

**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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**OPENING COMMENTS OF THE UTILITY CONSUMERS' ACTION NETWORK
("UCAN") AND ITS AFFILIATED PROJECTS NEW MEDIA RIGHTS ("NMR") AND
PRIVACY RIGHTS CLEARINGHOUSE ("PRC")**

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I. Introduction

The California Public Utilities Commission (“Commission”) should oppose AT&T’s application for acquisition of T-Mobile USA. Should this transaction be completed, the resulting company will control 47% of the wireless market and 55% of the mobile broadband market in California¹. A major California and nation-wide competitor will be eliminated, giving AT&T approximately 40% of the nation-wide mobile wireless market, and creating a powerful duopoly. Together, AT&T and Verizon Wireless will hold nearly 80% of the nation-wide market and over 77% of the California wireless market.²

In their Application filed with the Federal Communications Commission (“FCC”), AT&T claims that this transaction is “the most *pro-consumer* solution to the critical capacity challenges facing these two companies” and that “[i]t is also the most *pro-innovation* and *pro-investment* solution for America.”³ The Commission must fully investigate AT&T’s claims and assumptions, and confront strong evidence that the merger between AT&T and T-Mobile will result in higher prices, reduced competition, and less innovation in America’s wireless marketplace.

Utility Consumers’ Action Network (“UCAN”), and its affiliated projects New Media Rights (“NMR”), and the Privacy Rights Clearinghouse (“PRC”), herein after UCAN and its affiliates, submit these opening Comments pursuant to ordering paragraph 8 of the June 9, 2011 Order Instituting Investigating and the June 28, 2001 Joint Assigned Commissioner’s and Administrative Law Judge’s Ruling Addressing Various Procedural Issues. In these Comments, UCAN and its affiliates discusses the detrimental impact the potential merger will have in numerous areas of the wireless industry, because of 1) AT&T’s anti-innovation history and the

¹I.11-06-009, 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 (June 15, 2011), at 1, 10 n.9 (OII).

²Id. at 2

³Application for Acquisition of T-Mobile USA, Inc. by AT&T Inc., Public interest showing, page 9

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 the most privacy-friendly of the four major carriers from the market.

II. Reduced Competition Will Lead to More Gatekeeping and Less Innovation

In 2010, the FCC instituted new rules for Net Neutrality to preserve an open and free Internet. However, these rules contain no provisions for regulation of wireless broadband, only rules for traditional wired technologies.⁴ In the past, AT&T, along with Verizon Wireless have continually lobbied against Net Neutrality rules for wireless broadband.⁵

Indeed, when the FCC chose not to engage in basic regulation in the wireless space to ensure service providers do not abuse their gatekeeper powers, competition became the only force to ensure an open and free Internet for consumers. With a major competitor eliminated from the market through the potential merger, AT&T has the ability to write new chapters in its history of anti-innovation behavior.

In its FCC application, AT&T touts its role in fostering a “virtuous cycle” of innovation, where “improved networks spur more improved devices and applications, which in turn spur still-better networks, and so on in a ‘virtuous cycle’ of innovation.”⁶

However, AT&T’s opposition to innovative but competing services is well documented, and its affect on the wireless and mobile broadband marketplace in California should concern the Commission. Let’s take a look at just some of that history.

A. AT&T uses its gatekeeping role to stifle innovations in voice telephony and control the way consumers access the internet

⁴ Damon Kiesow, Proposed Net Neutrality Rules Ignore Mobile Broadband Access Issues, <http://www.poynter.org/latest-news/media-lab/mobile-media/111807/proposed-net-neutrality-rules-ignore-mobile-broadband-access-issues/> (Last visited May 31,2011)

⁵Five Things Wrong with AT&T’s Mega-Merger <http://www.savetheinternet.com/blog/11/03/24/five-things-wrong-atts-mega-merger> (Last visited May 31, 2011)

⁶ AT&T Application, Public Interest Statement, Page 62

In 2009, AT&T was called before the FCC to explain its role in Apple's decision to block Google Voice from the App Store for iPhone customers.⁷ During those proceedings it was revealed that Apple and AT&T had agreed not to approve Voice over Internet Protocol ("VoIP") services for use over the 3G network because the service is in direct competition to voice plans used on the phone. Initial approval for VoIP apps was limited to those that would only work when the phone was hooked up to a local wireless network rather than AT&T's data network.⁸

Skype, another VoIP application for the iPhone, was similarly blocked in 2009 for use on AT&T's network.⁹ Both Skype and Google Voice would have allowed consumers to move to cheaper voice plans, as well as have access to more affordable international calling. In addition, it was revealed that agreements included blocks for apps streaming live television, with AT&T claiming that it was concerned about strain on the network.¹⁰

Third party innovative services that are perceived by AT&T to affect its bottom line have been, and will continue to be, manipulated in order to secure its bottom line. Since there is not currently regulation, the only check on this abuse of market power is competition, which this merger reduces. In the unfortunate event that the Commission recommend the proposed merger to take place, placing significant conditions on AT&T that encourage openness and innovation at all layers of its wireless business will be necessary.

B. AT&T enables its partners to control the way consumers access the internet

AT&T has shown a willingness to make deals with other gatekeepers such as Apple that keep competing services from reaching the public. This gatekeeper model is demonstrably bad for the health of an open and innovative communications market, and the Commission should be

⁷ Ryan Singel, Google Voice App: AT&T Blames, Apple Denies, Google Hides <http://www.wired.com/epicenter/2009/08/apple-att-and-google-respond-to-feds-on-google-voice-rejection/> (Last visited May 31, 2011)

⁸Id.

⁹ AT&T and Apple Needlessly Shackle Users, <http://www.infoworld.com/d/the-industry-standard/att-and-apple-needlessly-shackle-skype-users-826?page=0,0> (Last visited May 31, 2011)

¹⁰ Ryan Singel Note 5, *supra*

paying close attention to the effect of the potential merger on the way individuals access and use the Internet. Software developers and start-up businesses who are forced to rely on gatekeepers for distribution of their product suffer through imposition of fees and unfavorable terms of service, especially when their product is perceived to compete with the gatekeeper. For example, recent changes in Apple's policies for software developers and in-app sales have forced at least one eBook reader out of business.¹¹ These changes in the terms of service effectively closed off the ability of a small, independent business to earn a profit and continue to grow in Apple's controlled market.

The fewer wireless Internet access providers available to Internet users, the greater the ability of gatekeepers at all layers of the communications marketplace to affect how Californians use the Internet, and what services they access.

As further evidence of the need for competition at the various layers of the wireless Internet marketplace, Apple has also demonstrated an ability and willingness to censor and block apps that it deems offensive. Two apps critical of President George W. Bush were blocked from sale in the app store, because Apple decided that they were in violation of the TOS, namely, a provision against criticizing a public figure,¹² or were deemed to be offensive to a large part of Apple's customers.¹³ Other apps have been labeled obscene and censored by Apple before being released to the public.¹⁴ Apple and AT&T are two separate companies, but as demonstrated directly with the Skype and Google Voice apps, they have worked together to hamper what is available to consumers to use through AT&T's network. Consolidating market power through the proposed merger will likely increase the gatekeeping powers of a company like AT&T.

¹¹We're Closing, For Good, iFlow Reader, <https://www.iflowreader.com/Closing.aspx> (Last visited May 31, 2011)

¹² Apple Rejects "Throw a Shoe at George W. Bush" iPhone App, <http://www.edibleapple.com/apple-rejects-throw-a-shoe-at-george-w-bush-iphone-app/> (Last visited May 31, 2011)

¹³Alec, *Steve Jobs Responds*, Juggleware Developers' Blog, <http://www.juggleware.com/blog/2008/09/steve-jobs-writes-back/> (Last visited May 31, 2011)

¹⁴ Amar Toor, Apple Censors Oscar Wilde Comic Over Gay Kiss, Realizes how Dumb that was, <http://www.switched.com/2010/06/16/apple-censors-oscar-wilde-comic-over-gay-kiss-realizes-how-dumb/> (Last visited May 31, 2011)

C. AT&T's broader history of censoring speech and use of its network

Independently of Apple and the App Store, AT&T has shown that they are willing to censor speech made through their network in the past. AT&T has blocked access to sites such as 4chan¹⁵ (a statement released by AT&T after this block was discovered blamed a DoS attack originating from the same IP address as the 4chan boards) and Usenet.¹⁶ AT&T has also been known to censor political speech, most notably seen during the broadcast of a Pearl Jam concert in 2007 because the lyrics to a song were critical of then-President Bush.¹⁷ AT&T later apologized for this incident. Despite this apology, AT&T has demonstrated a willingness to manipulate their network to forward their business strategy and political gains. The resulting company's dominant market share in California makes AT&T's increased market power a threat to free speech and an open Internet here.

D. AT&T's past spectrum bids illustrate an unwillingness to embrace innovation and openness

During a massive spectrum auction at the FCC about 3 years ago, AT&T avoided buying significant amounts of 700MHZ C-block spectrum. A significant reason for AT&T avoiding purchasing in the C-block was the fact that the FCC had placed open access requirements on C-block spectrum that would allow consumers greater freedom to connect the devices and applications they chose, rather than those approved by the carrier.¹⁸ AT&T instead paid a

¹⁵ David Murphy, AT&T Blocks 4chan, Stirs Internet Hornet's Nest, http://www.pcworld.com/article/169079/atandt_blocks_4chan_stirs_internet_hornets_nest.html (Last visited May 31, 2011)

¹⁶ Nicholas Deleon, Giganet Gives 50 Percent Off for Newly Usenet-less AT&T Customers, <http://www.crunchgear.com/2009/07/09/giganews-gives-50-percent-off-for-newly-usenet-less-att-customers/> (Last visited May 31, 2011)

¹⁷ Michelle Roberts, AT&T Censors Pearl Jam, then Says Oops, http://www.msnbc.msn.com/id/20201788/ns/technology_and_science-internet/t/att-censors-pearl-jam-then-says-oops/ (Last visited May 31, 2011)

¹⁸ Om Malik, AT&T's 700MHz Strategy: LTE, <http://gigaom.com/2008/04/03/open-access-restrictions-may-have-undervalued-spectrum/> (Last visited May 31, 2011)

premium for B-block spectrum, due in no small part to the fact that B-block spectrum did not have open access requirements.¹⁹

In the event the FCC and the CPUC do consider recommending the proposed merger to proceed, placing open access restrictions similar to that placed on C-block spectrum would be highly advisable to encourage competition at the device and application layer of the wireless marketplace.

E. The effects of increasing AT&T's power as a gatekeeper by granting this merger

The fewer wireless Internet access providers available to Internet users, the greater the ability of gatekeepers at all layers of the wireless Internet service to affect how we use the Internet and what services we can access.

AT&T has already demonstrated that they are willing to keep an innovative but competitive product from the market, and they have done this more than once.²⁰ AT&T has given the public no assurance that they will now discontinue such practices. With AT&T potentially controlling 47% of the wireless market in California, including a large portion of the Smartphone market, the consequences for innovation and independent start-up business will be devastating. If AT&T's market share increases, their ability to stop innovative products from reaching consumers will be exponentially higher. The mechanisms that drive AT&T's increased gatekeeping ability can be used to usurp consumers' ability to pick winners and losers, drive competitors out of business, and will distort the wireless marketplace on multiple levels.

Allowing a marketplace where AT&T has the market power to act as a gatekeeper, and can enable the gatekeeping activities of others, will have a devastating effect on the health of the market overall, particularly with those products and services which are perceived to be in competition with AT&T. The root of the problem lies with the gatekeeper's ability to control the

¹⁹Id.; Matthew Lasar, Verizon, AT&T Rule at 700MHz auction; Block D Fate Still Unsettled, <http://arstechnica.com/old/content/2008/03/verizon-att-rule-700mhz-auction-block-d-fate-unsettled.ars> (Last visited May 31, 2011)

²⁰ Ryan Singel, Note 5, *Supra* (Google Voice and Skype apps cannot run on 3G network)

development environment, changing policies to weed out competition and channel profits from the same market corners into their own pocketbooks instead of allowing competition and development from outside sources. California's position as a home to innovators means that the Commission should be particularly sensitive to these concerns, as gatekeeping activities affect the ability of California startups and small businesses from innovating for the wireless marketplace.

AT&T Labs does encourages development of specific products to add to AT&T's own offerings to the public, such as handsets and other peripheral devices, and AT&T partners with universities and other research firms to fund development and bring products to market.²¹ However, AT&T's own product and service development work does not excuse its anti-innovative history, and the Commission must be vigilant in avoiding giving the company the right to shape the entire landscape of innovation. AT&T's new market dominance will not encourage innovation and competition in the marketplace, either for handsets or for software applications used on them.

More than just the ability to keep products from the market, AT&T is able to directly control Internet traffic on the wireless network without being subject to regulations and oversight. The creation of an environment without oversight through regulation or competition can only hurt free speech, commerce and the open market. AT&T will be able to significantly slow or block access to non-affiliated sites and software applications ("apps"), creating significant barriers to the open market and free speech within the network, all of which have a detrimental effect on California consumers and the California wireless marketplace.

F. T-mobile's role in encouraging competition by openness to innovation

In contrast, T-Mobile has been a product innovator, being the first carrier to initiate products or services that are now standard across the wireless industry. T-Mobile had a role in

²¹ AT&T Application, Declaration of John Donovan, Page 11

popularizing the Wi-Fi hotspot, it released the first BlackBerry phone, it popularized texting and web browsing with the T-Mobile Sidekick, and it released the first Android Smartphone the T-Mobile G1.²² T-Mobile, despite the merger, is still moving forward with products consumers have been asking for such as Wi-Fi based calling at no additional charge to customers.²³ T-Mobile is also still experimenting with new products such as the recently released Bobsled, which allows for video calling on Facebook.²⁴ Without national carriers such as T-Mobile that are willing to take risks on innovative products to compete, consumer orientated innovation will likely be stifled.

G. The effect on consumers who rely solely on wireless broadband

The proposed merger would have a disproportionately negative effect on minority and low income users, who often rely solely on mobile devices and wireless broadband for primary Internet access.²⁵ A recent letter from the Greenlining Institute to this Commission indicated that the California community hardest hit by the potential merger are “value conscious” customers, who are in the market for low-cost wireless service. The Center for Media Justice highlighted the same issues in their letter to the FCC opposing the merger.²⁶ Currently, the market for low-cost wireless services is only slightly more competitive than the high average revenue market, and removing a major competitor will concentrate the market even more. AT&T asserts that there are plenty of competitors to take over the market share currently occupied by T-Mobile.²⁷ However, many of these carriers are not nationwide, and are only available for consumers in certain cities.

²² Jason Nottle, 5 T-Mobile Innovations, and 5 More We Lose, <http://www.thestreet.com/story/11060885/1/5-t-mobile-innovations-and-5-more-we-lose.html> (Last visited May 31, 2011)

²³ Om Malik, On T-Mobile All Wi-Fi Calls are Free, <http://gigaom.com/mobile/on-t-mobile-all-wi-fi-calls-are-free/> (Last visited May 31, 2011)

²⁴ Devin Coldewey, T-Mobile's is a Free, Facebook Based, VoIP App, <http://www.mobilecrunch.com/2011/04/19/t-mobiles-bobsled-is-a-free-facebook-based-voip-app> (Last visited May 31, 2011)

²⁵ Malkia Cyril, AT&T/T-Mobile merger hurts poor, <http://www.politico.com/news/stories/0411/53408.html> (Last visited May 31, 2011)

²⁶ Center for Media Justice, Letter to the Attorney General, Antitrust Division and Federal Communications Commission, <http://www.scribd.com/doc/56195088/ATT-T-Mobile-Merger-Opposition-Letter> (Last visited May 31, 2011)

²⁷ AT&T Application, Public Interest Declaration, Page 70

AT&T claims that post-merger, they will be able to deploy LTE coverage to 97% of Americans, but they will most likely not be providing that coverage in low-cost post-paid plans, unlike providers such as Leap or MetroPCS.

AT&T already limits access to data more than other wireless carriers, which makes it a difficult choice for consumers who rely solely on mobile broadband for Internet access. In 2010, AT&T was the first major carrier to move to limited data plans, charging high prices for very limited broadband access.²⁸ Other providers, including T-Mobile USA, have since followed suit. AT&T's pricing scheme is still unique among these new data plans, because instead of simply cutting speeds for customers who are over their data limit, AT&T charges overage fees of \$10 per additional gigabyte.²⁹ AT&T's top data plan, which is 2GB per month, is priced just below the discontinued unlimited access plans. Though customers who have access to the Internet through more than one channel are less likely to go over the 2GB limit, according to AT&T, for customers who rely on Smartphones and other mobile devices for primary Internet access, 2GB is a low floor.³⁰ The combination of limited broadband access and high overage costs significantly limits the ability of a wide consumer base to make use of the full functionality of the mobile Internet. AT&T and T-Mobile's data offerings are compared further below in Section III A. "Prices and Services," but the removal of T-Mobile from the marketplace will mean there is one less option for mobile broadband access for those consumers who rely on a mobile broadband connection as their only means of connecting to the Internet. As FCC Commissioner Clyburn has mentioned on numerous occasions, we should be particularly concerned about this

²⁸ By Hugo Miller and Greg Bensinger, AT&T Cuts Some Data Plan Prices, Ends Unlimited Offer, <http://www.businessweek.com/news/2010-06-02/at-t-cuts-some-data-plan-prices-ends-unlimited-offer-update4-.html> (Last visited May 31, 2011)

²⁹ MG Seigler, What's Funny As Hell About The Supposed AT&T iPhone Plan Price Cut, <http://techcrunch.com/2009/05/18/whats-funny-as-hell-about-the-supposed-att-iphone-plan-price-cut/> (Last visited May 31, 2011)

³⁰ George Tinari, AT&T Announces New Smartphone Plans, Adds Tethering, <http://www.techbits.com/2010/06/at-announces-new-smartphone-data-plans.html> (Last visited May 31, 2011)

community of individuals, because their full participation in our society depends on their ability to connect to the Internet.

With more and more people switching from traditional landlines to mobile devices, keeping the networks open and free is more imperative than ever.³¹ The lack of real competition from a robust wireless marketplace leaves AT&T with little incentive to change their current business practices, which favor profits and partnerships with other big businesses over consumer protection, transparency and free speech. Though AT&T has insisted in its lobbying efforts that competition will be the driving force behind an open Internet, this ideal cannot be sustained without meaningful competition in the marketplace. Indeed, AT&T's current practices will likely only worsen if the merger of AT&T and T-Mobile USA is allowed to proceed. Post merger, AT&T's new market dominance will spur AT&T to continue to grow the business at the expense of California consumers' access to a free and open Internet.

III. The Impact on Consumers: Reduced Service Offerings, Price Competition, and Customer Service Quality

A merger between AT&T and T-Mobile forces T-Mobile's 33 million customers to become AT&T customers, a choice they previously rejected when choosing to become T-Mobile customers. In the immediate wake of the proposed merger, these customers may not have another GSM carrier available and their mobile device may be locked if they wish to change services. This will leave many current T-Mobile customers no choice but to become AT&T customers or incur significant charges to change mobile service providers. While AT&T has promised to retain current T-Mobile pricing for current T-Mobile customers, it has given no indication that it will retain any of T-Mobile's prices or service offerings for new customers, nor has it indicated that current T-Mobile customers will be able to renew their T-Mobile service once the customer's contract expires or they need to purchase a new mobile device. Further, nothing in

³¹Jim O'Neill, Consumers Giving UP Landlines, <http://www.newser.com/story/27425/consumers-giving-up-landlines.html> (Last visited May 31, 2011)

the interim is preventing T-Mobile from altering its services offerings to be more similar to AT&T's services offerings. T-Mobile has already taken an initial first step of changing its mobile Internet services plans from unlimited to tiered.³² Though T-Mobile did retain the not AT&T-like option of allowing customers to exceed its data caps without charging customers more, T-Mobile has chosen instead to severely reduce the phone's Internet speed when a consumer exceeds their data limit.

Before T-Mobile completely mirrors AT&T services to prevent potential customers from receiving the benefit of current T-Mobile offerings, the Commission should consider the significant hardship that will be place on 33 million consumers who made a choice between 1 of 2 GSM based wireless services providers and chose the company with a reputation for better customer service, lower prices, greater service offerings, and a willingness to listen to and respond to the concerns of their customers. Approval of this merger will leave one national GSM carrier, one company to which a T-Mobile customer can take their mobile phone, one company that operates the cell towers that bring wireless services to their homes and offices. Consumers lose the benefit of choice and will be become forced customers without compensation of a company with a poor reputation for customer service, higher prices, fewer service offerings, and a history of ignoring the concerns of their customers.

A. Prices and Services

A price analysis survey conducted by Consumer Reports shows that T-Mobile voice and data plans typically cost \$15 to \$50 less per month than comparable plans from AT&T.³³ Though helpful, a detailed analysis is not necessary to view the price difference. A brief review of the plans offered by each company at their respective websites shows the difference in price for the

³² Internet & Email: Smartphones, http://www.t-mobile.com/shop/addons/services/information.aspx?PAsset=InternetEmail&tp=Svc_Tab_Smartphones (Last visited May 31, 2011)

³³ Jeff Blyskal, CR analysis: T-Mobile *is* cheaper than AT&T <http://news.consumerreports.org/electronics/2011/04/cr-analysis-t-mobile-is-cheaper-than-att.html> (Last visited May 31, 2011)

services offered. Starting with T-Mobile and AT&T's cheapest contact plan, T-Mobile offers 500 minutes of talk time plus unlimited nights and weekend and unlimited calling to other T-Mobile customers for \$39.99 per month. AT&T offers 450 minutes of talk time plus 5000 nights and weekend minutes, unlimited calling to mobile phones on any carrier and the ability to rollover minutes for 12 months. While consumers could dispute which offering is the superior deal, a few service add-ons create a significant shift. If a customer wants to add unlimited messaging it is an additional \$10 per month from T-Mobile, or an additional \$20 per month from AT&T. If a customer adds data services (required if the customer has a Smartphone), it is an additional \$15 for 200 MB or an additional \$25 for 2 GB from AT&T, or from T-Mobile its additional \$10 for 200 MB or \$20 for 2 GB per month. T-Mobile also offers customers the option of data plans of 5 GB or 10 GB for \$30 or \$60 per month respectively. T-Mobile also does not charge customers if they exceed their monthly data allotment. Rather T-Mobile reduces the Internet speed available to the customer (commonly known as a "soft cap"). If a customer exceeds their 200 MB limit on AT&T, AT&T automatically adds an additional 200 MB to the plan at the rate of \$15 for each additional 200 MB. If a customer exceeds AT&T 2 GB limit, AT&T automatically adds 1 GB at a rate of \$10 for each additional GB used.

	T-Mobile	AT&T
Cost per month	\$39.99	\$39.99
included voice minutes	500	450
included nights and weekends minutes	unlimited	5000
included mobile to mobile calling	T-Mobile only	any carrier
voice minute allotment rollover	not available	minutes rollover for up to 12 months
unlimited messaging add-on	\$10.00 per month	\$20.00 per month
200 MB data plan add-on	\$10.00 per month	\$15.00 per month*

2 GB data plan add-on	\$20.00 per month	\$25.00 per month**
5 GB data plan add-on	\$30.00 per month	not available
10 GB data plan add-on	\$60.00 per month	not available

*AT&T customers who exceed 200 MB in a month incur an additional \$15 per 200 MB used.

**AT&T customers who exceed 2 GB in a month incur an additional \$10 charge per 1 GB used.

AT&T and T-Mobile also offer a myriad of other services such as handset insurance, international messaging, and phone tethering where T-Mobile's services are less expensive, more extensive, or both. It is also worth noting that as the number of voice minutes increase, the price discrepancy also increases. AT&T charges \$10 more for 900 minutes than T-Mobile charges for unlimited minutes. For the unlimited tier, T-Mobile offers unlimited voice and messaging for \$10 less than AT&T offers solely unlimited messaging. T-Mobile actually offers unlimited voice, unlimited messaging and 200 MB of high speed data use for the same price as AT&T offers unlimited voice minutes.

The above price comparison only encompasses T-Mobile's 2-year contract offerings. It does not include the reduced monthly cost available to consumers who choose T-Mobile's "Even More Plus" plan offerings. In combination with its no annual contract offering, T-Mobile is the only national carrier to offer an equipment installment plan allowing consumers to purchase mobile devices over time without being subject to a contract with an early termination fee. T-Mobile also offers a service know as "Flexpay" which allows T-Mobile customers the option to pay for their monthly services at the start of the month and prevent overages, rather than be charged for accidentally incurred overages.³⁴ Removing T-Mobile from the wireless marketplace involves the removal of numerous unique service offerings.

B. Carrier Practices

³⁴ T-mobile Shop: Plans, http://www.t-mobile.com/templates/generic.aspx?Passet=Pro_Pro_InStoreOffers (Last visited May 31, 2011)

While mobile service providers in general have a few common practices such as locking mobile devices to the providers' network, having detailed Terms and Conditions, and reducing the cost of a mobile device in exchange for a consumer entering into a two year agreement, AT&T and T-Mobile have very different manners of interacting with and providing services to consumers and their customer base. AT&T, as a dominant carrier in the wireless services market, has a practice of resolving problems with a focus on generating revenue without consideration of the impact on its customers. In contrast, T-Mobile often appears to take an approach of listening to the impact a decision has on its customers, and has a history of trialing products and service that could be beneficial to consumers without a matching benefit to the corporation.

As an example, consider T-Mobile's decision to begin charging \$1.50 for its customers to receive paper bills.³⁵ T-Mobile was making a company money saving decision without concern of the harm it imposed on some of its customers. However, T-Mobile listened to its customers' reaction to the decision. Thousands of outraged T-Mobile customers informed T-Mobile customer service of their displeasure with the decision. T-Mobile in response determined the money saving benefits of the action were not worth the customer dissatisfaction that its decision had caused and rescinded its decision to charge customers to receive paper bills.³⁶ While it is arguable whether T-Mobile should have instead taken a billing approach that rewarded customers who switched to online billing rather than directly punish recipients of paper bills, the fact that it responded to consumer criticism at all is quite unique among wireless service providers.

In contrast, AT&T began receiving complaints from its customers that the upload speed of their Motorola Atrix 4G was significantly slower than advertised, with the uploading capping

³⁵ Laura Northrup, T-Mobile To Charge \$1.50 For Paper Phone Bills, <http://consumerist.com/2009/08/t-mobile-to-charge-150-for-paper-phone-bills.html> (Last visited May 31, 2011)

³⁶ Laura Gunderson, T-Mobile rescinds \$1.50 charge for paper bills, http://blog.oregonlive.com/complaintdesk/2009/09/tmobile_rescinds_150_charge_fo.html (Last visited May 31, 2011)

out at speeds 4 to 5 times slower than the average upload speed on the iPhone. In response to these complaints and media inquiries, AT&T denied that it was throttling or otherwise diminishing the speed on the Motorola Atrix.³⁷ It was not until a consumer posted AT&T's response to his complaint filed with the Better Business Bureau that the truth of the situation was revealed: AT&T had not enabled the HSUPA functionality on the device, which was apparently similar to how AT&T had disabled the Wi-Fi feature on devices in the past.³⁸ AT&T at the time claimed to still be performing tests and preparing the network. Despite its decision to disable the Atrix's upload speed capabilities to where its uploading functionality was slower than most 3G enabled devices, AT&T continued to advertise the Atrix as a 4G device and the "world's most powerful Smartphone."³⁹

AT&T's strategy of profits over customer service is no more evident than within its exclusivity agreement with Apple to carry the iPhone that only expired this year. AT&T tied one of the most popular mobile devices in the United States⁴⁰ to its network despite its inability to handle the customer traffic on its network. AT&T iPhone customers "particularly in densely populated urban areas, have complained of dropped calls, slow Internet access, and poor all around service."⁴¹ AT&T did not take steps to create an adequate network for the anticipated data-heavy usage of iPhone customers. AT&T took small inadequate steps to improve its network, and rather than giving consumers the ability to unlock their iPhone and utilize the device on another mobile service provider's network, such as T-Mobile. Instead, AT&T

³⁷ Marc Flores, Motorola Atrix 4g Upload Speeds Capped 300kbps, <http://www.intomobile.com/2011/03/04/motorola-atrux-4g-upload-speeds-capped-300kbps/> (Last visited May 31, 2011)

³⁸ Atrix 4G General Forums <http://forum.xda-developers.com/showthread.php?p=12020664&posted=1#post12020664> (Last visited May 31, 2011)

³⁹ Motorola Atrix 4G ad, <http://www.att.com/shop/wireless/devices/motorola-atrux.jsp?WT.srch=1#fbid=kBDGX8dTKtl> (Last visited May 31, 2011)

⁴⁰ Top Mobile Phones, Sites and Brands for 2009, http://blog.nielsen.com/nielsenwire/online_mobile/top-mobile-phones-sites-and-brands-for-2009/ (Last visited May 31, 2011)

⁴¹ Marguerite Reardon, AT&T to invest \$2B in mobile network, http://articles.cnn.com/2010-01-29/tech/att.network.boost_1_cell-sites-new-cell-network-upgrades?_s=PM:TECH (Last visited May 31, 2011)

eliminated its unlimited data plan and began charging comparably high rates for small amounts of data to discourage customers from using the AT&T 3G network. AT&T also attempted to place the blame on its network problems on a small number of AT&T customers, claiming that “3 percent of users are eating up 40 percent of the carrier’s network capacity.”⁴² While blaming its own customers, AT&T would not grant those customers the freedom to unlock and move their iPhones to another carrier’s network leaving most of its customers imprisoned on its network, except for the few who took the risk of jailbreaking their iPhones.

As mentioned earlier, T-Mobile has been a product innovator, being the first carrier to initiate products or services that are now standard across the wireless industry. T-Mobile had a role in popularizing the Wi-Fi hotspot, it released the first BlackBerry phone, it popularized texting and web browsing with the T-Mobile Sidekick, and it released the first Android Smartphone the T-Mobile G1.⁴³ T-mobile is also experimenting with Wi-Fi based calling at no additional charge to customers, along with an application that allows for video calling on Facebook. Again, without national competitors such as T-Mobile who are willing to take risks on innovative products to compete, consumer orientated innovation will likely be stifled.

C. Customer Service

AT&T and T-Mobile both have awards pages on their websites. On AT&T’s awards and honors page, AT&T is recognized for its corporate community service program, employment diversity, supplier diversity, and its business acumen.⁴⁴ T-Mobile has fewer awards, but what it has been recognized repeatedly for is its customer service and customer satisfaction.⁴⁵ Since at least 2008, JD Power and Associated has recognized T-Mobile year after year with highest

⁴² AT&T Promises Network Improvements, Hints at Data Caps, <http://www.eweek.com/c/a/Mobile-and-Wireless/ATT-Promises-Network-Improvements-Hints-at-Data-Caps-422813/> (Last visited May 31, 2011)

⁴³ Jason Notte, 5 T-Mobile innovations, and 5 more we lose, <http://www.thestreet.com/story/11060885/1/5-t-mobile-innovations-and-5-more-we-lose.html> (Last visited May 31, 2011)

⁴⁴ AT&T Awards and Honors, <http://www.att.com/gen/corporate-citizenship?pid=6422> (Last visited May 31, 2011)

⁴⁵ T-Mobile Awards, http://www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_Awards (Last visited May 31, 2011)

ranking in customer care, customer contact, and customer service.⁴⁶ AT&T in contrast appears to be rated below average among customers in those categories.⁴⁷ Consumer Reports has also recently released a customer satisfaction survey showing that T-Mobile outperforms AT&T in almost every category it compared. The survey also shows a continuing decline in customer satisfaction with AT&T over the last two years.⁴⁸

Regardless of a mobile services provider's reputation for customer service, customers from all carriers will often encounter situations that necessitate a call to the company's customer service. One common area of customer concern is bill shock caused by unauthorized charges on a customer's bill. While not all bill shock is from unauthorized charges, it is not uncommon for a consumer to incur such charges particular when traveling. UCAN has assisted numerous consumers in resolving disputes of unauthorized charges with each of the national providers. When consumers contact UCAN for assistance it is usually after they have been unable to resolve their complaint of unauthorized charges through interaction with a provider's customer service department. In resolving bill shock complaints UCAN has had very different experiences in its interaction with T-Mobile and AT&T. Below are examples of the manner and tact in which each corporation has chosen to resolve disputes raised by their respective customers.

An AT&T customer traveled to Ethiopia in 2007. The AT&T customer had five phones under one voice, text, and data services plan. To the consumer's knowledge none of the phone lines had international roaming capabilities. Unknown to the consumer, however, international roaming had been activated on one of the phones. A text message was apparently sent to the

⁴⁶ 2011 U.S. Wireless Customer Care Performance Study—Vol. 1, <http://www.jdpower.com/news/pressrelease.aspx?ID=2011010> (Last visited May 31, 2011)

⁴⁷ 2011 Wireless Customer Care Performance Study, <http://www.jdpower.com/Telecom/ratings/wireless-customer-care-ratings-%28volume-1%29/> (Last visited May 31, 2011)

⁴⁸ Paul Reynolds, T-Mobile beats AT&T in CR satisfaction survey, <http://news.consumerreports.org/electronics/2011/04/t-mobile-beats-att-in-cr-satisfaction-survey.html> (Last visited May 31, 2011); *Also* Consumer Reports cell-service Ratings: AT&T is the worst carrier, <http://news.consumerreports.org/electronics/2010/12/consumer-reports-cell-phone-survey-att-worst.html> (Last visited May 31, 2011)

phone, upon which international roaming was activated. The message, however, was sent after the consumer had notified AT&T that the phone was lost and the consumer had not yet activated a replacement phone. The account holder was not otherwise notified that international roaming had been activated. In January 2007, the customer and her brother flew to Ethiopia to attend a wedding. The customer's brother had the phone in his possession and he remained in Ethiopia until March 2007, when he returned to the United States with the phone still in his possession. While in Ethiopia, the customer and her brother had a landline phone available to them so neither had to use the brother's cell phone during their stay.

On February 16, 2007, the customer received a phone call from AT&T stating that the customer's brother's phone incurred over \$20,000 in charges and service had been suspended. That same day, the customer received her phone bill from AT&T. The bill included charges totaling \$20,621.15 for 2151 calls. The 2151 calls amounted to 5398 minutes of use of the phone line between January 22, 2007 and February 14, 2007. The bill indicated that all of the charges came from the customer's brother's cell phone while the phone was in Ethiopia. The customer informed AT&T that she was disputing the charges because the calls were not placed from her brother's phone and she had never received any notice that international roaming service was placed on the phone, but AT&T claimed that the charges were legitimate and that she would need to pay the bill in full.

This chain of events is especially disturbing because 2150 of the 2151 calls listed were not placed through the phone. The first call listed as incoming may have been an attempted voice mail call by the customer's brother upon his arrival in Ethiopia, but that call was never completed as dialed. After the customer's brother could not reach his voicemail, he assumed the phone did not function at all, so he placed the phone in his luggage for the remainder of his stay in Ethiopia. None of the 2038 international outgoing phone calls were to numbers previously dialed by the customer's brother's phone or any of the customer's other phones. The

international calls were to phone numbers in two dozen countries on five continents. In several instances, multiple phone calls occurred during the same time on the same phone. None of these phone calls should have been allowed to begin with because the customer did not enable international roaming services on any of her five phones.

The customer sought assistance from UCAN to help resolve her dispute of the charges. UCAN and AT&T were unable to satisfactorily resolve the dispute after months of negotiations. As a result, UCAN, concerned that such fraud could be occurring to other consumers traveling abroad, brought a complaint before this Commission alleging among other claims, that the charges were unauthorized and thus cramming under California law. The parties eventually reached a settlement.

In contrast to UCAN's interaction with AT&T, which could only be resolved through an adjudicatory proceeding through an administrative agency, here is an example of UCAN's experience resolving an issue of bill shock with T-Mobile, which was more responsive to the situation of its customer. In August 2009, a T-Mobile customer travelled to London and stayed in an apartment there for nine days. While at the apartment, the customer used data services on his T-Mobile phone. Before departing for home, the customer contacted T-Mobile, at the suggestion of a friend, to see whether he had incurred any charges on his phone while in London. The T-Mobile representative informed the customer that he had incurred \$2,100 dollars in data charges during his stay in London. The customer was surprised by this high amount, because he thought his phone had connected to the Wi-Fi network in the apartment he had stayed in.

During the same phone call, the customer disputed the data charges, explaining that he had not been informed that international data roaming was activated upon his phone. Unbeknownst to the consumer, when the sales representative set up the consumer's phone the representative turned data roaming on. Data roaming on new Smartphones is traditionally set in the off position. The customer paid the balance because he did not want this incident to

negatively affect his credit rating. Still upset over the bill, however, the consumer filed complaints with numerous organizations and elected officials including UCAN. UCAN engaged T-Mobile's executive office on behalf of the consumer, and after detailing the situation, T-Mobile offered to credit the consumer the amount of the data charges he had not expected to incur.

The difference in corporate response is startling. The AT&T customer had a situation where it would have been nearly impossible for the customer to have been the cause of those charges. Despite this near impossibility, AT&T refused to accept that the customer was likely the victim of some sort of fraud. The T-Mobile customer, in contrast, was mistaken about which services were active on his phone. T-Mobile could have claimed that it was the customer's responsibility to know whether international roaming was active on his account, but instead its executive customer service department, whom UCAN contacted, decided to acknowledge the customer's situation and offered a full credit for the charges. These two example cases are reflective of the experiences consumers have been able to expect from AT&T and T-Mobile. If the merger is approved, T-Mobile customers will not only lose the customer experience they have become accustomed to and have contracted with T-Mobile for, but will also have to ensure the poor customer service experience that AT&T provides.

IV. Market Dominance and the Harms of Duopoly

A. The emerging duopoly and the U.S. experience with over-concentrated markets

The merger of AT&T and T-Mobile represents a significant reduction in competition not only in the wireless arena, but also in the overall communications marketplace. Indeed, the resulting company will control 47% of the wireless market and 55% of the mobile broadband market in California.⁴⁹ AT&T and Verizon together will control 77% of the market for wireless

⁴⁹I.11-06-009, 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 (June 15, 2011), at 1, 10 n.9 (OII).

service.⁵⁰ The fact that these two companies have significant presences in landline, fiber, and other areas of communication means that two powerful companies, rather than consumer demand, can drive the future of our communications marketplace. The harms of market dominance in the wireless space are easily found in our own nation's history with wireless service.

While the FCC originally planned only one wireless network run by the local phone monopolies in the 1970's, by 1981 it had decided to issue licenses enabling two competing wireless services. A decade of duopoly brought high prices, little innovation, and according to a 1992 GAO report, nearly identical or identical pricing schemes in $\frac{2}{3}$ of wireless markets.⁵¹ Based on this experience, Congress moved to enable the FCC in 1993 to auction off more spectrum to increase competition in the wireless space to escape the stagnant market created by duopoly.

We have already experienced market concentration in our communications history, including in the wireless space, and the affect on the markets have been a proven failure. Market concentration is an acute problem for the California wireless marketplace.

B. Mexico as an example of the high prices and stagnation that arises from market over-concentration

Other countries consistently prove the inherent dangers of too much concentration of market power. Mexico is a prime example of the failure of competition and regulation, resulting in higher prices for consumers. After the state owned phone monopoly, TelMex, was sold to Carlos Slim for the bargain price of \$1.7 billion in 1990, the privatized TelMex still maintains over 80% of the wireline market, and Slim controlled Telcel controls over 70% of the Mexican wireless market.⁵² The New York Times has reported that the result is that a phone call in

⁵⁰Id. at 2

⁵¹ GAO Report: Concerns About Competition in the Cellular Telephone Service Industry (July 1992) Retrieved from <http://archive.gao.gov/d33t10/147125.pdf>

⁵² Julian Miglierini, Slim wrestles Televisa and TV Azteca over Mexico market, <http://www.bbc.co.uk/news/mobile/world-latin-america-12799922> (Last visited May 31, 2011)

Mexico costs around 50 percent more than the average of a group of countries including the United States, United Kingdom, Switzerland, Luxembourg, Canada, Australia, and Sweden.

Recently, the Mexican antitrust agency, the Federal Competition Commission (Cofeco) fined Telcel for having engaged in monopolistic practices by overcharging its competitors to connect calls to Telcel subscribers. Cofeco claims Telcel charged its rivals higher interconnection rates than those related to connecting calls between its own clients, and it has issued the highest-ever penalty levied in its history, MXN 12 billion (USD 1 billion).⁵³ Telmex and Telcel are the subjects of frequent complaints regarding the high prices and poor service provided by the companies. Mexico is an example of the results of a failure to encourage competition or provide baseline regulation. The reliance on competition as a mechanism to ensure lower prices, innovation, and consumer satisfaction are undermined by the removal of a key national competitor and creation of a 77% duopoly in the California wireless market held by two vertically integrated communications companies with interests across the U.S. communications market.

C. The United Kingdom and other countries as examples of the benefits of competition

Recent reports indicate that in countries where regulators have made decisions that encourage competition and choice in broadband service, consumers benefit in terms of speed, price, and innovation. In the UK consumers now have vastly superior choice in broadband providers, which leads to broadband data access plans as low as six dollars a month.⁵⁴ The Commission should be looking at the competitive landscape other countries, particularly those in Europe and Asia which have wireless marketplaces where service quality, availability, and prices exceed the offerings in the American wireless marketplace.

⁵³ Telmex edges closer to decision on pay-TV market entry? <http://www.telegeography.com/products/commsupdate/articles/2011/05/12/telmex-edges-closer-to-decision-on-pay-tv-market-entry/> (Last visited May 31, 2011)

⁵⁴ Besty Rate and Rick Karr, High Fiber, <http://www.pbs.org/wnet/need-to-know/culture/video-high-fiber/9263/> (Last visited May 31, 2011)

V. Consumer Privacy

If approved, the merger will result in significantly reduced competition in the major carrier marketplace, leading to decreased incentives for carriers to build consumer privacy protections into new and existing products and services. Privacy is a key concern of Californians, and a right to privacy is specifically identified in our Declaration of Rights, Article 1, Section 1 of the California Constitution.

T-Mobile has been recognized for the relative strengths of its privacy policies, specifically with respect to the retention of online data. AT&T, Verizon, and Sprint all retain greater amounts of customer data including logs of IP addresses their customers use and sometimes individual URLs of pages that customers view. Security and Privacy Researcher Chris Soghoian provides a more detailed analysis.⁵⁵ AT&T is also well-known for its prior involvement in NSA warrantless wiretapping.⁵⁶

If T-Mobile becomes AT&T, customers will likely be subject to AT&T's data privacy practices. Wireless marketplace consumers will lose the option to shop for wireless service based on privacy concerns. With its potential expanded network as well as the overall increase in Smartphone use, AT&T will have access to expansive amounts of customer data including location, financial, and behavioral data collected from mobile Internet use. We encourage the Commission to both examine AT&T's current data practices (including collection, flow, storage, and retention) and analyze the effect of the proposed merger on the market for consumer privacy protections to determine the privacy implications of the proposed merger.

VI. Conclusion

These Comments discuss just a portion of the detrimental impact the potential merger will have in numerous areas of the wireless industry in California and across the country. The

⁵⁵ See Chris Soghoian, *The negative impact of AT&T's purchase of T-Mobile on the market for privacy*, Mar. 21, 2011, <http://paranoia.dubfire.net/2011/03/negative-impact-of-at-purchase-of-t.html> (last visited May 31, 2011)

⁵⁶ See e.g. Electronic Frontier Foundation, *NSA Spying*, <http://www EFF.org/issues/nsa-spying> (last visited May 31, 2011)

Commission must fully investigate AT&T's claims and assumptions, and confront strong evidence that the merger between AT&T and T-Mobile will result in higher prices, reduced competition, and less innovation in America's wireless marketplace. AT&T's history of abusing its power as a gatekeeper, along with poor customer service and consumer privacy practices, indicates any merger increasing its market power in California must be given the Commission's full attention. Removal of T-mobile means elimination of an important state and national competitor that has been willing to experiment with technologies, services, and prices in order to compete. The positive impacts of such a competitor will not be easily replaced, so the Commission must approach any decisions on the proposed merger with caution.

Respectfully Submitted,

/s/

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