&T and T-Mobile have not rebutted this presumption. To successfully rebut the ordinary presumption of that either tacit or express collusion increases in a highly concentrated industry post-merger, the merging parties would have to establish with credible evidence "structural market barriers to collusion" that are unique to their industry.[53] The merging parties have not shown why their industry is so unique that by removing a significant competitor like T-Mobile will not make it easier to tacitly collude post-merger.

Section 7.1 of the Merger Guidelines defines the general conditions necessary for coordinated effects:

> Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are

[49] Andrew Dowell, *Consumer Reports Says AT&T 'Worst-Rated' U.S. Carrier*, WALL STREET JOURNAL, Dec. 7, 2010, http://online.wsj.com/article_email/SB10001424052748704156304576003423395003238-lMyQjAxMTAxMDIwMjEyNDIyWj.html.
[50] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).
[51] *Id.* at 721.
[52] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 724 (D.C. Cir. 2001).
[53] *Id.*

> likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

As we discuss in Part I, the industry is already highly concentrated. Moreover, there is no evidence of structural barriers to collusion. The few remaining firms can quickly detect and punish any attempt to increase competition by reducing price. In this industry, pricing and other terms of sale are highly transparent and are easily compared. These terms include: monthly fee; coverage area; included minutes, text and data; overage and roaming charges; length of contract; penalties; activation fee; and optional features.

The condition that there be rapid responses by rivals also appears to be true. One critic of the acquisition (Free Press) states that AT&T and Verizon "have a long history of raising prices in concert, as they both did early last year [2010] by requiring all customers on feature phones to add data plans."[54]

The FCC gives another example of how transparency affects price competition in its Fourteenth Mobile Wireless Competition Report. The example is particularly noteworthy. It shows how T-Mobile, acting as a price-cutter, prompted AT&T and Verizon to narrow their price premium on unlimited service offerings:

> 91. *Unlimited Calling Plans.* The focus of price competition now appears to be shifting to unlimited service offerings. In an effort to reduce churn, T-Mobile introduced a lower-priced version of its unlimited national voice calling plan in the first quarter of 2009, but limited its availability to select existing customers. With the subsequent launch of its new "Even More" plans in October 2009, T-Mobile reset prices on tiered offerings at significant discounts to its legacy plans, and brought its pricing structure more closely into line with that of Sprint Nextel, the least expensive nationwide service provider. The biggest pricing changes were

[54] http://www.freepress.net/files/ATT-TMobile.pdf at 2 &n.3.

made on T-Mobile's unlimited service offerings, which include bundled voice, text and data offerings as well as an unlimited voice-only calling plan. At the same time, T-Mobile discontinued its myFaves unlimited calling circle offer.

92. Even before T-Mobile launched its new pricing plans, Verizon Wireless and AT&T priced their postpaid service offerings at a premium relative to those of T-Mobile and Sprint Nextel. According to analysts, this premium reflected the willingness of consumers to pay higher prices for access to preferred handsets and data offerings, and in Verizon Wireless's case, positive perceptions of its network. T-Mobile's price changes appear to have prompted Verizon Wireless and AT&T to narrow the price premium on unlimited service offerings. In January 2010, Verizon Wireless reduced the prices of its unlimited voice plans for both individual and shared family offerings. Later the same day, AT&T responded to Verizon Wireless's changes with matching price reductions on its unlimited voice plans. While Verizon Wireless's and AT&T's unlimited plan price cuts were significant, their postpaid service offerings remained the most expensive in the industry, even following these price changes, as the prices of Sprint Nextel's and T-Mobile's equivalent or comparable unlimited plans had already declined sharply.

Table 10
Comparison of Unlimited Pricing Plans

	Verizon Wireless	AT&T	T-Mobile	Sprint Nextel
Voice	$69.99	$69.99	$59.99	Not offered
Voice – Text	$89.99	$89.99	$69.99	Not offered
Voice – Text + Basic Data	$99.99	$99.99	$79.99	Not offered
Voice – Text + Smartphone Data	$119.99	$119.99	$99.99	$99.99

There are probably many other examples of competitive moves and responses over time. They may involve the introduction and pricing of calling plans, commitment periods and penalties, pricing for subsidized handsets, and so forth. In each of these dimensions, the market is fully transparent to a competitor.

The merging parties may argue that tacit collusion is unlikely, because post-merger, Sprint would become the maverick firm and undercut any attempt by AT&T and Verizon to raise price, reduce consumer choice, or decrease their incentives to innovate. Sprint's incentives to serve as a maverick would arguably change, however, post-merger. Sprint may conclude that it would do better by going along with AT&T and Verizon than by trying to undercut them and gain customers. It may be possible to model the gains to Sprint depending on which strategy it pursued.

Nor has AT&T established that other firms would restore competition post-merger. Other than Sprint and Verizon, the other firms in the market are so small, so capacity constrained, and/or so dependent on Verizon and AT&T that they would not be likely to act as a check on coordinated interaction.

Handset competition and innovation

The merger will also likely lead to less choice and higher prices to consumers for handsets, and will give AT&T more power over handset suppliers. Price and non-price competition among the mobile wireless handset manufacturers, according to the FCC, affects competitive outcomes in the mobile wireless service market; competition is also shaped by the provider-as-retailer model of handset distribution. Bundling contracts and exclusive handset arrangements are firm conduct that occurs frequently in the provider-as-retailer model of handset distribution.[55]

The merger removes a company that buys and subsidizes handsets. The loss of a significant competitor means that handset manufacturers have one less customer they could turn to, or threaten to turn to, in negotiations with mobile service providers. Moreover, consumers may see their choices of handsets narrowed after the merger. Consumer costs for phones could also increase as the merged company faces less competitive pressure to subsidize phone prices as much as before. Another possible effect is that the growth of Android-based devices will be slowed. T-Mobile has been the leader in offering these devices as a means of countering the iPhone. There are numerous trade press reports and ads showing this ongoing competition.[56]

The introduction of Android software and devices is summarized in the FCC's Thirteenth Mobile Wireless Competition Report[57] as follows:

> 171. The *Twelfth Report* noted that the development of Android was announced in November 2007 by the Open Handset Alliance – an alliance of 34 handset makers, wireless providers and other technology companies led by Google Inc. ("Google"), T-Mobile,

[55] 14th Mobile Wireless Competition Report ¶ 311.

[56] *See, e.g.*, Walt Mossberg, *Google Answers the iPhone* (Oct. 15, 2008), available at http://ptech.allthingsd.com/20081015/google-answers-the-iphone/.

[57] *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

High Tech Computer Corporation ("HTC"), Qualcomm, and Motorola which was formed to accelerate innovation and "openness" in the provision of mobile wireless services. The *Twelfth Report* further noted that Android was intended to be the "first open, complete, and free platform created specifically for mobile devices," and that it was set to be commercially deployed in the second half of 2008.

172. As revealed in subsequent reports about its development, the Android system is a set of operating software developed by Google that is designed to support several different objectives. First, Android supports and brings together in one package a number of applications Google has developed for mobile handsets, including a search service, Google maps and a new advanced mobile Web browser that is intended to rival the browser on the Apple iPhone. Second, Android provides a platform to support a marketplace for applications made by other companies. Like Apple's software development kit and App Store, Android is designed to make it easier for third-party software developers to make their applications available on mobile handsets and to integrate these applications with handset features such as location-sensing technology. Third, despite its use of Google's search service and other Google applications, the Android system allows wireless service providers to customize the Android software to promote their own data services and content. Google is making the Android operating software available free of charge to handset manufactures and wireless service providers in order to encourage the development and deployment of handsets based on Android.

173. Although Google originally planned to launch the new Android handsets in the second half of 2008, subsequently the company indicated that the handsets would not be commercially available until the fourth quarter of 2008. Several factors contributed to the delays, including: (1) the inherent difficulty of managing a project in which Google had to collaborate with and coordinate the work of many different providers to support its Android technology platform, including handset manufacturers, wireless service providers, software developers and chip set makers; (2) challenges wireless service providers have encountered in their efforts to customize the Android software and brand their own devices; and (3) various challenges that confronted software developers in working with Google's programming tools and creating programs for Android.

> 174. **Google and T-Mobile unveiled the first Android device, the G1, in September 2008, and the following month T-Mobile became the first U.S. provider to launch a handset that uses the Android operating system.** The G1 runs on both T-Mobile's mobile broadband WCDMA/HSDPA network, which T-Mobile is still in the early stages of rolling out, and also on slower networks using older GSM-family technologies. In addition to Google's advanced new mobile Web browser, search interface and other Google applications such as maps, Gmail and YouTube, the G1 also features a touch-screen that slides open to reveal a real physical keypad underneath, a trackball that supplements the touch-screen navigation, GPS navigation, Wi-Fi access and Bluetooth connections, among other gadgets and functions. Although the Google applications come installed on the G1, the G1 has an applications store, called the Android Market, where G1 users will be able to download programs created by thirdparty developers. However, while Google maintains that the G1 leaves it up to consumers to decide what they want to run on their cellphones, one reviewer points out that the G1 is "tightly tied to Google's Web-based email, contacts and calendar programs." Nevertheless, while noting many differences between the G1 and Apple's iPhone, the same reviewer concludes that, like Apple's product, Google's G1 is "a serious handheld computer with a powerful new operating system."

Choice of devices is important to consumers, who increasingly are choosing a wireless service based on the devices that are available. According to the FCC's Fourteenth Mobile Wireless Competition Report:

> 299. Handsets and devices are becoming increasingly central to the dynamics of the overall wireless market. Recent studies show handsets playing an increasingly important role for consumers as a basis for choosing providers, although these studies differ as to the level of importance of handsets to consumers. For example, a recent report from Consumers Union provides data that suggests that many consumers switched to new wireless service providers in order to obtain a particular handset. Specifically, the report states that during the two-year period of 2008 through 2009, 38 percent of respondents who had switched providers did so because it was the only way to obtain the handset that they wanted. The same report also indicates that 27 percent of all respondents had a specific wireless handset in mind when they went shopping for a new handset. A first quarter 2009 survey by Nielsen Company shows handsets were the seventh most important reason consumers chose

> their existing wireless provider, although handset choice increased in importance to 6.4 percent from 2.9 percent in the third quarter of 2006. Recent analyst reports also identify access to handsets as an increasing challenge faced by mid-sized and small providers.

Viewed from a handset manufacturer's perspective, the acquisition removes a significant buyer from the market. This is likely to have a non-trivial impact on handset manufacturers' ability to negotiate. It is possible that the change will also reinforce AT&T's incentives to compete for exclusive deals, and Verizon will also find this to be the most viable strategy. This could easily result in Sprint not being a fully competitive alternative, putting further pressure on its long-term survival given the trends showing the importance of handset choice.

Text Messages

Text message prices depend on the number of competitors offering text services (i.e., are truly coordinated effects). Senate hearings were held in 2009 on text message prices. The theory is that with fewer firms, it is easier to coordinate on text pricing, and there does seem to be some evidence to this effect. According to Senator Kohl:

> **As their popularity has grown, so has the price charged on a per message basis. From 2006 to 2008, the price of sending and receiving a text message among the four largest cell phone carriers increased by 100% – from 10 to 20 cents per message. The four companies increased their text messaging prices in two steps – first from 10 to 15 cents, and then from 15 to 20 cents – within months or weeks of each other. These lockstep price increases occurred despite the fact that the cost to the phone companies to carry text messages is minimal – estimated to be less than a penny per message – and has not increased.**[58]

The Seventh Circuit recently affirmed the district court's decision not to dismiss a conspiracy case alleging text messaging price-fixing against the four national carriers.[59] The court of appeals noted, among other things, the fact that the four defendants sold 90% of U.S. text messaging services; that it would not be difficult for such a small group to agree on prices and to be able to detect "cheating"; that prices had been declining; and that "all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing

[58] Senator Herb Kohl, Kohl Column: Rising Text Message Prices (June 18, 2009), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2884.

[59] In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010).

structure, and then simultaneously jacked up their prices by a third."[60]

Pricing of text messages may present a natural experiment on coordinated pricing behavior in the industry. The use of text messages rapidly expanded in 2008-09, and the industry at that point apparently was sufficiently concentrated for coordinated interaction to occur. It is also possible that going from 4 to 3 "national" firms will result in even higher text message prices, which would be a merger effect.

Parallel Accommodating Conduct

The 1992 Merger Guidelines stated that "Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction."[61] The text message example above is an illustration of a potentially profitable strategy that includes the ability to detect and punish deviations. But economic theory has recognized for some time that there are forms of coordinated interaction that are profitable but do not involve the requirement (borrowed from classic cartel theory) that the firms involved be able to "detect and punish" cheating.

The revised 2010 Merger Guidelines refine the analysis and bring it into line with economic theory. The new Guidelines identify three kinds of coordinated behavior: (1) "explicit negotiation of how firms will compete or refrain from competing"; (2) "a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishing of deviations"; and (3) "parallel accommodating conduct not pursuant to a prior understanding."[62]

In discussing parallel accommodating conduct, the revised Guidelines state: "Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."[63] There is no "detect and punish" requirement.

The DOJ was concerned about parallel accommodating conduct in

[60] *Id.* at 628.
[61] 1992 Horizontal Merger Guidelines § 2.1.
[62] 2010 Horizontal Merger Guidelines § 7.
[63] Id.

its challenges to the *Worldcom/Sprint* and *Alcan/Pechiney* mergers.[64] In language that may prove equally applicable here, the DOJ alleged in *Alcan*: "After the acquisition, the combined firm and its largest North American rival would share market leadership and a common incentive to pursue strategies that emphasize accommodation and do not risk provocation."[65]

Unilateral Effects

Alternatively, the merger can be analyzed under a unilateral effects theory. In the context of the incipiency standard, the agencies' unilateral effects analysis is better viewed as a complement for cases where market definition is less straight-forward. In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. So, as one recent example, the DOJ can challenge a merger involving "value" shampoo, conditioners, and hairspray.[66] Whether the market is defined as shampoo generally or value shampoo specifically, the agency based on diversion ratios, the profit margins of the merging parties' hair products, and *Brown Shoe* factors, can predict that the prices for one or both of the merging firms' product will increase post-merger.

The problem is that unilateral effects theory has become the opium of merger review. If the agency can predict the likely post-merger price merger increase for value shampoos, white pan bread, or baby wipes, then the merging parties and courts will demand the FTC and DOJ to prove for every merger how prices will increase post-merger, and by what magnitude. It is not surprising then that most merger cases in recent years are challenged under a unilateral effects theory.[67] However, as one former head of the Antitrust Division observed,

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[64] See Carl Shapiro, Deputy Assistant Attorney General for Economics, Update from the Antitrust Division, Remarks as Prepared for the American Bar Association Section of Antitrust Law Fall Forum, Washington, DC (Nov. 18, 2010), http://www.justice.gov/atr/public/speeches/264295.pdf, at 28-29.

[65] United States v. Alcan Inc. et al. Case No. 1:03CV0212 (D.D.C. Sept. 29, 2003) ¶ 22.

[66] United States v. Unilever N.V., Civ. Act. No. 1:11-cv-00858 (D.D.C. May 6, 2011).

[67] Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Rediscovering Coordinated Effects, Presented at the American Bar Association Annual Meeting, Section of Antitrust Law, Washington, DC (Aug. 13, 2002) (noting "interesting side-effect of the 1992 Guidelines has been the emergence of unilateral effects as the predominant theory of economic harm pursued in government merger investigations and challenges"), http://www.justice.gov/atr/public/speeches/200124.pdf.

> [U]nilateral effects should not be the theory of choice simply by default. If we reach too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis, we might miss important cases that should be brought or craft our relief too narrowly in cases that we actually pursue.[68]

Where market definition and entry barriers are relatively straightforward, it is questionable whether the DOJ needs to rely on a unilateral effects theory, the utility of which is where market definition is less straightforward or meaningful (such as whether the market is defined as value shampoos or shampoo generally). Nonetheless, we discuss below how a unilateral effects theory applies here. But we do so with the important caveat that the incipiency standard controls. The fact that DOJ can show that the merger significantly increases the likelihood of a substantial unilateral price increase simply provides additional evidence of why the merger violates the Clayton Act.

Although the Guidelines outline several types of unilateral effects, the most likely candidate theory here involves pricing of differentiated products:

> The concept of unilateral effects is simple to describe: In markets characterized by product differentiation, mergers between close competitors are likely to lead to higher prices absent post-merger repositioning of other products in the market and/or efficiencies. In the usual case, the merging firms sell products (A and B) that consumers perceive to be close competitive substitutes for each other. Other products, while perhaps being functional substitutes on some level, are viewed by the consumers of A and B to be substantially differentiated from A and B in terms of product attributes, such that changes in the prices of A or B do not lead consumers to choose other products in significant numbers. After A and B come under common control, depending on the margins of products A and B, and the amount of sales diverted from A generally (and diverted to Product B specifically), the price of A could be raised because a sufficient number of consumers of A who switch, would switch to B, the profits of which, instead of being lost by the firm selling A, would now be captured by the merged firm. Other consumers would stay with A and pay the higher price.
>
> It is the diversion of consumers from A to B, compared to a

[68] *Id.*

> diversion to any other products, that permits a post-merger price increase. (Note that the same could be said about increases in the price of B leading to significant diversion to A.)[69]

It is beyond this Essay's scope to analyze "upward pricing pressure" or diversion ratios. However, several observations may be offered.

It seems likely that the parties are relatively close substitutes. First, they offer similar plans and services, although T-Mobile tries to price somewhat lower and also has somewhat lower profit margins. (Various measures of profitability are set out in the FCC's Fourteenth Mobile Wireless Competition Report.)

Second, it is likely that the real market for "low end" customers is in prepaid plans as opposed to postpaid plans. Prepaid plans are a way to cut costs and avoid the lengthy contracts that come with traditional cell phone plans. Prepaid plans have been growing rapidly (probably because of the recession) but they generate much lower revenue per subscriber than postpaid plans.[70]

If the DOJ applies an "upward pricing pressure" analysis, the result is likely to confirm the intuition (and fear) of many T-Mobile customers: that AT&T has an incentive to raise T-Mobile prices post-merger. AT&T has both a significantly higher market share and significantly higher margins than T-Mobile. If AT&T raises T-Mobile prices post-merger, it will likely recapture a high enough percentage of "defecting" T-Mobile customers that the price increase will be profitable. On the other hand, AT&T probably has much less of an incentive to raise prices to its own customers post-merger.

Indeed, AT&T's own unilateral effects analysis in past transactions highlights this concern. In its November 2008 FCC filing in connection with the acquisition of Centennial Communications, AT&T argued that Centennial was not a particularly close substitute because "AT&T focuses on the other national carriers in its competitive decision-making and does not focus on Centennial in deciding on pricing and service offerings."[71] It recognized that the number of competitors and share of the merging firms were relevant.[72] And it is worth noting that AT&T's past arguments about

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[69] Charles Biggio, Whole Foods' Impact on Unilateral Effects (2008), *available at* http://www.wsgr.com/PDFSearch/wholefoods0908.pdf.

[70] 14th Mobile Wireless Competition Report ¶ 163.

[71] AT&T/Centennial Public Interest Showing, *supra* note14, at 37.

[72] *Id.* at 36.

the ease of competitive repositioning do not square with its own repeated statements in this merger about the increasing demands consumers are placing on wireless networks.

Exclusionary Effects

Finally, the merger can be analyzed under an exclusionary effects theory. The theory is that a merger may enable the merged firm to engage in exclusionary conduct after the merger – for example, by denying rivals access to needed inputs, by cutting off their access to customers, or otherwise by raising their costs. When a merger enhances the ability of a firm to exclude rivals, the result may be harm to competition. This theory of harm has been recognized both in the case law[73] and by economists[74] for many years.

The 2010 Merger Guidelines now explicitly make this theory part of the antitrust review. Section 2.2.3 of the Guidelines expresses skepticism toward most competitor concerns about competitive effects, but contains an exception for exclusionary conduct:

> Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the merger. **However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct**.[75]

This theory of harm is particularly relevant to the AT&T/T-Mobile merger. The merging parties have asserted that smaller regional and local carriers will replace any competition lost through the merger, and therefore can be expected to act as a competitive constraint on the exercise of market power by the merged company. For this claim to be true, the smaller carriers must be able to develop and grow into a significant competitive force in the marketplace. If the merged firm can make it significantly more

[73] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1131 (7th Cir. 1983) (AT&T liable for raising the costs of actual and potential entrants into long distance service by denying them equal access to local telephone network).

[74] *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Analyzing Anticompetitive Exclusion*, 56 ANTITRUST L. J. 71, 81-82 (1987)

[75] 2010 Horizontal Merger Guidelines § 2.2.3 (emphasis added).

expensive for the smaller companies to operate, or otherwise act to block or limit their growth, the parties' claim becomes highly suspect.

Exclusionary theories are put forward in a number of the comments on the merger filed with the FCC. As one example, Cincinnati Bell Wireless ("CBW") is a regional carrier that serves approximately 509,000 subscribers in the greater Cincinnati and Dayton metropolitan areas as well as several counties in northern Kentucky and Indiana.[76] Like AT&T and T-Mobile, CBW is a GSM-based carrier. Because the parties hold out CBW as one of the regional carriers that would allegedly replace the competition lost by the merger, it is worth noting the difference in their relative sizes: Post-merger, the combined AT&T and T-Mobile would be approximately 250 times the size of CBW, yet CBW would be the second largest GSM-based carrier in the country.[77]

Regional carriers like CBW must give their customers the ability to roam out of the local region onto the networks of other carriers. Because CBW is GSM-based, the only two current alternatives for a roaming partner in most markets are AT&T and T-Mobile,[78] and the company currently has roaming contracts with both of them.

CBW states that AT&T's rates for voice and data roaming are approximately twice as high as T-Mobile's rates.[79] Post-merger, AT&T would be the only remaining 3G roaming alternative (since AT&T has already announced its intention to shut down T-Mobile's 3G network).[80] And CBW claims that in the past, AT&T has engaged in repeated acts of exclusionary conduct, including:

> charging unreasonable roaming rates; denying roaming access on its advanced data networks and opening access only after severe delays, at unreasonably high rates, and upon anticompetitive conditions; preventing access to contiguous or quality spectrum by buying it up through both auctions and merger; and denying access to new and innovative handset technology by tying manufacturers into exclusive arrangements and specifying "single carrier" handset designs developed for use only on its network.[81]

[76] Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications (May 31, 2011) at 7, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021681268.
[77] *Id.* at 15-16.
[78] *Id.* at 3.
[79] *Id.* at 16.
[80] *Id.* at 6.
[81] *Id.* at ii.

It does not require much imagination to see how the proposed merger could make things appreciably worse for firms like Cincinnati Bell Wireless and consumers. Losing T-Mobile as a supplier both exposes CBW to a roaming rate increase and increases its vulnerability to further exclusionary conduct by AT&T. Far from being able to grow and provide meaningful competition to the merged firm, CBW and similar firms are likely to be hemmed in if not further marginalized.

One final point. The agencies most often encounter exclusionary conduct in vertical mergers or in mergers with a vertical dimension, such as where the merged firm supplies needed inputs to customers who are also competitors. But there can be exclusionary effects on a purely horizontal basis as well. The Guidelines provide an example of such exclusionary effects in an industry characterized by "network effects." Broadly speaking, there are "network effects" if one person's adoption of a good (a) benefits other adopters of the good and (b) increases others' incentives to adopt it.[82]

> Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.[83]

Telecommunications is an industry subject to significant network effects. Indeed, the telephone is a classic example of network effects. In the early, unregulated era of telephone service, the dominant Bell system simply refused to interconnect with independent local phone companies.[84]

The existence of network effects in the mobile wireless industry may be seen in handset exclusivity. As the FCC noted, exclusive contracting for handsets only takes place "with providers that have larger customer bases and extensive network penetration."[85] Indeed, the FCC

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[82] Joseph Farrell and Paul Klemperer, "Coordination and Lock-In: Competition with Switching Costs and Network Effects" in Mark Armstrong and Robert H. Porter, eds., 3 Handbook of Industrial Organization 2007 (2007).

[83] 2010 Horizontal Merger Guidelines § 2.2.3.

[84] The Master Switch at 45-50.

[85] FCC 15th Wireless Report at ¶ 342.

notes that while all of the four nationwide providers have some exclusive arrangements, the non-nationwide providers typically do not.[86]

In what ways could the merger change the strategy of the merging parties given the existence of network effects? One possibility is that the merger will further enhance AT&T's incentive (and ability) to demand handset exclusivity. A second possibility is that AT&T, which currently has reciprocal roaming agreements with several carriers, could find itself in a position after the merger where it no longer needs those carriers as roaming partners. Reciprocal roaming agreements, according to AT&T, provide a check on roaming rates since the parties need each other. Post-merger, the situation may be more like AT&T and Cincinnati Bell Wireless, where CBW roams on AT&T's network but not vice versa.[87]

A third possibility involves network infrastructure. T-Mobile was a founding member of the "Open Handset Alliance," a broad alliance of technology and wireless firms that joined forces to develop the Android platform.[88] Such an alliance requires that the possibility of a return on considerable investments. One can readily imagine a post-merger world in which the inability to reach a sufficient number of wireless customers would make it impossible for a firm or group of firms to recoup their investments, and as a result the investments would not be made.

IV. REMEDIES

As Part II shows, this merger is presumptively anticompetitive. As Part III discusses, AT&T and T-Mobile in their public documents have not overcome this presumption of illegality by (i) showing how consumers will overall benefit with merger specific efficiencies and (ii) rebutting the presumption that the significant increase in concentration in an already highly concentrated industry will increase the likelihood of tacit collusion. Consequently looming large is the question of remedy. At the end of the day, if DOJ concludes that the merger violates the Clayton Act, what is the cure? There are three possibilities: sue to block the merger, agree to divestitures, or agree to behavioral conditions.

In the past several years, wireless mergers involving the four national facilities based providers have mostly involved an expansion of coverage, and the entities that were combined for the most part had not competed in most of the geographic areas. Where there was overlap, the

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[86] *Id.*

[87] CBW Reply at 5. http://fjallfoss.fcc.gov/ecfs/document/view?id=7021688585

[88] "Industry Leaders Announce Open Platform for Mobile Devices (Nov. 5, 2007), *available at* http://www.openhandsetalliance.com/press_110507.html

FCC required divestitures. A chart of the recent mergers appears below.

Year of Commission Approval	Merger
2005	Sprint/Nextel
2007	AT&T/Dobson
2008	AT&T/Aloha T-Mobile/Suncom Verizon Wireless/Rural Cellular Verizon Wireless/Alltel Sprint Nextel/Clearwire
2009	AT&T/Centennial

Significantly, according to the FCC, most of the divestitures in the Verizon/Rural Cellular and Verizon/Alltel mergers were to go to AT&T. Most of the divestitures in the AT&T/Centennial merger were to go to Verizon.[89] Assuming this took place, it shows how few potential buyers there were, and that the FCC and DOJ were apparently willing to accept an increase in national market concentration to remedy local concerns. The question is whether the same analysis would apply here when the present acquisition (i) would increase concentration nationally and in numerous local markets, and (ii) is not a geographic expansion. At a minimum, it is highly unlikely that either the FCC or DOJ would accept divestitures to Verizon in the present merger. In addition, DOJ prefers to have a single buyer on the theory that a merger that removes a single competitor is best remedied by replacing the single competitor with another as opposed to a group. But divesting assets to someone who is already in the market does not really remedy the competitive loss caused by a merger.

A. Behavioral Remedies

Behavioral conditions or behavioral remedies include imposing the requirement that the merged company agree to price or access terms, or otherwise change its conduct. For example, if there is concern that AT&T could disadvantage its competitors by charging excessive Special Access fees, AT&T could be ordered to provide access on reasonable and non-

[89] 14th Mobile Wireless Competition Report ¶ 84.

discriminatory terms. If there is concern about exclusive agreements with handset manufacturers, AT&T could agree not to enter such exclusives.

The DOJ, under the Obama administration, has been receptive to behavioral remedies, whereby the DOJ permits a merger, but regulates the behavior of the merging parties.[90] Historically, based on sound practical reasons, the antitrust agencies preferred structural remedies (requiring divestiture of assets) over behavioral ones.

Behavioral remedies are unattractive for many reasons, as the DOJ itself has recognized.[91] The DOJ is not set up as a regulatory agency. The staff that works on this merger will be disbanded and move on to other matters when the review is finished. The head of the DOJ Antitrust Division from both Republican and Democratic parties have said that DOJ is not, and should not be, in the business of ongoing oversight of remedies. Indeed, to the extent that DOJ is market oriented, behavioral remedies are perverse, in that they limit the ability of a firm to make market-based decisions, and they are by necessity applied only to the merged firm and not to its competitors.

Thus behavioral remedies should be used only when no other alternative exists, such as in vertical mergers where the main theory of harm is that rivals will be foreclosed from the market.[92] In telecom mergers, they tend to be used mostly for the sake of parallel orders: if the FCC wants to impose a behavioral remedy, the DOJ may also include it in a decree. But it should be understood that adding behavioral remedies to a consent decree usually accomplishes little if anything from DOJ's standpoint – it is done because it is a relatively low cost even if relatively low return proposition.

B. Divestitures

Partial divestiture of assets by one (or both) of the merging firms is a different story. Divestitures may be ordered if only parts of a deal are problematic. In a horizontal merger, divestitures are used to fix competitively significant overlaps. If the acquiring company offers many products, but only competes with the acquired company in one of those

[90] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

[91] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004, superceded 2010), http://www.justice.gov/atr/public/guidelines/205108.htm.

[92] See U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf ("conduct remedies often can effectively address anticompetitive issues raised by vertical mergers").

products, that product line may be divested. Or if the acquiring company competes with the acquired company in only one geographic location, its business in that location may be divested.

So the first point is that divestitures generally only make sense when the problematic overlaps are small relative to the size of the deal.

A second issue is who is the buyer? Divestitures, like any remedy, are intended to replace the competition lost through a merger. This has led to a number of requirements being imposed on a prospective buyer before DOJ will approve the buyer. For example, you do not want a buyer who has never managed a business like the one being divested. Firms who enter new and unfamiliar businesses often fail. For similar reasons, you do not want a buyer who is undercapitalized and needs to rely on the merged company to provide financing. That buyer may pull its punches because it is on the hook to the merged company. You also do not want the divested assets sold to several smaller buyers. While each of those buyers may be fine, they are also individually weaker than the original firm was, and therefore may be less effective competitors. Finally, you want an entire business divested, not just pieces of the business. History teaches that divestitures of complete businesses are much more likely to succeed than just certain assets or licenses.

So let's apply these well-accepted principles to the current merger.

First, the overlaps here are not small relative to the size of the deal. This is not a geographic expansion merger involving a handful of competitive overlaps, as was the case with prior wireless mergers. As previously stated, the relevant geographic market in this case appears national. But even on a local market basis, there are likely to be hundreds of local markets where AT&T and T-Mobile compete for customers, and where both are among the top four competitors. If DOJ finds likely competitive effects in all or most of those local markets, divestiture becomes an unattractive remedy.

Second is the question of the buyer. You want to restore the lost competition. A large buyer like Sprint would be one option, but only in those markets where it does not have a sizeable presence already. Otherwise, even with a divestiture, the number of players is being reduced post-merger.

A small buyer may be unattractive, since it may be unable to deliver what T-Mobile did to its customers. For example, it may depend more on its larger rivals than T-Mobile does. And that could end up meaning it has a higher cost structure, or is dependent on its competitors, in ways that T-Mobile is not.

Third is the question of what is being divested. The answer has to be primarily licenses for spectrum. And here we run into another problem. If, as AT&T asserts, it needs T-Mobile's spectrum, what is it going to divest? Spectrum. But since spectrum is the driver of the deal, it does not make sense that AT&T will simply sell off T-Mobile's spectrum everywhere there are overlaps. Rather, the likely result would be "mix and match" divestitures. AT&T will be willing to divest the spectrum that it does not need, but keep the spectrum that it needs (or is more desirable). We have seen something similar happen in radio mergers, where the merged company keeps the bigger stations and agrees to divest the smaller ones. AT&T's antitrust counsel would likely offer the same deal. Of course, it may happen by chance that a buyer needs precisely the same spectrum that AT&T is willing to divest, but that is unlikely to happen. A profit-maximizing firm does not pay $39 billion in order to sell to its competitors the best spectrum.

So what is the argument in favor of divestitures?

In the larger or urban geographic markets in which the merging parties compete, AT&T will no doubt argue that it should not have to divest anything. Those are the local markets where its needs are most acute. It will undoubtedly argue that these are also the markets that have the most provider choices, and also that T-Mobile is not much of a competitive factor, especially in the 4G future.

In the smaller or rural overlap markets, where there is less choice, AT&T probably would be willing to divest. Indeed, its likely endgame is to limit its divestitures just to those markets. Why? That solves a couple of the problems mentioned above. First, it means that the divestitures become a much smaller part of the overall deal. Second, it means that buyers can probably be found and approved. Third, the buyer will unlikely pose a significant competitive threat to AT&T nationwide post-merger.

So the merging parties' endgame, as we see it, is to keep the DOJ focused on narrowly defined geographic markets. AT&T will progressively whittle down the number of geographic markets where DOJ has concerns. By compartmentalizing the merger into small regions, AT&T and T-Mobile can horse trade with DOJ on divesture of assets in smaller markets like Knoxville, Tennessee. There is nothing sinister with this strategy; indeed it happens regularly at the agencies. While we were at the DOJ in the 1990s-2000s, we saw this piecemeal approach for radio[93] and bank mergers.[94] In retrospect, it is questionable whether these piecemeal divestitures actually restored the competition lost by the mergers and prevented the risks from the trend toward consolidation.

C. Enjoining the Merger

And that brings us to the last remedy: blocking the merger. Actually, according to the Supreme Court, that is the first remedy courts are supposed to consider. On the question of remedies, *United States v. E.I. Du Pont De Nemours & Co.*, 366 U. S. 316 (1961), which is still good law, states:

> The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.[95]

Given the unattractiveness of behavioral remedies and the likely inadequacy of piecemeal divestitures, the preferred remedy seems clear.

CONCLUSION

The AT&T/T-Mobile merger is presumptively anticompetitive under *Philadelphia National Bank*. There are important policy reasons for this legal presumption (including providing greater certainty to consumers and the industry participants, increasing transparency and accountability of the antitrust agencies and reducing the risk of political capture of the agencies). Here on a national level, this is a 4 to 3 merger in a highly

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[93] Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media is a Bad Idea*, 105 NORTHWESTERN UNIVERSITY L. REV. COLLOQUY 115 (2010), *available at* http://ssrn.com/abstract=1710466.

[94] Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313 (2010).

[95] 366 U.S. at 329-30 (footnotes omitted). Note that *DuPont* uses the word "divestiture" to mean *complete* divestiture – i.e. preventing an acquisition – not divestiture of some assets.

concentrated industry. The industry, through past mergers, has accelerated toward greater concentration. It has high entry barriers. There is no indication that the market shares overstate competitive significance.

The merging parties have not established why the market is not susceptible to coordinated effects (and there is reason to believe AT&T also could unilaterally raise prices to T-Mobile's customers post-merger). The merging parties must provide convincing evidence to overcome the presumption, which to date they have not. At the end of the day, the proposed merger likely violates section 7 of the Clayton Act and should be enjoined.

Mr. GOODLATTE. Professor Wright, we are pleased to hear your testimony.

TESTIMONY OF JOSHUA D. WRIGHT, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. WRIGHT. Chairman Goodlatte, Ranking Member Watt, Members of the Subcommittee, Chairman Smith and Ranking Member Conyers, my name is Joshua Wright. I hold a Ph.D. in economics, formerly an employee of the Federal Trade Commission and the Bureau of Competition, and am currently an antitrust law professor at George Mason University School of Law. I appreciate the opportunity to testify before you today on this important issue.

My testimony focuses upon how we should think about evaluating the likely competitive effects of the proposed transaction from a consumer welfare perspective.

I want to start by observing that there is a standard and well understood economic framework for analyzing horizontal mergers. That framework is articulated in the 2010 Horizontal Merger Guidelines that were recently promulgated by the DOJ and FTC under the Obama administration. Economists and lawyers at antitrust agencies apply these guidelines through highly fact-intensive investigations. The agencies then conduct various quantitative and qualitative analyses with these data.

My goal here is not to replicate or anticipate the analyses that those agencies will conduct, but to highlight the types of issues that the agencies are likely to confront along the way in applying that analytical framework to this merger.

I would like to begin with what is a broad and overarching principle of economic analysis of merger review that has emerged over the past 30 years of learning in the economics literature.

Modern merger analysis focuses, to the extent possible, on competitive effects directly and does not merely look at market structure to make inferences about the future effects of a merger. In other words, the economic theory and evidence is fairly clear that simply counting the number of firms in a market is an unreliable way to go about predicting the competitive effects of mergers.

The current agency guidelines reflect this consensus view in industrial organization economics that merely relying on a crude proxy like market structure is likely to lead in errors in both directions with respect to antitrust review. Instead, modern merger analysis focuses upon two issues, the likelihood a merger will create an incentive to raise price relative to the world without the merger on the one hand and, on the other, whether the merger will create efficiencies that will result in benefits to consumers.

On the efficiency side, as Mr. Stephenson alluded to earlier and as the FCC has recognized in its wireless report and elsewhere, capacity constraints characterize the current wireless competitive landscape. Wireless carriers must make significant investments to expand and upgrade network capacity. Given the practical difficulties and delays associated with expanding spectrum holdings through new auctions, acquisition of incremental spectrum through merger is desirable relative to delay and, importantly, through another feasible alternative which would be rationing existing spectrum through higher prices. These efficiencies from relaxing those capacity constraints are likely to result in benefits to consumers from increased usage.

On the anticompetitive side of the evaluation are two possibilities that the agencies will explore. Unilateral price effects arise when a post-merger firm is able to, without coordinating with its rivals, have the power to increase price. Coordinated price effects, as articulated in those same guidelines, by contrast arise when coordinated pricing or collusion between firms is made more likely by a specific merger. Unilateral price effects do not appear likely from the proposed transaction. Those effects are unlikely when a merger allows for expansion of capacity and reduction of the marginal cost of expanding capacity to increase output for consumers.

Further, a unilateral price effect is especially relevant when two merging firms sell products that are close substitutes. There is some evidence here that consumers do not perceive AT&T and T-Mobile USA wireless products as particularly close substitutes. For example, the 2010 FCC report emphasizes the close price competition between AT&T and Verizon rather than between AT&T and T-Mobile. Given the continued presence of Verizon and Sprint after the merger, the likelihood that AT&T will be able to unilaterally raise prices appears questionable. Similarly, given the continued presence of Sprint, MetroPCS, Leap, and others that cater to value-oriented consumers that have been the focus of T-Mobile's business, it also appears questionable whether there would be unilateral effects with respect to those consumers.

Nor does it appear that a coordinated effect, in other words, a price increase from coordination between rivals is likely. Mergers can facilitate coordinated pricing through eliminating of a maverick. It does not appear that T-Mobile is a maverick in the antitrust sense of the term. In contrast, in a period of growth, T-Mobile has steadily lost consumers and has not increased output and market share.

It appears, in conclusion, that T-Mobile is neither a particularly close competitor or a maverick as would be required for either of the anticompetitive theories.

I am hopeful that my testimony has highlighted some of the relevant issues, and I thank you for your time and allowing me to speak on this topic.

[The prepared statement of Mr. Wright follows:]

Written Testimony of

Joshua D. Wright
George Mason University School of Law

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet

Hearing on
"How Will the Proposed Merger Between AT&T and T-Mobile Affect
Wireless Telecommunications Competition?"

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Mr. Chairman and Members of the Subcommittee - thank you for the opportunity to testify before you today. My name is Joshua D. Wright. I am a Professor of Law at the George Mason University School of Law. I also hold a courtesy appointment in the Department of Economics. I received a J.D. from UCLA in 2002 and a Ph.D. in economics in 2003. I was the inaugural Scholar-in-Residence at the Federal Trade Commission from 2007 to 2008 and have also served as a consultant to the Federal Trade Commission on a number of issues. My research focuses on antitrust and regulatory economics, including evaluating the competitive effects of mergers and other business transactions. I represent myself solely at this hearing and I have received no financial support for this testimony.

My testimony today focuses upon how we should think about evaluating the likely competitive effects of the proposed transaction between AT&T and T-Mobile USA from a consumer welfare perspective. There is a standard and well-understood economic framework for analyzing horizontal mergers. The 2010 Horizontal Merger Guidelines "describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition."[1] The Guidelines focus upon whether the proposed merger will "create, enhance, or entrench market power or to facilitate its exercise."[2]

[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://justice.gov/atr/public/guidelines/hmg-2010.pdf.
[2] *Id.*

Understanding both how the merging parties compete and how the proposed merger will change competition is necessarily key to this analysis.

Economists and lawyers at antitrust agencies answer these questions through highly fact-intensive investigations. Antitrust agencies collect evidence from the merging parties, their customers, competitors, suppliers, and industry observers;[3] the agencies then conduct various quantitative and qualitative analyses with these data. Given that the Agencies have better information and more time to conduct such analyses, my goal here is not to predict the competitive effects of the proposed AT&T / T-Mobile merger directly, but rather to highlight the types of issues that the antitrust agencies are likely to confront along the way in applying the analytical framework articulated in the Guidelines.

I. The Proposed Transaction and Competitive Landscape

A. The Proposed Transaction

AT&T, Inc.[4] is a company that serves as one of the leading providers of "wireless, Wi-Fi, high-speed Internet, local and long distance voice, mobile broadband and advanced TV services."[5] AT&T is headquartered in Dallas, Texas. T-Mobile USA, Inc. is a wholly owned subsidiary of the international telecommunication company

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[3] *Id.*

[4] AT&T Mobility LLC operates AT&T's wireless network and is a wholly owned subsidiary of AT&T, Inc. I will use AT&T throughout my testimony to refer to both AT&T Mobility and AT&T, Inc. and its wholly owned subsidiaries.

[5] AT&T, INC., ACQUISITION OF T-MOBILE USA, INC.: DESCRIPTION OF TRANSACTION, PUBLIC INTEREST SHOWING, AND RELATED DEMONSTRATIONS, at 15 (filed with the Federal Communications Commission April 2, 2011).

Deutsche Telekom AG. T-Mobile USA is headquartered in Bellevue, Washington. T-Mobile USA offers "nationwide voice and data services to both residential and business customers in the United States,"[6] but the majority of Deutsche Telekom AG's capital investments are concentrated in "the provision of fixed broadband and wireless services in Germany and the rest of Europe."[7]

In the proposed transaction, AT&T has agreed to acquire from Deutsche Telekom AG all of the stock of the T-Mobile USA on a debt-free basis for total consideration of $39 billion. The total consideration includes cash payment of $25 billion. The balance will be paid with AT&T common stock.

The key inquiry economists and agencies alike undertake is to determine whether and to what extent the merger may change the merging parties' incentive and ability to compete. This analysis is crucial to developing sensible predictions of the proposed merger on consumers. This inquiry begins with a fact-intensive analysis of how the firms compete with each other in the existing marketplace including a complete understanding of the competitive landscape in which the proposed transaction is occurring. The agencies will be expected to engage in this type of thorough analysis, and they will certainly do so. Here, I will highlight several industry trends and facts that will provide important context for an analysis of the likely competitive effects of the proposed transaction.

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[6] *Id.* at 15.
[7] *Id.*

B. The Competitive Landscape

The wireless market has grown dramatically since the mid-1990s. The number of wireless subscribers has increased over 650 percent from June 1996 to June 2010, growing from 38 million to over 293 million.[8] The average use of monthly voice minutes has increased 475 percent over the same time period, from 119 to 686 minutes per subscriber.[9]

Moreover, however, the remarkable increase in data services has proven perhaps the most significant development in the wireless market over this period. The Federal Communications Commission's Fourteenth Annual Wireless Competition Report (2010 FCC Report) confirms this shift from voice to data services while noting that AT&T alone reported that its mobile data traffic increased four times between June 2008 and June 2009 and 5000 percent from mid-2006 to mid-2009.[10] One industry analyst notes that Cisco "forecasts a 48-fold cumulative increase in North American mobile data traffic between 2009 and 2014,"[11] observes that "the biggest challenge facing the industry is the hyper growth of wireless data," and predicts that the industry average

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[8] *See* CTIA, CTIA'S WIRELESS INDUSTRY INDICES MID-YEAR 2010 RESULTS 24 (Chart 3) (2010).
[9] *Id.* at 204-05 (Table 86).
[10] FED. COMMC'N COMM'N, THE FOURTEENTH ANNUAL WIRELESS COMPETITION REPORT ¶ 183 (2010). A significant portion of this increase is attributable to the adoption of smartphones, and in particularly the iPhone. The FCC Report indicates that smartphone sales and adoption rates have increased in recent years. *Id.* ¶ 309.
[11] BERNSTEIN RESEARCH, U.S. TELECOMMUNICATIONS AND CABLE & SATELLITE: CAPITAL PUNISHMENT 57 (2010),. *See also* FEDERAL COMMUNICATIONS COMMISSION, MOBILE BROADBAND: THE BENEFITS OF ADDITIONAL SPECTRUM 18 (exhibit 10) (2010) (stating the average of three forecasts suggests a traffic growth rate of more than 35 times the 2009 level).

will fall from $0.42 per megabyte of data traffic in 2009 to just $0.02 in 2014.[12] Industry revenues also reflect the growing demand for wireless data services; they account for 31 percent of carrier revenues as of June 2010.[13]

Wireless service providers have vigorously competed on price, quality, and innovation during this period. For example, the 2010 FCC Report notes an 88 percent decline in average revenue per voice minute between June 1996 and June 2010. [14] The report notes average revenue per voice minute fell to $0.05 in December 2008 and dropped beneath $0.05 by June 2010. [15] Carriers compete on other margins as well. While the 2010 FCC Report notes that the wireless industry has seen an increase in market concentration (from a Herfindahl-Hirschman Index (HHI) of 2150 in 2003 to 2848 in 2008),[16] it correctly recognizes that "market concentration, by itself, is an imperfect indicator of market power."[17] That recognition appears pertinent in the wireless industry. Industry analysts have observed – even in the midst of dramatic growth and increasing industry consolidation – that neither AT&T nor Verizon "has been able to generate returns in excess of the cost of capital in the past decade"[18] due to the cost of continued capital investments in new spectrum and facilities to keep up with data traffic loads. Importantly, these facts suggest that mergers in this industry can and

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[12] *Id.* at 60.
[13] CTIA, *supra* note 8, at 124 (Chart 28).
[14] Declaration of Dennis W. Carlton, Allan Shampine & Hal Sider at ¶ 15 (June 13, 2008).
[15] Fed. Commc'n Comm'n, *supra* note 10, at 112 (Table 19).
[16] *Id.*, at 48 (Chart 2).
[17] *Id.* ¶ 55.
[18] Bernstein Research, *supra* note 11, at 69.

have generated important efficiencies which intensify competition and benefit consumers.

Capacity constraints characterize the current wireless competitive landscape. Wireless carriers must make significant investments to expand and upgrade network capacity. As consumer demand for data increases, and along with it smartphone adoption rates, wireless carriers are under competitive pressure to deploy "next generation" services and expand spectrum holdings in frequency bands compatible with their existing network equipment and devices. Given the practical difficulties and delays associated with expanding spectrum holdings through new auctions,[19] acquisition of incremental spectrum through merger is desirable relative to delay and rationing existing spectrum through higher prices. Further, capacity constraints can be conceptualized as creating a high marginal cost of expanding output to new consumers or improving quality for existing consumers. Relaxing capacity constraints reduces that cost and facilitates benefits to consumers including increased output and lower prices. To the extent that T-Mobile USA's network and available spectrum will complement AT&T's spectrum and network resources, the combination creates enhanced outputs that neither would be able to achieve as standalone companies. Without such integration, both companies will face significant commercial and spectrum-related

[19] *See, e.g.*, FED. COMMC'N COMM'N, FCC SPECTRUM ANALYSIS: OPTIONS FOR BROADCAST SPECTRUM, OBI TECHNICAL PAPER NO. 3 (2010).

challenges that cannot be solved by non-merger devices. Because both companies use GSM and UMTS/HSPA+ technologies, AT&T's acquisition of T-Mobile is anticipated to benefit consumers by freeing up spectrum for more "spectrally efficient LTE technologies," increasing and providing for more efficient use of capacity as well as improving overall service quality.[20]

II. Analyzing the Competitive Effects of the Proposed Transaction

As observed above, when assessing the potential competitive effects of a proposed merger, it is important to recognize that market concentration alone is a poor predictor. Indeed, one of the fundamental contributions of antitrust economics in merger analysis over the past several decades – during which time there has been a substantial convergence in the economic analysis of horizontal mergers – has been a shift away from near-sole reliance upon market definition and calculation of market shares, towards a direct, fact-intensive analysis of economic evidence on competitive effects.[21] This trend has been consistent, based upon advances in economic theory and empirical learning, and has resulted in a slow erosion of "structural presumptions" that infer anticompetitive effects from changes in market structure.[22] Fact-intensive analysis

[20] AT&T, Inc., *supra* note 5, at 7.

[21] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L. J. 701, 703 (2010) ("But the Court has given a great deal of guidance in Sherman Act cases, moving away from simple rules and towards an approach emphasizing the practical reality of the market and the likely effects of the practice in question.").

[22] Carl Shapiro, former Department of Justice Chief Economist, and one of the chief architects of the new Guidelines, has observed that the shift away from market concentration and "base predictions of

of potential anticompetitive effects as well as cost savings and other efficiencies are favored over such presumptions wherever possible.

Modern merger analysis articulates two general classes of theories of anticompetitive harm from horizontal mergers. Both classes of theories postulate that a proposed merger can reduce the incentives of the post-merger firm to compete by removing an important competitive constraint. "Unilateral" price effects arise when the post-merger firm will acquire market power that allows it to unilaterally – that is, without coordinating with its rivals – increase prices. "Coordinated" price effects, by contrast, arise when coordinated pricing or collusion between firms is more likely post-merger. One classic example of a coordinated price effect arises when an acquisition removes a "maverick" from the industry–a firm that disrupts attempts at coordinated pricing by the industry with its own low prices that steal market share from rivals. Whether either or both of these theories fit the facts of a given case requires a fact-intensive and careful economic analysis. Any such analysis must weigh both upward pricing pressure as well as potential pro-competitive efficiencies.

While a complete analysis of the merger is beyond the scope of this testimony, several established facts indicate significant tension with both unilateral and coordinated theories of potential competitive harm. On the other hand, the available evidence concerning the dramatic growth in data demand and capacity constraints

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competitive effects primarily on market concentration" reflects not only change in agency practice, but also the "gradual decline of the structural presumption" in the courts. *Id.* at 708 n. 25.

facing AT&T in particular with regards to available spectrum generates strong inferences that the merger is likely to produce consumer-welfare-enhancing efficiencies by relieving those constraints.

A. Unilateral Price Effects Appear Unlikely

Unilateral pricing effects appear unlikely to result from the merger. A conventional unilateral price effects analysis is based upon the notion that when the suppliers of two close substitutes merge and then raise the price of one product after the merger, some of the customers that the firm *would* have lost from the price increase are in fact recaptured in the form of increased sales by the merged firm's own (formerly-competing) product. These recaptured sales give the post-merger firm a greater incentive to increase prices than existed before the merger. Unilateral price effects are unlikely to arise when (and are not conventionally analyzed in the context of)[23] a merger allows an expansion of capacity.[24] Further, a theory of unilateral effects is especially relevant when the two merging firms sell products that are close substitutes. There is some evidence here that consumers do not perceive AT&T and T-Mobile USA wireless products as particularly close substitutes. For example, AT&T earns a greater fraction of its revenue from data services while T-Mobile USA substantially targets non-

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[23] *See, e.g.*, Jonathan B. Baker, *Merger Simulation in an Administrative Context*, 5 (Feb. 22, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1790943.
[24] *See* Decl. Dennis Carlton et al, ¶¶ 139-40.

contract subscribers and places less emphasis on commercial customers.[25] The 2010 FCC Report, for example, emphasizes the close price competition between AT&T and Verizon, not between AT&T and T-Mobile USA.[26] Given the continued presence of Verizon and Sprint after the merger, the likelihood that AT&T will be able to unilaterally raise prices after the merger therefore appears questionable. Similarly, given the continued presence of Sprint, Metro PCS, Leap and others that cater to the value oriented consumers that have been the focus of T-Mobile USA's business, it also seems questionable whether there could be unilateral effects with respect to those customers.

B. Coordinated Effects Appear Unlikely

It also does not appear that the proposed transaction raises a significant likelihood of coordinated effects. Mergers can facilitate pricing coordination by eliminating a particularly disruptive and aggressive rival – a "maverick," in antitrust parlance. A typical maverick disrupts stable and coordinated pricing with discounts, stealing market share and increasing output whenever possible.[27] It does not appear that T-Mobile USA is a maverick in the antitrust sense of the term.[28] While T-Mobile USA has sometimes offered lower prices than AT&T, this is not the economic definition

[25] *Id.* ¶ 145.
[26] Fed. Commc'n Comm'n, *supra* note 10, ¶ 92.
[27] The FCC adopts a similar definition of a maverick as "firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals," and "is well positioned to attract customers currently served by competitors." *See* FCC Memorandum Opinion and Order, FCC 04-255, ¶ 160 (October 25, 2004).
[28] *See also* Decl. Carlton et al, ¶¶ 154-55.

of a maverick. Without more, a price difference does not connote an aggressive pricing strategy. For example, the 2010 FCC Report recognizes that AT&T's price premium relative to T-Mobile USA includes consumer perceptions of higher quality and access to better handsets and phones.[29] Further, to be effective (and by definition), a maverick, must steal market share from rivals by lowering price and increasing output. In contrast – and standing in stark contrast to the industry in a period of broad growth – 2011 Q1 results indicate that T-Mobile USA has steadily lost customers and has not increased output and market share.[30] Instead, the 2010 FCC Report notes that "prepaid service providers (like MetroPCS) have been the most aggressive in cutting the price of unlimited service offerings."[31]

It appears that T-Mobile USA is neither a particularly close competitor, as required for a unilateral effects theory, nor a maverick, as required for a coordinated effects theory. As one industry analyst observed:

> due to the sins of the past T-Mobile is melting at both ends of the subscriber spectrum. It is losing premium subscribers to Verizon and AT&T, it is losing value conscious subscribers to Sprint, and budget

[29] Fed. Commc'n Comm'n, *supra* note 10, ¶ 92. *See also* Roger Entner, *When Choosing a Carrier, Does the iPhone Really Matter?*, NIELSENWIRE (Aug. 10, 2009) http://blog.nielsen.com/nielsenwire/consumer/when-choosing-a-carrier-does-the-iphone-really-matter/ (noting that "the number of consumers who perceive Verizon Wireless as having the best mobile network has shot up over the last two years and it leads its closest competitor now by an almost 2:1 margin").
[30] For example, T-Mobile USA reported that it lost over 400,000 post-paid subscribers. Roger Entner, *T-Mobile Results Show AT&T Arrived Just in Time*, FIERCE WIRELESS (May 9, 2011), http://www.fiercewireless.com/story/entner-t-mobile-results-show-att-arrived-just-time/2011-05-09#ixzz1NLJdfX6r.
[31] Fed. Commc'n Comm'n, *supra* note 10, ¶ 102.

conscious subscribers to the disruptive unlimited providers such as MetroPCS, Leap Wireless, and Tracfone's StraightTalk products."[32]

C. Efficiencies

As discussed above, both AT&T and T-Mobile USA face significant capacity constraints. These capacity constraints are due to the lack of available new spectrum – a problem unlikely to resolve itself in the immediate future – and create a high marginal cost of expanding output. The alternative to relieving the capacity constraint is to ration existing spectrum by raising prices. Consumers thus stand to capture significant welfare gains (by avoiding price increases) from relieving these constraints. Relief of capacity constraints seems likely to result from this merger. AT&T and T-Mobile USA have similar spectrum and network assets; both offer GSM and UMTS/ HSPA/ HSPA+ services and operate 1900 and AWS spectrum. Combining these assets provides some relief from the capacity constraints discussed above and further facilitates greater deployment of 4G LTE services (utilizing T-Mobile USA's AWS spectrum). Facilitating a shift to consumer use of faster and more spectrally efficient technology is tantamount to expanding capacity and provides significant consumer welfare benefits.

A full and fact-intensive analysis under the Guidelines is likely to discover and document other substantial cost savings as well. For example, AT&T and T-Mobile USA each operate a separate control channel for its GSM network. Combining these networks would allow the combined firm to deploy for consumer use the capacity from

[32] Entner, *supra* note 30.

one of these channels. Further, combining the spectrum assets of the firms can increase capacity by creating a denser network, allowing the same physical resources to more efficiently service a greater number of users. The Agencies will evaluate these efficiency arguments under the analytical framework set forth in the Guidelines and with an eye toward assessing whether the resultant efficiencies will generate consumer benefits. One issue that frequently arises in this context is whether efficiencies that result in a reduction in the merging parties' fixed costs should be incorporated in the antitrust calculus.[33] However, it is important to recognize that the Guidelines allow sufficient flexibility so as to properly consider fixed cost savings as a pro-competitive efficiency when these savings generate significant competitive benefits such as a resultant increase in output.

III. Conclusion

A comprehensive and fact-intensive analysis of this merger is beyond the scope of my testimony here. However, I am hopeful that I have highlighted some of the relevant antitrust economic issues. Thank you for allowing me the opportunity to share my views on this timely and important topic.

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[33] Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, Rev. Indus. Org. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744299 (discussing fixed cost efficiencies).

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Professor of Law, George Mason University School of Law

- Courses: Antitrust, Advanced Antitrust, Contracts I, Contracts II, Economic Foundations of Legal Studies, Intellectual Property and Antitrust

Associate Professor, George Mason University School of Law (August 2010-May 2011)

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- Taught courses in microeconomics and antitrust economics to state and federal judges
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Assistant Professor, George Mason University School of Law (January 2005-August 2010)

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RESEARCH INTERESTS

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Adjunct Professor, Pepperdine University Graduate School of Public Policy (2003)
- Graduate course in Law and economics

Lecturer, UCLA Department of Economics
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HONORS, GRANTS AND AWARDS

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Summer Associate, Latham and Watkins (2001)
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Intern, Federal Trade Commission, Bureau of Economics (1997)

PUBLICATIONS

BOOKS AND BOOK CHAPTERS

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The Effect of State Consumer Protection Act Liability on Insurance Prices (with Eric Helland)

If Search Neutrality is the Answer, What's the Question? (with Geoffrey A. Manne)

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Antitrust 3.0

Antitrust Contests (with Michael R. Baye and Paul Pautler)

Daubert and The Industrial Organization of the Economic Expert Witness Market (with Fred McChesney and Jonathan Klick)

The Law and Economics of Contracts: The Self-Enforcing Range and Contract Interpretation

Inference from Antitrust Event Studies (with Jonah Gelbach and Jonathan Klick)

The Antitrust-Consumer Protection Paradox: Two Policies at War with Each Other

ACADEMIC PRESENTATIONS

State Regulation of Alcohol Distribution: The Effects of Post and Hold Laws on Output and Social Harms

American Law and Economics Association Annual Meeting (May 2011)
United States Department of Justice Antitrust Division (October 2010)
George Mason University School of Law Levy Workshop (September 2010)
Washington University at St. Louis Law and Economics Workshop (September 2010)
Conference on Empirical Legal Studies (November 2010)

Behavioral Economics, Law, and Liberty

George Mason University School of Law (September 2010)
Mont Pelerin Society Annual Meetings (October 2010)

Misbehavioral Economics: The Case Against Behavioral Antitrust

Canadian Law and Economics Association Annual Meeting (October 2010)

Antitrust Sanctions

American Law and Economics Association Annual Meeting (May 2010)

Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals

Southern Economic Association Annual Meeting (November 2010)
Georgetown University Law and Economics Workshop (October 2009)
Washington University at St. Louis Law and Economics Workshop (October 2009)
UCLA Law and Economics Workshop (September 2008)
Northwestern University Law and Economics Workshop (September 2008)
Stanford Law and Economics Workshop (January 2009)
University of Texas Law and Economics Workshop (December 2008)
George Mason University Economics Department Public Choice Seminar (April 2009)
American Law and Economics Association Meetings (May 2009)

Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup

Duke University Law School Intellectual Property Symposium (February 2008)
George Mason/ Microsoft Conference on the Law and Economics of Innovation (2008)
Tilburg Law and Economics Center (December 2008)

The Effects of Contract Regulation in the Alcoholic Beverage Industry

Southern Economic Association Annual Meeting (November 2007)

Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust Relevant Theory of Competition Now?
George Mason/ Microsoft Conference on the Law and Economics of Innovation (May 2007

The Antitrust Law and Economics of Category Management
American Law & Economics Association 2004 Annual Meeting

The Economics of Slotting Contracts
Silicon Flatirons New Institutional Economics Conference (June 2009)
Peking University Conference on Chinese Anti-Monopoly Law (October 2007)
American Law & Economics Association 2005 Annual Meeting
International Society of New Institutional Economics 2004 Annual Meeting
George Mason University Law School Levy Workshop (March 2004)

Slotting Contracts and Consumer Welfare
George Mason University Law School Levy Workshop (March 2006)
University of Texas Law School Center for Law, Business, and Economics (January 2006)
International Industrial Organization Conference (April 2006)
American Law & Economics Association 2006 Annual Meeting (May 2006)
Southeastern Association of Law Schools Annual Meeting (July 2006)
Southern Economic Association Annual Meeting (September 2006)
First Annual Conference on Empirical Legal Studies (October 2006)

Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective
NYU Journal of Law and Liberty Symposium (October 2006)

The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond
University of Missouri-Columbia School of Law (February 2008)
William S. Boyd School of Law, UNLV (April 2008)

CONFERENCES AND TESTIMONY

Panelist, George Mason University Law and Economics Center Conference on The Law and Economics of Search Engines and Online Advertising (June 2011)
Panelist, The FCC's Wireless Competition Report: A Preview (May 2011)
Panelist, George Mason University Law and Economics Center Conference on Behavioral Economics and the Consumer Financial Protection Bureau (March 2011)
Panelist, The Federalist Society Program on the FTC and The Internet (January 2011)
Panelist, The Federalist Society Program on Regulation of the Internet (December 2010)
Panelist, Stanford/ Hoover Institute Conference on Patents, Innovation and Business (June 2010)
Panelist, DOJ/FTC Proposed Merger Guidelines Workshop (January 2010)
Panelist, LECG Consumer Protection and Antitrust Conference (October 2009)
Panelist, Technology Policy Institute Conference on High-Tech Antitrust (October 2009)

Panelist, SEALS Empirical Legal Research Workshop (August 2009)
Panelist, ICANN Workshop on Economic Analysis of Vertical Separation for New gTLDs (June 2009)
Panelist, Cato Institute Program on Antitrust in the New Administration (June 2009)
Panelist, FTC Workshop on Resale Price Maintenance (May 2009)
Panelist, Searle Center Conference on Antitrust Law and Economics (September 2008)
Panelist, FTC at 100 Conference (September 2008)
Panelist, Federalist Society Conference on Intellectual Property (July 2008)
Panelist, SIEPR/ Hoover Institution Conference on the Modernization of Antitrust (May 2008)
Panelist, Searle Center Research Roundtable on the Theory of the Firm (March 2008)
Panelist, Searle Center Research Roundtable on the Law and Economics of Innovation (January 2008)
Panelist, Searle Center Conference on The End of the Microsoft Consent Decree (November 2007)
Panelist, DOJ/FTC Hearings on Sherman Act Section 2 and Single Firm Conduct on Exclusive Dealing
Panelist, George Mason Law Review Fall 2006 Antitrust Symposium

PROFESSIONAL ACTIVITIES

Director of Research, International Center for Law and Economics in Honor of Armen Alchian
Research Director, Searle Civil Justice Institute at the George Mason Law and Economics Center
Member, National Science Foundation Law and Social Science Advisory Panel
Member, Global Competition Policy Magazine Advisory Board
Editor, Supreme Court Economic Review (Volume 20-present)
Assistant Editor, *Antitrust Law Journal*
Referee, *Review of Law and Economics; Supreme Court Economic Review, Review of Industrial Organization, Journal of Legal Studies*
Contributor, *Truth on the Market* (a blog dedicated to academic commentary on law, business, and economics)
Co-Founder, Microsoft and George Mason Conference Series on the Law and Economics of Innovation
Conference Organizer, Merger Analysis in High Technology Markets (Feb. 1, 2008)

AFFILIATIONS AND MEMBERSHIPS

International Industrial Organization Society
American Economics Association
Southern Economic Association
International Society of New Institutional Economics
Sloan Foundation Industry Studies Affiliate
American Law and Economics Association

Federalist Society
California Bar Association
American Bar Association Antitrust Section

Mr. GOODLATTE. Thank you, Professor Wright.
Professor Gavil, welcome.

TESTIMONY OF ANDREW I. GAVIL, PROFESSOR, HOWARD UNIVERSITY SCHOOL OF LAW

Mr. GAVIL. Good morning, Chairman Goodlatte, Ranking Member Watt, Chairman Smith, and Ranking Member Conyers. Thank you all for this opportunity to offer my views on the competitive issues posed by the proposed acquisition by AT&T of T-Mobile USA.

As the Subcommittee is well aware, few industries are likely to be as important to our national economic, social, and political health in the 21st century as wireless telecommunications, and the proposed merger will significantly alter the shape of that industry.

Will the merger enhance the competitiveness of this field, producing lower prices, higher quality, and robust innovation? Or will it increase the incentives of the merging firms and other firms in the industry to exploit consumers, impair rivals, and stunt the growth and advancement of the industry? These are challenging and fact-intensive questions, as my colleague, Professor Wright, has pointed out.

Without access to the full range of information necessary to a fully informed analysis, I cannot offer you a confident, professional opinion today as to whether the merger will likely or not prove to be a violation of section 7. My goal is far more modest. In my brief time, I hope that I can help to identify some of the critical questions this Subcommittee's Members may want to pose in reaching your own conclusions.

I will confess, however, that I am deeply concerned that the proposed merger presents very substantial risks of anticompetitive effects across multiple dimensions of competition, not merely cell phone service to consumers.

While AT&T and T-Mobile have begun to make their case that consumers will realize benefits from the merger, the assertions are as yet not fully substantiated.

I am also very skeptical that a negotiated settlement between the Government agencies and AT&T and T-Mobile that permits the merger to go forward with conditions could be effective and consistent with the Clayton and Telecommunications Act's commitment to competition.

Hence, the question I am asking myself and the question I urge you to ask as well is why would we want to take this risk. Once this merger is complete, there will be no method for either the agencies or Congress to resurrect competition once it is gone.

My remarks focus on three points: competitive effects, efficiencies, and that last point about the quality that we could expect out of a regulatory settlement.

First, competitive effects. I would completely agree with the framework that Professor Wright has set out about how we go about analyzing mergers in a modern framework, but I think we disagree in the application here. And I know I am not as optimistic as he is about the outcome and not as certain as he is in the conclusions he has reached in terms of the record that we have before us today.

Yes, it is true that we don't today look solely at concentration. But we do look at concentration. The proposed merger would reduce the number from four to three which, under the guidelines promulgated by the Government, creates a strong presumption that it will be anticompetitive, and if the merger marginalizes Sprint as a major national player, the effective result could be to reduce competition from four to two.

What impact will that have on the incentives of these firms to compete? Will they compete aggressively post-merger?

AT&T has urged that they face aggressive competition from fringe competitors in local markets and that we should analyze the merger based on those local markets. But they are the principal conduits through which all of the extraordinary technological advances in this industry flow. Smaller fringe rivals simply do not perform that gateway function and would not be able to compete on the same footing. So concentration levels remain high today and they will be even higher.

This idea that we should analyze it on a local basis, city by city, can easily be seen to be a challenge if we just imagine some other examples. We buy major appliances and automobiles locally as well, but would a merger between Whirlpool and General Electric or a merger between General Motors and Chrysler be something that we would look at at a local level and think about fixing it through spinning off dealers? I think not.

Another concern I have is not just how much of a competitor T-Mobile is but what kind of a competitor it is. Has it been especially disruptive in this industry? Has it been especially price-sensitive? If it has, then its loss could be a loss out of dimension to its apparent size.

I am concerned about the impact the merger may have on innovation. As I said, many of the innovations we now enjoy are channeled through these two mega-portals, AT&T and Verizon. That will be more so in the future and they will be gatekeepers for innovation in the industry.

And finally, I am concerned about exclusionary conduct. What will their incentives be with respect to their rivals because of the dependency those rivals already face in terms of interconnection and roaming?

In conclusion, I would just again come back to my concern about a regulatory decree. I would urge the agencies who are reviewing this deal to reach an up or down, yes or no decision. I am very concerned that a judicially managed regulatory approach would be contrary to the spirit of the Telecommunications Act, indeed contrary to the reliance on competition that it was designed to implement. We should not go back to the days of regulated monopoly and Ma Bell.

Thank you very much, and I stand ready to answer any questions.

[The prepared statement of Mr. Gavil follows:]

Written Statement of
Professor Andrew I. Gavil
Howard University School of Law
Before the
House Judiciary Committee
Subcommittee on Intellectual Property, Competition, and the Internet
May, 26, 2011
2141 Rayburn House Office Building

Hearing on
"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

INTRODUCTION

Chairman Goodlatte, Ranking Member Watt, and members of the Subcommittee, Chairman Smith and Ranking Member Conyers, my name is Andrew Gavil and I am a professor at the Howard University School of Law where I have taught Antitrust Law since 1989.[1] Thank you all for this opportunity to offer my views on the competitive issues posed by the proposed acquisition by AT&T Inc. of T-Mobile USA, which is now being reviewed by the Antitrust Division of the Department of Justice and the Federal Communications Commission. As the Subcommittee is well aware, few industries are likely to be as important to our national economic, social, and political health in the twenty-first century as wireless telecommunications. As we migrate as a nation towards ever greater reliance on increasingly sophisticated and capable mobile communications devices and platforms, we need to carefully scrutinize efforts like this one to significantly alter the shape of that industry through the merger of two of its leading firms as opposed to internal expansion and innovation. Will the merger enhance the

[1] For complete biographical information and curriculum vitae, see: http://www.law.howard.edu/418. By way of disclosure, I do not represent any party with an interest in the proposed AT&T-T-Mobile merger and have not received any remuneration or other support in return for preparing this Statement.

competitiveness of this field, producing lower prices, higher quality, and robust innovation, or will it increase the incentives of the merging firms and other firms in the industry to exploit consumers, impair rivals, and stunt the growth and advancement of the industry?

These are not simple questions. Making a prediction about the likely future competitive consequences of a merger is challenging, especially in the case of such large-scale mergers in technologically sophisticated industries. The costs and consequences of error may be high if due to a challenge the merger is abandoned and consumers are denied real benefits. On the other hand, lack of a challenge when warranted may subject consumers to years of higher prices and reduced innovation owing to the loss of a vital and leading competitor that the agencies and the Congress will be powerless to resurrect.

Merger analysis under both the competition-focused framework used by antitrust agencies and the broader "public interest" standard used by the FCC is fact intensive and necessarily begins with in-depth review of often vast quantities of material provided by the merging parties and their rivals. These are all sophisticated, but also quite obviously self-interested firms, and they will be inclined through their respective armies of lawyers, lobbyists, and economists to present their cases in the most favorable light, painting potentially exaggerated pictures respectively of enormous costs or benefits for consumers. Your task, as is the task of the agencies, is to separate the wheat from this considerable mound of self-interested chafe. The necessary investigation, therefore, must probe beyond the more obvious, publicly available information and prepared statements of industry participants, to include the internal strategic planning documents and communications that can more clearly illuminate the parties' goals and the likely effects of the transaction. It will also be necessary, as is evident in today's Hearing, to go outside the merger candidates and their rivals to talk to customers, suppliers, and advocates of various interest groups.

Without access to the full range of information necessary to a fully informed analysis, I cannot as I sit here today offer you a confident professional opinion as to whether the merger will likely or not prove to be a violation of Section 7 of the Clayton Act, a boon to consumers, or perhaps even an event of little or no durable competitive consequences. My goal is far most modest. In my brief time, I hope that I can help to identify some of the critical questions this Subcommittee's members may want to pose in reaching your own conclusions.

I will confess, however, that I am deeply concerned that the proposed merger presents very substantial risks of anticompetitive effects across multiple dimensions of competition in what can only be viewed as an awesomely strategic and already highly concentrated industry. While AT&T and T-Mobile have begun to make their case that consumers will realize benefits from the merger, the assertions are as yet unsubstantiated. Hence, the question I am asking myself, and the one I urge you to ask as well, is this: "Why would we want to take the risk?" To explain, my remarks will focus on three points:

- The competition issues raised by the proposed acquisition are obvious, substantial, and wide-ranging, and cannot be analyzed solely through the lens of local consumer markets;
- The public justifications offered to date by AT&T and T-Mobile are vague, do not sufficiently address the likely competitive concerns raised by the merger, and may be based on strategies that the parties could well pursue now without the merger; and
- A negotiated, regulatory fix between AT&T and the federal agencies seems unlikely to be adequate to address the merger's competitive problems and will return an important segment of the telecommunications industry to the kind of ad-hoc, judicially managed regulatory approach that the Telecommunications Act was intended to supplant.

I. Discussion

A. The Competition Issues

The first and most fundamental question to ask in merger analysis is: "*What is the probability that the proposed acquisition will be 'anticompetitive'*"? For the overwhelming number of mergers and acquisitions consummated each year in the U.S., the answer to this question is "it can't," largely because the merging firms lack the power to affect prices or other dimensions of competition. To be anticompetitive, a merger must involve firms that have some degree of "market power" or the hope of establishing it through the merger. Consistent with the case law, the Horizontal Merger Guidelines issued jointly last summer by the Antitrust Division of the Department of Justice and the Federal Trade Commission thus take the position that: "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[2] As they go on to explain: "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[3]

The focus of the competitive effects evaluation of AT&T's bid to acquire T-Mobile, therefore, should not only be the immediate impact of the merger on conditions facing consumers, such as price, type, and quality of voice and data services, but must include the longer term implications of the merger for innovation in telecommunication services, handsets, mobile device operating systems, software applications, chipsets, and screen technologies, as well as transmission and compression technologies. AT&T, T-Mobile, Verizon, and Sprint, are

[2] *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES §1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html (hereinafter "Horizontal Merger Guidelines").

[3] *Id.*

not just service providers, they are the principal conduits through which all of the extraordinary technological advances in this industry flow and are delivered to various categories of consumers, such as individuals and enterprise clients. Their smaller rivals simply do not perform that gateway function, at least not to the same degree.

How then can a merger be "anticompetitive"? A merger can be anticompetitive because it makes it easier for all of the firms in an industry to coordinate their pricing or other competitive behavior ("coordinated effects"), because it permits the merged firm alone profitably to raise price or otherwise restrict competition ("unilateral effects"), or because it makes it profitable for the merged firm or other firms to impair the opportunities of rivals to compete on the merits ("exclusionary effects").[4] All three theories of anticompetitive effect share a common focus on the incentives of the firms and how they might be influenced by the merger. In the case of AT&T's proposed acquisition of T-Mobile, there are important questions to ask about all three kinds of potential adverse effects.

Historically, courts and agencies have presumed that anticompetitive effects become increasingly likely as the concentration in an industry reaches very high levels. Today, although the analysis of a merger goes well beyond a simple calculation of market shares before and after a deal,[5] market shares remain an important benchmark of most merger analyses because

[4] *See, e.g.*, ANDREW I. GAVIL, ET. AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 434 (2d ed. 2008). Although the Horizontal Merger Guidelines focus primarily on coordinated and unilateral effects, *see* HORIZONTAL MERGER GUIDELINES §§ 6 & 7, they acknowledge that "[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct." *Id.* at §1.

[5] The agencies might look, for example, at evidence of the effects of previous mergers in the industry, of the effects of recent entry or exit of firms, at variations in pricing and other dimensions of competition in different regions or with respect to different kinds of customers, and the disruptive role of "maverick" firms, which tend to stir up competition in some industries. *See* HORIZONTAL MERGER GUIDELINES §2.1.

"[m]arket shares can directly influence firms' competitive incentives."[6] Under the Horizontal Merger Guidelines, a merger that reduces the number of principal players in an industry from 5 to 4, the equivalent of a Herfindahl-Hirschman Index of 2500, results in a "highly concentrated" market and raises substantial competitive concerns.[7] Likewise, the courts have concluded that a 3-2 merger can rarely, if ever be justified.[8] So from the point of view of competitive effects, however one defines the markets involved here, AT&T's acquisition of T-Mobile is squarely within a zone of high concern.

Finally, because merger analysis is not complete with an analysis of the likely impact of the merger on the merging firms, we must also look to the industry, specifically its likely state after the merger. An important and obvious question is whether this will in fact turn out to be a "4 to 3" merger or whether it will in reality be a "4 to 2," because Sprint Nextel will be so marginalized that its effectiveness as a competitor – even if it remains viable as one – will be compromised. Will it be a competitive peer of Verizon and AT&T? It will also be important to evaluate the impact of the merger on conditions of entry in the industry, which are already difficult. Will anything about the merger further increase existing barriers to entry, or create new ones, such that the likelihood of supply responses to higher prices or other kinds of diminished competition will go unchecked?

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[6] *Id.* at §5.

[7] "Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." HORIZONTAL MERGER GUIDELINES §2.1.3; "Mergers resulting in highly concentrated markets [defined as having an HHI of 2500 or more] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* at §5.3.

[8] *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

With this overall framework in mind, I turn to four more specific issues that warrant careful consideration in the antitrust analysis of the proposed acquisition.

1. Price, Quality and the Proper Use of "Market Definition"

Whenever two direct competitors merge, the immediate and most obvious question is whether the merger will lead to higher prices or some other incident of reduced competition such as lower quality services. This will be an important focus of the agencies' evaluation of the instant merger given the degree of direct competition between AT&T and T-Mobile and the very high level of concentration. Essential questions will include whether the merger is likely to make it easier for the merged firm to coordinate its pricing and other competitive decisions with its principal rivals, Verizon and Sprint Nextel.[9] Will it lead these firms collectively to compete less aggressively? Another important area of inquiry will be whether AT&T and T-Mobile sell differentiated products that are especially close substitutes for one another, either for specific customers or in specific geographic areas, such that T-Mobile currently acts as a constraint on AT&T's pricing. This might suggest that a pre-merger effort to raise price that might not have been profitable could become profitable post-merger, because AT&T could recapture the customers that it likely would have lost to T-Mobile prior to the merger.[10]

These two scenarios focus on the most immediate potential consequences for consumers of wireless voice and data services, but they are not the sole areas of competitive concern. AT&T and T-Mobile also buy and sell other products and services that could be affected by the

[9] For a more complete discussion, see HORIZONTAL MERGER GUIDELINES §7.2. A related question will be whether the industry already exhibits signs of coordination, as was recently alleged in a private antitrust case. *See In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010).

[10] This scenario describes one kind of "unilateral effects". *See* HORIZONTAL MERGER GUIDELINES §7.1.

merger. It is important to also ask, therefore, whether the merger will alter AT&T's incentives (and Verizon's) in its dealings with its smaller rivals, with whom it negotiates interconnection agreements for its wired lines as well as wireless roaming agreements that today facilitate rivalry. Here the concern is the future incentive to engage in *exclusionary conduct*. Will the merged firm be in a position to impose additional costs on its rivals that might enhance its own profitability?[11] AT&T's assertion that the merger will permit T-Mobile's customers to have access to the latest and best devices, such as the iPhone and iPad, which are currently distributed by AT&T but have been denied to T-Mobile, is an indirect admission that it is already difficult for smaller providers to compete effectively for the latest equipment. How will the merger affect that and other incentives for AT&T and Verizon in the future?

And what of the merged firm's incentives with respect to handset manufacturers, mobile operating system and applications developers, and manufacturers of cell towers – the full range of firms with whom AT&T and T-Mobile currently interact? Are any of those firms concerned about the consequences of the merger and the prospect of the combined firm's potential as a "power buyer"?[12] Their choices in seeking to market new products and technological innovations could be severely curtailed.

As a response to these kinds of questions, AT&T has sought to focus discussion on "market definition," arguing that city-by-city analysis should be used to judge the effects of its acquisition of T-Mobile. Its primary argument for such an approach is that market power must

[11] Concerns about the exclusionary effects of mergers were recently on display in the Department of Justice's review of the Comcast-NBC/Universal deal and in Google's acquisition of ITA. For an explication of the economic analysis of exclusion that was undertaken in Comcast, see Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, ANTITRUST, Spring 2011, at 36.

[12] HORIZONTAL MERGER GUIDELINES §12.

be judged in terms of buyer substitution – "what choices are available to consumers in the event of a price increase?" AT&T appears to believe that more choices than just "the big four" are available to consumers in some localized markets, and hence the case for market power will be weakened if assessed in that context. Implicit in this approach is that any severe "local" competitive problems can be cured through "slice and dice" localized divestitures. These arguments should be scrutinized carefully.

First, based on the localized data prepared each year by the FCC, many of the leading local areas of service are already significantly or highly concentrated. So it is not clear that limiting the inquiry to localized competition will significantly alter the statistical analysis.[13] Moreover, even if the relevant *geographic markets* are local, the "*product*" being sold by AT&T and T-Mobile may be national and international wireless service. We have all seen the advertising campaigns with accompanying maps touting the breadth of AT&T and Verizon's coverage. Yet nationwide wireless coverage is something that their smaller rivals cannot offer absent interconnection and roaming agreements with their larger rivals. So the "local market" argument may tend to distort, not aid, the competitive effects analysis, because those local options may not constrain the pricing of national service providers like AT&T.

This may be an instance where the pre-merger internal documents of the merging parties are more revealing than their after-the-fact public statements, which have been crafted to make

[13] The most recent FCC annual review of competition in the industry concludes that levels of concentration are already very high in many regions of the country and have been steadily increasing. *See* FEDERAL COMMUNICATIONS COMM'N, 14[TH] ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES §C2 (May 20, 2010), *available at* http://www.fcc.gov/reports/commercial-mobile-radio-services-cmrs-competition-report-14th-annual. According to a Wall Street Journal analysis based on 2008 FCC data, the wireless service markets in ten leading U.S. geographic areas accounting for nearly 87 million subscribers are already highly concentrated. *See* Spencer E. Ante & Roger Cheng, *The Changing Telecom Landscape: Wireless Deal Dials Up Worries*, WALL ST. J., Mar. 22, 2011, at B4.

their case for the merger. While it is relatively easy in the heat of battle to imagine all kinds of peripheral rivals that constrain one's pricing, the internal documents, advertising campaigns, and other more objective evidence will tell the fuller story of which firms constrain AT&T pricing.[14] Those documents may reveal, for example, that in making their primary pricing and service decisions, AT&T and T-Mobile focus predominantly on each other, Verizon, and Sprint Nextel, paying little mind to smaller rivals, or they may support the assertion that competition is more robust and varied.[15]

More importantly, a myopic approach to defining the relevant markets is neither analytically sound nor complete. The essential inquiry in merger analysis is not market definition, but anticompetitive effect. Market definition and market share calculations are at best indirect ways of predicting anticompetitive effects. As a result, market definition may not be a necessary step in merger analysis in cases where more direct measures of competitive effect are available.[16] Those kinds of measures may yet emerge as significant in this case. Moreover, even to the extent market definition is an integral part of the analysis it is possible and often wise to evaluate competitive effects on multiple dimensions, not simply through the lens of a single

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[14] This was true in the Microsoft monopolization case, where Microsoft persistently asserted that its Windows operating system competed with many other kinds of desktop and portable operating systems. The courts soundly rejected the arguments, however, because there was little evidence to support the argument that such peripheral rivals actually affected Microsoft's pricing and other strategic decisions. *See United States v. Microsoft Corp.*, 253 F.3d 34, 51-54 (D.C. Cir. 2001).

[15] This kind of evidence was found to be persuasive with respect to defining the relevant product markets in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). There, although the merger was evaluated based on metropolitan areas, the product market was defined as "the sale of consumable office supplies through office superstores," so the market share calculations did not include non-superstore suppliers.

[16] As is explained in the Horizontal Merger Guidelines, "The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis." HORIZONTAL MERGER GUIDELINES §4.

"relevant market." Here, AT&T and T-Mobile's business activities are not limited to the provision of wireless communication services to "local" consumers. They sell their services through their respective Internet websites nationally, they sell directly to enterprise clients, and they buy various handsets that include various operating systems, and enter into roaming agreements with smaller rivals on a national and international scale. AT&T, T-Mobile, Verizon and Sprint also compete head-to-head by bundling handset and wireless services for sale through large, national retail chains like Best Buy, Staples, and Office Depot, a dimension of competition that has influenced competitive effects analysis in other merger cases.[17] So to gain an accurate picture of the impact of the merger, it may be necessary to look at multiple relevant markets.

Indeed, an antitrust analysis that focused narrowly on local sales to consumers could simply overlook the many possible competitive ramifications of AT&T's acquisition of T-Mobile.[18] The problem can be illustrated with some common examples. Consumers purchase major appliances and automobiles locally, but we would not analyze a merger of Whirlpool and General Electric or General Motors and Chrysler solely through local market data. In both examples, the firms are obviously national rivals, as is also obviously the case with AT&T, Verizon, Sprint Nextel and T-Mobile. In such cases, exclusive reliance on local market analysis would ignore too many dimensions of the mergers that could impact competition. That is why a formalistic, market definition-driven approach, rather than an effects-driven approach, could lead to inaccurate predictions about the likely effects of the merger.

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[17] *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

[18] As will be discussed at greater length below, this is also why a "local fix" strategy based solely on a simplistic, localized vision of competition would likely prove to be inadequate.

AT&T surely has been well-counseled as to all of this. It seems likely, therefore, that it has consciously chosen to argue its case for approval in this way for strategic reasons. First, doing so downplays the broader implications of the merger for significantly altering the structure of the entire industry – it focuses on the market definition trees in lieu of the competitive effects forest. Second, it justifies including in the market share calculations service providers that offer only local services, which might in some areas appear to lower the market shares of the merging firms. Third, and most obviously, it lays the foundation for suggesting that there is a fix for the competitive problem that need only be negotiated between the merging parties and the agencies. If competition is local, one should seek to identify the areas in which AT&T and T-Mobile have the most significant overlap – where their combined market shares are unacceptably high. Then, local solutions can be found in the form of some kind of slice and dice divestiture order. This "sacrificial lamb" strategy is designed from the outset to lead ineluctably to the conclusion that the competitive problems presented by the merger can be isolated and excised like a localized instead of a metastasized cancer. It is an invitation to negotiate, as if the merger involved supermarkets or local factories, so that attention is turned away from the larger question: "should the transaction be permitted at all?"

2. Elimination of a Maverick

A distinct issue in the analysis of the AT&T-T-Mobile acquisition concerns T-Mobile. Although for purposes of the competitive effects analysis it is important to understand *how much* of a competitor it is, it is also important to understand *what kind* of a competitor it is. The academic commentary and Horizontal Merger Guidelines recognize that we should be especially cautious about permitting the acquisition of a "maverick" – "a firm that plays a disruptive role in the market to the benefit of customers."[19] Has T-Mobile been such a positive, disruptive force in the industry? Has it been a leader in adopting new technologies, business strategies, or in lowering prices?

According to a March 2011 Wall Street Journal article, "Sprint Nextel Corp. and T-Mobile USA have been the most aggressive discounters among U.S. wireless providers, offering plans that are cheaper than those of both AT&T and Verizon Wireless.... They also are the only providers offering unlimited calling and data services."[20] The absorption of T-Mobile into AT&T, therefore, could result in the loss of an important constraint on the pricing behavior of AT&T and Verizon and an important channel for introducing new technologies to consumers. The end result might be to move the industry closer to the "quiet life" that favors coordination and leader-follower behavior over aggressive competition. This is an issue that must be carefully evaluated.

3. Innovation

One area that has received increasing attention in merger analysis – indeed in all antitrust analysis – is "innovation."[21] Innovation has always been a driving force behind competition and economic progress, but it is especially pivotal to today's technology industries. Even a casual

[19] HORIZONTAL MERGER GUIDELINES §2.1.5. For a more complete explanation of the role of mavericks in merger analysis, see Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002).

[20] *See* Spencer E. Ante & Roger Cheng, *The Changing Telecom Landscape: Wireless Deal Dials Up Worries*, WALL ST. J., Mar. 22, 2011, at B4. *See also* Jeff Bliss, *AT&T's Purchase of T-Mobile Questioned on Prices by FCC Official*, BLOOMBERG NEWS, Apr. 12, 2011 ("One way T-Mobile has sought to distinguish itself is on price."), *available at* http://www.bloomberg.com/news/2011-04-12/at-t-s-t-mobile-usa-takeover-questioned-by-fcc-official-over-price-impact.html.

[21] HORIZONTAL MERGER GUIDELINES §6.4.

observer would have to be impressed by the advances that competition has delivered in the last decade in telecommunications. In just over two decades we have advanced from the heavy, large "brick phones" that introduced mobile telephony, to far smaller, lighter, and more sophisticated handsets, smart phones, and tablet PCs, that have been enabled by a range of innovative mobile operating systems, more advanced processors, and faster data transmission. All of these fruits of competition have inured to the benefit of consumers. Importantly, many did not come from the telecommunications service companies, but from their suppliers.

Like pricing incentives, innovation incentives can be affected by a merger, but with longer term and potentially significant ramifications. The agencies and this Subcommittee will want to carefully consider the likely impact AT&T's acquisition of T-Mobile will have on innovation in the telecommunications industry. Here, as in the general analysis of competitive effects, the focus cannot be limited to an evaluation of innovation competition between AT&T and its primary rivals. It must go further to include the incentives of all of the industry participants who will need to channel their inventions through essentially two mega-portals: AT&T and Verizon. With the two largest installed bases of customers, they will become the gatekeepers of much of the innovation that flows to consumers. How will that affect their incentives and how will it affect the incentives of their suppliers? Like twin neutron stars, their gravitational force may well alter the trajectory of innovation for a generation.

B. The Proffered Justifications

Although concentration measures can provide a useful initial screen for identifying mergers that may substantially lessen competition, concentration alone is not a sufficient basis for condemning a merger. As the case law and the Horizontal Merger Guidelines recognize, even in the case of highly concentrated markets, the presumption of harm "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."[22] However, the courts and the agencies have used a "sliding scale" to establish the relative burdens on the parties and have consistently concluded that the higher the post-merger level of concentration, the greater the concern for competition, and hence the more demanding the standard of proof will be for the merging firms who seek to justify their deals.[23] So if the agencies conclude that the merger presents a substantial threat to competition, the second major question will be "*has AT&T proffered sufficient justifications in kind and evidence to suggest that, despite the inferences to be drawn from industry concentration, the merger will not create, enhance, or entrench its market power*"?

Although it is surely true that as a technical legal matter the government would bear the burden of proving likely anticompetitive effect if the merger is ultimately challenged in court, as a part of the agency review process AT&T can be expected to produce evidence of what our Horizontal Merger Guidelines call "cognizable efficiencies." Cognizable efficiencies are *verifiable* and *merger-specific*, and they cannot arise out of the anticompetitive effects of the merger.[24] All three requirements are very important. If two merging firms challenge the prediction that the profitability of a post-merger price increase will provide them with the

[22] HORIZONTAL MERGER GUIDELINES §5.3.

[23] "The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis." HORIZONTAL MERGER GUIDELINES §5.3. *See also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001)("'[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully,'" *quoting United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990)(an opinion authored by then Judge Clarence Thomas and joined by then Judge Ruth Bader Ginsburg).

[24] HORIZONTAL MERGER GUIDELINES §10.

incentive to raise price and harm competition by arguing that a second, more dominant incentive will lead them to instead achieve efficiencies that will lead to lower prices or improved services, they must produce evidence to support the claim – evidence that typically only they possess. And evidence of benefits that are unlikely to alter the incentives to restrict competition is simply not relevant for purposes of the antitrust analysis. Although it might be considered by the FCC as part of its broader "public interest" charge, because such non-competitive benefits do not tend to dissipate the predicted anticompetitive effect, they are simply irrelevant for antitrust purposes.

If the merging parties can show that efficiencies will create a counter-acting incentive to compete, they must also show that those efficiencies can only be achieved through the merger. If they can be achieved *without* the merger, than the merging firms' arguments falter in two ways. First, the merger does not appear to be a necessary vehicle for achieving them and hence cannot be used as an excuse for doing so. Second, however, the entire defense suffers from a lack of credibility: if the acquiring firm, for example, has current strategies available to it to lower its costs or improve its product, but has failed to pursue them, then the promise that it will do so post-merger can be fairly questioned. Finally, it is fair to question the stated scope of efficiencies and the promise that they will directly benefit consumers.[25]

AT&T has focused its public efforts to justify the merger on its need for additional spectrum. As reported in the Wall Street Journal, "T-Mobile lacked sufficient spectrum to upgrade to next-generation wireless technology. AT&T faced a longer-term capacity crunch

[25] *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp 1066, 1088-90 (D.D.C. 1997)(rejecting efficiency defense as unsubstantiated, exaggerated, and unlikely to be passed on to consumers).

because of the explosion of traffic."[26] It promises that with more and/or more effective use of spectrum, it will be able to provide higher quality voice and data services (fewer dropped calls, for example), and a broader range of data-intensive mobile Internet services. The argument invites two immediate questions: (1) how can two capacity constrained firms increase their capacity through merger? In other words, how can 0 + 0 = 1? And (2) why can't AT&T utilize the substantial cash it is using to acquire T-Mobile to instead make these improvements on its own?

In his prepared statement before the Senate Judiciary Committee on May 11, 2011, AT&T's Chairman, CEO, and President made the case this way:

> So, to meet the ever increasing demand by consumers, we have to find ways to get more capacity from existing spectrum. That is exactly what the combination of AT&T and T-Mobile will do. Our two companies have very complementary assets, which means that combining them will create much more service-enhancing network capacity – the equivalent of new spectrum – than the two companies could have done operating separately. That, in turn, means more room for growth and innovation, fewer dropped and blocked calls, and a faster, more reliable mobile Internet experience.[27]

The agencies and this Subcommittee should carefully scrutinize these assertions. Are they logical? Puffery? Are they supported by technical proof? And most importantly, will the post-merger incentives of AT&T actually lead it to pursue this strategy? In addition, as already noted above, under the Horizontal Merger Guidelines it is necessary to probe whether these alleged efficiencies are merger-specific, i.e. are improved methods of deploying spectrum somehow only possible through a combination with T-Mobile? Is there anything that currently constrains

[26] Shayndi Raice & Anupreeta Das, *AT&T to Buy Rival in $39 Billion Deal*, WALL ST. J., Mar. 21, 2011.

[27] Written Statement of Randall Stephenson, Chairman, CEO, and President, AT&T Inc., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights: "The AT&T/T-Mobile Merger," May 11, 2011.

AT&T from deploying these methods to enhance efficient use of existing spectrum on its own?[28] Finally, some of AT&T's "justifications" do not appear to relate directly to the competition analysis and hence are simply irrelevant for those purposes.

C. The Efficacy of a Negotiated, Regulatory Consent Decree

One of my greatest concerns is that the Justice Department and the FCC will be tempted to resolve these complicated issues through negotiation rather than challenge, if warranted, as it recently did in the cases of Ticketmaster's merger with LiveNation, Comcast's acquisition of NBC-Universal, and Google's acquisition of ITA. While such negotiated decrees have long served an important role in antitrust enforcement, and may well have been appropriate in those cases, the unique history of the telecommunications industry poses some unique questions about the wisdom of such an approach here.

As this Subcommittee well knows, for much of the twentieth century what became known as "the Bell System" operated as a heavily regulated monopoly. As a result of the antitrust case brought against it by the Justice Department, that monopoly was disassembled in the early 1980s in the hope of re-introducing principles of competition to telecommunications services and equipment that had long since dissipated. Until the passage of the Telecommunications Act of 1996, we operated under an uncomfortable hybrid system of regulation, competition, and judicial oversight guided by the Justice Department. The Telecommunications Act was intended in significant part to complete the work of the antitrust

[28] Some critics of the merger have argued that the justifications proffered by AT&T fail these tests and hence should not be credited. *See* Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction* (May 22, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850103.

case against the Bell System, more fully completing the transition from fully regulated monopoly to greater reliance on competition in light of then-emerging developments in technology.[29]

In light of this unique history, reversion to reliance on a negotiated decree requiring judicial oversight guided by the Justice Department – even with the involvement of the FCC -- would not only be inconsistent with the goals of both the original antitrust case and the Act, but unwise as a matter of national telecommunications policy. We should not waiver in our commitment to competition, especially given its extraordinary success in producing a diverse range of high quality services, devices, applications, operating systems, and capabilities. Permitting a negotiated decree to substitute for a definitive judgment as to the likely impact of the merger would in short be an admission of failure and an invitation for a creeping return to regulated monopoly that in the end worked well and comfortably for the Bell System, but not for the American consumer.

An illustration of my concern is glaring back at us in AT&T's insistence that the relevant markets for purposes of evaluating the merger are local. As I mentioned earlier, that strategy may reflect a strategic choice designed to illicit a posture of negotiation from the Justice Department and the FCC that would likely lead to divestitures. Such a divestiture strategy raises three obvious issues: (1) Could it be effective to counteract any anticompetitive effect, i.e. would it create a competitor of sufficient viable scale to counteract the predicted incentive to raise price?[30] (2) What exactly would be "divested"? and (3) Could the divestiture be achieved

[29] For a valuable and thoughtful account of this history, see TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011).

[30] The analysis of the likely effectiveness of divestitures is similar to the evaluation of likely entry under the Horizontal Merger Guidelines. In effect, a divestiture is an example of designed new entry. As is true under the

without agreements on interconnection and roaming between the company owning the divested assets and AT&T/T-Mobile? The second and third points are critical if the first is to become a reality. As to the second, it is important to understand how telecommunications is different from other, more traditional kinds of manufacturing industries where divestitures can be effective. AT&T does not have distinct plants or factories that would be divested. Unlike something like supermarkets, specific locations cannot be sold off and re-branded by a new owner. Indeed, for AT&T to continue to operate itself in any area of the country, it will need to maintain its full infrastructure. So what would be divested in a divestiture plan and how? One press report suggests that AT&T "is prepared to divest itself of 'substantial' parts of its *wireless subscriber base* in certain markets to appease regulators...."[31] No court will have any continuing authority over AT&T or T-Mobile's customers, however, once their contracts expire. At that point, they will once again be free to choose their wireless provider, which could promptly undermine the "divestiture."

Although divestitures might also include transmission towers, spectrum, and other facilities, the more fundamental flaw with such an approach would be that it simply does not address the whole of the likely competition problem. As noted above, by focusing solely on the allegedly local markets, the agencies would be ignoring the national and international competitive ramifications of the merger. Consumers will ultimately pay the price, but that does not mean that local divestitures can eliminate the problem.

Guidelines, to be effective, entry must be timely, likely, and *sufficient* to counteract the incentive to raise price. See HORIZONTAL MERGER GUIDELINES §9.

[31] Shayndi Raice & Anupreeta Das, *AT&T to Buy Rival in $39 Billion Deal*, WALL ST. J., Mar. 21, 2011.

Finally, unless the entity acquiring the divested assets already can offer national service, it will not satisfy the goal of being a truly viable source of competition for the merged firms – a "sufficient" new entrant. If offering such services requires interconnection agreements with AT&T to access its wired line customers, as well as roaming agreements to provide national wireless service, those firms will be vulnerable to any manner of exclusionary conduct designed to raise their costs and diminish their impact as competitors. Perhaps no more complex strategy will be needed than to deny them access to the latest 4G LTE networks and devices.

CONCLUSION

In conclusion, I have tried to outline for the Subcommittee some of the issues that now present themselves for resolution before the agencies. As I noted at the outset, in preparing my testimony for today I have come to focus on a single overarching issue: "Why would we want to take this risk?" As an experienced antitrust lawyer and professor, I worry that the merger will in effect lead to a wireless telephone market reduced to two principal players that lack the proper incentives to provide competitive prices, service, and a level of innovation consummate with the technological promise of these industries. I am also deeply skeptical of AT&T's ability to deliver the efficiencies and other benefits it has promised and doubt that they are directly related to the competitive problems. As a consumer, every instinct tells me to hold on to my wallet and get out my checkbook (on-line version, of course). And finally, as an American I am fearful and find disquieting the thought of in effect entrusting almost plenary control of our Nation's wireless communications infrastructure to but two firms.

Thank you again for inviting me to testify today and of course, I would be happy to respond to any questions you may have.

Mr. GOODLATTE. Thank you, Professor Gavil.

I will begin the questioning.

Professor Wright, I would like to follow up with a comment made by Professor Gavil. You discussed the horizontal nature of this merger, but aren't there pretty significant vertical implications to this as well? And my question to you is, should the Justice Department consider the merger's effect on competition in markets other than consumer wireless services such as the market for business-to-business agreements involving backhaul, roaming, or handset development?

Mr. WRIGHT. Thank you, and I believe the answer is, yes, they should and will consider those issues, again through the same sort of fact-intensive analysis that is articulated in the guidelines. I did not focus on either backhaul or roaming in my written testimony, but I am happy to make some remarks here and elaborate, if you so desire.

With respect to backhaul, this is purely, in essence, a vertical issue. The merger, as a few of the witnesses have identified, would increase the post-merger share to approximately 40 percent. This is lower from an antitrust perspective than the level of a share that would typically give rise to vertical concerns.

Now, the agency guidelines do allow the agency to consider and look carefully at vertical issues, but there is both a body of case law, economic theory, and empirical evidence on when those sorts of vertical concerns arise and when they don't.

Mr. GOODLATTE. Let me interrupt, since I have got a limited amount of time and some other questions I want to ask. We will submit some additional written questions. You may want to flesh that out more in a written response because I do want to have the benefit of that case law and your thoughts on that.

Mr. WRIGHT. I would be happy to.

Mr. GOODLATTE. Let me turn to Mr. Stephenson and follow up on that very issue.

AT&T sells backhaul to most of its competitors but can backhaul its own calls free of charge. Backhaul is a crucial input for your competitors' wireless services. Couldn't AT&T price backhaul at rates that force competitors to raise their prices?

Mr. STEPHENSON. We do offer backhaul in the marketplace and we offer it to a number of carriers represented in Mr. Berry's organization, in fact, all carriers across the United States. We are also a large purchaser of backhaul. In fact, we cover somewhere around 40 percent of the U.S. with our own backhaul. So 50-60 percent of the U.S.—we are purchasing backhaul ourselves from other competitors.

And we are having little difficulty finding competitive alternatives for backhaul. The cable companies—you can read their quarterly reports—are having a lot of success in offering backhaul to wireless carriers. There are alternative providers of backhaul—CLEX we like to call them in the industry—who are offering backhaul services. There are microwave solutions. In a lot of areas, we are investing our own capital and building our own backhaul when it is outside of our wireline franchise territories. So there is extensive opportunity for buying backhaul. It is a very competitive environment.

And I would also offer the FCC does currently have a proceeding open on this very issue, and they are dealing with this now within the FCC. And so I think there will be an open and full hearing of that issue as well.

Mr. GOODLATTE. Thank you.

Mr. Berry, did you want to comment on that as well?

Mr. BERRY. Yes, Mr. Chairman. I would just suggest that around 30 percent of the cost of running a cellular operating cost is getting that signal back to the main trunk, the backhaul. AT&T and Verizon own over 90 percent of the backhaul capacity in the United States and last year made over $8 billion on that service. 93 percent of the profit came from people other than AT&T and Verizon on backhaul. So I think the vertical integration and the potential impact that it has, especially on my smaller members, is huge.

And you are right. We do have backhaul with AT&T, and AT&T does, in some instances, use our members that also have backhaul. But overall, it is a huge problem and it will be a place where AT&T will be able to use their market power.

Mr. GOODLATTE. Thank you.

Mr. Obermann, I am going to allow you to respond to that, but I want to ask you another question and we will just put it all out there and you can respond.

You testify that T-Mobile has had an increasingly difficult time competing, arguing that the merger was the best option available for T-Mobile, but in January you told investors, quote, we have the best 4G network in the U.S. We have a sufficient spectrum position medium term. We have a variety of attractive smart phones on our shelves, including the largest lineup of android smart phones. You also described T-Mobile's spectrum position as, quote, better than most of our competitors.

Is T-Mobile today a viable competitor in the U.S. market or is it not?

Mr. OBERMANN. Well, both are true. I said that on the long term or longer term, we are lacking the spectrum——

Mr. GOODLATTE. You might want to pull the microphone a little closer to you.

Mr. OBERMANN. So on the longer term, we are lacking the spectrum to upgrade our technology to LTE. That is the new technology for fourth generation networks, and LTE is the superior technology over time. But as of today, we are trying to make the best out of our existing HSPA+ technology out of our network, and so we are trying to compete by aggressively marketing that facility. But currently the facts are that—and the Q1 numbers demonstrate that—we are losing customers still. We have lost 470,000 customers roughly, while Sprint, for instance, gained 1.1 million, Metro and Leap—they all gained customers and we lost customers. So the current position we are in is not easy. It is actually difficult. Yet, we are trying our best, of course, to market what we have with more success.

Mr. GOODLATTE. Thank you.

The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Obermann, I guess that raises the question in my mind. I guess T-Mobile really wants out of the United States market one way or another I take it. So what is the alternative if this merger is not approved?

Mr. OBERMANN. I am not sure I understood the question correctly. Was your question why we would stay as a shareholder in AT&T?

Mr. WATT. No. I take it that given the economic situation of T-Mobile—I mean, it sounded to me like from your testimony your preferred market is the Europe market, and you want out of the

U.S. market. So you are going to divest T-Mobile in the United States to somebody, AT&T or somebody else, because you want out of the market. Am I misreading what you said or just misunderstanding what you said?

Mr. OBERMANN. I think it is fair to say that we are fighting both in Europe and in the U.S. with big capital investment needs because also in Europe we need to upgrade our networks, wireline and wireless networks, which costs huge amounts of money, and also in the U.S., we would have to continuously build out the network and acquire new spectrum. So really the fundamental strategic problem we are facing here is the longer-term perspective, the lack of enough spectrum to build our LTE network.

The reason why we have chosen this combination with AT&T, after having analyzed the other theoretical options available, is that it is the most——

Mr. WATT. I think you answered that question. I asked a different question. My purpose is not to make you bear your financial situation here in this room. I don't think that is appropriate. So I won't pursue that line of questioning.

The real question I have—and I always hate to raise it because it sounds self-serving. In my congressional district, we have strong competition, wireless, all kinds of options because I represent particularly urban areas. But the older I have gotten, the more time I have spent in the mountains of North Carolina. When I go up there, there is no service.

So I understand, Mr. Stephenson, that AT&T already has a minimum of 21 megahertz and in some areas of the North Carolina mountains 40 megahertz of unused spectrum in the North Carolina mountains. Why would you not build that out now in the absence of this merger? And what is the likelihood that you will do that even if the merger is approved? I guess you all keep telling me that you got 97 percent coverage and all of this, but folks in the North Carolina mountains can't even get mobile service. In a lot of the parts of the North Carolina mountains, there is just no mobile service. There is no competition.

Mr. STEPHENSON. Yes, sir, I think I understand your question. I will tell you one of the biggest dilemmas, issues that I face as a CEO—I have been dealing with this for quite some time—is what to do about rural America. And rural America is a difficult equation for us, particularly getting broadband to rural America.

Mr. WATT. I am just talking about basic cell phone service. I am not even talking about broadband. I guess broadband would follow but I am talking about basic cell phone service in parts of the country that seem to me to need it.

Mr. STEPHENSON. Yes. So cellular service is going to follow the same equation as fixed line service. It is just more difficult and costly to get to rural America. It is going to take more time.

The elegance of what we are proposing here is it is going to give us an opportunity to use wireless technology to get high-speed and basic wireless services to rural America. That is the commitment with this deal. We do have scale now. We would have spectrum position that would allow us to cover 55 million more people in rural and small-town America with these capabilities, and that is the commitment we are making with this merger. It does provide the right incentives for us to begin to build out rural and small-town America with these wireless services, particularly broadband.

Ms. DESAI. Can I comment very quickly on that?

Mr. WATT. Go ahead.

Ms. DESAI. I just wanted to point out that Mr. Obermann earlier stated that the lower band frequency that T-Mobile would get after acquiring AT&T would provide rural coverage. So it is not clear that AT&T is actually getting something from T-Mobile. Mr. Obermann just said earlier that they would be acquiring lower band coverage that helps in rural areas.

Mr. WATT. Anybody else got any—Mr. Berry, maybe you can help me. You are from rural America here.

Mr. BERRY. Yes, sir. We have one carrier in your congressional district, Alltel, and we have five of my member carriers in North Carolina. And it is very difficult——

Mr. WATT. In the mountains of North Carolina, you got five carriers?

Mr. BERRY. Yes, sir. Not in your district. In your district we have——

Mr. WATT. This is not about my district really. It is about North Carolina in general, the rural areas of North Carolina.

Mr. BERRY. Correct. And many of our members focus, like you say, on building out that rural area. It is very difficult in rural America, especially in the Smoky Mountains down there and the difficult terrain of North Carolina. But my members are committed to building out in the areas and the communities which they serve and live and occupy, and that has been very difficult. And we will certainly talk to you more about how we can improve the coverage.

But you are absolutely right. There are unused spectrum allotments in North Carolina, particularly that AT&T owns, that have not been built out.

Mr. STEPHENSON. Could I respond to that, Ranking Member?

Mr. WATT. Yes, sir.

Mr. STEPHENSON. The unused spectrum, if I could clarify this. We have acquired a large amount of spectrum in several geographies around the United States. It is the 700 megahertz spectrum. The Government auctioned it off. We acquired that for one very specific purpose. That is where we are building these LTE broadband networks. It requires a big block of spectrum to build these broadband networks, 20 contiguous megahertz just to build these networks. And so we have acquired that spectrum, and that is where we are deploying it now. In fact, we announced that we will be launching five markets midyear this year in that spectrum. So it will take time to build these networks out, undoubtedly. But that is why we are holding that spectrum.

Mr. WATT. I guess somebody—who was it that said how long. Not long. I have been hearing that for a number of years now, and I keep asking. I won't go there.

Mr. Chairman, I ask unanimous consent to submit for the record the testimony of Larry Cohen, President of the Communications Workers of America, and the written statement of Daniel R. Hesse, Chief Executive Officer, Spring/Nextel Corporation so that we will have a complete record here.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

TESTIMONY OF LARRY COHEN
PRESIDENT
COMMUNICATIONS WORKERS OF AMERICA

"The AT&T/T-Mobile Merger"

Before the House Committee on the Judiciary,
Subcommittee on Intellectual Property, Competition, and the Internet

May 26, 2011

I am Larry Cohen, President of the Communications Workers of America (CWA). Thank you for this opportunity to submit this testimony for the record. CWA represents more than 700,000 workers in the communications, media, airline, and manufacturing industries as well as the public sector. Most important, for purposes of this hearing, we represent approximately 43,000 AT&T wireless employees. Therefore, the subject of this hearing – the AT&T/T-Mobile merger – is of intense interest to our members, and I very much appreciate the opportunity to share our views with you today.

We have studied this transaction carefully and reached the following conclusion: AT&T's acquisition of T-Mobile will be good for broadband deployment, good for consumers, good for jobs, good for workers' rights, and good for rural citizens. In short, we strongly believe that this merger will be good for America.

We understand that this transaction will be subject to thorough regulatory oversight, and such review is entirely appropriate. We also appreciate the role of Congress and, in particular, this Subcommittee in monitoring both the wireless marketplace in general and this specific transaction. At the end of these inquiries, however, we believe that three critical points will become apparent: (1) the AT&T/T-Mobile merger will accelerate high-speed broadband deployment; (2) the transaction will positively impact consumers; and (3) the merger will benefit workers. As a result, we believe that the merger should be expeditiously approved.

I. The AT&T/T-Mobile Merger Will Accelerate High-Speed Broadband Deployment

The AT&T/T-Mobile merger will enable AT&T to put together a high-speed broadband network that can provide 4G LTE service (which can deliver download speeds of 10 megabits per second) to 97 percent of the population of the United States within six years. This is especially noteworthy because only 20 percent of broadband subscribers in the United States currently connect to the Internet at such speeds.

In recent years, the Obama Administration and the Congress have rightfully made broadband deployment a top national priority. Today, as many as 26 million Americans do not have access to broadband networks, and the United States ranks only 12th in the world in broadband adoption and 25th in average Internet connection speeds. Indeed, Romanians currently enjoy average Internet speeds that are more than six times those experienced by Americans. This situation is entirely unacceptable. Just as our world-class interstate highway system fueled our nation's economic growth in the last century, we need to accelerate our deployment of high-speed broadband networks to maintain our international competitiveness and create jobs in this century.

Four years ago, CWA launched our Speed Matters campaign to highlight the fact that high-speed broadband is necessary to enable the current wave of technological innovation to reach all Americans and improve their quality of life. Telemedicine, distance learning, and smart grids, to give just a few examples, have enormous potential to improve health care, education, and energy conservation, but they will remain out of the grasp of tens of millions of Americans unless we are able to accelerate the development of high-speed wired and wireless broadband networks.

The AT&T/T-Mobile merger marks a critical step toward the goal of bringing high-speed broadband service into all American homes. As a result of its acquisition of T-Mobile, AT&T will be able to offer 4G LTE service to 55 million more Americans than otherwise would be the case. Its 4G LTE network will be able to cover 97 percent of all Americans instead of just 80 percent. This increased coverage is especially important in light of the fact that T-Mobile currently has no plans (or even a clear path) to offer real 4G service to any of its 34 million subscribers. Unfortunately, T-Mobile simply lacks both the spectrum and capital to build a 4G network. By contrast, because AT&T and T-Mobile use the same technology, it will be easy to integrate the two companies' networks and for existing T-Mobile customers to enjoy the benefits of 4G service.

While consumers throughout the United States will benefit from AT&T's expanded 4G LTE broadband network, the effects will be especially pronounced in rural America. Those living in rural areas are currently on the wrong side of a digital divide. For example, a report last year by the Pew Research Center's Internet & American Life Project found that while 70 percent of Americans in non-rural areas have broadband in their homes, the figure is only 50 percent among rural Americans. And one key reason for this gap is that high-speed broadband networks cover a significantly greater percentage of urban areas than rural areas.

In order to create jobs and sustainable communities in rural America and reverse the trend of depopulation that is plaguing many small towns as younger residents move to larger cities in search of economic opportunities, it is critical that we close the digital divide. The AT&T/T-Mobile merger will help do just that. The 55 million additional people to be covered by AT&T's 4G LTE network as a result of the merger are generally located in rural America. Indeed, the additional areas that will be covered by AT&T's 4G LTE network comprise an area equivalent to more than one-third of the land mass of the 48 contiguous states.

Finally, especially in light of our nation's current fiscal condition, it is worth noting that this dramatic expansion of high-speed broadband availability in rural areas will occur at no cost to taxpayers. The federal government already spends billions of dollars a year in universal service to ensure that everyone has access to basic service. And the FCC is considering an expansion of this subsidy program. The AT&T/T-Mobile merger will ensure dramatically increased broadband coverage without public subsidies, thus decreasing the degree to which the program will need to grow. To be sure, government can, and should, confirm merger-related broadband and speed commitments as well as establish concrete timetables for deployments.

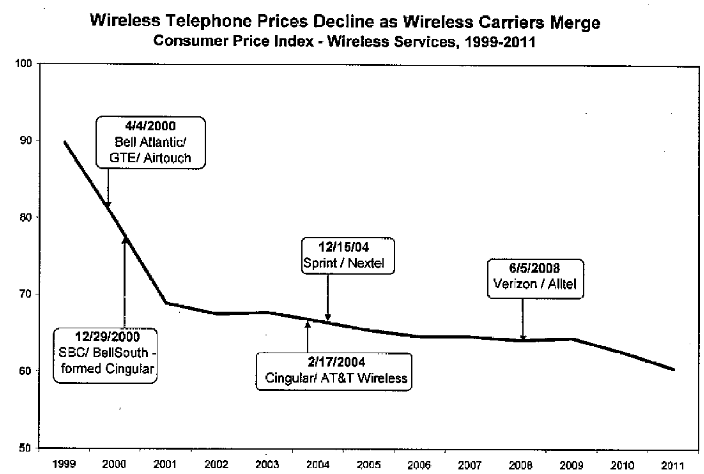
II. The Merger Will Benefit Consumers

Apart from the expanded 4G LTE high-speed broadband network that will result from the merger, we believe that AT&T's acquisition of T-Mobile will positively impact consumers in other ways.

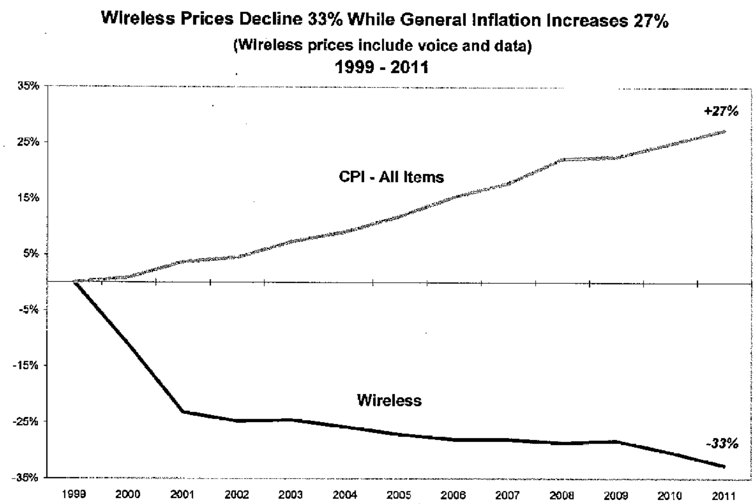
In particular, the merger will improve the quality of service received by AT&T and T-Mobile customers. AT&T's acquisition of T-Mobile will result in a company with increased cell tower density, broader network infrastructure, and added spectrum. This combination of factors will bring tangible benefits to AT&T's customers on a daily basis: fewer dropped calls, decreased network congestion, and increased broadband speeds.

Integrating T-Mobile cell sites into AT&T's network, for example, will effectively double the amount of traffic that can be carried using existing spectrum in the areas covered by such sites. Furthermore, AT&T, after the transaction, will be able to eliminate redundant control channels, thus freeing up more spectrum to carry additional traffic. It will also be able to group spectrum channels into larger pools, thus making it more likely that a subscriber will be able to find an open channel and allowing the companies' integrated network to carry more traffic with the same combined spectrum than the two companies could serve independently. Finally, AT&T will be able to make more efficient use of spectrum that is currently underutilized by one of the companies in certain locations.

To be sure, some contend that the merger will increase consolidation in the wireless industry, a development they maintain will harm consumers through higher prices and an insufficient range of choices. The facts, however, do not support this argument. Over the course of the last twelve years, we have witnessed numerous significant mergers in the wireless industry: Bell Atlantic-GTE-Airtouch in 2000; SBC Wireless-BellSouth Wireless in 2000; Cingular-AT&T Wireless in 2004; Sprint-Nextel in 2004; Verizon-Alltel in 2008; and AT&T-Centennial in 2009, just to name a few. And, how have these transactions impacted prices? As demonstrated in the following chart, prices paid by consumers for wireless service have continued to fall following such mergers.



According to the Bureau of Labor Statistics, from 1999 to 2011, inflation in the United States rose by 27 percent. Yet, over that same time period, wireless prices (including both voice and data) have actually dropped by 33 percent as shown in the following chart.



Indeed, to give just one specific example of the dramatic price declines in the wireless industry, according to the most recent figures supplied by the FCC, the average revenue per text message received by carriers decreased by more than 70 percent from 2005 to 2008.

There are a couple of reasons that mergers in the wireless industry have led to decreased rather than increased prices. First, such mergers often produce efficiencies and synergies that allow companies to compete more effectively in the marketplace. For example, if it does not acquire T-Mobile, AT&T will face increasing capacity constraints, and this spectrum shortage will decrease the company's incentive to attract new customers through reduced prices. The merger, by contrast, will increase AT&T's incentive to compete for new customers, and the network synergies resulting from the merger will give it a greater capacity to decrease prices. As one industry analyst has stated, "AT&T could use its scale and magnitude of synergy realization to further reduce prices against Verizon and narrow the pricing gap to Sprint, especially for emerging 4G services and rates charged to connected-device users."[1]

Second, and perhaps more important, the wireless industry is intensely competitive and will remain so after the AT&T/T-Mobile merger. In 23 of the top 25 U.S. markets, for instance, there are currently five or more facilities-based wireless competitors, including Verizon, Sprint, low-cost no-contract carriers like MetroPCS and Leap, and regional carriers such as US Cellular and Cellular South that offer nationwide service plans. Indeed, the FCC estimated just last year that more than 70 percent of Americans live in areas served by five or more facilities-based mobile wireless service providers and more than 90 percent of Americans reside in areas served by four or more such providers. There are also an increasing number Mobile Virtual Network Operators (MVNOs or resellers), and these competitors are growing rapidly. For example, one such MVNO, TracFone, has increased its subscriber base by approximately 30 percent just since the end of 2009.

Current and emerging wholesale providers that are constructing advanced wireless networks provide additional competition. Clearwire, for example, maintains that it is the largest spectrum holder in the nation, and its service is currently resold under the brands of Sprint and many cable operators. In fact, Sprint has a majority (54 percent) economic interest in Clearwire. Moreover, LightSquared expects to cover 260 million people by 2015 with its wholesale-only integrated wireless broadband and satellite network.

The intense competition that characterizes the wireless market is perhaps best illustrated by the number of consumers that change carriers. Specifically, an estimated 25 percent of customers in the United States switch to different wireless service providers each year.[2] Companies in the marketplace are therefore in a constant struggle both to retain their current

[1] Citigroup Global Markets, Telconomy 2011 – Wireless Update, March 21, 2011.

[2] FCC, In the Matter of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, May 20, 2010 (rel), para. 248.

customers and to attract new ones, an imperative that is driving them to lower prices, offer new service plans, applications, and devices, and make tens of billions of dollars in capital investments to improve the quality of their service.

In short, competition in the wireless industry is and will remain vibrant after the merger because of the numerous competitors that will remain in the market and because the dynamics of the marketplace discourage anti-competitive coordination or collusion. The wireless industry is constantly innovating, and there is a strong incentive for a company to be the leader in rolling out a new product or service. In addition, companies do not just compete on a single variable – price – but rather distinguish themselves with respect to a number of elements, including operating platforms, speed, and devices, thus making coordination or collusion far more difficult. Moreover, major players in the industry are under constant threat by the prospect of new entrants or the rapid growth of smaller rivals. MetroPCS, for example, has increased its subscriber base by approximately 17 times over the past nine years (from about 500,000 in 2002 to approximately 8.9 million today), and Leap's subscriber base has increased by 274 percent in the last seven years, growing from about 1.47 million to 5.5 million customers. Both companies, moreover, have dramatically expanded the coverage of their networks, with MetroPCS now claiming to have a larger footprint than Sprint, and Leap announcing that its network covers 277 million people. All of these factors combine to make the wireless market one that is highly unsusceptible to anti-competitive coordination or collusion according to economic literature and the history of vibrant competition within the industry.

Apart from strong competition within the wireless industry, wireless broadband providers also face competitive pressures from a broad array of sources. Consumers have a number of options when it comes to broadband service. Apart from mobile broadband, they can choose cable, DSL, satellite, or fiber. As each of these technologies develop and improve, the competitive pressures placed on wireless broadband providers increase, thus pushing them to improve their quality of service and constraining their ability to raise prices.

Additionally, before this transaction was proposed, it was clear that Deutsche Telekom was going to sell T-Mobile. Therefore, the real question posed by this transaction is not whether T-Mobile will survive as an independent competitor. Rather, the operative question is whether T-Mobile will be acquired by Sprint or AT&T, and the record clearly indicates that an AT&T/T-Mobile merger will be better for consumers and competition than would a merger between T-Mobile and Sprint.

To begin with, AT&T has the financial resources that are necessary to develop T-Mobile's assets fully. Its credit rating is investment grade, the company has a healthy debt-to-equity ratio, and its net profits are strong. Sprint, by contrast, likely would have significant difficulties in modernizing and growing T-Mobile's assets. The company currently has a BB- non-investment or "junk" credit rating, has a debt-to-equity ratio that is more than twice AT&T's, and has lost billions of dollars over the last three years. Sprint's cash flow and capital expenditures (cap ex) could not support the merger. In 2010, Sprint's cap ex was only 5.9 percent of revenues, compared to typical telecom cap ex in the range of 10 to 15 percent. Over the past six years (2005-2010), Sprint's cap ex declined 74 percent, from $5.6 billion in 2005 to $1.4 billion in 2010. In fact, to enter into a similar deal for T-Mobile, Sprint would have had to borrow tens of billions of dollars to fund the transaction, at least doubling its current $20 billion in long-term debt. While Sprint is currently making incremental progress in digging itself out of the hole it created with the Nextel merger and seems to be on track to becoming a healthy number three competitor, this transaction would have exposed Sprint to a significant challenge. Moreover, Sprint would have far more difficulty integrating T-Mobile assets into its network from a technical standpoint because Sprint would face the challenge of merging four different wireless operating systems that pose significant interoperability problems. AT&T and T-Mobile, by comparison, utilize similar and compatible technologies for their networks. Finally, AT&T has a proven track record of managing acquisitions smoothly and emerging from them with a strengthened company. The story of the Sprint-Nextel merger, on the other hand, has emerged as a cautionary tale for corporate America on the dangers of poorly conceived and managed acquisitions.

During the regulatory review process, we expect the Department of Justice (DoJ) and Federal Communications Commissions (FCC) to analyze thoroughly the competition issues raised by this merger. Consistent with past transactions, this review should focus on local market conditions, and as with recent wireless transactions, it is possible that AT&T will be required to divest assets in certain markets. We do not object to such steps and indeed expect the DoJ and FCC to take appropriate action to protect consumers and safeguard the public interest. However, at the end of the day, we believe, for the reasons outlined above, that the AT&T/T-Mobile merger will benefit consumers, who because of the transaction will enjoy greater access to 4G service, faster Internet connections, better service quality, and a marketplace where prices continue to decrease.

III. The Merger Will Be Good for U.S. Workers

In addition to accelerating broadband deployment and benefiting consumers, we also believe that the AT&T/T-Mobile merger will be good for U.S. workers. As the representative of 43,000 AT&T wireless employees, our foremost responsibility when it comes to this transaction is to ensure that this merger is in the interest of our members and workers in the industry, and we are convinced that it is.

AT&T is the only union wireless company. AT&T's management has worked in partnership with CWA to ensure that past mergers worked to the benefit of AT&T's employees, and this transaction will be no different. Over the past decade, AT&T has expanded through numerous transactions, including those involving Cingular, Dobson, and Centennial. And during that same time, the number of AT&T wireless workers represented by CWA has grown dramatically: from about 9,300 in 2001 to about 43,400 today.

During implementation of the AT&T/T-Mobile merger, CWA will work closely with AT&T to ensure that there will be no involuntary job losses and that any workers adversely affected by the transaction will be able to transition into other similar or better jobs with the company. Indeed, we believe in the long term that AT&T, after the merger, will be in a stronger position to create jobs because it will be better able to expand and extend its business than either AT&T or T-Mobile could have done as separate entities. To give just one example, the expansion of AT&T's 4G LTE network that will result from the merger holds the potential to create thousands of new jobs.

Aside from positively impacting our members who work for AT&T, the merger will also prove to be a boon for T-Mobile employees. When it comes to the subject of workers' rights, the difference between T-Mobile and AT&T is quite striking. While AT&T maintains a policy of true neutrality and allows workers to make their own decisions regarding union representation, T-Mobile is actively hostile to unions and opposes efforts by workers to organize and exercise their basic rights.

Once AT&T completes its acquisition of T-Mobile, more than 20,000 T-Mobile employees will benefit from a dramatically improved working environment. In accordance with our collective bargaining agreement, AT&T has publicly committed to maintain a policy of strict neutrality with respect to the organizing of T-Mobile employees after the acquisition, leaving the decision of whether to join a union up to individual employees according to a non-confrontational process sanctioned under the National Labor Relations Act. As a result, just as workers at other companies acquired by AT&T have chosen union representation soon thereafter, we believe that in an atmosphere free from fear and intimidation, there is an excellent chance that T-Mobile employees will make this choice as well. And if they do, T-Mobile employees will for the first time have an opportunity to select union representation based on global standards of workers' right to freedom of association and representation.

Indeed, looking at the big picture from the perspective of T-Mobile employees, AT&T's acquisition of T-Mobile is clearly in their interest. Before this transaction was proposed, it was clear that Deutsche Telekom was going to sell T-Mobile. The only real question was whether T-Mobile would be acquired by Sprint or AT&T, and AT&T is by far the better option for T-Mobile employees. For example, in contrast to AT&T's strict neutrality policy with respect to union organizing and positive partnership with CWA, Sprint has a long history of hostility to union organizing and workers' rights. The organizing drive at La Conexion Familiar, a Sprint long-distance service marketed to Latinos, has become legendary. In a show of courage and solidarity, 70 percent of the call center employees joined a petition to the NLRB to hold a union election. In response, Sprint closed the call center. In subsequent proceedings, an NLRB Administrative Law Judge found Sprint guilty of more than 50 violations of the law. During this experience and others, Sprint used a handbook detailing how to maintain a union-free workplace to train managers.

Although at one time there were organized units at Sprint, most of these were organized under previous owners, local telephone carriers such as United Telephone that Sprint acquired in a string of mergers. Sprint's strategy was to isolate them and to wall them off from the long distance and wireless segments of the company so that those divisions would remain union free. Indeed, when Sprint changed its business plan in 2005, it divested these units to Embarq.

There was a successful effort to organize three call centers in North Carolina. The workers persevered in the face of Sprint's relentless anti-union attacks over an eight-year period (1986-1994). Once the unit was organized, Sprint dragged out contract negotiations for another year and a half, using a variety of delaying tactics while trying to decertify the unit even before the contract was signed. Together, these experiences had the effect of freezing workers' interests in forming a union. The workers knew they were likely to lose their jobs if anyone tried to organize.

Furthermore, Sprint had outsourced up to 70 percent of its customer contact workforce to places like the Philippines, India, and Mexico.[3] Sprint is

[3] Alena Semuels, "Sprint focused on keeping customers happy so they don't leave," Los Angeles Times, March 5, 2009, http://latimesblogs.lattimes.com/technology/2009/03/sprint-and-cust.html

the only U.S. wireless company that outsources network management, and according to one source, a "great part" of the work has been sent abroad.[4] AT&T and its unions, by comparison, recently negotiated the return of 3,000 DSL-related customer service jobs to the United States, and workers at AT&T have a seat at the table when it comes to outsourcing because the topic continues to be the subject of negotiations between management and the union.

In sum, because of T-Mobile's current condition and the choice that Deutsche Telekom made to exit the market, T-Mobile workers now face a fork in the road, and to paraphrase Yogi Berra's famous words, it is in their interest to take it. One path forward is the merger with AT&T, a transaction that will allow them both to join a strong and stable company that is positioned for future growth and to work for an employer that respects the rights of American workers. The other path forward is a merger with Sprint, a transaction that would leave them at the mercy of a less financially robust company that is hostile to union organizing and has a troubling record of outsourcing. We believe that the best choice for T-Mobile's workforce is an obvious one.

IV. Conclusion

CWA believes that AT&T's acquisition of T-Mobile is a win-win-win proposition: it will accelerate broadband deployment, benefit consumers, and positively impact workers. As a result of the merger, AT&T will be able to build a network that will offer 4G LTE broadband service to 97 percent of Americans, the quality of service received by current AT&T and T-Mobile customers will improve, and more than 20,000 T-Mobile employees will be able to work for a company that respects workers' rights and to enjoy improved working conditions. All of these developments, moreover, will occur within a wireless marketplace that will remain dynamic and fiercely competitive.

[4] Gulveen Aulakh, "Ericsson to serve US clients using 'competent' workforce in India," *The Economic Times*, Nov. 26, 2010.

For all of these reasons, it is CWA's hope and expectation that, following a thorough regulatory review, the Department of Justice and the Federal Communications Commission will approve AT&T's acquisition of T-Mobile with the conditions enumerated in this testimony.

**WRITTEN STATEMENT FOR
THE RECORD BY
DANIEL R. HESSE
CHIEF EXECUTIVE OFFICER
SPRINT NEXTEL CORPORATION
RE: PROPOSED AT&T/T-MOBILE MERGER
BEFORE THE HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET
May 26, 2011**

Thank you for the opportunity to address the potential negative impacts that AT&T's proposed takeover of T-Mobile could have on the American economy, American innovation, and American consumers. The decisions to be made by the Department of Justice (DOJ) and the Federal Communications Commission (FCC) will have a profound impact on the future of the wireless industry. The choice is clear -- if the transaction is blocked, wireless competition will thrive and competition, in turn, will continue to drive investment, innovation, consumer choice, and U.S. global leadership in wireless communications.

If, on the other hand, the DOJ and FCC decide to permit the takeover, the wireless industry could regress toward a 1980s-style duopoly. AT&T would become the largest wireless carrier in the country with over 94 million subscribers and approximately 43% of the post-paid market. Coupled with Verizon's over 83 million subscribers and 38% of the post-paid market, the scope and scale of the resulting duopoly, controlling more than 80% of all U.S. contract customers and approximately 80% of all wireless industry revenues, percentages that would likely grow each year after that, would be prohibitive to viable competition from other carriers. Thus, the title of this hearing speaks for itself. This merger would put Humpty Dumpty back together again, and it should be stopped.

I am not here to ask for a special break or to seek any conditions in connection with this takeover. I am here because Sprint believes in competition, which goes hand-in-hand with innovation. Robust competition in the wireless industry is an essential part of our country's nearly two trillion dollar information economy that is vital to our Gross Domestic Product (GDP) and global competitiveness, and that has delivered affordable wireless communications and Internet access to virtually every American. As a result, wireless communications is a fundamental platform for our entire economy.

For example, in 2010 the wireless industry accounted for nearly $160 billion in revenue, approximately $25 billion in capital expenditures, and employed, directly or indirectly, an estimated 3.6 million Americans. If the industry remains competitive, wireless devices and services could generate productivity gains over the next 10 years amounting to almost $860 billion in additional GDP. Indeed, competition and innovation led Sprint to roll out America's first nationwide 4G network, first unlimited 4G plan, and first 4G phone. Sprint's innovative leadership greatly influenced Verizon's decision to accelerate its own timetable to roll out 4G services, which in turn caused AT&T and others in the industry to follow.

The fundamental problems arising from a structural transformation of the wireless industry from a competitive structure to a duopoly cannot be fixed through divestitures or conditions. The only remedy that can preserve competition and a vibrant wireless marketplace is for the Department of Justice and the Federal Communications Commission to "Just Say No" to this takeover. This industry can't afford it, consumers can't afford it, and this country can't afford it.

The Wireless Industry and America

The Mobile Age has arrived. It took 100 years to build one billion fixed phone lines, but only 20 years to add five billion mobile subscribers. At the end of 2010, over 302 million wireless subscriptions were active in the United States, a population penetration rate of almost 96%. And for the first time, the U.S. wireless industry last year carried more data traffic (e.g., email, text, and web browsing) than voice traffic. Robust competition in our industry has resulted in steadily dropping prices for higher quality wireless communications services.

More American households are abandoning fixed phone lines and looking to wireless exclusively for voice and data communications. For example, on April 20, 2011, the US Department of Health and Human

Services released a report indicating that, as of June 30, 2010 over one-quarter of all adults - 26.6% - lived in wireless-only homes, an eight fold increase over just six years. Ironically, because of their landline monopolies, AT&T and Verizon have the least incentive to price wireless service competitively enough to stimulate "cord cutting" of fixed phone lines.

Thus, for many Americans, wireless has become their only means of accessing information, communicating, and increasingly, conducting business. It is their lifeline. But, if the Department of Justice and the FCC allow AT&T to devour the nation's 4th largest carrier, the Twin Bells would be uniquely positioned as the gatekeepers of this lifeline. They could control access to, and the price of, the digital ecosystem and related industries. Upstream content providers and device manufacturers would have little choice but to deal with these entrenched duopolists controlling about 80% of the market.

Allowing AT&T and Verizon to control approximately 80% of the wireless industry's revenues will increase the scale and scope advantages that these companies already possess with regard to market share, spectrum holdings, infrastructure control, and ability to invest. These enormous companies would be significantly more profitable than all other wireless providers combined, which creates a formidable barrier to entry and expansion by other potential rivals. For example, AT&T and T-Mobile's combined 2010 EBITDA was approximately $27.2 billion and Verizon's was $26.5 billion. Sprint's 2010 EBITDA, in contrast, was only $4.5 billion. If the T-Mobile takeover is approved, AT&T and Verizon would control 88% of all wireless industry profits. Consequently, the disparity between the duopolists and all other providers is likely only to worsen. Going forward, it would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce quality, raise prices charged to content sellers for access to consumers or raise prices to customers for access to voice or Internet service.

Moreover, as descendants of the Bell monopoly of local wireline telephone companies, AT&T and Verizon each control a vast wireline infrastructure. Among other advantages, this allows them to obtain backhaul – a critical input of wireless service connecting towers to the larger network – at cost. This point cannot be underestimated. While we look at our handsets and the wireless towers they connect to as "wireless", from that point on, wireless traffic travels by landline, over the legacy wireline networks that are largely controlled by AT&T and Verizon. By contrast, because Sprint and other wireless carriers are not owned by large local telephone companies, we are forced to purchase backhaul service, in most cases from our largest competitors – AT&T or Verizon. Whereas Sprint must pay more than $2 billion a year in backhaul fees to its competitors, AT&T and Verizon earn enormous profits from their control over backhaul. By controlling the availability and price of backhaul, AT&T and Verizon are also able, to a large degree, to control their competitors' costs and quality of service.

The goal of every for-profit corporation is to maximize shareholder value – to bring the greatest return to its shareholders. I respect Randall Stephenson and Philipp Humm. They are doing their jobs, maximizing value for their shareholders. Unfortunately, there are only three beneficiaries of the proposed transaction: the shareholders of AT&T, Verizon and the sole shareholder of T-Mobile USA, Deutsche Telekom.

Competition incentivizes companies to increase shareholder value by offering superior quality, competitive prices, and constant innovation to attract more customers and thereby increase revenue. But if AT&T is allowed to takeover T-Mobile, the benefits of competition – that have driven the wireless marketplace for nearly two decades – could virtually disappear.

Nowhere would this be more apparent than in the loss of innovation. Competition drives innovation, and innovation is vital to maintaining the prosperity and leadership of this country. Innovation provides a path to productivity gains and economic growth. Because wireless communication has become a fundamental gateway to so many other related industries, it is imperative we advance competitive, market-driven policies that maximize this engine of innovation and economic growth.

For example, in the last several years, we have seen a tremendous increase in the variety of handsets being offered to consumers, each with different features and functionality. As of March 2010, AT&T offered 53 handsets, Verizon and Sprint each offered 44, and T-Mobile offered 37. This is competition at its best, and without it, this kind of innovation and market creativity could disappear. Handset manufacturers would be less likely to partner with anyone other than the duopolists, because access to their nearly 80% of the market's customer base would be sufficient. This could have immediate adverse effects on consumer choice and cause even more profound long-term harm by undercutting the wireless research and development ecosystem.

History Lesson: A Wireless Duopoly Disserves the Public Interest

We can predict how this movie will end. Back in the early 1980s, the FCC granted two terrestrial spectrum licenses in each geographic area, one to the local wireline company and the other to an applicant unaffiliated with any landline telephone company to provide what became known as cellular telecommunications services. The first commercial handheld cellular phone (known as "the brick") received FCC approval in 1983. It cost thousands of dollars to buy and monthly service was expensive too, thereby denying the availability of un-tethered communications to all but businesses and the wealthiest Americans.

In 1992, the U.S. General Accounting Office issued a report that concluded "duopoly markets are unlikely to provide a product at a competitively set price" and recommended that the FCC grant commercial wireless (Personal Communications Service) licenses to additional entrants because, "by giving consumers an additional choice, the new PCS provider could spur cellular telephone carriers to improve their services and lower their prices." (U.S. GAO, Telecommunications: Concerns About Competition in the Cellular Telephone Services Industry (July 1992) at 41-42.)

The following year, Congress authorized the FCC to auction additional spectrum for terrestrial personal communications services or PCS. Understanding the transformative principles of a competitive market economy, the FCC used these auctions to open the wireless industry to competition by restricting the amount of spectrum that could be purchased by a single company, thereby creating a competitive market with multiple players. Competition was good for consumers as prices fell and service improved. Several significant PCS competitors emerged, including Sprint and T-Mobile. According to CTIA data, the average monthly billing charge for cellular services dropped from $97 in 1987 to $39 in 1998, and voice revenue per minute dropped from $0.44 in 1993 to $0.05 in 2008. In this competitive environment, there was no need for the types of heavy regulation imposed on other communications industries, and the wireless industry flourished to the benefit of the entire value chain, from content providers to consumers.

For all of these reasons, the DOJ and FCC should stop this takeover and preserve a marketplace where thriving competition produces improved quality, lower prices, and ongoing innovations for wireless users. As history has amply demonstrated, we should not expect the two reconstituted Bell companies to actively compete with one another. They could effectively eliminate the robust competition that has served America so well for nearly two decades. The difference in size between the top two and any other competitor could become too great, which could marginalize the ability of Sprint and the remaining local and regional carriers to influence the level of innovation in the industry ecosystem.

AT&T's Claimed Spectrum Efficiencies Do Not Withstand Scrutiny

AT&T claims that its acquisition of T-Mobile will give AT&T the additional spectrum it needs and allow AT&T to extend wireless service to some parts of rural America that are without adequate coverage. This is a myth. Even without this transaction, with the Qualcomm spectrum it is purchasing, AT&T has the largest, licensed spectrum holdings of any wireless carrier. But it does not use that spectrum efficiently. Specifically, AT&T is not using on average 40 MHz of its spectrum across the nation – spectrum that could be used to improve service for its customers – but that AT&T has chosen instead to "warehouse" for future services.

AT&T could invest in its network to increase its capacity where necessary and use its spectrum more effectively. AT&T does not face a spectrum crisis, but rather a spectrum deployment problem of its own creation. Verizon has less spectrum and more subscribers than AT&T, but just weeks ago Verizon stated publicly that it has sufficient spectrum to meet its needs until 2015. Increasing demand for data-based communications, such as video and internet content, are not unique to AT&T; all carriers have to use their spectrum assignments efficiently. The most data-hungry devices are Android devices, which are more prevalent on Verizon's, Sprint's and T-Mobile's networks than they are on AT&T's as a percentage of devices on-network.

Finally, T-Mobile is already heavily using its spectrum in the same high demand areas where AT&T asserts it needs additional capacity. Thus, the proposed merger would bring little spectrum relief to AT&T where it claims to need it the most. If AT&T invested only a fraction of the $39 billion T-Mobile purchase price into its own network, AT&T could alleviate its alleged capacity concerns, upgrade its network, and deploy advanced wireless technologies, without harming wireless competition. In short, AT&T has several available alternatives, including buying spectrum on the market, for addressing its customer service needs without a merger that would eliminate the 4^{th} largest nationwide carrier and the nation's only other national GSM competitor.

AT&T also has attempted to justify the T-Mobile takeover by arguing it will enable AT&T to extend wireless services to rural America.

This is a false choice. There is nothing in the proposed merger that changes the fundamental economics of rural broadband deployment. Rural areas do not suffer from any shortage of spectrum given the lower demand for services that results from lower population densities. Rather, rural expansion has been delayed because the lack of population density in rural areas simply makes build-out more expensive per subscriber. The addition of the T-Mobile network to that of AT&T would not change this fact, and would only extend the AT&T network to about 1% more of the population than are already in AT&T's network coverage.

Congress and the FCC are both considering ways to promote broadband deployment in rural areas. It is noteworthy that of all the rural proposals under consideration, some of which are supported by Sprint, none would result in a corresponding reduction in competition in the rest of the country. If AT&T's real goal was to reach more people in rural areas, it could invest the $39 billion it is spending to buy T-Mobile to build out service to rural areas rather than raise the prospect of rural development as a pretext to swallow a competitor.

Local and Regional Carriers Cannot Replace T-Mobile

AT&T argues that there will be adequate competition after its acquisition of T-Mobile by pointing to regional and local competitors, such as niche prepaid carriers, MetroPCS and Cricket. These smaller prepaid companies provide a viable option for a limited group of customers, principally those who want a low cost phone with fewer options and features, and whose usage is primarily in a limited geographic area. However, these smaller prepaid companies will not be able to keep the Twin Bells from raising prices for the vast majority of consumers who want robust wireless device options, a national footprint and continued innovation. Likewise, the other few remaining post-paid carriers, which represent less than 5% of total post-paid subscribers, will not have the scale that will spur the Twin Bells to innovate or risk losing significant numbers of customers.

Importantly, the smaller companies all rely on competitive access to the national carriers' networks for wholesale roaming service, the pricing of which would be controlled by the Twin Bells following the proposed transaction. And for both domestic and international companies that need

GSM, with the elimination of T-Mobile, they would now have no alternate nationwide choice. Thus, the local and regional carriers cannot maintain either price or innovation competition in the wireless industry; they cannot individually or collectively restore the competition that would be lost by AT&T's proposed T-Mobile takeover.

Sprint Wants the Opportunity to Compete

In a competitive marketplace, on a fair playing field, Sprint can continue to be a leader in customer service, value, pricing, and innovation. We started as a small and entrepreneurial company, and we understand how to compete and succeed in the open marketplace.

Some mergers are justified, and even beneficial. They can improve industry competitiveness, health, and customer choice. This one does not. We believe that the acquisition of T-Mobile USA by AT&T is a "bridge too far" in consolidating too much market power in the hands of only two, similar companies. With the elimination of competition, we would ironically return to more government regulation, not less, as we turn the clock back to the days of Ma Bell. As Senate Judiciary Committee Chairman Kohl noted regarding the proposed MCI WorldCom/Sprint merger in 1999: "One need not be a rocket scientist – or even an antitrust lawyer – to be wary of a merger which results in just two dominant players in an industry." AT&T's takeover of T-Mobile would entrench two dominant players, just as

Chairman Kohl cautioned against. If this takeover is allowed, on what pretense would Verizon not be allowed to acquire remaining competitors?

I would like to thank you for holding this hearing today and taking a serious look at the proposed acquisition of T-Mobile by AT&T. We urge the Department of Justice and the FCC to take a hard look at this transaction and to weigh carefully the irreparable harm to competition, innovation, and customer choice against the purported benefits of combining two overlapping businesses.

Mr. WATT. I yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the Vice-Chairman of the Committee, the gentleman from Arizona, Mr. Quayle, for 5 minutes.

Mr. QUAYLE. Thank you, Mr. Chairman.

Mr. Stephenson, there are a lot of companies here that are U.S.-based but they have a lot of operations overseas and in Europe and in Asia, and a lot of times they are required to get a phone that is on a GSM network. Now, if the merger goes through between AT&T and T-Mobile, will there be a competitive alternative for these types of companies and individuals who require a plan that is on the GSM network?

Mr. STEPHENSON. So today if you are in Europe—pick an example—and you have a 3G device and you want to roam in the United States, there are very few phones in Europe that roam on the other GSM provider, which is T-Mobile. In fact, I might surmise that my friend René here is roaming on my network today, on the 3G network, for that very reason. This transaction does not change that one iota.

The importance to understand in the roaming world is the pricing discipline comes by virtue of we trade traffic. So if René needs for his customers to roam in the United States, I need my customers to roam in Europe, we exchange traffic, and then we set rates based on exchanges of traffic. That is the pricing discipline.

I will tell you I am aware of no situation around the globe where we have roaming arrangements where AT&T is paying less than the carrier who is bringing traffic to the United States. So the pricing discipline comes by virtue of those exchanges of traffic.

Mr. QUAYLE. Okay, thank you.

Mr. Berry, in your testimony, you talked about how the consolidation within the wireless market has led to higher prices. Anecdotally I just have to dispute that because I just don't know where you are getting—basing that on factual information because looking at my own wireless bill in the last few years, the prices have come down and the services have gone up. So where are you basing that assertion on?

Mr. BERRY. I said that prices would go up through consolidation.

Mr. QUAYLE. Well, in your statement, you actually pointed to the fact that—in your written statement that the consolidation that has occurred over the last 5 years has actually increased prices. And I just want to know where you base that on.

Mr. BERRY. Well, two factors. For example, you were talking about international. The United States prices are actually a little higher than they are in the international arena. We have had a lot of cost decreases because of technology. The correlation is not always cause and effect. I think what you are seeing is higher bills because of greater data usage and greater utilization from U.S. consumers. So your basic bill may go up.

Mr. QUAYLE. But that doesn't mean the consolidation has actually——

Mr. BERRY. The data——

Mr. QUAYLE. Sorry to interrupt, but that doesn't mean that the consolidation has actually led to higher prices based on what you are actually receiving. You are actually receiving more for less. So that is all I was trying to figure out what that actual statement was based upon.

Professor Gavil, you stated in your testimony that if this merger does go through, Congress may not have the ability to bring back competition within the wireless sphere. But wouldn't the marketplace be able to take care of that? Wouldn't the marketplace be able to bring back that competition if you have a situation where a company is gouging pricing? And one of the things that we have been seeing right now is T-Mobile has the low-cost provider. Now, doesn't that, first of all, give Sprint the ability to actually take up market share, take over customers who are looking for that low cost? And also doesn't that also give cable companies who have talked about getting in the wireless sphere, various Internet companies have also—if they see that there is the ability to go in and to have the capital to actually provide a service to those who feel that they are going to be under-provided and allowing the marketplace to bring back competition?

Mr. GAVIL. I think it is an important question, Congressman. And the answer has to do with barriers to entry that already exist in the industry. This is not an easy industry to get into. So even if the prices were higher—and in fact, if you think about it, the incentive to raise price is affected by those companies' estimation of whether they are likely to see new entry, new competition. It is not easy to acquire spectrum. It is not easy, as we have been hearing, to build out. It is not easy to produce 4G LTE systems.

So if you are looking at all of those factors, in theory, yes, you would hope that if prices go up, there would be interest from others in entering the market and bringing new competition. But the merger itself may make entry more difficult, as we have been talking about, these issues about interconnection and roaming. That would be a way a smaller carrier would want to enter the market, and yet they would be subject to having to engage in agreements with Verizon and AT&T even to get into the market, and they would probably be at a price disadvantage because of that.

So in theory, yes, but one of the things that is troubling about this market is the issue of entry barriers, and the merger will probably make those entry barriers even more difficult.

Mr. QUAYLE. But if a company that is currently not in the marketplace but does have the sufficient amount of capital to be able to enter and provide direct competition because they see that there is an area of this market that isn't being serviced and they can actually make a profit, even though the initial capital outlay will be substantial because, like you talked about, the barriers to entry, wouldn't you see that as a way for the market to just govern itself?

Mr. GAVIL. Yes, and in fact, under the Horizontal Merger Guidelines the Government uses, you look at the likelihood of entry and you ask whether it would be timely, whether it would be likely, and whether it would be sufficient to counteract any incentive to raise price. So that would most certainly be a part of the analysis.

Mr. QUAYLE. Okay. Thank you very much.

I yield back.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Chairman.

You know, during the Clinton administration, outside of Microsoft, the Department of Justice antitrust was pretty dormant. During the Bush administration, the door was shut and we don't know if they were asleep or awake. It didn't make much difference. And under Obama, I can count on one hand the number of mergers that have been blocked, very few. Oh, yes, they put on conditions. That is the last anybody ever hears about the conditions.

Now, normally at antitrust hearings, we get the promises that there won't be losses of jobs. We won't raise the rates. The thing I like about these witnesses is they don't even promise that, and so I thank you for your evasiveness on this issue. Then I don't have to come back next year and say they promised us they wouldn't cut any jobs.

So I am concerned. I see absolutely no redeeming reason for this merger to go through, not even one. T-Mobile is probably broke. I am glad Mel Watt doesn't want to reveal their finances. They are pretty desperate.

And we never ever do anything—the reason that the mountains of North Carolina don't have any services is it is not profitable. What is so hard to figure out about that? You don't make any money. You make $29 billion a year, but you don't make any money up in the country or in the rural areas or in small towns or in the mountains. That is why you don't give them any service. And so what makes me think that T-Mobile joining you is going to make that any different?

Mr. STEPHENSON. May I respond to that?

Mr. CONYERS. Sure.

Mr. STEPHENSON. I would not argue with you that the profit motive does not drive us to invest in a lot of rural America. It has been that way in this industry for quite some time. The Universal Service Fund was, in fact, developed for exactly that reason.

What I believe this transaction affords is there does become a profit incentive for us to build out 97 percent of the U.S. with this mobile capability and mobile broadband. The significance of that is we are no longer looking for Universal Service funding and Government funding to cover all of rural America. There is 3 percent remaining. We get to 97 percent with this transaction. There is 3 percent remaining for the Universal Service Fund. That is a manageable approach in getting rural coverage.

Mr. CONYERS. Let me ask the professor from Howard. What are your reservations about this deal?

Mr. GAVIL. I think beyond the reduction in the direct competition between the two firms, which I think clearly could result in higher prices for consumers, I am very concerned about what it means for the basic structure of the industry as a whole. As Chairman Goodlatte was asking Professor Wright earlier, this is not what we would traditionally call just a horizontal merger. The question is not just about the reduction of competition between two rivals. It is about them winding up in a situation where they are portals for lots of other firms with which they have vertical relationships.

Think about all the technology that has advanced in the last 5 years in handsets, in operating systems, in applications, all of the things that we can do with our smart phones and our new tablet PC's and iPads. All of those things have come from people who now must interact and negotiate with a market that will be dominated by AT&T and Verizon. And we can count on those two companies to do what is best in their interest, but I don't know that we want to entrust them with all of the decisions about what the next technology ought to be.

A competitive market can be more creative, can take some risks, and those kinds of creativity and risks can bring us a more interesting and broader variety of products, allowing those products to be tested through competition, not through the judgment of two large portals.

Ms. DESAI. To go to your comment about incentives for building out, Verizon has said that it will build out to about 95 percent of the country with the spectrum holdings that it has now. It is hard to believe that AT&T, which has similar holdings as Verizon, would just give up 15 percent of the market and not build out to 95 percent of the country. So I think we all expected that even before the merger, AT&T was going to compete with Verizon to build out. I don't think AT&T would simply give up 15 percent of the market to Verizon.

Mr. STEPHENSON. Would you mind if I corrected one thing? We do not have the same spectrum holdings as Verizon. Verizon has a nationwide 24 megahertz swath of 700 megahertz spectrum. We do not have that. Make no mistake about it. We are not on equal footing in terms of spectrum. We do need the spectrum that T-Mobile holds to do a complete 97 percent build-out of the U.S.

Ms. DESAI. I would just say I am going by the recent Congressional Research Service note that came out a couple of weeks ago that stated that the two companies had similar holdings, maybe not the same holdings, but they do have similar holdings.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair now recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us this morning, ladies and gentlemen.

Mr. Stephenson, let me revisit a question that has been kicked around several times this morning. How do carriers actually determine when to build out, expand, or upgrade service in small towns or rural areas, of which I have many in my district?

Mr. STEPHENSON. Ranking Member Conyers is accurate. We are a market-driven company and we build out when we can deploy capital and earn a return on that capital. And generally, it is only when technology is mature and the cost curves come down that costs justify deploying technology into rural America. And that is kind of the equation.

What is unique about this opportunity is around the globe, we are scaling LTE fourth generation mobile broadband. These cost curves are already coming down very, very quickly. And so if you put two things together, first of all, a spectrum position that will allow us to build into rural America and, second of all, a larger customer base against which you leverage that investment—we gain another 30 million subscribers with T-Mobile—it changes the economics. And that is why this basically affords a private market solution to cover rural America. That is one of the most exciting things about this. I have been looking for 5 years for a broadband solution to get to rural America cost effectively. I have not been able to find one. This is the first instance where we have a good, solid economic justification for getting to rural America.

Mr. COBLE. I thank you, sir.

Mr. Obermann, I am told that T-Mobile invested in infrastructure build-outs in Europe but elected not to do so in the United States. If this is accurate, why in Europe and not in the U.S.?

Mr. OBERMANN. With due respect, sir, that is not the fact. That is not the case. We invested continuously between $2 billion and $3 billion, roughly, per year over the last years and even in some years beyond $3 billion. So we keep investing into this market, but the fact of the matter is we haven't yet been able to acquire spectrum, radio spectrum, which gives us the opportunity to build the next generation networks, and this combination gives us and our customers the chance to get the benefits of the next generation technology and it frees up capacity. Neither AT&T nor us would have been able to build LTE to 97 percent of American customers.

Mr. COBLE. Thank you, sir.

Let me hear from Mr. Stephenson and Mr. Berry on this question.

I am told that AT&T intends to offer roaming agreements to all rural providers. Are there any limitations to this offer? And do these agreements also apply to data services? Why don't we start with you, Mr. Stephenson, and then I will hear from Mr. Berry.

Mr. STEPHENSON. I would tell you we are open for business for folks to roam on our networks, both 3G data as well as voice. I envision in the LTE environment, we will do roaming deals, and I would be glad to do roaming deals. The FCC, about a month ago, issued an order requiring companies to negotiate roaming deals at reasonable commercial terms. Before that order came out, we had a number of roaming agreements. Since that order came out, we have signed seven new roaming agreements on our 3G networks. So to answer your question directly, yes, we are open for business. It is actually a good business proposition for us.

Mr. COBLE. Thank you, sir.

Mr. Berry?

Mr. BERRY. Yes, Chairman Coble.

We are very glad to see the FCC order on data roaming. As a matter of fact, until the FCC began its NPRM and its process of directing a data roaming mandate, we were unable to obtain those type of agreements and especially in rural America.

For the LTE solution that Mr. Stephenson has just talked about, there is another problem and that is that AT&T has created its own private band plan within the lower 700 megahertz. Most of my members own band 12. Band 17 is a subset of that. If AT&T were to join with us and create interoperable standards for that band, we would join with them immediately and build out LTE throughout the rural area in the United States. We can't get access to handsets and devices and we can't—as you said, you have to make money in your build-out. We would like and we welcome the opportunity to join in roaming agreements.

But Verizon has already appealed that agreement of the FCC, and so it is on appeal. And we have yet to see whether or not that is actually going to make a difference. And we encourage every one of our members to continue to monitor that and try to enter into agreements with AT&T.

If you are a GSM provider, there are no other options. It is either roam with AT&T, if this deal goes through, or no one else. And right now, T-Mobile is the value partner for those roaming agreements. Once this deal goes through, there will only be one choice.

Mr. COBLE. Mr. Obermann, did you want to be heard?

Mr. OBERMANN. Sir, first of all, I just confirmed the number with my colleague. It was well beyond $30 billion which we have invested over the last 10 years into this market.

Second, to the point of roaming, I cannot see a reason—but maybe Mr. Stephenson should confirm that—why the existing roaming contracts with regional carriers—and there are quite many—would not be continued after the merger.

Mr. COBLE. I thank you, sir.

Mr. Chairman, I see my red light has illuminated. I yield back.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Florida, Mr. Deutch, is recognized for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

I would like to bring up something that was raised in the testimony submitted for the record by the Communications Workers of America. There has been an awful lot of complex analysis of these issues, and I appreciated CWA's succinct statement of their position. Their President, Larry Cohen, said that they have studied the transaction carefully. They reached the following conclusion, that the acquisition of T-Mobile by AT&T will be good for broadband deployment, good for consumers, good for jobs, good for workers rights, and good for rural citizens. I would like to get into some of those issues since there seems to be some difference of opinion, but he was quite clear.

I, importantly, would like to focus on the effect of mergers on U.S. workers. Workers have borne the brunt of this recession, and it is especially relevant in my State of Florida where unemployment continues to exceed 10 percent. So when I hear about a proposal of this magnitude, my first inclination is to look at what it will do for jobs and for workers, as Ranking Member Conyers brought up earlier.

I understand from Mr. Cohen's testimony, AT&T is the Nation's only union wireless company with 43,000 union workers. I trust, Mr. Stephenson, you would agree that that is a good thing for the company and for the employees at the company.

But returning to the question at hand, I would like to hear from the panel about how specifically the proposed merger will affect jobs. Are we looking at a net job loss because of redundancies between T-Mobile and AT&T? Or would there be new jobs created if the Department of Justice ultimately approves the merger?

I will start, Mr. Stephenson, with your views on that. Is there reason to think that this will have an affect on jobs overall?

Mr. STEPHENSON. As it relates to what it does to specifically union jobs, I can go back and tell you what has happened historically. When we combined Cingular with AT&T Wireless, we had the same situation. Since we put those two companies together, the number of union jobs have doubled in our company. What is driving that?

In our industry, but certainly no different than any other industry, but you only are hiring where you are investing. In our business, if you are not investing, you are not hiring. You can look at our plain old telephone service business. We are not investing over there anymore, and you know what is happening to employment. Employment is decreasing. In wireless, we are investing. We are investing aggressively, and so employment continues to grow in our wireless businesses.

This transaction, when consummated, to build out the LTE footprint, this broadband footprint we are talking about, and to do all the integration required will entail $8 billion of investment over a 3-year period of time. Again, in our industry, investment means hiring.

This is why the CWA and the unions across America—all major unions have endorsed this deal because there will be hiring associated with that investment.

Now, I don't want to mislead anybody. You put two companies together like this, there are redundancies. We will not need two finance organizations, for example. We will not require two marketing organizations. And so we will have to address areas where we have redundancies. We have a long history, in terms of how we address those.

In fact, Larry Cohen of the CWA and I directly negotiated 5 years ago a concept we call JOG. It is called the Job Offer Guarantee. And the way we manage these surplus situations is we offer each employee a job within a certain geographic area. And it has allowed us over the last few years to very effectively move employees out of declining businesses into growth businesses. It is very elegant. It doesn't happen real quickly, but we do get there. Using that and attrition, we believe we can manage through this.

Mr. DEUTCH. I think the Ranking Member was getting at this earlier. Ultimately, then I understand there will be an increase in union jobs. Is there anyone on the panel that can tell us or give their forecast on what this will mean to jobs overall? Will there be a net increase? Can we estimate what that net increase might be? What will we see? How will this affect the labor market?

Mr. STEPHENSON. I have not been able to do a detailed analysis literally of this organization. Traditionally what you will see is through attrition, there will be a short-term reduction in jobs through attrition and through the process we discussed. But both of us have a large labor force that has been outsourced, a lot of them out of the country. Our commitment has always been if we have to go down in redundancies, we go down there first and not in the United States. So I think in general in the short term, there may be a modest reduction, but over the 2- to 3-year time horizon, this should be a job creator. It historically has been.

Mr. DEUTCH. Mr. Obermann?

Mr. OBERMANN. If you can agree to the assumption that there is an additional build-out enabled by this merger, then you can also assume that the stimulating effects on jobs are significant by the broadband build-out. By additional broad band facilities and by building out the networks, it has a very stimulating effect on the economy overall. That is supported by a number of studies which we may deliver after the meeting.

Mr. DEUTCH. Thank you.

Mr. Chairman, it would be immensely helpful I think to understand better the possible downturn to the reduction short-term. Ultimately, the increase is long-term. If we could get a better appreciation for what that would look like, I think we would certainly all be better informed and it would help in this process.

And I yield back.

Ms. DESAI. Can I just quickly comment on that, if that is okay? I would just point out that AT&T has reduced their workforce in 8 of the last 9 years. So it is hard to see how moving forward they will continue to increase that workforce.

Mr. STEPHENSON. May I address that? This is a wireless transaction, and if you look at our wireless business over the same time horizon that Ms. Desai just articulated, the wireless workforce has been increasing steadily and in fact significantly. The declines have come on the side of the fixed line business, which those businesses are declining, and we have, I think, done a nice job of using attrition to manage those workforces down, as well as these job offer guarantees I discussed earlier. We have worked very hard with our labor union to try to migrate our workforce to the growing parts of the business.

Mr. GOODLATTE. I thank the gentleman.

The Chair now recognizes the Chairman of the Government Oversight Committee, the gentleman from California, Mr. Issa.

Mr. ISSA. I thank you, Chairman.

This has been very, very interesting. I guess since my Committee oversees the Post Office, we have lost almost 200,000 jobs over the last decade, union jobs. Guess what. If the business goes away, you are going to lose those jobs.

But I am going to take a different tact. Having been at the first Chicago show when cellular was rolled out and we were all so excited for this regional phenomenon that might catch on and allow us not to carry suitcases as our telephones and talk to operators who would then connect us. As I watch this go on from analog to digital and so on, I have seen one thing, which is, first of all, the tie-in with wireline does concern me. The fact is we are reassembling a duopoly on the back end. And I am going to want to know, in this process as we look at it, that the protections for the remaining wireless carriers—because I remember when it was wireline, and it basically cut those into two groups, those who had wire and those who didn't initially. And I am going to want to be concerned for the remaining non-wireline carriers, of which there are a very large amount with a very small amount—that that backhaul capability is delivered at a fair price.

Having said that, I want to mostly talk to Mr. Obermann. You are not putting money into your business and you are losing market share as we speak. Right? You are not putting sufficient money into your business. You are a 2G and 3G sort of entity with no rollout of new technology. Is that roughly a fair statement without insulting your company?

Mr. OBERMANN. No. I think that contradicts the facts to be honest because we have invested more than $30 billion, significantly more than $30 billion——

Mr. ISSA. Are you behind AT&T in technology rollout today?

Mr. OBERMANN. I am sorry?

Mr. ISSA. Are you ahead or behind AT&T in technology rollout, high-speed data?

Mr. OBERMANN. We are not on the same level in terms of network coverage but we cover about 280 million U.S. customers.

Mr. ISSA. So you have less coverage.

And back to the original question. Your data speed enhancements, your investment in new data and in the bandwidth to go with it—are you ahead or behind AT&T?

Mr. OBERMANN. No. As we speak today, we have a good performance on our HSPA+ network. We can compete well, but the fact is that going forward, we cannot upgrade our network to the next generation technology called LTE and that is faster. It is more efficient, and it has a couple of advantages, including efficiency gains.

Mr. ISSA. Okay. So cutting you off a little bit here, but for sales purposes, you would say you are not behind. You are not this and that. But your forecast is you are clearly not going to stay up. You are going to become the behind carrier in the current projection based on the capital available.

Mr. OBERMANN. In the longer term, we are lacking the essential prerequisites to upgrade the network. Currently I must say that we are a little stuck in the middle because we are attacked by a number of value-based smaller players. There are, as my neighbor says, more than 100 in his association alone, and I think we haven't mentioned the fact that every market, including the markets in California, they have four or more facility-based carriers, almost every major market. And there is a lot of competition and it is not just——

Mr. ISSA. Okay.

Mr. OBERMANN. We are being attacked by a number of smaller players.

Mr. ISSA. Right, and I have got more questions for your answers, if you can bear with me.

So I am looking at a company that is being offered $39 billion today. You are the only two major GSM players today. If somebody wanted to buy you that wasn't GSM-based, what would you be worth versus the $39 billion we are talking about here today?

Mr. OBERMANN. I am afraid I cannot answer that question, sir.

Mr. ISSA. Well, I'm going to guess you are worth about half as much to anybody, other than the partner that is willing to pay.

To me the real question here today is, is this a synergy that is good for the market? Is this in fact the highest and best value for your stockholders I think is undeniable? Does it allow for the bandwidth, which is probably about half your value maybe, plus or minus a little bit, to be used efficiently by a new carrier? I have got a yes to all of those.

My real question to Mr. Stephenson is how am I going to be comfortable that all of these smaller players that remain—and I use that term not to be negative to them but percentage-wise—that they are going to have access to get their cell towers efficiently delivered to you. You are not going to roam with them. You are not on the same standard today. But how are they going to be assured that they are going to get fair value versus you and Verizon that have competitive advantages on that legacy part of your system?

Mr. STEPHENSON. In terms of the backhaul——

Mr. ISSA. Backhaul, exactly.

Mr. STEPHENSON. As I said earlier, we are outside of our footprint, which is 40 percent of the U.S. roughly. We are having to buy this both in rural as well as urban America. And we are finding multiple options for buying backhaul across the United States. René would tell you the same thing. We have multiple options.

By that same token, I think we do a very good job of offering backhaul to anybody that comes to us. It is actually a very good business for us. It is a very competitive business. The pricing discipline is in the marketplace and we are seeing it today. And there is, again, an FCC proceeding on this issue right now where this is being addressed to ensure fair and good price access to these facilities.

Mr. ISSA. Mr. Chairman, I hope as we continue with this process, we will look at that whole question of whether two incumbent monopolies in fact on the wired side, the backhaul side as we are talking about here today, are going to be looked at very carefully. I wasn't here when Judge Greene executed the breakup, but now that is reassembled, I hope that this Committee will look at that part of it. I have no doubt that this is a good deal for the synergies of the wireless, but I do want to make sure that I am very, very cognizant of how the wireless companies are treated relative to the wireline part of these two companies that will remain.

Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. The gentleman's point is well taken and we certainly will be following that aspect of this issue closely.

The Chair now recognizes the gentlewoman from California, Ms. Sánchez, for 5 minutes.

Ms. SÁNCHEZ. Thank you, Mr. Chairman. I want to thank you for convening the hearing today to talk about this important proposed merger. The wireless industry has consolidated previously, and yet, much like we saw when this Committee examined the Comcast/NBCU merger in the last Congress, this merger has aspects that simply did not exist in previous mergers.

So I appreciate the testimony of all our witnesses here today.

Wireless is increasingly becoming more and more necessary for people to keep up with technology and to manage their lives. I know that Members of Congress would be lost without their wireless devices.

So I am interested in some of the information that I have been hearing. There are parts of me that like some of what I am hearing, and there are parts of me that don't like some of what I am hearing. So I am going to try to pose a few questions to get at some of the things that are niggling at the back of my mind.

Mr. Obermann, I want to start with you. And maybe it is because this merger has made me more aware, but I have taken notice lately of the TV ads that T-Mobile is running on television. And I have seen the ads both in California and D.C., and they are identical television ads across the country. And it seems clear that T-Mobile seems to be competing nationally with customers across the United States who have similar wireless needs.

And I am interested in knowing for the discussion on competition and whether competition will be thwarted because of the merger. I mean, would it be a fair statement to say that you believe that

T-Mobile competes with AT&T on a nationwide basis and has a nationwide customer base?

Mr. OBERMANN. Well, first of all, the reason why we are going heavy into the advertisement campaigns on network is because our network perception—one of the reasons for customers to churn—has to be improved. And we have worked very hard to improve our network performance and we try now to make the best out of it in terms of marketing.

Do we compete nationally? In fact, I would argue that regional markets vary a lot, and the competitive situation in every market is quite different. And there are very good examples for that. For instance, in California—sorry—in Florida, you have companies like MetroPCS which are very strong. In fact, I believe they are either number one or two in Miami. You have in other markets such as Wisconsin U.S. Cellular being very strong, if I am not mistaken. And therefore, you have in different regions different strength of players and different propositions.

We recently changed our approach and we are now going more regional with regards to promotions and campaigns because customers clearly make their choices locally. It is more important that when you live, for instance, in Ohio that your local player, your local service provider, has good coverage and good devices and good tariffs and good rate plans and so forth, and therefore, customers make local decisions. We are now, therefore, going more aggressively on the local level and compete more locally and recognize that fact.

Ms. SÁNCHEZ. Maybe it was just the ads that I saw that are identical on both coasts of the Nation, but it sort of seems to poke fun at AT&T. And so it seems to me if you look at the promotion and the advertising, that it seems that you are in direct competition. And that is an important component here because when we are talking about two market players that compete against each other potentially merging, there are implications for how much competition remains if that were to happen.

Mr. Stephenson, you spoke in your testimony a lot about the impact on rural customers and trying to reach more customers to provide coverage. My district is not a rural district. And so I am curious if you could please let me know what is the impact of this merger on urban consumers, specifically if you want to get more local California or the Los Angeles market to be specific.

Mr. STEPHENSON. Los Angeles, San Francisco, and New York have been our greatest challenges over the last 3 or 4 years because of the advent of these smart phones and very specifically the iPhone, and the volumes that these devices are generating on our network has been very, very dramatic.

We have talked about the spectrum situation, the need for more spectrum. The way to mitigate or to extend the utilization of your existing spectrum—one of the key ways is to build more cell sites and you get better utilization out of your existing system. California is a classic case where we have been building aggressively the number of cell sites we are trying to deploy.

As you know, it is not very popular to come into LA or San Francisco and put up a new cell site. The permitting and the zoning is very, very burdensome. It can take 2 and even 3 years to get permits and zoning to build a cell site in those areas. And so it really extends the time frame to get service quality improved in places like those.

The significance of this transaction is T-Mobile has a very significant cell site grid that we put with ours. It is the equivalent in both of those cities in California of accelerating our cell site build by 8 years the day we close it. So you begin to do the integration of the networks, but you now have a much more dense cell site grid. More cell sites means better service. More cell sites means fewer dropped calls, fewer blocked calls, and better data throughput speeds. So that is one of the most attractive aspects of this.

René's company and mine—we operate on the exact same spectrum frequencies which is very advantageous, makes us go faster, and we use the exact same network technology which will make this go faster. His 2G customers that he spoke of earlier—literally the day we close this, we can over the air redirect his customers to our 2G network so that they have the very rich spectrum access. They can get in-building coverage immediately and we have access to his cell towers. So there should be a very quick lift in service quality.

Ms. SÁNCHEZ. My time has expired. I have additional questions that deal with consumer issues that I would have loved to get to, but I will submit those in writing for our panelists and would appreciate your responses. And I will yield back.

Mr. GOODLATTE. I thank the gentlewoman.

The gentleman from Indiana, Mr. Pence, is recognized for 5 minutes.

Mr. PENCE. Thanks, Chairman. Let me begin by thanking you for today's hearing on the proposed merger.

I also want to welcome this distinguished panel for what has been an illuminating and informative conversation.

And I expect much of the public interest in this is reflective of the fact that we are growing completely dependent in our economy and in commerce on these terrible gadgets which to me should have a chain attached to them and be the size of a cannonball.

I actually got my first BlackBerry, Mr. Chairman, when I was first elected early in 2001. They were being offered to Members of the freshmen class as something of an affectation. I got one because my chief of staff lived and worked in Indiana, which he still does, and I said, you mean that little gadget would let me talk to him at any time? And they said sure.

As a point of history, you all might be interested to know that on 9/11 when my BlackBerry was working in the security building when nothing else was working, the congressional leadership, as has been documented, started to make inquiries about why cell phones weren't working and these BlackBerry things were. A week later, they were issued to every Member of Congress.

So the conversation about how we continue to expand the availability of not only voice transmission but data transmission has expanded rapidly in my short tenure in the Congress, and the impact on this business merger relative to continuing to widen that to every American I think is what is of most interest to everyone on this Committee.

And I am intrigued by some of the dialogue. Mr. Stephenson, you were just talking about the symmetry between the 2G technologies between AT&T and T-Mobile. Correct me if I am wrong, but AT&T, about 20 percent is at 2G, about two times that with T-Mobile. You said that the ability to immediately integrate a large portion of T-Mobile's customer base and begin to immediately provide data and information services would become available as opposed to looking at months or years before that happened.

T-Mobile has a significant presence in the Hoosier State. We are grateful for that.

I guess my questions would be, first, practical and maybe the two on the end of the table there that could address this would be—Mr. Stephenson, AT&T is committed to providing LTE coverage to more than 97 percent of the population. That is a big increase prior to this announcement. I would like you to speak to how that is—and you have addressed this broadly, but would welcome your additional comments on how this merger will further expand the availability of this critical technology to rural areas like my district and all across the State of Indiana.

And secondly, since T-Mobile does have a presence in Indiana, we continue in Indiana, as we do around the country to struggle in a difficult economy. And I am struck by some of the other testimony about workforce reductions, which are understandable in a hard economy. Companies are making tough decisions but would like either one of you to reflect on what impact this may have on jobs in our area or more broadly.

Mr. STEPHENSON. I will start. René, I will let you chime in where you see fit.

The rural broadband build-out—I will go back, and I just want to drill down one layer deeper in terms of what is required to deploy these mobile broadband services. And I have said it earlier, but it is important to reinforce that you can't just go out and deploy these services on top of existing technology. You have to have new, unused, clear, clean spectrum to deploy these services, and it has to be rather large blocks, 20 megahertz. That probably doesn't mean anything to most of you, but that is a big block of this spectrum. And there are a number of places where we have this block of spectrum, particularly in the lower bandwidth, 700 megahertz. In those areas, we are building. Places where we don't have the 700, there is a higher frequency band that we are using. And we don't have good, ubiquitous coverage of that throughout rural America. That is the same spectrum where T-Mobile has deployed their 3G technologies.

And so the beauty and the elegance of this transaction is it will allow us to put these two networks together. We can begin to move the 3G technology out of those bands of spectrum, clear it out for fourth generation mobile broadband particularly in a lot of these rural areas. So it cleans this out and it gives us a spectrum position to really begin to ubiquitously deploy this capability.

And I will say it again. There is a further profit-enhancing reason for this. He has a rather large customer base that we can leverage also. Frankly, we can make money in rural America, which I think what has always been the incentive we have been looking for. And so there is a profit motive. It is a private market solution to accomplishing this objective and allow us to do this 97 percent coverage.

Mr. OBERMANN. Just a complementary piece of information not related to the labor topic, but to our presence and relevance in Indiana. We only have 2 percent and in some markets such as Indianapolis a 7 percent share. Other players such as U.S. Cellular and Leap Cricket, as well as Rebel—and then I am not quite certain whether all the others. Sprint, AT&T, and Verizon, are there as well. It is quite a contested area. It is a very competitive environment there. Our market share in that area is fairly small.

Mr. STEPHENSON. If I could add one more thing. We have a long history in terms of employment in the State of Indiana, and the State of Indiana has done a number of things in the past to clear roadblocks for us to deploy broadband. We have always made commitments on our investment, our deployment, and our hiring, and we have always hit those. And I think we have a good track record in Indiana. This is a specific case where Indiana will be affected exclusively by the rural build, and again investment in our industry means hiring. So this should be a net job creator for the State of Indiana specifically.

Mr. PENCE. I appreciate that very much.

Mr. Berry?

Mr. BERRY. Yes, Congressman Pence. Thank you for the opportunity.

We have six members of RCA members in your congressional district. And, yes, they want to roll out broadband as dearly as everyone else.

I sort of dispute the contention that you need clean, clear, unused spectrum in order to roll out broadband. I mean, the first broadband 4G network was rolled out by MetroPCS with 1.5 megahertz of spectrum. Granted, they are going to grow and we hope they will grow all over the Nation.

Normally when you are adding onto your house, you don't normally buy the next house next door until your sunroom is finished. You can, through managing the network, do both. And that is what the small carriers are doing right now. They are rolling out high-speed 4G in your area right now. If we had interoperability and data roaming, then Randall Stephenson and AT&T and T-Mobile would have many partners in doing that.

The 55 million people that you talk about—that is AT&T new potential users. It doesn't mean that those 55 million people right now don't have some coverage or broadband capability like other carriers.

Mr. PENCE. Well, I am someone that really believes—the Chairman knows—in competition, but my objective is to create a—support policies and practices that create a level playing field. I believe, Mr. Chairman—and you represent a rural area too—we get this technology out to rural America, medium-sized cities, small towns, we will show the east coast and the west coast a thing or two about job creation and growth.

Mr. GOODLATTE. I thank the gentleman. My rural area is on the east coast. [Laughter.]

The Chair now recognizes the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Ms. Desai, one solution you propose for AT&T to increase its capacity is to build more infrastructure, cell towers, for example. But I am sure you would agree that building infrastructure takes time. And let's assume that AT&T is correct that a combine AT&T/T-Mobile entity can use its combine spectrum more efficiently than the two companies can separately. Wouldn't we increase capacity a lot faster by having AT&T and T-Mobile combined than we would by waiting for either or both to be able to build cell towers, buy spectrum, et cetera?

Ms. DESAI. So I think when you try to combine the two networks, it is still going to take time to convert.

Mr. NADLER. But wouldn't it be faster?

Ms. DESAI. I don't think it is clear it would be faster. If they invest in their network work, they have the spectrum. They have the assets to invest in their network now rather than trying to integrate T-Mobile customers into AT&T customers. I think that is a question——

Mr. NADLER. Thank you.

Mr. Stephenson, would it be faster?

Mr. STEPHENSON. No, sir, it would not. In fact, your particular market is a specific example of where you would get overnight efficiencies if you combine these two networks.

Mr. NADLER. That is what I just said. Would it be faster if you combined them than if you didn't?

Mr. STEPHENSON. Oh, yes. If we put these two networks together, it is a much faster path to improve service.

Mr. NADLER. So Ms. Desai is saying it is the same, and you are saying it is much faster. Okay.

Mr. STEPHENSON. Much faster.

Mr. NADLER. Ms. Desai, since 1999 the overall price of cell phone service has declined in inflation-adjusted terms. There were a lot of mergers in that period. Does this suggest that fewer competitors doesn't always mean higher prices?

Ms. DESAI. So I think that data relates to voice prices, and voice prices should go down, especially since the cost of providing voice service has gone down. So I think it is natural over 10 years for voice——

Mr. NADLER. Natural because of better technology. It has nothing to do with——

Ms. DESAI. Right. It is cheaper now to deliver voice service. But more and more, people are now using data service, and we have seen that in the last almost 10 years the average revenue per user nationally has gone up for carriers. So we are seeing that revenues are going up on average. The ARPU, the average revenue per user, is going up. So I think if you ask most people in this room, they would say that their cell phone bills have actually gone——

Mr. NADLER. Okay, thank you.

Mr. Stephenson, obviously—and several other members have alluded to this before—a key question for the antitrust review is whether the analysis is done assuming one national market or multiple local markets. Viewed as a national market, in terms of 2010 revenue, combined AT&T/T-Mobile would control 44 percent; Verizon, 35 percent; and Sprint, 16 percent. It would essentially be a duopoly raising serious competitive concerns in any traditional antitrust analysis.

Not surprisingly in your testimony you dispute relying on a national market and suggest we should be looking at each individual market. You say that, quote, wireless competition occurs primarily on the local level, that there are many other strong competitors in the marketplace besides Sprint, Verizon, and AT&T, and this is consistent with your FCC filing on this transaction.

In 2008, however, AT&T took a different position. As part of its acquisition of Centennial Communications, David Christopher, AT&T's Chief Marketing Officer, signed an affidavit to the FCC in which he very clearly argued that AT&T competes in a national market and that regional operators like Centennial were not real competitors.

For example, he made the following statements. I am just going to read one out of that declaration. This is a quote. "AT&T makes nearly all competitive decisions in response to national competition. AT&T offers national plans that gives subscribers a consistent number of minutes of service for a single monthly price with no roaming charges and does not provide regional or local plans that vary depending on subscriber location." These statements—and there are a couple other statements that I don't have time to read—mirror what AT&T has told the FCC with respect to other transactions in the past.

There is clearly a—at least apparently, I should say—if I am wrong, tell me so, but there is apparently a reversal in AT&T's position on this national versus regional market question between 2008 in the Centennial proceeding and now.

One, do you agree that there is such a reversal? And two, to what do you attribute it?

Mr. STEPHENSON. Yes, sir. We did make that assertion in 2008, and we have done it in other time frames as well. The FCC and the Department of Justice have consistently and routinely rejected that. They have consistently and routinely said that these markets are local markets, that the customer's decision is made at the local level.

And I would tell you over the last 3 years, there has been a significant change in this marketplace. When we made our analysis of this particular transaction, our view was that this local marketplace has changed. If you look at San Antonio, if you look at New York versus Miami, those markets are fundamentally different. Our key competitor in—take the valley, for example. Our key competitor there and in Miami are Leap and MetroPCS. They are the focus of our competition. You go to Houston, our key competitor is Verizon. You go to New York——

Mr. NADLER. Excuse me. Well, wasn't that true a few years ago also in any local market?

Mr. STEPHENSON. No. The market has fundamentally changed. MetroPCS and Leap are the basic examples of where this is changing. In fact, if you look at the last quarter, in the last quarter, the largest gainers in the mobile industry were those two providers, MetroPCS gaining 700,000 customers, Leap gaining in excess——

Mr. NADLER. So, in other words, you are giving me two answers. You are saying, one, the market has fundamentally changed. And two, even before the market changed, the FCC said look at the local market.

Mr. STEPHENSON. They consistently told us—DOJ actually consistently told us—these are local markets, and so that is where we are.

Mr. NADLER. Okay. Thank you. My time has expired. Thank you.

Mr. GOODLATTE. I thank the gentleman.

We have just a few minutes left in a series of votes. The series is going to go on for a long time. We have several Members of the Committee who still wish to ask questions. So we will recess the Committee. We encourage you to go out and get some lunch because it is going to be at least an hour, probably longer than that. And then we will reconvene just as soon as the series of votes ends. The Committee will stand in recess.

[Whereupon, at 12:37 p.m., the Subcommittee recessed, to reconvene at 2:51 p.m., the same day.]

Mr. GOODLATTE. The Committee will reconvene.

And the Chair now recognizes the gentleman from Texas, Mr. Poe, for 5 minutes.

We probably could use wireless technology. [Laughter.]

Mr. POE. Somewhat ironic, is it not?

Thank you, Mr. Chairman. Thank you for being here and coming back.

Mr. Stephenson, I want to talk about some issues regarding coverage. 97 percent with the merger. 97 percent of the country will be covered. I want to know kind of where that 3 percent is.

Here is the background. When I go down to the Texas-Mexico border, ranchers don't have cell service in every area. Recently I was in Arizona as a guest of Gabby Giffords and her staff, and while I was down on the Arizona border with Mexico, no cell service, except I was getting service from service from Mexico. It wasn't Mexico Bell, but it was something. And that was the only cell service I was getting.

Bob Krentz. His wife Sue and many of the other ranchers in Arizona believe that the reason he was murdered was because when he was ambushed, he could not use his cell phone. And so I have introduced, with the support of Congresswoman Giffords, legislation to try to get a private/public partnership so the ranchers can have cell service on the border with Mexico for national security reasons.

My question is, is that 3 percent going to be still on the border with Mexico, or is that going to be covered with this merger?

Mr. STEPHENSON. I am sorry. I cannot tell you definitively. I don't know. I will have to go check it out, but we will respond for the record to let you know where the coverage, as it relates to the border, is. As I look at the maps, it tends to be in the very mountainous regions, particularly in what we call the "square States," so the Montanas and Idahos. There are some areas in there that, just quite frankly, it is very difficult to cover. But I will have to get back to you on the border States.

What I would suggest, Congressman, is irrespective, that 3 percent still has to be a goal of ours. I don't think we as a country should give up on that 3 percent. What I would offer and suggest is as we build these networks out and as private capital finances the 97 percent, then we can really turn our attention from a Universal Service Fund standpoint to the 3 percent. And I reinforce that that is probably an achievable goal from a public policy standpoint rather than Universal Service funds trying to cover 20 or 15 percent.

But I will have to get back to you to tell you exactly where we stand as it relates to the border areas.

Mr. POE. I appreciate that and I have a list of questions that I will also submit for the record. Send the answers back to the Chair, if you would.

I think universal coverage is important, but it is especially important to people who live on the border because of the national security—their own personal security, rather, that they have a very strong concern about throughout those regions.

Mr. Berry, did you want to weigh in on that?

Mr. BERRY. Well, I just wanted to say the 97 percent, as I understand it, is 97 percent of the population, not 97 percent of the geographic territory of the United States.

Many of the small carriers, like the ones I represent, have the lower 700 megahertz band spectrum, and they have a geographic build-out requirement. Most of the spectrum that Verizon has and most of the spectrum that AT&T has has a population build-out requirement. So there are two different requirements for the same type of spectrum.

But if you cover 97 percent of the population in the United States, you are probably still short around 13 to 15 percent of the geographic territory in the United States.

Mr. STEPHENSON. Oh, no. It is much higher than that actually. 97 percent of the population is only 55 percent of the land mass. So there is 45 percent of the land mass that will not be covered by this build, which is 3 percent of the population. That is why I say I will have to get back to you.

Mr. POE. All right. Thank you very much for that.

In southeast Texas that, as you know, I represent, I have had some concern with people that have Cricket. They think Cricket is going to go out of business with this merger. Weigh in on that. Are you going to put them out of business, Mr. Stephenson? They think you are. They think you are going to put them out of business.

Mr. STEPHENSON. There is no indication of that yet. In fact, I would suggest to you Leap, Cricket, MetroPCS, these what we will call no-contract participants, have done, I believe, a very masterful job at penetrating the lower end of the marketplace with low-end price plans. And then what they have been doing of recent is bringing smart phones into the marketplace and moving up into the mid tier of our customer base. So, obviously, at the mid tier, there is starting to be some more definitive competition.

But if you look at the last quarter results, Congressman, what you will see is those two companies together added a million subscribers. So Leap added 300,000 subscribers. MetroPCS, same type company, added 700,000 subscribers, as opposed to T-Mobile who actually shrank in the first quarter of this year, and Sprint adding a million subscribers. So they are actually the fastest growing in the industry at this point.

Mr. POE. I am out of time. I have some other questions I would submit for the record with the Chairman's consent.

Mr. BERRY. Mr. Poe, I don't want Randall Stephenson to just brag on my members alone. I think we ought to also indicate that his company was very successful in adding 1.9 million new customers and Verizon was 1.7 million new customers in the last quarter. So I think the entire industry, for the most part, is growing, and consumers are accepting the type of product that we are putting out there.

Mr. STEPHENSON. No argument.

Ms. DESAI. Can I just briefly add——

Mr. GOODLATTE. Yes, Ms. Desai, you can respond as well.

Ms. DESAI. The GAO report found that the more concentrated the market gets, it makes it easier for the larger carriers to grow, but it makes it more difficult for the smaller and more regional carriers to grow because of barriers to entry. So the bigger that the companies get, it makes it more difficult for the smaller carriers to compete. So I think we should be concerned about what happens to smaller carriers.

Mr. POE. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The gentlewoman from California, Ms. Lofgren, is recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. And I think this hearing is a helpful one. I think these are very difficult questions that we are facing.

As I think about this, with this merger, we won't be entirely back to where we were when Judge Greene had the case, but we are definitely moving in that direction. When I think about what we accomplished with Judge Greene and the Telecom Act in 1996, not just in your space, but the innovation that was a result of that is astonishing. I remember a time when you could only buy your phone from Ma Bell, and now you have got smart phones. That innovation was because of the competition that happened. So not to have a competitive environment does concern me a tremendous amount.

On the other hand, I listened carefully to what Mr. Obermann said, and it sounds like you have made the decision—your company has made the decision you are not going to build out to 4G. And if you are not going to build out to 4G, you are not going to have a customer base.

So my question to you, Mr. Obermann, is this. What if the Department of Justice says you can't do this merger? What do you do then?

Mr. OBERMANN. The situation is that we have built out 4G services with our HSPA+ network. "4G" is a term which we can also claim for us——

Ms. LOFGREN. All right.

Mr. OBERMANN [continuing]. Because the existing network—we have upgraded it to——

Ms. LOFGREN. Let me just say you have made your decision. I don't want to argue on who is claiming 4G that it isn't really 4G. But you are not going to make the next level of investment you said.

Mr. OBERMANN. No. I said that we are lacking the precondition to build our network from what we have today, which is HSPA+ to the next generation technology based on LTE, long-term evolution. That is a technology which will offer more speed, more efficiency——

Ms. LOFGREN. So you are not going to do LTE.

Mr. OBERMANN. Which we cannot do given our spectrum position. And also, even if we had the spectrum, it would require significant additional investments——

Ms. LOFGREN. No. I got that. The question is if the Department of Justice nixes this deal with you and AT&T, what is your company going to do?

Mr. OBERMANN. Well, we would, obviously, try to make the best out of what we have and try to compete. But let me be clear on this. This would be over the longer term. We would be in a very difficult situation. We would probably have to change our market approach completely.

I don't think we would end up there because once the facts are on the table, you will see the benefits of this transaction, and I am sure that these benefits give good enough reason for this merger to be approved. So I don't think we will end up in that scenario. I think there are very good reasons. The benefits are enormous for our customers and for AT&T customers and for the market as a whole.

Ms. LOFGREN. You know, I was thinking that if this merger goes through, the obvious response is going to have to be a heavier regulatory load in the wireless space to try and preserve some competition. And then I was remembering COVAD which was in my district, and I remember as COVAD started as a DSL provider, AT&T was required to allow them access but they had to have more lawyers than engineers because they had to file lawsuit after lawsuit to enforce their rights. So I am wondering if the two professors have any advice for us in terms of how effective an increased regulatory approach through the FCC in the wireless space would be if this merger goes through.

Mr. WRIGHT. Thank you. The short answer is going to be it depends on the problem that you are talking about. With respect to, for example, roaming, there is, as I understand it, a regulatory framework in place with respect to those concerns. With respect to concerns some have raised, for example, with backhaul issues, although I stated in my earlier testimony that I do not think that those raise a particular concern here, given that we are not in that space——

Ms. LOFGREN. I am almost out of time. I don't want to appear rude, but I have got just a few seconds left.

Professor Gavil, one concern that has been expressed is that with a duopoly or monopoly, you would actually have the ability to deter innovation outside of the space. What could the FCC do about that?

Mr. GAVIL. As I understand it, right now that would really not be directly in their realm of regulation. That is one of the things I am concerned about.

I think on your first point, as I indicated at length in my prepared statement, I am very concerned about returning to a regulatory scheme that is a combination of the FCC, the Department of Justice, and the Federal courts. I think we tried to get away from that in the Telecommunications Act, and I think that a negotiated settlement of this deal would be a step backwards from the kind of competition framework that the Telecom Act was designed to create.

And in terms of innovation, we are going to essentially have two gatekeepers that will be picking winners and losers in terms of technology. It will be very difficult I think in that setting for new handset developments, new operating system developments to break through into the market. There will be fewer choices in terms of carriers with sufficient customer base to attract the capital it takes to innovate on a large scale.

Mr. OBERMANN. Congresswoman, please give me a chance to disagree with that. I think there is going to be enough competition. I just happened to find an ad where a new company called LightSquared is announcing that they are going to build out a broadband network and that this will be a nationwide built-out network today. There are plenty of other regional or large facility-based carriers such as Sprint and the regional ones. We don't have such a constrained competition. We have extensive competition in this market, and the market shares in the respective markets speak for themselves. There are some markets where U.S. Cellular or Metro or Leap or others are very strong players, where they are stronger than us, for instance. So we have intensive competition, and we create more capacity, which is badly needed and that will even enhance competition further.

Mr. BERRY. Congresswoman, if I may.

Ms. LOFGREN. It is up to the Chair. My time is up.

Mr. GOODLATTE. Mr. Berry is allowed to answer the question.

Mr. BERRY. Real quick just on that. I would like to quote John Stankey who is the head of AT&T Enterprise Business. Just 2 weeks ago, he said that Clearwater and LightSquared, which Mr. Obermann just mentioned, would be better off consolidating and the best hope for the U.S. mobile wholesale market providers is that they should get swallowed up by a merger. There really isn't a profitable wholesale market in the wireless industry today.

And to suggest that my regional carriers are potentially equal in their competitive advantage to an AT&T or Verizon is just not correct. We would say in Virginia that that dog won't hunt.

Ms. LOFGREN. Thank you, Mr. Chairman. My time has expired and I appreciate your indulgence in letting me go over.

Mr. GOODLATTE. I thank the gentlewoman.

And the Chair now recognizes the gentlewoman from Texas for 5 minutes, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank you very much. Our Committee has really been consistent with our diligence in oversight over a number of mergers that have occurred or been proposed over the last 12 months to 2 years. So I thank the Chairman and the Ranking Member as well.

Some of these questions have been asked and maybe asked again, but I would like to pose them in a way of trying to deliberate on solutions and to also focus on accountability.

Let me be very clear. I frankly believe that section 7 that we repeat so frequently does not have the framework and the teeth to do what we need to do. In my conversations with some of those in the Justice Department who have responsibility for that oversight, they would admit that it is not a particularly piercing set of criteria that allows for what I would call very, very detailed and strict review. That was evident from my perspective, personalized view, from United Airlines and Continental that I still consider a questionable decision.

But I think that we have some opportunities going forward in this instance to see what our solutions are. I think it is important to consider the driving factors in the wireless telecommunications industry, those offerings that drive consumer decisions, price, service, quality, and variety of devices. And we have a world of devices.

In addition, I think it is important to note and to put on the record that AT&T is a union company and its union friends or workers are in support of this. That is an important statement, albeit that job decisions have to be made.

So I am interested in, to AT&T's representative, in particular, what will be measures that you will be able to evidence that will ensure that the company's expansion minimizes the number of job loss particularly since T-Mobile has overlapping, if you will, job descriptions and positions. In addition, T-Mobile and others have lost less jobs than what AT&T has decided to do as they have merged or have been involved with other smaller companies. What is the measure of what kind of commitment, what kind of measure will you utilize or will you be able to present to the DOJ, to the FTC on the lack of job loss? Mr. Stephenson?

Mr. STEPHENSON. We report to, obviously, both the Department of Labor and then to our external public the level of jobs in our company on a routine basis.

What I would expect is if one were to look at our wireless business, which this is a wireless merger, that one could look at the employment levels in the wireless business to ascertain what has happened to employment. You pick the period of time, over whatever period of time that we evaluate this. There are going to be a lot of things going on.

The primary thing going on that I think is going to be most important is the broadband build-out. That is an $8 billion investment over a several-year time horizon. And I think there are couple of things that we all ought to evaluate. I can tell you what I will be looking at. A 97.3 percent population coverage of broadband. Do we achieve that? The investment required to get there, the $8 billion—the $8 billion investment is what will drive the job creation, is the $8 billion being invested? Are you achieve the coverage? Is the money being spent? Is the investment being put in the ground? Are the cell sites being constructed, et cetera, the antennas being erected? So can you evaluate those? Those are the metrics you look at to discern whether this merger is doing what you want it to do.

Ms. JACKSON LEE. Mr. Stephenson, you understand the inquiry because we have had these hearings before. Certainly I have had some wonderful briefings and explanations. I think it is the question of how serious the company will be and not going down the pathway. You have the opportunity for expansion. You need spectrum. You need broadband, and so do poor communities and rural communities where I think there is an intent to serve. Why can't we simply say we are creating jobs? We don't need to lose jobs. You are creating work. You are creating expanded work, expanded reach. Why do we have to lose jobs?

Mr. STEPHENSON. Well, that is the expectation. As I said at the very beginning, when you do these types of transactions and you put the companies together, there are redundant responsibilities. Again, you don't need two finance departments and marketing departments. We have a history of how you deal with those redundancies, and I think we have been very effective at dealing with them properly and offering folks opportunities to move into the growth sides of the business.

But this merger is about investment. It is about $8 billion in investment and broadband build-out to rural America, and so the jobs must go with that.

Ms. JACKSON LEE. Can I just ask Mr. Berry? What does this merger need to do for you to make you whole?

Thank you, Mr. Stephenson.

Mr. BERRY. Thank you for the question.

Ms. JACKSON LEE. The ultimate possibility of a merger. How are you made whole?

Mr. BERRY. I don't think you can. That is why I say I do not think that this deal can be conditioned into approval. I think the basic ecosystem of not only the companies, but the suppliers, the vendors that support the tier 2 and 3 carriers will be irrevocably changed if you have this merger. There will be fewer partners to partner with to roam. There will be fewer opportunities for the smaller carriers to grow and share their nationwide footprint with that they need so desperately in order to——

Ms. JACKSON LEE. What about cost? Pricing.

Mr. BERRY. Well, I think the pricing will ultimately go up. I think it will go up on several ends. You have this vertical integration, and we talked a little about it earlier. Chairman Goodlatte mentioned it. You are going to have a monopoly on the GSM side of the backhaul. So it is not going to be multiple people setting a competitive price on the backhaul.

Ms. JACKSON LEE. Mr. Stephenson, can you quickly just answer? It is a rural area. You are talking about expanding broadband into the rural area. I don't want Mr. Berry to go out of business.

Mr. STEPHENSON. There is an interesting fact here, and that is why Mr. Berry and his organization are opposed to this merger. We are going to build vast broadband to rural America. We will be a direct competitor to Mr. Berry and his companies that he represents. There will be direct, full competition. And I thought that is what we were about. And so we are actually bringing a new competitor to bear to rural America. And so I understand why they don't like the merger. That doesn't change the fact that it does enhance and bring more competition, which I believe is good for rural America. For the first time, rural——

Mr. GOODLATTE. The time of gentlewoman has expired.

Ms. JACKSON LEE. Well, let me thank them. Let me just put this on the record, Mr. Chairman, and then I will yield. And I thank you very much.

You heard me say service, pricing are key elements besides the whole expansion of the service. I just want to pierce even more about the pricing for rural and less economically endowed consumers. Competition is good. I am going to keep probing that question.

Thank you. I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

The Chair is now pleased to recognize the gentlewoman from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I appreciate this hearing and I came early and I have sat because I want very much to learn.

I see the work of this Committee, particularly as it relates to antitrust laws and mergers, et cetera, as extremely important. And I believe that I and others who are elected by the people have a responsibility to hold regulators accountable to their statutory responsibilities. The FCC is supposed to consider the public interest and diversity, and the DOJ is supposed to preserve competition. And so I think that we should get right in the middle of this. We should understand everything that is going on. We should be able to challenge, and that is precisely what I intend to do.

I want to start with a question that I would like to ask about access. There has been some conversation today about backhaul and special access. In previous comments to the FCC, T-Mobile has said that the FCC should consider fundamental reforms to its regulation of the rates for special access services. That, in T-Mobile's experience, are at least subject to competition. T-Mobile continues to seek an alternative to subsidizing its two largest competitors, but today AT&T and Verizon continue to supply the majority of T-Mobile's backhaul services. What implications could this merger have on special access rates, and how competitive can smaller carriers be if they have to pay high rates to offer consumers competitive plans?

Mr. Obermann, you started this conversation. Now, what are you saying about it today?

Mr. OBERMANN. I can say, Congresswoman, that we have made ourselves increasingly independent from the local telephone companies over the last few years and that there are now numerous—or there are sources to get special access from such as subsidiaries of utility companies, such as fiber companies, such as cable companies, or you can do it by microwave links. So it is a very competitive environment. And we have reduced already our dependency on the local telephone carriers.

The merger as such, ma'am, doesn't change the situation because we are not selling special access to third parties. So we are not a part in the competition there. And hence, since we don't sell, the merger between AT&T and us doesn't change the picture.

Ms. WATERS. Mr. Berry, I think you had something to say about backhaul and access.

Mr. BERRY. Yes. I guess the question I would ask is how do you determine what is a competitive price in a monopoly situation. I mean, normally in a monopoly situation, the market dominance of an individual or a company sort of trumps every other competitive price that is set by market forces. So if you are a GSM provider, there are not many alternatives there. By taking T-Mobile out of the market—and they are a competitive purchaser of backhaul—

you shrink that market availability, and AT&T will fold them into their capability and it will be part of the preference service that AT&T provides.

Ms. WATERS. Some of us are going to pay special attention to this.

I really am concerned about the jobs. You have answered a lot of questions about jobs, and you talked about where your investments are going, where the growth is, all of that. But I want you to know it is a major concern for many Members of Congress.

I want to move to something else. In the merger of Verizon and Alltel in 2008, the Justice Department ordered Verizon to divest assets in 100 areas in 22 States in order to proceed with its $28 billion acquisition of Alltel. The Bush administration's DOJ ordered Verizon to divest wireless businesses in certain areas, as well as radio spectrum. Verizon retained Morgan Stanley to sell the assets. However, we learned that AT&T bought the lion's share of Verizon's assets in 79 rural areas for $2.35 billion. AT&T acquired spectrum licenses, cell towers, and 1.5 million subscribers in the deal. Since AT&T phones were not compatible with Verizon phones, all of those subscribers had to upgrade and get new phones. That is a cost that we have to be concerned about.

Beyond that, I think you know the information about how minorities are using wireless. From what I can see, Latinos and African Americans lead the way in the mobile broadband use, subscribing at a rate of 53 percent and 58 percent, respectively. That is big.

And so having said that, I know we are early in the process, but do you anticipate having to divest any assets, small or rural businesses, as a result of this merger? And if so, have you thought about ways to extend opportunities for small, minority women-owned businesses to participate in some way? I am really focused on wealth-building these days, job creation, and ownership. Do you have any thoughts on that, Mr. Stephenson?

Mr. STEPHENSON. Yes, ma'am. Virtually every transaction we have done over the last few years has had similar requirements to achieve the approval. There will be certain markets that the DOJ will deem to be too much concentration, and so they will require us to divest networks, spectrum, and customer bases. And so I have an expectation there will be markets like that in this particular transaction that we will have to divest.

And I will tell you I have every expectation that we would entertain any number of options of people to come in and acquire these assets. They will be good standing businesses, businesses with revenue streams. It will require some capital, obviously, to keep them going. But, yes, we would obviously look at any kind consideration for other folks we could help in business development and economic development and folks who would not ordinarily have an opportunity to do this. We would give that evaluation.

Ms. WATERS. Well, I appreciate that. As Mr. Conyers said earlier, we get a lot of these conditions in these mergers that never get realized. And I am not focused on conditions right now. I think the case has been made that this may not lend itself to conditions because this is so big. We are talking about creating a duopoly here.

But I still want you to think about minority ownership and participation in a real way. It is about time that minorities who are consumers who are spending huge amounts of money in any industry be considered as owners in some way. And so I will be watching that.

Thank you very much, Mr. Chairman.

Mr. STEPHENSON. We have done those in the past too, madam.

Ms. WATERS. But I don't know of any that have been successful at this point.

Mr. GOODLATTE. We will allow Mr. Obermann to respond too.

Mr. OBERMANN. We have always taken great pride——

Ms. WATERS. I can't hear you.

Mr. OBERMANN. We have always taken great pride in serving minorities both as customers. We also have preferred suppliers. About 21 percent or so of our suppliers are minorities. So are our consumers. 50 percent are minority. And they will get access to better coverage, to better service, eventually to the best possible network and they can keep their rate plans. At least that is how I understood Mr. Stephenson in previous discussions. To me that is an important point. We care. And to them, it is beneficial.

Ms. WATERS. That is great. You add to that ownership and you excite me.

Thank you. I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

And I want to thank all of our witnesses today. There has been a lot more activity at this half of the table than at this half, but Professor Wright and Professor Gavil, Ms. Desai, your contributions were all important and very welcome. On this side, you had a lot of pointed questions directed to all three of you. I think you did well with your answers.

We have a number of additional questions that will be coming forward in writing, and we hope that you will respond to those quickly so they can be included in the record.

Ms. JACKSON LEE. Mr. Chairman?

Mr. GOODLATTE. The gentlewoman from Texas?

Ms. JACKSON LEE. Yes, Mr. Chairman. As the gentlelady is leaving, I just wanted to make sure, since I understand Mr. Conyers might have had that line of questioning, that Mr. Stephenson, a third person is interested in the opportunity for spin-offs and business development. That is myself.

And the other individuals at the other end of the table, Mr. Chairman, we didn't ignore. We will be reading their materials. I really believe this will be a long process that we all will be engaged in.

So I yield back. Thank you very much.

Mr. GOODLATTE. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, I again thank our witnesses and declare the hearing adjourned.

[Whereupon, at 3:25 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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July 29, 2011

The Honorable Bob Goodlatte
Subcommittee Chairman
Subcommittee on Intellectual Property, Competition and the Internet
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: Questions for the Record - AT&T/T-Mobile USA Merger

Dear Chairman Goodlatte:

In response to your July 15, 2011 letter to Randall Stephenson, I attach hereto AT&T's responses to the Subcommittee's Questions for the Record regarding AT&T's proposed acquisition of T-Mobile USA from Deutsche Telekom.

As Mr. Stephenson testified, with the scale, scope, spectrum, facilities and other resources obtained through this transaction, the combined company will be able to offer Long Term Evolution ("LTE")—the premier next-generation wireless broadband technology—to more than 97 percent of the U.S. population. In the process it will create jobs and investment, help bridge the digital divide, and help achieve the Administration's rural broadband objectives, all without the expenditure of government funds. Since the hearing, the transaction has continued to draw unprecedented support from across the political, social and commercial landscape. For your convenience, I include below a listing of some of these supporters:

- ***The governors of twenty-six states***, many with large rural populations: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, and West Virginia. These twenty-six governors support this merger because they recognize that the combined company's expanded LTE deployment will bring much-needed investment, innovation and job creation to their constituents, including those who live in smaller communities and rural areas.
- ***The Attorneys General of eleven states:*** Alabama, Arkansas, Georgia, Kentucky, Michigan, Mississippi, North Dakota, South Dakota, Utah, West Virginia and Wyoming. This bipartisan group of attorneys general, led by General Dustin McDaniel of Arkansas and General Mark Shurtleff of Utah, supports the merger because it will create new capacity for the combined company, leading to better phone service and faster data

downloads for consumers and spur jobs and economic development in their states and across the country.

- ***Rural advocacy groups*** such as the National Grange, the U.S. Cattlemen's Association, the National Black Farmers Association, the Intertribal Agricultural Council, and the National Rural Health Association, which understand the importance of expanded LTE coverage for bringing telemedicine, distance learning, e-commerce and other vital services and broadband opportunities to the residents of underserved communities and rural America.

- ***Venture capital firms*** such as Kleiner Perkins, Sequoia Capital, Charles River Ventures, Matrix Partners, Technology Crossover Ventures, Radar Partners, Norwest Venture Partners, New Venture Partners and Lightspeed Ventures, which support this merger because the widely available LTE platform it makes possible will help fuel the entrepreneurship, innovation and investment that is critical to U.S. leadership in applications development and high-tech industries.

- ***Equipment and handset manufacturers*** such as Qualcomm, RIM, Pantech, Corning, Avaya, Juniper Networks, Brocade, JDS Uniphase, Amdocs, Tellabs, ADTRAN, Sierra Wireless, and many others, which understand that the combined company will be able to use spectrum more efficiently, improve service quality, and deploy an expanded LTE network, all of which will in turn drive a virtuous cycle of technology deployment, job creation, and economic growth.

- ***Providers of applications, content, and technology***, including Microsoft, Oracle, Yahoo!, and Facebook; the industry-shaping technology leaders represented by TechNet; the 340 high-tech companies represented by the Silicon Valley Leadership Group; and the more than 3000 small and mid-sized software developers and information technology providers of the Association for Competitive Technology. All of these entities recognize that the combined company's expanded LTE network and its increased ability to better serve consumers and businesses will play a crucial role in supporting the innovative products and services they are developing for American consumers and businesses.

- ***Labor unions representing 20 million workers***—including the Communications Workers of America, the AFL-CIO, National Education Association, American Federation of Teachers, the Teamsters, the Service Employees International Union, the International Union of Painters and Allied Trades, the American Federation of Teachers, the United Food and Commercial Workers, and the United Mine Workers of America. These unions support this merger because it will lead to the provision of LTE to more than 97% of the U.S. population, support economic development and give more workers access to good jobs at the only major unionized wireless provider in the United States.

- ***Diversity organizations*** such as the NAACP, the National Urban League, the National Action Network, the Hispanic Federation, the Hispanic Institute, the Asian Business Association, the Minority Media and Telecommunications Council, Pride at Work, and many others. These groups support this transaction because the combined company's higher-quality mobile broadband services and expanded LTE deployment will help bridge the digital divide and empower the disenfranchised to become full participants in our digital society.

- ***Disabilities rights organizations*** such as the World Institute on Disability, the American Foundation for the Blind, the American Association for People with Disabilities, and the United Spinal Association, which understand that, by facilitating widespread access to next-generation wireless broadband, this merger will increase access to healthcare, workforce participation, and opportunities for civic and social engagement.

- ***Environmental groups*** such as the Sierra Club and Future 500, which recognize that the merger will enable broader deployment of smartgrid and other machine-to-machine solutions that can improve energy efficiency, reduce carbon emissions, and help protect the environment.

On behalf of AT&T, I want to thank you for the time and resources you and the rest of the Subcommitee on Intellectual Property, Competition and the Internet have devoted to reviewing this transaction.

Sincerely,

Jim McGlone

Chairman Bob Goodlatte

Q1: How did AT&T plan to deal with its alleged spectrum capacity problems before the prospect of acquiring T-Mobile arose?

AT&T has taken a variety of measures to address its spectrum and capacity needs. It has invested over $21 billion in its wireless network over the last 3 years to expand capacity and improve the quality of service. That has included building a UMTS network that currently covers approximately 260 million Americans and that will continue to expand; building thousands of new cell sites, and upgrading throughput speeds and capacity through the deployment of HSPA+ technology and enhanced backhaul; and leading the industry in the deployment of alternative technologies such as distributed antenna systems, WiFi offload and femtocells. It also has accelerated its plans to deploy next-generation LTE service to 80% of its footprint, so that that, multi-billion dollar project will now be completed by the end of 2013. Despite all these steps -- and the introduction of tiered pricing to provide more efficient pricing of heavy data usage -- demand growth has continued to outstrip the capacity of AT&T's existing spectrum and network. Without the merger, AT&T would have no choice but to allow the quality of service to degrade in highly congested areas, or to use additional pricing tools (including increased prices) to curb demand. But none of these measures would come close to the level of synergistic increases in capacity, and the resulting increases in output, that are made possible by the merger.

Q2: You testified in the Senate that AT&T needs "20 megahertz of contiguous unused spectrum" to launch its 4G LTE network. However, I am told that spectrum bonding technologies could be released within a year that would allow networks to launch on non-contiguous spectrum. Has AT&T explored technological solutions to its spectrum problems?

As stated in the answer to Question 1, AT&T has and is continuing to explore and use all available technological alternatives to meet its capacity needs. Spectrum bonding will allow increased flexibility in the use of different spectrum bands, but it will not be available for some time. The 3GPP standard enabling spectrum bonding is expected to be released late next year. After that, vendors of infrastructure equipment and consumer devices will have to develop hardware implementing the standard, and it will then need to be tested and deployed. AT&T expects that spectrum bonding will not come into commercial use until late 2014 at the earliest. Since AT&T is about to begin launching LTE markets, and plans to complete its currently planned LTE network by 2013, this development will not have any impact on AT&T's requirements for launching its LTE network.

Q3: You testified that together AT&T and T-Mobile can create "the equivalent of new spectrum" from their two separate and limited spectrum assets. Can AT&T similarly create "the equivalent of new spectrum" within its own current spectrum assets?

No. What this transaction, uniquely, permits is to combine two separate but complementary sets of spectrum *and network infrastructure* in ways that, as a matter of basic engineering, permit the spectrum to be used more efficiently and create *more* capacity than the two networks would have operated separately. These capacity-creating efficiencies come from integrating the two complementary cell grids, thereby creating automatic increases in the demand that can be served; eliminating redundant control channels, thereby freeing up spectrum; creating larger channel pools, which also allows the same amount of spectrum to handle more traffic; and utilization efficiencies, which permit more spectrum to be deployed to more efficient technologies than either company alone could do.

Q4: Do you agree with the testimony that AT&T and Verizon own over 90 percent of the backhaul capacity in the United States? If not, could you please provide your estimates of the percentage of backhaul capacity owned by various companies and the percentage of backhaul revenues realized by various companies? Please provide the sources for your estimates.

AT&T does not agree with that testimony. The provision of backhaul services is robustly competitive with a wide variety of established providers – including cable companies, (like Cox, Comcast, Charter, Cablevision, Brighthouse and Time Warner Cable), fiber providers (like DukeNet and Florida Power and Light), traditional CLECs (such as Level 3, XO, and tw telecom), and fixed wireless providers (including FiberTower, TTMI, Zayo, GigaBeam, Nextlink, Clearwire, and TowerCloud) – competing vigorously to provide alternative backhaul services to wireless carriers. Unfortunately, many of these alternative backhaul providers have been unwilling to share the information about the size and scope of their operations that would be necessary to calculate shares of backhaul capacity or sales in any relevant market. The Federal Communications Commission has an active proceeding to address this data gap, and it has issued voluntary data requests to a range of competitive providers of backhaul and other special access services.

But there is already ample evidence that no supplier controls the backhaul marketplace and that neither AT&T nor Verizon has any special advantage in the provision of the high speed "Ethernet" backhaul services that all major wireless carriers need to meet the exploding demand for their retail wireless data services. Verizon Wireless, for example, recently stated that it is moving all of its cell sites to Ethernet and that the number of competing Ethernet providers has exceeded its expectations. Likewise, T-Mobile, which began its migration to Ethernet backhaul several years ago, has reported to the FCC that it has chosen to use alternative backhaul providers for more than half of these Ethernet cell sites. On the provider side, AT&T has reported to the FCC the difficulties we have faced in competing to supply Ethernet backhaul services even as we have significantly decreased our bid prices. In short, any claim that AT&T and Verizon control an unreasonably high percentage of the backhaul services purchased by wireless carriers cannot be squared with the real world facts.

Ranking Member Mel Watt

Q5: Mr. Stephenson, during the hearing, I asked why AT&T doesn't provided even basic cell phone service in the mountains of North Carolina despite having significant unused spectrum in the area. You responded that AT&T's unused spectrum is in the 700 band which the company intends to use for the rollout of its 4G LTE network. However, I understand that AT&T has undeployed spectrum in the NC mountains not only in the 700 MHz band, but also in the AWS (1.7 GHz/2.1 GHz) and the WCS (2.3 GHz) bands. So, has AT&T chosen not to use its unused spectrum in the AWS or WCS bands to deploy basic cell phone service in the mountains of North Carolina because, as Ranking Member Conyers noted during the hearing, because it is simply isn't profitable to do so?

AT&T plans to use both its AWS and its 700 MHz spectrum for its LTE network, and has therefore not deployed current generation wireless service on either of those spectrum bands anywhere in the country. As for WCS spectrum, the current service rules applied to that spectrum band continue to make it unsuitable for a commercially viable mobile voice or broadband service.

Q6: Mr. Stephenson, in response to a question about how many jobs will be lost as a result of the proposed AT&T takeover of T-Mobile, you stated you had not completed a "thorough analysis" and could not provide precise numbers. Have you completed any analysis or estimate of job losses? If so, how many AT&T and T-Mobile job losses did your review indicate would occur as a result of this proposed deal? On what do you base your projection to Wall Street that you expect to wring $6 billion of job expense-related synergies out of the T-Mobile purchase in the first three years?

Contrary to the suggestion of job losses, we believe that the transaction will be quite positive for job creation. Job creation occurs where businesses are growing and where investment takes place. This transaction enables AT&T to expand wireless output and to create a more efficient and effective broadband and wireless offering, and those are the areas where we have seen tremendous job growth, both for service providers and in the economic sectors supported by advancements in wireless and broadband infrastructure and services. For this reason, we do not believe that creating a more efficient and effective organization necessarily means losses in employment.

In addition, there will be approximately $8 billion of integration investments and very significant infrastructure investments associated with the expanded build-out of the LTE network that accompanies this transaction. Jobs come with that investment. But it is not just AT&T that will have an enhanced ability to grow and invest as a result of this transaction. The transaction will create a much more robust mobile broadband platform that will fuel growth and investment throughout the wireless ecosystem, including in rural areas. That is why venture capital firms, such as Kleiner Perkins Caufield & Byers, Sequoia Capital, Charles River Ventures,

and many others support this merger. And it is why those who depend on that ecosystem the most – providers of applications, content, and technology, including Facebook, Microsoft, Oracle, Yahoo!, dozens of the nation's largest, most technologically sophisticated businesses represented by TechNet, the 340 high-tech companies represented by the Silicon Valley Leadership Group, and the more than 3000 small and mid-sized software developers and information technology providers of the Association for Competitive Technology also support the merger.

An analysis by the Economic Policy Institute estimates that the additional incremental investment from the merger will result in approximately 55,000 to 96,000 new jobs, which includes direct jobs, supplier jobs and "induced jobs" (*i.e.*, jobs created as a result of newly hired workers spending their income).[1] Moreover, expanding deployment of our state-of-the-art LTE platform will have job-creating ripple effects throughout the national economy, including in rural areas as residents are able to take advantage of advanced wireless broadband services that enhance educational and business-creation opportunities.

AT&T also is sensitive to the fact that there will be overlapping functions between the two companies; however, as with prior mergers, we expect any necessary force adjustments to be achieved mostly through normal attrition. And in all events, we believe there will be a net increase in jobs as a result of this transaction.

As Larry Cohen, President of the Communications Workers of America testified regarding the transaction, "absolutely there is a record here that, with the right conditions, it will increase jobs, both directly in the surviving company and in the key economic development that it can bring to rural America."[2] He concluded that "this merger is good for U.S. workers."[3] He pointed to the track record developed in prior AT&T wireless mergers and noted that "in the long term, the expansion of AT&T's 4G LTE network holds the potential to create thousands of new jobs both in this industry and in the rural communities."[4] It is for this reason that, not only the CWA, but the AFL-CIO, the SEIU and numerous other labor organizations, support this merger.

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[1] *See* Ethan Pollack, Economic Policy Institute, *The Jobs Impact of Telecom Investment*, Policy Memorandum #185, at 2 (May 31, 2011), http://www.epi.org/publications/entry/7127/.

[2] *See* attached copies of relevant pages (pp.44-47) from unofficial transcript of the Statement of Larry Cohen, President, Communications Workers of America, before the Senate Committee on the Judiciary, Subcommittee on Antitrust Competition Policy and Consumer Rights, May 11, 2011 at 44.

[3] *Id* at 47.

[4] *Id.*

As for the projections to Wall Street, we have not communicated the specific projected cost synergies related to job expenses. However, even for the various synergies that we have identified, those related to employment do not necessarily arise from a loss of employment: for example, when overlapping positions are identified, employees may be offered different jobs in growing portions of the business, or the issue may be addressed through attrition as employees retire or leave for other opportunities.

Representative Ben Quayle

Q7: It was recently reported that as many as 30,000 jobs could be lost, and when you testified before the Senate Judiciary Committee, you acknowledged that due to overlaps there would be cuts. Will those who are union organized be given preference over those who are not?

As testimony before both the Senate Judiciary Committee and the House Judiciary Committee made clear, there will be overlaps between the two companies' functions, but that should not be equated with the extent of any U.S. job losses. We believe this transaction will facilitate job growth, which inevitably comes with the network investment that we have committed to with our LTE network build-out and with making our wireless operations more effective and efficient. Wireless services have been and will be the source of tremendous job growth. There is inevitably a degree of attrition in the workforce, as employees retire or choose to move to other positions, and we take advantage of that process to manage the need to redeploy employees as well. It is never our preference to resort to lay-offs.

When addressing our needs in our labor force, we seek to treat all employees fairly and with dignity, whether or not they belong to a union. AT&T complies with all federal and state labor laws and does not interfere with or provide aid to employees in their decisions to form or join a union. We have employees who are members of a union and employees who are not. And, AT&T traditionally has remained neutral in all union organizing efforts and we intend to do so here post-transaction.

Representative Steve Chabot

Q8: Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?

This merger will allow a very significant expansion of next-generation high-speed wireless broadband service to over 55 million Americans, at an investment of billions of dollars of entirely private money, with no government assistance. Those who claim that the merger will lead to increased regulation are operating on the erroneous premise that it will lead to reduced competition that will necessitate governmental involvement. That is not the case -- the merger will lead to *increased output* and cause average prices adjusted for quality to *fall.*

STATEMENT OF LARRY COHEN, PRESIDENT, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, D.C.

Mr. Cohen. Good morning, Chairman Kohl and Ranking Member Lee and members of the Subcommittee. I am Larry Cohen, president of the Communications Workers of America, representing hundreds of thousands of workers in both the network and content sides of this industry.

We look forward to this review both by the Congress, the FCC, and the Department of Justice, but at the end of these inquiries, we believe there are three key points: first, that this merger represents an opportunity for this country really to accelerate high-speed broadband deployment; second, that the transaction with conditions can positively impact consumers; and, third, that absolutely there is a record here that, with the right conditions, it will increase jobs, both directly in the surviving company and in the key economic development that it can bring to rural America.

Four years ago, CWA launched our Speed Matters campaign to highlight the importance of high-speed broadband for our Nation's future. High-speed Internet is essential to economic competitiveness, job creation, and the quality of our lives. Telemedicine, distance learning, and smart grids have enormous potential, but they will remain beyond the grasp of tens of millions of Americans unless we are able to accelerate the development of true high-speed wired and wireless broadband networks. And I think critically is to look at the global perspective. The U.S. now has fallen behind 25 other countries, including Romania, in the capacity of our broadband networks. The President highlighted this in the State of the Union, but we have no path whatsoever to closing this gap.

Our view is that this merger, with conditions and with the commitments made by T-Mobile and AT&T, is a critical way to bridge this gap that exists in terms of the U.S. versus the rest of the world, critical for rural America, and critical for economic development.

As you have heard, AT&T commits to deploying next-generation wireless, which is 4G, which is 10 megs downstream at a particular point, and, again, these would need to be in the commitments and the conditions, to 97 percent of the people within the next 5 years. This is noteworthy because today only 20 percent of U.S. broadband subscribers--we do not have two different industries. It is about data speed. And we saw that even today with Microsoft's announcement to spend $8.5 billion to buy Skype. We would like to compartmentalize this industry. That is not the way consumers view it. It can be data over cable, data over wireless, data over wireline WiMax at Sprint is a major investor in. And, again, the effects of this merger are especially significant for rural Americans, most of whom are on the wrong side of the digital divide. We need maps, we need years, we need investment, we need speeds. Those can all be conditions of this merger.

The real question this transaction poses is not whether T-Mobile will survive as an independent competitor. As Mr. Humm said, they cannot be forced to make the investments to 4G. 4G is the global standard, and the untold story here really is whether Sprint or AT&T acquires the company. And with all due respect to my colleague and friend Mr. Hesse, to us this is an open-and-shut case. And AT&T will commit and as conditions of this merger, conditions can be applied on the merger that absolutely provide for when investment will be made, what the speeds will be, what pricing will be within ranges, et cetera. That is an opportunity this country cannot afford to miss. We are falling woefully behind in the global economy, partially because of these infrastructure needs.

So AT&T has the financial resources to deploy 4G. Sprint does not. Sprint has committed to three different incompatible technologies, including the Clearwire WiMax investment, and they are already, you know, beyond their own reach. In this case, as you have heard, AT&T and T-Mobile have similar and compatible technologies, both GSM. Sprint does not. They have three other technologies.

And, finally, this merger is good for U.S. workers. Our experience in these mergers that formed today AT&T Mobility is that in not a single case have workers lost their job. And we believe that conditions can be applied to this merger, and the FCC did it in the Bell South merger where not only was there no loss of employment, there was renewed investment, renewed commitment to the rural South in the Bell South case. It was good for workers. It was good for those communities. We think similar conditions need to exist in this merger when it is, in fact, approved.

And so in the long term, the expansion of AT&T's 4G LTE network holds the potential to create thousands of new jobs both in this industry and in the rural communities.

Thank you.

[The prepared statement of Mr. Cohen follows:]

United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet

Questions for the Record for Mr. Rene Obermann

Hearing on:
"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

Thursday, May 26, 2011
10:30 a.m.
2141 Rayburn House Office Building

Representative Steve Chabot

Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?

The wireless industry is competitive today and will be competitive after the merger. The long established policy of a regulatory light touch for wireless has been a huge success story and will continue to be so. Nothing about the AT&T/T-Mobile merger will alter the benefits of that approach or necessitate increased intervention and regulation by the Federal Government.

As the FCC recently found in its 15th Annual Wireless Competition Report,, 90% of Americans have access to 5 facilities-based wireless providers (up from 73% just one year ago) and 77% of the population has access to 6 or more providers. Approximately 68% of the population is covered by at least four mobile broadband providers. As the report notes, these providers offer differing service plans, price points, and devices in an attempt to lure customers and compete for business.

The American wireless marketplace will become even more competitive with the capacity growth and cost savings made possible by this transaction. Companies such as Sprint, MetroPCS, and Leap offer low-priced unlimited plans, and they will continue to put intense competitive pressure on AT&T and all the other wireless providers after the merger, as they do now. Additionally, by relieving capacity constraints and producing new, increased capacity, the merger will permit AT&T to compete even more aggressively to retain and win customers.

This merger also will bring significant benefits to U.S. wireless consumers. Those benefits are threefold: (1) improved service quality for AT&T and T-Mobile customers by combining the companies' networks and spectrum; (2) expanded rollout of 4G LTE mobile services to more than 97% of Americans; and (3) lower prices industry-wide as a *result of lower costs and expanded output in an increasingly capacity-constrained industry. As I stated in my testimony before the Subcommittee, I firmly believe that this transaction is the best possible outcome – not only for Deutsche Telekom, T-Mobile USA, and AT&T – but for our customers and for wireless competition and innovation in the United States.*

RCA

The Competitive Carriers Association

Questions for the Record Response of

Steven K. Berry
President & CEO
Rural Cellular Association

before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing on:

"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"
Thursday, May 26, 2011
10:30 a.m.
2141 Rayburn House Office Building

July 29, 2011

Mr. Berry

Chairman Goodlatte

Q1: Do you believe that T-Mobile had any clear path to building a 4G LTE network? If so how could T-Mobile do it?

RESPONSE:

T-Mobile has had a clear path to building a 4G LTE network, and that path becomes even clearer absent an AT&T takeover due to the resulting "break-up" concessions.

In the presentation at T-Mobile USA Investor Day earlier this year (Attachment A), Deutsche Telekom indicates that the "HSPA+ platform provides cost effective and technically flexible path to LTE" (Slide 39). Further, the slide notes that "T-Mobile's technology upgrade to LTE costs $1-2B."

While explaining the presentation, as seen in the transcript of the Investor Day (Attachment B), Neville Ray, Chief Technology Officer for T-Mobile, expanded on the path forward from HSPA+ to LTE. In this explanation, Ray offers, "So, a little bit more on LTE and the contrast between our LTE path at the right point in time for T-Mobile USA in its future as contrasted to our competition. We are on the GSM 3G path and we migrate from that to HSPA+ to LTE. It's seamless. That's how this technology path was built" (14).

Building on T-Mobile's HSPA+ deployment, which is currently advertised as "America's Largest 4G Network," T-Mobile is already operating a technology that was, as Ray indicates, built to have a path forward to 4G LTE. With the transition from HSPA+ to LTE, T-Mobile does not need to immediately deploy LTE throughout its entire network to begin to realize benefits to both cost and capacity in providing service to existing and future customers.

Further, as Deutsche Telekom CEO Rene Obermann indicates earlier in the session, T-Mobile is currently "generating a positive operating free cash flow of between $2.5 billion and $3 billion per annum," and currently holds "54 megahertz of spectrum in our major markets which for the next few years put[s] [T-Mobile] into a position which is actually better than most of our competitors" (2). While this positive operating free cash flow could provide the investment to fund the $1-2B upgrade to LTE, so too could a cash influx provided by the "break-up" condition in which $3B would be provided by AT&T to Deustsche Telekom in the event that the proposed acquisition of T-Mobile USA by AT&T is not consummated. Combined with additional spectrum provided by the "break-up" concessions, T-Mobile would have the capital, spectrum, and technology glide path for a "seamless" transition to LTE. In addition to T-Mobile's past plans for 4G LTE buildout, T-Mobile has an even clearer 4G LTE if the transaction is broken up.

Q2: Please provide the source for your testimony that AT&T and Verizon own over 90 percent of the backhaul capacity in the United States and made over $8 billion on that

Mr. Berry

service last year. Regardless of the percentage of capacity that these companies own, what percentage of backhaul revenues do AT&T and Verizon realize? Please provide the source for your answer.

RESPONSE:

In an effort to simplify the technical explanation of how wireless carriers transmit traffic from a cell tower to networks, "backhaul" capacity was used synonymously with "special access." While new and competitive forms of backhaul exist outside of special access, backhaul as a portion of special access utilizes the wireline telephone networks that were originally built by the old Bell Monopoly and primarily controlled by AT&T and Verizon.

Based on information collected by the FCC on Form 499-A and reported in the 2010 Monitoring Report[1], Regional Bell Operating Company Incumbent Local Exchange Carriers and Other Incumbent Local Exchange Carriers reported local private line & special access revenues from telecommunications and interconnected VoIP service provided for resale at over $13 billion, accounting for over 94% of the total amount (Table 1.5, line 305, column interstate). RCA estimated the amount of this total owned by AT&T and Verizon to be over $8 billion and 90% of this total amount.

Representative Steve Chabot

Q3: Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?

RESPONSE:

The most straight-forward solution to prevent increased intervention and regulation by the Federal Government if this merger is approved is simple – prevent the merger from going forward.

As was testified before the Subcommittee, the impact of this merger, if approved, is ubiquitous. It will have a negative impact on many segments of the wireless industry that it is very difficult if not impossible to condition into acceptance. Below is a list of challenges that competitive carriers face. Each of these issues would be exacerbated by this merger.

- Roaming and data roaming are huge factors, particularly in the current GSM technology family environment and in the future for 4G HSPA+ and LTE technology, as nationwide roaming would be available only through the monopoly provider of the merged AT&T and T-Mobile. Carriers without nationwide licenses need roaming partners to provide national coverage. Since wireless is a national market, every regional carrier is at risk of elimination without roaming. While the FCC's recent data roaming order imposes a requirement on carriers to offer data roaming agreements on comparably reasonable terms and conditions, the FCC's rules did not establish specific standards or timing by

[1] Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303886A3.pdf

which carriers must negotiate these agreements. The large carriers can use this lack of specificity to effectively deny carriers access to roaming.

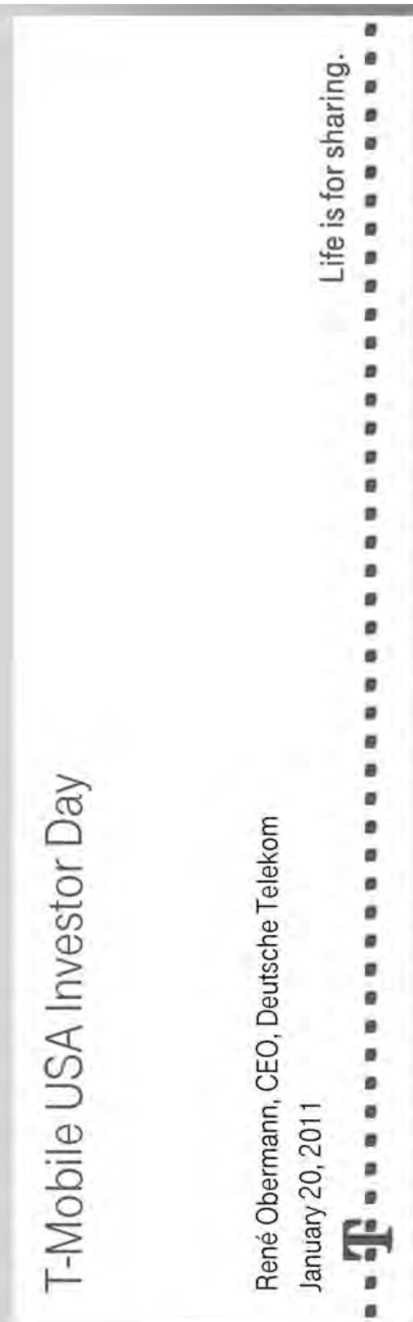
- Device availability and interoperability are also factors, as the scale commanded by the largest two carriers would be capable and incentivized to frustrate the development of interoperable devices compatible with competitive carrier networks. Additionally, the continuation of device and technology denial through device exclusivity agreements causes a competitive strain. Market based incentives for manufacturers to create new and innovative devices would significantly diminish for other competitive carriers.
- The special access market will shrink, as the two massive vertically-integrated carriers would control virtually all the facilities needed by competitors to connect cell towers into networks through access lines they control. Past and current evidence shows the largest carriers' willingness to use that market dominance to the detriment of regional carriers.
- Spectrum aggregation is also a factor, as the already dominant spectrum holdings by the two largest carriers would frustrate any new market entrants, increase capital requirements for new competition, and allow continued domination of the market by the largest incumbent carriers.

Altogether, the competitive wireless ecosystem, already diminished by the dominance of the largest two carriers, would be exacerbated through the increased control of the industry by a merged AT&T/T-Mobile. Such dominance would require additional intervention and regulation by the Federal Government in an attempt to recreate the consumer, network, and innovation benefits that competition provides.

This control will also foreclose the ability of new entrants to proceed to market due to the lack of available spectrum and frustrate viable business plans due to the capital intensive nature of the wireless industry. For example, potential new entrants, including Dish[2], will face reduced incentives and higher barriers to enter a market controlled by the largest incumbents. Even with increased regulations, restoration of competition to the wireless industry will be tenuous at best following this transaction.

[2] See REPLY OF DISH NETWORK L.L.C. TO JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS, available at **http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021688842**

ATTACHMENT A



Disclaimer

- This presentation contains forward-looking statements that reflect the current views of Deutsche Telekom management with respect to future events. They include, among others, statements as to market potential and financial guidance statements, as well as our dividend outlook. They are generally identified by the words "expect," "anticipate," "believe," "intend," "estimate," "aim," "goal," "plan," "will," "seek," "outlook" or similar expressions and include generally any information that relates to expectations or targets for revenue, adjusted EBITDA, earnings, operating profitability or other performance measures, as well as personnel related measures and reductions. Forward-looking statements are based on current plans, estimates and projections. You should consider them with caution. Such statements are subject to risks and uncertainties, most of which are difficult to predict and are generally beyond Deutsche Telekom's control, including those described in the sections "Forward-Looking Statements" and "Risk Factors" of the Company's Annual Report on Form 20-F filed with the U.S. Securities and Exchange Commission. Among the relevant factors are the progress of Deutsche Telekom's workforce reduction initiative, restructuring of its German operations and the impact of other significant strategic or business initiatives, including acquisitions, dispositions and business combinations and cost-saving initiatives. In addition, regulatory rulings, stronger than expected competition, technological change, litigation and supervisory developments, among other factors, may have a material adverse effect on costs and revenue development. Further, changes in general economic and business conditions, including the significant economic decline currently underway, in the markets in which we and our subsidiaries and associated companies operate and ongoing instability and volatility in worldwide financial markets; changes in exchange and interest rates, may also have an impact on our business development and availability of capital under favorable conditions. If these or other risks and uncertainties materialize, or if the assumptions underlying any of these statements prove incorrect, Deutsche Telekom's actual results may be materially different from those expressed or implied by such statements. Deutsche Telekom can offer no assurance that its expectations or targets will be achieved. Deutsche Telekom does not assume any obligation to update forward-looking statements to take new information or future events into account or otherwise. Deutsche Telekom does not reconcile its adjusted EBITDA guidance to a GAAP measure because it would require unreasonable effort to do so. As a general matter, Deutsche Telekom does not predict the net effect of future special factors because of their uncertainty. Special factors and interest, taxes, depreciation and amortization (including impairment losses) can be significant to Deutsche Telekom's results.
- In addition to figures prepared in accordance with IFRS, Deutsche Telekom presents non-GAAP financial performance measures, including, among others, EBITDA, EBITDA margin, adjusted EBITDA, adjusted EBITDA margin, adjusted EBIT, adjusted net income, free cash flow, gross debt and net debt. These non-GAAP measures should be considered in addition to, but not as a substitute for, the information prepared in accordance with IFRS. Non-GAAP financial performance measures are not subject to IFRS or any other generally accepted accounting principles. Other companies may define these terms in different ways. For further information relevant to the interpretation of these terms, please refer to the chapter "Reconciliation of pro forma figures", which is posted on Deutsche Telekom's Investor Relations webpage at www.telekom.com. Reconciliations for non-GAAP US GAAP measures like OIBDA and CCPU can be found in the T-Mobile USA earnings releases on www.t-mobile.com.

Agenda

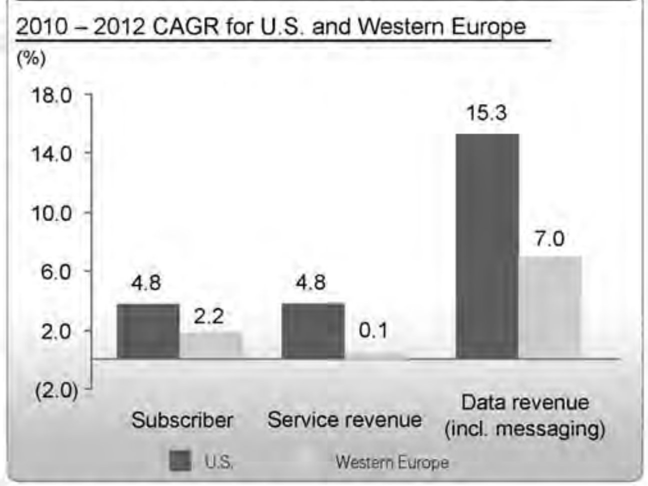
10:00 am – 10:20 am	René Obermann	Introduction
10:20 am – 11:15 am	Philipp Humm Philipp Humm Neville Ray	1. State of the business 2. Challenger strategy: - Overview - 4G network leader
11:15 am – 11:30 am		Coffee break
11:30 am – 12:30 pm	 Cole Brodman Philipp Humm Philipp Humm	2. Challenger strategy: - Affordable smartphone/My trusted brand - Multi-segment/Challenger business model 3. Wrap
12:30 pm – 1:00 pm		Lunch break in breakout rooms
1:00 pm – 2:30 pm		Break-out sessions for analysts and investors in breakout rooms (SoHi, Hudson Square, Kastel)

The U.S. mobile market is attractive

Healthy U.S. Business Economics

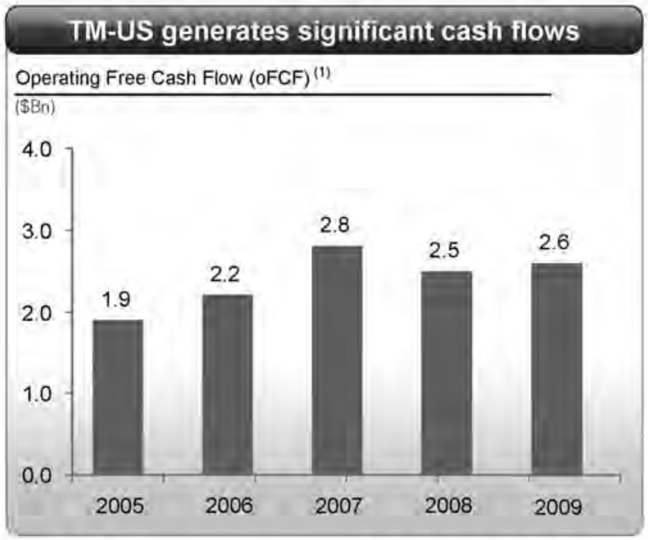
	United States	Western Europe
Higher ARPU	• $50 ARPU per month	• $31 ARPU per month
Higher and Growing Consumer Usage	• 800 MOU per month • $17 data ARPU per month	• 170 MOU per month • $9 data ARPU per month
Opportunity for Differentiation	• Four national carriers for population of 310 million	• Multiple brands / MVNOs per country with similar networks

U.S. Growth to Outpace Europe



Source: Ovum (May 2010) and BofAML (January 2011)

T-Mobile is an attractive asset



- Subscriber base of 34 million
- 9M revenue of US$16 billion
- 9M EBITDA of US$4.5 billion
- 54 MHz of spectrum
- Strong and future proven technology platform: GSM/UMTS/HSPA+
- 49,000 cell sites of which 23,000 with fiber backhaul

Operational progress being made – but still some way to go

- Ongoing improvement in data ARPU ✓
- Increased the number of smartphones to 39% of contract customer base ✓
- 3G Network roll-out accomplished, fastest network in the US with HSPA+ ✓
- Distribution strengthened: Number of national retail stores increased to 8,000 ✓
- Contract customer growth and churn ✗
- Revenue growth ✗

Revitalize the business: Operational priorities for 2011

Capitalizing on 4G Advantage

- HSPA+ equivalent to LTE
- Best 4G network
- Enough spectrum for medium-term
- Largest 4G handset portfolio

Operational Turnaround

- Tackle churn
- Transformation program
  - Reinvent
  - Grow
- Restructured organization

Flawless Execution of Challenger Strategy

- 4G network leader
- Affordable smartphones
- My trusted brand
- Multi-segment approach
- Challenger business model

Strategic objectives for the US-business

Challenge

- Long-term spectrum position
- Reduce scale disadvantages long-term

Our approach

- Exploring shareholder value enhancing strategic alternatives
- Establish a self-funding platform for T-Mobile USA
- Multiple sources of external capital available for T-Mobile USA
- Potential sale of non-core assets, including U.S. tower portfolio considered

Our objectives

- Improve return on capital employed
- Generate value for Deutsche Telekom shareholders

T-Mobile USA Investor Day

Philipp Humm, President and CEO – Neville Ray, CTO – Cole Brodman, CMO

January 20, 2011

Life is for sharing.

Executive Summary

Capitalizing on 4G advantage

- HSPA+ equivalent to LTE
- Best 4G network
- Enough spectrum for medium-term
- Largest 4G handset portfolio

Operational turnaround

- Tackle churn
- Transformation program
  - Reinvent
  - Grow
- Restructured organization

Flawless execution of challenger strategy

- 4G network leader
- Affordable smartphones
- My trusted brand
- Multi-segment approach
- Challenger business model

Outline

1. State of business - Philipp Humm
   - US market
   - Status of T-Mobile USA

2. Challenger strategy
   - Overview – Philipp Humm
   - 4G network leader– Neville Ray
   - Affordable smartphones/My trusted brand – Cole Brodman
   - Multi-segment/challenger business model – Philipp Humm

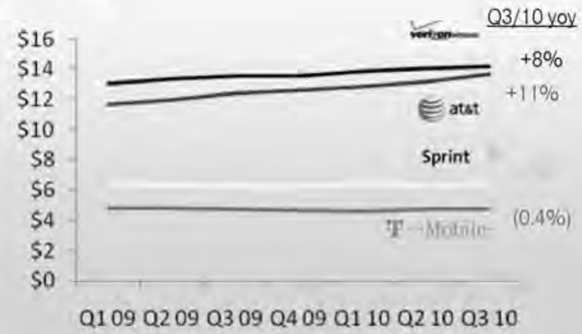
3. Wrap

Big 2 competitors getting stronger. T-Mobile achieves superior EBITDA for its scale

Revenue and profitability development in U.S. mobile market 2009-10

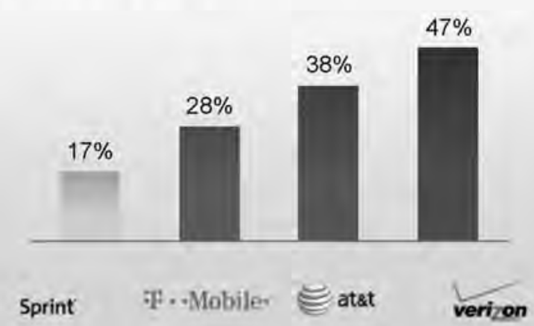
Service revenues[1]

Billions of $US



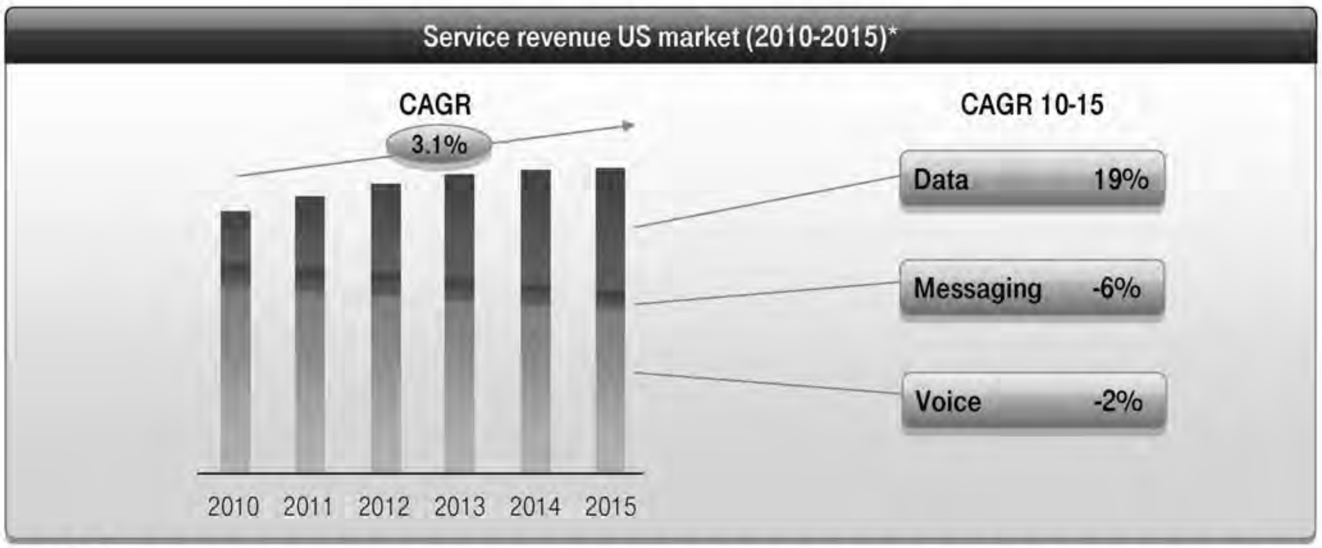
EBITDA margins[1]

% Service revenue, Q3 2010



1 For T-Mobile USA OIBDA margin in % of service revenues (US GAAP) for better comparability with the other US carriers

US market continues to grow, driven by data



*DT estimates based on integrating several industry forecasts

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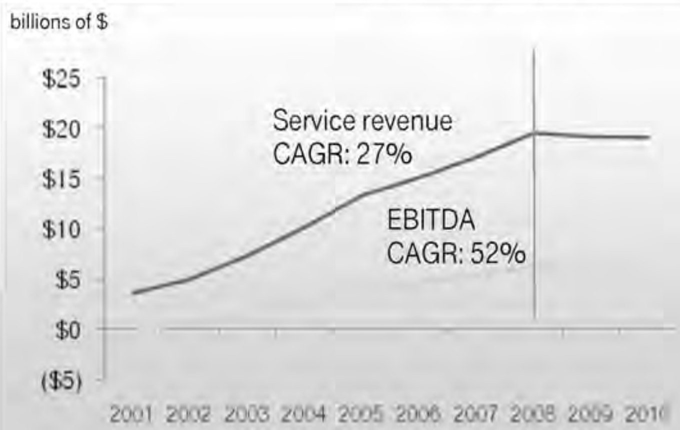
3. Wrap

T-Mobile revenues stalled in 2008 after 7 years of rapid growth

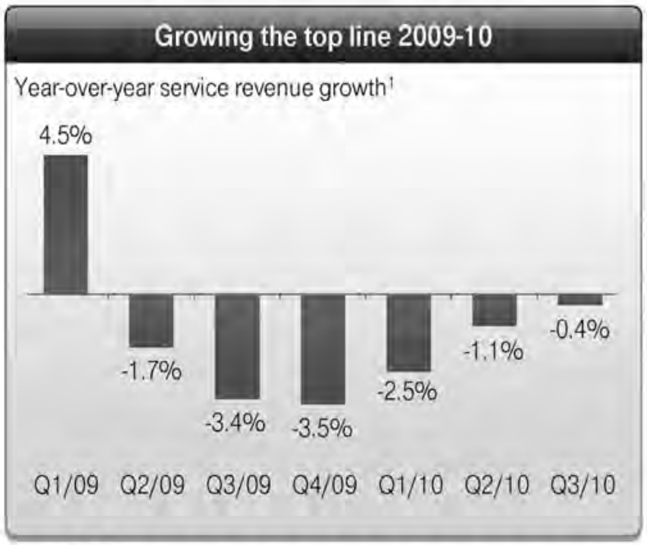
2001-2010 TMUS Service revenues and EBITDA

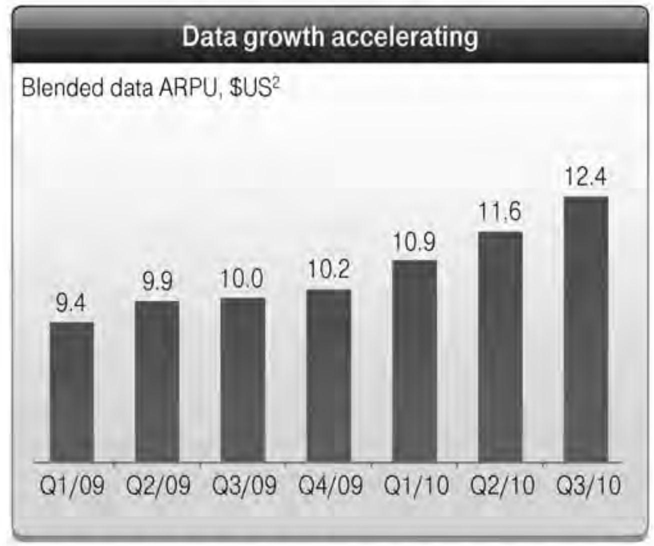


- Network/device perception (late to 3G)
- "Stuck in middle"
- Branded distribution gap
- Economy slowed

*2008+ includes uplift from SunCom acquisition of $0.8B revenues

T-Mobile top-line trends improving, driven by data



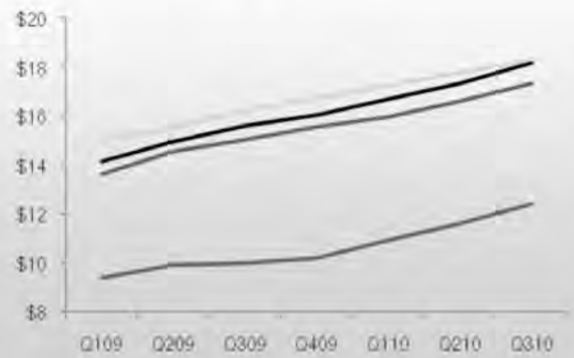


(1) IFRS, $US, (2) US GAAP.

T-Mobile data ARPU trajectory inflecting upwards with competition

Changing data ARPU trajectory

Blended data ARPU*



Q3/10 yoy growth

Sprint Postpay only*	13%
verizon wireless	15%
at&t	17%
T-Mobile	24%

* Source: Company reported financial results; for Sprint, used Morgan Stanley analyst estimate when company information not available

T-Mobile is ready to capture data market share

Strengthened competitiveness

4G network

- 200m pop at 21mbs
- Americas' fastest network (Nielsen[1])
- 42Mbps in 2011

Join America's largest 4G network

Strong smartphone portfolio

- Biggest Android line-up
- >25 4G devices 2011
- 39% smartphone in contract customer base[2]
- +50% of sales

Value leader

- Best price unlimited
- No 4G Toll
- $10 Data entry
- <$100 smartphones

4G Data Starting at $10

No 4G Toll

Competitive branded distribution

- ~2,050 company retail stores
  - Verizon: ~2,000
  - AT&T: ~2,300
  - Sprint: ~1,100
- Walmart co-brand

(1) Nielsen, 2010, (2) Smartphones include all 2G, 3G and 4G smartphones in contract customer base.

T-Mobile implemented major changes in last 75 days

First days of a challenger	
Loudly told 4G network story	• Attack network perception head-on
Deployed new organization & skillsets	• Implemented nimble business-line organization • Leveraging best practices from DT in CRM, channel management
Launched transformational programs	• Utilizing program structure and expertise from DT, by launching: • Next wave of Save-for-Service: Additional +$1B reinvent program • $3B growth program
Re-launched churn initiative	• New leadership, new organization, new approach
Developed challenger strategy	• Making the latest wireless mobile Internet services affordable and easy to use for everyone

TM Save for Service will deliver $ 1.8B savings by 2013

Ambition, gross savings p.a.

- $460M[1] in 2010
- $700M[1] by 2012

- $500M in 2010
- $800M by 2012

- +$0.3B in 2011
- +$1B by 2013

- Leverage DT expertise
- 2011 targets locked
- 2013 measures defined

Reinvest into the business to grow top line and sustain margins

1 Equivalent to EUR300 million and EUR500 million under the original EUR4.2 billion Save for Service Deutsche Telekom group program

Reinvent will lead to $1B in cost savings through process reinvention

	Ambition 2013: Cost savings[1]	Examples 2010 - 2013
Zero waste	$200M	• 30% call reduction in first 60 days from activations • 50% of postpaid customers on eBill • 30% reduction in handset return rate
Self service/ automation	$300M	• Reduce payment exit rate in IVR • 500bp improvement in IVR handle rate • Use web/handset to reduce 3M calls for account information
Simplify products	$200M	• Reduce handset remorse rate by 100bp • Decrease discounting 700bp across handset lifecycle
Network	$300M	• 100% of cumulative sites transitioned to All-IP • 1,000 sites for roaming overbuild

1 Approximate values

T-Mobile Grow program: ambition to deliver $3B additional revenue by 2014

Grow

$3B

Key projects	
1	4G leadership
2	MVNO and partner brands
3	Attack B2B
4	Churn
5	CRM
6	Sales effectiveness
7	Local GTM

T-Mobile did not solve churn in 2010

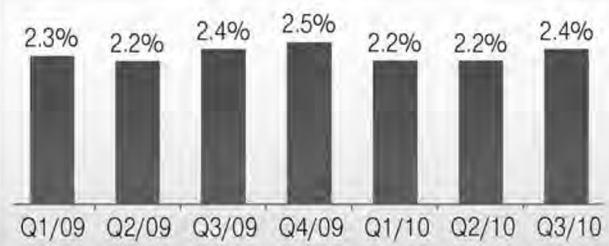
Launched programs in early 2010 to attack 65% of the issues

Sources

Solutions

Upgrade reinvention 12%	Credit Management 9%	Handset insurance 14%
Local coverage 5%	Save queue 16%	Outbound programs 9%

Contract churn did not improve



- Some implemented measures delivered benefit
- Off-contract, fraud, and credit issues worsened
- Increased competitive impact
- Mobile broadband issues

Completely redesigned churn organization and the approach

New organization

- Changed leadership
- Consolidated responsibilities, investments and decisions into single organization

New approach

- Compensation tied to churn
- Leverage DT Europe best practices and talent
- Deep analytical diagnostics
  - Predictive modeling
  - CRM
- Frequent executive steering and review

Implementation underway for 2011 with new measures to reduce churn

Churn program change

Issues	Measures
iPhone	Go Big with Android
Network	25% in-home coverage improvement p.a.; WiFi; 4G messaging and communication
Competitive offers	Same-as-new program
First payment default	Risk-adjusted product eligibility
Fraud	Improved risk management
Early churn	ETF enforcement, cancel queue, right-size
Mobile broadband	Onboarding (sales/coverage), prepaid options
Customer management	New CRM approach and systems
Communication	Network + devices + value

Toward 2% in 2011
<1.8% in 2012

T-Mobile generates significant cash flow

Solid oFCF while investing for the future

- TMUS delivers healthy cash flow
- Cash flow has been stable, even with significant investments in network and distribution

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3. Wrap

Path for moving from challenged to challenger

T-Mobile USA challenger strategy

Mission:

T-Mobile makes the latest wireless mobile internet services affordable and easy to use for everyone

With challenger strategy we go beyond our 2010 "value-conscious family" strategy

	2010	2011+
Growth strategy	Value-conscious family segment	Affordable data services
Segment	Consumer	Consumer + business
Brand message	Independent value campaigns	One consistent quality and value campaign
Cost structure	Cost savings	Business process redesign
Skills, scale	Some skill gaps compared to EU	Gaps closed with DT support
Structure	Centralized, national model	Shared, empowered model

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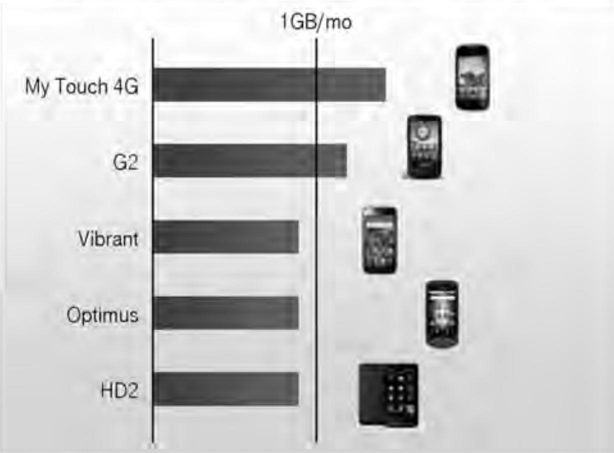
3. Wrap

Challenger Strategy

- 4G network leader
- Affordable smartphones
- My trusted brand
- Multi-segment player
- Challenger business model

Great news: customers love and use the 4G network

Latest devices breaking 1GB threshold



Strong reviews . . .

T-Mobile now providing 4G coverage to 200M pops

T-Mobile
200M POPs

verizon
110M POPs of LTE

Sprint
WiMAX for 110M POPs

at&t
HSPA+ approx. 100M POPs[1]

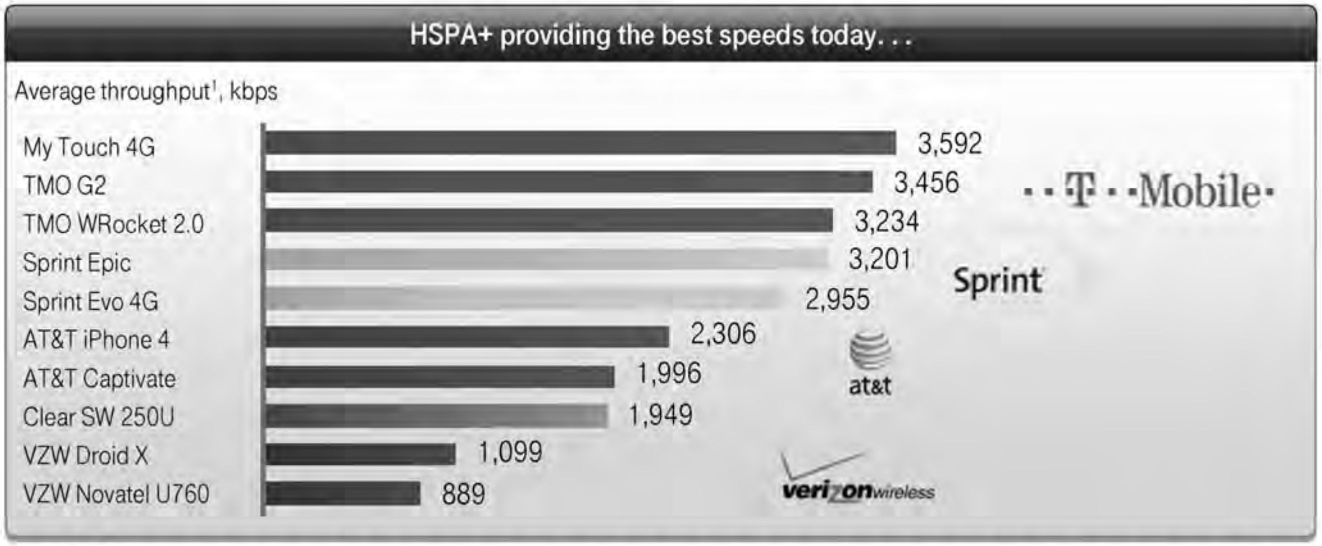
(1) TMUS estimate based on recent AT&T statements that HSPA+ with high speed backhaul will be provided to two thirds of their network by end of 2011

America's largest 4G network and now fastest in the Top 100 markets[1]

nielsen

(1) Source: The Nielsen Company estimation based on an independent benchmark. Nielsen's benchmark tests included the following networks: AT&T-HSPA, Verizon-EVDO-RevA, Sprint-EVDO-RevA, and T-Mobile-HSPA+. The tests were conducted in between May 28th, 2010 and November 30th, 2010. Results do not reflect all commercially available services in the market, including AT&T's HSPA+, Clearwire's WIMAX and Verizon's LTE networks.

HSPA+ provides best speeds today



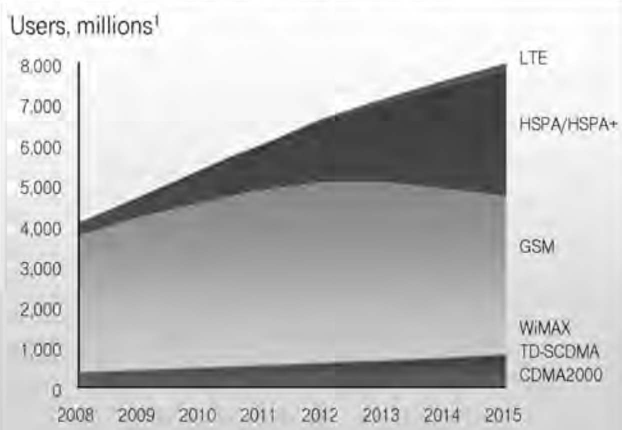
(1) Testing performed by Metrico in September/October 2010 across 29 markets, Sprint speeds measured in combined WiMax & CDMA areas.

Fastest and getting faster

- 21 Mbps today
- Getting faster in 2011: 42 Mbps
  - Las Vegas mobility test: comparable to Verizon LTE
  - Roll-out started
  - 140M POPs in 2011
  - 42 data sticks in H1, smartphones in H2
- In contrast to LTE/WiMAX, ongoing benefit delivery to existing 3G devices

HSPA+ dominates global scale for next five years!

HSPA+ global scale

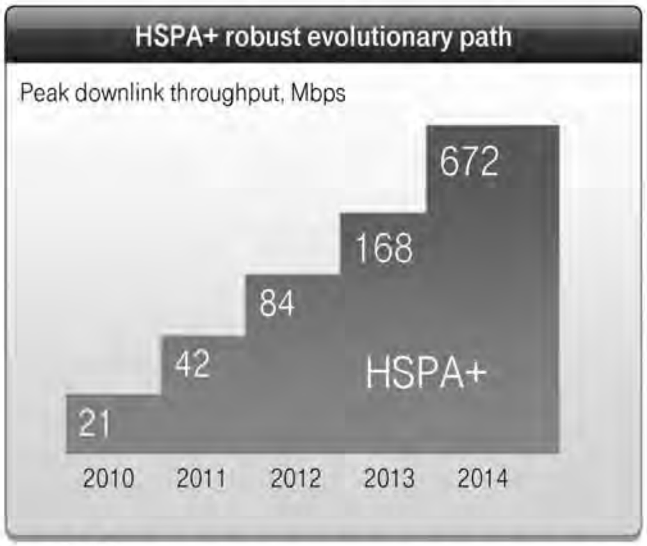


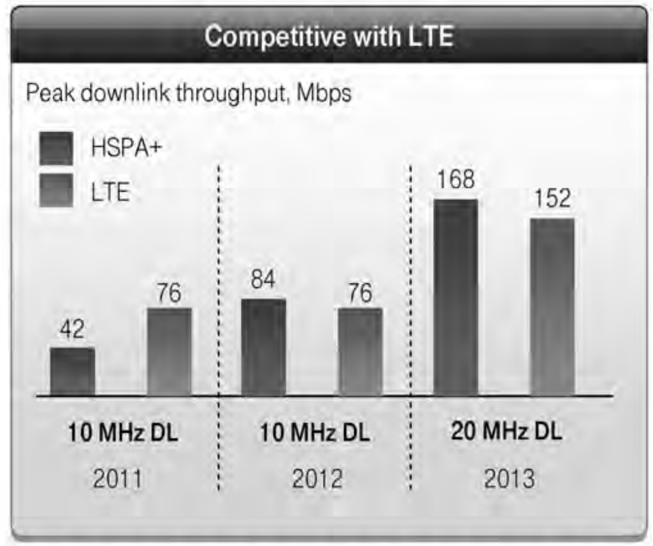
HSPA+

- 105 live global networks on HSPA+ today across 54 countries
  - 62 more planned
  - Major operators include:
    - DT, AT&T, Telefonica, Vodafone
- Superior handset line-up from large ecosystem
- Lower costs with single technology
- Less spectrum fragmentation drives global roaming strength

(1) Ericsson

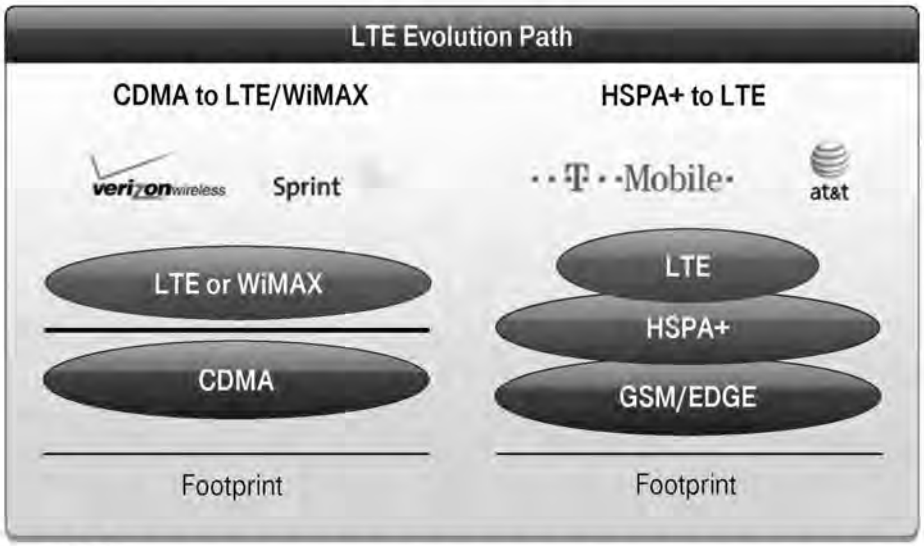
HSPA+ is competitive to LTE 4G technology, and is superior over the next years due to handset ecosystem





HSPA7: HSPA+: 10 codes, 16 QAM (5 MHz DL), HSPA+21 HSPA+: 15 codes, 64 QAM (5 MHz DL), HSPA+42: HSPA+: Dual Carrier (10 MHz DL); HSPA+84: MIMO (10 MHz DL); HSPA+168: HSPA+: Multi-carrier combinations (20 MHz DL); HSPA+672: HSPA+ Advanced I (40 MHz DL)

HSPA+ platform provides cost effective and technically flexible path to LTE

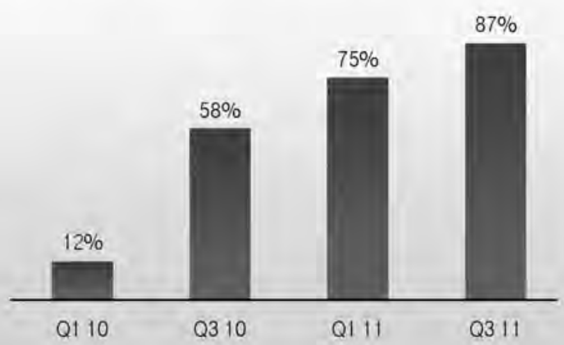


- T-Mobile's technology upgrade to LTE costs $1-2B
- Capacity driven deployment of LTE – not speed or coverage
- Seamless communication and handoff between network and device

High-speed backhaul enabling 4G speeds is a major competitive advantage for T-Mobile

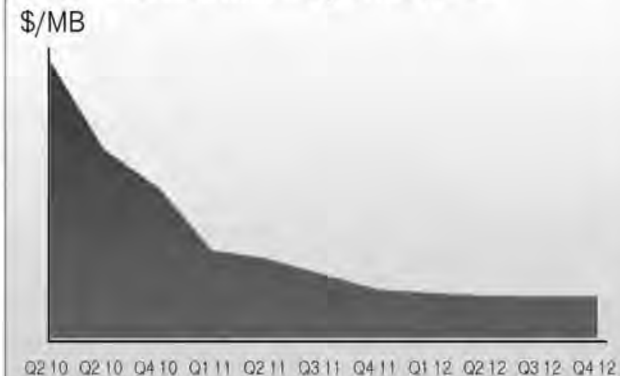
Ever faster speeds

High-speed fiber deployment: % of UMTS sites



Breaking the cost curve

Long-term backhaul costs, marginal cost per MB

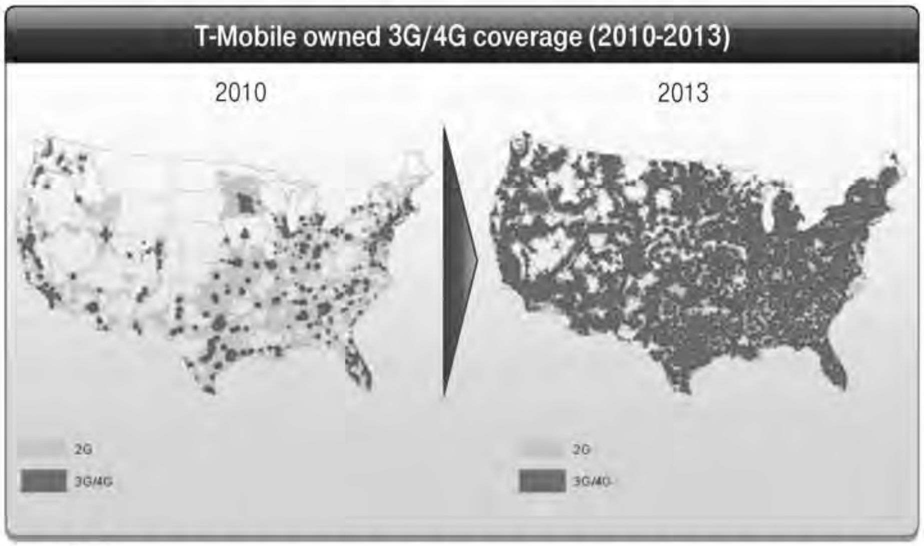


Source: TMUS Engineering

Three-pronged approach to coverage next three years

- Increase owned 3G/4G coverage with reduced roaming
- Robust in-home coverage to provide voice quality and rich broadband experiences
- WiFi coverage to bolster in-home coverage and broadband

Increase owned 3G/4G coverage – reduced roaming costs



- Enhanced data coverage at reduced costs
- Reduced roaming costs balancing build vs. roam
- Leverage partners where viable
- Exploit benefits of new radio infrastructure
- $400M of capex over 3-year period

Continuing to improve macro coverage in core areas

Improved home coverage

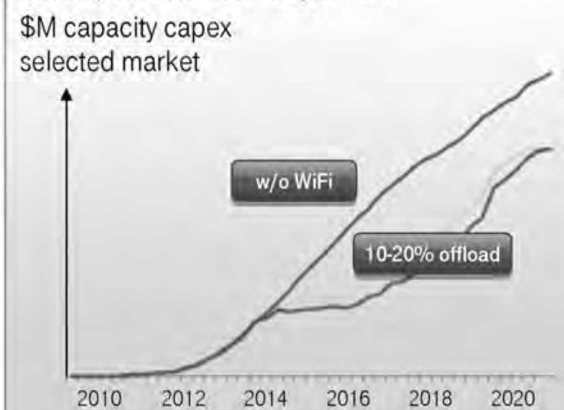
- 25% improvement each year, next three years
- Leveraging new base station products
- Deployment of new antenna technologies
- Improved site densities where necessary
- DAS and in-building system deployments

WiFi provides improved coverage and offloads capacity

Improved home coverage

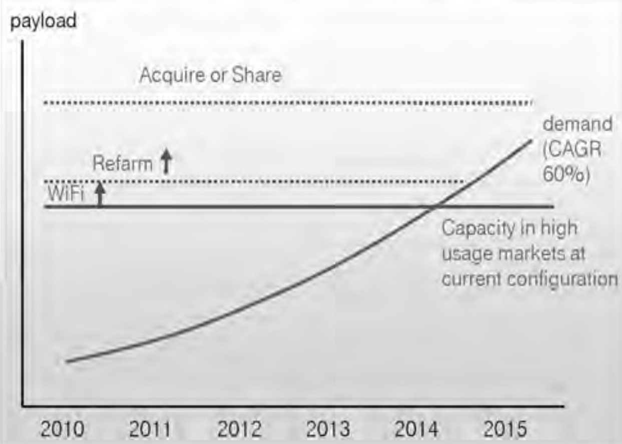
Efficiently managing capacity

Capacity capex to meet rising demand



Sufficient spectrum in short to medium term: exploring longer term and technology independent options

Spectrum capacity development



Sources of spectrum

Refarm
- PCS for HSPA+/LTE Options
- Availability in 2012
- No more 2G only devices

Acquire
- Auction (700MHz, AWS)
- Secondary market

Share
- Potential partners

Outline

1. State of business - Philipp Humm
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   - **Affordable smartphones/My trusted brand – Cole Brodman**
   - Multi-segment/challenger business model – Philipp Humm

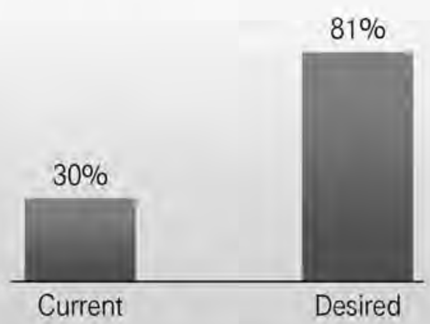
3. Wrap

Challenger Strategy

150M more US consumers want a smartphone! But, barriers still exist...

Customers desire smartphones . . .

Smartphone penetration*



How T-Mobile will capture this potential

We make the latest mobile internet services affordable and easy to use for everyone

- America's largest and fastest 4G network**
- Leading smartphone portfolio
- Worry-free plans
- My content, from anywhere on any device
- Improved service ensures customers are on the right plan and device

*Source: Q4 Nielsen Mobile Insights for current pentration, Morgan Stanley, alphawise for Desired penetration; **Nielsen 2011

Over 25 leading 4G devices in 2011...iconic and entry level!

Driving plan value to the next level of accessibility

Strategic elements

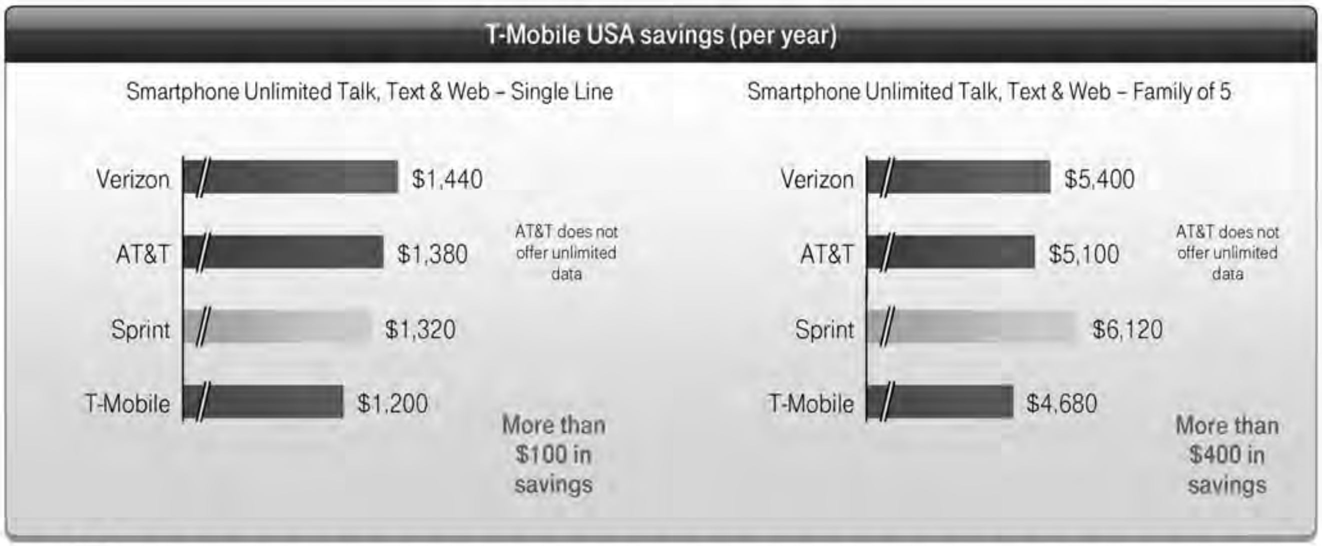
- Unlimited Talk, Text & Web
- Worry-free
- Entry-level data plans - $10
- Free value-added services
- Best value broadband plans

T-Mobile taking the lead in affordable data services

	T-Mobile	Verizon Wireless	AT&T	Sprint
 4G Data Starting at $10 / No 4G Toll	+$10 - 200MB +$30 Unlimited (no overage – speed slow down at 5GB)	$15 - 150 MB +$30 Unlimited	$15 - 200 MB +$25 for 2GB +$10/GB overage	No entry +~$30 4G Unlimited
	$25 – 200MB $40 – Unlimited** (no overage – speed slow down at 5GB)	$50 – 5GB $80 – 10GB +$10/GB overage	$35 – 200MB +$0.10/MB overage $60 – 5GB +$0.05/MB overage	$40 – 500MB (netbook only) $60 – 4G unlimited, 3G: 5GB +$0.05MB overage

*Source: Carrier websites, January 13, 2011 (Sprint's smartphone data pricing is TMUS estimate based on their current bundled pricing); **With qualifying voice plan

T-Mobile is the value leader



Source: Tariff pricing from carrier websites. Sprint: 4G smartphones such as EVO require $10 4G toll per line per month (included in comparison above). For AT&T presumes 2GB limit, no overage. Excludes usage, taxes, fees, etc.

Smartphones are the ideal entry point for rich and compelling services

Content discovery
- Google Search with Voice
- App Pack widget

Partner merchandising
- T-Mobile channel in Android market
- T-Mobile Mall Storefront

Personalized offers & recommendations
- App Pack v4 and featured apps
- Merchandising promotional bundles

Included free apps
- TBT Navigation
- T-Mobile TV
- Slacker Radio

Cross/up - sell
- Data plan up-sell on-device
- Content and apps promotion in web2go

And of course communication
- T-Mobile Video Chat powered by QIK
- International Talk and Text
- Caller Name service

WiFi calling – customers love it, analysts applaud it

WiFi on handsets

"WiFi calling needs to be in every phone forever and always. Yesterday."

engadget mobile

"WiFi calling app means T-Mobile Android phones are best choice for travel"

GADLING

T-Mobile is the WiFi calling carrier!

- Broad portfolio across all Android & Blackberry smartphones
- Differentiated by integrated voice/text/data into smartphones
- Enhanced coverage and speed
- Superior WiFi experience will be offered for free

Challenger strategy

4G network leader

Affordable smartphones

My trusted brand

Multi-segment player

Challenger business model

T-Mobile continues service leadership, yet aspires for more!

T-Mobile is the service leader...

T-Mobile USA rank among US wireless carriers	
Customer care	Ranked **1st** in **10 of last 12** biannual surveys
Retail sales satisfaction	Ranked **1st** in **9 of last 12** biannual surveys

2010 WORLD'S MOST ETHICAL COMPANIES
WWW.ETHISPHERE.COM

...in an industry with poor service

- 83 Express delivery
- 83 Internet retail
- 75 Department and discount stores
- 73 Hospitals
- 72 **Wireless service providers**
- 66 Airlines

Source: ACSI 2010

T-Mobile aspires to overcome bill shock

Issue

- Bill/overage issues comprise 10% of customer calls
- 28% of customers with national, international overage

National solution

- Unlimited data plan: speed step-down avoids overage
- Reduce overages
- $40 caps on data
- SMS warnings
- Customer tools (family allowances, overage meters)

International solution

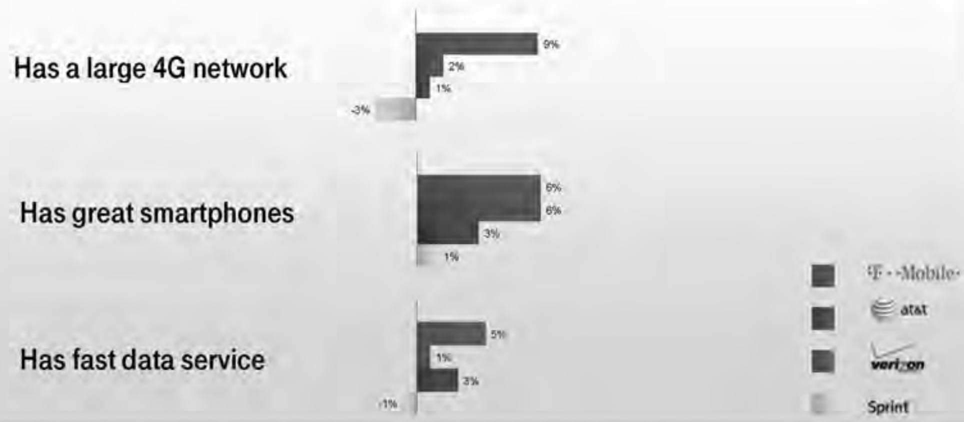
- Flat rate ILD plans for voice/text
- SMS warnings
- Soft caps with opt-in requirements

Placeholder – advertisements

Challenger advertising driving brand perception

Brand perception changing

Brand perception change*



* Nielsen November 1, 2010 – January 2, 2011; Change in Benchmark (11/1-11/7) to post launch (11/8-1/2)

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Challenger Strategy

- 4G network leader
- Affordable smartphones
- My trusted brand
- Multi-segment player
- Challenger business model

Pursuing multi-segments with multiple brands to leverage 3G/4G network

	Value proposition	Business model	Example
T-Mobile Postpaid	Affordable smartphones	T-Mobile	
T-Mobile Prepaid	Unlimited voice & data	T-Mobile	
Niches	Tailored solutions	Add-ons to T-Mobile or MVNO	Demographic brands
PayGo	Pay-as-you-go voice and data	2nd brand or MVNO	Tracfone
Distribution partners	Distribution unique opportunities	Co-brand or MVNO	Family Mobile, SIMPLE Mobile

Walmart & Simple provide two new successes to multi-segment strategy

Partner brands

Walmart Family Mobile T-Mobile

- Launched in approx. 2,500 stores
- Access to customers seeking affordable solutions
- Realizing attractive customer financials

MVNO

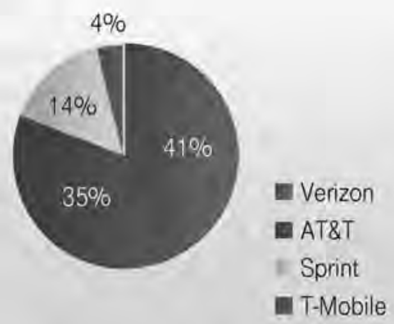
SIMPLE Mobile

- GSM product in CDMA distribution
- Rich monthly unlimited offer
- Low maintenance customer

Relaunching B2B as another target segment

Historical results reflect lack of focus; new approach

B2B Share



Target market share
SMB: exceed
Corporate: increase

Restoring relevance
- Historically under-funded
- Applying focus and fixing the fundamentals

Bringing strong value proposition
- 4G & WiFi connectivity leadership

For SMB
- Leverage branded assets
- Increased resources

For corporate
- IT partners for billing
- Cooperate with DT

Challenger Strategy

4G network leader

Affordable smartphones

My trusted brand

Multi-segment player

Challenger business model

Overcoming relative scale position with a partner and segmented approach

Examples to overcome relative scale

Regional go-to-market	• **ROI-based** regional investment and spend • **Localize** media budgets
Scale partnerships	• Network sharing • Leverage DT
Lower handset subsidy	• **Lower** average **handset cost** • Increase **branded distribution**
Operational & financial excellence	• **Reinvent** • **Financial rigor**

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T-Mobile – short-term targets 2011/12 and long-term ambition

Drivers	Key measures	Q1-Q3 2010	2011	2012
Revenue	Revenue	Slight decline	Slight increase	Increasing
	Contract data ARPU	$13	~$15	$18
	Smartphone penetration[1]	39%	>45%	>50%
Churn	Contract churn	2.3%	Toward 2%	<1.8%
Financial	EBITDA margin (in % of service revenues)	29%	Stable	Low 30s
	oFCF (excl. spectrum)	Stable	Slight increase	Increasing

Ambition 2015: mid 30s EBITDA margin, #3 player in revenues

1 Smartphones include all 2G, 3G and 4G smartphones in contract customer base

ATTACHMENT B

T-Mobile

January 20, 2011
10:00 AM ET

Rene Obermann: A very good morning to all of you here in New York. I think we should get started. We have a long agenda. I think the agenda should be up now. I can also do it myself. There it is. We have a long agenda. We should get started in order to have enough time to go through the presentations and also to have enough time for you to digest all the details with which we are going to hopefully convince you today that T-Mobile US is in a good way. So, good morning, again, to New York. Good morning to all of you watching us via webcast in Europe. And still some people come in. I'll wait another ten, 20 seconds. Okay.

Alright. Before getting the unavoidable question on any news on the full year financial for 2010, ladies and gentlemen, let me reiterate that this is an investor day on T-Mobile USA and that you should not expect to get an update on the financials for 2010. but before you start wondering whether this might be bad news, let me also reiterate that we are--it shouldn't be unexpected--confident to have met our group targets for the year 2010 and we're also confident to reach the objectives for the coming years which we have outlined in our investor day last year.

The reasons why we invited you to join us here in New York are three-fold. First of all, we would like to introduce our new Chief Executive Officer for T-Mobile USA and we would like to introduce to you some members, very senior members of our management team in the US. The second reason is that Philipp and his team want to share their view of the industry and their view of our business with you and explain to you what needs to be done and what they will do in order to improve our position in the United States. And lastly I would like to convey to you how we as Deutsche Telekom see our long-term position in the US and what we will do to develop a future proof and value generating position in the United States.

Before going into the presentation let me shed some light on Philipp and how happy I am that he has decided to take on the challenge to head our business in the US because he obviously can't say that about himself. He has joined DT in 2005. He began as Chief Executive of T-Mobile Deutschland Germany. He was responsible for the turnaround at T-Mobile Deutschland. Not only was he able to regain and extend market leadership versus our main competitor but also at the same time he was executing the Save-for-Service program at T-Mobile Germany--sorry. Safer growth program at T-Mobile Germany back in '05 it still was called which has helped us to improve margins in the German mobile business to levels beyond 40%. So, market leadership, extent market share, very marketing orientated and at the same time managed our efficiency program very successfully. He was also involved in finding some solutions for the European market particularly in the UK with Hutchison, the first network joint venture in the UK with Hutchison and later on he was involved in setting up the joint venture Everything Everywhere which you are all familiar with.

But before I get too carried away let me stop it here by saying we believe he has gathered as part of his track record at DT precisely the skills we need to successfully turn around our business in the United States. Having said all that, I think that you now a lot have had the opportunity to have taken a look at the schedule of today and have taken note especially of the coffee and lunch breaks. Now I would like to share with you my observations on the US market and our US business.

So, the market in the US is one of the most attractive markets worldwide. That is, despite economic crisis, despise a high level of competition that is still the case. There are three reasons for that. Number one, there is already a huge value in the market as of today. Typical US mobile consumers are spending around $50 per month on their mobile device. They're generating average data RPU of $17 per month and imagine where this came from, how fast it improved over the last couple years, and the average voice usage is at 800 minutes per month. All of these metrics are beating the European comparisons by a huge margin. So, it is a very attractive wireless industry, very attractive wireless market. Looking at the forecast for the market and basically all forecasts agree on that point, it is to be expected that the European markets cannot catch up with that volume of usage and also with the RPUs but that the US mobile market will continue to outpace the growth rates of Western Europe, especially in mobile internet. There is a huge opportunity to generate additional revenues.

The third point is that compared to the overall European mobile market, the US market has a relatively benign pricing environment although usage is much higher so you could argue price per minute or price per megabyte or so are significantly lower but the overall willingness of customers to spend higher RPUs per month is here in the US is higher and the packages which are being sold and the price points which are being sold are quite favorable in comparison to most European markets. That does create, if you look at the evidence in Germany and Italy and some other markets, it does create scope for successful challenging strategies and it's also worthwhile noticing that different to Europe we are speaking about a market that is mostly free from price regulation. So it is still an attractive market and it will be an attractive market.

We are convinced that T-Mobile is a very good asset. We have a 34 million customer base and in the first nine months of 2010 we generated revenues of over $16 billion and over $4.5 billion of EBITDA. And we are generating a positive operating free cash flow of between $2.5 billion and $3 billion per annum. So, that is only--that's one reason for saying this is a very attractive asset. Our network architecture is global standard now--is global standard with GSM, with UMTS, and also now with HSPA plus. We currently own 54 megahertz of spectrum in our major markets which for the next few years put us into a position which is actually better than most of our competitors are in. We have made huge upgrades to our network in a very short time thanks to the great efforts from the technology teams, made huge upgrades to our networks and we are now counting about 49,000 cell sites of which almost 50% are already connected with fiber backhaul. So, the performance is truly outstanding.

Independent field surveys show that real life data transmission speeds on our network are superior to most competitors and they are at least equivalent to LTE. There are a couple of reasons why things turned worse two years ago. There obviously was an impact from the economy turning into negative territory, particularly in the consumer space. But also the lack of a 3G network--please remember we came late with spectrum only end of '06. We acquired spectrum and then we are able to build a network. So, we were late with 3G. No question. We also lack competitive smart phones and we had a branded distribution gap in comparison to our competitors and all of that made us suffer. It resulted in revenue stalling and valuable contract customers leaving us.

The recipe for improving things was built around this analysis. We understood a huge effort in improving network quality and handset offerings. We readjusted our pricing propositions and we increased the branded distribution. And we have seen at least some success already. The data RPU continues to grow with accelerating pace. We now have the fastest nationwide 4G network in the US and the handset portfolio has vastly improved, as demonstrated by the rising number of smart phones in our base and as we show here. And we have also seen improving revenue trends. Philipp is going into more details.

However, we are not satisfied with a couple of other areas and we have still some work ahead of ourselves. Certainly contract customer growth and churn rates are still dissatisfactory and we have not yet returned to revenue growth. Philipp and his team's highest priority will be to revitalize the business in 2011. His strategy which will be explained in much more detail is consisting of three basic elements. A, we are going to capitalize on our 4G advantage, B, we are going for an operational turnaround and we will execute a challenger strategy. We currently do have and I think I said it before--I want to repeat that because it takes a long time to change people's minds. We have the best 4G network in the US. And we have a sufficient spectrum position medium-term. And we have a variety of attractive smart phones on our shelves, including the largest lineup of Android smart phones.

We will continue to work on our network by improving particularly in-house coverage and by reducing the needs for roaming which at the same time will also help us to bring down our costs. We will use Wi-Fi to enrich in-house broadband coverage and reduce network load where feasible. At the same time we will continue to improve our 3G, 4G network coverage and increase the transmission speed of our network which will increase from peak rates of 21 megabit today to 42 megabit in 2011, a significant improvement of the performance. And we expect to have this speed of 42 megabits available to 140 million POPs.

Operational turnaround means in the first place of course to tackle the churn issue. With 1.9 million contract gross adds per quarter, accumulative was about 5.4 or so for the first nine months gross adds of contracts. We have to find a way to make sure that these huge additions lead to a growing customer base again. The net growth has to improve. Next to that we're speaking about a radical reorganization of the business with some very ambitious initiatives. Reinvent the cost cutting program should result in an additional $1 billion of annual gross savings by 2013. We need these resources. We need these efficiency gains to restructure the business into a sustainable future proof business as we are not willing to sacrifice the margin further.

Grow, that's the second element of the programs, shall deliver a $3 billion of additional revenues until 2014 from key projects like 4G leadership, churn prevention where we have gained a lot of experience in Europe, growing into the business segment, and by other initiatives. Philipp, again, will elaborate on this in much more detail later. Finally, the challenger strategy. We think we radically have to change the way we go to market. We will spend our marketing dollars more locally. We will pursue marketing strategies aligned to the characteristics of the local markets rather than following a one size fits all strategy. The local markets vary quite a bit with regards to their competitive dynamics. Which also means that we will be open minded to a multi brand strategy. We will also expand into the business customer segment based on our strong data proposition rather than just focusing on the so-called value segment. That is a change how to approach the market to the past.

Being operationally successful is the pre-requisite for improving the value of T-Mobile USA and that is top priority for Philipp and his team in 2011. But there is also a top priority for myself and my very severe and strict CFO, Mr. Tim Hottges, and the entire Deustche Telekom Board. This is the longer-term outlook for the business and there is the issue of the long-term spectrum position. We have to face reality. Long-term spectrum position of not only T-Mobile USA but for the entire industry. Short to midterm we have enough spectrum to satisfy our demand and our growth as Neville and the team will explain later on. So, we are not desperately looking for new spectrum at any cost but longer-term the question exists and we have to get prepared. The second issue is about scale. Between us and our two bigger competitors is a huge gap when it comes to subscribers, when it comes to revenues, when it comes to margins, and to free cash flow. While we're not disadvantaged when it comes to procurement because we can leverage in many respects--for instance, infrastructure on devices are so the groups scale because of the volumes of our entire group. We feel it in our share of voice where we have to compete with much bigger pockets of our competitors.

So, we have to find a solution for both of these challenges and this will be done under the following criteria. The US business--that's the first point--has to develop into a self-funding platform that is able to fund its future itself. Bear in mind the ongoing CapEx, the regular CapEx between $2.5 billion to $3 billion, that is already being funded and after that the US still generates operating free cash flow of between $2.5 billion and $3 billion but for things over and above potentially for instance for getting new spectrum, we have to do that out of a self-funding platform. This means that we will explore shareholder value generating strategic alternatives for this business. This might range from partnerships, corporations, to network sharing opportunities, spectrum leads, whatever. There are various options for us which we are currently analyzing. Let me repeat on this occasion that we are currently not pursuing large scale cash acquisitions as Deutsche Telekom group.

There are multiple sources of external capital that might be available for T-Mobile USA. We are among other options for example ready to consider a potential sale of non-core strategic--non-strategic core assets, for example the US tower portfolio. The objective for us is to find a future proof solution for our US business which generates value for our Deutsche Telekom shareholders as well as improves our path forward regarding cost of capital. This again has utmost priority for the entire Deutsche Telekom management board.

With that, I would like to hand over to Philipp to talk to you about the US and what I consider a very compelling and clear and well thought through operational strategy. Philipp, please come on stage. Thank you.

Philipp Humm: Yes. Thank you, Rene. Ladies and gentlemen, welcome to New York. I'm very excited to be here and to share with you the T-Mobile USA story. When I arrived six months ago I encountered significant operational challenges for T-Mobile US. Therefore, we use the opportunity in the last months to really review and renew the operational strategy for T-Mobile US going forward with the main cornerstones to be seen on this slide. We are capitalizing on our 4G advantage. We are working on our operation turnaround and we are going after flawless execution of our challenger strategy.

Let me start--let me just get the right slide here. Yes. Let's first quickly look at the US market overall. And if we look at the overall US market we see that scale matters as can be seen in the relative performance of the big two. Drivers are investment in advertising, network, and in the iPhone. That being said, T-Mobile outperforms the number three by 11% on EBITDA margin despite $7 billion lower revenue. So on the EBITDA performance we're doing quite a strong job here in the US. As Rene mentioned earlier, the US market is a growing market. This growth is being driven by data which is still expected to sustain a growth rate of close to 20% over the next five years. So, this is a big opportunity for T-Mobile to really grab additional market share.

Let's talk about the current status of T-Mobile USA. T-Mobile USA was uniquely positioned with get more and the GSM network and as a result grew revenues and CAGR of 27% through 2008 and EBITDA grew even at a CAGR of 52%. This growth really stalled in 2008 due to four factors. The first one is we were late to 3G as our AW aspect firm only got acquired in 2006 and also got freed up late. So we could not really fully participate in the first data game. Second, our brand was kind of stuck in the middle with unlimited becoming industry standard on one side and T-Mobile being attacked from below by the no frills players in the market. Third is that our branded distribution was gapped compared to the top three players. And last but not least the market went from a double digit growth rate to a single digit growth rate which obviously also had some effect on our overall performance.

Now the good news is that if you look at the performance year over year in the last quarters, year over year revenue hit bottom at the end of 2009 and is now trending in the right direction driven mainly by data revenues as more customers adopt smart phones. And if you look at the chart on the right side, you can see that our blended data RPU is advancing at a rate of $2.40 year over year or 24% over the last four quarters. Now compared to competition, T-Mobile has a $4 to $6 gap in data RPU. T-Mobile was however able to start closing the gap to some extent having grown faster than anybody else in the data RPU. And going forward this is a huge opportunity for us. We see a lot of revenue potential for T-Mobile to simply close that gap.

T-Mobile has the right assets to close the data RPU gap going forward. T-Mobile built the largest and fastest 4G network in the country with 200 million POP coverage and with data speed of 21 megabits and we're currently rolling out 42 megabits in the country. Second, T-Mobile has a superior 4G handset lineup, smart phone lineup with 25 4G devices planned for the year 2011 and 50% of our sales today are already smart phones and 39% of our base is in smart phones. That's quite a lot of potential on the smart phone side. Third, value leader. T-Mobile sharpened its value proposition with the best price for unlimited propositions. We have no 4G toll. We have a new $10 data entry promotion plan which is the strongest one in the industry and we have more and more smart phones under $100 retail. Lastly, T-Mobile built out an owned retail store network which is the equivalent to one of the big two and on the same level as the big two and definitely superior to Sprint. And finally we build a great relationship with Wal-Mart, the world's largest retailer, and launched a core brand called Family Mobile which is growing very nicely.

In my first 75 days the leadership team and I have moved very quickly to implement major changes. First, we started to competitively communicate that we have the best 4G network. I'm sure many of you have seen the ad. We will show you the ad a little bit later as a reminder. Second, we rolled out a major reorganization for the group which has a certain number of elements. The first one is we delegated responsibility and accountability. We created segment manager, product manager, and channel manager, and regional manager and made them really responsible for the revenues and EBITDA end to end. And third we got resources from DT in areas where we lacked expertise like in channel management and in customer retention management.

We also launched two transformational programs, Reinvent with the target of additional growth savings of $1 billion per annum and Grow was the target to increase our revenue by $3 billion per annum. Churn had not really improved. So, we redesigned the program and changed leadership. We'll come to more detail in a second. And lastly and the thing I'm most excited about along with senior leadership of T-Mobile is that we develop a challenger strategy to take advantage of market growth and to bring back T-Mobile to its voice stream and early T-Mobile days.

Let me now focus very briefly on Reinvent, on Grow, and on churn. So, reinvent. We're hugely expanding our T-Mobile Save-for-Service program. The 2010 Save-for-Service program delivered more than planned. We saved $500 million in 2010 and now expect out of that program to have a run rate in 2012 of $800 million savings. The 2011 Save-for-Service program which really started in 2010 but is now being rolled out and implemented in 2011 called Reinvent, focus on business process redesign, leveraging similar DT programs run in Europe. We will realize at least $300 million of savings in 2011 and $1 billion in 2013 and this is on top of the 2010 savings which we have already realized. These savings are partially being reinvested into the business to grow the business while sustaining our margins.

So, a few details for the reinvent program. Reinvent will drive $1 billion in annual savings by 2013. $200 million come from what we call zero waste which is especially as we reduce calls to care and reduce handset returns. Second, $300 million come with self service and automation, especially on the web on the handset and through the IVR. $200 million come from simplifying our product range, particularly our rate plans, retiring also rate plans, and reducing handset remorse and unnecessary discounting we had in the marketplace. And lastly, the last $300 million come with our network as we drive all IP and continue our roaming overbill program which obviously will reduce our costs.

Next is our Grow program. The Grow program teams helped align management, generate an additional $300 billion worth of revenue uplift, up to 2014 annual uplift and the key subprograms are first obviously monetizing our 4G leadership. Second is strengthening existing partner brands like Wal-Mart and new MV renewals. Third is reactivating B2B, a segment where T-Mobile has not really played a major role in the last years. Fourth, lowering churn significantly--I will come more detail to churn in a second. Fifth, building SIM capabilities. Here, really strongly was the support of DT, Europe went already in 2005 in a market which cooled off and declined so we're able to bring in a lot of skills from Europe on this topic. Sixth, improving channel performance, in particular the return on dollar spend on SUC and SOC, spending the money more around returns on investment and last but not least moving from a national to a national regional go-to-market model along with the rollout of our new regional organization which is being implemented just as we talk.

Churn continues to be a challenge for us. The program we deployed and announced early 2010 did not bring the necessary results. And churn is for me a top operational priority and I'm determined to break the trend this year. Now what did we do? First we changed leadership, bringing an experienced leader from T-Mobile in Europe and we also consolidated and that's very, very important responsibilities for SUC, SOC, COM, and churn into a single organization called channel management and this is important as a structure before it had split responsibilities which cannot really work if you try to lower churn.

Next we tied short-term bonus compensation for the whole Company to churn. Then we brought in people on a project basis from DT to leverage best practices. We changed the analytics and made the topic a true top management priority. The teams worked to very, very detailed measures and we target to get towards 2% in 2011. And let me just give you three examples instead of making you go through each invest element of the slide and three of the bigger churn reason. Number one is iPhone continues to be around 10% of all churn and we're countering the 3G iPhone with 4G Android devices and are looking forward to take the iPad on with the coming Honeycomb 4G laptop in March and April. So, we're really developing our propositions where Android and 4G will be shown as being clearly superior to iPad and 3G or iPhone and 3G.

Second big raise is in our network coverage, about 20% of all churn. This is why we are aggressively advertising our 4G network to improve already the perception of the customers. We will increase in-home coverage by 25% per annum year for year over the next years. We're moving or we've moved already to 100% Wi-Fi on smart phones and really try to educate customers to constantly use it and make it worry free in usage. And we changed our data network coverage by making sure it is now included as a clear element of the customer on boarding process to make sure customers get the right service for the right network situation they are facing at home or on the go. Thirdly, and that's a third example, we have many, many other operational challenges and reasons why we lost customers and existing customers receiving a lesser offer than new customers and we had many rate plans and promotions for new customers which existing customers also wanted and that created obviously churn. So, we changed that. Existing customers now received same or better offers and we stopped doing a rate plan promotion and we'll only do promotions through devices or through add-ons.

Let me sum up by saying we are able overall to generate a very high level of cash float for our shareholders despite the decline in revenue and despite large investments in 4G network and in distribution. This is definitely attributable to an improved cost and CapEx efficiency overall. But now it's really time to resell the growth engine. And this is what I'm going to talk of now and onwards and my colleagues as well over the next period, what is really the challenger strategy, the challenger strategy which will fuel all growth going forward. T-Mobile, that's our missiou, will make the latest wireless mobile internet services affordable and easy to use for everybody. We have five levers.

The first one is we will not let our network competitive advantage go and we will therefore monetize our 4G network. This will strengthen the quality perception of the T-Mobile brand overall. Second, we will focus on making the purchase and the use of smart phones affordable to all Americans. We estimate that about 150 million Americans want smart phones but do not have smart phones today. We work very, very hard to make sure that the smart phones become affordable for them. This is why we launched a $10 data rate plan and this is why we're looking at bringing in smart phones below $100 retail. So we're going really backwards to the roots of the T-Mobile brand to the early T-Mobile days and the Voice Stream days. Third, while we are the number one service Company in our industry having won more than ten times the J. D. Powers award which is really great, we aspire for more. We want to be one of America's most trusted brands. It's not enough to be the number one in the wireless industry. It's overall the wireless industry from its perception as strong enough. We need to move out of the wireless industry and really develop a true trust relationship with our customers. So, we work very, very hard on eliminating in particular topics like bill shock in this year.

Part four and five of the strategy really focus on overcoming scale either on the revenue side which is a multi segment player or on the cost side which is challenger business model. As multi segment player, we will attack not only in consumer but also in B2B. We will strengthen our core brand but also continue to leverage partnerships there with companies like Wal-Mart and try to add additional partnerships as this would bring us additional revenue and the equation is always easy. We have experienced when we add additional brands, maximum have a 10% cannibalization. So, 90% comes from the market, from competitors. So, we have more to win--significantly more to win than to lose with every brand we add to our portfolio. On the cost side we will evolve our business model to fit the needs of a challenger and work very hard on getting the right costs and the right business model in place.

Now this strategy goes beyond our value conscious family strategy which we presented to you last year and I just want to highlight as we are now departing from the strategy so you understand the differences. The first one is instead of focusing really on segment we will target data for all segments and leverage our competitive advantage. Second, instead of only looking at consumer we are looking at consumer and business. Third, instead of airing a series of independent value campaigns, we move to one consistent campaign now which is combining a quality message network with a value message, $10 rate plans or very strong smart phone offerings into one.

First, on the cost structure side, instead of doing cost savings programs we are really now in the process of doing business process redesign which is more fundamental of the way we operate. For us, on the skills and scale sides we are aggressively closing skill gaps by leveraging best practices from DT and utilizing DT's global scale much more going forward. And lastly on the structure side but very important as well, we changed the organization model and really delegating responsibility to the organization, built profit centers, and moved to a national and regional go-to-market model which is much better suited for a challenger brand.

So, let me now hand over to Neville Ray who will talk about the first key strategic lever which is our superior 4G network. Thank you.

Neville Ray: Good morning, everybody. Thank you, Philipp and thank you all again for joining us here this morning. It's my pleasure to introduce the first and foundational element to our exciting new challenger strategy. Where are we with our 4G network? Where are we heading with that 4G network? And what does the future look like for our wireless customers here at T-Mobile?

There are really three pieces to my presentation today. The first piece will be looking at where we are with HSPA+ and where we head through 2011 and we're actually going to have a little bit of fun with you today and demonstrate the capabilities of the technology here in the room. We'll then move to a discussion on broader coverage and you've heard through the remarks of Philipp and Rene where we're heading with our coverage strategy for building, et cetera, and I'll reinforce and give you more depth and detail on many of those points. And then last but not least, I will round out the discussion talking about spectrum, the T-Mobile position today and where we are heading over the coming months and years.

Let me start with what's really great and exciting news around our 4G network and we are seeing large numbers of customers buy into the 4G network from T-Mobile. The chart on your left illustrates the usage we're seeing and I'd highlight the usage on two of our new compelling 4G smart phone products--the MyTouch 4G and the G2. And you can see usage on those devices on an average base per month is now exceeding a gigabyte, it's in the kind of 1.2 gigabytes per month range.

So, what does that mean? If you go back to smart phones, maybe the Blackberry base three to four years ago, the numbers on those devices would've probably been in the 10 to 20 megabyte per month range and here we are two to three years later with a gigabyte plus. So, to reinforce some of Rene's statements at the beginning of our presentations here today, we are seeing an explosion of mobile internet adoption in the USA market. So, it's a very, very exciting time to be in this space and to really leverage a 4G network position that T-Mobile has now established a leadership position. I think many things are happening. It's obviously not just about the network.

But a fast network is foundational to the types of media and services the customers are now digesting on these smart phones and other products. The mobile internet is here finally and customers are engaging with the mobile internet in very different ways from how they would engage with the fixed internet. The mobility of the product, the way they interact with social media, entertainment, location services, there's a whole gamut of new services and capabilities which are very, very exciting to the US consumer and they are embracing those services in a very powerful and meaningful way and it's clear to see from the usage that's upon these devices now we have finally, I believe, reached the era of mobile internet. So, that's a great, great story and it's a great time for us to be in a 4G position.

Rave reviews and very solid reviews on what we've done with our network. Big year for us in 2010 and I will talk now around the position that we've moved to with our largest 4G network. So, this is the culmination of many years of work. This is not something that happened over a 12 month period. But let me explain why. 4G services are about multiple things but I'd highlight maybe two or three. Everybody is very focused on the radio interface, how you move the packets and the bits and the bytes from a smart phone to the base station and absolutely you have to have a strong 4G radio interface. HSPA+ provides that for T-Mobile in the US.

The secondary piece is that you have to move all of that information content from the base station and connect it with the rest of the world. That requires high speed backhaul capability. In the wireless industry in the US for decades has been entrenched in copper backhaul, low throughput, high cost copper backhaul. It's imperative if you want to offer a 4G experience that you migrate from that copper experience to new IP based backhaul, primarily in the T-Mobile case, Ethernet over fiber. Now that does not happen over night. That's why we can stand up here and talk about a differentiation or a position of differentiation here in the US. We have been working aggressively for three years to upgrade our backhaul to an IP demand. And what you see on this chart and our largest position is the culmination of all of that work at the end of 2010.

Now the third element I mentioned on 4G experience is the packet core. And you have to make sure you have a very scalable core architecture that can handle and migrate and communicate with other parts of the telecom system and the IP world. That is pretty much a given today. Most carriers are migrating rapidly to an IP core. But if I look at the competitive set here in the US and you can see 200 million POPs from T-Mobile and you can see the competitive positions from our three major competitors in the US marketplace. Verizon with their footprint, approximately 110 million covered POPs, the last reports I see from Sprint and obviously that's a clear wide network that Sprint is utilizing for their 4G services but approximately 110 million covered POPs from clear and from WiMAX and then for AT&T, this is our estimate that's provided on the chart here. We believe it's a similar number for AT&T and our foundation for that belief is the information that we've heard from them at CES. AT&T announced in one of their releases that approximately two-thirds of their mobile broadband traffic will be carried on expanded backhaul--i.e. IP based backhaul by the end of 2011. So, two-thirds of their network by the end of '11. We believe they're in the 100 to 110 million range but that's our estimate. I can't give you any stronger or greater detail than that.

But here we are. We were late to the dance in 3G because of the spectrum challenges in cleaning that spectrum up so we could launch our services. But one of the great benefits of that was that we came out and we delivered and launched a very modern 3G network which was very upgradable to 4G capability and so we were able to rapidly capture and move ahead of our competition in this mobile data space.

So, the other great news piece is that as we move from largest, we are now in a position following the most recent release of the Nielsen data in a fastest network position. So, this testing, I think many of you are familiar and know the Nielsen business. It's one of the most reputable independent benchmarks for the wireless industry and Nielsen's testing was conducted in a period from kind of the end of May through pretty much the end of November and through that testing, as our network was still--we were still filling out our fiber backhaul in that network so progress continuing on through that testing period for us but across the top 100 markets in the US. Nielsen has announced we have the fastest network. So, great to be in the largest position and if you look at breadth of coverage and that speed, T-Mobile has a winning proposition today.

Let me give you some more dimensions to speed and performance that we've been measuring ourselves on the network through the work of a Company called Metrico. This is a more limited set of testing across 30 major markets in the US conducted a little later in 2010 primarily in the months of October and November. And what you can see here is we went out and tested the range of smart phones that were available in the US marketplace at that point in time. The MyTouch 4G and the G2 that I've already referenced from T-Mobile and the rocket is our data stick and then you can see the performance, these are average speeds across these markets from the Sprint Epic and Evo which are WiMAX products and then into the AT&T products and then at the bottom of the pile here you see the performance from the Verizon CDMA smart phones.

So, compelling data when you look at this position and you see the leadership position we have in smart phone performance. Very exciting to see this. And as we went out and tested, we learned a lot about the WiMAX networks, the performance and capability of the devices on that network and we were very, very pleased with our superior performance against what's been announced and proclaimed as a 4G network and 4G position for many months here in the US.

Okay. So the next piece we're going to do a demo and to avoid my Steve Jobs moment I will invite Brian Olsen (ph) to the stage. He's one of our smarter and brighter engineers and far more capable at running demonstrations than I am. We will ask Brian to get things set up here. While Brian's doing that, let me talk about our migration path from 21 to 42 megabit per second peak speeds. Rene and Philipp both mentioned this. We're very, very excited to be in a position where we can rapidly expand the performance and capability of the network. Much of this is possible in HSPA+ because these upgrades are primarily software and some hardware but very easy to upgrade our base stations to 42 capability, requires us utilizing more spectrum and effectively bonding two carriers of wireless spectrum together to result in double throughputs. This year, we will be rolling out 42 to approximately two-thirds of that 200 million footprint that I talked to earlier in the presentation.

So, the little--I apologize--this is a little tough to read. Philipp mentioned we've been rolling out 42 and we're starting that program aggressively in 2011 and we were at CES recently and prior to CES we had actually rolled out 42 across a number of sites and what we did is we conducted mobility testing using beta ZTE data stick at 42, a Verizon LT stick and a Clearwire WiMAX stick. And you can see on this chart, these are the average speeds that we secured in comparing 42 performance against the new Verizon LTE network performance. And you can see that there is very, very little difference here. We're in the eight to nine megabit per second range across both technologies. You can see the WiMAX position is somewhat different and the other piece that I would like to talk through here is in HSPA+ our network is loaded so we have many customers on that now. So, when we're testing in Vegas we have a lot of customers who are riding on the network and we were still securing these kind of peak speeds. If I look at the Verizon position, that network in Vegas is very, very new and very unloaded. So, devices, data sticks only recently being sold from Verizon in Vegas and the position that we see today is really no phones and no smart phones from Verizon on that LTE network for some time to come.

So, great to see that performance and here is where we talk about that comparative performance between HSPA+ and LTE. So, what we'd like to do now is quickly show you the capabilities of a 42 network. We're running here live in New York on our macro network. There's no base stations in the room here or anything else. I'm going to ask Brian to demonstrate whatever he's doing on that laptop over there and let you all participate in that. If we could flick over to the screen for the laptop.

Brian Olsen: I have over here--I'm really excited about our 4G network so I thought I'd take the opportunity here to test out the network for you. Whoa. What I'm doing here is I'm playing an online game with a bunch of people from around the world, probably around the US and what we're able to do because of the latency of our network, we're actually able to provide really seamless connectivity. People can play games just like you would online at your home. It's really like a home broadband connection with our 4G network.

Neville Ray: Excellent. I'm going to crash you down here.

Brian Olsen: I'll try.

Neville Ray: You're actually a much better driver than me.

Brian Olsen: I've been practicing.

Neville Ray: Thank you. If we could flip back to the slide then?

Brian Olsen: Alright. Why don't we end that?

Neville Ray: So, the purpose in showing you that game, that's one of the most aggressive ways to stress the wireless network. That's an online game. It's critical that you have very low latency and very high throughputs on the network. There's no stage. Online game. And Brian was there against multiple players in different parts of the globe.

So, the second piece we want to show you is really some of the raw throughput capability and this is nowhere near as sexy and fun as looking at a racing game. But Brian's going to flip over to a screen in a second here and we'll show you the kind of throughputs that we're pulling down on the network live here in New York both in terms of peak and average throughputs.

Now, while Brian's setting up I'll talk briefly to our position on HSPA+ 42 devices. So, Philipp mentioned data sticks in the first half of 2010, 2011, I'm sorry. We will have smart phone capability in the second half of 2011. So, Brian, do you want to flick--can we flick again over to the screen there?

Okay. So here we are. Brian, do you want to explain this thing real quick?

Brian Olsen: Absolutely. We have a live site here in New York that we've actually enabled with 42 megabits per second. What we actually seeing here is streaming to this ZTE preproduction data stick. We're actually seeing 20 to 30 megabits per second on average in this room and a max of 33.

Neville Ray: Excellent. Sorry for the eye test folks. If we could flip back to the chart? What we wanted to do was make sure you understood the capabilities and opportunity that's out there with HSPA+. And I think there's been a lot of discussion about the true throughput and performance capabilities of the technology. This is real. This is live. This technology has great legs and has a great opportunity for us going forward in the future. Thank you, Brian.

So, one last point on this slide. 42 delivers benefits to all of our 4G customers and 3G customers. Let me explain why. There's a lot of discussion about cell age performance in the wireless world. One of the beautiful things that 42 delivers, if you're a 3G user today with a 7.2 capable device for example--7.2 megabit per second such as an iPhone or many of the other 3G devices that are out there today and you're in an environment where your throughput is maybe a megabit per second on cell age. 42 will double that. It will always double that speed until you max out on the phone capability, the modem capability in the phone is 7.2, 14.4, 21--whatever it may be. So, there's a beautiful backward legacy benefit--backward compatibility benefit from HSPA+ to our existing 3G device holders as well as our 4G 21 holders and those that want to have that 42 experience will look to buy into a new 42 capable device. So, all of these ships raised on a 42 type which is a great story. That's in stark contrast to what happens in the LTE and WiMAX world where there's no benefit from an LTE network to an existing CDMA customer. Until they buy a brand new device which has the LTE capability. Obviously that's the same position in WiMAX.

So, let's talk briefly about the ongoing benefits of HSPA+. This is a global scale illustration and this is from one of the--the major radio vendor across the globe who sells a lot of all of this equipment excluding WiMAX. And the message on this slide is if you look at growth across the globe in wireless HSPA+ will be the dominant technology over the coming years. You will see on the top of this chart there is a thin line of LTE. So, LTE is starting to grow. But to give you a couple of other factoids right off this chart, 105 global operators today. I didn't check the last couple of days. That number's been moving every day that I look at it. 105 operators across the globe operating on HSPA+ today. Another 60 operators ready to move and planning to move to HSPA+. And you look at the names up there--obviously Deutsche Telekom, AT&T here in the US, Telefonica, Vodafone. Major wireless operators across the globe are upgrading their networks to

HSPA+. So, LTE is coming but it is going to take time for the technology to both mature from a technology perspective, for the bugs to be worked through that technology. It's also going to take time for the handset ecosystem to develop. Both Philipp and Rene mentioned this. Much richer ecosystem now growing in the HSPA+ world which we will fully leverage at T-Mobile USA.

The other piece on LTE that I would mention just briefly, one of the challenges in the LTE space today is spectrum fragmentation. What do I mean by that? There's a lot of different spectrum bands being looked at for LTE deployment. That number is approaching 30 spectrum bands today. Approximately 20 in kind of a time division space and about another eight or nine bands--I'm sorry. In the FDE space. And about another eight or nine bands in the TDE space. So, what does that mean? If you look at the beauty of DSM, four or five billion users across the globe. It's grown because, one, it's a very powerful ecosystem, but secondly, the roaming benefits and capability. Now, in the LTE world, we've massive spectrum fragmentation. That will be a challenge. What's underlying this chart is if you look at global roaming in the high speed data space it's going to be in HSPA+. That's the lion's share of where you will see that type of activity. So, in a domestic environment with LTE you may be in good shape but if you want to travel, even if you move to another part of the world where LTE is in place, the odds of you having spectrum banding in your device that will support that LTE network are going to be limited. So, those things will be worked through. Multibanding in devices is coming on a greater level than it's available today but that many of the underlying nd foundational reasons why LTE adoption will take some time.

Okay. A little bit more about HSPA+ and its evolution capabilities. 21 I've talked to. 42 I've talked to. The next step is 84. You can get to 84 several ways. You can use MIMO which is multiple antennas--two antennas in this case, both in the handset and the base station on the tower. You can aggregate more carriers. There are interim steps between 42 and 84, three carrier aggregation can give you 63 without MIMO. There are whole hosts of very attractive and exciting combinations available in HSPA+ as we continue to evolve and develop this network. But it does not stop there. 168 is now standardized. 672 is in the standard dialogue and discussion and activity as of December. The last 3G PP plenary. Many of the features necessary to support 672 and the potential advance of HSPA+ to IMT advance status which some of you in the room will know that's a gigabit per second technology in a fixed domain. That work is now underway and it's not just underway by T-Mobile. Many of the global operators I mentioned as well as the major vendors across the globe, the likes of Ericson, Nokia-Siemens networks, Wow way, QUALCOMM--all very engaged and committed on this development path on a go forward basis.

On the right-hand side of the chart is a brief outline of technical peak speeds--peak theoretical speeds that we see evolving over the next two to three years. You can see HSPA+ up against LTE in '11, '12, and '13. And you can see this is a very much neck and neck race. So, the superiority claims from an LTE perspective, if you look at the last really 12 to 18 months, HSPA+ has caught up in a very, very meaningful way. There are a number of reasons as to why that's happened. I think if you look at investment in the wireless industry, it became critical for all operators to ensure that they really sweated the asset base that they have, that they do everything they could to upgrade the HSPA networks to deliver 4G capable experiences and not necessarily have to move to LTE very rapidly. I think some of the spectrum activity or lack of spectrum activity in other parts of the world has also driven investment into HSPA+. But overall a great story and a great position for us to be in looking at a very rich evolutionary path going forward with HSPA+.

So, if we now look--sorry. Did I go too fast there? Okay. So, a little bit more on LTE and the contrast between our LTE path at the right point in time for T-Mobile USA in its future as contrasted to our competition. We are on the GSM 3G path and we migrate from that to HSPA+ to LTE. It's seamless. That's how this technology path was built. Now, the non-GSM family of competitors moving from CDMA to LTE or WiMAX face a very different challenge. If you want to deliver a high-speed service and you are a CDMA operator today you have to upgrade your whole network to LTE. There's no way to move forward with upgrades to that CDMA network. So you have to overlay the whole of the network. And so when you see LTE investment numbers coming in from some of our competition or WiMAX numbers, it's because they're plowing LTE across their entire footprint.

Now T-Mobile USA and I could argue AT&T has the same opportunity. We'll deliver 4G services with a broad HSPA+ footprint. At the right point in time when it's needed for us we can roll out LTE more as a capacity overlay because there are awesome benefits and the capacity delivery of LTE in the right spectrum configurations that will drive better economics and better performance for our customers. But when we do that, we don't have to go and touch the lion's share of our cell sites at all. So, you can see our expectation on investment levels around the LTE rollout for T-Mobile USA are more in the $1 billion to $2 billion range for that radio infrastructure upgrade depending on how far we go and how deep we go. So, a typical example, right in the middle of Southern Manhattan here, this is an area where you would deploy LTE. A lot of usage. A lot of capacity potentially coming at you and at the right point in time it makes sense to move to LTE. But that's in outer years and it's a limited deployment for us based on the strength of our HSPA+ product.

Okay. I kind of started my presentation talking about backhaul. Let's just come back to that quickly. You can see our path to upgrade backhaul as we move forward through 2011. 23,000 sites today. That number will close on 30,000 roughly by the end of this year. The other great benefit that I wanted to talk to and it was critical for us why we spent so much time planning and delivering and rapidly delivering on our IP backhaul is it significantly and radically changes the cost structure. So, we have a very, very scalable IP backhaul environment which we can grow data services on very, very cost effectively. The incremental cost for us to deliver IP backhaul has been limited. Philipp mentioned we will be migrating more of our voice services off of copper where they are today on to IP backhaul over the coming 12 to 18 months. And that will drive even more cost reduction as you look at this is dollars per megabyte on the right-hand side of the chart here and you can see the progress that's being delivered through the IP backhaul transition. So, it doesn't just deliver a great 4G experience. It delivers game changing economics and that's key. So, when you look at the gigabyte per month on a smart phone and you can see the cost reductions that we're driving on backhaul delivery, then you understand what we're all about and our rationale here.

Okay. Let's talk then to coverage and really I'll accelerate a little here. Our three-pronged approach to coverage over the next two to three years. So, in the outer box here are 3G, 4G, mobility area coverage. And we'll be pushing that number North of 290 million POPs over the coming years. We're in the space today, just shy of 280. So, we'll be moving that number forward. Obviously POPs get very, very thing in rural America. That's a fair amount of work and I'll explain how we'll achieve that.

The inner box here talks to what we will do with really improving the in-home coverage experience, making sure we've got a richer and deeper radio layer and deeper radio penetration into the home environment, pushing that North of 200 million. And then Philipp mentioned we will be leveraging Wi-Fi to make sure in the shaded area here where we have mobility coverage but not great in-home coverage, we'll make sure we can deliver Wi-Fi calling in that home environment so you have mobility from the macro network and great in-home coverage from our Wi-Fi services.

So, the first of those three is the broader rural and mobility coverage and I think on the left you can see our current footprint map with roaming in the light pink and magenta and then our plan through 2013 to really change that map. A whole host of activities there. We'll do some of this through partners but a lot of organic build leveraging really the benefits of both new base station technology, remote radio heads, new antenna technology, to really spread the breadth of our footprint. Not a hugely capital intensive program. We're trying to cover rural geography, not necessarily density of population by any means. Somewhere in the region of $400 million over the next three years, well within our capital windows.

If I move to the next slide, talking about improving in-home coverage. A goal and mission of my team is to continuously improve that in-home experience, becoming more and more critical, not just for voice services but for data services. Again, we're looking to leverage new base station technology there as well as the antennas. We will be adding cell sites. We had--we're up to 49,000 plus cell sites today. That number will increase somewhere in the 8% to 10% range over the next three years. We're also looking to leverage distributed antenna systems and other in building system solutions for our business customers and our customers in sports fan use, metros, et cetera, et cetera. So, continual program. I've been working on our network here in one form or another for 15 years and we will continue to drive that mission to deliver a great in home and in building coverage experience.

The last slide here, Wi-Fi coverage in the home. I think many of you know we have a rich legacy of Wi-Fi calling based on UMA. All of our smart phones now have Wi-Fi capability which is great to offload data services. Our competition leverages that too. What a great opportunity to leverage offload of the macro network for Wi-Fi. The other differentiating piece we have at T-Mobile is Wi-Fi calling. So, we're looking to make it really very, very simple for customers to utilize Wi-Fi calling in the home environment, particularly and in other Wi-Fi environments. So, T-Mobile differentiating position here on Wi-Fi calling and one that we will drive hard forward on over the coming months and Cole will provide us more detail on that shortly.

You can see this is just an illustrative example. Wi-Fi offload can have a big impact on capacity offload on the network. I'll talk a little more on that when we get to the next slide on spectrum. So really that's the third of the three prongs on improving coverage both for voice and for data services.

Okay. The spectrum story. I would focus your energy on the head of the slide here. Sufficient spectrum in short to medium-term, exploring longer-term and technology independent solutions. Rene talked to this already. I want to explain the foundational pieces underneath that statement. Why is it that I can stand up here and say in the short to medium-term we're okay? Because I think there's been a belief that there's a spectrum shortage at T-Mobile. That is not the case in the near to medium-term. Let me explain why. If you look at spectrum--owned spectrum today across most of the major competitors and you look at megahertz of spectrum against served customer base, T-Mobile, about 54 megahertz of spectrum today, customer base, 34 million customers. So you can all do the math. That's a ratio of about 1.6. If you run that math for Verizon or

AT&T, even with a whole gamut of spectrum deployed that they've reserved much of today for LTE. So 700 assets, AWS assets in both cases, maximum case about 90 megahertz across about 90 million customers. That ratio is about one. That's when they've really deployed and moved into the LTE spectrum that they've held back from for a number of years from deploying in that space.

The current ratios are way less than one. Probably in the 0.6 to 0.8 range. So, if you look at your volume of spectrum that T-Mobile has today, our ability to grow in this wireless data space is much stronger than our competition. So, we're in a good spot. I'm growing our network into new spectrum. If you look at smart phone growth for AT&T or Verizon, they've been driving that growth into all of the existing taxed spectrum assets. I think you all know many of the competitive stories about network performance for one of our major competitors that has resulted from that. It's not been pretty. So, we're in an advantage position today where I'm leveraging new spectrum. That's where my growth is going into new spectrum. So, that's a great position for us in the near to medium-term.

Now, longer-term absolutely we need spectrum. I spend a lot of my life in DC talking to regulators and other entities about spectrum needs in the US. But we're not alone. You have an FCC that's looking to push 500 megahertz of new spectrum, almost doubling the offered spectrum in the US marketplace over the next decade. 300 megahertz of that they plan to bring to the marketplace in the next three to five years. So, that's very, very positive. The industry needs more spectrum. In Germany recently, great auction, 360 megahertz of spectrum was auctioned in Germany. That spectrum is now being grown into. So, in the US absolutely we need more spectrum but I'm not alone at any of those dialogues or discussion with the FCC or the NTIA who manages the government owned spectrum assets in the US.

So, for us, if I jump to the quiet piece in the middle, I've started there already, we're obviously very interested in what happens in those FCC auctions. I think everybody knows about the 700 megahertz D block. Processes become probably heavily politicized but it changes almost every day the discussion and dialogue. I read a bunch of news coming out of DC this morning on 700 D block. We're absolutely positive and optimistic about commercial option in D block. More AWS spectrum which is where we operate our 3G and 4G services today. That's on the block probably further out. D block will not happen in 2011. It's going to be a 2012 story. AWS, somewhat later. AWS, 50 megahertz plus coming in new AWS spectrum to be worked through.

So, they're all exciting opportunities. If I jump back up to refarm on the top right of your chart, one of the things that we're working aggressively on as we've been migrating our customer base from 1900 where we live with our GSM services today, all of that growth that's occurring in HSPA+ in the AWS spectrum is freeing up head room for our customers and for our business in 1900. It's almost a third of our base that's moved across to AWS. So, that's freeing up 1900 spectrum in many markets which opens up this opportunity we call refarm. That spectrum presents opportunities for us to deploy more HSPA+ or LTE and we're working through those option discussions right now. But there are many markets where already today we have a lot of 1900 spectrum we could repurpose. So, we're in a good position with refarm.

One of the great things, mentioned it briefly on HSPA+ is something that's called multiband aggregation. That's the opportunity to bond spectrum from AWS with spectrum from 1900, adding those carriers together to deliver much higher throughputs and performance capabilities. Those types of opportunities are going to be there in the '12, '13 timeframe. So, there's many, many things happening from a technology perspective, an environment from a regulatory perspective, much change happening in the industry to attack the spectrum need. So, longer-term, yes, we need spectrum. I will tell you this--there are more options developing around us today than there ever has been in my career in the US both from a regulatory perspective in terms of sharing options and in terms of secondary market. We all make the right choice s to move forward with our plan for new spectrum at the right point in time and it will be technology independent as I mentioned earlier in the presentation.

Okay. That's the end of my comments. I thank you for your attention. I believe now we are heading to a coffee break for the next 15 minutes. Thank you.

Cole Brodman: We're going to get started if you can make your way back to your tables and seats, I would appreciate it. We're already a little bit behind time. We want to make sure we have a chance for the rest of the presentation. Even Rene listened to me this time. Okay. We'll go ahead and get started. Welcome back. Once again good morning and thanks for attending this morning. We really appreciate all the travel and effort it took to get here. My name is Cole Brodman. I'm the chief marketing officer of T-Mobile USA and my job really in that role is to make sure I'm driving the brand, changing market perception about the brand, driving traffic and purchase intent for our great products and service portfolio that we're going to talk about here this morning and growing our revenue share over time, meeting those aspirational targets that Philipp set out in front of you today.

So, Philipp was showing you that T-Mobile is changing business strategy and reinvigorating our challenger heritage. I've been with the business 15 years. I remember what it was like when we were Voice Stream or the early part of T-Mobile USA to really fight and challenge the marketplace. That's the spirit we have now back in the business.

Neville has also shown you that our engineering team over the last three years has built a really compelling modern 3G and 4G network with modern backhaul scalable to well over 200 million of the US population today and ready for the next generation of mobile broadband services. This network, America's largest 4G network today really is ready to take on the coming wave of smart phones and mobile broadband products and services.

What I'm here to talk about today is the next piece of our challenge which is really the marketing piece of the puzzle; how we change brand perception, how we communicate our products and services better, and how we drive revenue share in the US marketplace.

So, while the smart phone revolution is absolutely already underway and started, the reality is that independent analysis suggests that still 150 million people in the US have yet to adopt a smart phone. We think that's a tremendous opportunity for T-Mobile to be positioned as that next brand to make smart phones affordable for the average US consumer.

What's it going to take? We've got a couple barriers we have to break down. First and foremost that next 150 million people that eventually will want a smart phone need to make sure that they can afford a smart phone. Today they're not sure they can. Either the price of the device or the price of the services put them off. Secondly, this is a very complicated category in its legacy. So, purchasing a new smart phone for a consumer today that has been using voice and technology services it's a little bit complicated, sometimes very complex and maybe a little bit intimidating. We want to be the Company that makes that very simple and easy to use.

So, our new brand position is making the latest mobile internet services affordable and easy to use for everyone. How are we going to do that? What are we going to have to do? At T-Mobile we're going to make sure our customers know they get more because we're going to work very hard every day to make sure five things come through very clearly.

We want to have America's largest and fastest 4G network. We want to make sure we communicate that to our potential customer base very, very clearly. We want to have the leading smart phone portfolio. We have a fantastic portfolio today in the marketplace but consumers aren't aware of it. We want to have worry free plans so that consumers don't have to worry about complicated bills and overages and charges. T-Mobile wants to be that trusted brand that consumers can lean into for their next data purchase solution.

We want to make sure that consumer's most important content can be access from anywhere on any device. The revolution is absolutely underway to move even beyond smart phones. You're seeing now, a lot of you in the room are using tablet computers. Absolutely changing the face of how consumers are going to consume content and use personal computing. We want to be the brand that brings that to life for them.

Last but not least we want to make sure our sales representatives and customer service representatives can always make sure the customer gets on the right plan and the right service regardless of budget or location for that customer. So, these are going to be the five key tenets of our new brand position as we move forward in the marketplace.

Let's talk a bout devices. The device is absolutely an important object of desire for consumers. It's the key part of their purchase decision today oftentimes when they chose a carrier. Get to this next slide. As Neville pointed out, we've got a great opportunity with HSPA+ to take advantage of the most scaled ecosystem for devices in the world. We think that puts us at a tremendous advantage as we start to drive smart phones in this next 150 million people in the US marketplace.

We're going to fight the smart phone battle on two fronts. First, and what largely is seen today in the marketplace are these iconic super phones, that next device that comes out with the latest processer, the latest screen, the latest operating system that kind of pushes performance to the next level. T-Mobile absolutely would be a leader in that marketplace today and we believe we are today, delivering great products like the myTouch 4G, today are really driving purchase behavior at the high end of the marketplace.

We think a huge opportunity exists in scaling smart phones down to every day America. For that we believe T-Mobile has a significant advantage, one that our CDMA competitors are now trying to knit together either a WiMAX technology or an LTE technology into a single smart phone cannot follow.

That big bet of making smart phones affordable for the consumer is really going to start with a bet on Android. We're the leaders in the Android development and evolution when we announced the first Android product in the world, the G1, back in 2008. We continue to lead and innovate with Android in making it both affordable and also pushing the performance boundaries for consumers. In 2011 as Philipp showed you, we're going to start to drive Android prices and smart phone prices down by introducing 4G smart phones by summer that will be well below the $100 retail price point for consumers.

We've also got a fabulous portfolio of devices coming in the near-term that will push that high-end envelope of performance. One of the most exciting things I'm here to talk to you about today is the return of the Sidekick. The Sidekick was the first smart phone minimum the world frankly in 2002 when we introduced it. It really started to change the way consumers thought about interacting with other people through text and internet services. Still today in the marketplace the Sidekick is one of the top five recognized phone brands in the US market. It has a lot of consumer equity already built into the marketplace. We're going to bring it out again fresh and new, a new 4G product built on the backs of Android to kind of reinvigorate that base that we know is out there looking for the best social communication services around. We're excited to be bringing the Sidekick back into the US market.

In addition, I really want to talk to you also about tablets this morning. I think the tablet category, as I mentioned earlier, is revolutionary in terms of how people will consumer content and access the internet. We believe that a 4G network powered also by Android on the operating system is a great opportunity to introduce tablets to every day America, start to look at a tablet as a smart phone companion so that when a consumer needs that larger screen or a little bit more processing power they can turn to T-Mobile as a place where they can get a great connection on our 4G network and a great choice of tablets made affordable by driving Android into the tablet ecosystem.

So, at CES, kind of reinforcing here today, we introduced two new tablet devices, the first 4G tablet in the US. The first is the Dell Streak 7 which we talked about at CES. It's a seven inch device from Dell. We believe it will start to break the price point barrier in the US in terms of tablet affordability. Also very exciting is the G slate which will come out in March as Philipp referenced earlier. This product really pushed the evolution of performance on the Android tablet ecosystem, driving a 4G product into the market with a very impressive hardware and software spec on Google's latest Honeycomb operating system.

T-Mobile's heritage back to the early days is really in making wireless affordable for everyday America. That's what we're going to do now by making wireless data services and internet services affordable for everyday America. When this legacy has worked well it has not been a discounting strategy. It's been one of providing more services for the consumer. Our average RPUs over the year have always been very stable and in the middle or at the top of the industry. And we believe that T-Mobile can continue that as we move into the wireless data evolution by allowing our customers to get more for what we think is a great price in terms of values but also sustainable in terms of driving great revenue share in the marketplace.

There's also a problem with trust in this category. I'm going to talk about this a little bit more later. But I want to touch on it here briefly. We think one of the opportunities is to make these next generation data services much more easy to understand and afford for the everyday consumer. So, we're going to make sure that starts with really eliminating overage on these data products. Today, overage is a big source of growing concern for the consumer that's starting to adopt wireless data. T-Mobile's data plans going forward are going to be worry free and we'll tell you a little bit more about that in the coming slides.

Finally, we think we have a huge opportunity to disrupt adjacent industries by including value-added services in our data plans that many competitors charge for or don't make available, services such as navigation and really looking at how consumers can start to use the wireless device as their primary turn by turn navigation device versus buying standalone devices from other folks in adjacent industries.

T-Mobile is absolutely taking the lead in leadership in the industry in making wireless data services affordable for the US consumer. The next 150 million people looking for smart phones and mobile data are going to be turning for affordability and ease of use before they make their purchase decisions, we believe. So, launched in November of last year we introduced America's most affordable smart phone plan at $10. It's a great entry price but it comes on America's largest 4G network so you don't have to compromise that data quality.

Our plans also feature very friendly overage controls. As you can see from the chart, our $30 plan for example has no overage. We use a speed step down which the vast majority of consumers on smart phones, well over 99% of consumers don't hit those caps. But for that small percent that actually do, we'll give them notifications and slow the speeds down instead of charging them expensive overage bills as our competitors do as well.

The low end plan, the $10 plan has a very graceful price step up and it's capped at $40 which is only $10 above our highest end smart phone plan. So, again, trying to eliminate that bill shock for the average consumer that may have purchased a $10 plan thinking it's all they're going to use. They get into their smart phone, find they use it a lot more than they want, we're not going to send them a first bill that's going to shock them through the roof. That's one of the key things we think to making wireless services more accessible.

In addition, we remain the value leader across our broad bundled plans as well. T-Mobile continues to lead in voice, text, and web bundled values. You can see from this chart, Philipp referenced this a little bit earlier. You can see that for the average single line user, T-Mobile saves hundreds of dollars a year in the 10% to 15% range for the average single line user by buying our limited voice, text, and web plans. Again, as I mentioned on the slide previously, our web plans don't include overage that may push these bills even higher and the savings even higher for the average consumer.

Family plans are even a better story. The average family in the US compared to our competition will save anywhere from 10% up to 30% by buying T-Mobile's unlimited talk, text, and web plan. So, again, making the latest wireless services affordable for the average consumer and ensuring that we back up our mission of being the leader in affordable data services and smart phone services for the wireless marketplace.

Smart phones and the screen time that is now increasing on these smart phones is a great entry point for digital merchandising and up sell and cross sell efforts. The average consumer spends over an hour a day looking at their smart phone, flicking through screen, accessing information. That's a huge opportunity for T-Mobile to take advantage of in terms of how we present new offers, new content, and communicate our partners' value to the average US consumer.

By integrating personalization on the backend and consumer profiling, we can make sure consumers see the latest offers targeted just for them. We think this is a huge source of new revenue for T-Mobile by providing personalized offers, by providing content, by providing up sell and cross sell recommendations, making our latest plans available to them right on their device, single click to access and try and buy, all posted to their T-Mobile bill very seamlessly, very easily. And we believe again this is great value, not only for T-Mobile and our products and plans but for our partners' products and plan as well. As I mentioned earlier, a great opportunity for us to feature our partners' products like navigation, like T-Mobile TV that offers a lot of value built into their data plans that other carriers may in fact charge extra for as well.

Neville hit on this point a little bit earlier but I wanted to reinforce it from a slightly different perspective. Wi-Fi. Wi-Fi calling is something that T-Mobile's had a heritage in for the last five years in the marketplace. Unfortunately, we haven't done a good job of communicating this to the average US consumer. We're the leader in driving seamless integration of voice, text, and data services in the Wi-Fi into the smart phones and broadband products we offer. Most consumers, it's de facto now. Most consumers have a Wi-Fi network if they have broadband. There's no question on the ubiquity of Wi-Fi as a coverage solution or a value tool for the average US consumer.

We believe we have a huge opportunity in going after this marketplace by ensuring all of our smart phones in fact have seamless integration of voice, text, and data services. As Philipp noted earlier, in 2011, all of our Android and Blackberry products will have a Wi-Fi calling client that will have seamless integration of voice, text, and data into a seamless package on the smart phone. Nothing else the consumer has to do other than recognize that Wi-Fi network, one click to sign up and log in. And after that it will always work for them right out of the box and every time they move back into that Wi-Fi environment.

By embracing Wi-Fi we have a unique opportunity to deliver value in three different ways. The first is that coverage for the US consumer is still a problem for many people. The suburban areas and neighborhoods that many people live in are some of the toughest places in the market to zone and build new cell towers. By allowing Wi-Fi to be used for voice, text, and data services in their household and by extending onto their personal network, T-Mobile can increase coverage satisfaction and reduce coverage churn in the household by offering the seamless service.

Secondly, starting this year, T-Mobile will be making their voice, text, and data services over Wi-Fi completely included in their plans. It won't count against their buckets, it won't count against their minutes, it won't count against their text messages. So, if you're using Wi-Fi, you're essentially going to get a great additional value as part of T-Mobile's plans because it will be free and included in your package.

And finally we get a great benefit on the network side. Neville talked about Wi-Fi offload as a key benefit of how we reduce spectrum load on our network by allowing the customer to use their Wi-Fi network very, very easily. It frees up capacity in the neighborhood areas wherever there's Wi-Fi available, thus allowing other customers who don't have that advantage to use our network and free up capacity and decreasing our operating costs on a going forward basis.

So, three key advantages. To date so far we've seen a lot of critical acclaim for our Wi-Fi calling client. My job again and my team's job is to make sure our position in the market, position in our stores that consumers are more aware of Wi-Fi as an integrated part of how we go to market and something that's unique to T-Mobile and very distinctive in the marketplace.

We're going to shift gears just a little bit and talk about becoming America's most trusted brand. As I noted earlier, the wireless industry is historically very low on consumer trust. As our new focus is built on leading customer service and trying to really build on that heritage that we've had so successfully over the years, we want to move that to the next step of being America's most trusted brand. We believe that will start to break down the barriers that consumers perceive in adopting some of these next generation services.

T-Mobile as I mentioned has a heritage in being a leader in customer service. We've won ten of the last 12 J. D. Powers award for customer service and nine of the last 12 on the retail side of customer service as well. Unfortunately for most consumers these customer service accolades and needs comes after the purchase decision has already been made. We get great credit from our consumers for what we do after the purchase decision is already made but the broad marketplace doesn't really recognize that customer service leadership as something that really motivates them to purchase a carrier.

What we need to do is move that to trust. We believe trust is a much more aspirational target for the Company and for our service representatives to build upon. As you can see on the slide, the wireless category, it's great to note, comes in ahead of the airline industry but we have a long way to go to really rise customer service up to the levels that we believe are needed to really move to be a trusted partner so that consumers can use T-Mobile as their next generation wireless access carrier for voice, text, and data services, and increasingly replace other forms of communication and use T-Mobile as their only place to get access to their most important and trust content around the world.

So, building trust leadership is going to be really, really key. How are we going to do this? We think the primary way in is to reduce bill shock. The issue today is we have over 25% of all our customers on a monthly basis have some type of either national or international overage situation that may come as a surprise for them. That drives about 10% of our customer care calls due to billing, billing on overages or some type of non-included plan service. What we've been doing over the years is making unlimited services affordable for consumers. Our voice, text, and data plans today already lead the marketplace in value and affordability. That's one simple way to ensure they don't have overages, get on to unlimited voice, text, and data plan.

We've also been an innovator in family controls and services that allow the average US consumer who are on pool plans to ensure that the family has a viable and always on way to manage services across all the lines in that family pool. We've been a leader in family control services historically. But we've got to go a lot further.

As we move into wireless data as contrasted with wireless voice, wireless voice is very, very predictable bill usually in most cases. You're going to spend--Philipp showed you earlier, 800 minutes is the average usage in the US marketplace. Maybe a consumer might spend a few hundred minutes a month more but on data just by accessing a certain piece of content or an application or a website, the data usage may be much higher than the average consumer might expect.

So, what are we going to do? We're going to ensure that we reduce overages through these worry-free plans, this notion of speed step downs versus complicated overages. We're going to have SMS warnings as they reach these speeds that step down thresholds and give them ways to step up to an additional plan if they need to. And we're going to continue to allow data services to evolve in these family control areas to ensure that customers that have been using family controls for voice and text can now use it for data services as well.

International is the next opportunity for us to really revolutionize how we manage data overages for the average consumer. International plans oftentimes have even higher bill shock because some of these applications hit the network so often that a bill using two or three applications can be tens or hundreds of dollars a day just to use them internationally. So, T-Mobile as an international leader is going to work with our partners and other portfolio companies to ensure that in 2011 we revolutionize by offering flat rate

	data plans on an international basis, allowing consumers to pick from day, week, or monthly plans when they're traveling internationally and cap their data usage at affordable and fixed rates. So, I want to close on what I think is one of the most exciting things that we've done in the last couple of months which is really change our advertising anchor in the marketplace. To be a challenger you have to have challenger advertising. We have to get the word through and it has to break through for the consumer. The latest ads I'm going to show you here this morning as we start to dramatize the benefits of 4G in the smart phone space and how T-Mobile makes 4G affordable without sacrificing quality. Let's roll this first ad which is called "Shirtless".
Unidentified Participant:	Hi. I'm a T-Mobile myTouch 4G.
Unidentified Participant:	And I'm an iPhone 4.
Unidentified Participant:	So, iPhone, where's your shirt?
Unidentified Participant:	Oh. Yeah. I had to give it to AT&T here for my data plan.
Unidentified Participant:	Ouch. My nationwide 4G plan is only $10 a month.
Unidentified Participant:	Look. Sometimes you just got to pay more to be slower. Makes sense if you don't think about it.
Unidentified Participant:	Now for just $10 a month, T-Mobile gives you--
Cole Brodman:	Cut off a little bit there. Don't know why. But for $10 a month T-Mobile gives you m ore on 4G. There you go. I'll finish for you. The second ad we're going to show you is a rough cut. So, it's not a finished copy. It'll start running next week we believe and it really starts to dramatize what's happened recently with the event of the iPhone going to Verizon and how really it hasn't bought consumers anything from a performance perspective. We've really gone from a 3G network to a slower 3G network. So, we're going to show you the next ad which we call "Identity".
Unidentified Participant:	Hi. I'm a T-Mobile myTouch 4G.
Unidentified Participant:	And I'm an iPhone 4.
Unidentified Participant:	Who are your buddies?
Unidentified Participant:	That's AT&T and that's Verizon.
Unidentified Participant:	Actually I'm Verizon.
Unidentified Participant:	I'm AT&T.
Unidentified Participant:	How do you tell them apart? Does one of them have nationwide 4G like me?
Unidentified Participant:	Nope. I'm pretty much slow with either one.
Unidentified Participant:	Wow. Tough choice.

Unidentified Participant: Hey, no choice is still a choice.

Unidentified Participant: Now for just $10 a month T-Mobile gives you high-speed internet on the go on America's largest 4G network. T-Mobile. Step up to nationwide 4G.

Cole Brodman: I even saw a couple smiles in the audience on that. That's good. It's starting to break through. So, fun, fresh, and frankly going right after our competitors in an interesting way that we think will really motivate the market and make it memorable.

So, how do we know we're on the right track? I'm going to close with one last slide which really will tell you what we're doing in changing perception. One of the key things we have to do with the brand is to make our new brand positioning known with the consumers. Our job is to shift brand perception over time and start to ensure that people understand that we have three key things that they're looking for when they make that smart phone decision. We've got a leading and reliable network. We have a great smart phone portfolio. And we have leading value and affordable data plans.

So, this advertising which began November 3 is starting to really wear in. You can see from this chart here which was measured by Nielsen over the November to early January period that we're starting to see the message around our large 4G network is really breaking through. We've shifted perception around having a large 4G network 9% over this two month period which again we think will really start to drive consumers to consider T-Mobile as they're looking for their next smart phone choice. 4G really is shorthand for modern and faster. For us it's a great way to kind of break through the clutter and allow consumers to really understand that T-Mobile's got a great network to offer.

We're also starting to see that we're dimensionalizing additional attributes like has a great smart phone portfolio and has a fast data service. So, has a great smart phone portfolio but at the same period of time has popped 6% and has a fast data service has popped 5%. The good news here in almost all cases, we've made relative gains compared to competition from where we were. We're starting to actually break through. The last thing I want to close on is from a recall perspective, one of the things advertising used to do was be memorable. So, from a recall perspective over the second half of December, the ads that we ran previous to this campaign which were very similar featured the same kind of creative look and platform were recalled at a higher rate than any other ads in our industry including iPhone ads and ads from Verizon and AT&T. So, consumers played back the messages in the recall and attributed them to T-Mobile at a higher rate than other competitors' ads that they saw in the marketplace as well. So, we know we're starting to break through with this fresh approach.

So, thank you for your time. I look forward to meeting some of you a little bit later. I'm going to turn it back over now to Philipp. Thank you.

Philipp Humm: Let me just--yes. Let me move on. We now come to multi-segment strategy and to challenger business model. Multi-segment player, we are the 4G network leader. We have affordable smart phones and we're moving to become a truly trusted brand. Now the next two categories which is multi-segment player and challenger business model is all about overcoming scale either on the revenue or on the cost side.

If we look at multi-segment player, we see that Verizon and AT&T are each North of 1500 customers per tower which allows obviously a greater leverage of fixed costs. We are just under 700 customers per tower. We have a lot of capacity available to us which we can leverage to make additional revenues.

We will continue to approach multiple segments, leveraging multiple brands. Our core brands will always target valuable post-paid and prepaid customers and we will explore further the opportunity to pursue tailored solutions for niches and we have had a lot of success with the Hispanic segment and we'll continue to explore other opportunities going forward.

For pay-as-you-go we will continue to leverage partners like TracFone to meet market demand and one highlight for the year is related to unique distribution partnerships. Let me talk further on that subject. Wal-Mart family mobile and Simple mobile have been two true successes for T-Mobile in 2010. Right now Wal-Mart family mobile is in 2500 Wal-Mart stores and gives family access to seeking affordable solutions. Customers get for $45 unlimited voice and text and can add family members for $25 or data for $10. Another success product has been an NVAO called Simple mobile. Simple offers a rich unlimited offer similar to our prepaid products but offered through primary CDMA distribution channels and we will continue to explore further these but also additional and new relationships.

Another area that exemplifies our new approach is pursuing the B2B segment. We only have a market share of about 4% in B2B despite the fact that we have very, very strong assets. 4G leadership, global GSM and HSPA+ network, international proposition, international customer base. We have true assets here we can leverage being part of the bigger group Deutsche Telekom. Thirdly we had deprioritized this segment. This is now changing. We will leverage our assets like stores, partners, and call centers for small businesses where we want to gain a fair market share in the market overall. It's not 4% but a fair market share comparable to our overall market share.

For large enterprises we are outsourcing our billing system and will intensify the corporation with DT, outsourcing to get the complexity out of our billing system and move that out of the Company. And we want to significantly grow with large enterprise and worth but not achieve a rich market share but still significantly grow in that segment.

Let me close with the fifth lever with the challenger business model. We at T-Mobile work very hard to find ways to overcome scale disadvantages. I talked about the top line in the multi-segment section. Let me now come to ways to overcome scale in cost structures as well. First, as our regional markets defer based on network and distribution strengths, demographic but also on competitive landscape, we will shift media from national to national regional based on our spendings, meaning in areas where we are strong or where we have a strong network, where we have a strong distribution we will spend more and we believe we can win market share in areas where we have either a weak distribution or a weak network. And we will also tailor the message to the respective areas.

Second, we are open to pursue scaled partnerships, network sharing to achieve rural coverage, and reduce by doing that roaming expenses and we will intensively use DT's scale even more in IT development of new IT systems going forward where T-Mobile USA is playing an active role. Network, handset, purchasing, but also simply know-how because we have a lot of know-how in the group which we can leverage for ourselves.

Third, as a consequence on focusing on affordable smart phone we are lowering the average handset price. By doing that we are lowering the average subsidy. So, lowering the average handset cost, but at the same time also increasing handset distribution.

Last but not least working on operational efficiency and financial excellence. I talked earlier about the Reinvent program which is going to deliver another $1 billion but Reinvent is more than a program. It's a transformation program which transforms the way the Company is going to operate year in, year out and we'll apply very, very strong financial rigor to all the things we're doing here in the Company.

So, let me come now to the guidance. This chart is somehow missing, my friends. You have the chart in your decks. Let me use it from here. So, let me wrap up. We are implementing a challenger strategy leveraging our 4G network, making smart phones affordable, moving from service to trust, reducing scale disadvantages by approaching multiple segments and significantly lowering our costs.

Can somebody maybe bring in the right chart? The strategy is about getting T-Mobile back on a growth path. Our financial ambition levers for the next two years are as follows. For 2011, as we turn around the operations we're aiming to return to revenue growth, a stable EBITDA margin and a slight increase in operating free cash flow. Most important for us is a significant reduction of churn at 2%. For 2012, we expect increasing revenues, a contract data RPU of $18, a smart phone penetration of more than 50%, a contract churn below 1.8%, and EBITDA margin in the low 30% and an increasing operating free cash flow.

Let me be clear on one thing. We have not dropped our ambition to achieve a mid-30s margin. We feel that this is achievable by 2015. What is critical to me however is getting the business moving in the right direction again, something that I'm very confident we can do. But this means that our margin ambition needs to wait 30 long months. Longer-term, given the advantages that we have with our strategy and we have a competitive advantage and we have a clear USP in the market, I see no reason why we can't become the clear number three player in the market overall.

Thank you very much.

Rene Obermann: Just a couple of organizational remarks. We'll be having a lunch break right now. It will be until one o'clock. We're starting our breakout session at one o'clock. That is for the analysts and investors only. In order to make the most efficient use of your time we have divided you guys within three groups. So, there will be a green group, a blue group, and a yellow group. You see which group you belong to with your badge. Your badges all have colors. And so, the green group is myself, the yellow group is Andres Pui (ph) who is here in the middle and the blue group is my colleague Niles Pearlman (ph).

So, we collect you to get you up or down wherever to your meeting rooms where we'll be having the breakout session and we'll also have lunch packages waiting for you. So, I go with the group with the green group. I'll collect my green group over here right next to the podium and I'll go up down to the 46th floor where we'll be having the meeting at the So High (ph) meeting room. Andres Pui here with the yellow group, he'll be meeting in the lobby and they'll be going down to the third floor to the Hudson Square room where they have--or where you guys have your meetings and Niles Pearlman with the blue group, Niles will be collecting you down there on the right-hand side of the room where the technology was. They're still looking for that last chart I suppose. They'll guide you down to the Castle (ph) room which is down in the lobby. So, have fun. Have a good appetite and see you at the breakout session. You'll all see the management team. The management teams will be rotating. All of you will have the same time with each management team members. Thank you.

Consumers Union
Nonprofit Publisher of Consumer Reports

House Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Questions for the Record
Parul P. Desai, Policy Counsel

"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

Chairman Bob Goodlatte

Q1. You note that in its 2010 report, the FCC for the first time "opted not to declare [wireless] a competitive market." In your view, did the FCC declare the market uncompetitive, or, because of the growing complexity of the market and the lack of an accepted definition of "effective competitiou," did the FCC consider it prudeut to return to an earlier practice of describing market conditions but not making a definitive declaration?

A2. In its 2010 report, the FCC did not declare the wireless market to be effectively competitive *or* uncompetitive. Rather, as you stated, the FCC noted the market is complex but, also noted, among other things, that there are significant barriers of entry and growth in wireless market, such as high special access rates, access to spectrum, and difficulty in accessing certain devices. It appears the FCC's report provided the market conditions and data needed to determine what policy solutions may be needed to ensure a vibrant marketplace. Moreover, while the FCC did not find the market to be a competitive one, it did find that concentration in the wireless market has increased 32 percent since 2003 and 6.5 percent in 2008.

Q2. You testified that Verizon has announced its intention to build out to about 95 percent of the country with its current spectrum holdings. Where did Verizon announce that specific intention?

A2. Reports and data suggest that Verizon intends to build out LTE coverage to at least 94% of the population, but more likely 98%, based on updated coverage data.

On its website, Verizon states that "4G LTE is currently available in 38 markets, over 60 major airports, and covers approximately 110 million people within the United States. And we're aggressively expanding to cover our *entire existing nationwide 3G footprint with 4G LTE* by the end of 2013." *Verizon 4G LTE Network*, https://www.lte.vzw.com/AboutLTE/VerizonWireless-LTENet-work/tabid/6003/Default.aspx (emphasis added). Verizon's nationwide, "growing high-speed wireless network covers more than 280 million people." *3G Mobile Broadband*, https://www.verizonwireless.com/b2c/mobilebroadband/?page=coverage. In other words, Verizon's wireless network covers 94% of the population. *See* Robert C. Atkinson and Ivy E. Schultz, Columbia Institute for Tele-Information, *Preliminary Report Prepared for the Staff of the, FCC's Omnibus Broadband Initiative*, 8 (November 11, 2009) ("Verizon's network covered 288 million people or 94% of the U.S. population.").

Verizon further states its "4G LTE deployment is enhanced by its 'beachfront' 700 MHz spectrum [which] provides coverage and in-building penetration advantages...." *Verizon 4G LTE Network*. This is spectrum that Verizon won in a 2008 FCC auction. *See* Statement by FCC Chairman Kevin Martin, March 20, 2008, http://hraunfoss.fcc.gov/edocs_public/attachmatch/-DOC-280968A1.pdf.

Thus, Verizon has the ability to, and plans to, deploy 4G LTE coverage to at least 94% of the population with its current spectrum holdings. However, more recent reports suggest that Verizon's LTE coverage will more likely reach 98%. *See* "It's a Verizon Wireless iPhone, but it's not LTE," *Connected Planet*, Jan 11, 2011 ("VZW's CDMA and EV-DO networks cover 98% of the population...."); *see also* "Verizon Wireless Unveils Suite Of 4G LTE Smartphones, Tablets, A MiFi, Hotspot And Notebooks," Verizon Press Release, Jan. 6, 2011 ("We will aggressively continue launching 4G LTE markets over the next 36 months. We'll cover two-thirds of the U.S. population in the next 18 months, and by the end of 2013 we'll offer our 4G LTE network from coast to coast – everywhere that we offer 3G today.").

Representative Steve Chabot

Q1. Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?

A1. The current broadband wireless market is a largely unregulated one. If this merger were approved, two carriers would control nearly 80% of the market, with no protections or regulations to discourage anti-competitive, anti-consumer behavior. Thus, rather than approve AT&T's bid for T-Mobile, lawmakers and policymakers should move forward to resolve a number of pending issues – such as special access reform and interoperability - in a way that will foster competition, consumer choice, innovation, and fair prices.

Written Response to Questions for the Record

Joshua D. Wright
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United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet

Hearing on
"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

May 26, 2011

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Mr. Chairman and Members of the Subcommittee - thank you for the opportunity to respond to Representative Steve Chabot's question:

"Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?"

I understand the question to be whether approval of the proposed AT&T / T-Mobile merger could potentially increase future regulation and intervention. For instance, some opponents of the merger have speculated that its approval would ultimately lead to a merger between Verizon and Sprint. Senator Kohl's recent letter to Attorney General Holder and Federal Communications Commissioner Genachowski warns that "we cannot turn a blind eye to the dangerous possibility that this acquisition could ultimately result in a duopoly in the national cell phone market."[1]

Antitrust analysis is, at its core, about evaluating the likely competitive effects of the current transaction. In their own analysis, the antitrust agencies will properly ignore speculation that this merger will spur a future transaction. Antitrust is at its best when focusing its attention upon the application of economic theory and econometric technique to data; it is at its worst, and most likely to fail its mission of protecting competition, when it strays from this core enterprise into speculation. Antitrust analysis has moved well beyond merely counting the number of firms in a market in

[1] Letter of Senator Kohl to Attorney General Holder and Chairman Genachowski (July 20, 2011), *available at* http://kohl.senate.gov/ATT-TM%20LT%20to%20DOJ%20and%20FCC.pdf.

order to predict competitive effects and determine the need for intervention or regulation.

An appropriate antitrust analysis would focus on the competitive constraints facing AT&T and T-Mobile. Characterizations of the wireless market as a "duopoly" ignore the significant competitive constraints imposed by Sprint, the third largest provider with over 50 million subscribers, as well as the regional and local networks, handset manufacturers, application developers, wireline services, wi-fi, and a host of other market characteristics, all of which have contributed to the remarkable reduction in prices (and increase in quality) in both voice and data. Ignoring the success of local and regional players like MetroPCS, Leap, and Cellular South (companies growing faster than some of the national competitors) is unsound. MetroPCS, for example, was the first carrier to institute LTE technology and deploy LTE in eighteen cities (Verizon is in just thirty-eight). In fact, MetroPCS is the largest carrier in some markets. The FCC defines markets locally in its most recent competition report because consumers search for wireless providers where they live, work, and travel.[2] A national market definition obscures the fact that nearly 90 percent of Americans have a choice of five or more wireless providers.[3]

Instead, modern antitrust has largely rejected reliance upon indirect proxies for market performance, such as concentration, in favor of a rigorous analysis of whether and how the merger at issue will change the incentives of firms in the market to compete. As I observed in my testimony, I do not believe that there is any evidence that

[2] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, No. 10-133, ¶ 50 (FCC June 27, 2011) [hereinafter Fifteenth Report], *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf.
[3] *Id.* ¶ 380.

the proposed transaction will result in reduced consumer welfare.[4] Indeed, Senator Kohl's letter highlights testimony from Dan Hesse, the CEO of Sprint, which is telling in this regard. If there were any remaining questions about whether the merger will result in a reduction of competition, higher prices, and a more comfortable life for wireless carriers on the one hand, or more vigorous competition and competitive benefits passed on to consumers on the other, Mr. Hesse settles the matter, concluding that the transaction would render "the competitive environment . . . much more difficult for Sprint." In short, Sprint acknowledges that the merger will increase rather than diminish competition, to the benefit of consumers. A regulatory policy that would prevent the merger on the grounds that the merger makes it necessary for Sprint to compete even harder harkens back to the days where regulatory agencies were charged with protecting competitors rather than consumers, and should be rejected. Given the pressing need to alleviate the spectrum capacity constraints facing AT&T, and the competitive benefits *for consumers* arising from relief from those constraints, opponents face a significant burden of demonstrating competitive harm in order to justify intervention.

In sum, the best way to ensure that the merger does not lead to counterproductive future intervention or regulation is to rely upon the agencies to

[4] *How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?: Hearing Before the Subcomm. on Intellectual Prop., Competition & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 8-9 (2011) (testimony of Joshua D. Wright, Professor, George Mason University School of Law).

conduct a rigorous economic analysis of the transaction. That analysis should be focused upon the present transaction – does it increase competition, relieve spectrum capacity constraints, and allow more rapid roll out of 4G LTE to consumers, or will it facilitate coordinated or unilateral price increases? – rather than speculation about possible future transactions that may or may not occur. There will be ample opportunity for such transactions to be evaluated on their own merits.

Professor Andrew I. Gavil
Howard University School of Law
Before the
House Judiciary Committee
Subcommittee on Intellectual Property, Competition, and the Internet
May, 26, 2011
2141 Rayburn House Office Building

Hearing on
"How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?"

Response to Question Posed by Representative Steve Chabot

The Question: "Many are concerned that this merger will lead to increased intervention and regulation by the Federal Government. What can be done to prevent this result?"

Response from Professor Gavil:

I share the expressed concern that the proposed AT&T-T-Mobile merger may lead to increased intervention and regulation by the Federal Government -- but I do not associate that threat with an "up or down" decision to permit or oppose the merger. As I indicated in my Written Statement, those who fear increased intervention and regulation should be far more troubled by the prospect that the Department of Justice and the Federal Communications Commission will succumb to AT&T and T-Mobile's invitation to "fix" the conceded competitive problems of the merger by negotiating an elaborate consent decree. Such a decree would likely permit the merger to go forward in return for extensive conditions on AT&T's post-merger operations, required divestitures, and mandated long-term, continuing agency and judicial oversight. Such a decree could return us to the days of the regulated Ma Bell monopoly, effectively abandoning the commitment to competition made by Congress in the Telecommunications Act of 1996. Over decades, AT&T proved to be especially adept at manipulating that regulatory system to its advantage and its interest in reconstituting such a system now should be viewed with great skepticism.

In contrast, law enforcement is not the same as "regulation." Indeed, in the case of the Clayton Act's prohibition of anticompetitive mergers, effective law enforcement can be understood as preserving the competitive process, diminishing the likelihood that the Federal Government will later need to intervene aggressively either through regulation or forced restructuring of an industry to restore competitive conditions. Congress passed the Clayton Act for this very purpose – to preserve competition so regulation would not become necessary. Although it may seem counter-intuitive at first, therefore, thoughtful law enforcement to protect competition can actually diminish the need for invasive and pervasive regulation down the road.