STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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June 16, 2011

Filed electronically Via ECFS
Wireline Competition Bureau
Federal Communication Commission
445 12th Street, SW
Washington, DC 20554

Re: **WT Docket No. 11-65**, New York State Public Service Commission; Petition To Deny/REDACTED

Dear Sir or Madam:

On behalf of the Public Service Commission of the State of New York ("NYSPSC"), enclosed for filing in the referenced proceeding please find a "redacted" version of the NYSPSC's May 31, 2011 Petition To Deny.

This filing is being made at the verbal request of Kathy Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau.

This filing of a redacted version of the NYSPSC's Petition To Deny is not an admission or concession that the public release of an unredacted version of the NYSPSC's Petition To Deny would be inconsistent with, or not in full compliance with, the protective orders governing the treatment of confidential information in this proceeding. Nor is this filing a concession that the earlier filing of the NYSPSC's Petition To Deny was inconsistent with, or in violation of, the protective orders governing the treatment of confidential information in this proceeding.

Notwithstanding this filing, the NYSPSC reserves all rights and defenses as might apply.

Very Truly Yours,

Sean Mullany
Assistant Counsel

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Before the
Federal Communications Commission
Washington, D.C. 20554

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

PETITION TO DENY OF THE STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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PETITION TO DENY OF THE STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

In March, 2011, AT&T reached an agreement to purchase wireless competitor T-Mobile from Deutsche Telekom for $39B. If the merger is approved, AT&T would become the largest wireless carrier in the United States, and only three wireless carriers would control more than 80 percent of the market.

This proposed merger is the latest, and largest, in an accelerating trend of mergers and consolidation that has dramatically reduced the number of wireless carriers in the United States in recent years.[1] The FCC's Fourteenth Annual Report analyzing competition in the wireless industry, issued in 2010, did not conclude the

[1] WT Docket No. 10-133, *In the Matter of Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition*, Reply Comments of United States Cellular Corporation, at pp. 2-3 & n. 3 (August 16, 2010) ("U.S. Cellular Comments").

wireless industry is "effectively competitive."[2] This was the first time in seven years that the FCC was unable to find "effective competition" in the wireless industry.[3]

This merger will particularly impact markets in New York State. The FCC uses two screening methodologies to initially analyze the impact of a proposed wireless company merger. The first examines the impact of a proposed merger on market share concentration. The second screening method examines the effect of a proposed merger on spectrum aggregation. In this case, both the market concentration and spectrum aggregation screening tools indicate the proposed merger may have anticompetitive impacts, and that these anticompetitive impacts will be felt, in particular, in New York State. Therefore, the FCC should carefully scrutinize the potential impacts of the proposed merger on New York State's wireless voice and broadband markets. Where adverse impacts are confirmed, the FCC should, at a minimum, impose conditions that effectively ameliorate, or mitigate such impacts.

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[2] *See* FCC, WT Docket No. 09-66, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, FCC 10-81, at ¶¶50-55 (May 20, 2010) ("14th Annual Report").

[3] WT Docket No. 10-133, *In the Matter of the State of Mobile Wireless Competition*, Reply Comments of U.S. Cellular Corp., at p. 3 (August 16, 2010) (("For the first time in seven years, the FCC did not conclude that there is 'effective competition' in the wireless industry, a very significant finding, in striking contrast to those in previous reports"); WT Docket No. 10-133, *In the Matter of the State of Mobile Wireless Competition*, Comments of AT&T Inc., at p. 1 (the Fourteenth Annual Report failed conclude the wireless marketplace is characterized by "effective competition," unlike the FCC's six prior reports).

Standard of Review

To approve this merger, the applicants must show, and the Federal Communications Commission must find, that the merger will serve the public interest, convenience and necessity.[4] The FCC has said its public interest analysis "necessarily encompasses ... a deeply rooted preference for preserving and enhancing competition in relevant markets...."[5] Mergers raise serious concerns about anticompetitive effects that can harm consumers, and thwart innovation. As the FCC has said, "[m]ergers, a type of exit, are closely reviewed by the Commission because mergers can potentially form stronger competitors that restrain competitors from exercising market power. At the same time, a merger may increase the risk that the merged firm may itself exercise undue market power."[6] For these reasons, a careful analysis of the potential anticompetitive impacts of any proposed merger is "an important part of the [FCC's] public interest evaluation ...."[7] The FCC will examine

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[4] *See* 47 U.S.C. § 310 (d) ("No ... license ... shall be transferred ... except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."); *In re AT&T Inc.*, 25 FCC Rcd 8704, 8716 (F.C.C. 2010) ("Pursuant to sections 214(a) and 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed assignment and transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity")(citing 47 U.S.C. §§ 214(a), 310(d)); *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13927, ¶27 (F.C.C. 2009) (same).

[5] *In re AT&T Inc.*, 25 FCC Rcd 8704, 8717, ¶23 (F.C.C. 2010).

[6] 14th Annual Report, at ¶12.

[7] *In re Applications of Cellco P'ship d/b/a Verizon Wireless & AT &T, Inc., et al.*, 25 FCC Rcd 10985, 10996, ¶22 (F.C.C. 2010).

"whether a transaction will enhance, rather than merely preserve, existing competition," and also considers "potential and future competition and the impact on the relevant market."[8]

A transaction may harm the public interest by "substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes."[9] If such potential for harm is found, then the FCC will "employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits[,] [and the] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest."[10] As part of such balancing, the FCC has statutory authority to "impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."[11]

The FCC employs two "initial screens" to identify markets in which competition and consumers may be harmed by a merger. These screening tools are designed to rule out markets that clearly will not be impacted by the merger, allowing

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8 *In re AT&T Inc.*, 25 FCC Rcd 8704, 8717 (F.C.C. 2010).

9 *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13927, ¶27 (F.C.C. 2009).

10 *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13927, ¶27 (F.C.C. 2009). *See, also, In re Applications of Cellco P'ship d/b/a Verizon Wireless & AT &T, Inc., et al.*, 25 FCC Rcd 10985, 10996, ¶23 (F.C.C. 2010); *In re AT&T Inc.*, 25 FCC Rcd 8704, 8717, ¶25 (F.C.C. 2010).

11 *In re AT&T Inc.*, 25 FCC Rcd 8704, 8717-18, ¶25 (F.C.C. 2010)(citing 47 U.S.C. § 303(r) & 47 U.S.C. § 214(c)).

the FCC to confine its more detailed review (done on a case-by-case and market-specific basis) to markets that may be harmed. The first "initial screen" identifies post-transaction market concentration levels. The second "initial screen" analyzes a merger's impact on the allocation of electromagnetic spectrum available in particular markets for wireless voice and broadband services.[12]

These two separate elements of the FCC's "initial screen" (*i.e.*, the market concentration methodology, and the spectrum allocation methodology) each have a different focus. The market concentration (or HHI) analysis measures the more immediate competitive impacts of a proposed merger on affected markets. In contrast, the spectrum screen focuses on longer-term impacts on competition in wireless markets, including the ability of competing firms to enter the market.

In this case, the HHI initial screen analysis described below indicates a more substantial impact, in the near term, on the competitiveness of New York State's wireless markets. In contrast, the long-term impacts of the merger, based on the spectrum allocation analysis, appear to be of a lesser magnitude.

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[12] In New York State, because AWS and BRS spectrum is available, the 145 MHz threshold is the appropriate metric for analyzing the effects of this proposed merger on spectrum allocation. This "spectrum screen" examines whether the merged entity would have, on a market-by-market basis, a 10 percent or greater interest in 95 megahertz or more of PCS, SMR, and 700 MHz spectrum, where neither BRS nor AWS-1 spectrum is available; 115 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 125 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 145 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available. *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13936 (F.C.C. 2009).

Market Concentration

The first-described element of the FCC's initial screen, the market concentration screen, employs the Herfindahl-Hirschman Index, or "HHI."[13] In general, HHI "is used to measure concentration of mobile wireless service providers."[14] In this particular context, the FCC's HHI screen identifies how a proposed merger or license transfer will change market concentration. The HHI screen has two elements. The first measures post-transaction market concentration levels. The second measures the degree of change in market concentration levels caused by a merger or license transfer. In numerical terms, the HHI screen identifies "service areas in which (1) the post-transaction HHI would be both greater than 2800 and would increase by at least 100, or (2) the post-transaction HHI would increase by 250 or more, regardless of post-transaction HHI levels. Service areas that meet either of these criteria are subject to further, case-by-case, competitive analysis."[15]

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[13] The HHI is calculated as the sum of the squares of the market shares of the firms operating in a market.

[14] FCC, WT Docket No. 09-66, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, FCC 10-81, ¶¶4 & 49 (May 20, 2010) (the "14th Annual Report).

In its 14th Annual Report, the FCC reported that HHI values are increasing, and that the 2008 data reflected, in part, several mergers completed during that year. 14th Annual Report, at ¶¶4 & 51.

[15] 14th Annual Report, at ¶52. The United States Department of Justice ("DOJ"), and the Federal Trade Commission ("FTC"), have issued revised merger guidelines for evaluating the anticompetitive impacts of such mergers under federal antitrust law. *See* U.S. Dept. of Justice, Federal Trade Comm'n, Horizontal Merger Guidelines (Issued August 19, 2010) (available at

HHI values must be "weighted" by Economic Area (EA)[16] population because "HHI values tend to vary with the population density of different markets. It should be noted that, because market concentration by itself "is an imperfect indicator of market power[,]" the FCC employs a "market-by-market analysis of market concentration as one of many indicia used to find evidence of market power."[17]

Staff of the New York State Department of Public Service ("DPS") has calculated HHI figures for the Economic Areas listed in Table C-3 of the FCC's 14th Annual Report, using proprietary NRUF/LNP data for December 2010.[18] Based upon such data, the proposed merger would fail the first element of the FCC's HHI

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http://www.justice.gov/atr/public/guidelines/hmg-2010.html) ("Horizontal Merger Guidelines"). DOJ's HHI screens are described as "standards" that are not definitive measures of the absence or presence of market power. "Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration." Horizontal Merger Guidelines, at §5.3 & p. 19.

Like the FCC, DOJ and FTC will examine, among other factors, the degree to which a merger will increase the merger firm's level of concentration in markets. The FCC has said that "[t]he DOJ's position on competition policy is in agreement with the approach taken in the *Fourteenth Report*. The DOJ states, '[t]he operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition.'" 14th Annual Report, at ¶16.

16 New York State's 62 counties fall into six "Economic Areas," designated "4," "5," "6," "7," "8," and "10." However, a number of these cross state boundaries. Our analysis focused on five of these (*i.e.*, Economic areas "5," "6," "7," "8," and "10") because these encompass primarily New York subscriber locations.

17 14th Annual Report, at ¶55. Other indicia of market power include "entry and exit conditions, the degree of price and non-price rivalry, and innovative activity that undercuts the market power of non-innovators by increasing product diversity and quality and lowering costs." 14th Annual Report, at ¶55.

18 These NRUF/LNP data were received by the DPS Staff under protective order on May 25, 2011. The presentation here is aggregated to protect the confidentiality of the underlying data.

initial screen by causing a total HHI exceeding 2800, and a change in HHI exceeding 100, in all New York State economic areas. In addition, the proposed merger would fail the second element of the FCC's HHI initial screen because the change in the HHI level caused by the merger would exceed 250 in all New York State economic areas, except Albany, Rochester, and Syracuse.[19]

HHI Analysis By Economic Areas, Based On December 2010 NRUF/LNP Data

Economic Areas	HHI Before	HHI After	Delta HHI
Albany-Schenectady-Troy, NY	[redacted]	[redacted]	[redacted]
Syracuse, NY-PA	[redacted]	[redacted]	[redacted]
Rochester, NY-PA	[redacted]	[redacted]	[redacted]
Buffalo-Niagara Falls, NY-PA	[redacted]	[redacted]	[redacted]
NY-North New Jersey-Long Island, NY-NJ-CT-PA	[redacted]	[redacted]	[redacted]
Total New York Economic Areas (subscriber-weighted)	[redacted]	[redacted]	[redacted]
Economic Areas in Rest of Nation (subscriber weighted)	[redacted]	[redacted]	[redacted]
U.S. Subscriber Weighted Total	[redacted]	[redacted]	[redacted]

[19] The proposed acquisition also exceeds the DOJ Horizontal Merger Guidelines thresholds for post-merger HHIs, as well as change in HHI, in all New York economic areas.

When these HHI figures are weighted for population levels,[20] the average post-transaction HHI for New York State economic areas is [redacted], and the change in aggregated HHI for New York State economic areas is [redacted]. These values are higher than the rest of the nation. More specifically, after the merger the weighted aggregate HHI for the rest of the nation would be [redacted], and the change in aggregated HHI for the rest of the nation would be [redacted].

These numbers illustrate that the proposed merger will have a greater impact on wireless markets in New York State compared to the rest of the nation. As a result, the impact of the proposed merger on competition in New York wireless markets is of great concern. It is particularly noteworthy that the increase in HHI that the proposed merger would cause is greatest within the economic area encompassing the New York City Metropolitan Area. That value totals [redacted], and is of greatest concern.

Spectrum Aggregation

In evaluating the competitive impact of a proposed merger, the FCC also considers whether the merger will result in any excessive "aggregation of spectrum" under the control of a particular wireless services provider. The inquiry centers on those portions of the electromagnetic spectrum that have been deemed "suitable" for providing mobile telephony/broadband services. This includes "all spectrum suitable

[20] In this analysis, the HHI values are weighted by telephone numbers assigned to wireless subscribers in each economic area.

for the provision of wireless broadband over broadband networks, in addition to spectrum suitable for mobile voice and data services." [21] This, in turn, includes "spectrum bands designated for cellular, PCS, SMR, and 700 MHz services, as well as AWS-1 and Broadband Radio Service ("BRS") spectrum where available."[22]

The FCC applies this initial screening method to help eliminate from further review "those markets in which there is clearly not competitive harm...."[23] Thus, as to electromagnetic spectrum aggregation, the FCC's screening methodology is designed to identify, for further case-by-case market analysis, any markets within which spectrum aggregation would exceed certain thresholds.[24] These thresholds, in turn,

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[21] *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17473, ¶53 (F.C.C. 2008).

[22] *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17473, ¶53 and ¶62 (F.C.C. 2008).

[23] *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13936, ¶46 (F.C.C. 2009). The FCC describes its initial screen as "conservative" and designed to "ensure that [the FCC does] not exclude from further scrutiny any geographic areas in which the potential for anticompetitive effects exists." *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13936, ¶46 (F.C.C. 2009).

[24] In its Fourteenth Annual Report, the FCC described its spectrum screen as follows: "In 2004, the Commission adopted a 'spectrum screen' to assist in its analysis of potential competitive concerns raised by transactions in which providers were aggregating spectrum. This screen identified particular markets in which the spectrum aggregation exceeded a pre-determined amount of spectrum, set at approximately one-third of the critical spectrum input. In those markets, the Commission conducted further analysis to determine whether sufficient spectrum capacity would be available to other providers to compete effectively; in markets where this would not be the case, the Commission required divestiture of spectrum. As additional spectrum has become available in recent years, the Commission has continued to revise its policies for analyzing spectrum aggregation, including modifications to its spectrum screen, as it seeks to ensure competition in the provision of mobile wireless services." FCC, WT Docket No. 09-66, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, FCC 10-81, ¶263 (May 20, 2010) (footnotes omitted).

are market specific. For example, "the spectrum screen will vary in a particular market depending on the availability of AWS-1 and BRS spectrum in that market ...."[25] In areas AWS-1 and BRS spectrum is available for mobile telephone/broadband services, the FCC applies a spectrum screen of 145 megahertz.[26] The 145 MHz screen is the applicable threshold level for New York State because AWS-1 and BRS spectrum is available in all market areas.

On April 21, 2011, the Applicants filed their Description of Transaction, Public Interest Showing and Related Demonstrations with the FCC. "Appendix A" to that filing listed the current (*i.e.*, pre-merger) spectrum holdings of AT&T and T-Mobile. Analysis of this data shows that the merger will lead to potentially anticompetitive spectrum aggregation in a number of markets in New York State. Moreover, the impact is higher in New York than the national aggregate. Based on AT&T's data of current spectrum holdings of AT&T and T-Mobile, 408 of 3072 counties in the United States would meet or exceed the FCC's spectrum screen, thereby requiring further market-specific review. That data also indicates the merged carrier's spectrum holdings in New York State would meet or exceed the 145MHz threshold in 16 of 62

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[25] *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17477-17478, ¶64 (F.C.C. 2008).

[26] *In re AT&T Inc. & Centennial Communs. Corp.*, 24 FCC Rcd 13915, 13936, ¶46 (F.C.C. 2009); *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17477-17478, ¶64 (F.C.C. 2008).

New York State counties.[27] When analyzed in terms of Cellular Market Areas ("CMAs"), six of the 17 CMAs in New York State will meet or exceed the 145 MHz spectrum screen.

The spectrum screen failure rate in New York State raises significant concerns about the anticompetitive impacts of the proposed merger. Even more telling, however, is an analysis of the merger's impact on the change in spectrum allocation. When AT&T's data is weighted to account for population levels, the average spectrum utilization by the merged entity, within New York State, is 142.2 MHz.[28] This is higher than the merged carrier's average spectrum utilization in the rest of the nation, which is 138.7 MHz. The greater impact of the proposed merger on New York State, in terms of spectrum allocation, is graphically illustrated the histogram below.

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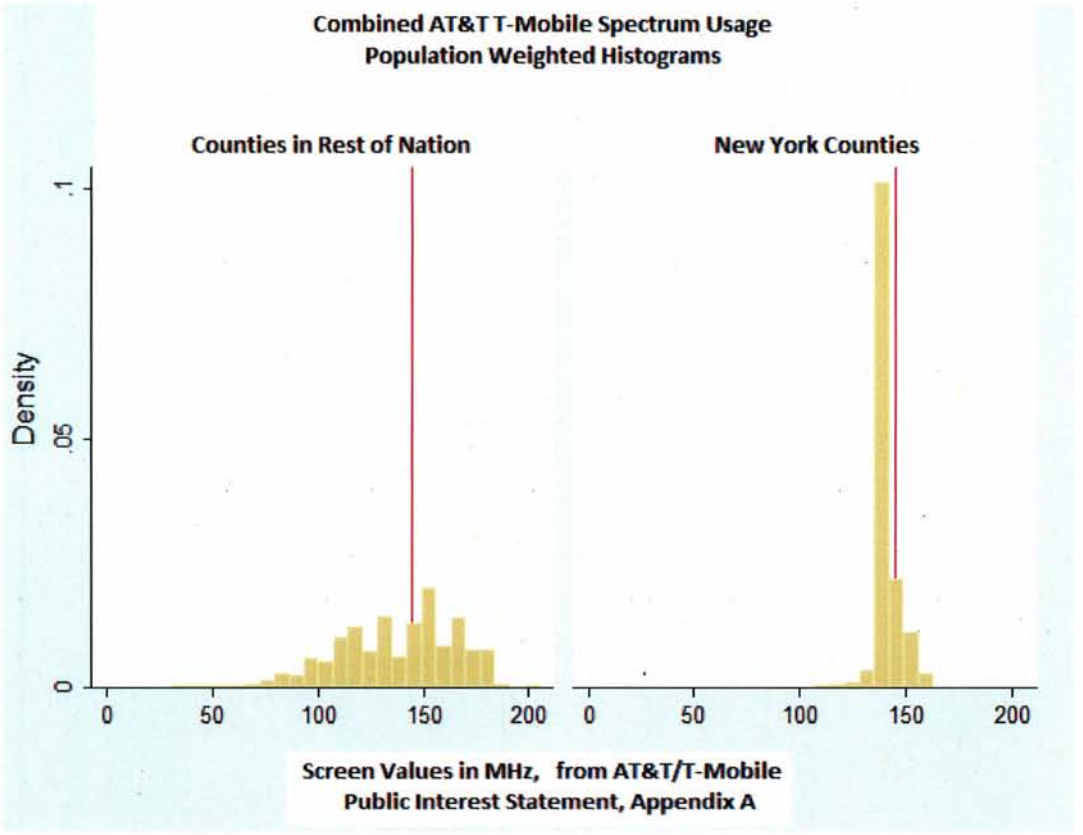
[27] The spectrum screen is met or exceeded in the following counties: Allegany, Cattaraugus, Cayuga, Chautauqua, Chenango, Cortland, Dutchess, Erie, Herkimer, Niagara, Oneida, Schuyler, Seneca, Tompkins, Ulster and Yates.

[28] This analysis used 2009 county population information from the census bureau website. (Available at: **http://www.census.gov/popest/counties/counties.html**).



This graph illustrates that most counties in New York State will be very close to the FCC's 145MHz initial spectrum threshold if this merger is approved as proposed. Thus, many areas of New York State will potentially be highly sensitive to market degradation if there is any further increase in merged entity's spectrum holdings.

CONCLUSION

Applying the FCC's initial screens to this proposed merger indicates it will have significant anticompetitive impacts that will be felt, in particular, in New York State. More significantly, the proposed merger will materially increase the level of market concentration in the New York City Metropolitan Area. In view of this, the FCC should not approve this transaction without subjecting it to heightened scrutiny and

performing a rigorous, market-specific review of its impacts on New York State's wireless voice and broadband markets. Wireless infrastructure and services are critically important to the citizens, and economy, of New York State. The competitive vigor of New York's wireless markets must be protected. Further, the NYPSC's policies in regulating landline telecommunications markets have increasingly relied on vibrant competition in wireless markets, and the innovation and pricing discipline from such competition, to ensure intrastate rates are just and reasonable. It is critically important that New York State consumers be protected against potential harm caused by further consolidation in wireless voice and broadband markets.[29]

We also urge the FCC to allow additional process, including opportunities for further review and comment, as the FCC moves forward in its review. This is particularly important in states, such as New York, where anticompetitive impacts would be felt disproportionately. The New York State Public Service Commission is continuing its review of this proposed merger, and more work must be done to evaluate potential adverse impacts and, where necessary, eliminate or mitigate such impacts.

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[29] *See* Case 05-C-0616, *Examination of Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings*, at p. 40 & n. 3 (issued April 11, 2006)(" The data we now have fully support our conclusion that Verizon's and Frontier of Rochester's prices are being constrained by actual and potential intermodal competitors"); Case 07-C-0349, *In Re Examining a Framework For Regulatory Relief*, Order Adopting Framework, at pp. 1-2 (issued and Effective March 4, 2008) (Defining a market as competitive if a company that raises its prices loses revenue on an aggregate basis, and finding that this occurs when a substantial majority (*i.e.*, more than 69%) of a company's customers have access to both wireless and cable alternatives to landline service).

Respectfully submitted,

Peter McGowan
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Public Service Commission of the State
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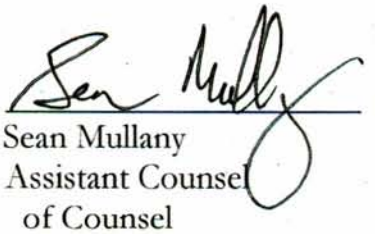

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Dated: May 31, 2011
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