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The FCC Staff's Report Against the AT&T/T-Mobile Merger: A Critical Analysis

by

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On November 22, FCC Chairman Julius Genachowski proposed a draft order finding AT&T and T-Mobile failed to establish that their proposed merger was in the public interest, and designating the deal for a hearing before an administrative law judge. AT&T and T-Mobile then withdrew their merger applications at the FCC before any vote was taken on the draft order.[1] Despite the Federal Communications Commission's subsequent dismissal of the merger applications without prejudice,[2] the FCC released a staff analysis and findings that the AT&T/T-Mobile merger was not in the public interest and "would likely lead to a substantial lessening of competition in violation of the Clayton Act."[3]

The FCC's release of its staff's analysis and findings regarding the AT&T/T-Mobile merger has raised some questions about administrative and procedural impropriety.[4] Of equal concern, however, are the substantive problems besetting the FCC's staff report and what these problems say about the staff's mindset concerning competitive analysis.

We are well aware that, just as this paper was in the process of being published, AT&T and T-Mobile announced that they have abandoned their plans to merge in the face of the government's opposition. In our view, this does not diminish in any way the value of the paper as a constructive critique of the FCC's approach to considering the *competitive and overall public interest effects of the proposed merger. Indeed, with the spectrum crunch confronting the nation a stark reality, the public will not be well-served if the FCC continues to adhere to an overly-rigid static marketplace view.*

The staff report employs a static analysis ill-suited to today's dynamic wireless marketplace. Unfortunately, the staff puts primacy on market concentration indicators such as existing market share and spectrum holdings, all the while seemingly oblivious – seemingly deliberately oblivious – to market conditions and factors that might detract from its conclusions.

Despite T-Mobile's precarious state of finances and spectrum holdings, the staff implicitly assumes T-Mobile will successfully undertake nationwide 4G deployment. Along the way, the staff disregards the potential benefits of putting more spectrum to work with 4G. The report also discounts competition where it presently exists and dismisses potential competition in the market. It employs market definitions that are at times irrelevant or too narrow to reflect reliably the potential competitive impact of the AT&T/T-Mobile merger.

Overall, the staff report is a one-sided document. The report outright dismisses or significantly discounts every conceivable public benefit from AT&T/T-Mobile. And it readily and uncritically accepts nearly every alleged potential harm from the merger. As a result, the report appears almost completely devoid of even-handedness in its analysis and application of the FCC's public interest standard.

The main matter of concern of this particular paper is not whether AT&T/T-Mobile ultimately is in the public interest or whether it poses any potential harms, although that is, of course, an important matter. Rather, the paper's main purpose is to call attention to the way a proper analysis at least would have given more credit to the existence of certain competitive market conditions and dynamic market processes over simple snapshots of particular market outcomes at any given moment.

The staff report's failures to reflect the marketplace realities in considering the AT&T/T-Mobile merger are troublesome. It is important that the staff not bring its same mindset and predispositions to consideration of the recently-announced Verizon/SpectrumCo deal or other future proposed wireless transactions. Indeed, Verizon's proposed purchase of new spectrum licenses holds out the promise of substantial public benefits resulting from the significant expansion of 4G LTE services.

The FCC's analysis of the Verizon/SpectrumCo proposal, and other proposals, should focus on whether market conditions will continue to promote investment and disruptive changes that will bring about the next and successive generations of breakthroughs in wireless products and services. For if the FCC subjects Verizon/SpectrumCo or other transactions to the same rigidly static analysis and one-sided treatment present in the staff report concerning AT&T/T-Mobile, it would all but guarantee a negative result.

On prior occasions, we have criticized the FCC's assessment of competitive conditions in the advanced telecommunications market, including the wireless market. And, more recently, we have criticized aspects of the U.S. Department of Justice's wireless competition assessment.[5] The FCC's staff report repeats many of the outdated analytical assumptions embodied in recent FCC actions, and so in this paper we now offer a similar critical assessment of the staff report.

The Staff Report Overemphasizes Market Concentration Indicators

In the FCC's staff report, market concentration serves as the lens through which it views the wireless market and the proposed AT&T/T-Mobile merger. At the outset, the FCC's staff report posits that the combination of two nationwide wireless providers "would result in an increase in both subscriber and spectrum concentration that is unprecedented in scale," and that "elimination of a nationwide rival" means the loss of a disruptive competitor to "counteract[] the exercise of market power."[6]

Although the staff report acknowledges that "there is more to establishing likely competitive harms than measuring market and spectrum concentration,"[7] economist Hal Signer correctly points out that "[t]he Staff Report fails to explain, however, what *more* is needed to establish anticompetitive effects."[8] So despite its caveat, the staff report nonetheless treats static market share as the organizing principle of its analysis, asserting that "these [concentration] metrics shed light on the scope and scale of competition that would be eliminated by the proposed transaction."[9]

The staff report relies, in particular, on its own Herfindahl-Hirschman Index (HHI) estimates of Cellular Market Areas (CMAs).[10] It also relies on a spectrum screen that "examines the input market for spectrum that is suitable for the provision of retail mobile wireless services."[11] When the spectrum screen thresholds are exceeded, the FCC undertakes an analysis of how the proposed merger affects consumer welfare in each market where the threshold is exceeded.

Contending that AT&T/T-Mobile exceeds certain HHI thresholds in 99 of the top 100 CMAs and in 419 of 734 CMAs nationwide,[12] and that "the Commission's spectrum screen is triggered in an excess of 250 CMAs,"[13] the staff report treats the proposed deal as presumptively harmful to consumers.[14] The staff report's invocation of this presumption tips the scales decidedly against the deal in every – or nearly every – facet of its analysis of potential public interest benefits and harms arising from AT&T/T-Mobile.

The staff report's claims regarding the FCC spectrum screen are subject to compelling criticisms. As Larry Downes recently pointed out regarding the staff report's findings that the spectrum screen was exceeded in 274 CMAs:

> [I]n a footnote, the report concedes that the staff only reached these findings after first reducing the amount of spectrum that triggers the screen by 12.5 Mhz.--roughly 10 percent. That might not sound like a

> significant reduction, until you look at its affect. Of the 274 markets where the screen is triggered, 82 of them--almost a third--are included only if the new, lower total is applied.[15]

The staff report provides no reasoning for this lowering of the spectrum screen. And as Downes explains, "until now the agency has never lowered the estimate of total spectrum usable for mobile services, nor made any change without an explanation."[16] Nor does the staff report actually conduct any individualized market analyses for those 274 CMAs. The staff report's reliance on changing goalposts without explanation or individualized analysis undermines any support for its spectrum screen rationale.

The Staff Report Fails to Account for Dynamic Market Conditions and the 4G Wireless Future

It might be proper to make market concentration the primary analytical factor to consider where the market under examination is static. However, the advanced telecommunications market is dynamic. Over the last several years, in particular, wireless services have been characterized by rapid, disruptive innovation. Wireless services have dramatically shifted from being voice-centric to broadband-connected and data-centric. Wireless networks have gone from 2G to 3G and are now moving toward 4G, with tethering, WiFi, and an increasing variety of other connectivity alternatives being made available. Brick-sized phones are no longer to be found, with consumers now choosing from among a myriad of touch-screen, multimedia, web surfing smartphones run by specialized mobile operating systems and jam-packed with applications. Wireless consumers also enjoy a plethora of pricing options, including all-you-can-eat plans, bucket plans, and prepaid plans.

Scott Cleland's recent criticism of the staff report's failure to consider the competitive pressure of the Internet on wireless services puts a particularly sharp point on how the staff report's analysis is devoid of any serious recognition of the dynamic nature of today's wireless market:

> The most glaring omission of evidence, fact and context is the staff's total blind eye to the huge competitive substitution effect and downward price pressure of **free** Internet voice, texting, and video on all wireless providers. Incredibly, if one does an Adobe Acrobat word search of the FCC's 157-page staff analysis PDF, there is no mention of the following words: "Internet," "bandwidth," "wireless broadband," "WiFi," "WiMax," "Android," "Netflix," "iChat," "Facetime," "Google," "Apple," "Facebook," "Microsoft," or "Skype."[17]

Where industries, such as wireless, are technologically dynamic, they should be examined according to a dynamic market-minded outlook that takes stock of market conditions conducive to continuing investment and innovation. Instead of an outcome-based static market share analysis, a dynamic market analysis involves a forward-looking evaluation of the market's underlying competitive conditions and processes for delivering new generations of products and services.[18] For wireless, this means taking stock of market conditions related to ongoing migration of competing wireless networks to 4G standards, including investment in network infrastructure upgrades and the achievement of spectrum efficiencies. A proper analysis of today's wireless marketplace should include consideration of the prospects of continued heavy investment in wireless infrastructure as wireless providers begin migration to 4G networks.

Given their enhanced performance capabilities, 4G networks – such as LTE or WiMax – will undoubtedly serve as the transmission pathway for launching and diffusing the next generation of disruptive innovations in wireless products and services. As one analyst report explains, "[f]rom a technical standpoint, 4G promises three benefits over 3G: increased throughput, lower latency, and stronger security. One result is a reduced cost per megabit."[19] Thus, technological breakthroughs owing to 4G efficiencies might likely offer wireless consumers better choices for service at lower prices than regulation-enforced measures to reduce market concentration concerns among existing nationwide wireless providers.

This point concerning the primacy of competitive processes compared to snapshots of market outcomes is furthered by the example of one recent study of wireless in foreign countries that reveals no discernable difference in competitiveness between 4 and 3 providers:

> Empirical evidence shows that a higher number of nationwide operators does not necessarily mean lower prices or faster falling prices. Among the countries observed, prices fell the fastest with six operators competing against each other. The second fastest price and spend decline was with three operators. Voice spending fell less with four competitors and even slower with five operators.[20]

For that matter, a July 2011 study by Gerald R. Faulhaber, Robert W. Hahn, and Hal J. Singer finds that market concentration, by itself, has no impact on what customers pay.[21]

The Staff Report Fails to Take Seriously the Potential Costs and Benefits of T-Mobile Spectrum Being Repurposed for 4G Services

At the same time, any analysis fit for today's wireless marketplace should take seriously the precarious position of T-Mobile as a potential nationwide 4G wireless network provider. In the FCC's *Wireless Competition Report* T-Mobile is described as having "[n]o U.S.-specific plans" for 4G deployment.[22] And affidavits submitted by T-Mobile executives to the FCC also acknowledge that while the carrier is boosting the performance of its networks through HPSA+, "[d]ue to spectrum exhaustion, difficulty in aggressive re-farming of existing spectrum holdings and a lack of other viable spectrum options, T-Mobile USA has no clear path to an effective, economical deployment of LTE."[23]

Transactions that would put T-Mobile or its assets on track for delivery of 4G services therefore offer enormous potential benefits to consumers. At best, however, the staff report appears to take for granted that T-Mobile will achieve nationwide 4G network deployment. It admits that "LTE deployment is less certain but not impossible for T-Mobile,"[24] while otherwise largely ignoring the subject of 4G build out on T-Mobile's footprint. The staff report instead insists that AT&T really would have built out to 97% of its footprint instead of 80% even without the merger,[25] and dismisses the presence of any public interest benefit from wireless broadband deployment primarily on that basis.[26]

But there is no good reason to implicitly treat T-Mobile LTE as an inevitability, particularly where no explanation is offered as to how T-Mobile would overcome its purported cash shortage and spectrum capacity problems. Nor is there good reason to ignore the potential merger benefits arising from the repurposing of T-Mobile's spectrum to LTE.

And the staff's dismissal of potential benefits from the merger based on its "historical practice of footprint-wide technological upgrades" ignores the trends in surging wireless data traffic, spectrum capacity constraints, and the spectrum crunch that the FCC itself has recognized.[27] As the October 2010 staff technical paper stated, "the nation is running out of spectrum and will experience a spectrum deficit starting in 2013."[28] For wireless providers facing spectrum capacity shortages in the face of skyrocketing data-rich mobile wireless traffic, including high-definition video, efficiencies gained by adding and repurposing contiguous spectrum for 4G through joint ventures or mergers provide an important means of maintaining quality of service in accommodating the continuing increase of mobile wireless and mobile broadband usage.

The Staff Report Disregards the Constraining Effects of Existing Competitors

Characteristic of the staff report's one-sided competition analysis is its disregard of the competitive effects of existing market competitors.

The FCC's *Wireless Competition Report* contains a 2010 estimate that 99.2% of the population is served by two or more wireless voice providers, 97.2% is served by three or more providers, and 94.3% is served by four or more providers, and 89.6% is served by five or more providers.[29] Regarding wireless broadband coverage and competition, an estimate in the FCC's *Wireless Competition Report* indicates that 91.9% of the population is served by two or more wireless broadband service providers, 81.7% is served by three or more providers, and 67.8% is served by four or more providers.[30]

But the staff report quickly dismisses the relevance of regional (and local) wireless providers in its competitive analysis. It contends that wireless network coverage numbers published in the FCC's *Wireless Competition Report* likely overstate the extent of coverage, "should not be seen as a substitute for individual market analyses," and are no "proxy for the degree of actual competition that transpires in a local market."[31] In explaining away competition from regional and local wireless providers, the staff report states:

> We conclude that data cited by the Applicants [*i.e*., wireless coverage data from the FCC's *Fourteenth Wireless Competition Report*] on the mere presence of a provider in a geographic region poorly reflects the competitive significance of the firms in retail wireless service markets and in mobile telephony/broadband services markets. By contrast, the market shares that we use to compute measures of market concentration reasonably reflect each provider's competitive significance in retail wireless service markets and in mobile telephony/broadband service markets because smaller shares often reflect limited facilities or spectrum footprint, targeted service offerings, or brand recognition that could not be expanded in a timely or sufficient manner in response to an anticompetitive price increase.

Beyond noting its HHI estimates for CMAs, however, the staff fails to undertake any individual analysis of local markets. And nowhere does the staff report consider, for instance, whether a series of local or CMA-based divestitures or other conditions could be imposed to alleviate anticompetitive concerns. Asserting that national characteristics of the wireless market regarding service and pricing plans do not vary much by geographical region, the staff reports concludes: "we do not find it necessary to assess the competitive effects in retail wireless services individually in each local market to determine the likely consequences of the proposed transaction for competition."[32]

For the staff report's purposes, in other words, mere presence of actual competitors is not a proxy for the type of individualized local market analysis that the staff report avoids. But estimates of mere market concentration are a proxy – in this case creating a presumption of consumer harm that informs the staff report's nationwide market analysis as well as considerations of public interest benefits and harms from AT&T/T-Mobile. In addition, by the staff's way of thinking, the competitive impact of regional and local wireless providers can be dismissed because they have small shares of the market, only limited facilities and spectrum, offering niche services that aren't disruptive or substitutable for services offered by nationwide carriers.

But this approach appears at odds with the FCC's analysis of competitive conditions in its *Fourteenth Wireless Competition Report*, where it states that:

> Because mobile wireless consumers are generally not willing to search for competitive alternatives that do not serve their local areas, the relevant geographic area is a local area. Accordingly, assessing competition in mobile wireless services at the national level could overstate the level of competition and industry concentration because the total number of providers in the entire United States exceeds the number of providers that compete with each other in any single region in which a consumer searches for a wireless provider.[33]

In fact, the regional and local wireless competitors summarily dismissed by the staff analysis appear to fit the report's general description of market definitions: "When one product is a reasonable substitute for the other in the eyes of buyers, we include it in the same relevant product market even if the products themselves, or the locations which they are sold are not identical."[34] Wireless services provided by regional and local wireless competitors similarly fall under the antitrust standards cited by the staff report for defining markets, to wit: "all products 'reasonably interchangeable by consumers for the same purpose.'"[35]

And it is certainly worth mentioning that an end-user perspective would give at least some consideration to the presence of the prepaid wireless reseller market that has attracted growing numbers of customers. The FCC acknowledges in its *Wireless Competition Report* that its HHI metrics "may not fully reflect the effect of [prepaid wireless resellers] on competition and consumer welfare."[36] Those effects are similarly absent from staff's HHI-emphasizing analysis.

The Staff Report Dismisses Potential Competition

In addition to dismissing the presence of competitors, the staff report's disregard of existing regional and local competitors involves rejection of potential competition that should be part of any assessment of dynamic markets. The report contends that "a regional provider cannot practically replace the competition lost from the departure of T-Mobile, and thus counteract or deter the exercise of post-merger market power through repositioning or expansion beyond its footprint."[37]

But the staff's reasoning as to why end users would reject "competitive alternatives" that "serve their local areas" is less than convincing. Higher retail prices being charged by nationwide wireless providers can present regional and local providers with an opportunity to undercut their larger competitors on price options. In a November ruling in *Sprint v. AT&T*, U.S. District Judge Ellen Huvelle quoted Judge Richard Posner's common sense observation about businesses in the marketplace: "You *want* your competitors to charge high prices."[38]

Technologically dynamic markets are often characterized by the "innovator's dilemma," whereby competitors offering lower-end innovations rather than high-end services gain critical market share, and in some instances can even eventually surpass market leaders. (The aforementioned growth in the prepaid wireless retail market is but one manifestation of lower-end adoption along these lines.) Although the staff report dismisses the ability of smaller wireless providers to replace an acquired T-Mobile and perform a disruptive role, one should recall, for instance, the FCC's *Wireless Competition Report*'s observation that whereas T-Mobile is described as having "[n]o U.S.-specific plans,"[39] MetroPCS "launched LTE in 13 cities" as of January 2011.[40]

Also insightful is the FCC's observation in its *Fourteenth Wireless Competition Report* regarding mergers and acquisitions made since 2005 by the four nationwide wireless providers to expand service coverage: "[i]n 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."[41] Recent experience shows that mergers in the industry, while causing alarm to analysts focused on HHI numbers, can actually result in more consumers having more choices among nationwide providers. And the potential for future mergers or joint ventures between regional or local providers – or cable companies or DBS providers, for that matter – shouldn't be dismissed.

An evenhanded analysis should, as a matter of principle, take seriously both potential competition in the market as well as potential *anti*competition. But the staff report's emphatic rejection of potential competition from regional and local wireless providers premised on the assumptions described above stands in stark contrast to its repeated invocation of concerns over potential anticompetitive conduct arising from AT&T/T-Mobile. This results in a lopsided competition analysis.

The Staff Report Relies on Irrelevant and Narrow Market Definitions

The sections from the staff report already quoted suggest a strained and seemingly arbitrary use of market definitions for its analysis. On the one hand, the staff report "recognize[s] that most retail consumers purchase wireless service locally."[42] On the other hand, however, the staff report's emphasizes the effects of nationwide provider conduct.[43] Combined with its assertion that "to provide service comparable to a nationwide provider, and thus to be able to compete effectively and prevent competitive harm, a regionally provider would most importantly need to obtain a nationwide spectrum footprint and the resources to build it out,"[44] the staff report all but redefines and substantially narrows the relevant market to mean locally-offered retail wireless service by a nationwide provider. In particular, the staff report appears to adopt an even tighter set of market definitions with its assertion that "the porting data suggests that few customers find their products to be *the closest* substitutes for those offered by the nationwide providers."[45]

In a similar vein, the staff rejects the competitiveness of regional providers offering nationwide service through roaming arrangements. It insists that "roaming arrangements do not allow these providers to replicate the competitive position of a nationwide facilities-based provider,"[46] because roaming agreements are costly and result in inconsistent service. The staff report even states it is "not persuaded" by the argument that because regional providers offering customers "nationwide coverage through roaming, without charging their customers roaming fees, that roaming enables they [sic] a cost-effective means of competing with nationwide providers."[47]

Also, at more than one point in its analysis of "other potential harms that relate to the cost of certain inputs that providers need in order to compete,"[48] the staff report seemingly shrinks the scope of its market definitions to certain GSM wireless services. For instance, the staff report warns that completion of the merger would leave AT&T as the only nationwide provider "of GSM and HSPA-based roaming services."[49]

However, the FCC has already established regulations for data roaming that require "all mobile wireless carriers to provide roaming for common carrier services to other carriers on a just, reasonable, and non-discriminatory basis."[50] To put the matter into further perspective, U.S. District Court Judge Ellen Huvelle's November ruling in *Sprint v. AT&T* dismissed Sprint's antitrust claims relating to GSM data roaming, since nearly every wireless network in the U.S. save for networks operated by AT&T and T-Mobile have operated on CDMA standards and not GSM.[51] Judge Huvelle similarly dismissed Cellular South's (now C-Spire) GSM-based roaming claims save for the approximately three percent of Cellular South's subscribers who use GSM.[52]

The more significant shortcoming to the staff's analysis in this regard is its special solicitude for a wireless for 2G and 3G services in a market aiming toward 4G services. Of course, the staff report's similar assertions that the merger "would leave AT&T as the only nationwide provider of GSM-based wholesale services,"[53] and that the elimination of T-Mobile as "the only other national purchaser of GSM-based handsets [] could alter the handset/device input market in ways harmful to competition and innovation,"[54] are accompanied by hardly any analytical reasoning to back them up. Rather, the staff merely lent its own credence to the merger opponents' arguments in this regard and insisted that an administrative law judge should resolve the issues.[55]

Needless to say, the staff report's market definitions exclude consideration of wireline service alternatives and any price-constraining or other effects that such services might have. Given the number of recent FCC reports and actions devoid of intermodal competition assessments,[56] the fact that wireline-wireless substitution fails to make it onto the staff's radar is hardly surprising. But it's certainly worth weighing the competitive potential presented by arrangements between wireless providers and satellite providers, or the possibilities raised by more ubiquitous Wi-Fi hotspot roaming to offload increasing mobile VoIP traffic demands.

At the very least, wireline alternatives should have entered into the picture for the staff report's brief analysis of the backhaul market, since wireline telco and cable providers can offer backhaul services to wireless providers. But the staff declines to take even that limited kind of intermodal competition seriously, concluding that the loss of T-Mobile "as a critical 'anchor tenant' in many local markets "could reduce the market for [backhaul] services and deter additional competitive entry, leading to higher backhaul prices."[57] Here, as elsewhere, the staff report's narrowly-focused market definitions fail to reflect today's dynamic market.

The Verizon-SpectrumCo Transaction

On December 2, it was announced that Verizon Wireless reached agreement with SpectrumCo to purchase 122 Advanced Wireless Services (AWS) spectrum licenses for $3.6 billion.[58] SpectrumCo is a joint venture between Comcast, Time Warner Cable, and Bright House Networks. It is reported that with the licenses gained by the transaction, Verizon Wireless will be able to "reach around 259 million potential customers, or 83%

of the U.S. population" with some 110 MHz of spectrum nationwide.[59] Verizon intends to utilize its new spectrum to bring 4G LTE services to consumers.[60]

By providing Verizon with spectrum for a more rapid and expansive build out of LTE services, the SpectrumCo purchase presents a number of consumer-welfare enhancing benefits. The proposed sale of AWS spectrum licenses will better ensure such spectrum will be put to its highest use, putting to rest prior claims that the spectrum licenses bought at auction by SpectrumCo are going unused. By acquiring the spectrum, Verizon improves its capacity for carrying surging wireless broadband data traffic on its LTE networks.

The Verizon/SpectrumCo deal doesn't involve reductions in the number of existing wireless providers – one of the aspects that so concerned the FCC staff regarding AT&T/T-Mobile. But whatever the similarities and differences between Verizon/SpectrumCo and AT&T/T-Mobile, all such merger and acquisition reviews deserve to be analyzed in light of today's rapidly innovating environment and competitive wireless market conditions. Such an analysis should emphasize the presence of conditions conducive to continued investment and disruptive change, rather than simply snapshot pictures of market shares.

Conclusion

The FCC staff report on AT&T/T-Mobile offers a predominantly static analysis that is ill-suited for today's dynamic wireless marketplace. The report overemphasizes market concentration indicators, such as HHI numbers and the supposedly recently-lowered spectrum screen, while it is seemingly oblivious to the dynamic market conditions present in today's wireless market. The report appears to take nationwide 4G deployment by cash-strapped T-Mobile for granted while disregarding the potential benefits of putting more spectrum to work with 4G.

The staff report also discounts competition where it presently exists and dismisses potential competition in the market where it might exist. And it sets market definitions that are at times irrelevant or too narrow to sufficiently take stock of AT&T/T-Mobile's potential impact on wireless consumer welfare. The overall result is a staff report so one-sided that it reads more like a preconceived argument against AT&T/T-Mobile than an impartial assessment of the merger and all its likely effects on wireless competition.

Whether or not the proposed AT&T/T-Mobile merger ultimately is in the public interest or whether it poses any potential harms is not really the central focus of this paper. Rather, the main purpose of this paper is to show that the staff report, because it is so decidedly one-sided, fails properly to analyze the competitive consequences and public interest benefits of the proposed merger.

The wireless marketplace is competitive, dynamic, and innovative. Mergers and other transactions involving wireless providers should be considered in the context of these market realities. This does not mean that market shares and HHI figures should not be considered carefully. But it does mean that other factors, such as the ones discussed at length in this paper, should not be ignored. They must be given their due if the interests of consumers, and not the interests of competitors, is to prevail.

All wireless mergers and acquisitions subject to FCC review, including the Verizon/SpectrumCo proposal, should be analyzed in light of today's rapidly changing, competitive wireless market. Verizon's plan to acquire additional spectrum to enable a more rapid and expensive build out of its 4G LTE services poses a number of potential public benefits. But if the FCC takes the staff report's one-sided analytical approach in analyzing Verizon/SpectrumCo, the agency will almost surely reach a result with negative consequences for overall wireless consumer welfare.

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[1] *See* Letter from Patrick J. Grant and Nancy J. Victory, In Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, WTB Docket No. 11-65 (Nov. 23, 2011), http://fjallfoss.fcc.gov/ecfs/document/view?id=7021748296; Statement from Wayne Watts, AT&T Senior Executive VP and General Counsel (Nov. 24, 2011), http://mobilizeeverything.com/news/statement-from-wayne-watts-att-senior-executive-vp-and-general-counsel; Cecilia Kang, *FCC to accept withdrawal of AT&T, T-Mobile merger*, POST TECH (WASHINGTON POST) (Nov. 29, 2011), http://www.washingtonpost.com/blogs/post-tech/post/fcc-to-accept-withdrawal-of-atandt-t-mobile-merger/2011/11/29/gIQAKg8a9N_blog.html.
[2] Order, In Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, WTB Docket No. 11-65, at ¶ 10 (November 29, 2011), http://transition.fcc.gov/transaction/DA-11-1955.pdf.
[3] Staff Analysis and Findings ("Staff Report"), In Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, WTB Docket No. 11-65, ¶ 5 (November 29, 2011), at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1130/DA-11-1955A2.pdf.
[4] *See, e.g*., Media Advisory: "FSF's Randolph May's Statement on Withdrawal by AT&T and T-Mobile of FCC Merger Application" (November 29, 2011) ("it is another matter to release the report to the public because it is a pre-decisional staff memorandum that normally wouldn't be released publicly, at least not without the Commission formally voting to put its official imprimatur on the contents of the report").
[5] *See* Randolph Jay and Seth L. Cooper, "The Department of Justice's Case Against the AT&T/T-Mobile Merger: A Faulty Static Marketplace Vision," *Perspectives from FSF Scholars*, Vol. 6, No. 26 (October 14, 2011), available at: http://www.freestatefoundation.org/images/The_Department_of_Justice_s_Case_Against_the_AT_T_v_T-Mobile_Merger_101711.pdf.
[6] Staff Report, at ¶ 17.
[7] Staff Report, at ¶ 17.
[8] Hal Singer, "Top Ten Lines in the FCC's Staff Analysis and Findings," *Truth on the Market blog* (December 2, 2011), available at: http://truthonthemarket.com/2011/12/02/top-ten-lines-in-the-fccs-staff-analysis-and-findings/.
[9] Staff Report, at ¶ 17.
[10] *See* Staff Report, at ¶¶ 18-19, 42-44.
[11] Staff Report, at ¶ 43.
[12] *See* Staff Report, at ¶¶ 18, 44.

[13] Staff Report, at ¶ 18.
[14] Staff Report, at ¶¶ 19, 47.
[15] Larry Downes, "FCC plays fast and loose with the law…again," *Congress Blog (The Hill)* (December 8, 2011), available at: http://thehill.com/blogs/congress-blog/technology/198111-fcc-plays-fast-and-loose-with-the-lawagain.
[16] Larry Downes, "FCC plays fast and loose with the law…again."
[17] Scott Cleland, "Top Ten Flaws in FCC's AT&T/T-Mobile Competition Analysis," *Forbes.com* (December 5, 2011), available at: http://www.forbes.com/sites/scottcleland/2011/12/05/top-ten-flaws-in-fccs-attt-mobile-competition-analysis/.
[18] *See, e.g*., Dennis O. Weisman, "On Market Power and the Power of Markets: A Schumpeterian View of Dynamic Industries," *Perspectives from FSF Scholars*, Vol. 3, No. 5, at pg. 2 (February 26, 2008), ("It is widely recognized in the economics literature that dynamic efficiency (the introduction of innovative new services and production methods) is more important than static efficiency (the alignment of prices with economic costs) in terms of conferring benefits on consumers"), available at: http://www.freestatefoundation.org/images/Power_of_Markets.pdf.
[19] Deloitte, "The Impact of 4G Technology on Commercial Interactions, Economic Growth and U.S. Competitiveness," at pg. 9 (August, 2011), available at: http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/TMT_us_tmt/us_tmt_impactof4g_081911.pdf.
[20] http://freestatefoundation.blogspot.com/2011/08/report-us-wireless-consumers-enjoying.html
[21] *See* Gerald R. Faulhaber, Robert W. Hahn, and Hal J. Singer, "Assessing Competition in U.S. Wireless Markets: Review of the FCC's Competition Reports," (July 11, 2011), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880964.
[22] *Fifteenth Report* , Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services ("*Wireless Competition Report*"), WT Docket No. 10-133 (June 24, 2011), at pg. 6 (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).
[23] Declaration of Dr. Kim Kyllesbech Larsen ("Larsen Declaration"), In Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, WT Docket No. 11-65, DA 11-799 (April 19, 2011), at 9, para. 23, available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240427. *See also, e.g., id*. at 10, para. 27; Declaration of Thorsten Langheim ("Langheim Declaration"), In Re: Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations WT Docket No. 11-65, DA 11-799 (April 19, 2011), at 6, para. 14, available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240426.
[24] Staff Report, at ¶ 213.
[25] *See* Staff Report, at ¶¶ 252-253.
[26] *See* Staff Report, at ¶ 258.
[27] Staff Report, at ¶ 252.
[28] FCC Staff Technical Paper: "Mobile Broadband: The Benefits of Additional Spectrum" (October, 2010), available at: http://download.broadband.gov/plan/fcc-staff-technical-paper-mobile-broadband-benefits-of-additional-spectrum.pdf.
[29] *Wireless Competition Report*, WT Docket No. 10-133, at pg. 6 (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).
[30] *Id*. at pg 7.
[31] Staff Report, at ¶ 42, fn. 127.
[32] Staff Report, at ¶ 34.
[33] *Fourteenth Report*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, ("*Fourteenth Wireless Competition Report*" or "*Fourteenth Report*"), WT Docket No. 09-66 (May 20, 2010), at pg. 53, ¶ 24.
[34] Staff Report, at ¶ 29.
[35] Staff Report, at ¶ 29, fn. 90.
[36] *Wireless Competition Report*, WT Docket No. 10-133, at pg. 96, ¶ 49.
[37] Staff Report, at ¶ 62.
[38] *Sprint Nextel Corp. v. AT&T, Inc*., No. 1:11-cv-01600, *Cellular South, Inc. v. AT&T Inc*., No. 1:11-cv-01690 (D.D.C. Nov. 2, 2011) (order granting in part denying and denying in part motions to dismiss

lawsuit), at pg. 14 (quoting *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778 (7th Cir. 1999) (Posner, J.).

[39] *Wireless Competition Report*, WT Docket No. 10-133, at pg. 6 (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

[40] *Wireless Competition Report*, WT Docket No. 10-133, at pg. 6 (3G/4G Deployment by Selected Mobile Wireless Service Providers Table).

[41] *Fourteenth Wireless Competition Report*, WT Docket. No. 09-66, at pg. 126, ¶ 75.

[42] Staff Report, at ¶ 33.

[43] Staff Report, at ¶ 34.

[44] Staff Report, at ¶ 64. *See also id*. at ¶¶ 67-68.

[45] Staff Report, at ¶ 63 (emphasis added).

[46] Staff Report, at ¶ 67.

[47] Staff Report, at ¶ 67, fn 196 (cite omitted).

[48] Staff Report, at ¶ 96.

[49] Staff Report, at ¶ 102.

[50] *See* Second Report and Order, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, 26 FCC Rcd 5411, 5423, at ¶ 23 (2011), appeals pending, *Verizon v. FCC*, Nos. 11-1135 & 11-1136 (D.C. Cir. filed May 13, 2011).

[51] *See Sprint Nextel Corp. v. AT&T, Inc*., No. 1:11-cv-01600, *Cellular South, Inc. v. AT&T Inc*., No. 1:11-cv-01690, at pgs. 35-36.

[52] *See Sprint Nextel Corp. v. AT&T, Inc*., No. 1:11-cv-01600, *Cellular South, Inc. v. AT&T Inc*., No. 1:11-cv-01690, at pgs. 33, 37-38.

[53] Staff Report, at ¶ 109.

[54] Staff Report, at ¶ 120

[55] Staff Report, at ¶¶ 105, 111, 122.

[56] For criticisms of the FCC's unwillingness to consider intermodal or cross-platform competition, *see e.g*., Seth L. Cooper, "FCC Should Stop Refusing to Acknowledge Wireless Competition," *Perspectives from FSF Scholars*, Vol. 6, No. 16, at pgs. 3-4 (July 19, 2011), available at: http://www.freestatefoundation.org/images/FCC_Should_Stop_Refusing_to_Acknowledge_Wireless_Competition_071811.pdf; Seth L. Cooper, "Forbearance Follies: What the FCC's New Framework Portends for the Third Way," *Perspectives from FSF Scholars*, Vol. 5, No. 18, at pgs. 3-4 (July 9, 2010), available at: http://www.freestatefoundation.org/images/Forbearance_Follies_070810.pdf.

[57] Staff Report, at ¶ 115.

[58] Press Release: "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 Billion," PR Newswire (December 2, 2011), available at: http://www.prnewswire.com/news-releases/comcast-time-warner-cable-and-bright-house-networks-sell-advanced-wireless-spectrum-to-verizon-wireless-for-36-billion-134898303.html.

[59] Trefis Team, "Verizon Goes Spectrum Hunting Mindful of AT&T DoJ Woes," Forbes.com (December 7, 2011), available at: http://www.forbes.com/sites/greatspeculations/2011/12/07/verizon-goes-spectrum-hunting-mindful-of-att-doj-woes/#footnote_1_90235; Marguerite Reardon, "Verizon's $3.6 billion spectrum deal: Who wins and who loses?" *CNet* (December 2, 2011), available at: http://news.cnet.com/8301-30686_3-57335808-266/verizons-$3.6-billion-spectrum-deal-who-wins-and-who-loses/.

[60] *See* Press Release: "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 Billion."