

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

<p>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.</p>	<p>FILED PUBLIC UTILITIES COMMISSION JUNE 9, 2011 SAN FRANCISCO, CALIFORNIA INVESTIGATION 11-06-009</p>
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**COMBINED REPLY COMMENTS AND BRIEFINGS OF THE UTILITY
CONSUMERS' ACTION NETWORK ("UCAN") AND ITS AFFILIATED PROJECTS
NEW MEDIA RIGHTS ("NMR") AND PRIVACY RIGHTS CLEARINGHOUSE
("PRC")**

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Pursuant to the Administrative Law Judge’s Ruling Requesting Additional Information and Addressing Various Procedural Issues, Utility Consumers’ Action Network (“UCAN”) and its Affiliated Projects New Media Rights and Privacy Rights Clearinghouse (Collectively “UCAN and its Affiliated Projects”) file and serve these combined reply comments and briefings.

I. INTRODUCTION

A representative from UCAN and its Affiliated Projects was present at the well attended Public Participation Hearing in San Diego. Many of the speakers present spoke in support of AT&T acquiring T-Mobile USA; others spoke out against the acquisition. What stood out to UCAN and its Affiliated Projects though was not the support for the acquisitions, but the reasons given for supporting the acquisitions. These members of the public, whether for or against the acquisition, expressed a similar list changes of improvements that they want to occur as a result of this acquisition. While this list is not exhaustive, the public expressed a desire for jobs, increased investment in communities, better quality of service including stronger reception and faster data service, and lower prices.¹ The Commission has the unenviable tasks of distilling a mountain of discovery, testimony and exhibits to determine whether AT&T’s proposed acquisition will serve the public interest and fulfill the public desire for more jobs, greater community investment, improved service, and lower prices.

Through this proceeding, UCAN and its Affiliated Projects have been focused on particular aspects of the public interest: the potential harm to innovation, the potential impact of service offerings, price, and service quality, privacy protections, and the potential harms of a duopoly. In these reply comments, UCAN and its Affiliated Project will reemphasize these

¹ See Video Files of the Workshop, Part 1 and Part 2 available at http://www.cpuc.ca.gov/PUC/hottopics/2Telco/110628_att.htm.

points, dispel some misinformation that has permeated the workshops and other filings, and recommend potential merger conditions for the Commission to recommend to the Federal Communications Commission, in the event the Commission does not take the path recommended by numerous commenters of exercising the full extent of its authority to prevent this acquisition.

II. UCAN, NEW MEDIA RIGHTS, AND PRIVACY RIGHTS CLEARINGHOUSE'S OPENING COMMENTS

In its Opening Comments, UCAN and its Affiliates Projects discussed the detrimental impact the potential acquisition will have in numerous areas of the wireless industry, because of 1) AT&T's anti-innovation history and the lack of net neutrality rules in the wireless space 2) the negative effect on customer service, prices, and variety of services available, and 3) the removal of the most privacy-friendly of the four major carriers from the market. While UCAN and its Affiliated Projects will not be rearguing its assertions here, its review of the information presented in this Commission's workshops, filed with the Federal Communications Commission, and submitted in response to requests from the Commission for briefing and additional information has not impacted the arguments and assertions UCAN and its Affiliated Projects made in its Opening Comments.

AT&T maintains its history of: using its gatekeeper role to stifle innovation in voice telephony and control the way consumers access the internet; censoring speech and use of its network; and failing to embrace innovation and openness in past spectrum auction.² The loss of T-Mobile USA's openness to innovation and low pricing will be significant and not replaced by AT&T nor sufficiently filled by other national or regional carriers.³ Costs for AT&T voice, messaging, and data services will remain high. Indeed, AT&T recently eliminated its 1,000 text

² UCAN and Affiliated Projects Opening Comments p.2-6.

³ UCAN and Affiliated Projects Opening Comments p. 7-8 and 11-13

message for \$10 plan, limiting consumer choice to its \$20 for unlimited messaging plan or no plan at the rate of \$0.20 per message.⁴ A change conspicuously coinciding with news reports that some analysts and industry insiders predict that carrier revenues associated with messaging are going to decrease dramatically over the next few years.⁵ AT&T has not addressed the impact of limiting consumers to one national GSM carrier to choose from and has made no promise of interoperability between LTE networks despite technical feasibility.⁶ Consumers will still lose T-Mobile as a choice as a national low cost carrier, with no guarantee that its current prices will be available to new customers.⁷ In fact, during this proceeding AT&T has taken steps to make its current plans more similar to AT&T plans, confirming earlier this month that it will begin charging data overage fees on its own low-end 200MB data plan as opposed to its previous policy of throttling data speeds when consumers reached their plan limits.⁸ AT&T has made no assurances that consumers will continue to receive T-Mobile's superior customer service nor is there any indication that AT&T will alter its past practices of resolving problems with a focus on generating revenue rather with consideration of the impact on consumers.⁹ AT&T has not sufficiently addressed the clear market dominance it will share with Verizon Wireless nor the problems that over-concentration in the wireless market and the benefits that competition have presented in other countries.¹⁰ Lastly, the significant impact to consumer privacy protections

⁴ Sam Biddle. AT&T's New Text Plan Overcharges You by 10,000,000 Percent. Literally. <http://gizmodo.com/5832245/atts-new-text-plan-overcharges-you-by-10000000>.

⁵ Sandhya Raman. SMS: The dying cash cow for wireless carriers? http://www.fiercemobilecontent.com/special-reports/sms-dying-cash-cow-wireless-carriers?utm_medium=nl&utm_source=internal.

⁶ UCAN and Affiliated Projects Opening Comments p. 11.

⁷ UCAN and Affiliated Projects Opening Comments p. 11-13.

⁸ Bonnie Cha. T-Mobile to Charge Overage Fees on 200MB data plan. http://www.cnet.com/8301-17918_1-20091487-85/t-mobile-to-charge-coverage-fees-on-200mb-data-plan/.

⁹ UCAN and Affiliated Projects Opening Comments p.13-20.

¹⁰ UCAN and Affiliated Projects Opening Comments p. 20-22.

with the loss of the carrier with the strongest privacy policies policy has not been addressed despite privacy being a key concern to Californians.¹¹

III. WORKSHOP ISSUES

A representative of UCAN and its Affiliated Projects was able to attend the July 15 workshop on innovation issues and the July 22 workshop on Customer issues. The public workshops provided an excellent opportunity for the Commission, Commission staff, parties, and the public to hear from independent and party experts on the various wireless market and consumer issues that the acquisition will impact. The Commission should be commended for its efforts to hold so many public workshops and public participation hearings in such a short period of time with the goals of informing the public and receiving public feedback on the potential impact of the acquisition and how it is viewed generally by the public. During the workshops, however, some statements and assertions were made that UCAN and its Affiliated Projects believe should be addressed out of concerns for their relevance, accuracy, or importance.

A. Possibility of Sprint Acquiring T-Mobile not Relevant

A statement UCAN and its Affiliated Projects heard repeated a few times throughout the workshops, typically during a discussion of jobs is that T-Mobile is going to be acquired and will not continue to operate on its own and that it is likely Sprint that will acquire T-Mobile if AT&T is not allowed to acquire it. For example, Mr. Val Afanasiev, Administrative Director for the Communications Workers of America, District 9 stated “The real question this transaction poses is not whether T-Mobile would survive as an independent competitor, but whether Sprint or AT&T will acquire T-Mobile.”¹² In addition, Mr. Art Pulaski, Secretary and Treasurer of the

¹¹ UCAN and Affiliated Projects Opening Comments. p. 23.

¹² Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California’s Economy, July 22, 2011, at 158-159.

California Labor Federation also contrasted current AT&T's employment environment with Sprint's employment environment and the impact it would have on T-Mobile workers.¹³ UCAN and its Affiliated Projects became concerned about these statements when Commissioner Ferron questioned whether an antitrust analysis had been completed for a hypothetical combination of Sprint and T-Mobile.¹⁴ While this could be a compelling comparison and useful for determining just how harmful AT&T's acquisition of T-Mobile could be to the wireless market, UCAN and its Affiliated Projects question the suggestion that an acquisition must necessarily occur, and that it will be either Sprint or AT&T.

Therefore, without commenting on the potential benefits of a unionized workforce, or the employment practices of either AT&T or Sprint, UCAN and its Affiliated Projects are concerned that the Commission may be lead to a false either or proposition. Commission opposition to AT&T's acquisition of T-Mobile does not amount to tacit approval for Sprint to acquire T-Mobile. Further, there is little evidence to suggest that if AT&T's proposed acquisition was rejected that Sprint could make a compelling case that its attempt to acquire T-Mobile should not be rejected on the same ground. Further, UCAN and its Affiliated Programs believes that there are other potential merger partners for T-Mobile including cable companies, or a major Silicon Valley corporation looking to improve its position in the Communications industry, such as Facebook, Apple or Google. UCAN and Affiliated Projects also believe that T-Mobile could also stand alone as an independent American company if Deutsche Telecom chose to spin off the company or otherwise limit its involvement. These are just some of the potential alternatives for

¹³ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 210-212.

¹⁴ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 231.

T-Mobile. Deutsche Telecom could even, as a last resort, auction off the assets of T-Mobile. The Federal Communications Commission could even reclaim T-Mobile's spectrum in coordination with Deutsche Telecom in a similar manner to how the Federal Communications Commission has proposed to reclaim currently unused spectrum holdings of the broadcast industry, and hold a spectrum auction to allow for a new competitor to enter the market place, allow all current carriers a chance to enhance their spectrum holdings, and/or improve the network reseller market if a purchaser sought to emulate LightSquared's idea to offer wholesale LTE.¹⁵ UCAN and its Affiliated Projects do not endorse any of these alternatives, but merely raise them to point out it is premature and inappropriate to assume that a Sprint acquisition of T-Mobile is the only outcome of a denial of an AT&T acquisition.

B. AT&T and Competition with T-Mobile, Leap, and Metro PCS

AT&T CEO Randall Stephenson when questioned by lawmakers in May 2011, refused to call T-Mobile a competitor stating instead that T-Mobile is not a "competitive focus" for AT&T.¹⁶ This concept was repeated during the workshops by AT&T representatives while also claiming that providers such as MetroPCS and Leap are competitors. For instance Mr. Mitch Farber, AT&T Assistant Vice President of Marketing responsible for developing pricing strategies and understanding the competitive dynamics that drive those strategies stated that "AT&T competes not only with Verizon, Sprint, T-Mobile in California, but also increasingly with fast-growing, low cost, all-you-can-eat-providers... such as MetroPCS and Leap"¹⁷ and that "AT&T must compete with low prices leaders of the California wireless industry MetroPCS and

¹⁵ Rahul Gaintonde, LightSquared to Launch Nationwide Wholesale LTE Network. <http://broadbandbreakfast.com/2011/05/lightsquared-to-launch-nationwide-wholesale-lte-network/>.

¹⁶ Josh Smith. AT&T CEO Says T-Mobile Isn't a Competitor. <http://techdailydose.nationaljournal.com/2011/05/att-ceo-says-tmobile-isnt-a-co.php>.

¹⁷ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 79.

Cricket.”¹⁸ While at the same time making the claim that T-Mobile “simply does not exert strong competitive pressure on AT&T in California” and “T-Mobile is not a driver of major competition or material constraint on AT&T’s pricing.”¹⁹ UCAN and its Affiliated Projects have not been able to reconcile these two ideas. If it is to be accepted that two regional carriers such as MetroPCS and Leap/Cricket present competitive pressures it seems absurd to suggest that a national carrier with more customers than both of the regional carriers, a greater Smartphone selection, and a larger network is not a competitor. These inappropriate assertions undermine this proceeding and hinder analysis of the actual impact the loss of T-Mobile will have on competition. Indeed, Assembly Member Bradford had to temper his comments during the workshop upon hearing AT&T continually assert that T-Mobile is not a competitor for AT&T while carriers such as MetroPCS, Cricket, or US Cellular assert competitive pressures on both companies in his understanding of their market share and available spectrum.²⁰ The Commission should order AT&T to stop presenting evidence on the proposition that T-Mobile does not exert competitive pressures on AT&T and require AT&T to present a real analysis on the impact the loss of T-Mobile will have on the wireless market. Due to AT&T’s interest in the matter, UCAN and Affiliated Projects recommend the Commission look to other commenting parties for a more accurate picture of the merger’s affects on the market.

C. Service Quality Improvements for T-Mobile Customers

¹⁸ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California’s Economy, July 22, 2011, at 82.

¹⁹ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California’s Economy, July 22, 2011, at 83.

²⁰ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California’s Economy, July 22, 2011, at 130-131.

As a part of the acquisition, AT&T has expressed that T-Mobile customers will experience improved coverage and service reliability. For example, AT&T's Associate Vice President of Radio Access Network Engineering, Mr. Steve Breheny, stated during a workshop panel that "the combination of AT&T and T-Mobile's networks provide the necessary spectrum to allow for the transition of customers to the faster, more efficient Universal mobile Telecommunications System, or UMTS, and LTE technologies without downgrading service to the millions of AT&T customers that continue to rely solely on AT&T's 2G GSM network for their wireless communication communities."²¹ However, Mr. Breheny went on to explain that T-Mobile customers may experience different transition experiences depending on whether the T-Mobile customer is currently on 2G SM network or T-Mobile's UMTS network. He explained that the majority of T-Mobile's 2G customers have handsets that will work on AT&T's GSM network, while T-Mobile's UMTS subscribers will need to transition to compatible handsets and migrate to AT&T's network in order to gain broader UMTS coverage.²² A transition to a new device may not sound like a difficult hurdle, but AT&T has made no indication as to what handsets it will make available to T-Mobile customers, no indication as to whether those handsets will be available at no cost to T-Mobile customers, whether those devices will be equivalent to the T-Mobile customer's current handset, or whether T-Mobile customers will be able to terminate without ETF if there device is incompatible with the AT&T network. Without answers to these questions real service quality improvements for T-Mobile's UMTS customers is pure speculation. In addition, it should be noted that no T-Mobile customers have devices

²¹ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 141.

²² Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 142-143.

compatible with the to be built LTE network and, as discussed more below, AT&T has made no assertions or promises concerning a T-Mobile customer's ability to access the LTE network without foregoing all of their T-Mobile plans and prices.

D. Price Retention and Comparable Devices and Services

AT&T's representative Mitch Farber stated during the workshop that "T-Mobile customers will not suffer a price increase. T-Mobile customers will be able to maintain their current plans after the deal closes, even when they upgrade to a new comparable device."²³

TURN's representative on the panel, Dr. Trevor Roycroft, took AT&T to task on this statement questioning just what AT&T's upgrade policy will be and asking AT&T to define "comparable device."²⁴ Mr. Farber could not provide a definitive answer to the question stating "there's [sic] many details that need to be worked out, what a comparable device [sic] is, so we don't have all the specifics at the moment."²⁵ Dr. Roycroft then followed up asking whether LTE would be a comparable transition for T-Mobile customers and if they would be able to obtain LTE service and devices without changing their T-Mobile plans. Again, AT&T's Mr. Farber could only indicate that AT&T had not yet defined comparable device.²⁶ This exchange is emblematic of various exchanges throughout the workshop, where AT&T was asked to provide definite examples of things that may or may not change for T-Mobile customers, and the response that

²³ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 180.

²⁴ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 106.

²⁵ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 106.

²⁶ Transcript of CPUC Public Workshop Proposed Acquisition by AT&T of T-Mobile Workshop – Effect of the Proposed Merger on Service Quality, Consumer Services, Employment, and California's Economy, July 22, 2011, at 107.

came was essentially that those details will be worked out post-merger. So despite AT&T making promises that customers will be able to transition to AT&T, even noting as explained above, that some customers may have to transition to new devices, AT&T cannot make any definitive statement as to what T-Mobile customers will or will not be able to do, what services it will be able to access, what devices they will be able to use, and what service plans it will be able to retain or for how long. These facts should give the Commission great pause before considering recommending AT&T's acquisition of T-Mobile. AT&T is making a promise, but will not give any details on how or if it will fulfill this promise. The Commission should insist on definite answers as to what steps AT&T will take to implement its promises such as allowing T-Mobile customers to retain their price plans even through device upgrades and details on the actual limits to AT&T's promises whether they be technological or AT&T imposed.

IV. MERGER CONDITIONS

While UCAN and its Affiliated Project agrees with DRA, TURN, and other opponents that the harms of the proposed acquisition cannot be adequately remedied or mitigated regardless of conditions, UCAN and its Affiliated Projects have the following observations concerning necessary conditions that the Commission should consider as part of its investigation. AT&T has made a lot of promises in this proceeding including but not limited to its rollout of its LTE network to 97 percent of the population, improved service quality, the retention of current T-Mobile pricing for T-Mobile customers and etc.... If the Commission decides to recommend or otherwise expresses a favorable opinion of AT&T's acquisition of T-Mobile to the Federal Communications Commission, the Commission should only do so on the condition that each and every representation or promise that AT&T has made be made a requirement to this proceeding with stiff penalties in place for AT&T's failure to meet those requirements within stated or

determined time periods. A continual statement during the workshop and whenever AT&T is ever asked for actual information concerning its promises is that it is a post-merger consideration. One example of many is AT&T's promise to allow T-Mobile customer to retain their current service plans at current prices even if the customers determines to upgrade their device, or in the case of UMTS customers may required to upgrade their device. The Commission could mandate the maintenance of T-Mobile services and plans for a specific period of time as a condition to the merger, including conditions to allow consumers to upgrade their device without sacrificing their T-Mobile plan. T-Mobile customers would then have the security of knowing that there plan is secured by more than just the pre-merger promise of AT&T.

In addition, as UCAN and its Affiliated Projects detailed in our Opening Comments, AT&T avoided bidding on significant portions of the 700 MHz C-Block spectrum upon which the FCC has placed open access requirements that would allow consumers greater freedom to connect the devices and application they chose, rather than those approved by the carrier.²⁷ The Commission should recommend to the Federal Communications Commission that all of the conditions placed on the C-Block, effectively now of Verizon Wireless' LTE Network, should also be placed on AT&T's LTE Network to ensure consumers have at a minimum the same open access options available to them between their two LTE options. UCAN and its Affiliated Projects also strongly encourage the Commission to consider requiring AT&T to fulfill the four recommendations of Professor Crawford as a condition of or subsequent to the merger. Professor Crawford in her written statement presented the following four ideas (1) require that free highest-speed-possible wireless access be provided in perpetuity throughout California's major cities, (2) require AT&T to use some of the ample fiber it controls to wire anchor institutions and open those connections on standard, reasonable terms to anyone who asks, (3) enlist AT&T's concrete

²⁷ UCAN and Affiliated Projects Opening Comments at 5.

aid in the building of community-owned fiber networks throughout California, and (4) require that AT&T permit accredited audits of its network performance.²⁸ Requiring these conditions would not only meet the regulatory duties of the California Public Utilities Commission, but it would help address the mandate of the California Broadband Council, in which the CPUC participates, which is to ensure broadband access and digital literacy across California.

V. CONCLUSION

For all of the foregoing reasons, UCAN respectfully requests that the Commission recommend to the Federal Communication Commission that AT&T's proposed acquisition of T-Mobile be denied and in the alternative that the Federal Communications Commission impose stringent merger conditions to ensure that AT&T fulfills all the promises and representations that it has claimed will result from the proposed acquisition, and in addition, at a minimum place the same open access and other requirements on AT&T's future LTE network spectrum that the Federal Communications Commission placed on the 700 MHz C-Block spectrum as well as adopt Professor Crawford's proposed conditions.

Respectfully Submitted,

/s/

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²⁸ Written Statement of Susan Crawford, Professor, Cardozo Law School. Hearing on: Applications of AT&T, Inc. and Deutsche Telecom for Consent to Assign or Transfer Control of Licenses and Authorizations Before the California Public Utilities Commission. July 15, 2011. At 15-16.