Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF

<u>THE FREE STATE FOUNDATION</u>[*]

These comments are submitted in response to the Commission's request for comments concerning its review of the transfer of control of licenses resulting from a proposed acquisition of T-Mobile (a subsidiary of Deutsche Telekom AG) by AT&T Inc. These comments also respond to petitions to deny previously submitted in this proceeding, particularly those insisting that the Commission block the proposed merger.[1]

I. Introduction and Summary

The advanced telecommunications and broadband information services market in which wireless operators compete is characterized by competition and dynamism. Through inter-modal or cross-platform competition, consumers now enjoy a growing variety of choices for voice, video, and data products and services. As shown in considerable detail in these comments, consumers of

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[1] *See*, *e.g.*, Petition to Deny of Center for Media Justice, et al. (CMJ), WT Docket No. 11-65 (May 31, 2011), at v-vi, 1, 51; Petition to Deny of Free Press, WT Docket No. 11-65 (May 31, 2011), at 3, 70; Petition to Deny of Public Knowledge and Future of Music Coalition ("Public Knowledge"), WT Docket No. 11-65 (May 31, 2011), at 4, 62; Petition to Deny of Sprint, WT Docket No. 11-65 (May 31, 2011), at i, 2, 130.

wireless services, in particular, enjoy a healthy choice of service options offered by competing wireless service operators and wireless handset manufacturers, wholly aside from choices of substitutable services offered by non-wireless providers. In recent years, the wireless marketplace has been characterized by heavy investment, rapid innovation, continuously changing consumer habits, and consistently declining prices, all typically indicators of a competitive market.

Consistent with the Free State Foundation's general practice, the purpose of these comments is not to specifically endorse the proposed AT&T/T-Mobile merger. Rather it is to discuss the context in which the FCC properly should evaluate the merger, or, for that matter, similar mergers. Most significantly, the consumer choice and dynamism that characterize the market should inform the Commission's analysis of the competitive effects and public interest benefits of the proposed merger. The competition that exists in the market, the general rule that mergers produce procompetitive or at least benign effects, and the economic efficiencies generally created by network expansion and capacity upgrades are all factors weighing in favor of the merger proposal.

With the incontrovertible growth in spectrum use necessary to accommodate exploding consumer demand for bandwidth-hungry wireless services, especially video, the Commission must take seriously the potential for the proposed merger to improve spectrum efficiency, increase output, and improve performance to the benefit of consumers. Cisco has just released its annual mobile Internet projections. Even if the projections turn out to be only "half-true," as the saying goes, they are absolutely startling. For example, Cisco projects that, by 2015, 1 million video minutes – the equivalent of 674 days – will traverse the Internet every second. Thus, in light of the goal of ubiquitous broadband availability at increasingly faster speeds and surging demand, the Commission must carefully consider the claimed public interest benefit of the merger's facilitation of more rapid and extensive LTE 4G deployment roll-out.

Moreover, the Commission's analysis should recognize the disciplining effects on wireless pricing and services provided by cross-platform competitors. Therefore, the agency should consider the relevant product and service markets in a way that takes account of the broader telecommunications and multi-platform broadband market. Because wireline, cable, and satellite providers offer voice, video and data services of their own that supply substitutes for wireless, the Commission should analyze the competitive effects of the merger with this cross-platform competition in mind.

Finally, we do not repeat here the concerns we have raised many times in prior merger proceedings and various writings regarding the Commission's merger review process.[2] However, it is no less imperative in this proceeding that the review process be conducted without undue delay, and that the Commission's consideration be guided by concerns for consumer welfare rather than competitor welfare. If the Commission should determine that its market analysis raises any anticompetitive concerns, it is crucial that the Commission adopt only conditions that are narrowly tailored to addressing such proven concerns. It must reject what inevitably will become a multitude of cattle calls for the imposition of extraneous and inappropriate conditions.

II. The Advanced Telecommunications and Broadband Information Services Marketplace That Includes Wireless Is Competitive and Dynamic

Today's competitive and dynamic market for advanced telecommunications and broadband information services provides the context in which this proposed merger should be analyzed. Over the last several years the wireless "ecosystem," in particular, shows all the telltale signs of dynamism, namely: robust competition, heavy investment, rapid innovation, continuously changing consumer habits, and consistently declining prices.

[2] *See, e.g.*, Comments of the Free State Foundation, In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 10-56 (June 21, 2010), available at: http://www.freestatefoundation.org/images/Comcast-NBCU_Intitial_Comments_-_Final_062110.pdf; Randolph J. May, "FCC Merger Review Reform: The Case for Regulatory Modesty," *FSF blog* (March 3, 2011), available at: http://freestatefoundation.blogspot.com/2011/03/fcc-merger-review-reform-case-for.html.

A. Consumers Have Meaningful Choice Among Wireless Service Providers

Consumers currently have a number of wireless service providers to choose from. According to the Commission's 2010 Wireless Competition Report ("Report"), "[a]pproximately 273 million people, or 95.8 percent of the total U.S. population, are served by three or more competitors offering mobile wireless service in the census blocks in which they live, and approximately 259 million people, or 90.9 percent of the U.S. population, live in census blocks served by four or more competitors."[3]

Contrary to the claims of several petitioners,[4] based on the Commission's observations from last year's Report, and employing a conservative estimate, post-merger, consumers would still have a significant choice of wireless service providers. Post-merger, the wireless market will include three national carriers – the merged entity, plus Verizon, and Sprint.[5] Consumers would also continue to have a choice from a handful of multi-metro regional providers such as MetroPCS, Leap (Cricket), and US Cellular – with recent entrants such as Clearwire also providing choices to consumers.[6] In addition, consumers would continue to have a choice from among a numerous small, regional providers such as Cincinnati Bell, Cellular South, and numerous others since "[t]here are over one hundred small facilities-based providers throughout the country that typically provide service in a single geographical area, many of them rural areas."[7]

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[3] Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services ("Report"), WT Docket No. 09-66 (May 20, 2010), at 38, para. 44, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf.
[4] *See, e.g.*, Petition to Deny of CMJ, at 9-14; Petition to Deny of Free Press at 21-31; Petition to Deny of Public Knowledge, at 20-33; Petition to Deny of Sprint at 8 *et seq*., 55 *et seq*.
[5] *See* Report, at 28-29, para. 27.
[6] *See* Report, at 29, para. 28; *id.*, at 49-50, paras. 69-71; *id.*, at 51-52, para. 73.
[7] Report, at 29, para. 29

B. Competing Wireless Service Providers Have Made Heavy Investments

Wireless service providers expand network coverage and improve capacity through investments that increase the scope and upgrade the performance of their networks. Heavy investment is a sign of a competitive and dynamic market. In the case of wireless services, the record of the past several years shows that wireless service providers have made significant investments in infrastructure. As the Commission's 2010 Report indicates, wireless service providers made capital expenditures totaling $240 billion between 1998 and 2008.[8] Heavy capital investment has continued over just the past few years. In 2009, for instance, wireless service providers' overall capital investments exceeded $ 20 billion.[9] And in 2010, wireless service providers' capital invested was approximately $25 billion.[10] Wireless service providers have likewise made significant advertising expenditures in recent years, totaling more than $3.3 billion in 2009 alone and over $3.6 billion in 2008.[11]

C. Rapid Innovation Characterizes Wireless Products and Services

Market dynamism is manifested by the growing variety of new functionalities offered by wireless service providers. Even the most basic wireless service plans, for instance, typically include unlimited or large-bucket text messaging. Thanks to technological breakthroughs, wireless services have undergone a revolution with the rise of broadband-enabled handsets. Consumers in the U.S. can choose among 630 different wireless devices. As the Commission's Report points out, "smartphones accounted for 44 percent of total handset sales in the third quarter of 2009, up from 27 percent in the second quarter of 2008," and "smartphones

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[8] Report, at 119, para. 209.
[9] CTIA, "Background on CTIA's Semi-Annual Wireless Industry Survey" (March 22, 2011), at 10, available at: http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf.
[10] "Background on CTIA's Semi-Annual Wireless Industry Survey," at 10.
[11] *NielsenWire*, "U.S. Ad Spend Falls Nine Percent in 2009, Nielsen Says" (February 24, 2010), available at: http://blog.nielsen.com/nielsenwire/consumer/u-s-ad-spend-falls-nine-percent-in-2009-nielsen-says/.

represented 23 percent of all U.S. handset sales in the fourth quarter of 2008, up from 12 percent in 2007."[12] Such devices now feature sophisticated operating systems, an abundance of wireless apps, and direct access to the Internet via wireless broadband. And an increasing number of consumers have adopted wireless services that do not include voice through the use of subscriptions accompanying the purchase of e-readers and smartpads, or through wireless broadband subscriptions through services such as Clearwire.[13]

D. Wireless Consumer Habits Are Undergoing Continuous Change

The dynamism of today's wireless market is also manifested by changing consumer habits with regard to wireless. Relevant again is the growing numbers of consumers adopting smartphones. At the end of 2010, there were over 78 million active smartphones in the U.S., a 57 percent increase from the year before.[14] And the number of text messages sent has skyrocketed. According to the Commission's Report: "[T]ext messaging volumes grew 177 percent from a total of 363 billion in 2007 to just over 1 trillion in 2008. In 2009, monthly text messaging traffic increased 92 percent from 385 billion messages during the first half of 2008 to 740.3 billion messages in the first half of 2009."[15] The Commission suggests that "[t]he trend of declining voice minutes may be due to substitution by mobile messaging services."[16]

Also, the Commission recognizes that "the number of adults who rely exclusively on mobile wireless for voice service has increased significantly in recent years."[17] A survey cited by the Commission in its Report indicates that in the first half of 2009, "22.7 percent of households, or more than one out of every five, were wireless-only, up from 17.5 percent in the first half of

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[12] Report, at 80, para. 137 (cites omitted).
[13] *See* Report, at 49-50, paras. 69-71.
[14] CTIA, Press Release: "CTIA-The Wireless Association® Announces Semi-Annual Survey Results" (March 22, 2011), available at: http://www.ctia.org/media/press/body.cfm/prid/2062.
[15] Report, at 105, para. 178.
[16] Report, at 103, para. 176.
[17] Report, at 179, para. 339.

2008, 13.6 percent in the first half of 2007, and 10.5 percent in the first half of 2006."[18] A more recent iteration of that same study indicates that those trends are continuing, with perhaps more than 25% of households having "cut the cord." In addition, a recent report by Cisco states that there are more than 2.6 million North American mobile-only Internet users, and it projects that number to climb to over 6.5 million in 2012 and to more than 14 million in 2013.[19]

E. Prices For Wireless Products and Services Are Continuously Declining

Importantly, competition, investment and innovation in today's dynamic market has brought about steady declines in prices for wireless services. The Commission's Report, for instance, observes that "there is ample evidence of a sharp decline in mobile wireless prices in the period since the launch of PCS service."[20] The Commission's numbers point to consistent decreases in wireless consumer revenue per minute for voice services, with revenues declining from $0.44 per minute in 1993 to $0.29 per minute in 1998 to $0.10 per minute in 2003 down to $0.05 per minute in December, 2008.[21] Unlimited and bucket plans for text messaging have similarly resulted in decreasing per message prices, with the Commission estimating that "the price per text message dropped to $0.011 in 2008, down from $0.025 in 2007 and $0.036 in 2006."[22] In addition, "average roaming revenue per minute has progressively declined over time, from just over 30 cents per minute in 1999 to between three and four cents per minute in recent years."[23]

Moreover, the steep declining price curve that has characterized wireless prices in the U.S. over the past 15 years compares favorably to international markets. According to the

[18] Report, at 179, para. 340.
[19] Cisco, "Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010-2015" (February 1, 2011), at pg. 10, Table 6, available at: http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf.
[20] Report, at 109, para. 185.
[21] *See* Report, at 112, 190 Table 19 (Average Revenue Per Minute).
[22] Report at 112-113, para. 192.
[23] Report, at 114, para. 199.

Commission's Report, consumers in Great Britain, Germany, and France, Japan and most other countries pay more, and only Hong Kong has lower rates.[24]

III. Competitive and Dynamic Market Conditions Should Inform the Commission's Analysis of the Proposed Merger

A. Compelling evidence should be required to justify regulatory interference with the merger

Competition in the advanced telecommunications and information services market should have important implications for the Commission's review of the proposed merger. In particular, the Commission's analysis should be calibrated by three critical factors.

First, when the Commission withholds its approval of a proposed merger or imposes conditions on that approval it means a government institution is substituting its own market judgment for private actors. In the context of the Commission's review, the Commission's substitution of its judgment for that of merging parties can be justified only if there are specifically identified harms demonstrated by compelling evidence. And, if there are any such specifically identified harms, the Commission must target narrowly any remedies designed to address them.

Second, as the Department of Justice's current Antitrust Division Chief has observed, "the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign."[25] Because a vast majority of mergers do have procompetitive or benign effects, any Commission finding that a particular proposed merger would lead to contrary results should be based on compelling evidence.

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[24] Report, at 195-196, para. 361, Table 40 (Mobile Market Performance in Selected Countries**).**

[25] Christine A. Varney, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.htm.

These considerations also mean that the Commission should reject arguments opposing or questioning proposed mergers that rely merely on static market share.[26] A resort to static market share is the wrong way to assess competitive conditions in the market. The D. C. Circuit has previously ruled that the Commission has acted arbitrarily and capriciously by disregarding agency precedents that assess markets using additional indicia such as potential competition.[27] For that matter, the Commission should reject empty "bigness is badness" rationales for interfering with a merger, particularly in light of the strongly procompetitive or benign nature of mergers.

As the Commission recognizes, mergers provide a way for wireless service providers to extend network coverage and improve capacity.[28] Over the past several years, the expansion of network coverage has been key to breaking down local and long distance calling distinctions, allowing today's consumers to obtain all of their desired voice services through a single subscription and a single bill. Expansion of network coverage has also led to the reduction of voice and (more recently) wireless data roaming, resulting in lower costs for consumers who are now less likely than ever to pay high roaming charges.[29]

The merger applicants plausibly contend the merger would improve spectrum efficiency and increase capacity, leading to fewer dropped calls and faster speeds. The proposed merger also has the potential to facilitate faster and wider deployment of LTE 4G services. This is particularly important given that wireless service providers face mobile data traffic demand

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[26] *See* petitions to deny cited in fn. 4, *infra*.
[27] *See, e.g., Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).
[28] *See, e.g.,* Report at 52, para. 75 ("Facilities-based providers have expanded their network coverage and capacity through mergers and acquisitions…In many instances, the entities that were combined had not previously competed in the same geographic market; as a result these transactions resulted in the expansion of the coverage of the newly combined entity").
[29] *See* Report at 114, para. 198 ("roaming as a percentage of overall traffic has decreased from 8.8 percent in 1999 to 5.5 percent in 2008, a nearly 40 percent relative decline").

growth of staggering proportions. As Cisco projects: "Global mobile data traffic will increase 26-fold between 2010 and 2015."[30]

Parties that have paid for spectrum licenses through auction, and which face ongoing competition, have strong incentives to maximize their usage of capacity to improve their operating efficiency and increase their output. The Commission should require a strong showing before disregarding the capacity-increasing plans of merging parties, while crediting arguments that the merging parties are either unwilling or unable to increase their capacity once the proposed merger is completed.[31] It should require a similarly strong showing for the Commission to disregard deployment plans of the merging parties in favor of contrary claims made by competitors.[32]

Third, where a proposed merger will take place within the context of a market characterized by intense, ongoing competition, the less likely it is that a proposed merger will undermine consumer welfare. The presence of a competitive alternatives makes it all the more essential for any Commission interference with the proposed merger to be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

B. The Dynamism of the Market Should Inform the Commission's Definitions of the Relevant Market and the Competitive Effects of the Merger Include Cross-Platform Impacts

A proper analysis of mergers involving wireless service providers should take seriously the dynamism of the advanced telecommunications and information services market. That dynamism should inform how the Commission defines the relevant market and services. It

[30] *See, e.g.*, Cisco, "Global Mobile Data Traffic Forecast Update, 2010-2015," at 2.
[31] See, e.g., Comments of CMJ, at 31-38; Comments of Free Press, at 39-42, 64-66, 68-70; Comments of Public Knowledge, at 49-60; Comments of Sprint, at
[32] *See, e.g.*, Comments of Sprint, at 118 *et seq*.

should also inform how the Commission defines the competitive effects of the proposed merger on the relevant market and services.

In its Wireless Report, the Commission states: "[W]e regularly assess whether intermodal sources of competition (*e.g.*, wireline, fixed wireless, and satellite communication services) can or will place competitive pressure on mobile wireless service providers."[33] Unfortunately, on prior occasions the Commission has downplayed the dynamism of the telecommunications and broadband market, adopting an unduly narrow view that artificially eliminates the competitive impact of rival platforms. For instance, in its Qwest-Phoenix MSA Order declining to grant regulatory forbearance relief from legacy wireline regulation, the Commission excluded from its analysis any competitive impact by wireless.[34] More recently, in its Section 706 Broadband Report, the Commission's conclusion that broadband is not being deployed in a timely and reasonable manner was based on an analysis that mistakenly excluded wireless.[35]

While we believe the wireless marketplace will remain effectively competitive if the merger is approved, taking the dynamism of today's market into account means the Commission's analysis should not be focused myopically on competing providers and services within a narrowly-confined wireless products and services market segment. Rather than define the relevant product and services markets strictly in terms of wireless, the Commission should consider inter-modal or cross-platform competition from wireline telecommunications, cable and satellite providers. Such companies provide an array of voice, video, and data services that in many instances, and in many respects, provide consumers with ready substitutes for wireless. The Commission must factor into its analysis the cross-platform competition that is present.

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[33] Report, at 25, para. 12.

[34] *See* Memorandum Opinion and Order, Petition of Qwest Corporation for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135 (June 22, 1010) at 33-34, paras. 50-59.

[35] *See* Seventh Broadband Progress Report and Order on Reconsideration ("706 Report"), GN Docket No. 10-159 (May 20, 2011), at 2, para. 1; *id.* at 16-17, para. 26; *id*. at 19-20, para. 33.

In a dynamic market with cross-platform competition, there may be circumstances where a merger might appear to have an anticompetitive impact on one market segment that is defined too narrowly, but that might have an overall benign or procompetitive impact when considered against the backdrop of ongoing cross-platform rivalry. By creating greater efficiencies that spur enhanced competition from cross-platform rivals, such mergers actually benefit the consumers who pick and choose between the products and services provided by competing platforms. Accordingly, it would be a mistake for the Commission to focus solely on the competitive effects of wireless mergers on wirelessly-delivered products and services without appropriately considering the broader broadband marketplace.

IV. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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