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See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

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STATEMENT OF COMMISSIONER MIGNON L. CLYBURN ON AT&T/DEUTSCHE TELEKOM AG LICENSE TRANSFER PROCEEDING

Before discussing the concerns I have about the license transfer applications filed by AT&T Inc. and Deutsche Telekom AG this past March, I will address the procedural posture the Commission finds itself in because, on November 23, after being notified of the Commission's intent to circulate a Hearing Designation Order, the Applicants sent an electronic filing to request withdrawal of these applications. I understand why the decision was made not to proceed with the Hearing Designation Order and I wish to express my support for today's release of the staff Analysis and Findings. The agency has the discretion to issue such a report in this proceeding and, furthermore, this action promotes federal agency transparency. Several outside parties have spent considerable time and resources to respond to the data and information requests that the FCC staff sent them, and they deserve to see the staff's analysis of the record evidence. In addition, the Applicants have stated that they "are continuing to pursue the sale of Deutsche Telekom's U.S. wireless assets to AT&T." Consequently, as they decide how best to reframe any changes to their transfer of control applications, the Applicants also deserve to have the benefit of the staff's Analysis and Findings.

When I began to consider this license transfer application between the number two and number four (in terms of subscribers) nationwide mobile wireless service providers, I initially had concerns about the impact such a proposed merger would have for competition, innovation and investment, and customer service. I decided to keep an open mind because the Applicants offered interesting arguments why these license transfers would serve the public interest. Most notably, AT&T's customers have complained about the problems they have with AT&T's mobile wireless data services and the acquisition of additional spectrum could help alleviate that problem. Second, AT&T asserted that the proposed merger would result in a net gain of job openings for Americans seeking to enter the mobile wireless service industry. As is evident in the Analysis and Findings, the FCC staff engaged in a careful and thorough review of each of these issues.

As I have said before, if we want markets to be unencumbered by the cost of regulation, we need to ensure that the markets are truly competitive.¹ My concern that the proposed merger could substantially lessen competition in the mobile wireless service market begins with what I see in the current state of the market. Increased consolidation, over the past several years, has resulted in fewer regional and rural service providers that are able to discipline the largest carriers. Voice and data roaming and other network sharing agreements would stimulate the deployment of networks to more Americans, but the denial of these agreements and those opportunities would prevent the smaller carriers from providing competitive service offerings to their subscribers, resulting in pockets of this Nation not being

¹ See April 8, 2011, Prepared Remarks of Commissioner Mignon L. Clyburn before the National Conference for Media Reform, entitled "Robust Competition in the Wireless Industry is the Key to a Successful Marketplace."

robustly served. In fact, the most recent 15th Mobile Services Report finds that more than seven million Americans still live in rural census blocks with two or fewer mobile service providers. In addition, more than 37 million Americans live in rural census blocks that have two or fewer choices when it comes to mobile broadband services. It may be that this current state of affairs calls for the Commission to adopt more regulation to better implement the public interest aims of the Communications Act. But, in my view, ensuring that the competitive structure of the market furthers the goals of the Act is another reason why the Commission must review license transfer applications and make its determination as to whether or not such applications serve the public interest.

Consistent with FCC precedent, the staff reviewed those aspects of the structure of the mobile services market that are relevant to this proceeding. It then determined the relevant product market to be the mobile telephony/broadband services product market. It also appropriately reviewed the impact of the merger on a local market basis and a nationwide basis. The staff's findings suggest the applications appear to substantially lessen competition in ways that no conditions would appear to remedy. The Commission uses the Herfindahl-Hirschman Index, or HHI, to trigger when it must take a closer look at the impact of a proposed merger on a relevant geographic market. It conducts that closer scrutiny when a proposed merger would lead to market concentrations that exceed 2800 on the HHI and the change in the HHI would be 100 or the change in the HHI would be 250 or greater in a market irrespective of the total market concentration. Based on the staff analysis, 419 local markets, formally known as Cellular Market Areas, hit the HHI trigger for closer agency scrutiny.

When it subjects a proposed merger to heightened competitive review, the Commission considers whether the proposed merger would create incentives for the merged entity and other competitors, such that they would likely engage in unilateral or coordinated action that would harm competition. Said another way, we ask whether by removing T-Mobile, AT&T and competitors would be more likely to raise prices. After a detailed analysis of these issues, the staff concluded that the removal of T-Mobile as a competitor would create these incentives for AT&T and other competitors because these two companies compete with each other for customers and respond to each other's competitive strategies. The staff also considered the Applicants' argument that the merger would not result in these competitive harms because smaller regional mobile wireless carriers are available to effectively compete. The staff was not persuaded by this argument because these smaller mobile wireless carriers do not have the resources to replace T-Mobile's competitive strength in the market. These smaller carriers have considerably less spectrum, smaller service footprints, lower Average Revenue Per Unit and, as I implied earlier, have difficulties obtaining roaming agreements. Furthermore, it appears the proposed merger would make it even more difficult for these smaller carriers to compete because the merged entity would make it more difficult for them to acquire the more advanced and popular handsets and acquire the backhaul services. For these and additional reasons, the staff report finds that the proposed merger would substantially lessen competition in the market for mobile telephony/broadband services.

I am also concerned about the impact that policies and market structure have on innovation and investment in the mobile wireless services market. Innovation is why we have seen mobile wireless handsets change from being about the size of a brick with limited coverage and offering only voice service, to including the advanced technologies in smart phones, tablets and other portable devices that operate at broadband speeds. As the National Broadband Plan stated, greater deployment and adoption of mobile broadband services will drive innovation throughout our Nation's economy. With regard to the impact of the proposed merger on innovation in the industry, the staff Analysis and Findings also finds harm because, by removing T-Mobile, the proposed merger would remove a disruptive force in the mobile wireless services market. T-Mobile exerts that disruptive force by engaging in both price and technical innovation. For example, the staff Analysis explains that, T-Mobile was the first nationwide provider to offer the following innovative pricing plans: month-to-month postpaid plans; plans that allow customers to pay for new phones over four monthly interest free installments; and soft data cap plans that

allow customers to exceed their monthly maximum in data service without incurring expensive overage fees. T-Mobile also acted disruptively by being the first to invest in and deploy HSPA+ technology through its network. That strategy led AT&T to respond by accelerating its deployment of the same technology. T-Mobile was a founding member of the Open Handset Alliance which spurred the deployment of Android devices to the market. It was also the first provider to offer an Android smart phone. According to the staff report, the Applicants have not shown how the innovation in pricing and technology, which T-Mobile had the resources and market power to introduce to the market, would continue after this proposed merger.

Also of concern is that the staff found that the proposed merger could adversely impact customer service. The staff found that AT&T's documents show that the cost savings from the proposed merger would result from the elimination of most T-Mobile customer service representatives and the complementary infrastructure. In recent years, T-Mobile has received high ratings for its customer service. So, this causes me to question how current customers would be impacted.

As I implied earlier, I was intrigued by the Applicants' assertions that the proposed transactions would result in the following merger specific benefits: (1) network efficiencies that would allow them to meet the challenges caused by the explosion of data traffic on their networks; and (2) the creation of more jobs for Americans than would occur without the merger. The Applicants submitted several documents to support the network efficiency claim including economic and engineering models. The staff report reviewed these models and, in some instances, agreed with some of the assertions the Applicants made. The staff's overall assessment of these models and documents, however, is that they fall far short of being persuasive because "the models provided are abstract, [are] not robust to more reasonable assumptions, [are] not consistent with each other or, in many cases, [with] the Applicants' internal documents and have no demonstrated predictive value."

The staff also stated that they were not persuaded by the Applicants' contention that the proposed merger would result in the creation of more jobs. That is due to the staff's calculation that, in order to reach the dollar amount of synergies the Applicants assert would result from the merger, this would necessarily mean the elimination of jobs. The staff found that this is consistent with AT&T's own statements in the record that "jobs serving redundant functions" would be eliminated to reduce costs. Furthermore, staff examined the history of AT&T's management decisions following recent mergers. The staff found evidence that "in 2002, there were 70,000 employees at AT&T Mobility and its predecessor companies. Since then, AT&T merged with Cingular, Dobson, and Centennial. Today, there are 67,000 employees at AT&T Mobility." After reviewing this evidence, the staff found that, even if AT&T follows through with its commitment to not terminate any call center jobs in the United States, there is "no dispute that the proposed transaction will result in fewer total direct jobs across the business."

The staff Analysis and Findings concludes that the proposed merger would substantially lessen competition whether reviewed at the local market or national market level, and there are substantial questions whether the claimed public interest benefits would occur.

I would like to thank Renata Hesse, Austin Schlick, Rick Kaplan, Paul De Sa and the staff members from their respective Bureaus and Offices who worked tirelessly to finish the review of these applications before 180 days. I commend them for presenting us with a sound analysis of the relevant issues in the proceeding.