

**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)	

**REPLY OF THE STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE**

By: Peter McGowan, General Counsel
Sean Mullany, Assistant Counsel
Office of General Counsel
State of New York Department of Public
Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-7663
sean_mullany@dps.state.ny.us

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In its May 31, 2011 Petition to Deny, the New York State Public Service Commission showed that AT&T's proposed purchase of T-Mobile from Deutsche Telekom may have anticompetitive impacts, and that these anticompetitive impacts will be felt, in particular, in New York State. The NYSPSC's analysis showed that the proposed merger would exceed thresholds under both the market concentration and spectrum aggregation components of the FCC's "initial screens." In particular, the market concentration initial screen analysis indicated a more substantial impact, in the near term, on the competitiveness of New York State's wireless markets. 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 NYSPSC'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.¹

In a "Joint Opposition" to all petitions to deny, AT&T, Deutsche Telekom AG and T-Mobile USA, Inc. (collectively "AT&T") concede that the FCC's initial screens are "designed . . . to identify markets that . . . should be subject to further review."² Thus, AT&T concedes one of the central points in the NYSPSC's

¹ 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 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 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).

² Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions To Deny and Reply to Comments ("Joint Opposition"), at 101. See *id.*, at 132 (" . . . the Commission's HHI screens . . . serve . . . to eliminate from further review those markets in which there is clearly no competitive harm . . . "); *id.*, at 184 & n. 338 (the spectrum screen "is 'designed to be conservative and ensure that any

Petition To Deny, namely, that where the merged company would exceed the thresholds under the FCC's initial screens, the FCC should carefully scrutinize the proposed merger, identify any competitive harms and mitigate such impacts.³

AT&T goes on to assert, however, that the proposed merger will not unduly harm wireless markets,⁴ and will not lead to harmful spectrum aggregation.⁵ The FCC, however, should carefully examine and test AT&T's claims. For example, AT&T overstates its case by characterizing the FCC's initial screens as "merely a processing tool"⁶ To the contrary, by triggering a need for more detailed review and examination, the initial screens identify where potential risks of adverse impacts are significant enough to warrant careful examination before any approval. As

markets in which there is potential competitive harm based on spectrum aggregation is identified and subjected to more in-depth analysis' ").

³ See Joint Opposition, at 184 & n. 340 (exceeding the spectrum screen "triggers a closer look at competitive conditions in the particular CMAs that have been identified, and it allows flexibility in addressing any competitive concerns").

⁴ See Joint Opposition, at 99-100 (asserting the wireless marketplace is "a textbook example" of a market "with a small number of participants [that] can perform competitively"); at 185 ("[T]he combined company's spectrum holdings will fall far short of levels that could support any reasonable concern about spectrum aggregation").

⁵ See Joint Opposition, at 187 (asserting that, post-merger, "there will be no market where the combined company will hold one-third or more of the spectrum available for mobile wireless services").

⁶ Joint Opposition, at 132 ("the Commission's HHI screens ... serve as mere processing tools . . ."); *id.*, at 184 & n. 337 ("The spectrum screen is merely a processing tool . . .").

discussed more fully below, the FCC should examine and test AT&T's sweeping claims that the merger will not harm consumers, or competition, in wireless markets.

In its Joint Opposition, AT&T asserts that exceeding the HHI thresholds in the FCC's initial screen "prove[s] nothing[.]" and "does not itself signify anything about the likely competitive effects of a merger" ⁷ Responding to concerns about market concentration, AT&T first focuses on claims that the merger will "catapult the market 'inexorably toward a 1980s-style duopoly.'" ⁸ Noting concerns that market concentration will lead to higher prices, reduced consumer choice and less innovation, AT&T argues that "[t]his 'duopoly' rhetoric is as familiar as it is empty" ⁹ because the merger will not, in fact, lead to a duopoly. ¹⁰ AT&T asserts that "in the real world" the U.S. wireless marketplace "remains intensely competitive." ¹¹ AT&T claims that "'often highly concentrated markets . . . may actually yield competitive pricing[.]" ¹² and that "'markets with a small number of

⁷ Joint Opposition, at 99, and 100.

⁸ Joint Opposition, at 93-94.

⁹ Joint Opposition, at 93.

¹⁰ Joint Opposition, at 94 (asserting the term duopoly "does not describe any market in the wireless ecosystem, nor will it describe any such market post-merger").

¹¹ Joint Opposition, at 94.

¹² Joint Opposition, at 99-100.

participants can perform competitively.’” According to AT&T, “[t]he wireless marketplace is a textbook illustration” of this.¹³

The FCC should carefully examine AT&T’s claims. AT&T’s emphasis on the absence of a “duopoly” ignores the fact that, in many wireless markets, the merger will reduce the number of competitors to three. Previously, the FCC has recognized that such levels of market concentration create risks of anti-competitive conduct.¹⁴ More specifically, the FCC has required divestiture in markets where a merger would reduce the number of genuine competitors to four or fewer, because such levels of market concentration “may result in a significant likelihood of successful unilateral effects and/or coordinated interaction.”¹⁵ The FCC has said that, “[g]enerally, we find that, in any market in which the transaction would reduce the number of genuine competitors to three or fewer, the proposed transaction may result in a significant likelihood of successful unilateral effects and/or coordinated

¹³ Joint Opposition, at 99-100.

¹⁴ *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, WT Docket Nos. 04-70 *et al.*, FCC 04-255, Memorandum Opinion & Order, at ¶57 (Adopted October 22, 2004; Released: October 26, 2004).

¹⁵ *In Re Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, WT Docket No. 07-208, FCC 08-181, Memorandum Opinion and Order and Declaratory Ruling, at ¶78 (Adopted July 31, 2008; Released August 1, 2008) (citing the *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 191).

interaction.”¹⁶ Given this, AT&T’s sweeping claims that this merger will not harm wireless markets must be closely examined by the FCC.

In particular, this merger would lead to high levels of concentration in wireless markets within New York State.¹⁷ For example, AT&T’s own data shows that, if this merger is approved, the Cellular Market Areas (CMAs) serving Utica-Rome and Poughkeepsie, New York, would both exceed the FCC’s spectrum aggregation screen, and have only three wireless providers.¹⁸

Accordingly, the FCC should not take at face value AT&T’s claims that wireless markets will remain highly competitive even if this merger is approved. The FCC should reject AT&T’s claim that exceeding the HHI thresholds of the FCC’s initial screen “prove[s] nothing” It proves, at a very minimum, that the FCC must carefully examine this proposed merger because it presents significant risks of harm to markets and consumers. The FCC should investigate and identify any such potential impacts.

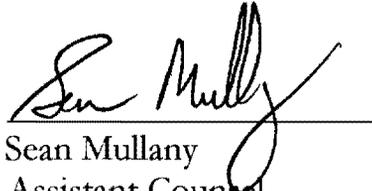
¹⁶ *In Re Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, FCC 08-258, Memorandum Opinion and Order and Declaratory Ruling, at ¶101 & n. 342 (Adopted November 4, 2008; Released November 10, 2008) (citing *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 191).

¹⁷ If this merger is approved, the Albany-Schenectady-Troy, N.Y. Economic Area would have only three wireless providers.

¹⁸ See *Acquisition of T-Mobile USA, Inc. by AT&T Inc., Description of Transaction, Public Interest Showing and Related Demonstrations*, Appendix C (“Competitors in CMAs in Which the Spectrum Screen Is Reached”) (Filed with the FCC April 21, 2011) (CMA 115, Utica-Rome; CMA 151, Poughkeepsie).

Respectfully submitted,

Peter McGowan
General Counsel
Public Service Commission of the State
of New York

A handwritten signature in black ink, appearing to read "Sean Mullany", written over a horizontal line.

By: Sean Mullany
Assistant Counsel
of Counsel
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-7663

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Albany, New York