

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications of Cricket License Company, LLC, <i>et al.</i> , Leap Wireless, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations)	WT Docket No. 13-193
)	
Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization)	

PETITION TO DENY

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PETITION TO DENY

I. INTRODUCTION AND SUMMARY

Public Knowledge, Consumer Action, and Writers Guild of America, West (collectively, the “Petitioners”) petition the Federal Communications Commission (“Commission”) to deny the above-captioned applications (the “Applications”) filed by AT&T Inc. (“AT&T”), Leap Wireless International, Inc. (“Leap”), Cricket License Company, LLC (“Cricket”), and Leap Licenseco Inc. (“Leap Licenseco”) (collectively, the “Applicants”) seeking consent to transfer control of licenses and authorities held by Leap and its subsidiaries to AT&T, and to reassign a Lower 700 MHz A Block license from Cricket to Leap Licenseco.

Sections 214(a) and 310(d) of the Communications Act, as amended, require the Commission to determine “whether the Applicants have demonstrated that the proposed transfer

of control of licenses . . . will serve the public interest, convenience, and necessity.”¹ In making this determination, the Commission “employ[s] a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”² This evaluation “encompasses the broad aims of the Communications Act”³ and includes a competitive analysis that is “informed by, but not limited to, traditional antitrust principles.”⁴ The Applicants bear the burden of “proving, by a preponderance of the evidence, that the proposed transaction . . . will serve the public interest.”⁵

As set forth in greater detail below, the proposed transaction threatens the public interest because it would further consolidate wireless spectrum and harm competition in the prepaid wireless market. The Applicants fail to meet their affirmative burden to show that these harms are outweighed by potential public interest benefits,⁶ and the Commission should accordingly deny the Applications. If, however, the Commission approves the Applications, it should require AT&T to divest operating units in a number of markets and to maintain certain offerings in the prepaid market.

¹ *Applications of Deutsche Telekom AG, T-Mobile USA, Inc. and MetroPCS Communications, Inc. for Consent to Transfer Control of Licenses and Authorization*, WT Docket No. 12-301, Memorandum Opinion and Order, DA 13-384, ¶ 14 (Wireless Telecommunications Bur., rel. March 12, 2013) (“*T-Mobile-MetroPCS Order*”); see also 47 U.S.C. §§ 214(a), 310(d).

² *T-Mobile-MetroPCS Order* at ¶ 14.

³ *Id.* at ¶ 15 (quotation omitted).

⁴ *Id.* at ¶ 16.

⁵ *Id.* at ¶ 14.

⁶ See Public Interest Showing of AT&T, WT Docket No. 13-193 (filed Aug. 1, 2013) (“Public Interest Showing”); Supplemental Showing of AT&T, WT Docket No. 13-193 (filed Aug. 20, 2013) (“Supplemental Showing”).

II. THE PETITIONERS HAVE STANDING TO SUBMIT THIS PETITION

Section 309(d)(1) of the Communications Act and Section 1.939 of the Commission's Rules allow any "party in interest" to file a petition to deny any application.⁷ To establish party-in-interest standing, "a petitioner must allege facts sufficient to demonstrate that grant of the application would cause it direct injury."⁸ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.⁹ An organization may meet these standards in its own right or may demonstrate that one or more of its members meets these requirements,¹⁰ and the Commission routinely permits groups representing the public interest to participate in proceedings as "parties in interest."¹¹

Public Knowledge is a not-for-profit institution dedicated to preserving and protecting consumer rights. It has worked extensively to improve affordable, non-discriminatory access to broadband and telecommunications services, and has participated in numerous merger proceedings before the Commission.¹² Consumer Action is a national 501(c)(3) nonprofit organization that seeks to help individual consumers throughout the United States assert their

⁷ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.939.

⁸ Applications of AT&T Inc. and Deutsche Telecom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, Memorandum Opinion and Order, 27 FCC Rcd 4423, 4425 (2012).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., *Applications Granted for the Transfer of Control of the Operating Subsidiaries of Securus Technologies Holdings, Inc. to Securus Investment Holdings, LLC*, WT Docket No. 13-79, Public Notice, 28 FCC Rcd. 5720, 5722 n.20 (2013) (noting that the Petitioners—which included Public Knowledge—had standing to oppose a transfer of control "as representatives of consumers of the relevant services"); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses; Applications of Verizon Wireless and Leap to Exchange Lower 700 MHz, AWS-1 and PCS Licenses; Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses*, WT Docket No. 12-175, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95 (2012) (considering a Petition to Deny filed by Free Press); *Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18, Order, FCC-188 (2011) (considering a Petition to Deny filed by Free Press et al.) ("AT&T-Qualcomm Order").

¹² See, e.g., *Petition to Deny of Public Knowledge and Future of Music Coalition*, WT Docket No. 11-65 (filed May 31, 2011); *Petition to Deny of Public Knowledge*, MB Docket No. 10-56 (filed June 21, 2010).

rights in the marketplace and to advance pro-consumer industry-wide change for the benefit of all. Consumer Action's goals include enabling consumers protect themselves from unfair practices by banks, lenders and telecommunications firms and to ensure fair and affordable access to services, such as broadband and mobile, that allow them to participate fully in society. Writers Guild of America, West, Inc. is a labor organization representing more than 8,000 professional writers who depend on robust competition in telecommunications to allow creators to connect with the public. WGAW has been an advocate for increased competition in the wireless market, which is necessary to ensure consumers have affordable access to mobile video offerings.

Here, the Petitioners represent the public interest and allege both a direct injury—harm to competition—and a causal link between that injury and the challenged action. As such, the Petitioners are parties in interest with standing to submit this Petition to Deny.¹³ This Petition was filed timely within the period set forth in the *Public Notice*, DA 13-1831 released on August 28, 2013.¹⁴

III. THE PROPOSED CONSOLIDATION OF WIRELESS SPECTRUM HOLDINGS WILL HARM WIRELESS COMPETITION, SLOW INNOVATION, AND HAMPER INVESTMENT.

A. Spectrum Screen

The Commission applies a two-part screen to help identify local markets where competitive concerns are more likely.¹⁵ The first part of the screen is based on the size of the

¹³ See 47 C.F.R. § 1.939.

¹⁴ *AT&T Inc., Leap Wireless International, Inc., Cricket License Company, LLC, and Leap Licenseco, Inc. Seek Consent to the Transfer of Control of AWS-1 Licenses, PCS Licenses, and Common Carrier Fixed Point to Point Microwave Licenses, and International 214 Authorizations, and the Assignment of One 700 MHz License*, WT Docket No. 13-193, Public Notice (rel. Aug. 28, 2013).

¹⁵ *T-Mobile-MetroPCS Order* at ¶ 38.

post-market transaction Herfindahl-Hirschman Index (“HHI”) and the change in HHI.¹⁶ The second part of the screen identifies local markets where an entity would acquire more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services.¹⁷ For markets triggered by either screen, the Commission will, on a case-by-case basis, “examine the likelihood of competitive harm by assessing the potential competitive effects of any significant increases in market or spectrum concentration in the marketplace.”¹⁸ Attached as Appendix A is a county-by-county analysis of the spectrum screen that shows the troubling results of AT&T’s proposed acquisition of the competitive wireless assets.

Nationally, the proposed transaction would cause AT&T to exceed the screen in 94 counties, which collectively have a population of almost 8.5 million Americans.¹⁹ The markets exceeding the screen cover nearly two dozen states, with Nevada, Texas and Idaho seeing the largest jumps in resource concentration at 21%, 18%, and 14% over the spectrum screen, respectively.²⁰ AT&T’s concentration of spectrum by band is also noteworthy. In the PCS band, for example, the proposed transaction will result in AT&T controlling 50% or greater of all available PCS spectrum in 74 counties, which have a collective population of nearly 5 million, and more than 33% of all PCS spectrum in nearly one-third of all counties, which have a collective population of 76,332,217.²¹ Meanwhile, the effect of the proposed transaction on the competitive opportunity possible in particular markets is even more pronounced. For example,

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *AT&T-Alltel Order* at ¶ 40.

¹⁹ AT&T already exceeds the cap in four of these counties, and in 30 other counties where it is not acquiring spectrum from Leap. *See* Appendix A.

²⁰ *Id.*

²¹ *Id.*

AT&T will control 70 MHz or 54% of all available PCS spectrum in Carbon, TX and 50 MHz or 56% of all AWS spectrum in McAllen, TX.²² And the effects of the additional resource concentration are not confined to one or two bands. By way of example, the proposed transaction would place AT&T over the screen in one market, Lake Charles, by 29 MHz – meaning that AT&T will exceed the spectrum screen in Lake Charles by an amount greater than many of its competitors have available to provide service in many markets.²³ If the Commission intends to promote the facilities-based competition that AT&T claims to prize so highly, the Commission must ensure that AT&T has not acquired all or most of the resources necessary to construct facilities capable of providing robust, facilities-based wireless broadband service. The proposed transaction falls short of that standard.

As AT&T acknowledges, the proposed transaction will trigger an unprecedented number of Cellular Market Areas (“CMAs”) during the spectrum screen.²⁴ In fact, the spectrum screen analysis is even more serious than AT&T acknowledges – triggering 40 CMAs, not 38 CMAs as AT&T asserts.²⁵ No single transaction has pushed a carrier so far over the Commission’s competitive screen as this one will. In the \$780 million AT&T-Alltel merger, for example, the spectrum screen triggered just one CMA.²⁶ In the \$1.5 billion T-Mobile-MetroPCS merger, the spectrum screen did not trigger any markets.²⁷ In the \$100 million GCI-ACS transaction, the

²² *Id.*

²³ *Id.*

²⁴ Public Interest Showing at 35.

²⁵ See *Id.*; Appendix A.

²⁶ *AT&T-Alltel Order* at ¶ 40.

²⁷ *T-Mobile-MetroPCS Order* at ¶ 40.

spectrum screen triggered one CMA.²⁸ In the \$2 billion AT&T-Qualcomm transaction, the spectrum screen triggered three CMAs.²⁹

In terms of spectrum concentration, the closest parallel to the present case would be the \$28 billion Verizon-Alltel merger.³⁰ In that 2008 transaction, the spectrum screen identified 27 CMAs that required further review, and the HHI screen identified 218 CMAs.³¹ The Commission approved that transaction, but required Verizon to divest spectrum in 105 of the CMAs “[t]o ensure that any potential harms posed by th[e] transaction will be outweighed by the proposed transaction’s alleged public interest benefits.”³² The competitive harms signaled by the Commission’s spectrum screen in this case are even more pronounced than those found in the Verizon-Alltel merger and warrant denial of the instant application.

B. Spectrum Consolidation

As the Commission has explained, “ensuring the availability of sufficient spectrum is critical for promoting the competition that drives innovation and investment.”³³ Permitting one or two carriers to continue aggregating spectrum, however, reduces the availability of spectrum for competition and harms the wireless market. In the Commission’s words, “if permitted to aggregate large amounts of spectrum,” a mobile provider may “exert undue market power or

²⁸ *GCI-ACS Order* at ¶¶ 42-43.

²⁹ *AT&T-Qualcomm Order* at ¶ 44.

³⁰ *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantic Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 (2008) (“*Verizon-Alltel Order*”).

³¹ *Id.* at ¶ 81.

³² *Id.* at ¶ 157, Appendix B.

³³ *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-267, Notice of Proposed Rulemaking, 27 FCC Rcd 11710, ¶ 4 (2012); *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, Sixteenth Report, 28 FCC Rcd 3700, ¶ 86 (2013) (“*Sixteenth Report*”).

inhibit market entry by other service providers.”³⁴ Analysts have also recognized that market concentration is currently hurting the wireless market.³⁵

AT&T has been acquiring significant amounts of spectrum on the secondary market, both through acquiring competitors and through purchasing licenses. For instance, AT&T has already acquired several competitors, including Alltel Wireless,³⁶ NextWave Wireless,³⁷ and Centennial Communications.³⁸ AT&T has also sought Commission approval to purchase the wireless assets and customers of Long Lines.³⁹ And without timely and appropriate Commission and Department of Justice intervention, AT&T would have also acquired T-Mobile, the nation’s fourth largest carrier.⁴⁰ Moreover, even without purchasing companies outright, AT&T has been buying up many licenses. In the past six months alone, AT&T has acquired licenses from Big Wave Ventures, Qualcomm, Redwood Tel Acquisition, David M. Gates, Broadband

³⁴ *Id.* ¶ 7.

³⁵ See Fitch Ratings, *Spectrum Inspection: The Auction Roadmap* at 13 (Apr. 16, 2012) (“[W]ireless operations have experienced a general decline in subscribers, profitability, and EBITDA generation. Fitch expects headwinds on the wireless business to continue and include the competitive landscape, the disadvantages of a regional operator in an increasingly duopolistic market, high unemployment, slow economic recovery, and the lack of an iPhone service offering.”).

³⁶ *Applications of AT&T, Inc. and Atlantic Tele-Network, Inc. For Consent to Transfer Control of and Assign Licenses and Authorizations*, WT Docket No. 13-54, Memorandum Opinion and Order, DA 13-1940 (WTB, rel. Sept. 20, 2013) (“AT&T-Alltel Order”).

³⁷ *Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc. and San Diego Gas & Electric Company*, WT Docket No. 12-240, Memorandum Opinion and Order, 27 FCC Rcd. 16459 (2012).

³⁸ *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Rcd 13915 (2009).

³⁹ Phil Goldstein, *AT&T to Snap Up Iowa’s Long Lines as Wireless Acquisitions Continue*, FierceWireless, Jul. 29, 2013, <http://www.fiercewireless.com/story/att-snap-iowas-long-lines-wireless-acquisitions-continue/2013-07-29>.

⁴⁰ See, e.g., Tim Carmody, *Justice Department Moves to Block AT&T, T-Mobile Merger*, Wired, Aug. 31, 2011, <http://www.wired.com/business/2011/08/justice-department-moves-to-block-att-mobile-merger/>; Edward Wyatt and Jenna Wortham, *AT&T Merger and T-Mobile Faces Setback*, N.Y. TIMES, Nov. 24, 2011, available at http://www.nytimes.com/2011/11/25/technology/att-deal-with-t-mobile-takes-a-step-back.html?pagewanted=all&_r=0.

Communications, and Southern Michigan Cellular Company.⁴¹ The Commission should not let this spree continue, as preserving independent carriers relying on their own spectrum holdings – carriers like Leap – promotes competition in the wireless market and avoids excessive spectrum aggregation.

Below-1 GHz spectrum has superior propagation characteristics to the PCS and AWS spectrum at issue in this transaction; however, the Commission has recognized that higher frequency spectrum, such as much of Leap’s holdings, is also competitively important.⁴² As the Sixteenth Report explains, “higher-frequency spectrum may be just as effective, or more effective, for providing significant capacity, or increasing capacity, within smaller geographic areas.”⁴³ Additionally, higher-frequency spectrum may be made more valuable by being combined with lower-frequency spectrum because providers like AT&T, which obtain coverage by deploying services in below-1 GHz spectrum, can use above-1 GHz spectrum for additional capacity.⁴⁴ Indeed, AT&T itself has argued that high frequency is as or more effective at providing wireless service, particularly when we are facing a spectrum crunch.⁴⁵ Consequently, AT&T’s acquisition of Leap’s higher-frequency spectrum should not be overlooked merely because it is not below 1 GHz.

⁴¹ See, e.g., <http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=3432278>; <http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=3025175>; <http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applLicenses.jsp?applID=7499187>.

⁴² See, e.g., *Sixteenth Report* at ¶ 120.

⁴³ *Id.* at ¶ 126.

⁴⁴ *Id.* at ¶ 119.

⁴⁵ See, e.g., AT&T Notice of Ex Parte Presentation, WT Docket No. 12-269, Attach. 1 at 5 (June 13, 2013).

C. Innovative Technologies

Whatever the frequency, further consolidation of wireless spectrum threatens cutting edge, innovative applications and technologies. Many of these applications and technologies require fast Internet connections for multimedia uses, such as high-definition video. Netflix and Hulu are well-known companies that offer such products, and many independent content creators offer them, too. Prepaid users, in particular, have much to gain from creative content offerings, as the Internet is proving an increasingly important avenue for reaching low-income communities. But all wireless users benefit from a more competitive online market with more diverse voices.

Robust, facilities-based competition among providers denies AT&T life-or-death power over innovative new business models. For instance, both AT&T and Verizon recently expressed interest in a “1-800 Apps” model, which would charge app developers for the cost of data instead of consumers.⁴⁶ Such an approach would have a chilling effect on the offering of data-heavy services and, in particular, disadvantage cash-poor companies that cannot afford to foot their users’ bills. Yet, in an uncompetitive market, the dominant carrier(s) could do just that, and unilaterally dictate Internet companies’ business models in ways that stifle growth and innovation.

Denying AT&T’s latest move to corner the market on critical input resources for wireless broadband service will help not only help American consumers enjoy continued rivalry on price, service, and innovation, but also help ensure businesses of all sizes continue to have access to

⁴⁶ See, e.g., Anton Troinovski, *AT&T May Try Billing App Makers*, WALL STREET JOURNAL, Feb. 28, 2012, available at <http://online.wsj.com/article/SB10001424052970204653604577249080966030276.html>; Kevin Fitchard, *Viewdini: Could this App be Verizon’s First Pass at Toll-Free Mobile Data?*, GIGAOM, May 22, 2012, <http://gigaom.com/2012/05/22/viewdini-could-this-app-be-verizons-first-pass-at-toll-free-mobile-data/>.

multiple, competing wireless connection to provide American consumers with innovative new service offerings.

D. Divestiture

If the Commission approves the proposed transaction despite the substantial public interest harms signaled by the spectrum screen and discussed further below, it should, as it did in the Verizon-Alltel merger, condition its consent on divestiture of a number markets. The initial spectrum screen triggers significantly more markets here than it did there, and the HHI screen may trigger even more. Although case-by-case analysis of these markets is needed to fully measure proposed the threat of public harm, the Commission should not, as explained above, underestimate the dangers further spectrum consolidation—especially to innovation and to cutting edge technologies.

IV. AT&T’S ACQUISITION OF LEAP WILL REDUCE COMPETITION IN THE PREPAID MARKET, HARMING LOWER-INCOME WIRELESS CONSUMERS.

A. The Prepaid Market

The prepaid market is a distinct product market from the postpaid wireless market. As the Commission has explained, a relevant product market is the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a “small but significant and non-transitory price increase,” presuming no change in the terms of sale of other products.⁴⁷ In other words, when one product is a reasonable

⁴⁷ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations File Nos. 0001656065, et al. and Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto*

substitute for the other in the eyes of consumers, it is to be included in the relevant market.⁴⁸

Thus, the relevant product market includes all products reasonably interchangeable by consumers for the same purpose.⁴⁹

Although the prepaid market could theoretically appear interchangeable from the postpaid market, consumers do not treat or view the markets that way. Prepaid plans often cost less than postpaid plans, never require lengthy contracts, and generally do not involve credit checks.⁵⁰ Prepaid plans tend to attract low-income consumers and consumers with bad credit.⁵¹ Additionally, consumers who wish to avoid lengthy contracts or credit checks will strongly prefer prepaid services, regardless of price.

Because of these features, a hypothetical monopolist could easily and profitably impose a “small but significant and non-transitory price increase” in the prepaid market at the expense of the nation’s most vulnerable consumers.⁵² As the Greenlining Institute points out, a significant number of consumers would not view \$40 wireless services and \$100 services as substitutes for one another, and would not switch if the prepaid service’s price increased.⁵³ Moreover, the Commission has recognized that the wireless industry itself treats the prepaid market as a distinct

Lease of Licenses File Nos. 0001771442, 0001757186, and 0001757204 and Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, FCC 04-255, at ¶ 71 (2004) (“*Cingular-AT&T Order*”).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., Marc Lifsher, *More Cellphone Users Switch to Prepaid Plans*, LOS ANGELES TIMES, Feb. 19, 2003, available at <http://articles.latimes.com/2013/feb/19/business/la-fi-0220-prepaid-cellphone-boom-20130220> (“*More Cellphones Users Switch*”); Sprint Petition to Deny, WT Docket No. 11-65, at 19 -22 (filed May 31, 2011) (Sprint AT&T-T/Mobile Petition).

⁵¹ See, e.g., *More Cellphone Users Switch*; Sprint AT&T/T-Mobile Petition at 22; *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 06-17, Eleventh Report, 21 FCC Rcd. 10947, 10985 n.224 (2009) (noting an analyst’s conclusion that each of the major carriers had launched or re-launched a prepaid services to increase penetration of lower income brackets).

⁵² *Cingular/AT&T Order* at ¶¶ 71-72.

⁵³ Opening Comments of the Greenlining Institute, WT Docket No. 12-301, at 5 (filed Jan. 22, 2013.)

market—noting that the industry has traditionally failed to heavily promote prepaid offerings, as they typically yield lower average monthly revenue per user and higher churn rates for service providers.⁵⁴ And the relative growth rates of the pre- and post-paid markets further show that the two are distinct. Between the end of 2009 and the end of 2011, the number of prepaid subscriptions grew 29 percent.⁵⁵ Meanwhile, the number of postpaid subscriptions grew just under three percent during that period.⁵⁶

Although the Commission has previously lumped the pre- and post-paid markets together in a combined “mobile telephony/broadband services” product market,⁵⁷ it has acknowledged that this classification may be overbroad. This mobile telephone/broadband services market is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (“mobile broadband services”).⁵⁸ As the Commission has recognized, this definition encompasses differentiated services (e.g., voice-centric or data-centric), devices (e.g., feature phone, smartphone, tablet, etc.), and contract features (e.g. prepaid vs. postpaid), and that wireless providers often recognize such distinctions

⁵⁴ *Sixteenth Report*, 28 FCC Rcd at 3810.

⁵⁵ *Sixteenth Report*, 28 FCC Rcd at 3858.

⁵⁶ *Sixteenth Report*, 28 FCC Rcd at 3858.

⁵⁷ *See, e.g., AT&T, Inc., Cellco Partnership D/B/A/ Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC for Consent to Assign and Lease AWS-1 and Lower 700 MHz Licenses*, WT Docket No. 14-56, Memorandum Opinion and Order, DA 12-1854 at ¶ 24 (WTB, 2013) (*Verizon/Grain Order*); *see also Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Factor Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 at ¶¶ 45-48 (revisiting the product market definition used in previous transactions and settling instead on “mobile telephony/broadband services”).

⁵⁸ *See, e.g., AT&T, Inc., Cellco Partnership D/B/A/ Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC for Consent to Assign and Lease AWS-1 and Lower 700 MHz Licenses*, WT Docket No. 14-56, Memorandum Opinion and Order, DA 12-1854 at ¶ 24 (WTB, 2013) (*Verizon/Grain Order*); *see also Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Factor Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258, ¶¶ 45-48 (revisiting the product market definition used in previous transactions and settling instead on “mobile telephony/broadband services”).

in their internal analyses of the marketplace.⁵⁹ The Commission has acknowledged that these distinctions suggest the possibility of smaller markets nested within this larger “mobile telephony/broadband services” product market.⁶⁰ But the Commission has found it unnecessary to examine that possibility in order to analyze the potential competitive effects of previous transactions, and instead considered those aspects of product differentiation, as appropriate, when analyzing the competitive effects of the transaction within the relevant markets.⁶¹

B. Low-Income Consumers

The Commission has an obligation to protect low-income subscribers, who disproportionately depend on the prepaid market. Congress created the Commission “to make available, so far as possible, to *all the people* of the United States . . . a rapid, efficient, Nation-wide . . . wire and radio communication service with adequate facilities at reasonable charges.”⁶² More than sixty years later, in the Telecommunications Act of 1996, “Congress directed the Commission and states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers.”⁶³ Section 254(c) adds that “[c]onsumers in all regions of the Nation, including low-income consumers . . . should have access to telecommunications and information services”⁶⁴ Moreover, as the National Broadband Plan points out, the cost of digital exclusion is large

⁵⁹ *Applications of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16204 n.97 (WTB, 2011).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 47 U.S.C. § 151.

⁶³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997); *see also* 47 U.S.C. § 254(b)(3).

⁶⁴ 47 U.S.C. § 254(c).

and growing, and it compounds inequities for historically marginalized groups, such as people with low incomes.⁶⁵

Low-income consumers would be disproportionately affected by this transaction. First, as explained above, low-income consumers tend to be attracted to prepaid wireless plans like Leap's.⁶⁶ Second, the 54 markets triggered by the Commission's initial spectrum screen have a significantly lower median income than the national average. In 2010, the median income in the 54 markets triggered was \$40,802.⁶⁷ In contrast, the median income in the nation as a whole was \$50,046.⁶⁸ This represents nearly a 20% difference in income, and further illustrates why the Commission should approach the further concentration of limited spectrum resources in these markets with special care.

C. Harm to the Prepaid Market and to Low Income Consumers

The proposed transaction risks eliminating a large, disruptive player in the prepaid market and risks further hindering the ability of low-income consumers to obtain affordable wireless services. According to the Commission's *Sixteenth Report*, approximately 70.8 million of the nation's 322 million mobile wireless customers subscribed to prepaid services at the end of 2011.⁶⁹ Facilities-based providers serve approximately 48 million of these prepaid customers.

⁶⁵ National Broadband Plan at 129.

⁶⁶ See *supra* III.A.

⁶⁷ See Appendix A; United States Census Bureau, Small Area Income Poverty Estimates, <http://www.census.gov/did/www/saipe/data/interactive/#>.

⁶⁸ See United States Census Bureau, Small Area Income Poverty Estimates, <http://www.census.gov/did/www/saipe/data/interactive/#>.

⁶⁹ *Sixteenth Report*, 28 FCC Rcd at 3858.

Mobile virtual network operators (“MVNOs”) and resellers like TracFone serve the rest, but are not considered “market participants” by the Commission.⁷⁰

These facilities-based market participants, along with their approximate number of prepaid subscribers, are as follows:

- Leap: five million;⁷¹
- Verizon: six million;⁷²
- AT&T: seven million;⁷³
- Sprint-Nextel (including Boost Mobile and Virgin Mobile): 15 million;⁷⁴ and
- T-Mobile (including MetroPCS): 15 million⁷⁵

With nearly 5 million subscribers and a 10% share among market participants, Leap is a major player in the prepaid market.⁷⁶ Leap is also is a disruptive force in the pre-paid market.⁷⁷ For instance, Leap was one of the first prepaid providers to offer unlimited prepaid talk, text, and data offerings.⁷⁸ And Leap was the first U.S. prepaid provider to offer the iPhone.⁷⁹

⁷⁰ Although the Commission does not consider MVNOs and resellers to be market participants, it does consider the effect of these entities in its competitive evaluation. *See, e.g., T-Mobile-MetroPCS Order* at ¶¶ 36-37; *AT&T-Alltel Order* at ¶29; *GCI-ACS Order* at ¶ 41.

⁷¹ Public Interest Showing at 29.

⁷² Verizon Quarterly Report, http://www.verizon.com/investor/DocServlet?doc=2013_2q_qb_vz_v2.pdf.

⁷³ AT&T Quarterly Report, http://www.att.com/Investor/Earnings/1q13/ib_final_1q13.pdf.

⁷⁴ Sprint Quarterly Report, <http://investors.sprint.com/Cache/1001177567.PDF?Y=&O=PDF&D=&fid=1001177567&T=&iid=4057219>.

⁷⁵ T-Mobile Quarterly Report, <http://investor.t-mobile.com/phoenix.zhtml?c=177745&p=quarterlyearnings>.

⁷⁶ Consistent with the Commission’s prior analyses, we do not include MVNOs and resellers as “market participants.”

⁷⁷ *See, e.g., Applications of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16196 ¶21 (explaining that competitive concerns are exacerbated when the industry risks losing a disruptive force); AT&T Public Interest Showing at 96 (describing Leap as an “upstart” playing a disruptive role in wireless markets).

⁷⁸ *Sixteenth Report*, 28 FCC Rcd at 3811.

⁷⁹ *Sixteenth Report*, 28 FCC Rcd at 3845.

In addition, the proposed transaction will increase horizontal market concentration in the prepaid wireless market: the number of market participants will fall from five to four, and AT&T's share of the market will climb to approximately 25%.

If AT&T is interested in the prepaid market, it has adequate resources to enter the market without eliminating a disruptive competitor. AT&T already possesses a nationwide 4G network and sufficient spectrum to accommodate new prepaid subscribers, who tend to use less data than postpaid subscribers. AT&T entering the market would further encourage competition. By comparison, AT&T's proposed transaction removes a disruptive competitor from the market without any material benefit for the consumers who rely on Leap's innovative low-cost plans and customer-friendly contract terms.

D. Conditions

If, despite evidence to the contrary, the Commission finds that the transaction is in the public interest, it should impose conditions to protect competition in the prepaid market. In its Public Interest Showing, AT&T promises to "honor the rate plans of existing Leap customers" and "offer competitive rate plans" to new customers.⁸⁰ In a Supplemental Showing, AT&T clarifies that this means it will honor an existing Leap customer's plan "provided that the customer does not suspend or terminate his or her service . . . or choose to upgrade to a device or plan that is not comparable to his or her current device or plan."⁸¹ Even as clarified, AT&T's promises are exceptionally. AT&T fails to indicate:

- Whether AT&T will continue to honor the bulk of existing Leap customers' current terms and conditions, such as:

⁸⁰ Public Interest Showing at 9.

⁸¹ Supplemental Showing at 2.

- Unlimited voice;⁸²
 - Unlimited text, picture, video and international messaging;⁸³
 - Unlimited data, including a guaranteed amount of Full-Speed data that varies as follows: \$50 for 2.5 GB/month; \$60 for 5 GB/month; and \$70 for 10 GB/month;⁸⁴
 - Unlimited song downloads on Muve Music enabled phones;⁸⁵
 - \$15 activation fee;⁸⁶
 - Free overnight shipping;⁸⁷
 - 30 day return policy for phones and broadband devices;⁸⁸ and
 - Mobile Hotspot (Cricket Tethering) for an additional \$10/month.
- Which devices and plans are considered “comparable” and will thus be available to existing Leap customers who do not wish to relinquish their current plans;⁸⁹
 - Whether AT&T will allow existing Leap customers full access to its “more robust data services,” or instead throttle their data speeds to keep customers at existing levels;⁹⁰
 - Much of anything about the rates, terms, and conditions that will be offered to *new* prepaid customers.

Moreover, AT&T seems to anticipate that most existing Leap customers will not keep their current plans for long. Instead, AT&T believes that Leap customers will be attracted to

⁸² See Cricket, Smartphone Plans, <http://www.mycricket.com/cell-phone-plans#smartphone-plans>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Cricket, Muve Music, <http://www.mycricket.com/muve-music/tell-me-more>.

⁸⁶ See Cricket, Smartphone Plans, <http://www.mycricket.com/cell-phone-plans#smartphone-plans>.

⁸⁷ *Id.*

⁸⁸ See Cricket, Web Return Policy, <http://www.mycricket.com/support/return-policy>.

⁸⁹ See Supplemental Showing at 2.

⁹⁰ *Id.*

AT&T's offerings and "choose to migrate on their own initiative."⁹¹ In particular, AT&T expects that many Leap customers will switch as they select new devices, especially since, in AT&T's and others' experience, "prepaid subscribers typically upgrade their devices frequently."⁹² To further speed the process, AT&T may also "formulate offers designed to further encourage Leap customers to migrate . . . within 18 months of merger close."⁹³ In other words, far from allowing customers to retain their current wireless offering from Leap, AT&T has announced its intention to migrate Leap customers from their current low-cost, low-fee plans to AT&T's more costly pre-paid offerings as quickly as possible.

If the Commission approves the proposed transaction, it should take certain precautions to mitigate some of the potential public interest harms. In particular, to protect prepaid consumers and competition in the prepaid market, the Commission should AT&T to: (1) Continue offering the same prepaid service as Leap, with the same rates, terms and conditions, for a minimum of four years for existing Leap customers and two years for new prepaid customers; (2) allow existing Leap customers, for a minimum of four years, to upgrade their plans or devices without losing the terms and conditions currently available to them; (3) not throttle its prepaid customers when they using their guaranteed "Full-Speed Data;" and (4) make the same handsets available to its prepaid customers that it does to its postpaid customers.

⁹¹ *Id.*

⁹² *Id.*; *see also* Public Interest Showing of T-Mobile, WT Docket No. 12-301, at 21 (filed Oct. 18, 2012) (noting that 60-65 percent of MetroPCS' customers upgrade their handsets each year).

⁹³ Supplemental Showing at 2-3.

V. CONCLUSION

The Petitioners respectfully requests that the Commission deny the Applications. If allowed, the proposed transaction would further consolidate wireless spectrum and harm competition in the prepaid wireless market. The transaction raises serious public interest concerns, which the Applicants fail to show are outweighed by public interest benefits. If the Commission nonetheless approves the Applications, the Petitioners requests that it do so only on condition that AT&T divest in a number of markets and maintain prepaid offerings for new and existing customers that Leap currently offers to its customers, many of whom are low-income earners with access to few competitive alternatives.

Respectfully submitted,

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DECLARATION OF JOHN BERGMAYER

I, John Bergmayer, declare under penalty of perjury on this 27th day of September, 2013 that:

1. I have read the foregoing Petition to Deny of Public Knowledge.
2. This declaration is submitted in support of the Petition to Deny applications in FCC Docket Number WT 13-193.
3. I am the Senior Staff Attorney for Public Knowledge, an advocacy organization that has worked extensively to improve affordable, non-discriminatory access to broadband and telecommunications services.
4. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s/ John Bergmayer
John Bergmayer
Senior Staff Attorney
Public Knowledge