

**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	)	

**REPLY TO OPPOSITION**

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**I. INTRODUCTION AND SUMMARY**

Public Knowledge, Consumer Action, and Writers Guild of America, West (collectively, the “Petitioners”) submit their Reply to the Joint Opposition to the Petitions 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.<sup>1</sup>

As explained in the Petition, the proposed transaction threatens the public interest because it would further consolidate wireless spectrum and harm competition in the prepaid

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<sup>1</sup> See Joint Opposition of AT&T Inc. and Leap Wireless International, Inc., WT Docket No. 13-193 (filed Oct. 23, 2013) (“Opposition”).

wireless market.<sup>2</sup> The Applicants fail to meet their affirmative burden to show that these harms are outweighed by potential public interest benefits,<sup>3</sup> and, as described below, also fail to address many of the concerns raised by the Petitioners and others in response to the proposed transaction. The Commission should accordingly deny the Applications.

## II. THE PREPAID MARKET

Prepaid and postpaid services are distinct product markets. The Commission's test for determining the scope of the relevant product market is based on whether the consumer views the products as separate.<sup>4</sup> The ultimate arbiter of a relevant market is the degree to which consumers regard the relevant products as, in fact, substitutable based on the features, price, and intended use as well as the seller's relative profit margin on the products.<sup>5</sup>

Of course, any similar services are substitutable at some point. Buses can substitute for sedans. Taxis can substitute for limousines. The library can substitute for a Google search. And tap water can substitute for champagne. Such theoretically possible substitution is not sufficient

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<sup>2</sup> See Petition to Deny of Public Knowledge, Consumer Action, and Writers Guild of America, West, WT Docket No. 13-193 (filed Sept. 27, 2013) ("Petition").

<sup>3</sup> 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").

<sup>4</sup> See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, FCC 04-255, ¶ 71 (rel. Oct. 26, 2004) (applying the "hypothetical monopolist test," which defined the product market by whether "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.").

<sup>5</sup> Specifically, the Horizontal Merger Guidelines state that the definition of the product market depends "both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products." United States Department of Justice and the Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, at Section 4.1.3 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#4a> (last accessed Oct. 29, 2013) ("HORIZONTAL MERGER GUIDELINES").

to establish a common product market. Instead, market definition depends on how consumers actually perceive the two products. As the Department of Justice explained to the Commission earlier this year, the outcome of the market definition inquiry must rest on a fact-intensive inquiry into the “functional experience from the perspective of the customer.”<sup>6</sup>

Contrary to AT&T contention, therefore, the answer to the question of market definition is not whether the line between two products is “blurry” or entails line drawing between them.<sup>7</sup> Such line-drawing is inevitable and not “inherently arbitrary,” as AT&T claims.<sup>8</sup> As explained in the Department of Justice’s Horizontal Merger Guidelines, “[c]ustomers often confront a range of possible substitutes for the products of the merging firms.”<sup>9</sup> Some substitutes are closer than others and attempts to “include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other.”<sup>10</sup> The principles of market definition seek “to make this inevitable

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<sup>6</sup> *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (Apr. 11, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7022269624> (last accessed Oct. 29, 2013). Thus, the Department of Justice has considered whether business or government customers constitute a distinct set of customers and found that the distinct needs and purchasing patterns of “enterprise customers” warrant consideration separate from general end-user customers. *Id.* (citing Complaint at 8, *United States v. AT&T and T-Mobile* (No. 11-1560) (D.D.C., filed Aug. 31, 2011); see also Competitive Impact Statement at 10, *United States v. Verizon and Alltel* (No. 1:08-cv-01878) (D.D.C., filed Dec. 12, 2008); Competitive Impact Statement at 11, *United States, et al. v. Verizon Commc 'n Inc., CellCo P 'ship d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Commc 'n, Inc., and Bright House Networks, LLC* (No. 12-1354) (D.D.C., filed Aug. 16, 2012).

<sup>7</sup> Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of WT Docket No. 13-193 Authorizations; Application of Cricket License Company, LLC And Leap Licenseco Inc. for Consent to Assignment of Authorization, WT Docket No. 13-193, at 20-21 (Oct. 23, 2013); Mark A. Israel, *An Economic Analysis of Competitive Effects and Consumer Benefits from the Proposed Acquisition of Leap Wireless by AT&T*, at 6-7 (Aug. 1, 2013), attached to Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 23, 2013).

<sup>8</sup> See Opposition at 24.

<sup>9</sup> HORIZONTAL MERGER GUIDELINES, at Section 4.

<sup>10</sup> *Id.*

simplification as useful and informative as is practically possible” because “relevant markets need not have precise metes and bounds.”<sup>11</sup>

The role of the competition authority is “one of enforcement, on a case-by-case basis, rather than an exercise in prospective rule-making, and it investigates mergers when they are proposed and examines *the specific circumstances surrounding each transaction.*”<sup>12</sup> AT&T’s denunciation of the very factual inquiry necessary to determine whether or not pre- and postpaid services constitutes a separate product market thus strikes at the principal function of the regulatory authority in this case: that is, whether defining a separate product market for prepaid wireless services is warranted based on consumer perceptions and experiences as well as differentials in revenues and earnings between the two product offerings.

In this case, the weight of evidence favors the definition of a prepaid market for mobile wireless services. The factors that differentiate prepaid from postpaid service begin with the customer profile. Prepaid customers are distinct from postpaid customers in that they exhibit:

- Lower creditworthiness;<sup>13</sup>
- Lower employment rates;<sup>14</sup>
- Less purchasing power;<sup>15</sup> and
- Substantially less average revenue per user (“ARPU”); and<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269, at 18 (Apr. 11, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7022269624> (last accessed Oct. 29, 2013).

<sup>13</sup> For example, prepaid subscribers are less likely to own a home. See Kevin Fitchard, *Smartphones make big gains in prepaid*, GIGAOM (Mar. 28, 2012), available at <http://gigaom.com/2012/03/28/smartphones-make-big-gains-in-prepaid/> (last accessed Oct. 29, 2013).

<sup>14</sup> MaCorr Research, *Listening in on the Prepaid and Postpaid Cellphone Markets*, (Sept. 2013), available at <http://www.macorr.com/blog/?p=190> (last accessed Oct. 29, 2013).

<sup>15</sup> *Id.*

<sup>16</sup> See GSMA Intelligence, *Mobile users move toward contract tariffs as prepaid plateaus: New study identifies Americas as sole prepaid growth region* (May 2013), available at <https://gsmaintelligence.com/analysis/2013/05/mobile-users-move-toward-contract-tariffs-as-prepaid->

- Prepaid subscribers are also substantially more likely to be women.<sup>17</sup>

The distinctions in consumer profile lead to different approaches to the product brand, price, features, and retail experience. Thus, AT&T—like most other major national carriers—relies upon *separate* prepaid stores, uses *separate* prepaid brands, and offers *separate* pricing, support and service.<sup>18</sup> AT&T also tracks prepaid wireless subscribers separately for its investors,<sup>19</sup> and separately classifies revenues from postpaid and prepaid products.<sup>20</sup> The product distinction even extends to the back office, which relies on functionally distinct Operations Support Systems and Business Support Systems to support pre- and postpaid offerings.<sup>21</sup>

According to AT&T, the company makes these costly and enduring distinctions among pre- and postpaid wireless mobile products for one simple reason: because “certain customers . . .

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plateaus/386/ (last accessed Oct. 29, 2013); Chetan Sharma, U.S. WIRELESS MARKET UPDATE: Q3 2012, at 3 (Nov. 2011).

<sup>17</sup> MaCorr Research, *Listening in on the Prepaid and Postpaid Cellphone Markets*, (Sept. 2013), available at <http://www.macorr.com/blog/?p=190> (last accessed Oct. 29, 2013).

<sup>18</sup> See *AT&T launches new brand Aio for prepaid phone service*, REUTERS, May 9, 2013, available at <http://www.cnbc.com/id/100724271> (last accessed Oct. 29, 2013).

<sup>19</sup> AT&T Inc., QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE QUARTERLY PERIOD ENDED SEPTEMBER 30, 2013: FORM 10-Q (Nov. 2, 2012), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdIPTg1MzY3NDMmRFNFUT0wJINFUT0wJINRREVTQz1TRUNUSU9OX0VOVEISRSZzdWJzaWQ9NTc%3d> (last accessed Oct. 29, 2013).

<sup>20</sup> AT&T Inc., ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2013: FORM 10-K (Feb. 22, 2013), available at [http://www.sec.gov/Archives/edgar/data/732717/000073271713000017/ye12\\_10k.htm](http://www.sec.gov/Archives/edgar/data/732717/000073271713000017/ye12_10k.htm) (last accessed Oct. 29, 2013).

<sup>21</sup> Stephen Jones, *Differences Between Prepaid and Postpaid Processing?*, PUREBILL, (June 15, 2013), available at <http://www.purebill.com/column/pb130615-prepaid-postpaid-payments.html> (last accessed Oct. 29, 2013). Whereas postpaid billing systems offer substantial flexibility for both the carrier and customer, prepaid consumer billing depends upon real-time charging systems because the funds available from a prepaid customer are limited to the prepaid balance. To avoid excessive risk of financial loss, carriers must closely monitor and be positioned to rapidly terminate the customers network access when the prepaid funds have been exhausted through services, taxes, and fees.

prefer to control usage or pay in advance.”<sup>22</sup> A more accurate description would be because certain consumers, especially low-income consumers, including many people of color, have no choice but to control usage or pay in advance. These customers are unable to substitute postpaid service for prepaid service. From their perspective, as from the point of view of AT&T’s separate prepaid and postpaid systems, the two products remain distinct.

The advent of operator device financing in the prepaid segment hardly unifies the two distinct product markets for pre- and postpaid wireless services.<sup>23</sup> Nor does some measure of interchangeability among some purchasers of the two products eliminate the distinction.<sup>24</sup> AT&T does not contest that the two products are marketed differently, perceived differently, priced differently, purchased differently, tracked differently, sold differently, and supported differently. AT&T also does not contest that the two products also have substantially different revenues per user. These measures – not ostensibly blurred lines between operator-administered device financing options – dictate the relevant product market for purposes of the competition analysis. And for these reasons, pre- and postpaid wireless services at issue in this transaction comprise separate product markets.

### **III. MARKET PARTICIPANTS**

Over the past decade, the Commission has consistently considered only facilities-based providers to be “market participants” when evaluating the extent to which a proposed transaction

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<sup>22</sup> AT&T Inc., ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2013: FORM 10-K, at Exhibit 13 (Feb. 22, 2013), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271713000017/ex13.htm> (last accessed Oct. 29, 2013).

<sup>23</sup> See generally Ericsson, THE END OF PREPAID AND POSTPAID (Sept. 2013), available at <http://www.ericsson.com/res/docs/2013/end-of-prepaid-postpaid-final.pdf> (last accessed Oct. 29, 2013).

<sup>24</sup> Joint Opposition of AT&T Inc. and Leap Wireless International, Inc. to Petitions to Deny and Condition and Reply to Comments, WT Docket No. 13-193, at 23-24 (Oct. 23, 2013).

would increase horizontal market concentration.<sup>25</sup> During this time, the Commission has also repeatedly rejected the notion that mobile virtual network operators (“MVNOs”) and other resellers are also “market participants.”<sup>26</sup> This does not mean, however, that the Commission’s analysis ignores MVNOs. On the contrary, the Commission recognizes that MVNOs “have an impact in the marketplace” and “may provide additional constraints against anticompetitive behavior.”<sup>27</sup> As the Commission has explained though, these constraints are more appropriate considered in the more general “competitive evaluation” than in the initial concentration analysis.<sup>28</sup>

Good cause exists for such a distinction, especially under the circumstances. Unlike facility-based providers like AT&T and Verizon, MVNOs generally do not own any network facilities.<sup>29</sup> Instead, they purchase mobile wireless services from facilities-based providers and

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<sup>25</sup> See, e.g., *Applications of GCI Communications Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc. For Consent to Assign Licenses to the Alaska Wireless Network, LLC*, Memorandum Opinion and Order and Declaratory Ruling, FCC 13-96, at ¶ 41 (2013) (“*GCI/ACS Order*”) (“[A]s in previous transactions, we will consider only facilities-based entities . . . to be market participants, but continue to assess the effect of MVNOs and resellers in our competitive evaluation.”); *Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. For Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order and Declaratory Ruling, DA 13-384, at ¶ 37 (WTB, 2013) (“*T-Mobile/MetroPCS Order*”) (“As in previous transactions, we exclude MVNOs and resellers from consideration when computing initial concentration measures.”); *Applications of AT&T Wireless Services, Inc. & Cingular Wireless Corporation et al.*, Memorandum Opinion & Order, FCC 04-255, at ¶ 92 (2004) (“*AWS/Cingular Order*”) (“Generally, we limit our analysis to only facilities-based carriers, either nationwide or regional, for example excluding [MVNOs].”).

<sup>26</sup> See, e.g., *T-Mobile/MetroPCS Order* at ¶ 36; *Applications of AT&T Inc. and Cellco Partnership d/b/a/ Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, Memorandum Opinion and Order, FCC 10-116, ¶ 41 (2010) (“*Verizon/AT&T Order*”).

<sup>27</sup> See, e.g., *T-Mobile/MetroPCS Order* at ¶37.

<sup>28</sup> See, e.g., *GCI/ACS Order* at ¶ 41; *T-Mobile/MetroPCS Order* at ¶ 37; *AWS/Cingular Order* at ¶ 92.

<sup>29</sup> See *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*, Sixteenth Report, FCC 13-34, at ¶ 29 (2013) (“*Sixteenth Report*”).

then resell those services to consumers.<sup>30</sup> As a result, MVNOs are dependent on the networks of facilities-based providers which may, for instance, raise the rates MVNOs (and by extension, their customers) pay for wireless services.<sup>31</sup> Additionally, MVNOs “do not engage in the full range of non-price rivalry such as creating capacity through network investments, network upgrades, or network coverage.”<sup>32</sup> This means that MVNOs are fundamentally limited in the ways they can compete with facilities-based providers and cannot, for instance, improve their networks particular areas to gain a competitive edge.

AT&T claims that “opponents, such as Public Knowledge, disregard the competitive impacts MVNOs,”<sup>33</sup> but this statement misrepresents the Petitioners’ argument. The Petitioners never suggested that the Commission’s evaluation should ignore the effect of MVNOs on the prepaid market. Rather, the Petitioners asserted that, because MVNOs like TracFone are not facilities-based providers, they should not be considered prepaid “market participants.” As described above, such an approach is both consistent with Commission precedent and appropriate under the circumstances.

#### **IV. THE SPECTRUM SCREEN**

The proposed transaction will trigger an unprecedented number of Cellular Market Areas (“CMAs”) during the Commission’s initial spectrum screen.<sup>34</sup> By the Petitioner’s count, the proposed transaction will trigger 40 CMAs.<sup>35</sup> By the Applicants’ count, it will trigger 38.<sup>36</sup>

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<sup>30</sup> *Sixteenth Report* at ¶ 29.

<sup>31</sup> *See, e.g., Sixteenth Report* at ¶ 272 (“Contractual agreements, and therefore wholesale prices, between MVNOs and resellers depend upon the rates that each MVNO or reseller negotiates with facilities-based providers.”).

<sup>32</sup> *Sixteenth Report* at ¶ 36.

<sup>33</sup> Opposition at 28.

<sup>34</sup> *See* Petition at 6.

<sup>35</sup> *See* Petition at 6.

Either number, however, pushes this transaction further past the competitive screen than any transaction that preceded it.<sup>37</sup> Moreover, the areas in question consist of more than 80 counties, cover nearly two dozen states, and are home to more than seven million consumers.<sup>38</sup> Plus, the transaction would give AT&T overwhelming control of key resources, such as more than 50% of all available PCS spectrum in most of these counties.<sup>39</sup> The Applicants do not deny any of these things.<sup>40</sup> Rather, the Applicants attempt to shift the focus from them with a series of misdirections which the Petitioners will now address.

First, the Applicants attempt to undermine the Petitioners' data, insisting that "Public Knowledge builds its arguments around a spectrum chart that contains a number of errors."<sup>41</sup> In a chart containing data about 3,231 counties, however, the Applicants allege only nine inaccuracies.<sup>42</sup> Moreover, these discrepancies are likely due to methodological differences: the Petitioners count counties toward the licensee if the licensee's contour touches it, and the Applicants may apply a different method. The Commission should not be fooled by this red herring of an argument, especially when the discrepancies involve less than 0.3% of the entries

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<sup>36</sup> Public Interest Showing at 35; Opposition at 12.

<sup>37</sup> See, e.g., *AT&T/AllTel Order* at ¶ 40 (finding that the screen triggered just one CMA); *T-Mobile/MetroPCS Order* at ¶ 40 (finding that the screen did not trigger any CMAs); *GCI-ACS Order* at ¶¶ 42-43 (finding that the screen triggered just one CMA); *AT&T/Qualcomm Order* at ¶ 44 (finding that the screen triggered three CMAs); *Verizon/Alltel Order* at ¶ 81 (finding that the screen triggered 27 CMAs).

<sup>38</sup> See Opposition at 12-14 (estimating that the screen will be exceeded in 85 counties and that seven million consumers will be affected); Petition at 5 (estimating that the screen will be exceeded in 94 counties and that 8.5 million consumers will be affected).

<sup>39</sup> See Petition at 5.

<sup>40</sup> See Opposition at 11-18.

<sup>41</sup> Opposition at 16.

<sup>42</sup> Opposition at 16; see also Petition at Appendix A.

in the Petitioner’s chart,<sup>43</sup> and the Applicants’ own data also shows that AT&T will exceed the spectrum screen an unprecedented number of CMAs.<sup>44</sup>

Second, contrary to the Applicants’ suggestion, the Petitioners do not contend that the proposed transaction would cause AT&T to exceed the screen “in several dozen counties that are not even involved in this transaction.”<sup>45</sup> In fact, the Petitioners properly note that AT&T already exceeds the cap in a number of areas where it is not acquiring spectrum from Leap.<sup>46</sup> And, in their tally of places where the “proposed transaction would cause AT&T to exceed the screen,” the Petitioners count only counties where (1) AT&T is acquiring spectrum from Leap and (2) AT&T does not already exceed the spectrum cap.”<sup>47</sup> Additionally, the chart’s data about other counties is relevant to the competitive analysis. Where, as here, an applicant proposes to exceed the screen in additional markets, the Commission should reexamine *all* of the markets where it is already over the screen. The Commission allowed AT&T to exceed the screen in those other markets based on a holistic market assessment of the state of competition as opposed to an atomistic analysis divorced from consideration of AT&T’s dominant position in the market overall.<sup>48</sup> Because the facts that may have justified these exceptions would no longer apply, it is appropriate to examine all of the markets where AT&T has acquired excessive spectrum holdings to determine whether divestitures or other remedies are appropriate.

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<sup>43</sup> See Petition at Appendix A.

<sup>44</sup> Public Interest Showing at 35; Opposition at 12.

<sup>45</sup> See Opposition at 16.

<sup>46</sup> Petition at 5 n.19.

<sup>47</sup> Petition at 5.

<sup>48</sup> See, e.g., *AT&T/Qualcomm Order* at ¶ 43 (“[W]e review the competitive effects of AT&T’s post-transaction spectrum holdings on both a local and a national level.”).

Third, the Applicants ask the Commission to “reject Public Knowledge’s suggestion to examine PCS spectrum aggregation in isolation” because “there is no reason to single out PCS spectrum for a separate screen.”<sup>49</sup> In fact, the Petitioners never asked the Commission to single out PCS spectrum for a separate screen. Rather, the Petitioners observed that “AT&T’s concentration of spectrum by band is []noteworthy” and used data about the PCS band to illustrate this concentration.<sup>50</sup> This does not mean that a separate screen is warranted, but it is relevant to the Commission’s “review of the competitive effects of an increase in spectrum holdings in the marketplace.”<sup>51</sup>

Fourth, the Applicants mistakenly assert that the Petitioners “contend[] that hitting the screen is proof of competitive harm *per se*.”<sup>52</sup> In fact, the Petitioners assert no such thing. Instead, the Petitioners acknowledge that the screen is merely the first step in the Commission’s competitive analysis.<sup>53</sup> The actual competitive analysis follows: “[f]or markets triggered by either screen, the Commission will, on a case-by-case basis, examine the likelihood of competitive harm.”<sup>54</sup>

Fifth, if anything, it is the Applicants who mischaracterize the spectrum screen. The Opposition states that “the Commission’s spectrum screen is intended ‘to eliminate from further

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<sup>49</sup> Opposition at 17.

<sup>50</sup> See Petition at 5-6

<sup>51</sup> See, e.g., *T-Mobile/MetroPCS Order* at ¶ 22; *AT&T/Qualcomm Order* at ¶¶ 49-50 (taking into consideration the substantial holdings AT&T would have under 1 GHz if the proposed transaction were allowed).

<sup>52</sup> Opposition at 15.

<sup>53</sup> See Petition at 5.

<sup>54</sup> Petition at 5 (quotation omitted).

review those markets in which there is clearly no competitive harm.”<sup>55</sup> This, however, is a prior articulation of the spectrum screen that the Commission has not used since 2010. In its place, the Commission currently uses the following: “a two-part initial screen [is used] to help identify those local markets that provide particular reason for further competitive analysis . . . [h]owever, the Commission is not limited in its consideration of potential competitive harms solely to markets identified by its initial screen.”<sup>56</sup>

## V. AT&T’S MIGRATION PLAN

AT&T argues that its migration plans for Leap’s current customers are “substantially similar to those approved in the *T-Mobile/MetroPCS Order*” and that “[t]here is no basis for treating these plans differently.”<sup>57</sup> This analysis, however, ignores a critical distinction between the AT&T and T-Mobile transition plans: AT&T conditions upgrades on giving up existing [Leap] plans. T-Mobile, on the other hand, has not forced its customers to choose between an updated device and abandoning MetroPCS’s rates, terms, and conditions.

While AT&T intends to “honor the existing rate plan of each Leap customer as of merger close,” Leap customers may only maintain their existing plans if they do not upgrade to devices or plans that are not “comparable” to their current ones.<sup>58</sup> Nowhere has AT&T explained what “comparable” means or for how long it will make “comparable” options available. AT&T has

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<sup>55</sup> Opposition at 12 (quoting *Applications of AT&T, Inc. & Dobson Commc’ns Corp. for Consent to Transfer Control of Licenses & Authorizations*, Memorandum Opinion and Order, FCC 07-196, at ¶ 39 (2007) (“*AT&T/Dobson Order*”)).

<sup>56</sup> Compare, e.g., *AT&T/Dobson Order* at ¶ 39 with *T-Mobile/MetroPCS Order* at ¶ 22.

<sup>57</sup> See Opposition at 7-9.

<sup>58</sup> Opposition at 7.

also not committed to offering “comparable” devices that does not rely on the aging CDMA/EVDO technology.

Additionally, AT&T still has not specified whether the “rate plans” kept by existing Leap customers would include any of the favorable terms and conditions currently enjoyed by Leap customers. For example, Leap customers currently enjoy non-rate-based features like: unlimited voice; unlimited text, picture, video, and international messaging; unlimited data; unlimited song downloads on Muve Music enabled phones; \$15 activation fee; free overnight shipping; 30 day return policy for phones and broadband devices; and \$10/month Mobile Hotspot.<sup>59</sup> These are important terms and conditions, yet AT&T could eviscerate them while keeping Leap customers’ “existing rate plan[s].” So far, AT&T has provided no reason to think that it will not do just that.

AT&T’s silence on the ongoing availability of Leap’s current terms and conditions also speaks volumes. As AT&T and other carriers have observed, prepaid customers upgrade their devices frequently.<sup>60</sup> Furthermore, because AT&T and Leap’s networks are incompatible, AT&T will eventually have to transition all Leap customers to new devices. Therefore, in order to gain the post-merger benefit of increased access to cutting edge devices, Leap subscribers will eventually have to surrender the low-cost service many customers rely on as their primary phone.<sup>61</sup> Without a concrete commitment to continue to serve low-income consumers, the Commission should anticipate that AT&T will continue with its established pattern of moving customers to more costly plans.<sup>62</sup>

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<sup>59</sup> See Petition at 17-18.

<sup>60</sup> See, e.g., Opposition at 7.

<sup>61</sup> Leap, Our Customers, available at <http://www.leapwireless.com/brands/cell-phone-customers>.

<sup>62</sup> See, e.g., AT&T, Quarterly Report for the Period Ended June 30, 2013, at 23 (filed Aug. 2, 2013), available at [http://www.sec.gov/Archives/edgar/data/732717/000073271713000080/q2\\_10q.htm](http://www.sec.gov/Archives/edgar/data/732717/000073271713000080/q2_10q.htm) (explaining that AT&T expects continued growth as subscribers “continue to choose higher-priced usage-based data plans”).

## VI. CONCLUSION

The Petitioners respectfully reiterate their request that the Commission deny the Applications in question. The Applicants' Opposition fails to address critical issues raised by the Petitioners and others, and, if allowed, the proposed transaction would further consolidate wireless spectrum and harm competition in the prepaid wireless market.

Respectfully submitted,

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