

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

Investigation 11-06-009
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REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. CONTRARY TO AT&T’S CLAIMS, THIS MERGER WILL NOT PROMOTE THE PUBLIC INTEREST	2
A. THE MERGER WILL NOT LEAVE THE WIRELESS MARKET “FIERCELY COMPETITIVE” AS AT&T CONTENDS.	2
1. The Merger Will Result in a Duopoly in California.	2
2. AT&T’s Claim That There Will Be No Harm to the Backhaul Market Is Deceptive Because AT&T Already Has Concentrated Power in the Backhaul Market.	3
3. AT&T Mischaracterizes the Record on Roaming and Disregards the Fact that it Already Has a History of Denying Smaller Carriers Roaming Agreements.	6
4. Contrary to AT&T’s Claims, AT&T Already Holds Monopsony Power That Has Had a Negative Effect on Choice and Competition in Handsets and Related Equipment.	8
B. AT&T FAILS TO DEMONSTRATE THAT IT WILL RETAIN THE VALUE-CONSCIOUS MARKET.	10
C. CONTRARY TO AT&T’S ASSERTIONS, METROPCS AND LEAP ARE OF LIMITED COMPETITIVE VALUE.	13
1. Pre-Paid and Post-Paid Are Not Perfect Substitutes For Each Other.....	14
2. Small Regional Carriers Are Not Even In a Position to Compete with AT&T.	15
3. Regional Carriers Do Not Provide Nationwide Coverage at Competitive Rates.	16
4. Local and Regional Carriers Are Not Available Choices for All Consumers in the State.	17
D. AT&T FAILS TO PRESENT ANY EVIDENCE REBUTTING THE FACT THAT MARKET CONCENTRATION IS FAR GREATER IN CALIFORNIA THAN NATIONWIDE AND WILL LIKELY LEAD TO PRICE INCREASES.	18
E. AT&T PROVIDES NO EVIDENCE THAT THIS MERGER WILL CREATE JOBS AND BENEFIT THE CALIFORNIA ECONOMY.....	19
F. AT&T PROVIDES NO GUARANTEE THIS MERGER WILL BENEFIT RURAL AREAS.....	21
G. CONTRARY TO AT&T’S ASSERTIONS, AT&T IS NOT AN INNOVATIVE FIRM AND THE ELIMINATION OF T-MOBILE WILL REDUCE INNOVATION AND CHOICE IN THE WIRELESS MARKET.	22

III.	AT&T’S CLAIM THAT THIS MERGER WILL ALLOW IT TO SERVE CUSTOMERS BETTER IS DISINGENUOUS BECAUSE IT DOES NOT NEED ADDITIONAL SPECTRUM.....	24
A.	AT&T’S ALLEGED CAPACITY CONSTRAINTS ARE OF ITS OWN MAKING.	24
B.	AT&T’S ALLEGED CAPACITY CONSTRAINTS ARE DUE TO ITS LACK OF INVESTMENT IN ITS OWN NETWORK AND ITS FOCUS ON BUYING UP COMPETITORS.	25
C.	AT&T DOES NOT NEED T-MOBILE TO DEPLOY LTE TO 97% OF THE U.S. POPULATION.	27
D.	AT&T’S CLAIMS CONCERNING ALLEGED MERGER BENEFITS CANNOT BE TAKEN SERIOUSLY BECAUSE AT&T HAS A HISTORY OF BROKEN PROMISES WITH RESPECT TO CLAIMED MERGER BENEFITS.	28
IV.	THE ANTI-COMPETITIVE EFFECTS OF THIS MERGER CANNOT BE ELIMINATED WITH MITIGATION MEASURES	33
A.	GREENLING’S RECOMMENDATION FOR A \$450 MILLION DIGITAL DIVIDE FUND THE LATINO BUSINESS CHAMBER, THE BLACK ECONOMIC COUNCIL, AND THE NATIONAL ASIAN AMERICAN COALITION’S RECOMMENDATION FOR A \$50 MILLION TECHNICAL ASSISTANCE PROGRAM SHOULD NOT BE ADOPTED.	33
B.	THE COMMISSION SHOULD REVISIT WIRELESS LIFELINE.	34
V.	CONCLUSION.....	35
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

State Statutes

Cal. Pub. Util. Code § 854(c)(4)..... 19

Cal. Pub. Util. Code § 854(c)(6)..... 19

Federal Agency Cases and Reports

*Annual Report and Analysis of Competitive Market Conditions
With Respect to Mobile Wireless, WT Dkt. No. 10-133
Fifteenth Report (rel. June 27, 2011)*23

*In the Matter of Applications of AT&T Wireless Services, Inc.
and Cingular Wireless Corp. for Consent to Transfer Control of Licenses
and Authorizations, WT Dkt. 04-70 et al., Memorandum Opinion and
Order, 19 FCC Rcd 21522 (rel. Oct. 26, 2004)*..... 8

*Reexamination of Roaming Obligations of Commercial Mobile
Radio Services Providers, WT Docket No. 05-265,
Second Report and Order, (rel. Apr. 7, 2011)*..... 8

Bureau of Labor Statistics, Seasonally Adjusted Unemployment Rates
as of July 2011 available at <http://www.bls.gov/lau/> 19

California Public Utilities Commission Cases and Reports

*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 (filed June 9, 2011) [I.11-06-009]*..... passim

D.01-12-021..... 31

D.09-04-062..... 33

D.10-11-033..... 34

*Market Share Analysis of Retail Communications in California 2001
Through 2009, CPUC Communications Division (March 10, 2011)..... 3*

*Report on Telephone Carrier Service Quality for the Year 2010,
CPUC Communications Division (March 2011) 32*

I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) submits these reply comments pursuant to the Order Instituting Investigation (OII) into the planned purchase and acquisition by AT&T Inc. (AT&T) of T-Mobile USA, Inc. (T-Mobile), the Administrative Law Judge's (ALJ) July 19, 2011, Ruling Setting Briefing Schedule for Market Definitions, and the ALJ's August 11, 2011, Ruling Requesting Additional Information and Addressing Various Procedural Issues. Due to the overlapping and intertwining nature of the information provided in various comments and briefs filed so far, DRA combines its responses to those pleadings herein. DRA strongly believes that this merger is not in the public interest, and will have numerous deleterious effects on competition, the California economy, and California consumers.

This merger is nothing more than an attempt by AT&T to stifle competition by acquiring an unprecedented amount of spectrum and controlling other key inputs of wireless service such as backhaul services and roaming. AT&T's monopoly power within their incumbent local exchange carrier (ILEC) footprint would increase phenomenally with its acquisition of T-Mobile. The increased market concentration would cement AT&T's role as a gatekeeper in the telecommunications markets, not only for wireless services, but wireline as well. Contrary to AT&T's assertions, the elimination of T-Mobile will reduce customer choice and remove a major innovator from the market when it comes to equipment and plans.

Moreover, this proposed transaction purports to solve problems that are illusory or of AT&T's own making (i.e., the alleged spectrum shortage and capacity constraints), and is not necessary. The claimed benefits that AT&T touts to the consumers and the California economy are speculative at best, and generally not enforceable (i.e. the roll-out of LTE to unserved areas and fewer dropped calls). Ultimately, this proposed merger creates too many unknown and unreasonable risks to the California economy and consumers. It is not in the public interest and should not be approved by either the California Public Utilities Commission (Commission) or the Federal Communications

Commission (FCC). The Commission should reject this merger as against the public interest and should urge the FCC to reject it as well.

II. Contrary to AT&T's Claims, this Merger Will Not Promote the Public Interest

As discussed below, contrary to AT&T's assertions, this merger is not in the public interest as it will stifle competition and create a duopoly situation with respect to *all* telecommunications services in California, including wireless services. In reviewing this proposed transaction, the Commission should focus on the negative deleterious effects the merger will have on California and California consumers. Although AT&T lists a number of states that it claims supports this merger,¹ the Commission should keep in mind that California has a much larger AT&T presence than many other states. AT&T's dominant market power in California is more extreme than that exerted in the rest of the country, and this market power will only become more concentrated if this merger is approved.

A. The Merger Will Not Leave the Wireless Market "Fiercely Competitive" as AT&T Contends.

1. The Merger Will Result in a Duopoly in California.

In its opening comments, AT&T asserts that "the transaction will leave the wireless marketplace fiercely competitive – indeed, more competitive than before."² This claim is pure fiction. Factually, the merged entity would boast over 20 million California customers, which, as the OII notes, represents 47% of the California wireless market.³ With 47% of California's wireless market, the merged entity would surpass Verizon as the state's dominant wireless carrier (which has approximately 30% of the wireless market) and result in 77% market control by the two "competing" wireless carriers.⁴

¹ Cingular Wireless/T-Mobile Opening Comments, p. 2 (July 6, 2011).

² *Id.*, p. 1.

³ OII, p. 7.

⁴ OII, p. 8.

DRA agrees with the conclusions of Trevor R. Roycroft, Ph.D., that “[t]he proposed merger of AT&T Mobility and T-Mobile would move wireless policy a giant step backward – consummation of the merger will virtually complete a round-trip to a duopoly market structure. The dominant firms – AT&T Mobility and Verizon Wireless – will tower above a fringe of much smaller rivals.”⁵ This duopolistic certainty is one of the prominent issues regarding the proposed merger. As discussed further below, AT&T’s contention that local geographic markets provide effective competition⁶ is nothing more than a smoke screen to deflect the Commission’s attention away from the looming assurance of the wireless duopoly.

AT&T and Verizon will not only control the wireless markets, but will also have a lock on the largest market shares across *all* telecommunications technology markets in California (wireline, wireless, VoIP, and broadband). According to the Commission’s Communications Division (CD), as of December 2009, AT&T and Verizon owned 87% of traditional voice market, 64% of wireless voice market, 74% of mobile broadband market, 68% of total voice market (wireline, wireless and VoIP), and 66% of all connections (all technology modes) in the market.⁷ The Commission should not be deceived into concluding that moderately-sized, horizontally integrated, local carriers have the capacity or resources to compete in a duopolistic market. AT&T will hold an increased market share that encompasses many relevant technologies post-merger, affording it a greater advantage and sufficient monopoly power to dominate much of the California telecommunications industry, causing significant harms to consumers, carriers and equipment vendors all alike.

2. AT&T’s Claim That There Will Be No Harm to the Backhaul Market Is Deceptive Because AT&T

⁵ Declaration of Trevor R. Roycroft, Ph.D., in support of The Utility Reform Network’s (TURN’s) Opening Comments, p. 8 (July 6, 2011) (Roycroft Decl.).

⁶ Cingular Wireless/T-Mobile Opening Comments, p. 35.

⁷ CPUC Communications Division, *Market Share Analysis of Retail Communications in California 2001 Through 2009*, p. 5 (March 10, 2011) available at <http://www.cpuc.ca.gov/NR/rdonlyres/22731419-A492-4D52-A09A-0815C3D06A61/0/110322MarketShareAnalysis.pdf>.

Already Has Concentrated Power in the Backhaul Market.

AT&T claims that there will be no negative implications on the provision of backhaul services because there is “strong competition” for the provision of backhaul and because T-Mobile is not a significant purchaser of backhaul.⁸ AT&T further maintains that a merger with T-Mobile “could not increase any *incentive* AT&T might have to raise its wireless rivals’ costs...”⁹ However, AT&T’s analysis regarding competition in the backhaul market is deceptive as it fails to acknowledge that AT&T *already* has a strong lockhold on the provision of backhaul services. Moreover, the claim that the merger “could not increase” an incentive to raise rivals’ costs may be indicative of the already high incentive that AT&T has to raise its rivals’ costs. In any case, it is not the incentive, but the actual impact on competition and consumers that matters.

AT&T’s comments evade the issue of the special anti-competitive edge that ILECs like AT&T and Verizon have within their own service territories when providing backhaul to competitors. As Joseph Gillan, in his declaration on behalf of CALTEL, observes:

AT&T enjoys certain indisputable advantages from its legacy network footprint (such as a ubiquitous network of physical assets like rights-of-way, conduit, poles, fiber and copper facilities) that can be used to provide either Ethernet or TDM-based services. The combination of these physical assets and a contracting strategy that ties Ethernet to DSL commitments enables AT&T to leverage its legacy market power to newer, emerging services.¹⁰

Wireless carriers need to connect to ILEC landline networks to complete phone calls. ARMIS data shows that AT&T and Verizon collectively collect about 81% of all

⁸ Cingular Wireless/T-Mobile Opening Comments, pp. 43-48.

⁹ *Id.*

¹⁰ Declaration of Joseph Gillan, p. 4, filed in support of CALTEL Additional Comments and Analysis of the California Association of Competitive Telecommunications Companies Regarding Backhaul and Merger Conditions (Aug. 22, 2011).

special access revenues within their service territories.¹¹ ILECs, mainly AT&T and Verizon, together provide over 90% of backhaul and other special access services nationwide.¹² These facts undermine AT&T’s claim that there is “strong competition” in the provision of backhaul services.

There are real cost consequences for competitors. T-Mobile Vice President Kathleen O’Brien Ham made the case as recently as May 2010: “in areas where ILECs continue to enjoy a monopoly, backhaul costs remain unreasonably high.”¹³

AT&T also argues that for backhaul, Ethernet-based services are now more relevant than TDM-based services, and that “ILECs such as AT&T have no particular advantage” in providing Ethernet-based services.¹⁴ As noted above, however, AT&T’s legacy network and market dominance *already* provides it tremendous advantage with respect to Ethernet. AT&T attempts to buttress its case by citing impressive sounding figures for competition in Business Ethernet ports (“no single provider has more than a 24 percent share”¹⁵), although such figures are largely irrelevant to retail wireless backhaul access because Business Ethernet ports have a business customer base that is entirely different from the competing wireless carriers that purchase backhaul access.

Moreover, even if the proposed merger would not eliminate a major backhaul provider, it would eliminate a major backhaul purchaser from the market, thus reducing demand for competitive backhaul sources and weakening competition in this market. Alternative providers to ILEC services would lose the fourth largest wireless provider as a customer. If the merger is approved, AT&T would have the ability to affect

¹¹ See 2007 FCC ARMIS Report 43-01, Table 1.

¹² See Sprint Nextel Petition to Deny, p. 39, Docket WT No. 11-65, *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (FCC May 31, 2011) (Sprint Petition to Deny) available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675883>.

¹³ Letter from Kathleen O’Brien Ham, Vice President T-Mobile, to Marlene H. Dortch, FCC, Re Ex Parte Communication: *Special Access Rates for Price Cap Local Exchange Carriers* WC Dkt. No. 05-25 (May 6, 2010).

¹⁴ Cingular Wireless/T-Mobile Opening Comments, p. 44.

¹⁵ *Id.*

competition by charging higher rates for backhaul and imposing more restrictive contract terms for backhaul which will directly impact the costs of other smaller carriers that compete in the wireless market.¹⁶ AT&T's ability to shift T-Mobile backhaul traffic to its own backhaul facilities would also enhance the market power of AT&T as a wireline carrier. Consumers would ultimately pay the price through inflated rates to incumbent local exchange carriers or indirectly in the prices they pay for non-ILEC services.

3. AT&T Mischaracterizes the Record on Roaming and Disregards the Fact that it Already Has a History of Denying Smaller Carriers Roaming Agreements.

In its response to the August 11, 2011, ALJ Ruling Requesting Additional Information, AT&T states:

[A]t the workshop, all agreed that AT&T's and T-Mobile USA's networks use the GSM standard, and that Sprint, Leap/Cricket, and all other carriers that operate in California use technically incompatible CDMA standards and cannot, and do not, roam on AT&T's or T-Mobile USA's networks.... Thus, all agree that the merger will not reduce wholesale roaming options for any California carriers *today*.¹⁷

AT&T's contention is deceptive for two reasons. First, AT&T mischaracterizes the workshop testimony when it states that "all agree" that the merger will not have a negative impact on roaming. A review of the workshop transcript cited by AT&T¹⁸ does not at all support AT&T's contention that "all parties" agree with its characterization of the roaming issue. Second, AT&T's selective characterization of roaming options, with the caveat that the statement applies only to "today," avoids the longer term issue of maintaining a competitive environment in a dynamic market. DRA would like to emphasize that the Commission's role in safeguarding a fair and competitive environment for wireless roaming should also ensure a *future* market of new, vibrant

¹⁶ Roycroft Decl., p. 106.

¹⁷ Cingular Wireless/T-Mobile Response to August 11, 2011 ALJ Ruling Requesting Additional Information, p. 18, (Aug. 22, 2011) (emphasis added).

¹⁸ *Id.*, citing Workshop 1 Tr. at 175:19-176:11, 180:24-182:22, 203:8-16, 206:3-8, 211:14-212:2.

technologies and new market entrants. At stake is not only the status quo but the future of a dynamic and, hopefully, innovative industry. The Commission should consider the market competitive only if new, future entrants, especially those deploying new wireless technologies, can enter without anti-competitive barriers placed in their way.

In its comments, AT&T attempts to dismiss the fact that the merger will give AT&T the ability and incentive to impact the future market by increase roaming costs by pointing to the FCC's recent modifications of roaming regulations, and by claiming it has "offered reasonable roaming arrangements to carriers who request them."¹⁹ However, according to the regional and prepaid carriers, AT&T has a history of denying smaller carriers roaming agreements.²⁰ AT&T is especially unwilling to offer 3G and 4G roaming,²¹ which forces regional or prepaid carriers to remain on outdated networks and handsets. This is especially problematic for the GSM roaming market. Regional carriers using GSM technology only have a choice between T-Mobile and AT&T for national roaming agreements. Approval of this merger would mean AT&T would have a monopoly on nationwide 3G GSM roaming service.²² In the instances where AT&T has provided 3G GSM roaming agreements to smaller carriers, those carriers have consistently accused AT&T of providing the service at unreasonably high prices, only

¹⁹ *Id.*

²⁰ See Petition to Deny of Leap Wireless International and Cricket Communications, FCC WT Docket No. 11-65, *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (FCC May 31, 2011); and Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications, WT Dkt. No. 11-65 *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (filed May 31, 2011); see also Letter from Senator Al Franken to Chairman Julius Genachowski, et al. and Attorney General Eric Holder (July 26, 2011), p. 7, available at http://franken.senate.gov/files/letter/110726_Letter_DOJ_FCC_ATT_TMobile_Merger.pdf (Sen. Al Franken Letter).

²¹ See, e.g., Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications, WT No. 11-65 *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (FCC May 31, 2011).

²² *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?* Hearing Before the Subcomm. On Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 112th Cong. (2011) (Hu Meena, Cellular South, responses to questions for the record from Senator Leahy); see also, Sen. Al Franken Letter, at p. 7.

after severe delays, or only in conjunction with anti-competitive conditions.²³ According to Cellular South, the limited nature of the GSM roaming market even today has dramatically undermined a number of regional carriers.²⁴ Approval of this merger would mean AT&T will have the ability to potentially drive some of its competitors out of business by increasing roaming fees.

Moreover, the fact that the FCC recently modified roaming regulations to apply to data roaming does not necessarily provide remedies to carriers who have been unfairly denied roaming arrangements, as AT&T claims. Until recently, carriers did not even have the legal obligation to provide data roaming to competing carriers that rely on network roaming arrangements. The FCC's new rules that require mobile carriers to enter into reasonable data-roaming agreements with competitors²⁵ are of questionable value because they do not set prices for the roaming agreements, but only require carriers to negotiate "commercially reasonable" rates, leaving it up to dominant providers like AT&T to determine what a "commercially reasonable" rate is. Even so, this right is currently subject to legal challenge, and may be of limited positive value as the obligation to provide "commercially reasonable" terms and conditions does not require a provider to enter into a data roaming arrangement for a particular data service where it is not "technically feasible to provide roaming for such service...."²⁶ Therefore providers such as AT&T will have the ability to choose their operating technology and standards, even if those are inefficient or incompatible with competitors' technologies.

4. Contrary to AT&T's Claims, AT&T Already Holds Monopsony Power That Has Had a Negative Effect

²³ *Petition of Cincinnati Bell Wireless LLC to Condition Consent or Deny Applications*, WT No. 11-65 *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (FCC May 31, 2011); see also, Sen. Al Franken Letter, at p. 8.

²⁴ See previous footnote.

²⁵ *Re-examination of Roaming Obligations of Commercial Mobile Radio Services Providers*, WT Docket No. 05-265, *Second Report and Order*, (rel. April 7, 2011), ¶ 1.

²⁶ *Id.*, ¶ 47.

on Choice and Competition in Handsets and Related Equipment.

AT&T asserts in its opening comments that the merger will not increase AT&T's ability or incentive to use exclusive deals to deny competitors access to desirable handsets and smartphones.²⁷ However, AT&T *already* has the ability and incentive to do exactly that and has exercised that power to the disadvantage of its competitors, as it has done by tying up the iPhone and rejecting a manufacturer's desire to offer free mapping service on its phone (see below).

If the merger is approved, AT&T would become the only carrier using GSM handsets in the US.²⁸ In addition to obtaining all of T-Mobile's customers and equipment, as the sole GSM carrier, AT&T would be in a monopsony position to make demands of handset manufacturers. Any GSM handset maker that cannot meet AT&T's demands would be effectively shut out of the US market. From the consumers' perspective, this is troubling. If a handset manufacturer offers a handset with a particular feature, but AT&T does not wish to offer that feature, that feature or handset effectively will not be available to consumers. As DRA discussed in its August 22, 2011 comments, AT&T has already engaged in this type of anti-competitive behavior when RIM (which manufactures the Blackberry) wanted to offer a free mapping service to customers who bought the Blackberry. AT&T did not allow this free feature, because it wanted to charge users \$10 a month for its own comparable service.²⁹ Therefore, equipment suppliers and manufacturers will have no choice but to accept the terms and conditions set by AT&T.

Further, the merger will substantially increase AT&T's share of the wireless market, thus making it easier for AT&T to convince handset manufacturers to enter into

²⁷ Cingular Wireless/T-Mobile Opening Comments, p. 40.

²⁸ See Declaration of John Dupree, ¶ 17, attachment C to Sprint's Opening Comments (July 6, 2011).

²⁹ See DRA's Comments in Response to August 11, 2011 ALJ Ruling Requesting Additional Information, p. 13 (Aug. 22, 2011), citing 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.

exclusive agreements. This larger share will induce handset manufacturers to enter into exclusivity agreements for the latest, most desirable handsets like the iPhone and Droid to the detriment of its smaller rivals. As TURN's expert stated:

In the handset market exclusive deals may prevent existing or upstart rivals from gaining access to technologies that consumers find attractive. While AT&T will experience a positive feedback loop from handset exclusivity (i.e., attractive and exclusive handsets lead to a growing number of wireless subscribers), for rival carriers handset exclusivity may lead to a declining market position.³⁰

This size advantage following the merger will give AT&T substantial market power that could overwhelm smaller rivals.

B. AT&T Fails to Demonstrate That It Will Retain the Value-Conscious Market.

This merger would remove the lowest-priced facilities-based wireless provider on the market. AT&T fails to provide any evidence that it would offer similarly priced plans for new customers, and the result is that this merger will reduce consumer choice and harm value-conscious consumers. AT&T's comments make it clear that it has no plans to retain the value-conscious market. As AT&T itself notes, AT&T targets high average revenue per use (ARPU) subscribers with its "higher quality positioning."³¹ In its attempt to diminish the effect that the loss of T-Mobile will have on competition, AT&T takes great pains to paint T-Mobile's lower priced services as "complementary" to and not competitive with AT&T's offerings.³² According to AT&T, T-Mobile does not exert strong competitive pressure on AT&T in California or elsewhere, and the two brands

³⁰ Roycroft Decl., p. 23.

³¹ Cingular Wireless/T-Mobile Opening Comments, p. 39.

³² AT&T's characterization of T-Mobile as a lesser competitive threat also contradicts the AT&T and T-Mobile's own testimony at a hearing before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. The CEOs of both T-Mobile and AT&T acknowledged that they were direct competitors of each other, competing in the same markets. Randall Stephenson of AT&T specifically agreed that AT&T and T-Mobile were "major competitors." See Letter from Sen. Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to U.S. Attorney General Eric Holder, and to FCC Chairman Julius Genachowski, July 20, 2011, at p. 1, fn. 1.

serve substantially different groups of subscribers.³³ AT&T also claims that it has not responded to any of T-Mobile’s significant national consumer pricing and promotions in at least two years.³⁴ Although DRA disagrees that AT&T and T-Mobile are not competitors, these claims merely underscore the fact that AT&T has no plans to compete for the same value-conscious consumers that T-Mobile serves, and instead expects that providers such as Leap and MetroPCS will “fill in the gap.”

AT&T has also failed to provide sufficient detail regarding how it will handle T-Mobile’s existing cost-conscious mobile plan subscribers. Though AT&T states it will allow T-Mobile customers to keep their current contracts, it provides no further indication as to how those customers will be treated once those contracts have expired. In its response to CD’s pointed questions about how long AT&T plans to offer existing service/plans/rates, and whether these plans and rates will be available to new customers, AT&T stated “[n]o decision has been made regarding future plan terms, rates, life cycle management, billing, customer information, or technical and handset support that may be implemented if the transaction receives regulatory approval.”³⁵ Likewise, AT&T has no plans concerning the transition of T-Mobile customers with respect to customer service aspects like handset support, billing, or customer information.³⁶ Furthermore, as Greenlining notes, respondents “oppose any conditions which would release subscribers from their obligation to pay early termination fees (ETFs).”³⁷ More to the point, TURN points out, “T-Mobile’s lower-priced services would disappear as soon as a customer’s contract was up. Low income customers would suffer, because T-Mobile has placed a

³³ Cingular Wireless/T-Mobile Opening Comments, p. 38, citing Christopher FCC Decl., ¶ 27; Carlton FCC Decl., ¶ 149.

³⁴ Cingular Wireless/T-Mobile Opening Comments, p. 38, citing Christopher FCC Reply Decl., ¶¶ 33-36.

³⁵ AT&T’s response to CPUC Data Request No. 2, dated May 17, 2011, question DR No. 2a.

³⁶ AT&T’s response to CPUC Data Request No. 2, dated May 17, 2011, question DR No. 2b.

³⁷ See Greenlining Opening Comments, p. 29, *citing* Joint Opposition of AT&T Inc., Deutsche Telekom Inc. and T-Mobile USA Inc. to Petitions to Deny and Reply to Comments 62, *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (FCC June 10, 2011), pp. 223-224.

greater emphasis on providing reasonably priced pre-paid service, much more so than AT&T.”³⁸ The mere fact that AT&T has failed to elaborate on its long-term treatment of T-Mobile customers makes clear that AT&T’s intention is to force them into high priced contracts that AT&T already offers. Cost-conscious customers will have to seek service elsewhere.

Value-conscious T-Mobile customers also have cause for concern with respect to handsets if AT&T repeats certain conduct seen in the 2004 Cingular/AT&T merger. AT&T then promised that customers could “continue using their existing cell phones and rate plans.”³⁹ The FCC imposed the condition in that merger requiring that Cingular (now AT&T) keep the AT&T TDMA analog network until at least February 2008.⁴⁰ What AT&T/Cingular did not indicate until July 2006 was that AT&T would be imposing a new charge of \$4.99 per month for TDMA/Analog customers. This new charge announcement included marketing verbiage recommending the “option” to upgrade to a handset and rate plan on AT&T’s new and improved GSM network.⁴¹ The privilege of accepting this “option” however came at a price of an \$18.00 transfer fee, purchase of a new handset, and a new two-year service contract. Of course, customers could “opt” to stay with their contracts on a degraded network to avoid early termination fees, if they were not satisfied with service quality or promises made.

T-Mobile users in rural areas are most likely to have handsets that are not compatible with LTE, AWS, or 700MHz services. As TURN points out in its opening comments:

³⁸ See TURN’s Opening Comments, p. 4.

³⁹ See Letter from Consumer Watchdog to FCC and Commissioner Sandoval (Aug. 9, 2011), p. 4, citing Second Amended Consolidated Complaint and Demand for Jury Trial at ¶ 32, *Coneff v. AT&T Corp.* No. 06-944 (W.D. Wash. 2006). Found at http://www.consumerwatchdog.org/resources/cwd_att_merger_letter_final.pdf.

⁴⁰ *In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Dkt. 04-70 et al., *Memorandum Opinion and Order*, 19 FCC Rcd 21522, ¶ 179 (rel. Oct. 26, 2004); see also, July 2006 Bill Insert for Cingular and AT&T Customers.

⁴¹ See July 2006 Bill Insert for Cingular and AT&T Customers.

LTE is not backward compatible with AT&T and T-Mobile's existing 3G GSM technologies. Thus, it may be in customer's best interest if LTE is not deployed in less congested areas. In this situation, customers would be forced to trade in handsets that are only compatible with 3G GSM and HPSA+, and purchase new, more expensive handsets that are compatible with LTE....⁴²

Rural areas and smaller communities served by T-Mobile have not had success securing backhaul at reasonable prices to roll out 3G services.⁴³ In short, many of T-Mobile's value-conscious customers who have handsets that are not compatible with AT&T's network will likely receive treatment like former AT&T TDMA subscribers with respect to declining quality, deferred maintenance of old technologies, higher rates, new two-year contracts, and custom made new charges designed to stimulate enrollment in LTE services with a higher ARPU. Indeed, DRA notes that AT&T has already stated that T-Mobile subscribers with 3G phones will have to replace their phones to keep their wireless broadband service.⁴⁴

C. Contrary to AT&T's Assertions, MetroPCS and Leap Are of Limited Competitive Value.

AT&T claims that mavericks such as MetroPCS and Leap can "quickly replace the diminished market role T-Mobile USA plays today..."⁴⁵ However, there are several reasons why these companies are not able to step into the shoes and fill the void left by T-Mobile's absence.

DRA initially notes that AT&T appears to take contradictory positions on the competitive value of lower-priced providers such as MetroPCS and Leap (as well as T-Mobile). On the one hand, AT&T takes great pains to paint T-Mobile's lower priced

⁴² TURN Opening Comments, p. 21, citing Roycroft Decl., ¶¶ 173-174.

⁴³ TURN Opening Comments, p. 14; see also May 6, 2010 Letter from Kathleen O'Brien Ham, Vice President T-Mobile, to Marlene H. Dortch, FCC, Re Ex Parte Communication: *Special Access Rates for Price Cap Local Exchange Carriers* WC Dkt. No. 05-25.

⁴⁴ Peter Svensson, *AT&T: T-Mobile 3G phones will need to be replaced*, Associated Press (Mar. 21, 2011), available at <http://finance.yahoo.com/news/ATT-T-Mobile-3G-phones-will-apf-862423457.html>.

⁴⁵ Cingular Wireless/T-Mobile Opening Comments, at p. 6.

services as “complementary” to and not competitive with AT&T’s offerings.⁴⁶ As noted above, AT&T claims that T-Mobile does not exert strong competitive pressure on AT&T in California or elsewhere, and the two brands serve substantially different groups of subscribers.⁴⁷ Because of these differences in the plans they offer and types of subscribers they market to, AT&T claims it does not view T-Mobile as a close competitor, let alone as a major competitive threat.⁴⁸ If that is true, then carriers such as MetroPCS and Leap should also not be viewed as competitive threats to AT&T, for AT&T itself says that MetroPCS, Leap and others target the same value-conscious consumers as T-Mobile, and even tend to offer lower prices than T-Mobile for value-oriented services.⁴⁹ Yet, AT&T strives to portray these other carriers, including MetroPCS and Leap, as their competitors in order to show that they still will face “intense competition” after the merger.⁵⁰ AT&T cannot have it both ways. Either providers that offer lower-priced plans and market to value-conscious consumers are “fierce competitors” with AT&T or they are not.

1. Pre-Paid and Post-Paid Are Not Perfect Substitutes For Each Other.

Nonetheless, AT&T argues that pre-paid carriers such as MetroPCS and Leap are full-fledged competitors because they now offer smartphones and “all you can eat” services.⁵¹ As DRA touched upon in its opening brief on market definitions, pre-paid offerings of carriers such as MetroPCS and Leap are not really substitutes for T-Mobile’s post-paid offerings and are of limited competitive value in evaluating what choices consumers have in the wireless market.⁵² This is because there are distinctions between

⁴⁶ DRA agrees with Greenlining that T-Mobile operates in both the high ARPU and value-conscious market. See Greenlining’s Opening Comments, pp. 2-3.

⁴⁷ *Id.*, p. 38, *citing* Christopher FCC Decl. ¶ 27; Carlton FCC Decl. ¶ 149.

⁴⁸ *Id.*

⁴⁹ *Id.*, p. 39.

⁵⁰ *Id.*, p. 5.

⁵¹ Cingular Wireless/T-Mobile Opening Brief on Market Definitions, pp.13-14 (Aug. 5, 2011).

⁵² DRA Opening Brief on Market Definitions, pp. 6, 9-10 (Aug. 5, 2011).

pre-paid vs. post-paid plans and smart phones vs. traditional cell phones, which essentially constitute subcategories in *each* relevant product market, rather than the same all-inclusive relevant product market as AT&T suggests.⁵³ Consumers may choose pre-paid services for reasons other than price-sensitivity, such as not wanting to be locked into a long-term contract, or other demographic reasons such as lack of a good credit rating or stable income source.

Likewise, AT&T argues that post-paid and pre-paid providers compete vigorously as evidenced by the rate consumers are switching to non-contract carriers.⁵⁴ Again, though, this behavior could be attributed to many things, not the least of which may be the poor economy and high unemployment. Any migration from post-paid to pre-paid markets is very likely due in good part to cost cutting by financially stressed consumers during an extended economic downturn and period of high unemployment, rather than meaningful “competition.”

2. Small Regional Carriers Are Not Even In a Position to Compete with AT&T.

AT&T’s claims that small regional carriers such as MetroPCS and Leap are competitors are further contradicted by market share data. Currently, AT&T accounts for 32% of all post-paid subscribers nationally, Verizon accounts for 39%, Sprint accounts for 15%, and T-Mobile accounts for 11%. AT&T overstates the extent of competition from providers such as Leap and MetroPCS as the remaining small, regional wireless carriers serve less than 3% of all post-paid subscribers.⁵⁵ These small carriers, such as MetroPCS and Leap, do not have the market power to give them the ability to compete with AT&T, and cannot possibly be a competitive threat to AT&T.

On the contrary, the merger would hurt these small carriers, as AT&T’s proposed acquisition would cause even greater concentration in the post-paid wireless market. Post-merger, AT&T would control 43% of all post-paid subscribers nationwide, and

⁵³ Cingular Wireless/T-Mobile Opening Brief on Market Definitions, pp. 8-16.

⁵⁴ Cingular Wireless/T-Mobile Opening Brief on Market Definitions, p. 12.

⁵⁵ See Sprint’s Petition to Deny filed with the FCC (May 31, 2011), p.11 and Table 4 in Attachment A.

Verizon and AT&T collectively would control 82% of the subscribers in the post-paid market.⁵⁶ The small, regional carriers' share of post-paid market would be reduced even further post merger. They would be effectively driven out of the post-paid market by the AT&T and Verizon duopoly. This demonstrates that the Commission must conduct a separate review of the merger's effect on the post-paid market, meaning that the post-paid market is a distinct market separate from pre-paid.

3. Regional Carriers Do Not Provide Nationwide Coverage at Competitive Rates.

In its response to the August 11, 2011, ALJ Ruling, AT&T attempts to dismiss claims that Leap and MetroPCS are not full-fledged competitors because unlike Sprint, Verizon, AT&T and T-Mobile, they do not have their own nation-wide facilities-based networks on which to provide nationwide coverage.⁵⁷ As discussed above, carriers that lack nationwide infrastructure are at the mercy of dominant ILEC carriers such as AT&T and Verizon when it comes to key inputs such as backhaul and roaming. Local or regional carriers such as Leap and MetroPCS must "roam" on the network of another carrier in order to provide service to customers travelling outside that company's local or regional service area, making their "national" plans more expensive than they first appear. AT&T's recent claim that carriers such as MetroPCS have moved to flat-rate nationwide coverage models does not contradict this fact, as even AT&T acknowledges that customers may incur voice roaming charges of \$0.19/min plus taxes and fees outside these so-called "extended" coverage areas.⁵⁸ The fact is smaller regional carriers are at the mercy of larger market providers such as AT&T when it comes to roaming. For reasons DRA explains above, problems associated with roaming are even more pronounced in the data roaming market.

⁵⁶ *Id.*

⁵⁷ Cingular Wireless/T-Mobile's Response to August 11, 2011 ALJ Ruling Requesting Additional Information, p. 11 (Aug. 22, 2011).

⁵⁸ *Id.*, p. 11 n. 22.

AT&T also neglects to address the costs required to purchase the valuable and finite resource of spectrum. AT&T asserts that T-Mobile faces obstacles to obtaining billions of dollars in capital needed to acquire new spectrum.⁵⁹ If T-Mobile is facing problems obtaining spectrum, how are smaller regional carriers supposed to step in and fill the gap?

4. Local and Regional Carriers Are Not Available Choices for All Consumers in the State.

Finally, contrary to AT&T's attempt to portray a robust competitive market in California,⁶⁰ regional carriers are not available in all areas of the state, and do not present a real choice in the wireless market for many consumers. MetroPCS for example, does not hold spectrum in Fresno, Madera, San Diego, or Tulare counties.⁶¹ Cricket only holds spectrum in 13 mostly rural counties in California, including Alpine, Del Norte, Fresno, King, Madera, Mariposa, Merced, Mono, San Benito, San Diego, Stanislaus, Tulare, and Tuolumne.⁶² Customers located in urban areas will likely not find Cricket to be a viable alternative. Given that consumers generally choose among providers in areas where they live, work, and travel on a regular basis, a provider in one corner of the state may have no relevance to a consumer living in the opposite corner.

Ultimately, the local competitive offerings of the smaller carriers that AT&T refers to are not substitutes for the national product options of AT&T, Verizon and Sprint. Those local competitors are merely niche players and are viable options primarily for lower income customers and in limited geographic areas, including those without credit, transients, and students.

⁵⁹ Cingular Wireless/T-Mobile Opening Comments, p. 15.

⁶⁰ *Id.*, pp. 5-6.

⁶¹ AT&T Response to OII Data Request DR 7, Bates Stamped 4970; *see also* Roycroft Decl., p. 43.

⁶² AT&T Response to OII Data Request DR 7, Bates Stamped 4970; Roycroft Decl., pp. 43-44.

D. AT&T Fails to Present Any Evidence Rebutting the Fact That Market Concentration is Far Greater in California than Nationwide and Will Likely Lead to Price Increases.

As DRA discussed in its opening brief on market definitions, the evidence in this record shows that following the merger, market concentration in local regions will dramatically increase throughout California.⁶³ A majority of the metropolitan areas in California will suffer increases to their relative Herfindahl-Hirschman Index (HHI) numbers at levels three and four times that considered significant under current merger guidelines, including San Francisco, Sacramento, San Diego, Bakersfield, Fresno and Los Angeles.⁶⁴ According to AT&T's own data, *every single cellular market area (CMA) in California* will push post-merger HHIs levels well past the threshold for highly concentrated markets, with HHI increases for most CMAs two to four times the minimum considered by the DOJ to raise significant competitive concerns.⁶⁵

The local concentrations represented by the high HHI levels and huge HHI increases in the specified areas within California are critical measures for the Commission to consider during its review of the merger, as wireless consumers in those highly concentrated areas would likely experience negative effects due to enhancement of market power, including increased prices. AT&T chooses to ignore the significance of the HHI increases, and instead claims that this transaction will not create incentives to raise prices because it will result in “greater output” and “lower prices” as it will enable AT&T to meet “otherwise intractable capacity constraints.”⁶⁶ AT&T further claims that this transaction could not create anticompetitive effects because T-Mobile is “not a close substitute” for AT&T.⁶⁷ However, as DRA discusses below, AT&T's alleged capacity

⁶³ DRA Opening Brief on Market Definitions, pp. 14-15 (Aug. 5, 2011).

⁶⁴ Roycroft Decl., p. 45.

⁶⁵ AT&T Response to Staff DR 2, Bates Stamped ATTITMCA000534.

⁶⁶ Cingular Wireless/T-Mobile Opening Comments, p. 36; *see also* Cingular Wireless/T-Mobile's Response to the August 11, 2011 ALJ Ruling Requesting Additional Information, p.12 (filed Aug. 22, 2011).

⁶⁷ *Id.*

constraints are not “otherwise intractable” and are of AT&T’s own making. Moreover, as discussed above, AT&T’s claim that AT&T and T-Mobile are not “close competitors” is contradicted by their own testimony. In short, AT&T fails to overcome the presumption that its increased market concentration will result in harmful effects, including price increases.

E. AT&T Provides No Evidence That This Merger Will Create Jobs and Benefit the California Economy.

While AT&T makes unsupported claims that this merger transaction will create jobs,⁶⁸ history and industry experience tell us otherwise. At a time when California is struggling with a 12% unemployment rate,⁶⁹ the Commission should not condone a transaction which is likely to eliminate jobs. The Commission has a statutory obligation to ensure that the proposed merger is beneficial to state and local economies and will not adversely affect employees of either merging entity.⁷⁰ DRA contends that, if AT&T and T-Mobile’s application is granted, the merged entity will purge a substantial number of California jobs as a part of cost cutting measures. In its response to staff’s inquiry about positions that will be eliminated in California, AT&T answers “AT&T’s goal is to create a workforce best positioned to compete in today’s global and competitive technology environment.”⁷¹ In business parlance, this means streamlining and layoffs. In its opening comments, Sprint states that “[i]n California alone, an estimated 3,669 T-Mobile jobs are in jeopardy as a direct result of AT&T’s takeover. In addition, the merger would also have a significant indirect impact on other businesses with ties to the wireless industry.”⁷²

This figure should not come as a surprise to the Commission: in recent years the wireless industry has substantially reduced its workforce by “synergizing” in order to cut

⁶⁸ *Id.*, p. 28.

⁶⁹ See Bureau of Labor Statistics, Seasonally Adjusted Unemployment Rates as of July, 2011 at <http://www.bls.gov/lau/>.

⁷⁰ Cal. Pub. Util. Code §§ 854(c)(4) and (6).

⁷¹ AT&T Response to Staff Data Request 2, DR No. 7(b) (May 17, 2011).

⁷² Sprint Opening Comments, p. 26.

costs. On July 19, 2011, Public Knowledge submitted a letter to the FCC that noted the following:

As reported by the Wall Street Journal, Labor Department figures show that since 2006, the number of wireless industry workers has shrunk by about 20%. [Cite Omitted] Industry executives cite ‘efficiencies’ as one of the primary reasons they’ve been able to slash so many jobs. But they neglect to mention that a major source of these ‘efficiencies’ has been the elimination of jobs through mergers. Since 2006, the industry has contracted significantly as AT&T merged with Cingular and Verizon merged with AllTel, along with numerous smaller mergers. There is every reason to suppose that this merger would follow a similar pattern and allow the merged company to increase its ‘efficiency’ by cutting jobs. T-Mobile’s workforce – one of the most diverse in the country – is likely to be hardest hit.⁷³

The alarming job reductions serve no public interest, and instead illustrate the harmful impacts this proposed merger will have on California. Though AT&T and T-Mobile have indicated that the proposed merger will create jobs and lead to long-term benefits for California, the facts brought forth paint a much darker picture. In its petition to deny the merger filed at the FCC, for example, Free Press states:

AT&T’s dismal performance in customer satisfaction surveys, especially when compared to T-Mobile’s and Sprint’s superior reviews, should call into question AT&T’s claims that this transaction benefits consumers. AT&T’s takeover of T-Mobile also threatens to destroy tens of thousands of jobs at a time when America is suffering an unprecedented lengthy period of high unemployment. Since 2002, during a period when it acquired firms with more than 180,000 employees, AT&T has seen a net job loss of well above 100,000 workers. This mirrors the pattern in the overall RBOC industry following years of consolidation,

⁷³ See Letter from Public Knowledge to Julius Genachowski, Eric Holder, and Katherine Sandoval, re: *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (August 9, 2011), p. 1 (citations omitted). Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021693956>.

where employment figures saw a net decline of nearly 40 percent.⁷⁴

As mentioned above, AT&T fails to state how many jobs will be lost due to redundancies and closure of call centers and billing operations. According to the declaration of Rick L. Moore, Senior Vice President of Corporate Development at AT&T, filed in support of the merger application at the FCC:

[T]here are substantial synergy opportunities in the area of customer support and general and administrative costs. These include cost savings that will result from combining and optimizing customer support functions, including call center and billing operation . . . There will also be cost savings from removing redundancy in the corporate and overhead functions. [AT&T] estimate[s] the NPV for this category of synergies is also in excess of \$10 billion.⁷⁵

Under pressure to realize \$39 billion in efficiencies and given the job-reducing trends in the wireless industry, AT&T will surely slash jobs in the wake of this merger. The Commission should not find that this transaction will benefit the California economy or the employees of the merging entities.

F. AT&T Provides No Guarantee This Merger Will Benefit Rural Areas.

In its application before the FCC, AT&T indicated that as a result of the merger it will build out LTE service to areas where 97% of the U.S. (98% in California) population resides.⁷⁶ AT&T reiterates those claims in its opening comments and in its comments

⁷⁴ Petition to Deny of Free Press, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (FCC April 31, 2011), p. 45 (citations omitted). Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675955>.

⁷⁵ See Declaration of Rick L. Moore, ¶ 37, in support of *Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (FCC April 21, 2011). Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240425>.

⁷⁶ AT&T Application, WT Dkt. No. 11-65 (April 21, 2011), p. 54. See also, Letter from AT&T's J. David Tate to John M. Leutzka to Director, Communications Division California Public Utilities Commission (May 3, 2011).

filed on August 22, 2011.⁷⁷ However, DRA questions AT&T's commitment to roll out LTE to rural areas, as T-Mobile's network does not extend into rural areas to the same extent as AT&T's network. In his declaration, TURN's expert Trevor Roycroft pointed out that T-Mobile has the same footprint as AT&T, so that "adding T-Mobile infrastructure to AT&T's network will not add much in the way of expanded coverage in rural areas."⁷⁸ And once again, AT&T fails to provide any specifics regarding its "commitment" to roll out LTE, particularly to rural areas. In its data responses to this question, AT&T only provides the Commission with the most general information of its plans to roll out LTE, and fails to provide any geographic specificity concerning projections for build-out.⁷⁹ Moreover, as explained further below, AT&T was already unwilling to spend the money necessary to deploy LTE coverage to serve rural areas, and it is highly unlikely that the proposed merger will change the costs and benefits of serving these areas.

G. Contrary to AT&T's Assertions, AT&T Is NOT an Innovative Firm and the Elimination of T-Mobile Will Reduce Innovation and Choice in the Wireless Market.

In its opening comments, AT&T claims that this merger will not reduce innovation, and is in fact necessary for AT&T to continue to play a "key role" in mobile broadband innovation.⁸⁰ However, gobbling up competitors is the *least* innovative way to expand and improve services. As TURN points out, AT&T and Bell Labs have a history of stifling competition and innovation.⁸¹ DRA posits that AT&T could better engage its resources by investing in its own infrastructure, stop hoarding spectrum, and use more efficient technologies in order to be innovative and provide better service.

⁷⁷ Cingular Wireless/T-Mobile Opening Comments, p. 27; Cingular Wireless/T-Mobile August 22, 2011 Response to ALJ Ruling Requesting Additional Information, p. 5.

⁷⁸ Trevor Roycroft's Final Declaration, p. 94, ¶ 175.

⁷⁹ AT&T Response to Staff Data Request 2, DR No. 5(a) and 5(c), (May 17, 2011), and Bates Stamped ATTITMCA000531-532.

⁸⁰ *Id.*, p. 30.

⁸¹ TURN's Opening Comments, pp. 10-12.

By contrast, T-Mobile is one of the most innovative firms in the wireless market. For example, T-Mobile was the first carrier to offer the the Android operating system.⁸² T-Mobile has also been a driving force in wireless data services, smartphone technology and WiFi hotspot deployment and integration.⁸³ In 2002, T-Mobile provided the first Blackberry phone and was the first carrier to offer integrated voice and email.⁸⁴ T-Mobile was also an early supporter of the commercial Wi-Fi hot spot, offering service in major airports and Borders Bookstores in 2002,⁸⁵ and according to Free Press “T-Mobile also upgraded capacity at its towers and deployed the more robust HSPA+ cellular standard long before AT&T began its upgrades to the ‘3.5G’ technology.”⁸⁶

Furthermore, AT&T would likely remove many popular handset offerings and reduce the total number of handsets available to customers.⁸⁷ As Free Press noted in its opening comments, “[c]urrently, AT&T’s product inventory consists of 85 handsets while T-Mobile offers 60, with an overlap of just 13 devices. AT&T will likely remove many handset offerings popular among T-Mobile, and in the future, AT&T would be less likely to bring innovative handsets to market.”⁸⁸ AT&T’s current product inventory consists of 85 handsets while T-Mobile offers 60, with an overlap of just 13 devices.⁸⁹ The removal of popular handsets and certain popular price plans like T-Mobile’s “Even More Plus” would result in substantial harm for consumers as it would limit their choices

⁸² Free Press Opening Comments, p. 15, *citing* Ryan Kim, *Google, T-Mobile introduce first Android phone*, San Francisco Chronicle (Sept. 24, 2008).

⁸³ See e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, WT Dkt. No. 10-133, *Fifteenth Report* (rel. June 27, 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf.

⁸⁴ Roycroft Decl., p. 66.

⁸⁵ *Id.*

⁸⁶ Letter from Freepress to the US Senate regarding the ATT and T-Mobile merger (May 10, 2011), available at http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf.

⁸⁷ Free Press Opening Comments, p. 16 (filed July 6, 2011) *citing* Sascha Segan, *My Letter to the FCC About AT&T-Mobile: Time to Submit Yours*, PCMag.com (May 3, 2011).

⁸⁸ *Id.* p. 16.

⁸⁹ *Id.*

in the wireless market. With T-Mobile eliminated and an innovator gone in the wireless market, AT&T would have fewer incentives to innovate and improve on products (in both technologies and prices).

III. AT&T's Claim That This Merger Will Allow It to Serve Customers Better Is Disingenuous Because It Does Not Need Additional Spectrum

A. AT&T's Alleged Capacity Constraints Are of Its Own Making.

In its opening comments, AT&T claims that it confronts significant spectrum and capacity constraints and that this transaction will “create immense new capacity that will produce enormous benefits to consumers.”²⁰ As a primary matter, DRA disagrees with AT&T's characterization of its spectrum and capacity problems. 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 holdings in California than almost every other carrier, including Verizon, Sprint/Nextel, T-Mobile, US Cellar, MetroPCS, or Cricket.²¹ Combining AT&T and T-Mobile's spectrum holdings would increase AT&T's statewide spectrum by about 62%.²² However, AT&T also states that it does not use either its current 700 MHz spectrum holding or its AWS spectrum in California.²³ This accounts for 30% to 40% of all AT&T's spectrum holdings in most major markets in California.²⁴ In addition to stockpiling its existing 700 MHz and AWS spectrum holdings, AT&T is set to acquire additional 700 MHz from Qualcomm.

Any capacity limitations AT&T is currently facing is of its own doing. Certainly, AT&T could elect to utilize unused spectrum if it decided to. The fact that AT&T has *elected* not to utilize its spectrum to increase capacity and technology efficiencies is not

²⁰ Cingular Wireless/T-Mobile Opening Comments, pp. 1, 11-21.

²¹ AT&T Response to OII Data Request 7, Bates Stamped ATTITMCA004970.

²² See Roycroft Decl., p. 72.

²³ AT&T Response to Staff Data Request 2, DR No. 4(b).

²⁴ AT&T Response to Staff Data Request 2, DR No. 4(a), Bates Stamped ATTITMCA000529-530.

sufficient reason to seek merger authorization. Instead, DRA asserts that AT&T's mismanagement of its spectrum and technologies is precisely why the Commission should reject this merger.

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.²⁵ 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.²⁶ 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.

According to the Declaration of Trevor Roycroft, "[i]t is important to recognize that when AT&T pursues this approach [use the 700 MHz and AWS spectrum to roll out its LTE], it will be able to reduce capacity pressure on its PCS and 850 MHz spectrum, which it is using to provision the balance of its 2G and 3G GSM services."²⁷ Indeed, by exercising its capability to build out its unused spectrum, AT&T would reduce any capacity constraints it is currently facing and, perhaps, improve its already mediocre wireless service. Investing in these types of network management opportunities is much more advantageous to California and its wireless market. Further, DRA questions the true benefit of the allegedly "new spectrum" this merger will create when it will come at the expense of subsuming a 2G competitor and the elimination of lower-priced wireless plans.

B. AT&T's Alleged Capacity Constraints Are Due to its Lack of Investment in Its Own Network and its Focus on Buying Up Competitors.

Even if the Commission accepted AT&T's alleged capacity problems, they are not unique to AT&T and instead highlight AT&T's failure to be proactive. In its opening

²⁵ Cingular Wireless and T-Mobile USA's Opening Comments, p. 1.

²⁶ *Id.*

²⁷ Roycroft Decl., pp. 71-72.

comments, AT&T tries to portray itself as a leader in network investment.⁹⁸ However, contrary to AT&T's claims, it has sorely lagged behind other carriers in infrastructure investment.⁹⁹ In recent years, national carriers such as Sprint and Verizon have aggressively invested in wireless infrastructures to prepare for capacity shortage due to increasing demands for spectrum by smartphone users.

In contrast, AT&T has not taken any significant steps to address this issue. AT&T has had the opportunity to significantly invest in its wireless infrastructure but has chosen not to do so. As Free Press states, “[m]ore aggressive investment by AT&T in its wireless infrastructure and more rapid deployment of LTE could have put AT&T in the same position Verizon Wireless stands today: with a news powerful LTE network in many places in the United States that can already be used to take customers off of older networks.”¹⁰⁰ As discussed below, AT&T's failure to invest has resulted in backhaul capacity constraints which have led directly to its poor service quality. This proceeding's record, as well as the FCC's record, has made it clear that AT&T has demonstrated a history of underinvesting in its wireless infrastructure.¹⁰¹ Now, AT&T attempts to use its mismanagement practices in order to support its merger position.

A comparison with the wireless industry average network spending also shows that AT&T has lagged significantly. In Sprint's petition to deny the merger filed with the FCC, Sprint cites a UBS Investment Research report showing capital expenditure by wireless carriers per subscriber from 2007 to 2009. According to this research, AT&T made annual capital investments of \$66 per subscriber, while the weighted average for the rest of the industry was \$87 per subscriber.¹⁰² But for the fact that AT&T has been

⁹⁸ Cingular Wireless/T-Mobile Opening Comments, pp. 32-33.

⁹⁹ See, e.g., Sprint's Opening Comments, pp. 30-31; Sprint's Petition to Deny, pp.85-88 and Declaration of Charles River Association, pp. 99-100.

¹⁰⁰ Free Press Opening Comments, p. 49,

¹⁰¹ Petition to Deny of Free Press at 69-70, *In the Matter of Application of AT&T, Inc. and Deutsche Telekom AG to Transfer Control of Licenses and Authorizations Held by T-Mobile USA, INC. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (FCC April 31, 2011) (citations omitted). <http://fjallfoss.fcc.gov/ecfs/document/view?id7021675955>.

¹⁰² Sprint's Petition to Deny, Attachment A, Decl. of Charles River Association, p. 100, fn. 225.

lagging in network investment for the past several years, AT&T could have completed their LTE build-out for far less than the cost of acquiring T-Mobile.

DRA further agrees with other commenters that AT&T also makes disproportionately less investment on its wireless networks compared with its investments in wireline. Free Press notes, for example, that, “[AT&T] takes more than half of its operating income from wireless, but only directs about a third of its capital expenditures into wireless.”¹⁰³ AT&T’s poor service is directly linked to its failure to properly invest in wireless infrastructure. The Roycroft Declaration explains this problem as such:

AT&T’s well-documented service quality problems are not due to lack of spectrum, but lack of sufficient backhaul capacity and failure to deploy technology to use its spectrum efficiently. Prior to filing the transaction, AT&T had already announced plans to upgrade its network and improve its wireless service. The acquisition is not needed for those initiatives. The answer to AT&T’s network problem is greater investment.¹⁰⁴

The fact that AT&T has neglected investing in its own network is yet another reason why this merger fails to meet the standard for merger-specific benefits and should be rejected.

C. AT&T Does Not Need T-Mobile to Deploy LTE to 97% of the U.S. Population.

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.”¹⁰⁵ 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

¹⁰³ Free Press Opening Comments, p. 49 [citations omitted].

¹⁰⁴ TURN’s Opening Comments, p. 16, citing Roycroft Decl. ¶¶ 159-62, 187, 188.

¹⁰⁵ 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.

extending LTE coverage is not possible without the merger.¹⁰⁶ 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.¹⁰⁷ 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 one of its major competitors.¹⁰⁸ 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 do not serve the rural areas AT&T claims will benefit from this transaction.¹⁰⁹ 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 tenuous and speculative and cannot be taken seriously.

D. AT&T's Claims Concerning Alleged Merger Benefits Cannot Be Taken Seriously Because AT&T Has a History

¹⁰⁶ Letter from 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 (Aug. 8, 2011). 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. The letter is publicly available on the internet at <http://www.broadbandreports.com/r0/download/1678331~018ee90413e657e412818181a5d840ff/DOC.pdf>.

¹⁰⁷ *Id.*, p. 2.

¹⁰⁸ *Id.* 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.; *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 (June 10, 2011).

¹⁰⁹ *See, e.g.*, Joint Petition to Deny of Center for Media Justice, Consumers Union, et. al., p. 33, WT Dkt. No. 11-65, *In the Matter of Application of AT&T Inc. and Deutsche Telekom Inc. to transfer control of licenses and authorizations held by T-Mobile USA Inc. and its subsidiaries to AT&T Inc.* (FCC May 31, 2011).

of Broken Promises With Respect to Claimed Merger Benefits.

In prior telecommunications carrier merger proceedings before both the Commission and the FCC, AT&T and its predecessors 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.”¹¹⁰ 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.

For example, AT&T claims that consumers will benefit from fewer dropped calls, better service quality, and cost synergies.¹¹¹ AT&T also claims that this transaction will result in “lower prices relative to levels expected in the absence of the proposed transaction.”¹¹² In AT&T’s Public Interest Statement (PIS) filed with the FCC,¹¹³ the merger applicants claim the proposed transaction “will generate strong and diverse public interest benefits that would not occur but for this transaction,” including increased capacity, enhanced efficiency and “significantly improve(d) service quality.”¹¹⁴ The PIS makes theoretical claims that “the transaction will increase total industry output and thus produce lower prices.”¹¹⁵ It also asserts that the merger will enhance public safety because the carriers’ already existing emergency wireless mobile command units, used for mass outages, can draw on expanding “infrastructure and spectrum resources.”¹¹⁶ Despite these abstract promises, there are no specific goals, nor metrics to quantify

¹¹⁰ See Joint Application of SBC Communications Inc. and AT&T Corp., p. 30 in A.05-02-027 (filed Feb. 28, 2005).

¹¹¹ Cingular Wireless and T-Mobile’s Opening Comments, pp. 4, 22, 26, 27.

¹¹² Cingular Wireless and T-Mobile’s Opening Comments, p. 21, citing Carlton FCC Decl., ¶ 134.

¹¹³ Acquisition of T-Mobile USA, Inc. by AT&T Inc.: Description of Transaction, Public Interest Showing and Related Demonstrations, WT Dkt. No. 11-65 (FCC April 21, 2011) (AT&T PIS).

¹¹⁴ AT&T PIS, p. 18.

¹¹⁵ *Id.*, p. 18.

¹¹⁶ *Id.*, p. 64.

expected benefit claims, to say nothing of performance reporting or enforcement mechanisms. Alleged consumer benefits are stated only as generalities, with no commitments to solid, verifiable outcomes, and are so general as to be meaningless. There is absolutely no guarantee that consumers will receive better service quality or will realize any benefits from supposed cost synergies.

Given AT&T's track record with regard to such promises, DRA has no reason to believe that AT&T will follow through with its commitments, nor does DRA believe this Commission can enforce such promises. AT&T has a history of broken promises when it comes to alleged benefits that will result from its merger transactions. When AT&T Corp. and SBC Communications Inc. (SBC) applied for a merger here in 2005, the applicants put forward vague public interest claims similar to those made in this case, including claims that "service quality will be maintained or improved as a result of the merger."¹¹⁷ Although the Commission decision ultimately approving the application¹¹⁸ was short on specifics to assure consumer benefits, the original Proposed Decision in that case reminded us of AT&T's past failings at keeping its promises: "(i)n the SBC/Telesis merger, SBC provided certain assurances that service quality would be maintained or improved, although SBC's repair service subsequently deteriorated."¹¹⁹

Despite numerous pledges to "maintain or improve service quality", to this day, AT&T's service quality remains substandard. In the wake of both the 1997 SBC/Telesis merger and the 2005 SBC-AT&T merger, there has been a constant stream of problems associated with AT&T's service quality:

- 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.¹²⁰ Tens of thousands of person-hours were loaned from California while service quality in the state suffered.

¹¹⁷ See *Joint Application of SBC Communications Inc. and AT&T Corp. for authority to transfer control*, A.05-02-027, pp. 25, 30 (filed Feb. 28, 2005).

¹¹⁸ See D.05-11-028 (issued 11/18/05).

¹¹⁹ Proposed Decision: *Opinion Approving Application to Transfer Control*, A.05-02-027 (mailed 10/19/2005), at 173.

¹²⁰ See Reply Testimony of the Office of Ratepayer Advocates, in A.05-02-027 (August, 2005), p. 81,

- In 2001, 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's¹²¹ repair intervals failed to follow a Commission-ordered merger condition requiring that service quality be maintained.¹²²
- In 2008, DRA issued a consumer alert concerning AT&T's U-verse video service, which had been designed for the more lax Texas standards for providing public access, educational and government (PEG) channels, because it did not come up to California standards of PEG access.¹²³
- In its 2010 service quality reports filed with the CPUC, AT&T failed to meet out of service repair interval standards in all four quarters of 2010. "AT&T, Verizon and Frontier never attained the 90% standard, with ATT lagging ... with restoral rates in 2010 ranging from 33% to 54%."¹²⁴
- 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.¹²⁵ Correspondingly, it appears that high service quality 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.

citing SBC Response to DGP-QOS-Pacific-026-07, June 18, 2002.

¹²¹ Pacific Bell is the d/b/a used by Telesis, SBC, and sometimes AT&T to refer to the local ILEC.

¹²² D.01-12-021, *mimeo*, p. 1.

¹²³ DRA found these PEG channels, which should have had separately dedicated channels for easy access and for recording and later play-back, were all sequestered on one lower-tier channel with a menu required to access the different types of programming. *Available at* <http://www.dra.ca.gov/DRA/Telecom/hot/ATTs+U-verse+PEG.htm>.

¹²⁴ CPUC Communications Division, *Report on Telephone Carrier Service Quality for the Year 2010*, p. 3 (Mar. 2011) *available at* <ftp://ftp.cpuc.ca.gov/Telco/ServiceQualityReports/3-29-11%20Final%20CD%20Service%20Quality%20Report.doc>.

¹²⁵ *Informational Hearing In Los Angeles: Telephone Service Outages and Infrastructure Needs*, California State Senate Public Hearings, (Feb. 4, 2011), audio presentation of this hearing *available at* <http://seuc.senate.ca.gov/informationalhearings>.

These examples of unenforceable commitments from earlier mergers indicate that AT&T's California wireline customers have been left with no recourse while ever larger and less accountable carriers walk away from their promises.

There is no reason to suspect things will be any different as the same carrier gains increases in market concentration in the wireless market. AT&T's service quality fares no better on the wireless side. Both J.D. Powers¹²⁶ and Consumer Reports¹²⁷ give low marks to AT&T's service quality. In 2004, this Commission fined Cingular Wireless for its egregious practices towards its customers regarding the lack of information given to customers at the time of sale and its collection of ETFs and other penalties from consumers.¹²⁸ AT&T simply has not developed a track record that allows its promises regarding merger benefits, particularly improvements to service quality, to be credible. The Commission should not accept AT&T's vague and unenforceable promises to "maintain or improve" service quality, particularly when the service quality is sub-par in the first place, and should not find that this merger will provide any benefits to California consumers. The Commission should reject this merger. At the very least, AT&T's track record indicates the need for strong and enforceable standards and mitigations, including meaningful penalties for non-compliance, as part of any merger approval.

¹²⁶ *2011 Wireless Call Quality Performance Study*, J.D. Powers (2011), available 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/).

¹²⁷ *Contract Cell Phone Ratings*, Consumer Reports, Jan. 2011, available 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>.

¹²⁸ D.09-04-062.

IV. The Anti-Competitive Effects of This Merger Cannot Be Eliminated with Mitigation Measures

A. Greenling's Recommendation for a \$450 Million Digital Divide Fund the Latino Business Chamber, The Black Economic Council, and The National Asian American Coalition's Recommendation for a \$50 Million Technical Assistance Program Should Not Be Adopted.

In its comments, Greenlining urges the Commission to recommend to the FCC that it create a national fund devoted to bridging the Digital Divide.¹²⁹ The Latino Business Chamber, Black Economic Council and National Asian American Coalition (Joint Commenters) also filed joint comments supporting the creation of a \$50 million fund to develop a new technical assistance program for small businesses and promote job creation.¹³⁰

Greenlining agrees with DRA that this Commission should reject the proposed merger.¹³¹ If the merger is approved, California's communications markets will undergo substantial and significant changes in terms of market concentration, market power, and other areas which DRA has identified and discussed in these and other comments in this docket. While DRA, TURN, Greenlining, and other parties have proposed mitigation measures which should be adopted in the event this Commission approves the merger, and which should be recommended to the FCC, it is not possible to craft a set of mitigation measures which would fully offset or eliminate the many deleterious effects upon the public interest and upon competition which would flow from approval of the merger. Consequently, all of these parties agree that the merger should not be approved.¹³²

If the merger is nonetheless approved, DRA agrees with Greenlining that AT&T should provide both pre and post-merger reports on job losses, store closings, transition

¹²⁹ Greenlining's Opening Comments, pp. 36-27 (July 6, 2011).

¹³⁰ Joint Comments of Latino Business Chamber, Black Economic Council, and National Asian American Coalition in Response to August 11, 2011 ALJ Ruling, p. 10 (filed Aug. 22, 2011).

¹³¹ Greenlining's Opening Comments, p. 1.

¹³² *Id.*, see also, TURN's Opening Comments, p. 1.

efforts, churn rates, and customer satisfaction.¹³³ This recommendation could be incorporated into the reporting and service standards which DRA has recommended. Greenling also recommends that AT&T increase its purchases from WMDVBE (Women, Minority, Disabled Veteran Business Enterprise) entities from 18.8% to 20%.¹³⁴ DRA does not oppose this proposal. Greenlining additionally suggests that any store closings resulting from the merger should be concentrated on company owned stores rather than those operated by franchisees.¹³⁵ While DRA does not have a position regarding this recommendation at this time, DRA agrees that the idea may have merit and suggests that the Commission explore it.

However, DRA cannot support the Greenlining recommendation for a \$450 million dollar “Digital Divide Fund”, nor can it support Joint Commenter’s proposal to create a \$50 million dollar fund for assistance to small businesses.¹³⁶ These proposals have little to do with the identified harms of the merger, and do not directly benefit the customers of AT&T or T-Mobile. As a general matter, DRA believes that mitigation measures should have a clear and rational nexus with the harms that would result from approval of a proposed merger, and be directly tied to the customers which those harms would impact.

B. The Commission Should Revisit Wireless Lifeline.

DRA agrees with TURN that the Commission needs to revisit D.10-11-033 and its decision not to place permanent price caps on wireless LifeLine charges.¹³⁷ The Commission will be reviewing implementation issues for wireless LifeLine in D.10-11-033. At this point, there is a lack of information showing how the proposed merger will affect California low-income consumers and, as aforementioned, the merger will result in

¹³³ Greenlining Opening Comments, p.14.

¹³⁴ Greenlining Opening Comments, pp. 38-39; *see also* Greenlining’s Response to Aug. 11, 2011 Ruling Requesting Additional Information, p. 17.

¹³⁵ Greenling Opening Comments, p. 39; Greenlining’s Response to Aug. 11, 2011 ALJ Ruling, p. 18.

¹³⁶ Greenlining Opening Comments, pp. 36-37; Greenlining Response to Aug. 11 ALJ Ruling, p. 15; Joint Commenter’s Response to Aug. 11, 2011 ALJ Ruling, pp. 9-11.

¹³⁷ TURN’s Comments on August 11, 2011, ALJ Ruling, pp. 15-16 (filed Aug. 22, 2011).

loss of choice for value conscious consumers in the state. Therefore, the Commission should consider extending the current price caps in place for the LifeLine program to identify and rectify potential administrative problems for low-income consumers during the chaotic transition phase if the merger is approved by the FCC.¹³⁸ In addition, in D.10-11-033, the Commission has directed the CD to hold workshops on LifeLine Phase II implementation issues in regards to non-traditional carriers.¹³⁹ Considering the chaotic impact the proposed merger will have on the California LifeLine program, DRA urges the Commission to “fast track” the planned workshops in hopes of developing a healthy line of discussion on the topic with the public.¹⁴⁰

V. CONCLUSION

Rather than invest in its own network and focus on creating a better product for consumers, AT&T prefers to acquire new customers and expand its network by buying up and eliminating its competitors. The increased market concentration that will result from this merger will stifle competition, reduce choices and increase prices for consumers, and pose too many risks for the California economy in hard economic times. Furthermore, this merger is unnecessary to address the alleged “problems” asserted by AT&T and there is no guarantee that it will result in any of the benefits promised by the respondents. This merger is not in the public interest and the Commission should do everything in its power to stop it.

Respectfully submitted,

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¹³⁸ The LifeLine Price Caps are set to expire on January 1, 2013.

¹³⁹ D.10-11-033, Ordering Paragraph 46.

¹⁴⁰ In 2009, the Division of Ratepayer Advocates convened a LifeLine Wireless Forum in which numerous LifeLine Wireless issues were identified and published in a workshop report.

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