Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE IN OPPOSITION TO APPLICATIONS

The American Antitrust Institute ("AAI")[1] submits these reply comments in response to the Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments ("Joint Opposition"). Specifically, AAI responds to three unfounded claims made by the Applicants and one distortion of AAI's position.

I. The Opposition of Sprint and the Small Regional Competitors (But Not Verizon) Is Entirely Consistent with a Likelihood of Unilateral, Coordinated, and Exclusionary Anticompetitive Effects

The Applicants suggest that the opposition to the merger by Sprint, MetroPCS, Leap and other smaller carriers should be discounted (or that it even implies that the merger will be procompetitive) because they would benefit if the merger raised prices.[2] The fact that a

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[1] AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. It is supported by voluntary donations into its general treasury and has no financial interest in this matter. AAI is managed by its Board of Directors, which alone has approved of this filing. (One member of the board was recused.) The Advisory Board of AAI, which serves in a consultative capacity, consists of over 110 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. The individual views of members of the Advisory Board may differ from the positions taken by AAI.

[2] Joint Opposition at 4 ("Sprint and the other wireless competitors do not oppose this transaction because they believe the combined company will cut output, raise prices, and stop innovating, for that could only benefit them and their shareholders. . . . At bottom, these rivals would simply prefer to compete against a capacity-constrained AT&T and a standalone T-Mobile USA without financial backing from its parent and no clear path to LTE. And they seek to prevent the emergence of a more efficient competitor that will

particular competitor may derive short-term benefits from elevated prices that would arise from an anticompetitive merger is insufficient reason to ignore the substance of their objections. Moreover, in this matter, the competitors' opposition is consistent with consumer interests because of the unusually high risk that the merger will result in exclusionary effects. Indeed, the Horizontal Merger Guidelines emphasize that rival firms' "overall views [on a merger] may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct," noting that in such instances "[t]he interests of rivals and consumers would be broadly aligned in preventing such a merger."[3]

The oppositions filed by Sprint, MetroPCS, Leap and other smaller wireless carriers focus in large part on the risk that AT&T's and Verizon's direct control of essential inputs that the competitors need to compete, such as roaming and backhaul services, and dominance in spectrum and handsets, will prevent them from competing effectively with the "Twin Bells" and indeed will marginalize them as competitors. To be sure, AT&T's competitors would benefit in the short run from the higher prices and reduced innovation that are likely to result from the elimination of T-Mobile as a competitor,[4] but over the long run their ability to challenge the market leaders or even survive in an effective duopoly would be compromised.[5]

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offer consumers higher quality services."); Reply Decl. of Dennis W. Carlton et al. ¶ 60 (arguing that claims of the opponents "are paradoxical because if the proposed transaction resulted in higher prices, AT&T's rivals would benefit by gaining an opportunity to add subscribers by undercutting the higher prices that the alleged duopolists would charge").

[3] U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2.3 (2010) ("2010 HORIZONTAL MERGER GUIDELINES").

[4] MetroPCS's CEO acknowledged this. *See MetroPCS Communications Inc. at Barclays Capital High Yield Bond and Syndicated Loan Conference – Final*, FD (FAIR DISCLOSURE) WIRE, March 24, 2011 ("Looking at the AT&T presentation, it was clear that one of the synergies there is increasing the ARPU of T-Mobile. And again, we look at that as very beneficial to us given that we are a value provider in the market place."). The fact that the smaller carriers would benefit in the short run makes their objections more, not less, credible.

[5] *See* Craig Moffet et al., *U.S. Wireless: Picking Winners and Losers in the Wake of the Deal . . . Raising Target Prices for T, VZ, Leap, and PCS*, Bernstein Research, April 5, 2011, at 6-7 ("With their scale,

If the merger were truly likely to create a more efficient competitor and lead to lower prices for consumers, then AT&T's main rival, Verizon, presumably would have the most to lose. Yet Verizon has not opposed the merger, and many Wall Street analysts view Verizon as a chief beneficiary of the deal because of the likelihood that it would lead to more stable industry prices, i.e., would be anticompetitive.[6] Investors apparently agreed, if the movement of Verizon's stock price after the merger announcement is any guide. In the two-day window following the announcement of the merger on Sunday March 20, 2011, Verizon's shares jumped 3.1% compared to the S&P 500's increase of only 1.1%.[7]

Verizon and AT&T have the ability to put intense pressure on the likes of Sprint and T-Mobile, further extending their lead and perhaps permanently marginalizing these players in the process. . . . This helps explain both Sprint's three-weeks ago interest in its own deal with T-Mobile, and its current opposition of a deal between T-Mobile and AT&T. The desire to improve scale is clear and arguably a strategic necessity.").

[6] *See id.* at 2 ("Verizon will benefit from a more stable industry structure and from inevitable dislocations at AT&T/T-Mobile"); Rebecca Arbogast & David Kaut, *AT&T/T-Mo Deal Tough, But Not Unthinkable and AT&T Benefits for Even Trying*, Stifel Nicolaus, March 21, 2011, at 2 ("Verizon gives up some spectrum lead to AT&T, but enjoys the significant collateral benefit of having T-Mobile eliminated"); Simon Flannery et al., *Telecom Services*, Morgan Stanley Research, March 28, 2011, at 7 (stating that implication of merger for Verizon was positive: "Lower competitive intensity; can also benefit in the market place while its largest rival focuses on the deal integration"); Kevin Smithen & Scott Thompson, *Verizon Communications*, Macquarie (USA) Equities Research, March 28, 2011, at 1 ("We view Verizon as the biggest beneficiary of the proposed AT&T/T-Mobile combination in both the short and the long term"); Sergey Dluzhevskiy, *Sprint Nextel Corp*., Gabelli & Company Global Equity Research, March 22, 2011, at 1 (Verizon "will also benefit significantly (as a strong #2) from more rational pricing").

[7] *See* http://finance.yahoo.com/q/hp?s=VZ+Historical+Prices (Verizon historical prices) (visited June 14, 2011); http://finance.yahoo.com/q/hp?s=^GSPC+Historical+Prices (S&P 500 historical prices) (visited June 14, 2011); *see also* Jonathan Cheng, *DJIA Declines 17.90, But Volatility Eases*, WALL ST. J., March 23, 2011, at C5 (noting that "Verizon Communications continued to benefit from the prospect of consolidation in the telecommunications industry [and] was the strongest performer among the Dow components"). In opposing the Sprint/MCI merger in 2000, Professor Carlton performed an event study using a two-day window following the merger announcement to show that the increase in value of long distance competitors' stocks exceeded the expected return based on changes in market conditions, using the S&P 500 index as a baseline. *See* Decl. of Dennis W. Carlton & Hal S. Sider ¶¶ 49-58, Joint Applications of MCI WorldCom, Inc., and Sprint Corp. for Consent to Transfer Control, CC Dkt. 99-333 (Feb. 18, 2000). Carlton concluded that "changes in equity prices of long distance network operators appear to reflect investors' expectations that competition in the provision of long distance services will be adversely affected as a result of the proposed transaction." *Id.* ¶ 58.

In short, the positions of AT&T's competitors are entirely consistent with a likelihood of unilateral and coordinated anticompetitive effects that would benefit the industry (and Verizon in particular), and exclusionary effects that would harm Sprint and the competitive fringe in the long run.

II. The Existence of Local Geographic Markets Does Not Preclude the Existence of a National Market

AT&T entirely ignores the point made by AAI and Sprint that a national geographic market can exist even if local geographic areas are also relevant markets. That point was expressly made by DOJ in recent wireless mergers,[8] is a premise of the revised Horizontal Merger Guidelines,[9] and is consistent with the notion of "submarkets" within broader markets.[10] Insofar as some wireless competition is local, it is appropriate to consider local relevant markets. But where, as here, the predominant competition between the merging parties and the other national carriers is national, as AT&T has repeatedly argued in the past,[11] it would ignore "commercial realities" to fail to consider the effect of the merger in the national market.[12]

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[8] *See* Comments of the American Antitrust Institute at 7 and n. 16 (May 31, 2011).

[9] The revised Guidelines eliminated the "smallest market" principle previously used in the hypothetical monopolist test. *Compare* U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 1.11, 1.21 (1992) ("The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test.") ("The 'smallest market' principle will be applied [in defining the geographic market] as it is in product market definition.") *with* 2010 HORIZONTAL MERGER GUIDELINES § 4.1.1 ("The hypothetical monopolist test . . . does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.").

[10] *See Federal Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997) ("the sale of consumable office supplies by office superstores may qualify as a submarket within a larger market of retailers of office supplies in general"); *see also* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 148 (2007) ("If one set of products and locations constitute a relevant antitrust market, it is likely that one or more larger sets of products and locations that encompass the initial market would also be an antitrust market.").

[11] *See* AAI Comments at 8-9 (citing instances); *see also* Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, WT Dkt. 09-104, Description of Transaction, Public

The Commission has previously rejected AT&T's and Verizon's arguments that the relevant geographic market in wireless mergers was *only* national, which is not surprising when the acquired companies were local or regional providers, and the existence of national pricing did not preclude the possibility of unique local market effects.[13] But in *AT&T/Centennial* the Commission also recognized that the standard local market definition was not appropriate for Puerto Rico and the Virgin Islands because "the potential for competitive harms is likely to be realized over the entire market rather than in smaller, more localized areas."[14]

We agree with the Applicants on one point: "[N]o matter how the geographic market is defined, it would be nonsensical to ignore [whatever] competitive pressures [are] exerted by no-contract and regional providers."[15] However, we disagree strongly with Applicants' contention that the merger is not likely to be anticompetitive because "three-quarters of the U.S. population could choose any one of three or more competitive alternatives to AT&T" if AT&T tried to

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Interest Showing and Related Demonstrations at 22 (filed May 22, 2009) ("[T]he evidence shows that the predominant forces driving competition among wireless carriers operate at the national level.").

[12] *Cf. United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964) ("Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962)).

[13] *See, e.g., Applications of AT&T Inc. and Centennial Communc'ns Corp.; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Dkt. No. 08-246, 24 FCC Rcd 13915, 13941, ¶ 57 (2009) (noting that while AT&T "currently sets its price on a nationwide basis, and does not offer many localized promotions for either pricing plans or handsets," there was no evidence that "this situation would be unchanged post-transaction"). In its earlier comments, AAI mistakenly stated that the DOJ and FCC have not previously reviewed a merger between two national carriers; AT&T/Cingular in 2004 and Sprint/Nextel in 2005 were mergers of national carriers. But the degree of national competition was less significant in 2004 and 2005 than it is today. Moreover, in those two national mergers, the merger proponents contended that the relevant geographic market was *exclusively* national, and the Commission followed the "smallest market" principle of the then-applicable Horizontal Merger Guidelines. *See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp; For Consent to Transfer Control of Licenses, Authorizations*, WT Dkt. No. 04-70, 19 FCC Rcd 21522, 21562, ¶ 86 (2004) ("smallest geographic area"); *Applications of Nextel Communc'ns, Inc. and Sprint Corp.; For Consent to Transfer Control of Licenses and Authorizations*, WT Dkt. No. 05-63, 20 FCC Rcd 13967, 13990, ¶ 53 (2005) (same).

[14] *AT&T/Centennial Order*, 24 FCC Rcd at 13934 ¶ 42.

[15] Joint Opposition at 112.

increase national prices after the merger, and that "[i]t is inconsequential that the identify of those alternative providers would vary from one local market to the next."[16]

The question is not whether the smaller regional and prepaid providers are substitutes for the national carriers to some degree, but whether those substitutes *would* prevent a post-merger increase in prices or replace the competitive constraint provided by the fourth national carrier, T-Mobile. The fact that the smaller carriers do not operate on a national basis cannot be ignored in assessing their competitive significance on a national level any more than one can ignore the difference between the competitive significance of facilities-based carriers and resellers, whom the Commission does not consider to be participants in the relevant local markets even though they are substitutes to some extent.[17]

Ultimately, the Applicants have failed to demonstrate how the regional competitive fringe, which collectively accounts for *less than seven percent* of total wireless revenues, could replace the loss of T-Mobile as a national competitor and constrain the merged firm or the Twin Bells from exercising market power, particularly in light of Applicants' supposed difficulty in independently overcoming their capacity constraints and effectively competing in the market notwithstanding their tremendous advantages in size, scale, and scope.[18] Indeed, the Applicants

[16] *Id.* at 113.

[17] *See, e.g., Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless; For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Dkt. 09-104, 25 FCC Rcd 8704, 8724, ¶ 41 (2010) ("As in previous decisions, we exclude MVNOs and resellers from consideration when computing initial concentration measures, although we acknowledge that non-facilities-based service options have an impact in the marketplace and in some instances may provide additional constraints against anticompetitive behavior."); *cf. AT&T/Centennial Order*, 24 FCC Rcd at 13941, ¶ 57 ("We do not consider entry via roaming agreements to mitigate anticompetitive effects as a result of this transaction. There is no evidence in the record that indicates that non-facilities-based service enabled through roaming agreements is cost effective.").

[18] As Dr. Selwyn points out, "There is no *a priori* basis to conclude or to expect that the 'competitors' mentioned by the Applicants and their experts are somehow immune from the laundry list of barriers to organic expansion cited by the Applicants" and thereby capable of disciplining the exercise of market

do not dispute that unilateral price increases will occur, as AT&T eliminates T-Mobile's lower-priced service plans and moves T-Mobile subscribers to its more expensive and more profitable plans.[19]

III. Mergers That Significantly Increase Concentration in Highly Concentrated Markets Are Presumptively Anticompetitive

Neither the Applicants nor their experts deny that combining AT&T and T-Mobile will significantly increase concentration in already highly concentrated markets, regardless of how the relevant markets are plausibly defined. Rather, Applicants simply dismiss HHI concentration figures as meaningless.[20] Yet it is well established that mergers resulting in highly concentrated markets are *presumptively anticompetitive* especially where, as here, barriers to entry are high. This principle is firmly embedded in the antitrust case law,[21] the Horizontal Merger Guidelines,[22] Commission precedent,[23] and economics.[24]

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power by the merged firm. Decl. of Lee L. Selwyn on Behalf of the Ad Hoc Telecommunications Users Committee ¶¶ 23-25 (May 31, 2011).

[19] *See* AAI Comments at 14. Among the other contradictions in their pleadings, Applicants repeatedly state that the regional fringe can replace whatever competition is lost from the elimination of T-Mobile, yet they acknowledge, as they must, that T-Mobile is a closer rival than the prepaid regional rivals. *See* Decl. of Dennis W. Carlton et al. ¶ 149.

[20] *See* Joint Opposition at 99 ("figures prove nothing by themselves"); 101 ("HHI screen is a processing tool designed only to identify markets that fall outside . . . safe harbor and should therefore be subject to further review").

[21] *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) ("[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."); *Fed. Trade Comm'n v. HJ Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.").

[22] *See* 2010 HORIZONTAL MERGER GUIDELINES § 5.3 ("Mergers resulting in highly concentrated markets [HHHI above 2500] that involve an increase in HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

[23] *See Application of EchoStar Communications Corp., General Motors Corp., and Hughes Elecs. Corp.*, 17 FCC Rcd 20559, 20619 ¶ 150 (2002) ("[U]nder traditional structural analysis, there appears to be a substantial likelihood that the proposed merger will significantly increase concentration in an already

Professor Willig and his colleagues state in their declaration that "the mere fact that relevant markets are concentrated according to traditional concentration measures does not imply the absence of effective competition in the marketplace. Depending on their many other characteristics, even highly concentrated markets can be highly competitive."[25] Of course this is true, but neither Professor Willig nor the other economists supporting the Applicants have demonstrated that such characteristics are applicable here. On the contrary, Professor Willig cites to William Baumol, John Panzar, and Robert Willig, *Contestable Markets and the Theory of Industry Structure*, but Baumol's contestability theory assumes that "entry is absolutely free, and exit is absolutely costless,"[26] which is obviously not the case in wireless markets where barriers to entry are high.

Applicants – but notably not their economists – also contend somewhat contradictorily that high concentration is less relevant in markets involving high fixed costs (which typically indicate that entry and exit is quite costly) such as the wireless industry. According to Applicants: "Such cost structures give non-capacity constrained firms unusually strong

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concentrated MVPD market, that barriers to entry into this market are high, and that the proposed merger will therefore have a significant adverse effect on competition."); *see also* Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd 11407, 11455, ¶ 55 (2010) ("High market concentration may be a reasonable proxy for significant market power when a reduction in the number of competitors or an increase in their shares of subscribers result in significantly fewer constraints on the market power of the remaining firms.").

[24] *See* Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement,* 22 ANTITRUST, Summer 2008, at 29, 33 ("Modern oligopoly theory makes clear that in the absence of entry and merger efficiencies, a merger that leads to a substantial increase in market concentration will tend to raise price, harm consumers, and reduce economic efficiency."); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 988 (Richard Schmalensee & Robert D. Willig eds., 1989) (empirical studies show positive correlation between concentration and price levels).

[25] Reply Decl. of Robert D. Willig et al., ¶ 3.

[26] William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure,* 72 AM. ECON. REV., No. 1, March 1982, at 1, 3 (emphasis omitted).

incentives, even in highly consolidated markets, to keep prices low to win and retain incremental customers because such firms save few costs when they lose customers but forgo all associated revenues."[27] Even if this point were true as a theoretical matter, it can hardly be relevant to these Applications, which are *premised* on the Applicants' capacity constraints and purportedly *high* marginal costs, and where the Applicants have failed to show why the rest of the industry does not suffer from similar constraints. Second, the fact that firms have high price-cost margins in high fixed-cost industries may indeed lower the "critical loss" required for a unilateral price increase to be profitable, but that says nothing about the effect of increased concentration on individual firm demand elasticity or the likelihood of coordinated conduct.[28] A significant increase in concentration is ordinarily likely to lead to higher prices even if an industry involves zero marginal costs.[29]

IV. A Rate Freeze or Other Conditions Would Not Fix the Merger's Competitive Problems

The Applicants cite AAI as among those "suggest[ing] that the combined company should be required to offer T-Mobile USA's existing rate plans to *all customers* [or] should be required to offer a low-tier price plan."[30] However, AAI argued just the opposite:

> No regulatory solution can adequately solve the competitive problems with this merger. . . . A rate freeze would be inadequate because it does not address all of the other aspects of competition between the companies that would be lost, including competition on handsets, network coverage and quality, customer service, and innovation. Nor does it address the possibility that, absent the

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[27] Joint Opposition at 100.

[28] The point of the articles cited by the Applicants is that the "critical loss" in high fixed-cost industries is lower than in industries where marginal and average costs are a greater percentage of prices, all else equal. *See id.* at 100 n.141. But of course, whether a firm has an incentive unilaterally to increase prices depends as well on the *actual* loss the firm will suffer from raising prices (i.e., its demand elasticity), and a high margin may very well indicate a relatively inelastic demand and a lower actual loss. *See* Joseph Farrell & Carl Shapiro, *Improving Critical Loss Analysis*, ANTITRUST SOURCE, Feb. 2008, at 1, 17.

[29] *See* Baker & Shapiro, *supra* note 24, at 33 (discussing narrow exceptions to general point).

[30] Joint Opposition at 217-218 & n.445.

merger, competition between the companies may lead to lower subscription prices in the future.[31]

The Applicants agree that a rate freeze and other conditions, including those designed to prevent exclusionary conduct, are inappropriate, although obviously for different reasons. They are apparently willing to divest assets in certain local markets where the merger creates a potential for anticompetitive effects, but tellingly insist that the purchasers of those assets may vary from locality to locality because the relevant geographic markets are local.[32] Plainly AT&T not only wants to eliminate a national competitor, but ensure that the Commission does not create a rival that could match T-Mobile's effectiveness.

Conclusion

For the foregoing reasons and those stated in AAI's initial comments, the Commission should promptly deny the Applications.

Respectfully submitted,

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[31] AAI Comments at 28-29.

[32] *See* Joint Opposition at 206.