

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation on the Commission's Own
Motion Into the Planned Purchase and Acquisition by
AT&T Inc. of T-Mobile USA, Inc., and its Effect on
California Ratepayers and the California Economy.

Investigation 11-06-009

(Filed June 9, 2011)

OPENING COMMENTS OF THE GREENLINING INSTITUTE

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OPENING COMMENTS OF GREENLINING INSTITUTE

The Greenlining Institute (“Greenlining”) hereby files these Opening Comments in the above-captioned matter. The proposed merger would cause significant economic harms and would harm competition. Additionally, the proposed merger is not in the public interest. Accordingly, the California Public Utilities Commission (“the Commission”) should find that the merger is not in the public interest and deny the Application or, in the alternative, impose measures to mitigate the negative effects of the merger.

SUMMARY

First, the proposed merger does not provide economic benefits to ratepayers. Applicants have failed to demonstrate how the merger would result in economic benefits to California ratepayers. Additionally, the proposed merger would cause economic harm to California ratepayers by eliminating jobs, retail stores, and customer service centers.

Second, the proposed merger would adversely affect competition in a number of wireless markets. The merger would harm competition in the retail value-conscious wireless services market; low-income and other value-conscious consumers would face increased prices and degraded quality of service. The merger would also harm competition in wholesale markets; the elimination of T-Mobile as the dominant value-conscious provider would give AT&T the incentive and ability to engage in anticompetitive conduct in the backhaul and roaming markets.

Third, the proposed merger is not in the public interest. The proposed merger promises to degrade the quality of service to California’s low-income ratepayers; T-Mobile’s value-conscious customers will migrate to other value-conscious providers, potentially doubling the load on those other providers’ networks. The merger will be neither fair nor reasonable to the public utility employees affected by the merger; the proposed merger would cause extensive job

losses, and Applicants have provided no assurances that jobs will be retained. The merger will, on an overall basis, harm California communities by delaying low-income consumers' access to Long Term Evolution (LTE) technology, broadening the Digital Divide, and leaving some consumers without access to a local wireless services retailer. Additionally, the proposed merger provides no mitigation measures which would help prevent these significant adverse consequences. Accordingly, the Commission should deny the Application.

If the Commission does not deny the application, it should impose conditions to mitigate the merger's harmful effects. The Commission should impose conditions that (1) require AT&T to "pass through" its cost savings, (2) promote diversity, (3) restrict the closure of retail establishments, and (4) allow T-Mobile customers to decline services from the merged organization without penalty.

STATEMENT OF FACTS

I. WIRELESS PROVIDERS

The major wireless phone providers in the U.S. are Verizon, AT&T, Sprint, and T-Mobile.¹ Smaller providers include MetroPCS, Leap, and U.S. Cellular.² Verizon, Sprint, and AT&T target high average revenue per user (ARPU) subscribers.³ MetroPCS, Leap, and U.S.

¹ See Description of Transaction, Public Interest Showing and Related Demonstrations 11-12, 15, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm'n April 21, 2011) (hereafter, "Application").

² See *id.* at 12. The Application also lists Clearwire and LightSquared as "wireless providers." *Id.* at 13. Those companies appear to provide data services, but not telephone service. See www.clear.com; <http://www.lightsquared.com/>.

³ See Application at 101 (AT&T and Verizon); Applicants' Declaration of Dennis W. Carlton, Allan Shampine and Hal Sider ¶ 97, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm'n April 21, 2011) (hereafter, Carlton Decl.).

Cellular target “value conscious” customers.⁴ T-Mobile straddles the two markets, offering service to both high ARPU and value conscious customers.⁵

High ARPU and value-conscious providers offer significantly different products, serve significantly different customers, and offer significantly different prices. High ARPU providers primarily offer “contract” wireless services;⁶ value-conscious providers offer primarily no contract, “all you can eat” services.⁷ High ARPU providers offer more high-end, advanced handsets.⁸ High ARPU and value-conscious providers have distinctly different “churn” rates—the percentage of total customers who switch providers.⁹ Prices for value-conscious services tend to be roughly half that of prices for high ARPU services.¹⁰

Mobile wireless service is particularly important to low-income consumers and communities of color, as it may be their only access to broadband. The Commission’s National Broadband Plan noted that only 40% of low-income consumers adopted broadband, a much lower rate than the national average (65%).¹¹ It is more likely that a low-income consumer’s wireless device is their only means of accessing the internet.¹² Low-income consumers usually obtain service from value-conscious providers; this is often because of the lower prices of value-

⁴ See Application at 99.

⁵ See Application at 101.

⁶ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint).

⁷ See Carlton Decl. at ¶ 101; Declaration of David A. Christopher ¶¶ 20, 45, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm’n April 21, 2011) (hereafter, Christopher Decl.).

⁸ See Christopher Decl. at ¶ 33; *see also*, Carlton Decl. at ¶ 96.

⁹ See Christopher Decl. at ¶¶ 23, 51-52.

¹⁰ See Christopher Decl. at ¶¶ 45, 61-62.

¹¹ See Federal Communications Commission, Connecting America: The National Broadband Plan 167, Exhibit 9-A (March 2010) (hereafter, “National Broadband Plan”).

¹² See Pew Internet and American Life Project, Mobile Access 2010 10, (2010), *available at* http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf (hereafter, Pew Mobile Access Report).

conscious services.¹³ Some low-income consumers are unable to obtain service from high-ARPU providers, because of issues of creditworthiness or prior disconnections.¹⁴

African Americans and Hispanics adopt broadband at lower rates – 59% and 49% respectively, compared to the 65% national average.¹⁵ African-Americans and Latinos are also more likely to access the internet through mobile services.¹⁶ Thus, these communities are at the low points of the “Digital Divide.”

II. THE PROPOSED MERGER

AT&T seeks to acquire the spectrum licenses currently held by T-Mobile as part of a merger between AT&T and T-Mobile.¹⁷ AT&T claims to be pursuing the merger because AT&T does not have sufficient spectrum to serve its customers and deploy next-generation mobile technology.¹⁸

Applicants argue both that (1) T-Mobile customers will stay with AT&T,¹⁹ and that (2) T-Mobile customers will migrate to value-conscious providers.²⁰ It appears that after the merger, AT&T intends to retain T-Mobile’s high ARPU customers, and expects T-Mobile’s value-conscious customers to migrate to other value-conscious providers. Applicants state that “...MetroPCS, Leap, and others can fill any gap T-Mobile USA might leave in the competition for value-conscious consumers when the merger is completed.”²¹

¹³ See Argument, § III.A.1.a.iii, below.

¹⁴ See Catherine J. K. Sandoval, Comment, In the Matter of Framework for Broadband Internet Service 7, GN Docket No. 10-127 (Fed. Comm. Comm’n July 15, 2010).

¹⁵ See National Broadband Plan, *supra* note 11, at 167, Exhibit 9-A.

¹⁶ See Pew Mobile Access Report, *supra* note 12, at 10.

¹⁷ Application at 1.

¹⁸ See *id.*

¹⁹ See Joint Opposition of AT&T INC., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments 62, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm’n June 10, 2011) (hereafter, Opposition) (citations omitted).

²⁰ See Opposition at 131.

²¹ Application at 99.

III. SPECTRUM HOLDINGS

AT&T has “the most cell sites and the most spectrum of any wireless network,” and has the “strongest spectrum position” of any provider.²² AT&T owns a majority of the nation’s 700 MHz spectrum, considered the prime “beachfront property” of spectrum.²³ AT&T has about 284 MHz more spectrum than its closest competitor in the top 21 markets in the United States.²⁴ Of 734 Cellular Market Areas (CMAs), AT&T has met the Commission’s spectrum screen in 202 of those markets.²⁵ AT&T is actively expanding its spectrum holdings, and is seeking to purchase more spectrum from Qualcomm and other license holders.²⁶

ARGUMENT

I. STANDARD OF REVIEW

A party seeking Commission approval of a merger, acquisition, or transfer of control of a public utility in California must prove, by a preponderance of the evidence, that the proposed merger (1) provides short term and long-term benefits to ratepayers, (2) does not adversely affect competition, and (3) is in the public interest.²⁷

II. THE PROPOSED MERGER DOES NOT PROVIDE ECONOMIC BENEFITS TO RATEPAYERS.

In order to warrant approval, merger transactions must produce both short-term and long-term economic benefits.²⁸ While Applicants argue that the merger will result in some vague, general benefits, it has failed to show that the merger will bring specific benefits in California.

²² AT&T, Network: Robust Network and Security, <http://www.wireless.att.com/businesscenter/business-programs/small/network-security.jsp> (last accessed May 20, 2011).

²³ See Marguerite Reardon, Is AT&T a Wireless Spectrum Hog? (2011), http://news.cnet.com/8301-30686_3-20058494-266.html (last accessed May 25, 2011).

²⁴ See *id.*

²⁵ See Application, Appendix C.

²⁶ See FCC Public Notice, DA 11-252, WT Docket No. 11-18 (Feb. 9, 2011); FCC Public Notice, DA 11-943, (May 24, 2011).

²⁷ See Pub. Util. Code, § 854.

²⁸ See Pub. Util. Code, § 854(b).

Additionally, the merger promises to cause specific harms in California by eliminating jobs and closing retail locations.

A. Applicants Have Failed to Demonstrate How the Merger Will Result in Economic Benefits to California Ratepayers.

Applicants speculate that the merger will benefit Californians. Applicants do not, however, explain how those benefits will be achieved, except in the most vague and nebulous terms, citing broad statements about the entire wireless industry,²⁹ general studies,³⁰ and broad economic analysis.³¹ For example, Applicants argue that the proposed merger will generate efficiencies, claiming that these efficiencies are “well-understood and accepted throughout the wireless industry.”³² However, Applicants cannot actually quantify the merger’s purported efficiency gains; those gains “will depend on several key factors that vary market-by-market.”³³ Applicants assert that the merger will generate over \$39 billion in cost savings,³⁴ but admits that they will not have enough information to make an accurate determination of savings until after the merger.³⁵ The Commission should not rely on such illusory statements on the benefits of the merger.

B. The Proposed Merger Will Cause Economic Harm to California Ratepayers.

Even if the merger resulted in Applicants’ alleged benefits, the economic harms caused by the merger would outweigh those benefits. For example, the merger promises to (1) eliminate jobs in California, and (2) close a number of retail locations in California.

²⁹ See Opposition at 75.

³⁰ See Opposition at 92, n. 122.

³¹ See Carlton Reply Decl. at ¶¶ 108-133.

³² Reply Declaration of William Hogg at ¶ 27, In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc., WT Docket No. 11-65 (Fed. Comm. Comm’n June 10, 2011) (hereafter, Hogg Reply Decl.).

³³ *Id.*

³⁴ See Opposition at 74.

³⁵ See Response of AT&T Inc. to Information and Discovery Request Dated May 27, 2011 (hereafter, AT&T Response to FCC Data Request), response to DR 26(c), DA 11-799, Docket No. 11-65 (Fed. Comm. Comm’n, May 27, 2011).

1. The Proposed Merger Will Cause Economic Harm by Eliminating Jobs.

a. The Proposed Merger Will Result in Extensive Job Losses.

AT&T argues that the proposed transaction will have a net benefit in terms of employment, noting particularly that the transaction promises to create “high-tech, high-wage jobs.”³⁶ However, AT&T does not address the effects of the proposed transaction on entry-level, low-wage jobs. If the merger is approved, AT&T and T-Mobile will combine their call center and billing operations, resulting in a reduction in staff.³⁷ Additionally, AT&T will integrate many of T-Mobile’s cell sites into AT&T’s network in those areas where AT&T’s network is congested.³⁸ Other sites will be decommissioned.³⁹ It is fair to assume that the integration and decommissioning of cell sites will result in the integration and decommissioning of maintenance crews, resulting in more lost jobs. Similarly, AT&T will “optimize the distribution network to both enhance retail coverage and customer service while eliminating significant cost;”⁴⁰ this “optimization” will no doubt also involve job cuts.

While AT&T heralds the proposed merger as having the long-term potential to create “benefits for job creation and job improvement,”⁴¹ AT&T does not address the thousands, if not tens of thousands, AT&T and T-Mobile employees, many of whom are members of low-income communities, who stand to lose their jobs if the merger were approved. In response to the data

³⁶ Opposition at 86.

³⁷ See Declaration of Rick L. Moore ¶ 37, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm’n April 21, 2011) (hereafter, Moore Decl.).

³⁸ See Hogg Reply Decl. ¶ 44.

³⁹ See Moore Decl. at ¶ 34.

⁴⁰ *Id.* at ¶ 35.

⁴¹ Application at 56-57.

request seeking information about the net number of jobs that will be lost in California after the merger, AT&T provides no assurances, but rather hints at the cost-cutting that is sure to result.⁴²

b. AT&T Provides No Assurance that Jobs Will Be Retained.

T-Mobile currently employs approximately 42,000 people in the United States; doubtlessly many of these employees are in California.⁴³ AT&T is a much larger company, with many more employees nationwide and in California. Although Applicants have made vague promises that they plan to increase investment in the deployment of 4G LTE service, leading to jobs, their more specific statements all point to great job losses.

While AT&T claims that the net effect on employment could be positive, the effect on retail and customer support employment promises to be negative. The merger promises to severely harm such employment; this harm outweighs any purported benefits caused by the supposed new high-tech and union jobs.

2. The Proposed Merger Will Cause Economic Harm by Eliminating Many Retail Stores, Customer Service Centers and Related Jobs.

Many of the job losses that are sure to result from the merger will come from the closure of retail stores. As stated above, in areas where AT&T and T-Mobile stores are located near each other, store consolidation in the interest of efficiency is likely to occur. A study conducted by the CoStar Group for the Wall Street Journal found that 41% of AT&T stores nationwide have at least one T-Mobile store no more than one mile away.⁴⁴ The study found the overlap

⁴² See Compliance Filing of AT&T Inc in Response to Order Instituting Investigation Ordering Paragraph 7 (hereafter, AT&T Response to Data Request 7), Response to DR 7.b:

After the transaction closes, AT&T will evaluate the combined company's staffing, store locations and network distribution facilities in order to enhance its sales operations and achieve the optimum network deployment.

AT&T's goal is to create a workforce best positioned to compete in today's global and competitive technology environment.

⁴³ T-Mobile, Company Information, available at http://www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_CompanyOverview (last accessed June 30, 2011).

⁴⁴ See Anton Troianovski, T-Mobile Dealers Start to Hang Up, WALL STREET JOURNAL (June 23, 2011), available at <http://online.wsj.com/article/SB10001424052702303970604576402021687133238.html>

greatest in the western states, and especially in cities in Southern California and the Bay Area.⁴⁵ For example, in Los Angeles the average distance from an AT&T wireless store to the nearest T-Mobile store is around one mile.⁴⁶ Thus, cities in California are the most likely to see the loss of retail stores and their related jobs.

Similarly, AT&T's proposed efficiency savings will consist of the elimination of customer service centers and marketing. While AT&T's more public statements vaguely promise job retention, its statements to shareholders more accurately promise lost jobs from "retail store rationalization" and "synergy opportunities across marketing, customer support and operations."⁴⁷ AT&T recognizes that job losses in these areas are forthcoming, offering the rather tepid response that "where some jobs serving duplicative functions are eliminated to reduce costs, AT&T will rely mostly on natural attrition."⁴⁸

Many T-Mobile independent dealers fear that they will bear the brunt of "retail store rationalization."⁴⁹ The downsizing of retail stores and independent dealers (and their related jobs) will likely especially impact Latinos, as they constitute a disproportionate segment of T-Mobile's customer base, making up about a quarter of T-Mobile's customers nationwide, compared to only 12% of AT&T's customers and 9-10% of Verizon's customers.⁵⁰ In 2009, T-Mobile launched an initiative to seek out Latino entrepreneurs to own and manage more than one

⁴⁵ See *id.*, graphic "Crossed Lines, AT&T and T-Mobile stores are near each other in many cities."

⁴⁶ See *id.*

⁴⁷ PowerPoint presentation to AT&T Shareholders by Randall Stephenson, "AT&T + T-Mobile: A World-Class Platform for the Future of Mobile Broadband" at Slide 29 (Mar. 21, 2011) available at http://www.att.com/Common/about_us/pdf/INV_PRES_3-21-11_FINAL.pdf ("AT&T Presentation to Shareholders")

⁴⁸ Opposition at 93.

⁴⁹ See Anton Troianovski, T-Mobile Dealers Start to Hang Up, *supra* note 44.

⁵⁰ See Michaela Mora, T-Mobile is Popular Among Hispanics, Relevant Insights (July 1, 2010) available at <http://relevantinsights.com/hispanics-and-tmobile>; PowerPoint by Jerry Rocha, "Mobile and Social in Hispanic America 2010," Slide 5, available at <http://www.slideshare.net/jerryrocha/hispanic-mobile-and-social-networking-for-ad-tech-11410>

hundred stores targeted in urban areas with high concentrations of Latinos.⁵¹ Such dealers and similar retail stores, especially those in close proximity to AT&T stores in heavily Latino areas of Southern California, will bear the brunt of expected store closures.

Despite AT&T's vague claims about jobs, AT&T does not address in any way the effects of the proposed merger on entry-level jobs, such as retail jobs and customer support positions, which promise to be negative.

III. THE PROPOSED MERGER WOULD ADVERSELY AFFECT COMPETITION.

Public Utilities Code section 854, subdivision (b)(3), directs the Commission to deny mergers that adversely affect competition. Section 854(b)(3) further directs the Commission to “request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.” The Commission, as charged by section 854(b)(3) should request such an opinion from the Attorney General.

Federal antitrust law provides a framework for analyzing competitive effects under § 854(b)(3).⁵² In examining the competitive effects of a merger, courts and agencies first define the relevant market or markets.⁵³ The court or agency then examines the competitive effects of the merger on any relevant markets.⁵⁴

⁵¹ See Richard Kaplan, T-Mobile Pursues Hispanic Entrepreneurs . . . and Consumers, HispanicBusiness.com (Dec. 18, 2008) available at http://www.hispanicbusiness.com/news/news_print.asp?id=138760

⁵² See In the Matter of the Joint Application of SBC Communications, Inc., and AT&T Corp. Inc. for Authorization to Transfer Control, 2005 Cal. PUC LEXIS 516 (Cal. PUC 2005).

⁵³ See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, p. 7 (August 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (hereafter, Merger Guidelines).

⁵⁴ See *id.*

A. The Proposed Merger Would Adversely Affect Competition in the Value-Conscious Wireless Services Market.

1. The Local Value-Conscious Wireless Services Market Is a Relevant Market.

The competitive analysis of a proposed merger begins with determining appropriate market definitions for the merger.⁵⁵ Market definition requires defining both the product market and the geographic market.⁵⁶

a. The Product Market

The relevant market consists of all goods which are “reasonably interchangeable” with a product.⁵⁷ Products are “reasonably interchangeable” if consumers (1) view those products as substitutes for each other and (2) would switch among those products in response to a change in price.⁵⁸ In determining whether goods are reasonably interchangeable, courts consider the price, use, and qualities of the respective products.⁵⁹

Submarkets can themselves “constitute product markets for antitrust purposes.”⁶⁰ The Department of Justice (DOJ) and the Federal Trade Commission (FTC) developed the “hypothetical monopolist” test to help determine whether submarkets are distinct product markets.⁶¹ Under this test, the agencies assume the existence of a hypothetical firm that is the only seller of a relevant product, and ask whether that firm could profitably impose a small but significant and nontransitory increase (SSNIP) in price on that product.⁶² If buyers would shift to available alternatives because of the SSNIP, the other products to which the buyers would

⁵⁵ *Id.*

⁵⁶ Merger Guidelines, *supra* note 53, at 7.

⁵⁷ United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 395 (U.S. 1956).

⁵⁸ See Apple v. Psystar, 586 F. Supp. 2d 1190 at 1196 (N.D. Cal. 2008).

⁵⁹ See *id.*

⁶⁰ See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

⁶¹ See Merger Guidelines, *supra* note 53, at 7; see also, FTC v. Whole Foods Mkt., 548 F.3d 1028, 1038 (D.C. Cir. 2008).

⁶² See *id.* at 8.

switch are part of the “product market.”⁶³ Applying the hypothetical monopolist test does not necessarily lead to a single relevant product market.⁶⁴

The Courts have articulated a number of factors used to help define submarkets. These “practical indicia” of relevant submarkets include industry or public recognition of the submarket as a separate economic unit,⁶⁵ (2) unique production facilities,⁶⁶ (3) distinct products,⁶⁷ (4) distinct customers,⁶⁸ (5) distinct prices,⁶⁹ (6) sensitivity to price changes,⁷⁰ and (7) specialized vendors.⁷¹ A court or agency need not find all of these indicia to find an appropriate submarket; rather, they are intended to furnish “practical aids in identifying zones of actual or potential competition rather than with the view that their presence or absence would dispose, in talisman fashion, of the submarket issue.”⁷²

Applicants rather casually define the product market as “a combined mobile telephony/broadband services market.”⁷³ However this combined market consists of two separate submarkets: a more expensive, high average return per unit (ARPU) mobile wireless services market (the “high ARPU market”), and a less expensive, value-oriented mobile wireless services market (the “value-oriented market.”)⁷⁴ Applicants draw this distinction in their own

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See, e.g., Brown Shoe, 370 U.S. at 325; FTC v. Warner Communs., 72 F.2d 1156 (9th Cir. 1984); Beatrice Foods Co. v. FTC, 540 F.2d 303 (7th Cir. 1976).

⁶⁶ See, e.g., Beatrice Foods, 540 F. 2d at 308.

⁶⁷ See, e.g., Lucas Auto Eng'g v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 2001), RSR Corp. v. FTC, 602 F.2d 1317 (9th Cir. 1979).

⁶⁸ See, e.g., Brown Shoe, 370 U.S. at 326; Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 579 (10th Cir. 1985).

⁶⁹ See, e.g., Warner Communs., 742 F.2d at 1163; RSR Corp., 88 F.T.C. 800, *aff'd*, 602 F.2d 1317 (9th Cir. 1979).

⁷⁰ See United States v. Aluminum Co. of Am., 377 U.S. 271, 275-276 (1964).

⁷¹ See, e.g., RSR Corp., 602 F.2d at 1317; Bendix Corp. v. FTC, 450 F.2d 534, 537 (6th Cir. 1971).

⁷² International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913, 932 (9th Cir. 1975) (referring to indicia listed in Brown Shoe, 370 U.S. 294).

⁷³ Application at 72.

⁷⁴ There are a number of additional relevant markets in addition to the services markets described in this Petition. For example, a compelling argument could be made that the relevant market is GSM-compliant phones, or wholesale spectrum. However, discussion of those, or other, relevant markets is beyond the scope of this Petition.

application, noting that AT&T, Verizon & Sprint offer contract-based,⁷⁵ higher-priced services,⁷⁶ as well as more advanced networks and devices,⁷⁷ while value-oriented providers like MetroPCS and Leap offer low-priced,⁷⁸ no-contract⁷⁹ services that appeal to value-conscious consumers.⁸⁰ Applicants further note that these two markets can be readily distinguished by their differing products, customers, and prices.

i. High ARPU and Value Conscious Providers Offer Substantially Different Products.

High ARPU and value-conscious providers offer significantly different products. Verizon, Sprint and AT&T primarily offer “contract” wireless services;⁸¹ MetroPCS and Leap offer primarily offer no-contract, unlimited use services.⁸² High ARPU and value-conscious providers also differ in terms of the handsets and devices they offer. AT&T, Sprint and Verizon offer more high-end, advanced handsets.⁸³ Applicants compare T-Mobile’s devices to those of MetroPCS and Leap, and describes them as inferior to those offered by AT&T, Verizon, and Sprint.⁸⁴

High ARPU and value-conscious providers have distinctly different “churn” rates—the percentage of total customers who switch providers. In the last quarter of 2010, AT&T’s churn was 1.32 percent, Verizon’s was 1.34 percent, and Sprint’s was 2.44 percent.⁸⁵ Churn rates for

⁷⁵ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint).

⁷⁶ See Application at 78-82.

⁷⁷ See *id.*

⁷⁸ See *id.* at 12.

⁷⁹ See *id.* at 70.

⁸⁰ See *id.* at 71.

⁸¹ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint).

⁸² See Carlton Decl. at ¶ 101; Christopher Decl. at ¶¶ 20, 45.

⁸³ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint); Christopher Decl. at ¶ 33; *see also*, Carlton Decl. at ¶ 96.

⁸⁴ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint); Christopher Decl. at ¶ 35.

⁸⁵ See Carlton Decl. at ¶ 89 (regarding AT&T), ¶ 91 (regarding Verizon), ¶ 97 (regarding Sprint). Christopher Decl. at ¶ 23.

value-conscious providers were notably higher—MetroPCS had a churn rate of 3.5 percent,⁸⁶ while Leap had a churn rate of 4.0 percent.⁸⁷ These differences in churn rates, contract or no-contract service, and devices indicate that high ARPU and value-conscious providers offer different products.

ii. High ARPU and Value Conscious Providers Serve Substantially Different Customers.

Value-conscious subscribers are, by Applicants' own admission, from a significantly different demographic than AT&T's subscribers.⁸⁸ Applicants state that, unlike the customer base for high ARPU providers, T-Mobile's customer base is more value oriented towards no-contract services.⁸⁹ Applicants further note that MetroPCS, Leap, and other value providers target these same value-conscious customers.⁹⁰ Low-income consumers tend to be value oriented and subscribe to value-conscious services. Low-income consumers tend to avoid high ARPU plans because of high costs, or because they do not meet high ARPU providers' requirements.⁹¹

It appears that Applicants themselves view high ARPU and value-conscious customers as separate groups; Applicants repeatedly assert that they expect T-Mobile's value-conscious customers to migrate to value-conscious providers. For example, Applicants state that T-Mobile and AT&T are not "close competitors," and that value-conscious providers could fill "the

⁸⁶ See *id.* at ¶ 61.

⁸⁷ See *id.* at ¶ 62. T-Mobile's churn rate for that period was 3.6 percent (*See id.* at ¶ 23). In its Application, AT&T argues that T-Mobile's high churn rates are a sign that T-Mobile is not a competitive threat to AT&T. (Application at 100-101). Interestingly, this statement conflicts with AT&T's assertion in the Commission's recent net neutrality proceedings; at that time, AT&T asserted that high churn rates were a sign that a market was competitive. AT&T, Comment, In the Matter of Preserving the Open Internet Broadband Industry Practices 3, WC Docket No. 07-52 (Fed. Comm. Comm'n 2010).

⁸⁸ See Application at 99.

⁸⁹ See *id.* at 102.

⁹⁰ See *id.* at 98.

⁹¹ See Catherine J. K. Sandoval, Comment, In the Matter of Framework for Broadband Internet Service 7, GN Docket No. 10-127 (Fed. Comm. Comm'n July 15, 2010).

competitive role T-Mobile USA occupies today.”⁹² Applicants further claim that, post-merger, value-conscious providers “can quickly replace the diminished market role T-Mobile USA plays today,”⁹³ and that “[i]n short, MetroPCS, Leap, and others can fill any gap T-Mobile USA might leave in the competition for value-conscious consumers when the merger is completed.”⁹⁴ By Applicants’ own admission, high ARPU and value-conscious providers target distinct groups of customers.

iii. High ARPU and Value Conscious Providers Offer Substantially Different Prices.

High-ARPU providers charge higher prices, at least in part because consumers are willing to pay more for preferred handsets and data offerings.⁹⁵ AT&T competes on price with Verizon and Sprint; Verizon and AT&T share “a virtually identical tiered pricing structure.”⁹⁶ AT&T has historically had to respond to Sprint on pricing.⁹⁷

There is some indication that high ARPU providers respond to price changes by value-conscious providers;⁹⁸ however, prices for value-conscious services tend to be roughly half that of prices for high ARPU services.⁹⁹ For example, MetroPCS offers unlimited voice, text, and data plans for \$40-60 per month. A comparable plan from AT&T would cost \$114.99, from Verizon, \$119.98, and from Sprint, \$109.99.¹⁰⁰ Similarly, Leap’s service plans cost about half

⁹² Application at 70.

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 99.

⁹⁵ See Fourteenth Report, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 25 FCC Rcd 11407, 11472 ¶ 93 (May 20, 2010) (hereafter, Fourteenth Wireless Report).

⁹⁶ *Id.*

⁹⁷ See Christopher Decl. at ¶¶ 40-44.

⁹⁸ See Fourteenth Wireless Report, *supra* note 95, at 92 (citations omitted).

⁹⁹ See Christopher Decl. at ¶¶ 45, 51-52.

¹⁰⁰ See Christopher Decl. at ¶ 51. AT&T’s \$114.99 would include unlimited voice and text, but a cap on data use. See *id.*

the price of AT&T's service plans.¹⁰¹ As discussed above, low-income consumers are drawn to value-conscious providers, no doubt because of the significantly lower cost.

iv. High ARPU and Value-Conscious Services Are Distinct Product Markets.

High ARPU and value-conscious services offer very different products with very different characteristics. Additionally, high ARPU and value-conscious providers serve very different customers and offer significantly different prices. If a value-conscious provider were to implement a SSNIP, customers who left that provider would switch to another value-conscious provider. By Applicants' own admission, a value-conscious consumer facing higher prices imposed by AT&T would switch to a value-conscious provider like MetroPCS or Leap, and not to a high ARPU provider.¹⁰² Accordingly, the relevant product market is the value-conscious wireless services market.

b. The Relevant Geographic Market Is the Local Market.

In addition to determining the product market, the Commission also determines the relevant geographic market.¹⁰³ In evaluating the geographic market, courts and agencies try to "find the area or areas to which a potential buyer may rationally look for the goods or services he seeks."¹⁰⁴

Greenlining agrees with Applicants' analysis that the geographic market is "local," i.e., areas where consumers "live, work, and travel on a regular basis."¹⁰⁵ This is particularly true of low-income consumers, who are less likely to have an internet connection at home, and are more

¹⁰¹ See Christopher Decl. at ¶52.

¹⁰² See Application at 98.

¹⁰³ See Merger Guidelines, *supra* note 53, at 13.

¹⁰⁴ U.S. v. Grinnell Corp., 384 U.S. 563, 588 (1966).

¹⁰⁵ Application at 73 (citation omitted).

likely to only access the internet via cell phone;¹⁰⁶ this limitation makes it more difficult for low-income consumers to shop online. Accordingly, the relevant geographic market is the local area where consumers live, work, and travel on a regular basis.

c. The Relevant Market Consists of Local, Value-Conscious Services.

While AT&T is a high ARPU provider, the proposed merger is not removing a competitor from the high ARPU services market. Rather, the merger is removing a competitor from the value-conscious services market, and the competitive effects of the merger will impact the value-conscious services market. Value-conscious T-Mobile customers faced with a SSNIP would switch to another value-conscious service provider, and would not switch to a high ARPU service provider. Accordingly, the relevant market is a local, value-conscious wireless services market.

2. The Proposed Merger Will Result in Greatly Reduced Competition in the Retail Value Conscious Services Market.

Applicants argue that the market is currently competitive, relying on the Commission's finding that approximately three-fourths of Americans live in areas with at least five facilities-based wireless providers.¹⁰⁷ However, this argument relies on Applicants' incorrect definition of the relevant market, which conflates the high ARPU and value-conscious markets.¹⁰⁸ Nationally, most cellular marketing areas (CMAs) are served by only two or three facilities-based value-conscious providers; in the overwhelming majority of those CMAs, T-Mobile is one of those providers.¹⁰⁹ 37 of California's 58 counties are served by two facilities-based value-conscious providers; the remaining 21 counties are served by three facilities-based value-conscious providers. However, T-Mobile is a facilities-based value-conscious provider in all 58 of those

¹⁰⁶ See Pew Mobile Access Report, *supra* note 15, at 10.

¹⁰⁷ See Application at 70.

¹⁰⁸ See section II.B.1, *supra*.

¹⁰⁹ See Application, Appendix B.

counties. If the merger proceeds, 37 counties will be served by one facilities-based value-conscious provider, and 21 counties will be served by two such providers.¹¹⁰ The result will be widespread monopolies and duopolies in the value-conscious service market in California, and substantially less competition in that market.¹¹¹

Additionally, the proposed merger will significantly decrease remaining value-conscious providers' incentives to compete. According to Applicants, value-conscious providers like MetroPCS and Leap are succeeding "because they tend to offer lower prices than T-Mobile USA for value-oriented services."¹¹² Without T-Mobile as the dominant competitor, value-conscious providers will have no incentive to keep prices low or improve offerings or quality of service.¹¹³ Accordingly, the proposed merger will substantially lessen competition within the market.

The vast majority of low-income consumers, as well as consumers of color who use value-conscious services, will be forced to choose from one, or at best two, value-conscious

¹¹⁰ See Application, Appendix B. This analysis is based on the assumption that if a provider owns spectrum in a particular county, that provider offers service in that particular county.

¹¹¹ The Herfindahl–Hirschman Index (HHI) will, of course, have to be calculated on a CMA-by-CMA basis. However, there is every indication that T-Mobile's elimination from the market will result in higher market concentration. Those areas with only one value-conscious provider remaining will, of course, have an HHI of 10,000, the highest possible.

It is difficult to predict the market concentration that will exist in areas with more than one remaining value-conscious provider, because it is difficult to predict which provider T-Mobile's former value-conscious customers will choose. Depending on this migration, market concentration in those areas could increase or decrease. For example, consumers in Alpine County can currently choose between three value-conscious providers—T-Mobile, MetroPCS, and Leap, the three largest value-conscious providers in the country. Assuming that those providers' market shares mirror their national market share, the current HHI would be $((70*70)+(18*18)+(12*12))=5323$. (This, and the following, calculations assume that all of T-Mobile's customers are value-conscious customers; Greenlining does not have access to sufficient data to calculate what percentage of T-Mobile's customers are value-conscious customers). After the proposed merger, if all of T-Mobile's customers became MetroPCS customers, the HHI would be $((88*88)+(12*12))=7887$. If T-Mobile's customers migrated equally to MetroPCS, and Leap, the HHI would be $((53*53)+(47*47))=5020$, a slight decrease. Regardless, because AT&T bears the burden of proving, by a preponderance of the evidence, that the proposed merger will serve the public interest, it should also bear the burden of showing that market concentration in areas with more than one remaining value-conscious provider will not increase. (It should be noted that these numbers may vary slightly because of rounding).

¹¹² Application at 99.

¹¹³ Leap has objected to the proposed merger, apparently out of concerns that the merger would eliminate Leap's ability to compete in the larger wireless services market. See Sara Jerome, Leap opposes AT&T merger (May 24, 2011), available at <http://thehill.com/blogs/hillicon-valley/technology/162985-leap-opposes-atat-merger>. Leap seems particularly concerned about the proposed merger's effects on Leap's spectrum position (*Id.*); as discussed in § II.C., below, the merger promises to significantly increase the load on the already limited amount of spectrum that smaller providers like Leap possess.

wireless providers. Those consumers who do not have a home internet connection, or who have limited transportation, will have to obtain service from a retailer, potentially in a very limited range, which will further reduce their choice of providers. These consumers, already affected by the reduced competition from providers, could also be affected by reduced competition from providers' retail establishments, whose management knows that consumers have no other choice but to shop at that establishment.

The proposed merger will result in higher market concentration and widespread monopolies and duopolies in the value-conscious services market. Applicants argue that the proposed merger will not adversely affect competition generally, but do not address competition in the value-conscious services market, in California, or, for that matter, in the local markets which Applicants claim are the relevant markets. The harmful effects of the proposed merger on competition discussed above outweigh the purported benefits. Accordingly, the merger would adversely affect competition, and the Commission should deny the Application.

B. The Proposed Merger Promises to Decrease Competition in the Wholesale Input Market.

“Inputs” are technologies that facilitate communication between networks; inputs include interconnection, backhaul, and roaming.¹¹⁴

- *Interconnection* allows “the linking of two networks for the mutual exchange of traffic;”¹¹⁵ it allows one carrier’s customer to call another carrier’s customer, and vice versa.¹¹⁶
- *Backhaul* is “important to competitive LECs and occurs when a competitive LEC uses an entrance facility to transport traffic from a leased portion of an incumbent network to the competitor’s own facilities.”¹¹⁷ Value-conscious providers rely on backhaul and other services to connect their cell towers to switching centers, as well as to connect to the

¹¹⁴ See AT&T Opposition at 216.

¹¹⁵ 47 CFR § 51.5.

¹¹⁶ See *Talk America, Inc. v. Michigan Bell Telephone*, No. 10-313, slip op. at 4, note 2 (U.S. June 9, 2001).

¹¹⁷ *Id.*

networks of other carriers.¹¹⁸ Similarly, non-facilities based value-conscious providers are dependent on backhaul to maintain their operations.¹¹⁹

- *Roaming* is a subscriber's ability to use a wireless device outside his or her service area.¹²⁰ Roaming allows a subscriber to use their carrier's service on another carrier's network, without losing connection.¹²¹ Traditionally, roaming has involved telephony, but it also applies to data services.¹²²

Interconnection, backhaul and roaming services do not appear to be interchangeable because of their technological differences. For example, interconnection involves the exchange of information between two networks; while backhaul does not involve the exchange of traffic between an incumbent and a competitive network.¹²³ Similarly, Interconnection and backhaul involve connections between two networks, while roaming involves connections between a subscriber's handset and a network.¹²⁴ Accordingly, one type of input does not appear to be a substitute for another type of input.

Additionally, the Federal Communications Commission views individual inputs as separate products. The Commission has distinct regulatory schema for interconnection,¹²⁵ backhaul,¹²⁶ and roaming.¹²⁷ It appears, therefore, that interconnection, backhaul, and roaming are all separate relevant submarkets for the purposes of merger analysis. The Commission should study the merger's effects on each of those markets separately, particularly the backhaul and roaming markets.

¹¹⁸ See Sprint Nextel Corporation Petition to Deny, at 40, n. 148, Docket WT No. 11-65, Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations (Fed. Comm. Comm'n May 31, 2011 (hereafter "Sprint Petition to Deny")).

¹¹⁹ See *id.*

¹²⁰ See CDMA Development Group, Roaming, available at <http://www.cdg.org/roaming/index.asp>.

¹²¹ See Fed. Comm. Comm'n, Roaming for Mobile Wireless Services, available at <http://www.fcc.gov/rulemaking/05-265>.

¹²² CDMA Development Group, *supra* note 120.

¹²³ See Talk America, No. 10-313, slip op. at 4, n. 2.

¹²⁴ See CDMA Development Group, *supra* note 120.

¹²⁵ See 47 U.S.C. § 251(c)(2).

¹²⁶ See Peter Bluhm, Competitive Issues in Special Access Markets 11 (2009), available at http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf.

¹²⁷ See Fed. Comm. Comm'n, In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services ¶ 3, WT Docket No. 05-265 (April 7, 2011).

1. The Merger Will Diminish Competition in the Backhaul Market.

a. The Market for Backhaul Services Is Local and Includes any Technology Capable of Providing Backhaul Services

Wireless providers purchase backhaul and other special access services from ILECs and cable, fiber optic, and microwave providers.¹²⁸ These providers appear to be interchangeable; T-Mobile, for example, purchases backhaul from AT&T, but purchases backhaul from other providers when possible.¹²⁹ Purchasers of backhaul similarly do not appear to be restricted to a particular technological standard.¹³⁰ Accordingly, the relevant product market for backhaul appears to include any technology capable of providing backhaul services.

Backhaul is a “facilities-based” service.¹³¹ “Facilities” are transmission pathways and equipment that connect two networks.¹³² Those connections are traditionally wires and cables, although wireless backhaul is becoming increasingly common.¹³³ Backhaul connections require either physical connections or short-range wireless connections;¹³⁴ accordingly, purchasers of those services must purchase in a location where the two networks are close enough to connect.¹³⁵ For example, in California, Cricket can only purchase backhaul services from AT&T, Cox, or Time Warner Cable, because it is limited by the physical location of Cricket’s facilities.¹³⁶ It appears, then, that “the area or areas to which a potential buyer may rationally

¹²⁸ See Sprint Petition to Deny at 39.

¹²⁹ See *id.*

¹³⁰ See Opposition at 163.

¹³¹ See Talk America, No. 10-313, slip op. at 4, n. 2.

¹³² See *id.*

¹³³ See FreeWiMAXInfo.com, Wireless Backhaul, *available at* <http://www.freewimaxinfo.com/wireless-backhaul.html>.

¹³⁴ See *id.*

¹³⁵ See Responses of Cricket Communications, Inc. (U-3076-C) to CPUC Data Requests (hereafter, Cricket Response to Data Request), Response to DR 13.

¹³⁶ See *id.*

look for the [backhaul] services he seeks....”¹³⁷ is limited to local facilities. Accordingly, the relevant geographic market for backhaul is local.

b. The Merger Will Diminish Competition in the Backhaul Market.

ILECs, primarily Verizon and AT&T, provide over 90 percent of backhaul and other special access services nationally.¹³⁸ Cable, fiber optic, and other providers provide the other ten percent.¹³⁹ ILECs appear to provide more than the national average of backhaul and other special access services in California; for example, Cricket relies on AT&T for “all or nearly all” of Cricket’s backhaul services in California.¹⁴⁰ In California, “Sprint purchases an even greater percentage of its backhaul needs from the ILECs than it does nationwide.”¹⁴¹

T-Mobile has played an important role in keeping special access services competitive, because it has the size and buying power to play ILECs against other providers.¹⁴² There is some concern that if T-Mobile disappears as a buyer in the special access services market, many third party providers will no longer be viable, and potential new entrants will be dissuaded from entering the market.¹⁴³ T-Mobile’s elimination from the backhaul services market will result in the elimination of backhaul providers, and discourage the entry of new backhaul providers. Accordingly, market concentration will increase, harming competition.

Additionally, Applicants are unable to provide any assurances that the merger will not affect competition for backhaul services. Applicants argue that there are no concerns about competition for backhaul services, but acknowledge that “any consideration [by AT&T]

¹³⁷ *U.S. v. Grinnell Corp.*, 384 U.S. 563, 588 (1966).

¹³⁸ *See* Sprint Petition to Deny at 39. These providers are often referred to as “third party” providers.

¹³⁹ *See id.*

¹⁴⁰ Cricket Response to Data Request, Response to DR 7.

¹⁴¹ Responses of Sprint Nextel to Data Requests from the Commission Staff (hereafter, Sprint Response to Data Request), Response to DR 13.

¹⁴² *See* Sprint Petition to Deny at 40.

¹⁴³ *See id.* at 41.

regarding potential modification of terms and pricing for backhaul has not yet occurred.”¹⁴⁴

Additionally, Applicants are opposed to any conditions or mitigation measures that would ensure that the merger does not cause anticompetitive effects in the backhaul services market.

AT&T argues that the national backhaul market is competitive, and that the proposed merger will not harm competition in that market.¹⁴⁵ However, as discussed above, the backhaul market is local; AT&T has not addressed the competitive effects of the proposed merger on local markets. The proposed merger will adversely affect competition in local backhaul services markets, and Applicants are apparently unable or unwilling to accept conditions or mitigation measures. Accordingly, the Commission should deny the Application.

2. The Merger Will Diminish Competition in the Roaming Market.

a. The Roaming Market Consists of Two National Submarkets.

The product market for roaming is somewhat more restricted than the product market for backhaul, because different networks use different radio access technologies, commonly referred to as “standards.” Networks typically operate using one of two standards: Most mobile networks use a group of standards based on Code Division Multiple Access (CDMA) technology.¹⁴⁶ AT&T, T-Mobile, and a number of smaller providers use Global System for Mobile Communications (GSM) networks.¹⁴⁷ A CDMA phone cannot operate on a GSM

¹⁴⁴ AT&T Response to Data Request, Response to DR 7.

¹⁴⁵ See Opposition at 162.

¹⁴⁶ See Consumers Union, Frequently Asked Questions About Cell Phone Portability, available at http://www.consumersunion.org/campaigns/learn_more/000960indiv.html. Because they all use CDMA, 2G services (which use the Interim Standard 95 (IS-95) standard), and 3G services (which use the CDMA-2000 standard), can use the same base stations and spectrum. See CDMA Development Group, CDMA Technology, available at <http://www.cdg.org/technology/cdmatechnology.asp>. Qualcomm owns most of the IP rights in CDMA. Qualcomm, LTE/WiMax PATENT LICENSING STATEMENT (December 2008), available at <http://www.qualcomm.com/documents/files/lte-wimax-patent-licensing-statement.pdf>.

¹⁴⁷ These networks are usually referred to as “GSM networks,” but use several different technologies. These networks’ 2G standard is the Global System for Mobile Communications (GSM) standard. See Application at 22. Their 3G standard is the Universal Mobile Telecommunications System (UMTS) standard. *Id.* While the UMTS standard is based on the GSM standard, it is not “backwards compatible;” therefore, UMTS networks require separate base stations and spectrum from GSM networks. See *id.* See also, 3G and UMTS Frequently Asked

network, and vice versa.¹⁴⁸ Accordingly, the market for roaming services appears to consist of two separate submarkets:¹⁴⁹ the market for GSM-based roaming, and the market for CDMA-based roaming. Additionally, it appears that the market is limited to services that provide nationwide coverage.¹⁵⁰ Accordingly, the relevant market consists of two separate standard-specific roaming services markets, both of which are national.

b. The Merger Will Adversely Affect Competition in the GSM Roaming Market.

If the merger is approved, AT&T will become the only major wireless provider using the GSM network standard.¹⁵¹ As the only GSM provider with a national network, AT&T will have monopoly power over the GSM roaming market.¹⁵² Accordingly, AT&T will have both the incentive and the ability to raise prices in the GSM roaming market above competitive levels.¹⁵³

It is worth noting that AT&T has been historically resistant to roaming agreements. In its response to the Commission's data request, Cricket Communications, Inc. (Cricket) notes that

The FCC observed in its recent data roaming order that "AT&T has largely refused to negotiate domestic 3G roaming arrangements," and noted that AT&T did not enter into a single 3G roaming agreement until March 2011. The FCC also

Questions, available at <http://www.umtsworld.com/umts/faq.htm#f22>. IP rights in the GSM and UMTS standards are spread out among a small number of manufacturers. Eric Stasik, Royalty Rates And Licensing Strategies For Essential Patents On LTE (4G) Telecommunication Standards (2010), available at <http://www.investorvillage.com/uploads/82827/files/LESI-Royalty-Rates.pdf>.

¹⁴⁸ See John Riberio, Roamware Lets CDMA Users Roam on GSM Networks (Oct. 25, 2005), available at <http://www.infoworld.com/t/networking/roamware-lets-cdma-users-roam-gsm-networks-797>. There are some "dual-mode" phones, which contain both GSM and CDMA technology and allow users to roam on both GSM and CDMA networks. *Id.* See also, CNet, Verizon Wireless, available at http://reviews.cnet.com/4520-3504_7-6253284-5.html (last accessed June 21, 2011). Most of the world uses GSM networks, although many of those networks use different spectrum than American GSM networks; therefore, a GSM phone from the United States may not work on a GSM network in another country. Long Distance Post LLC, History of GSM and More, available at <http://www.ldpost.com/telecom-articles/History-of-GSM-and-More.html>.

¹⁴⁹ See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

¹⁵⁰ See Cricket Response to Data Request, Response to DR 14.

¹⁵¹ See *id.*

¹⁵² See Horizontal Merger Guidelines, *supra* note 53.

¹⁵³ See *id.*

found that it was “unlikely” that AT&T would be willing to offer roaming arrangements for 4G LTE networks “at any time in the near future.”¹⁵⁴

Cricket further notes that in November 2010, T-Mobile complained to the FCC that T-Mobile “had ‘not been able to achieve a 3G roaming agreement with AT&T’ despite ‘AT&T’s apparent willingness to provide 3G roaming to foreign carriers.’”¹⁵⁵

Despite this historical opposition to roaming agreements, Applicants argue that there are no concerns about competition for roaming.¹⁵⁶ At the same time, AT&T does not have any specific data regarding “the possible effects of the Proposed Transaction on roaming or wholesale charges or . . . the Merged Company’s offering of roaming or wholesale arrangements.”¹⁵⁷ Furthermore, Applicants are opposed to any conditions or mitigation measures that would ensure that the merger does not cause anticompetitive effects in the roaming services market.¹⁵⁸

If the Commission approves the merger, AT&T will have the ability and incentive to raise prices in the roaming market, particularly the GSM market, above competitive levels. Many of AT&T’s current roaming agreements are unilateral; smaller carriers pay AT&T for roaming services, but AT&T does not reciprocate.¹⁵⁹ Because AT&T does not need roaming services from these smaller carriers, AT&T will have an even greater ability and incentive to

¹⁵⁴ Cricket Response to Data Request, Response to DR 14, *citing* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, WT Docket No. 05-265, ¶¶ 1, 13 (April 7, 2011) (“Data Roaming Order”).

¹⁵⁵ Cricket Response to Data Request, Response to DR 14, *citing* Ex Parte Letter from Howard J. Symons, counsel for T-Mobile USA, Inc., to Marlene Dortch, Secretary, WT Docket No. 05-265 (filed Nov. 2, 2010).

¹⁵⁶ *See* Opposition at 155-162.

¹⁵⁷ Response to FCC Data Request, response to DR 34, *citing* Fed. Comm. Comm’n, Information and Discovery Request for AT&T Inc., DA 11-799, Docket No. 11-65 (May 27, 2011).

¹⁵⁸ *See* Opposition at 216-217.

¹⁵⁹ *See* Reply of MetroPCS, Inc. and NTELOS Inc., In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc., WT Docket No. 11-65 (Fed. Comm. Comm’n June 20, 2011); Reply of Cincinnati Bell Wireless LLC, In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc., WT Docket No. 11-65 (Fed. Comm. Comm’n June 20, 2011).

raise those smaller carriers' prices. Applicants' past conduct, failure to provide any information about future roaming agreements, and opposition to protective mitigation measures raise serious concerns about possible future anticompetitive conduct. Applicants have failed to show that the merger will not adversely affect competition, especially in light of serious concerns about a monopoly in the GSM roaming market. Accordingly, the Commission should deny the Application.

C. To Protect Competition, the Commission Should Impose or Recommend Conditions Related to Input Access.

Section 854 requires that the Commission consider possible mitigation measures to avoid any adverse impacts of that merger as a condition of approval of that merger.¹⁶⁰ As discussed above, the merger promises a number of harms to competition in both wholesale and retail markets.

Applicants are opposed to the Commission's imposing conditions related to inputs, such as backhaul or roaming obligations.¹⁶¹ However, as discussed above, AT&T has not shown that it lacks the incentive to harm access to those inputs *in specific markets*. The Commission should impose conditions – or recommend to the FCC to impose conditions – to ensure that low-income consumers have access to value-conscious plans with national coverage in each local market. Additionally, the Commission should ensure that the merger actually does help bridge the Digital Divide.

Applicants claims that the merger will allow AT&T to provide LTE services to an additional 17 percent of Americans; the Commission should impose conditions ensuring that AT&T deploys those services to that “additional” 17 percent on the same timeframe, and at the same prices and quality that it provides those services to the rest of its customers. AT&T's

¹⁶⁰ See Pub. Util. Code, § 854(b)(3).

¹⁶¹ See Opposition at 216-217.

failure to do so should trigger automatic provisions allowing other carriers interconnection and roaming on AT&T's LTE network *at cost*.

IV. THE MERGER IS NOT IN THE PUBLIC INTEREST.

A. Analysis of the Criteria Listed in Public Utilities Code Section 854(c) Demonstrates that the Proposed Merger Is Not in the Public Interest.

Public Utilities Code section 854 requires that a merger be in the public interest.¹⁶² In determining whether the merger is in the public interest, the Commission must consider whether the merger will:

- (1) Maintain or improve the financial condition of the resulting public utility doing business in the state;
- (2) Maintain or improve the quality of service to public utility ratepayers in the state;
- (3) Maintain or improve the quality of management of the resulting public utility doing business in the state;
- (4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees;
- (5) Be fair and reasonable to the majority of all affected public utility shareholders;
- (6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility;
- (7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state; and
- (8) Provide mitigation measures to prevent significant adverse consequences which may result.

The Commission may only authorize a merger if, on balance, the § 854(c) criteria are in the public interest.¹⁶³

In the instant matter, an analysis of the § 854(c) criteria shows that the proposed merger is not in the public interest. The merger promises to degrade the quality of service to California's low-income ratepayers. The job losses resulting from the merger will harm California's public utility employees. The merger will, on an overall basis, harm California

¹⁶² See Pub. Util. Code., §854(c).

¹⁶³ See *id.*

communities by delaying low-income communities access to advanced services, particularly LTE services, reducing the amount of spectrum available for value-conscious services, and widening the Digital Divide. Finally, the merger provides no mitigation measures to prevent these significant adverse consequences, and Applicants vigorously oppose the imposition of any such measures.

1. The Merger Promises to Degrade the Quality of Service to California's Low-Income Ratepayers.

Even if the Commission agrees with Applicants that (1) the market is the global wireless services market and (2) that the proposed merger would not be anticompetitive, the merger would still not be in the public interest because of its impact on low-income consumers.

Applicants claim that the proposed merger would benefit all consumers, by lowering AT&T's cost of serving additional subscribers and therefore encouraging AT&T to expand output and lower prices.¹⁶⁴ Assuming, for the sake of argument, that the proposed merger would result in these benefits, it would only result in those benefits to consumers of high ARPU services.

While this may be good news for AT&T customers and stockholders, it will seriously harm value-conscious consumers, who will face dropped calls and lower quality of service, and will have to wait even longer for next-generation services. The proposed merger promises to *increase* costs and *reduce* capacity to consumers of value-conscious services, i.e. low-income consumers. As discussed above,¹⁶⁵ the proposed merger will result in virtually no competition between value-conscious service providers, resulting in increased costs and stagnant or reduced quality of service.

The proposed merger promises to replace an industry leader in regards to customer service with a wireless carrier who has consistently been rated as providing the worst customer

¹⁶⁴ See Application at 42.

¹⁶⁵ See Argument, III.A.2., *supra*.

service.¹⁶⁶ AT&T's problem with dropped calls and overtaxed data systems has been well documented, leading to the worst ratings in customer satisfaction surveys.¹⁶⁷ In contrast to AT&T's poor customer service ratings, T-Mobile has generally high customer satisfaction, ranking first in J.D. Powers' semiannual study of retail wireless sales satisfaction for four consecutive times.¹⁶⁸

If the Commission approves the merger, the subscribers of the merged entity are sure to experience confusion, as they adjust to any changed service provisions, delivery of service, billing, points of contact, etc. The Applicants could attempt to ameliorate this period of customer adjustment and confusion by increasing customer support resources. However, in response to data requests, AT&T reveals that it has absolutely no current plans to increase customer service representatives or otherwise deal with the transition period.¹⁶⁹ The merger is not in the public interest if customers will experience a drop in customer service without any mitigation.

2. The Proposed Merger Will Be Neither Fair Nor Reasonable to Affected Public Utility Employees.

As discussed above,¹⁷⁰ the proposed merger will result in the loss of many public utility jobs. Many of these lost jobs will be retail and customer support jobs.¹⁷¹ The merger promises

¹⁶⁶ See e.g. "2011 U.S. Wireless Customer Care Performance Study," J.D. POWER AND ASSOCIATES, available at <http://www.jdpower.com/Telecom/ratings/Wireless-Customer-Care-Ratings-%28Volume-1%29/>; T-Mobile beats AT&T in CR satisfaction survey, Consumer Reports (Apr. 11, 2011) available at <http://news.consumerreports.org/electronics/2011/04/t-mobile-beats-att-in-cr-satisfaction-survey.html>

¹⁶⁷ See e.g., Consumer Reports Cell-Service Ratings: AT&T is the Worst Carrier, CONSUMER REPORTS (Dec. 6, 2010) ("AT&T is the lowest-scoring cell-phone carrier in the U.S., according to a satisfaction survey of 58,000 ConsumerReports.org readers.") available at: <http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-attworst.html>.

¹⁶⁸ See Press Release "J.D. Power and Associates Reports: Spending Sufficient Time Explaining Mobile Device Operation Is Critical to Higher Satisfaction with the Wireless Retail Sales Process," *supra* note 187.

¹⁶⁹ See AT&T Response to Data Request, Responses to DR 6.a, 6.c.i, 6.c.ii:

No decision has been made regarding future plan terms, rates, life cycle management, billing, customer information, or technical and handset support that may be implemented if the merger receives regulatory approval.

¹⁷⁰ See section II.B.1., *supra*.

to severely harm such employment; this harm outweighs any purported benefits caused by new high-tech and union jobs. Accordingly, the proposed merger will be neither fair nor reasonable to the public utility employees affected by the merger.

3. The Merger Will, on an Overall Basis, Harm California Communities.

The merger will harm California Communities by delaying low-income communities access to advanced services, particularly LTE services, reducing the amount of spectrum available for value-conscious services, and widening the Digital Divide. Additionally, the proposed merger threatens to leave consumers without access to a local wireless services retailer.

a. The Merger Will Delay Low-Income Consumers' Access to LTE Services.

Applicants claim that one of the primary benefits of the proposed merger would be to make Long Term Evolution (LTE) broadband services available to 97% of the country.¹⁷² However, given AT&T's plan to abandon value-conscious subscribers, it would be more accurate to state that AT&T plans to make LTE services available to 97% of *high ARPU subscribers* in the country. While high-ARPU consumers may arguably benefit from AT&T's expanded coverage, low-income value-conscious consumers will not, because they will not be able to afford high ARPU services, which are typically twice that of value-conscious services.¹⁷³

The proposed merger could potentially *slow* value-conscious providers' deployment of LTE services. MetroPCS and Leap are currently building out LTE networks.¹⁷⁴ T-Mobile currently provides service to about 33.6 million customers.¹⁷⁵ The other four major value-

¹⁷¹ *Id.*

¹⁷² See Application at 1.

¹⁷³ See § III.A.1.a.iii, *supra*.

¹⁷⁴ See Application at 85 (MetroPCS), 88 (Leap).

¹⁷⁵ See T-Mobile, T-Mobile USA Reports First Quarter 2011 Results, available at <http://s.tmocache.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/5657114502E70FF3012FD6A0635D5CAB/file/TMUS%20Q1%202011%20Press%20Release-Final.pdf> (last accessed May 25, 2011).

conscious providers (MetroPCS, Leap, U.S. Cellular, and Cellular South) together provide service to another 21.6 million customers.¹⁷⁶ If the Commission approves the merger, AT&T will use T-Mobile's spectrum to enhance AT&T's high ARPU network.¹⁷⁷ If, as AT&T assumes, T-Mobile's value-conscious customers move to providers like MetroPCS and Leap, the increase in subscribers could conceivably double the concurrent load on networks serving value-conscious consumers. Value-conscious providers may, therefore, have to use spectrum currently marked for LTE deployment to handle this increased demand. This need will delay, if not outright prevent, value-conscious providers from implementing LTE services to their customers.

In a very real sense, Applicants are asking the Commission to help relieve AT&T's "spectrum crunch" by imposing a spectrum crunch on value-conscious providers. While this may be good news for AT&T customers and stockholders, it will seriously harm value-conscious consumers, who will face dropped calls and lower quality of service, and will have to wait even longer for next-generation services. The proposed merger promises to delay the deployment of advanced services to those consumers, and is against the public interest.

b. The Merger Promises to Broaden the Digital Divide.

Applicants further claim that AT&T's deployment of LTE networks will bring more wireless broadband services to African-Americans and Latinos, thus closing the Digital

Unfortunately, Greenlining has no access to data indicating how many of T-Mobile's customers are high ARPU customers, and how many are value-conscious customers.

¹⁷⁶ See MetroPCS, MetroPCS Reports First Quarter 2011 Results, available at <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&id=1558297> (last accessed May 25, 2011) (8.9 million); Leap, Leap Reports First Quarter 2011 Results, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1559644&highlight=> (last accessed May 25, 2011) (5.8 million); U.S. Cellular, U.S. Cellular Reports First Quarter 2011 Results, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=106793&p=irol-newsArticle&ID=1560793&highlight=> (last accessed May 25, 2011) (6 million); Application at 90 (Cellular South, .88 million).

¹⁷⁷ See Application at 34-35.

Divide.¹⁷⁸ However, AT&T does not provide any real commitments to achieve these results and does not in any way address the barrier of affordability, which prevents many low-income, African-American and Latino consumers from taking advantage of wireless broadband services. The proposed merger will not result in the deployment of advanced services to low-income consumers or communities of color.

These consequences promise to further widen the Digital Divide. Low-income consumers and consumers of color, who disproportionately rely on mobile-only wireless service, will have less dependable phone service.¹⁷⁹ This is of particular concern to low-income families, many of whom do not have wireline phone service.¹⁸⁰ Poor and/or inconsistent download speeds will further reduce these consumers' ability to access health information,¹⁸¹ government services,¹⁸² and employment opportunities.¹⁸³ Higher dropped call rates mean that consumers may not be able to contact emergency services in dangerous and life-threatening situations.¹⁸⁴

The proposed merger will seriously threaten the health, safety and welfare of a large number of California's citizens. While the proposed merger could theoretically result in competition and improved service for high ARPU customers, it would do so at the expense of low-income consumers and communities of color. Such a consequence would only serve to widen the Digital Divide and would be contrary to the public interest.

¹⁷⁸ See Application at 59-61.

¹⁷⁹ See Pew Mobile Access Report, *supra* note 12, at 10.

¹⁸⁰ See Janice A. Hauge, Eric P. Chiang, and Mark A. Jamison, More than a Lifeline: Low-Income Households' Telecommunications Preferences 5 (2008), available at http://warrington.ufl.edu/purc/purcdocs/papers/0804_Hauge_More_Than_A.pdf.

¹⁸¹ See The Children's Partnership, Information Technology Making a Difference in Children's Lives: An Issue Brief for Leaders for Children, Digital Opportunity for Youth Issue Brief No. 4 (2008).

¹⁸² See ALA Office for Research & Statistics, U.S. Public Libraries & E-Government Services 2, (2010), available at http://www.ala.org/ala/research/initiatives/plftas/issuesbriefs/brief_e-gov_june.pdf.

¹⁸³ See William H. Leher, Carlos A. Osorio, Sharon E. Gillett, & Marvin A. Sirbu, Measuring Broadband's Economic Impact, Broadband Properties 3 (December 2005).

¹⁸⁴ See E Casey Lide, Balancing the Benefits and Privacy Concerns of Municipal Broadband, 11 N.Y.U.J. Legis. & Pub. Pol'y 467, 470 (2008).

c. The Merger May Leave Consumers without Access to a Local Wireless Services Retailer.

The vast majority of T-Mobile's customers purchase wireless services at local retail establishments.¹⁸⁵ In response to a FCC's Information Request, AT&T was unable to state which stores it will close as a result of the merger.¹⁸⁶ Thus, consumers will not know if they will be able to continue to receive customer support from their local retail store. This loss of a local retail store, as discussed in Section II.b.ii is significant, as many customers rely on the store to upgrade or change their handsets or to renew or change their service plans.¹⁸⁷ Additionally, the vacant store fronts resulting from the closure of retail establishments could cause increased urban blight, declining property values, residential instability, and increased crime.¹⁸⁸

The loss of customer support resulting from the anticipated closing of T-Mobile's retail stores has been discussed above – and this loss of salespeople is especially relevant given that T-Mobile has ranked high in customer satisfaction partly because its salespeople devote a substantial amount of time to educating customers about new devices and services.¹⁸⁹ T-Mobile customers, who may need to accustom themselves to new and different provisions of service because of the merger, may lose their best resource for customer support.

¹⁸⁵ See Declaration of James Alling at ¶ 5, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Fed. Comm. Comm'n June 10, 2011).

¹⁸⁶ Reply to Information Request at 72.

¹⁸⁷ See Press Release "J.D. Power and Associates Reports: Spending Sufficient Time Explaining Mobile Device Operation Is Critical to Higher Satisfaction with the Wireless Retail Sales Process" (Feb. 17, 2011) available at <http://businesscenter.jdpower.com/JDPACContent/CorpComm/News/content/Releases/pdf/2011016-wrss.pdf> ("More than one-half (56%) of wireless customers visit their retailer to upgrade or replace a phone from their current carrier. Renewing or changing an existing wireless plan (38%) and purchasing a new device (31%) round out the top reasons customers cite for having visited a retail store within the past six months").

¹⁸⁸ See Bernard E. Harcourt & Jens Ludwig, Broken Windows: New Evidence from New York City and a Five-City Social Experiment, 73 U. Chi. L. Rev. 271, 281 (2006).

¹⁸⁹ See *id.*

4. The Merger Provides no Mitigation Measures to Prevent these Significant Adverse Consequences.

Greenlining acknowledges that AT&T has demonstrated significant leadership in promoting diversity¹⁹⁰ and providing jobs with union wages and benefits.¹⁹¹ If the Commission approves the merger, Greenlining anticipates that AT&T will use its position as the nation's largest wireless telephone services provider to ensure that other industry participants, such as handset providers, technology suppliers, and construction firms follow AT&T's lead. Furthermore, Greenlining applauds AT&T's noble goals of ensuring quality, innovative, next-generation wireless phone service, passing the economic benefits of the merger through to consumers, promoting diversity, and bridging the Digital Divide.

However, as discussed above, Applicants have not provided any specific assurances or plans to ensure that the proposed merger promotes those goals. For example, in proceedings before the Federal Communications Commission, Applicants oppose any restrictions on divestitures, while acknowledging that those divestitures could protect competition in local markets.¹⁹² AT&T is unable or unwilling to provide the Commission information about AT&T's specific plans regarding backhaul¹⁹³ and roaming,¹⁹⁴ but opposes the imposition of any conditions related to backhaul and roaming that would protect consumers and the public interest.¹⁹⁵

Similarly, while Applicants state that AT&T welcomes the addition of T-Mobile's high-ARPU customers,¹⁹⁶ Applicants ask the Commission to reject conditions to help protect those

¹⁹⁰ See AT&T, AT&T Supplier Diversity, available at http://www.attsuppliers.com/sd/Supplier_Diversity.aspx, last accessed June 20, 2011.

¹⁹¹ See Application at 10.

¹⁹² See Opposition at 206.

¹⁹³ See AT&T Response to FCC Data Request, Response to DR 25.

¹⁹⁴ See AT&T Response to FCC Data Request, Responses to DRs 34-35.

¹⁹⁵ See Opposition at 216-217.

¹⁹⁶ See Opposition at 62 (citations omitted).

new customers, or allow T-Mobile customers who do not wish to stay with AT&T to do so; for example, Applicants oppose any waiver of termination fees or conditions to help prevent “bill shock.”¹⁹⁷

5. The Proposed Merger Is Not in the Public Interest.

As discussed above, the proposed merger promises to degrade the quality of service to California’s low-income ratepayers. The job losses resulting from the merger will harm California’s public utility employees. The merger will, on an overall basis, harm California communities by delaying low-income communities’ access to LTE services, widening the Digital Divide, and leaving consumers without access to a local retailer. Finally, the merger provides no mitigation measures to prevent these significant adverse consequences, and Applicants vigorously oppose the imposition of any such measures. Per 854(c), the proposed merger is not in the public interest; accordingly, the Commission should deny the Application.

B. If the Commission Does Not Deny the Application, It Should Impose Conditions that Mitigate the Merger’s Harmful Effects.

If the Commission approves the merger, it should impose conditions to ensure that the promised general benefits have specific effects. In so doing, the Commission should ensure that those benefits accrue to low-income consumers and communities of color, as these communities will be especially impacted.

1. To Ensure that Low-Income Consumers and Communities of Color Receive the Benefits of the Merger, the Commission Should Impose Conditions Requiring AT&T to “Pass Through” Its Cost Savings.

Applicants claim that the proposed merger will result in savings exceeding \$39 billion,¹⁹⁸ and that these savings will be passed on to consumers.¹⁹⁹ However, Applicants’ support for this

¹⁹⁷ See Opposition at 223.

¹⁹⁸ See Opposition at 74.

¹⁹⁹ See Application at 52.

statement is that cost savings “create incentives to expand output and reduce prices to consumers.”²⁰⁰ It would be more accurate for Applicants to state that the proposed merger will result in AT&T having incentives to pass on savings to consumers; AT&T has made no other assurance or commitment to ensure that consumers benefit. Additionally, AT&T opposes any conditions ensuring a reduction in prices.²⁰¹

As discussed above, Applicants’ purported expanded output and increased savings would not benefit value-conscious consumers, and the proposed merger would result in reduced competition, higher prices, and lower quality of service in the value-conscious market. Many value-conscious consumers rely on wireless services to access the internet. Thus, the proposed merger could result in a deepening of the Digital Divide.

The Commission should ensure that value-conscious consumers receive the benefit of AT&T’s savings pass-through – not just the adverse impacts in terms of reduced competition, higher prices and degraded service quality. In order to at least partially offset the potential impacts of the proposed merger on low-income communities, Greenlining urges the creation of a national fund devoted to overcome the Digital Divide. Considering the vast amount of savings that Applicants claim will result from the merger, AT&T should provide this Digital Divide Fund with \$90 million per year for five years. This Digital Divide Fund should be directed to underserved communities or to non-profit organizations whose primary mission is to serve underserved communities, communities of color and the poor. Additionally, the Digital Divide Fund should result from an increase in corporate philanthropy, not merely a redirection of existing philanthropic resources to the fund. The Commission should recommend the creation of

²⁰⁰ See Application at 52.

²⁰¹ See Opposition at 219.

this fund to the Federal Communications Commission, or condition approval of the merger on the creation of this fund in California

The Commission has recognized that the lack of affordability of broadband services contributes to the Digital Divide.²⁰² The National Broadband Plan also proposes free or very low cost wireless broadband as a means of addressing the affordability barrier to broadband adoption.²⁰³ However, the proposed merger would remove competition and spectrum in the market for wireless broadband. Thus, the Digital Divide Fund should include in its mission addressing affordability of wireless broadband.

As discussed above, the proposed merger promises to eliminate a fair number of low-income, entry-level jobs; Applicants assert that the merger will result in the creation of high-income, high-tech jobs, but do not address what will happen to these displaced low-income workers. A portion of the Digital Divide Fund should be earmarked for job retraining, giving low-income workers the skills and education necessary to obtain employment in the high-income, high-tech jobs created as a result of the proposed merger.

2. To Protect Low-Income Consumers and Communities of Color, the Commission Should Impose Conditions that Promote Diversity.

The elimination of competition and spectrum from the value-conscious wireless market disproportionately affects not only low-income consumers, but also communities of color. Communities of color are more likely to depend on the value-conscious services that could be eliminated with the transfer of T-Mobile's resources and market to AT&T's high ARPU business model. Latinos especially rely on T-Mobile's lower cost wireless services, making up about a

²⁰² See Federal Communications Commission, Connecting America: The National Broadband Plan (March 2010) ("National Broadband Plan"), at 167-68. The National Broadband Plan found that some communities adopt broadband at significantly lower levels, including 1) Hispanics, half of whom do not adopt broadband; 2) African-Americans, 41% of whom do not adopt broadband; and 3) those whose annual household income is less than \$20,000, 40% of whom do not adopt broadband. The National Broadband Plan further found that cost is the most significant reason non-adopters cite for their failure to use broadband.

²⁰³ See *id.* at 173-74.

quarter of T-Mobile's customers, compared to only 12% of AT&T's customers and 9-10% of Verizon's customers.²⁰⁴ African-Americans and Asian/Pacific Islanders also made up a disproportionate number of T-Mobile's customer base.²⁰⁵

The loss of T-Mobile as a competitor, while it affects all value-conscious consumers, will especially impact communities of color, who make up a disproportionate share of T-Mobile's customer base. However, AT&T has the ability to counteract the potentially detrimental effects of the proposed merger on communities of color, by increasing spending with minority businesses enterprises (MBEs) through its supplier diversity program.

Many regions and communities, especially inner-city and rural communities of color, do not benefit from the economic stimulus provided by large businesses. Such communities rely most heavily on small businesses for jobs and economic development. For example, in 2008, small businesses accounted for 49.6% of private-sector employment in the United States.²⁰⁶ For communities of color, the small businesses that make up MBEs are a significant source of economic development and jobs.

AT&T states that in 2010, it spent \$9.2 billion with minority, women and disabled veterans business enterprises, representing 18.8 percent of its total procurement. AT&T's goal is to procure 21.5 percent of its total procurement from diversity-owned enterprises and specifically, 15 percent with MBEs. In order to counteract the deleterious impact of the proposed merger on communities of color – as well as to more closely represent the proportion

²⁰⁴ See Michaela Mora, T-Mobile is Popular Among Hispanics, Relevant Insights (July 1, 2010) available at <http://relevantinsights.com/hispanics-and-tmobile>; PowerPoint by Jerry Rocha, Mobile and Social in Hispanic America 2010 Slide 5, available at <http://www.slideshare.net/jerryrocha/hispanic-mobile-and-social-networking-for-ad-tech-11410> ("Nielsen PowerPoint")

²⁰⁵ See Nielsen PowerPoint at Slide 5. African-Americans made up 14% of T-Mobile's customers, 8% of AT&T's customers and 6% of Verizon's customers. Asian/Pacific Islanders made up 9% of T-Mobile's customers, 5% of AT&T's customers and 3% of Verizon's customers.

²⁰⁶ See U.S. Small Business Administration, Office of Advocacy, "Small Business Profile: United States (February 2011)", available at <http://www.sba.gov/sites/default/files/files/us10.pdf>

of communities of color in its customer base – AT&T should increase its target for spending with MBEs to 20 percent.

3. To Protect Low-Income Consumers and Communities of Color, the Commission Should Impose Conditions Restricting the Closure of Retail Establishments.

As discussed above, it is quite possible that AT&T’s closure of “less profitable” retail locations could result in low-income communities that do not have access to a local retail establishment. The Commission should not approve the merger until AT&T provides the Commission with a list of stores marked for closure; additionally, the Commission should prohibit the closure of any locations that would deprive low-income consumers of access to of the merged organization’s retail locations.

4. The Commission Should Impose Conditions Allowing T-Mobile Customers to Decline Services from the Merged Organization.

As discussed above, AT&T plans to “allow” current T-Mobile customers to keep their contracts from T-Mobile after the proposed merger. However, Applicants have not addressed what will happen to customers who do not want service from AT&T. Applicants oppose any conditions which would release subscribers from their obligation to pay early termination fees (ETFs).²⁰⁷ As a condition of the merger's approval, the Commission should require that AT&T allow any T-Mobile subscriber to terminate their contract without any penalty, including the payment of an ETF.

V. CONCLUSION

AT&T apparently wants to ensure quality, innovative, next-generation wireless phone service to Americans—as long as those Americans generate high revenue for AT&T. AT&T’s goals—to expand coverage and quality of service, deploy next-generation services, and bridge

²⁰⁷ See Opposition at 223-224.

the Digital Divide—are laudable. However, the proposed transaction will not bring these improvements to low-income consumers, a group which already has limited access to the wireless devices, services, and applications which are crucial to success in American society. The proposed transaction promises to reduce quality of service, delay the deployment of next-generation services, and widen the Digital Divide between higher-income and lower-income citizens. Even if the proposed transaction brings about all of the benefits AT&T claims, the harms to competition in the wholesale and retail wireless services markets and to low-income consumers far outweigh those purported benefits, and would harm the public interest as a result. Furthermore, the retail and customer support job losses that are sure to result will adversely impact this same community.

The importance of wireless broadband as a means to reduce the Digital Divide cannot be understated. The Commission itself noted that low-cost wireless broadband was a significant resource as a means of addressing the low rate of broadband adoption among low-income consumers. Low-income consumers and communities of color cannot be left further and further behind as technology advances.

The National Broadband Plan notes the central role that broadband plays in the social and economic life of Americans, listing the percentage of broadband users who engaged in certain online activities, including: bought a product (83%), received local or community news (80%), visited a government website (79%), banking (69%), received information or applied for a job (60%), received advice from government about a health or safety issue (54%), took a class online (24%).²⁰⁸ Electronic mail is increasingly replacing telephone calls as a basic and necessary

²⁰⁸ See National Broadband Plan, p. 16, Exhibit 3-B.

means of communication. For people who use the internet, 59% send or read e-mail as part of a typical day.²⁰⁹

Thus, broadband is a resource of incredible importance for survival and advancement in this country. While AT&T promises to deploy T-Mobile's spectrum to bring more broadband access to Americans, low-income Californians cannot be further left behind.

For the above-stated reasons, Greenlining respectfully requests that the Commission deny the Application.

Respectfully submitted,

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²⁰⁹ See Pew Internet & American Life Project, Internet, Broadband, and Cell Phone Statistics 11, (January 5, 2010) available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_December09_update.pdf.