

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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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)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO THE
AUGUST 11, 2011, ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING
ADDITIONAL INFORMATION AND ADDRESSING
VARIOUS PROCEDURAL ISSUES**

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I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) submits these comments in response to the Assigned Administrative Law Judge's Ruling of August 11, 2011 (ALJ Ruling), requesting additional information and analysis on several substantive issues related to the proposed merger of AT&T Inc. (AT&T) and T-Mobile USA, Inc. (T-Mobile). Several of the questions posed in the Ruling request information from the respondents and market participant parties in this proceeding. DRA reserves the right to file reply comments to parties' responses to these questions. The ALJ Ruling further asks for potential mitigation measures the California Public Utilities Commission (Commission) should adopt and recommend to the Federal Communications Commission (FCC) in the event this merger is approved.¹ While DRA provides a list of mitigation measures that might ameliorate some of the harm from this merger, we do not believe sufficient conditions exist that will adequately protect California consumers or the California economy and make this merger in the public interest. DRA remains opposed to this merger and for reasons DRA will explore more thoroughly in its reply comments to be filed August 29, 2011, the proposed merger is not in the public interest and will not be beneficial for California. The Commission should urge the FCC to reject this merger.

II. DISCUSSION

A. Spectrum (ALJ Ruling Question 3)

The ALJ Ruling notes that at the Commission's July 8 workshop on the effect of the proposed merger on competition, AT&T's witness suggested that 650 MHz of spectrum is available to providers for mobile broadband services.² Question (3) asks parties, as part of the analysis of spectrum available to competition in the relevant product and geographic markets in California, to discuss the extent, if any, to which consideration should be given to spectrum that is not currently used by carriers in

¹ ALJ Ruling, p. 10.

² ALJ Ruling, p. 6.

California, or is expected to become available and accessible to mass market handsets in California in the next six months.

Spectrum, and access to it, has been a contentious issue throughout this proceeding. AT&T, without the merger, already holds more spectrum than any other provider in California other than Clearwire, which provides wholesale services. According to information provided by AT&T, on a county-by-county basis AT&T has more spectrum in California than either Verizon, Sprint/Nextel, T-Mobile, US Cellar, MetroPCS, or Cricket.³ Combining AT&T and T-Mobile's spectrum holdings would increase AT&T's statewide spectrum by about 62%.⁴ However, AT&T also states that it does not use either its current 700 MHz spectrum holding or its AWS spectrum in California.⁵ This accounts for 30% to 40% of all AT&T's spectrum holdings in most major markets in California.⁶

DRA urges the Commission to look carefully at the amount of unused spectrum in its analysis of competition in the relevant product and geographic markets in California for several reasons. First, the fact that AT&T holds so much unused spectrum undercuts its principal argument in favor of this merger. AT&T's claimed capacity constraints due to spectrum shortage is a driving force behind this transaction. According to AT&T, this transaction will create "immense new capacity" that will create "enormous" benefits for consumers, including improvements in AT&T's wireless services.⁷ However, AT&T's claim that it faces a severe spectrum shortage simply is not credible in light of the fact that it is hoarding such a significant amount of unused spectrum.

Second, AT&T's control of spectrum, including unused spectrum, will increase AT&T's ability to raise competitors' costs. As Sprint notes, AT&T's proposed acquisition of T-Mobile will provide "AT&T with an extraordinary and unprecedented

³ AT&T Response to OII Data Request 7, Bates Stamped ATTITMCA004970.

⁴ See Declaration of Dr. Trevor R. Roycroft on behalf of TURN, p. 72 (filed July 6, 2011) (Roycroft Decl.).

⁵ AT&T Response to Staff Data Request 2, DR No. 4(b).

⁶ AT&T Response to Staff Data Request 2, DR No. 4(a), Bates Stamped ATTITMCA000529-530.

⁷ Cingular Wireless and T-Mobile USA's Opening Comments, p. 1 (filed July 6, 2011).

aggregation of bandwidth.”⁸ Spectrum, along with backhaul and roaming, is a critical input to the supply of wireless service. The argument regarding spectrum is rather straightforward: the disproportionate aggregation of spectrum in the hands of one company restrains supply, and thus reduces competition.

In the same manner that locking mobile devices limits consumer communication options, large aggregations of spectrum restricts market competition by preventing spectrum access by potential competitors and, thus, is anti-competitive. Sprint states, “[w]ith the Twin Bells [AT&T and Verizon] controlling an enormous percentage of the nation’s most valuable spectrum holdings following the transaction, Sprint and other carriers would be at a distinct disadvantage in meeting their capacity needs by accessing spectrum in these core wireless bands.”⁹ Sprint goes on to warn “[t]o avoid operational harms resulting from limited capacity, Sprint, other incumbents, and new entrants would be forced to rely on other spectrum bands that could become suitable for wireless broadband communications in the future.”¹⁰ Utilizing these other spectrum bands would inflict substantial costs on competitors due to the expense of developing infrastructure and equipment necessary for commercial operation, and would dissuade future providers from entry to California’s wireless market. Although AT&T touts the competitive gain resulting from the proposed merger, it is clear that AT&T’s current and potential control over numerous spectrum bands is distinctively anti-competitive and will reduce the amount of spectrum available to other wireless carriers.

B. Backhaul (ALJ Ruling Question 8)

ALJ Ruling Question 8 requests discussion of potential changes in wireless backhaul seller market power, and non-ILEC-affiliated backhaul buyer costs, as a result of the proposed merger. It further invites discussion of potential impacts on handset innovation, spectrum access, roaming, and other subjects, all of which are important

⁸ Sprint’s Opening Comments, p. 23 (filed July 6, 2011).

⁹ *Id.*, p. 24.

¹⁰ *Id.*, p. 25.

potential impacts. Due to the unprecedented level of wireless industry concentration that would result from the proposed merger, there are no comparable metrics DRA is aware of that clearly indicate the likely scale of anti-competitive impacts on these subjects. Data must be available to the Commission to verify cost change impacts on both the seller and buyer sides of the backhaul issue, as well as restrictive contract term changes, if the proposed merger is ultimately allowed. The Commission should also be able to monitor contractual or other technical barriers to backhaul and spectrum access post-merger.

In addition to the information on backhaul services requested in the ALJ Ruling, DRA also recommends that if the proposed merger is approved, the Commission should obtain additional information on key elements pertaining to backhaul competition, roaming policies, spectrum costs, and handset innovation and functionalities. Such an information should include:

- a. quantifying wireless backhaul and spectrum costs in the existing pre-merger market;
- b. providing additional network cost data needed to evaluate just and reasonable competitive rates for this access;
- c. evaluating contractual terms and technical restrictions affecting backhaul and spectrum access for non-ILEC affiliated wireless carriers;
- d. evaluating impacts on innovation and limitations on handset functionalities; and
- e. evaluating impacts on carrier roaming policies and restrictions.

The Commission and its divisions should have access to all necessary cost data to verify any post-merger impacts related to backhaul costs, roaming costs, and innovation and limitations on handset functionalities. Requiring meaningful reporting of backhaul network costs should allow the Commission to evaluate reasonable rates for competitor access. In addition, the Commission should be able to monitor other anti-competitive practices in backhaul access contract terms and conditions that exploit market concentration and/or wireline affiliate ILEC status within California.

It is also apparent that industry contracts, including but in no way limited to Section 33 Pricing Flexibility Contracts, may be used or abused in order to promote or

retard competition in the backhaul market. If these contracts are unavailable, including amendments, then a meaningful review will be impossible. DRA recommends that a study of backhaul and special access contracts be mandated by the Commission and the FCC which includes an analysis and comparison of rates, discounts, and terms. This study should compare the treatment various wireless service providers receive to determine if contracts are used as an anti-competitive tool within carrier ranks. This study should also compare backhaul rates discounts and terms received by smaller wireless carriers with special access contracts, of equivalent size, used by enterprise and governmental users.

C. Competition (ALJ Ruling Question 10)

Information on California customer movement between carriers is critical for the Commission to assess the current and future availability of meaningful consumer choice in the wireless markets, and the vibrancy of wireless market competition. In addition to the six months of port-out data requested in response to ALJ Ruling Question 10, these data should continue to be made available to the Commission upon request if the proposed merger is approved, in order for the Commission and its divisions to ascertain any post-merger impacts on customer behaviors. Customer migration data can then inform Commission monitoring of carrier competition concerning backhaul, spectrum, handsets, roaming, service quality, etc.

D. Potential Mitigation Measures (ALJ Ruling Question 11)

2. There are not sufficient conditions available to ameliorate the harms that will be caused by this merger.

The ALJ Ruling asks parties to discuss whether any merger-specific potential mitigation measures are warranted and can or should be imposed, and to propose specific mitigation measures that are either within the jurisdiction of this Commission to impose or should be recommended to the FCC or other agencies.¹¹

¹¹ ALJ Ruling, pp. 9-11.

For reasons discussed below and that DRA will address more thoroughly in its forthcoming reply comments, this proposed merger is neither justified nor in the public interest and would impose serious harms to consumers, competition, and the California economy that cannot be remedied or mitigated. Many of the claimed benefits to this merger are illusory, vague, and unenforceable. For example, AT&T claims that this transaction will result in “lower prices relative to levels expected in the absence of the proposed transaction.”¹² This alleged benefit is so speculative, general, and unsupported as to be meaningless.

Likewise, AT&T claims that it is “committed to extending LTE coverage to over 97% of the nation’s population, far more than was planned or possible without the transaction.”¹³ However, AT&T fails to explain in its comments before the Commission why it cannot or will not deliver these benefits today. Indeed, a recent letter from AT&T to the FCC, filed here at the Commission on August 15, 2011, undermines AT&T’s claim that extending LTE coverage is not possible without the merger.¹⁴ That letter demonstrates that AT&T was unwilling to spend \$3.8 billion to expand its current LTE roll out plan beyond 80% of the U.S. population, despite concerns by its own marketing department that leaving LTE investment at 80% would leave AT&T at a competitive disadvantage relative to Verizon.¹⁵ Although AT&T executives claim that the decision not to expand roll out was based on cost, specifically \$3.8 billion, at the same time AT&T nonetheless was quite willing to pay \$39 billion in order to acquire and eliminate

¹² Cingular Wireless and T-Mobile’s Opening Comments, p. 21, citing Carlton FCC Decl., ¶ 134.

¹³ Declaration of John Donovan in support of AT&T’s FCC Application (Donovan FCC Decl.), ¶ 11; see also Cingular Wireless and T-Mobile’s Opening Comments, p. 4.

¹⁴ August 8, 2011 Letter Richard L. Rosen (AT&T’s counsel) to Marlene H. Dortch, Notice of Ex Parte Communication: In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations WT Dkt No. 11-65. Filed at CPUC with Bates Stamp ATTITMCA006712-6717. Although marked highly confidential, AT&T publicly filed a largely unredacted copy of this letter on the FCC’s website on August 11, 2011. Although it has since been removed, the letter is publicly available on the internet and can be found at <http://www.broadbandreports.com/r0/download/1678331~018ee90413e657e412818181a5d840ff/DOC.pdf>

¹⁵ *Id.*, p. 2.

one of its major competitors.¹⁶ AT&T's claim that it needs T-Mobile to increase its LTE roll out from 80% to 97% simply is not true. Moreover, T-Mobile's spectrum holdings lie entirely within AT&T's own footprint, and does not serve the rural areas AT&T claims will benefit from this transaction.¹⁷ If AT&T were truly unwilling to spend \$3.8 billion to deploy LTE coverage to serving rural areas, it is highly unlikely that the proposed merger will change the costs and benefits of serving these areas. Given these facts, AT&T's claimed "commitment" to serve rural areas is specious and cannot be taken seriously.

For these reasons and others that DRA will explore more fully in its forthcoming reply comments, the Commission should find that this transaction is not necessary and not in the public interest. The Commission should submit these findings along with the record developed in this proceeding to the FCC and urge the FCC to reject this merger.

3. AT&T has a history of broken promises when it comes to claimed merger benefits.

In prior telecommunications carrier merger proceedings before both the Commission and the FCC, merger applicants have made a broad range of promises and proposed commitments. These promises have included vague goals such as "service quality will be maintained or improved as a result of the merger."¹⁸ Rarely, if ever, do merger applicants voluntarily include specifics on fulfilling these promised benefits, such as timelines, mitigation measures, milestones, or enforcement mechanisms. The proposed transfer of T-Mobile to AT&T is no exception; AT&T offers no such specifics.

In addition to the alleged benefits and promises listed above, AT&T also assures that service quality would improve as a result of this merger, and further, that the merger

¹⁶ *Id.*; see also, Response of AT&T Inc. to Information and Discovery Request Dated May 27, 2011, filed in FCC WT Docket No. 11-65, p. 11 (filed June 10, 2011). The letter notes that AT&T's supposed decision to "not" build out LTE to 97% was cemented during the first week of January, yet AT&T's response to discovery requests indicate that at the same time AT&T was already considering buying T-Mobile, having proposed the deal to Deutsche Telekom on January 15.

¹⁷ See, e.g., Joint Petition to Deny of Center for Media Justice, Consumers Union, et. al., FCC AT&T/T-Mobile Merger Proceedings, p. 33 (filed May 31, 2011).

¹⁸ Joint Application of SBC Communications Inc. and AT&T Corp., A.05-02-027, Feb. 28, 2005, p. 30.

would reduce the number of blocked and dropped calls.¹⁹ The Commission should give little weight to these promises because AT&T has a history of broken promises to the Commission. In the SBC/Telesis merger, for example, SBC promised to maintain or improve service quality in its California Commitments letter.²⁰ Yet, service quality problems have persisted. The Commission further recognized the decline in service quality since the SBC/Telesis merger by ruling against SBC in the post-merger Repair Complaint case. The Commission found that Pacific Bell's²¹ repair intervals failed to follow a Commission-ordered merger condition requiring that service quality be maintained.²² AT&T has not developed a track record that allows its promises to be credible. As noted above, DRA questions the enforceability of these claims and others that AT&T makes in support of its application. DRA does not believe that sufficient measures can be implemented to ensure these and other promises made in the application are realized.

Nonetheless, the August 11, 2011, ALJ Ruling asks parties to propose specific mitigation measures tailored to address a variety of issues, including promoting competition in the backhaul and roaming markets, promoting competition in serving different types of California consumers, encouraging choice in the handset market in California, ensuring that merger-specific benefits in California are realized, and improving wireless service quality in California.²³ Because of this history of broken promises, the Commission cannot take any of AT&T's alleged benefits of this transaction at face value. At the very least, if this merger is allowed to happen, the Commission should adopt measures that would ensure strong regulatory oversight and monitoring in order to ensure that benefits are realized, and to develop a record so that the Commission may investigate potential harms that may result from this merger and levy penalties as

¹⁹ *Id.*, p. 22.

²⁰ See SBC/Telesis Merger Decision D.97-03-067, *mimeo*, p. 81.

²¹ Pacific Bell is the d/b/a used by Telesis, SBC, and sometimes AT&T to refer to the local ILEC.

²² D.01-12-021, *mimeo*, p. 1.

²³ Ruling, p. 10.

warranted. Given AT&T's poor track record on service quality, and its failure to keep past commitments, it is important that the Commission strengthen and enforce its service quality standards and reporting requirements and be prepared to penalize AT&T if it should fail to meet those standards and requirements.

4. This Commission has jurisdiction to adopt and enforce consumer protection matters against wireless carriers.

The Omnibus Budget Reconciliation Act of 1993 (OBRA), which amended § 332(c)(3)(A) of the Federal Communications Act (FCA), provides:

[N]o state or local government shall have any authority to regulate the entries of or the rates charged by any Commercial Mobile Service . . . , except this paragraph shall not prohibit a state from regulating the other terms and conditions of Commercial Mobile Service.

(47 U.S.C. § 332(c)(3)(A).)

Although states may not regulate the entry of or rates charged by wireless providers, not all matters affecting wireless providers rates are preempted from state regulation under the FCA. Section 332's preemptive reach has been limited to regulations that *directly and explicitly* control rates or prevent market entry, or require a determination of the reasonableness of rates. (*Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366; *Fedor v. Cingular Wireless* (7th Cir. 2004) 355 F.3d 1069, 1074.) In addition, states explicitly retain jurisdiction to regulate "other terms and conditions" of wireless service. (47 U.S.C. § 332(c)(3)(A).) This phrase has been broadly defined to include consumer protection matters. Legislative history makes it clear that "other terms and conditions" includes matters such as customer billing information and practices and billing disputes as well as other "consumer protection matters."²⁴ Thus, the Commission has substantial responsibilities and retains broad jurisdiction over the terms and conditions of service in wireless markets. It also has responsibility to monitor merger impacts on competition, technological innovation, and consumer choices, and to take remedial actions if warranted.

²⁴H.R. Rep. No. 103-111, reprinted in 1993 U.S. Code Cong. & Admin. News, p. 588.

Therefore, the Commission can set conditions for the merger that are California-specific and relate to terms and conditions of wireless service other than rates and entry. Any merger conditions relating to rates and entry must be determined by the FCC. Moreover, although any conditions the Commission imposes in this proceeding must be tailored specifically to address harms caused by this merger, the Commission still may address harms related to the industry in general in the context of an industry-wide rulemaking. In the event that the merger is approved, DRA offers the following measures in an attempt to protect the public interest and consumers in California, following the outline set forth in the ALJ Ruling. Given the legal framework set forth above, DRA notes which conditions may be imposed by the Commission, and which may be recommended to the FCC to adopt if it approves the merger.

a. Promote competitiveness in the backhaul market for wireless communications services in California.

DRA reserves the right to respond to this issue in its reply comments.

b. Promote Commercial Mobile Radio Services (CMRS) competition in servicing different types of California customers including value-conscious customers, customers who want more or improved data and broadband access, and other market segments in California.

AT&T has made few commitments to T-Mobile customers about what will happen to them if the merger is approved. They have no assurance that plans and rates will not go up, and many reasons to believe that their bills will increase as AT&T and Verizon engage in price matching behaviors.²⁵ If the merger is approved, DRA supports restrictions on AT&T, particularly with respect to low income and “value-conscious” T-Mobile customers, because the merger would remove the lowest priced nationwide facilities-based wireless provider on the market.²⁶ These conditions are also necessary to

²⁵ See, e.g., Opening Comments of TURN (July 6, 2011), p. 9.

²⁶ Declaration of Trevor R. Roycroft on Behalf of TURN (July 6, 2011), pp. 12-15.

ensure that AT&T follows through on its promise of alleged benefits for T-Mobile customers, and its unsubstantiated claim that the merger will result in a “diversity of rate plans.”²⁷ If the Commission recommends mitigation measures to the FCC in this area, it should urge the FCC to adopt the following measures:

- **Require AT&T to offer T-Mobile’s lower cost plans to new customers and allow existing T-Mobile customers to keep and extend their contracts for a period of at least three years, regardless of the remaining term of their current contract. AT&T should also be required to offer T-Mobile’s lower cost plans to current T-Mobile customers that obtain service on a month-to-month basis.**
- **Require AT&T to allow T-Mobile customers who wish to leave AT&T to terminate their T-Mobile contract with no early termination fee or any other penalty.**²⁸
- **Require T-Mobile to provide departing customers with unlocking codes for their handsets.**

c. Maintain incentives for CMRS innovation in California.

DRA reserves the right to respond to this issue in its reply comments.

d. Maintain or encourage choice and innovation in the handset market in California.

Wireless providers compete on the basis of pricing plans and various non-price elements – network quality, marketing strategies and product differentiation, which include handset/device and application offerings. The goal of competition is to bring benefits to consumers such as lower prices, higher quality and greater choice of

²⁷ AT&T FCC Merger Application, p. 44.

²⁸ DRA believes the Commission has the authority to impose this condition itself, as well as other conditions concerning ETFs set forth below, as an ETF is more akin to a penalty rather than a rate for service. The fee is intended to reduce customer turnover and is the same no matter when the customer cancels the contract. Many court cases have specifically found that early termination fees are not rates, but rather constitute “other terms and conditions.” (See, e.g., *Gelles v. Verizon Communications Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 99087; *Esquivel v. Southwestern Bell Mobile Systems, Inc.* (S.D. Tex. 1996) 920 F. Supp. 713; *Phillips v. AT&T Wireless* (S.D. Iowa 2004) 2004 U.S. Dist. LEXIS 14544.)

services.²⁹ However, in the area of handsets/devices, provider activities work to impede competition and impose constraints on consumer choices.

In order to compete, wireless providers differentiate themselves by introducing new handsets/devices, distinguishing their handset/device offerings from those of their competitors, responding to competitors' handset/device innovations with rival offerings, offering certain handset/device models on an exclusive basis, and controlling whether handsets/devices that they do not sell directly can be used on their networks. Wireless providers engage in handset/device related activities that harm consumers including handset exclusivity arrangements; lengthy contracts (often 2-year minimum); high early-termination fees on contracts; lack of handset portability (between services/carriers/applications); and switching consumers' costs (e.g., by requiring consumers to repurchase applications). Discriminatory arrangements can allow AT&T to exclusively offer integrated products such as the iPhone that competitors cannot offer. These means to stay ahead of competition can impede competition, reduce innovation and harm consumers by limiting or eliminating consumer options.³⁰

In sum, wireless consumers face substantial obstacles (e.g., high costs) in choosing amongst and switching between carriers, and are frequently left with no options but to stay with their current providers, pay higher prices and/or tolerate poor service quality. In a market with effective competition, consumers should have minimal obstacles when switching to a carrier who offers better prices, features or quality.³¹

DRA understands that these anticompetitive activities are not necessarily specific to AT&T. Nonetheless, DRA recommends that the Commission recommend that the FCC adopt the following global pro-consumer measures for *all* wireless service providers:

²⁹ 15th Mobile Wireless Competition Report (FCC 11-103), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf.

³⁰ 15th Mobile Wireless Competition Report (FCC 11-103), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf.

³¹ Freepress May 10, 2011 letter to the US Senate regarding the ATT and T-Mobile merger. http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf.

- **Require wireless carriers to decouple network and handsets. Customers should have flexibility to take their handsets with them if another carrier can offer them better service.** For example, in Europe and Asia, wireless consumers have better choices due to such decoupling. They can buy a cell phone in London, and simply swap out a small card (called a SIM card) in the back of the phone and the handset works across any other European network. This decoupling of networks and handsets has created a vibrant European handset market, where manufacturers innovate relentlessly to keep customers loyal.³²
- **Prohibit wireless carriers from locking down the functionality of wireless handsets and/or locking out applications.** Consumers who pay for a new phone should be able to expect that phone to do all the things the manufacturer designed it to do and should not have it subject to later-imposed wireless carrier restrictions. As noted in a Wall Street Journal article³³, handset manufacturers have been trying to offer consumers services for free on new handsets, but network operators such as AT&T and Verizon have said “no” to those free services because they compete with services that the wireless carriers want to charge for. According to the article, RIM (which manufactures the Blackberry) wanted to offer a free mapping service to customers who buy the Blackberry, but AT&T said no, because it proposed to charge users \$10 a month for a comparable service. Another example is Verizon’s Worldphone by RIM (which manufactures the Blackberry), which has the capability built in to work on cellular networks in Europe, as well as to work on other GSM networks here in the States. Yet Verizon locks down the device so that it can charge users extra fees for the privilege of phones working as they were actually designed to work. That is, the GSM capability built into the \$600 handset simply will not work unless a user pays Verizon for a more expensive “international plan.”
- **Require handset upgrades at no charge if and when technology changes make existing handsets unusable or obsolete (planned obsolescence).** LTE technology is beneficial, particularly in urban areas, but it is not backwards compatible with T-Mobile’s existing 3G GSM technology or HPSA. Therefore, the AT&T plan to bring LTE to 97% of

³² Testimony of Chris Murray Senior Counsel Consumers Union On behalf of Consumers Union, Consumer Federation of America, and Free Press Regarding “Wireless Innovation and Consumer Protection” Before the U.S. House of Representatives Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, July 11, 2007.
http://www.openinternetcoalition.org/files/dmfile/Murray_Testimony_7_11.pdf

³³ Vascellaro, Jessica, “Air War: A Fight Over What You Can Do on a Cell Phone – Handset Makers Push Free Features for Which the Carriers Want to Charge.” Wall Street Journal, June 14, 2007.

US residences, by way of this merger, will surely affect T-Mobile subscribers and obviate the acquisition of new handsets.

- **Wireless carriers with a market share of over 50% should not be permitted to offer any device not available to other carriers with the same terms and conditions.**

e. Maintain competitive access to roaming services in California.

DRA reserves the right to respond to this issue in its reply comments.

f. Maintain incentives for price competition and competitive terms available to California subscribers including early termination fees.

Customers are often forced to sign long-term contracts that contain hefty early termination fees (ETFs) if they want wireless services. These early termination penalties, combined with the consumers' desire to upgrade their handset to obtain the latest technology, reduce the incentive for wireless carriers to compete based on service quality, consumer choice, and competitive pricing plans because customers are locked into contracts with them for extended time periods. In addition, customers whose phones are lost, stolen, or damaged are also required to pay ETFs and often required to sign fresh/new long term contracts. In other words, if their phone was lost stolen or damaged, or they would just like a newer phone with features unavailable in their 'old' phone, and they were two years into a three year contract, they must sign a new three year term contract in order to get a new phone. In order to mitigate the harmful effects of this practice on California consumers, DRA recommends the Commission adopt the following mitigation measures.

- **Place a cap (maximum limit) on the amount of ETFs wireless carriers may charge their customers.**
- **Require wireless carriers to pro-rate their ETFs, so that, at a minimum, a consumer exiting a two-year contract after the end of the first year would have to pay only half the ETF.**
- **Require AT&T to allow T-Mobile customers, who did not initially choose AT&T, the opportunity to leave AT&T without being subjected**

to early termination fees. AT&T should be required to make customers aware of this opportunity by notifying customers through various means like direct mail, bill inserts, and electronic communications.

- **Require AT&T to offer handsets at full price with no specified contract term i.e. month-to-month, for customers that do not want to be subjected to ETF or term contracts.**

g. Ensure that merger-specific benefits in California suggested by the respondents, including benefits to California communities, California economies, and respondents' employees, are realized in the post-merger period.

As discussed above, AT&T makes numerous promises in its application before the FCC and in its comments before this Commission about the benefits this merger will allegedly bestow upon the nation as well as California consumers and the California economy. AT&T promises, for example, that it “will deploy LTE within six years after closing to over 97 percent of Americans –including more than 98 percent of Californians.”³⁴ Given AT&T’s track record with regard to such promises, DRA has no reason to believe that AT&T will follow through with such a commitment, nor does DRA believe this Commission can enforce such a promise. Nonetheless, in an attempt to try to ensure that AT&T follows through on its promise to rollout LTE to 97% of the population, DRA suggests that the Commission urge the FCC to set a specific time frame for rollout of LTE into rural areas. The Commission should also require AT&T to submit regular reports to the CPUC in order to monitor the deployment of LTE services in California, particularly into rural areas.

- **The Commission should urge the FCC to set a specific time frame for rollout of LTE into all rural areas.** AT&T should be required to deploy these LTE services over specified timeframe, including areas classified as rural by FCC definition.

³⁴ Comments of Cingular Wireless/T-Mobile (July 6, 2011), p. 27.

- **The Commission should require AT&T to submit regular milestone reports (to the CPUC) in order to allow monitoring of deployment.**

h. Improve wireless service quality in California.

AT&T historically has not placed a high priority on customer service and service quality, and as noted above has failed to keep its promises about improved service quality following its earlier mergers. Both J.D. Powers³⁵ and Consumer Reports³⁶ give low marks to AT&T's service quality. Moreover, AT&T has engaged in a number of tactics that demonstrate its low regard for customer service, particularly in California. For example, DRA learned in the February 4, 2011, California State Senate Public Hearings on the severe services outages of December 2010 and January 2011 that AT&T prioritizes the dispatch of repair personnel in a manner that makes residential customers second class citizens. Higher revenue generating customers are given preferential treatment and faster repairs than other customers.³⁷ Correspondingly, it appears that high-service quality provided to a few is achieved at the price of poor service quality to many, which may include vulnerable customers such as the elderly and low-income persons. To date, AT&T has not been held accountable for this prioritization. In 2000, AT&T sent California technicians to other states with stricter service quality standards and penalties, even though service quality was worse in California.³⁸ Tens of thousands of person-hours were loaned from California while service quality in the state suffered.

³⁵ 2011 Wireless Call Quality Performance Study at [http://www.jdpower.com/telecom/ratings/wireless-call-quality-ratings-\(volume-1\)/west/](http://www.jdpower.com/telecom/ratings/wireless-call-quality-ratings-(volume-1)/west/).

³⁶ Consumer Reports "Contract Cell Phone Ratings" January, 2011, issue, at <http://www.consumerreports.org/cro/electronics-computers/phones-mobile-devices/cell-phones-services/cell-phone-service-buying-advice/guide-to-cell-phone-carriers/cell-phone-service-ratings/cell-phone-service-ratings.htm>.

³⁷ February 4, 2011 Informational Hearing In Los Angeles: Telephone Service Outages and Infrastructure Needs. For audio presentation of this hearing, go to <http://seuc.senate.ca.gov/informationalhearings>.

³⁸ See Reply Testimony of the Office of Ratepayer Advocates, in A.05-02-027 (August, 2005), p. 81, citing SBC Response to DGP-QOS-Pacific-026-07, June 18, 2002, incorporated by reference herein.

The Commission should undertake a thorough investigation of AT&T's service quality and priorities in dispatching repair personnel. Under an unduly narrow interpretation of the P.U. Code, AT&T could simply maintain its current level of service quality performance and fully meet its merger requirements with respect to service quality, even if its current performance is below industry standards. As a condition of *this* merger AT&T should be required to maintain service quality in the areas in which it performs adequately and improve service quality in measures in which it performs poorly.

Given the risks to customers and to a competitive wireless environment that this merger poses, the Commission should also require that customers are given adequate information upon which to base purchase decisions. In D.04-09-062, the Commission noted the discrepancy between what AT&T knows about its coverage, and what it discloses to customers. In particular, the Commission discussed the lack of information provided to customers in rate area maps that Cingular included in its stores, marketing brochures, and other advertising:

These maps provide little useful information to customers - and no information about the relative likelihood of outdoor, in-vehicle and in-building coverage. The record reveals that Cingular (like all wireless carriers) has detailed engineering information that can predict, typically with 95% accuracy, the likelihood that these services will be available. Cingular collects some of the data itself but also uses other entities, such as drive test companies, to collect and verify data.

In fact, a customer has no ready means to obtain accurate, detailed coverage and capacity information. Information of this kind is unavailable to customers at the point of sale, either directly or through sales agents. Our review of the record in this proceeding persuades us that customers should have access to more information than they can obtain at present.³⁹

Customers should have access to more information than they can obtain at present from AT&T. The Commission should require AT&T to provide customers with street

³⁹ D.04-09-062, *mimeo*, p. 68.

level coverage maps that show street-by-street granularity in portraying signal strength. This is important for both current AT&T customers and for former T-Mobile customers as AT&T will be accommodating different technologies if the merger is approved. In the event this merger is approved, DRA accordingly recommends the Commission adopt the following measures to improve wireless service quality in California:

- **Require AT&T to maintain service quality in the areas in which it performs adequately and improve service quality in measures in which it performs poorly.**
- **Require AT&T to provide customers with street level coverage maps that show street-by-street granularity in portraying signal strength.**
 - i. **Institute data reporting requirements to assist with monitoring any changes to service quality, terms, or competition in the post-merger period.**

At the public workshop hearing held in this proceeding on July 8, 2011, Dr. Roger Noll, professor of economics emeritus at Stanford University, discussed the tremendous information advantage the wireless industry has over regulators, and the need for an independent assessment of performance data. Dr. Noll noted that one of the hallmarks of the era of deregulation in the telecommunications markets was that public information was no longer collected and disseminated on many of the status sources types of data one needs to have in order to definitively answer questions on relevant markets, the likelihood of exercising market power, and the like.⁴⁰ Indeed, this Commission’s decision on service quality exempted wireless carriers from service quality data reporting, information that would have been useful to measure the service quality impacts of this merger.⁴¹ Dr. Noll’s “single most important recommendation” was that the Commission should “demand supporting data that is extensive and disaggregated.”⁴²

⁴⁰ Transcript Public Workshop July 8, 2011, p. 22.

⁴¹ D.09-07-019, *mimeo*, p. 57.

⁴² Transcript Public Workshop July 8, 2011, p. 22.

If the Commission had adopted the recommendations of consumer advocates in its Service Quality Decision, it would have a record of service quality reports to measure the service quality impacts of this merger. The Commission should require AT&T to provide an index of all service quality measures the company uses to evaluate its service quality. AT&T should also provide its internal service quality targets and all industry standard metrics it utilizes in its provision of service. From this data the Communications Division can determine which data would be most relevant for evaluating service quality on an on-going basis. In addition to the index recommended above, AT&T and T-Mobile should provide immediately all underlying data supporting any advertising claims about service quality prior to the merger application. As a condition of this merger the merged entities should be required to provide service quality that is on par with industry standards on an ongoing basis. Furthermore, data from the Commission's Consumer Affairs Branch (CAB) captures only a small fraction of total customer complaints levied against utilities that do business in California. These utilities directly receive a host of complaints from consumers that are never vetted by CAB. Thus, the Commission should require AT&T to provide to the Communications Division and to the Consumer Protection and Safety Division summary data on all complaints from California customers, by category of complaint, as a mechanism to monitor service quality before and after the merger, should it be approved.

To this end, DRA recommends that the Commission adopt the following requirements concerning data reporting:

- **Require AT&T and T-Mobile to immediately provide all underlying data supporting any advertising claims about service quality prior to the merger application.**
- **Require AT&T to provide an index of all service quality measures the company uses to evaluate its service quality.**
- **Require AT&T to provide its internal service quality targets and all industry standard metrics it utilizes in its provision of service.**
- **Require AT&T to provide summary data on all complaints from California customers, by category of complaint.**

j. Other relevant issues

DRA reserves the right to respond to this issue in its reply comments.

III. CONCLUSION

As discussed herein, many of the promised benefits of this transaction are unenforceable or will likely be ignored by AT&T if this transaction is approved. For the reasons discussed above and which will be more thoroughly explored in its reply comments, DRA believes there are not sufficient measures that can be taken to ameliorate the harmful effects this merger will pose to California consumers and the California economy. Nonetheless, DRA recommends the above measures the Commission should adopt in the event this merger is approved by the FCC. These measures will be necessary to protect consumers, especially lower income persons and current T-Mobile customers, who will have the most to lose by the proposed transaction. Although DRA urges the Commission to file comments at the FCC recommending that it reject this transaction, DRA also suggests measures the Commission can adopt itself or propose to the FCC to mitigate some of the harms that will come from this merger in the event this transaction is approved.

Respectfully submitted,

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