

# **MERGER ANTITRUST LAW**

## **Unit 0: Introduction to Substance and Process**

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## THE FEDERAL MERGER ANTITRUST STATUTES

### Substantive Prohibitions

#### **Clayton Act § 7. Acquisition by one corporation of stock of another**

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [15 U.S.C. § 18]

*[Remainder of section omitted]*

#### **Sherman Act § 1. Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

#### **Sherman Act § 2. Monopolizing trade a felony; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

**FTC Act § 5. Unfair methods of competition unlawful; prevention by Commission**<sup>[1]</sup>

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

- (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [15 U.S.C. § 45(a)(1)]

*[Remainder of section omitted]*

**Causes of Action****Sherman Act § 4. Jurisdiction of courts; duty of United States attorneys; procedure**

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [15 U.S.C. § 4]

**Clayton Act § 4. Suits by persons injured**

(a) *Amount of recovery; prejudgment interest.* Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [prejudgment interest provision redacted] [15 U.S.C. § 15(a)]

*[Sections 4(b)-4(c) omitted]*

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[1] Technically, Section 5 of the FTC Act is not an antitrust law. Section 1 of the Clayton Act defines "antitrust law" to include only the Sherman Act, the Clayton Act, and the import cartel provisions of the Wilson Tariff Act, Act of Aug. 27, 1894, ch. 349, §§ 73-76, 28 Stat. 509, 570, *as amended by* Act of Feb. 12, 1913, ch. 40, 37 Stat. 667 (current version found at 15 U.S.C. §§ 8-11). 15 U.S.C. § 12.

**Clayton Act § 4C. Actions by State Attorneys General**

- (a) *Parens patriae*; monetary relief; damages; prejudgment interest
  - (1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. [15 U.S.C. § 15c(a)(1)]

**Clayton Act § 15. Restraining violations; procedure**

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U.S.C. § 25]

**Clayton Act § 16. Injunctive relief for private parties; exception; costs**

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring

suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [15 U.S.C. § 26]

**FTC Act § 5(a). Unfair methods of competition unlawful; prevention by Commission**

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) [*Substantive prohibition—see above*]

(2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations [with limited exceptions] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3)–(4) [*Omitted*]

(b) *Proceeding by Commission; modifying and setting aside orders.* Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. [*Remainder of subsection omitted*]

[*Remainder of section omitted*<sup>2</sup>]

**Clayton Act § 11. Enforcement provisions**

(a) *Commission, Board, or Secretary authorized to enforce compliance.* Authority to enforce compliance with sections 13, 14, 18 [Clayton Act § 7], and 19 of this title [the Clayton Act] by the persons respectively subject thereto is vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to part A of subtitle VII of title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking

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2. The remainder of Section 5 sets for the procedure for the Commission to adjudicate alleged violations of Section 5. The only relief the Commission may enter is a *cease and desist order*, which is essentially an injunction.

associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: [*Remainder of section adopts the same quasi-adjudicative process that the Commission uses to enforce FTC Act § 5*]. [15 U.S.C. § 21]

## The Merger Review Process<sup>3</sup>

### Summary of the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>4</sup> and its implementing regulations require that the parties to large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

1. file a notification report form with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission prior to closing their transaction, and
2. observe a postnotification *waiting period* before the transaction can be consummated.

The HSR Act does not change the standards of substantive merger antitrust law, nor does it provide any remedies for anticompetitive mergers. Rather, the HSR Act simply provides the federal antitrust enforcement authorities with an opportunity to learn about and review major transactions before they are consummated.

The notification must be made on a form (not surprisingly called an “HSR form”) prescribed by the federal enforcement agencies. The HSR Act provides for an *initial waiting period* of 30 calendar days (15 days for all-cash tender offers) following the filing of the notification. The act authorizes the investigating agency to request additional documents and data from the reporting parties during the initial waiting period. This request, almost universally called a *second request*, extends the waiting period for the time it takes the parties to comply plus an additional waiting period, called the *final waiting period*, of 30 calendar days (10 days for all-cash tender offers). Second requests tend to be enormously burdensome, both because a second request may only be issued once to each reporting party so investigating agency has an incentive to ask for everything conceivably relevant to its investigation, and because the length of time the agency has to investigate the transaction is largely a function of the length of time it takes the parties to respond. It is not unusual for the response to a second request to include well over a million documents. Even so, most companies doing sophisticated transaction today can comply with a second request in six weeks to four months. If it takes the parties 10 business days to make their HSR notifications,

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3. We will examine the HSR Act and the merger review process in some detail in Unit 6.

4. Hart-Scott-Rodino Antitrust Improvements Act of 1976 §201, Pub. L. No. 94-435, 90 Stat. 1390, *amended*, Pub. L. No. 98-620, Title IV, §402(10)(A), 98 Stat. 3358 (1984); Pub. L. No. 106-553, 114 Stat. 2762 (2000) (current version at Clayton Act §7A, 15 U.S.C. §18a).

then the total time from signing to the end of the final waiting period is usually four to sixth months (= 0.5 months before filing + 30 days for the initial waiting period + 1.5-4 months for second request compliance + 30 days for the final waiting period).

Since almost everyone acknowledges that 30 days of the final waiting period is not an adequate amount of time for the investigating staff to review the documents and data submitted by the parties and make a recommendation on the disposition of the investigation, and for the leadership of the agency to make a reasoned and informed decision, the parties typically enter into a *timing agreement* with the agency to provide the agency with additional time beyond the expiration of the final waiting period (often between 30 to 90 days), which extends the time from signing to the end of the investigation to five to nine months.

There are four outcomes possible at the end of the agency investigation:

1. The agency closes the investigation without taking enforcement action and allow the transaction to close without further interference
2. The agency and the parties settle the investigation with a judicial or administrative *consent decree* requiring the merging parties to restructure their deal—usually by divesting businesses or assets to a third party approved by the investigating agency—to eliminate the agency’s competitive concerns.<sup>5</sup>
3. The agency initiates litigation to enjoin the closing of the transaction on the grounds that the merger or acquisition, if consummated, would violate the antitrust laws.<sup>6</sup>
4. The parties voluntarily terminate their transaction, either because (a) the parties will not settle at the agency’s ask and will not litigate, or (b) the agency concludes that no settlement will resolve the agency’s concerns and parties will not litigate.

Contrary to popular parlance, the HSR Act is not a “clearance” statute. Satisfying the HSR Act’s reporting and waiting period requirements confers no immunity from future attack. On a number of occasions, states, takeover targets, and other private parties successfully have challenged reported mergers and acquisitions after the federal authorities have “cleared” the transaction. Indeed, even the DOJ and the FTC have challenged mergers and acquisitions after they have permitted the Act’s waiting period to expire, although in most cases to date it appears that the agency identified the potential problem prior to the expiration of the waiting period and had warned the parties that if they closed the transaction it would be at the risk of a possible subsequent challenge.

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5. We will examine merger antitrust remedies and settlements in Unit 7.

6. We will examine merger litigation throughout the course, but especially in Unit 8.





## FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS

# FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger

## Agency's Largest Supermarket Divestiture Order to Date Requires Sales to Four Buyers

FOR RELEASE

January 27, 2015

**TAGS:** [Retail](#) | [Grocery/Supermarkets](#) | [Bureau of Competition](#) | [Competition](#) | [Merger](#)

Supermarket operators Albertsons and Safeway Inc. have [agreed to sell 168 supermarkets to settle Federal Trade Commission charges](#) that their proposed \$9.2 billion merger would likely be anticompetitive in 130 local markets in Arizona, California, Montana, Nevada, Oregon, Texas, Washington, and Wyoming.

According to the FTC's [complaint](#), [Albertsons and Safeway compete vigorously](#) on the bases of price, quality, product variety, and services, and offer consumers the convenience of one-stop shopping for food and other grocery products. Without a remedy, according to the FTC, the acquisition will lessen supermarket competition to the detriment of consumers in 130 local markets.

"Consumers everywhere rely on local supermarkets for their weekly shopping needs," said FTC Chairwoman Edith Ramirez. "Absent a remedy, this acquisition would likely lead to higher prices and lower quality for supermarket shoppers in 130 communities. This settlement will ensure that consumers in those communities continue to benefit from competition among their local supermarkets."

At the time the proposed acquisition was announced, Albertson's LLC operated 630 supermarkets under the Albertsons banner in 15 states, and under the Market Street, Amigos, and United Supermarkets banners in Texas. New Albertson's, Inc., operated 445 supermarkets under the Jewel-Osco, ACME, Shaw's, and Star Market banners, in the eastern United States. Safeway operated 1,332 supermarkets under the Safeway, Tom Thumb, Randall's, Pak 'n Save, The Market, Vons, Pavilions, and Genuardi's banners located throughout the country.

Under the proposed settlement, Haggen Holdings, LLC will acquire 146 Albertsons and Safeway stores located in Arizona, California, Nevada, Oregon, and Washington; Supervalu Inc. will acquire two Albertsons stores in Washington; Associated Wholesale Grocers, Inc. will acquire 12 Albertsons and Safeway stores in Texas; and Associated Food Stores Inc. will acquire eight Albertsons and Safeway stores in Montana and Wyoming. It is expected that Associated Wholesale Grocers, Inc. will assign its operating rights in the 12 Texas stores it is acquiring to RLS Supermarkets, LLC (doing business as Minyard Food Stores) and that Associated Food Stores Inc. will assign its rights in the eight Montana and Wyoming stores it is acquiring to Missoula Fresh Market LLC, Ridley's Family Markets, Inc., and Stokes Inc.

Also under the proposed settlement, the divestitures to Haggen must be completed within 150 days of the date of the merger; the divestitures to Supervalu Inc. must be completed within 100 days of the date of the merger; and the divestitures to Associated Food Stores Inc. and Associated Wholesale Grocers, Inc. must be completed within 60 days of the date of the merger.

The proposed settlement includes an Order to Maintain Assets, to help ensure that Albertsons maintains the stores until they are divested. The proposed settlement also appoints a monitor to oversee the merging parties' compliance with their obligations under the settlement agreement. Details about the divestitures, including a list of stores and the local markets affected, are set forth in the [analysis to aid public comment](#) for this matter.

The Commission vote to issue the complaint and accept the proposed consent order for public comment was 5-0. The FTC will publish the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through February 26, 2015, after which the Commission will decide whether to make the proposed consent order final. [Comments can be filed electronically](#) or in paper form by following the instructions in the "Supplementary Information" section of the Federal Register notice.

**NOTE:** The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to \$16,000 per day.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to [antitrust@ftc.gov](mailto:antitrust@ftc.gov), or write to the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman  
Julie Brill  
Maureen K. Ohlhausen  
Joshua D. Wright  
Terrell McSweeney

In the Matter of

Cerberus Institutional Partners V, L.P.  
a limited partnership;

AB Acquisition LLC,  
a limited liability company;

and

Safeway Inc.,  
a corporation.

Docket No. C-4504

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondents AB Acquisition LLC (“Albertson’s”), and Cerberus Institutional Partners V, L.P. (“Cerberus”), both subject to the jurisdiction of the Commission, agreed to acquire Respondent Safeway Inc. (“Safeway”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent Cerberus is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 875 Third Avenue, New York, New York.

2. Respondent Albertson’s is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Cerberus, through Albertson's, of which Cerberus is the majority owner, owns and operates a number of supermarkets chains throughout the United States, including supermarkets operating under the Albertsons, Lucky, and United banners.

4. Respondent Safeway is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

5. Respondent Safeway owns and operates a number of supermarket chains throughout the United States, including supermarkets operating under the Safeway, Vons, Pavilions, and Tom Thumb banners.

6. Albertson's and Safeway own and operate supermarkets in each of the geographic markets relevant to this Complaint and compete and promote their businesses in these areas.

## **II. JURISDICTION**

7. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

## **III. THE ACQUISITION**

8. Pursuant to an Agreement and Plan of Merger dated as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014, Albertson's proposes to purchase all of the issued and outstanding common stock of Safeway in a transaction valued at approximately \$9.2 billion ("the Acquisition").

## **IV. THE RELEVANT PRODUCT MARKET**

9. The relevant line of commerce in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets.

10. For purposes of this Complaint, the term "supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

11. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units (SKUs), as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not typically set or change their food or grocery prices in response to prices at other types of stores.

13. Although retail stores other than supermarkets may also sell food and grocery products, these types of stores—including convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores—do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. These retail stores do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping at other types of stores, or significantly increase grocery purchases at other types of stores, in response to a small but significant price increase by supermarkets.

## **V. THE RELEVANT GEOGRAPHIC MARKETS**

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers’ grocery shopping occurs at stores located very close to where they live.

15. Respondents currently operate supermarkets under the Safeway, Vons, Pavilions, Tom Thumb, Albertsons, and United banners within approximately two-tenths of a mile to ten miles of each other in each of the relevant geographic markets. The primary trade areas of Respondents’ banners in each of the relevant geographic markets overlap significantly.

16. The 130 geographic markets in which to assess the competitive effects of the Acquisition are localized areas in (1) Anthem, Arizona; (2) Carefree, Arizona; (3) Flagstaff, Arizona; (4) Lake Havasu, Arizona; (5) Prescott, Arizona; (6) Prescott Valley, Arizona; (7) Scottsdale, Arizona; (8) Tucson (Eastern), Arizona; (9) Tucson (Southwest), Arizona; (10) Alpine, California; (11) Arroyo Grande/Grover Beach, California; (12) Atascadero, California; (13) Bakersfield, California; (14) Burbank, California; (15) Calabasas, California; (16) Camarillo, California; (17) Carlsbad (North), California; (18) Carlsbad (South), California; (19) Carpinteria, California; (20) Cheviot Hills/Culver City, California; (21) Chino Hills, California; (22) Coronado Island, California; (23) Diamond Bar, California; (24) El Cajon, California; (25) Hermosa Beach, California; (26) Imperial Beach, California; (27) La Jolla, California; (28) La

Mesa, California; (29) Ladera Ranch, California; (30) Laguna Beach, California; (31) Laguna Niguel, California; (32) Lakewood, California; (33) Lemon Grove, California; (34) Lomita, California; (35) Lompoc, California; (36) Mira Mesa (North), California; (37) Mira Mesa (South), California; (38) Mission Viejo/Laguna Hills, California; (39) Mission Viejo (North), California; (40) Morro Bay, California; (41) National City, California; (42) Newbury Park, California; (43) Newport Beach, California; (44) Oxnard, California; (45) Palm Desert/Rancho Mirage, California; (46) Palmdale, California; (47) Paso Robles, California; (48) Poway, California; (49) Rancho Cucamonga/Upland, California; (50) Rancho Santa Margarita, California; (51) San Diego (Clairemont), California; (52) San Diego, (Hillcrest/University Heights), California; (53) San Diego (Tierrasanta), California; (54) San Luis Obispo, California; (55) San Marcos, California; (56) San Pedro, California; (57) Santa Barbara, California; (58) Santa Barbara/Goleta Heights, California; (59) Santa Clarita, California; (60) Santa Monica, California; (61) Santee, California; (62) Simi Valley, California; (63) Solana Beach, California; (64) Thousand Oaks, California; (65) Tujunga, California; (66) Tustin (Central), California; (67) Tustin/Irvine, California; (68) Ventura, California; (69) Westlake Village, California; (70) Yorba Linda, California; (71) Butte, Montana; (72) Deer Lodge, Montana; (73) Missoula, Montana; (74) Boulder City, Nevada; (75) Henderson (East), Nevada; (76) Henderson (Southwest), Nevada; (77) Summerlin, Nevada; (78) Ashland, Oregon; (79) Baker County, Oregon; (80) Bend, Oregon; (81) Eugene, Oregon; (82) Grants Pass, Oregon; (83) Happy Valley/Clackamas, Oregon; (84) Keizer, Oregon; (85) Klamath Falls, Oregon; (86) Lake Oswego, Oregon; (87) Milwaukie, Oregon; (88) Sherwood, Oregon; (89) Springfield, Oregon; (90) Tigard, Oregon; (91) West Linn, Oregon; (92) Colleyville, Texas; (93) Dallas (Far North), Texas; (94) Dallas (Farmers Branch/North Dallas), Texas; (95) Dallas (University Park/Highland Park), Texas; (96) Dallas (University Park/Northeast Dallas), Texas; (97) McKinney, Texas; (98) Plano, Texas; (99) Roanoke, Texas; (100) Rowlett, Texas; (101) Bremerton, Washington; (102) Burien, Washington; (103) Everett, Washington; (104) Federal Way, Washington; (105) Gig Harbor, Washington; (106) Lake Forest, Washington; (107) Lake Stevens, Washington; (108) Lakewood, Washington; (109) Liberty Lake, Washington; (110) Milton, Washington; (111) Monroe, Washington; (112) Oak Harbor, Washington; (113) Olympia (East), Washington; (114) Port Angeles, Washington; (115) Port Orchard, Washington; (116) Puyallup, Washington; (117) Renton (New Castle), Washington; (118) Renton (East Hill-Meridian), Washington; (119) Sammamish, Washington; (120) Shoreline, Washington; (121) Silverdale, Washington; (122) Snohomish, Washington; (123) Tacoma (Eastside), Washington; (124) Tacoma (Spanaway), Washington; (125) Walla Walla, Washington; (126) Wenatchee, Washington; (127) Woodinville, Washington; (128) Casper, Wyoming; (129) Laramie, Wyoming; and (130) Sheridan, Wyoming. A hypothetical monopolist controlling all supermarkets in these areas could profitably raise prices by a small but significant amount.

## **VI. MARKET CONCENTRATION**

17. Under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”) and relevant case law, the Acquisition is presumptively unlawful in the markets for the retail sale of food and other grocery products in supermarkets in all 130 geographic markets listed in Paragraph 16. Under the Merger Guidelines’ standard measure of market concentration, the Herfindahl-Hirschman Index (“HHI”), an acquisition is presumed to create or enhance market power or facilitate its exercise if

it increases the HHI by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. The Acquisition would result in market concentration levels well in excess of these thresholds.

18. Post-acquisition HHI levels in the relevant geographic markets would range from 2,562 to 10,000, and the Acquisition would result in HHI increases ranging from 225 to 5,000. Exhibit A presents market concentration levels for each of the relevant geographic markets.

19. The Acquisition would reduce the number of meaningful competitors from two to one in 13 relevant geographic markets, three to two in 42 relevant geographic markets, and 4 to 3 (or greater) in 75 relevant geographic markets.

## **VII. ENTRY CONDITIONS**

20. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the Acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for a supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

## **VIII. EFFECTS OF THE ACQUISITION**

21. The Acquisition, if consummated, is likely to substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic markets identified in Paragraph 16 in the following ways, among others:

- (a) by eliminating direct and substantial competition between Respondents Albertson's and Safeway;
- (b) by increasing the likelihood that Respondent Albertson's will unilaterally exercise market power; and
- (c) by increasing the likelihood of, or facilitating, coordinated interaction between the remaining participants in each of the relevant markets.

22. The ultimate effect of the Acquisition would be to increase the likelihood that the prices of food, groceries, or services will increase, and that the quality and selection of food, groceries, or services will decrease, in the relevant geographic markets.

## **IX. VIOLATIONS CHARGED**

23. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-seventh day of January, 2015, issues its complaint against said Respondents.

By the Commission.

Donald S. Clark  
Secretary

SEAL:



**EXHIBIT A**

<b>Area Number (See Para. 16 of Complaint)</b>	<b>City</b>	<b>State</b>	<b>Merger Result</b>	<b>HHI (pre)</b>	<b>HHI (post)</b>	<b>Delta</b>
1	Anthem	AZ	4 to 3	2768	3423	655
2	Carefree	AZ	5 to 4	2298	2976	678
3	Flagstaff	AZ	5 to 4	2744	3365	621
4	Lake Havasu	AZ	4 to 3	2609	3401	792
5	Prescott	AZ	4 to 3	2675	3405	730
6	Prescott Valley	AZ	4 to 3	2828	3340	512
7	Scottsdale	AZ	3 to 2	3797	5001	1204
8	Tucson (Eastern)	AZ	4 to 3	3341	4130	789
9	Tucson (Southwest)	AZ	5 to 4	2018	2909	891
10	Alpine	CA	3 to 2	3857	5002	1145
11	Arroyo Grande/ Grover Beach	CA	3 to 2	3690	6864	3174
12	Atascadero	CA	3 to 2	3456	6242	2786
13	Bakersfield	CA	6 to 5	1923	2562	639
14	Burbank	CA	3 to 2	4199	5011	812
15	Calabasas	CA	3 to 2	3400	5415	2015
16	Camarillo	CA	5 to 4	2950	4215	1265
17	Carlsbad (North)	CA	4 to 3	2977	3888	911
18	Carlsbad (South)	CA	5 to 4	2209	3210	1001
19	Carpinteria	CA	2 to 1	5012	10,000	4988
20	Cheviot Hills/ Culver City	CA	4 to 3	2394	3914	1520
21	Chino Hills	CA	4 to 3	3596	4047	451
22	Coronado Island	CA	2 to 1	5025	10,000	4975
23	Diamond Bar	CA	3 to 2	4466	5231	765
24	El Cajon	CA	4 to 3	2983	3597	614
25	Hermosa Beach	CA	5 to 4	2752	4371	1619
26	Imperial Beach	CA	2 to 1	5869	10,000	4131

27	La Jolla	CA	3 to 2	5505	7083	1578
28	La Mesa	CA	3 to 2	3382	5997	2615
29	Ladera Ranch	CA	2 to 1	5081	10,000	4919
30	Laguna Beach	CA	3 to 2	3335	5799	2464
31	Laguna Niguel	CA	4 to 3	3190	3883	693
32	Lakewood	CA	6 to 5	2073	2581	508
33	Lemon Grove	CA	3 to 2	3581	6059	2478
34	Lomita	CA	3 to 2	3695	5040	1345
35	Lompoc	CA	4 to 3	2566	3713	1147
36	Mira Mesa (North)	CA	5 to 4	2412	3808	1396
37	Mira Mesa (South)	CA	2 to 1	6904	10,000	3096
38	Mission Viejo/ Laguna Hills	CA	4 to 3	3157	3784	627
39	Mission Viejo (North)	CA	3 to 2	3933	5012	1079
40	Morro Bay	CA	5 to 4	2965	4056	1091
41	National City	CA	3 to 2	3748	5013	1265
42	Newbury Park	CA	3 to 2	3629	5833	2204
43	Newport Beach	CA	5 to 4	3160	3811	651
44	Oxnard	CA	4 to 3	2939	3375	436
45	Palm Desert/ Rancho Mirage	CA	6 to 5	2196	3094	898
46	Palmdale	CA	4 to 3	3056	4039	983
47	Paso Robles	CA	4 to 3	2851	5427	2576
48	Poway	CA	4 to 3	2540	3526	986
49	Rancho Cucamonga/ Upland	CA	4 to 3	3266	4118	852
50	Rancho Santa Margarita	CA	4 to 3	2628	4300	1672
51	San Diego (Clairemont)	CA	3 to 2	4066	6374	2308
52	San Diego (Hillcrest/ University Heights)	CA	3 to 2	4436	6571	2135
53	San Diego, CA (Tierrasanta)	CA	2 to 1	5586	10,000	4414
54	San Luis Obispo	CA	4 to 3	2896	5306	2410
55	San Marcos	CA	3 to 2	5991	6282	291

56	San Pedro	CA	3 to 2	3518	6442	2924
57	Santa Barbara	CA	4 to 3	2741	3462	721
58	Santa Barbara/ Goleta	CA	3 to 2	3909	7469	3560
59	Santa Clarita	CA	4 to 3	2646	3732	1086
60	Santa Monica	CA	4 to 3	3293	4879	1586
61	Santee	CA	3 to 2	3477	6133	2656
62	Simi Valley	CA	5 to 4	3633	7101	3468
63	Solana Beach	CA	3 to 2	3830	6188	2358
64	Thousand Oaks	CA	3 to 2	4057	6047	1990
65	Tujunga	CA	3 to 2	3688	3969	281
66	Tustin (central)	CA	4 to 3	3474	4348	874
67	Tustin/Irvine	CA	4 to 3	3939	4485	546
68	Ventura	CA	4 to 3	2732	3550	818
69	Westlake Village	CA	5 to 4	1955	3563	1608
70	Yorba Linda	CA	4 to 3	2803	4588	1785
71	Butte	MT	3 to 2	4701	5189	488
72	Deer Lodge	MT	2 to 1	5000	10,000	5000
73	Missoula	MT	4 to 3	3107	4063	956
74	Boulder City	NV	2 to 1	5051	10,000	4949
75	Henderson (East)	NV	4 to 3	2705	3356	651
76	Henderson (Southwest)	NV	3 to 2	3653	5042	1389
77	Summerlin	NV	4 to 3	3107	4367	1260
78	Ashland	OR	2 to 1	5013	10,000	4987
79	Baker County	OR	2 to 1	5102	10,000	4898
80	Bend	OR	6 to 5	2632	3824	1192
81	Eugene	OR	5 to 4	2392	3414	1022
82	Grants Pass	OR	4 to 3	2769	3537	768
83	Happy Valley/ Clackamas	OR	2 to 1	5006	10,000	4994
84	Keizer	OR	5 to 4	2852	3367	515

85	Klamath Falls	OR	5 to 4	2511	2917	406
86	Lake Oswego	OR	4 to 3	3176	5604	2428
87	Milwaukie	OR	3 to 2	5729	6082	353
88	Sherwood	OR	3 to 2	3989	5028	1039
89	Springfield	OR	3 to 2	4400	5197	797
90	Tigard	OR	5 to 4	2261	2984	723
91	West Linn	OR	3 to 2	3611	6268	2657
92	Colleyville	TX	5 to 4	2686	3465	779
93	Dallas (Far North)	TX	5 to 4	2413	2891	478
94	Dallas (Farmers Branch/ North Dallas)	TX	4 to 3	3746	5175	1429
95	Dallas (University Park/ Highland Park)	TX	4 to 3	2755	4261	1506
96	Dallas (University Park/ Northeast Dallas)	TX	5 to 4	2345	3065	720
97	McKinney	TX	5 to 4	2692	3613	921
98	Plano	TX	4 to 3	3105	3541	436
99	Roanoke	TX	3 to 2	4680	5351	671
100	Rowlett	TX	3 to 2	3386	5450	2064
101	Bremerton	WA	4 to 3	2721	3399	678
102	Burien	WA	5 to 4	1979	4489	2510
103	Everett	WA	5 to 4	2301	2586	285
104	Federal Way	WA	5 to 4	2312	2709	397
105	Gig Harbor	WA	3 to 2	3396	5235	1839
106	Lake Forest Park	WA	5 to 4	3889	4352	463
107	Lake Stevens	WA	5 to 4	2646	3455	809
108	Lakewood	WA	5 to 4	2333	3170	837
109	Liberty Lake	WA	3 to 2	3483	5090	1607
110	Milton	WA	3 to 2	3960	5010	1050
111	Monroe	WA	4 to 3	2911	3352	441
112	Oak Harbor	WA	3 to 2	4296	6446	2150
113	Olympia (East)	WA	6 to 5	2205	2566	361

<b>114</b>	<b>Port Angeles</b>	<b>WA</b>	<b>3 to 2</b>	<b>3773</b>	<b>5588</b>	<b>1815</b>
<b>115</b>	<b>Port Orchard</b>	<b>WA</b>	<b>4 to 3</b>	<b>2747</b>	<b>3362</b>	<b>615</b>
<b>116</b>	<b>Puyallup</b>	<b>WA</b>	<b>3 to 2</b>	<b>4160</b>	<b>5072</b>	<b>912</b>
<b>117</b>	<b>Renton (East Hill-Meridian)</b>	<b>WA</b>	<b>4 to 3</b>	<b>3304</b>	<b>3719</b>	<b>415</b>
<b>118</b>	<b>Renton (New Castle)</b>	<b>WA</b>	<b>4 to 3</b>	<b>4417</b>	<b>5274</b>	<b>857</b>
<b>119</b>	<b>Sammamish</b>	<b>WA</b>	<b>2 to 1</b>	<b>5761</b>	<b>10,000</b>	<b>4239</b>
<b>120</b>	<b>Shoreline</b>	<b>WA</b>	<b>4 to 3</b>	<b>3792</b>	<b>4017</b>	<b>225</b>
<b>121</b>	<b>Silverdale</b>	<b>WA</b>	<b>4 to 3</b>	<b>2845</b>	<b>3516</b>	<b>671</b>
<b>122</b>	<b>Snohomish</b>	<b>WA</b>	<b>2 to 1</b>	<b>5595</b>	<b>10,000</b>	<b>4405</b>
<b>123</b>	<b>Tacoma (Eastside)</b>	<b>WA</b>	<b>4 to 3</b>	<b>3260</b>	<b>3727</b>	<b>467</b>
<b>124</b>	<b>Tacoma (Spanaway)</b>	<b>WA</b>	<b>5 to 4</b>	<b>2707</b>	<b>3360</b>	<b>653</b>
<b>125</b>	<b>Walla Walla</b>	<b>WA</b>	<b>5 to 4</b>	<b>2624</b>	<b>3417</b>	<b>793</b>
<b>126</b>	<b>Wenatchee</b>	<b>WA</b>	<b>3 to 2</b>	<b>3744</b>	<b>5047</b>	<b>1303</b>
<b>127</b>	<b>Woodinville</b>	<b>WA</b>	<b>3 to 2</b>	<b>3568</b>	<b>5192</b>	<b>1624</b>
<b>128</b>	<b>Casper</b>	<b>WY</b>	<b>4 to 3</b>	<b>3816</b>	<b>4353</b>	<b>537</b>
<b>129</b>	<b>Laramie</b>	<b>WY</b>	<b>3 to 2</b>	<b>3793</b>	<b>5000</b>	<b>1207</b>
<b>130</b>	<b>Sheridan</b>	<b>WY</b>	<b>3 to 2</b>	<b>4802</b>	<b>5421</b>	<b>619</b>

### THE HERFINDAHL–HIRSCHMAN INDEX

Market concentration and changes in market concentration are important variables in merger antitrust analysis. The original measure of market concentration in merger analysis was the four-firm concentration ratio (“4FCR”), which is simply the sum of the market shares of the four largest firms in the market. So if the four largest firms have shares of 30%, 20%, 15%, and 10%, the 4FCR is 75%.

The 1982 DOJ Merger Guidelines introduce a new market concentration measure call the *Herfindahl–Hirschman Index* (“HHI”). The HHI, which had been used by industrial organization economists long before 1982, is calculated by squaring the market share of each firm in the market and then summing the resulting squares. So, for example, for a market consisting of five firms with shares of 30%, 30%, 20%, 10%, and 10%, the HHI is calculated as follows:

<u>Share</u>	<u>HHI contribution</u>
30	900
30	900
20	400
10	100
10	100
100	2400

So the HHI is equal to 2400. Symbolically,

$$\text{HHI} = \sum_{i=1}^N s_i^2$$

where there are  $N$  firms in the market and the  $i$ th firm has a market share of  $s_i$ .

The change in the HHI resulting from a merger—commonly call the *delta* ( $\Delta$ )—is equal to the HHI of the market after the merger (postmerger HHI) minus the HHI of the market before the merger (premerger HHI). If the second and third firms in our example, the postmerger HHI calculation is:

<u>Share</u>	<u>HHI contribution</u>
30	900
50	2500
10	100
10	100
100	3600

The postmerger HHI is 3600, so that the delta is 1200. A simple way to calculate the delta is to multiply the market shares of the merging firms and then multiply the result by two:

$$\Delta = 2ab = 2 \cdot 30 \cdot 20 = 1200.$$



# Department of Justice

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## **JUSTICE DEPARTMENT FILES ANTITRUST LAWSUIT TO BLOCK AT&T'S ACQUISITION OF T-MOBILE**

*Transaction Would Reduce Competition in Mobile Wireless Telecommunications Services, Resulting in Higher Prices, Poorer Quality Services, Fewer Choices and Fewer Innovative Products for Millions of American Consumers*

WASHINGTON – The Department of Justice today filed a civil antitrust lawsuit to block AT&T Inc.'s proposed acquisition of T-Mobile USA Inc. The department said that the proposed \$39 billion transaction would substantially lessen competition for mobile wireless telecommunications services across the United States, resulting in higher prices, poorer quality services, fewer choices and fewer innovative products for the millions of American consumers who rely on mobile wireless services in their everyday lives.

The department's lawsuit, filed in U.S. District Court for the District of Columbia, seeks to prevent AT&T from acquiring T-Mobile from Deutsche Telekom AG.

"The combination of AT&T and T-Mobile would result in tens of millions of consumers all across the United States facing higher prices, fewer choices and lower quality products for mobile wireless services," said Deputy Attorney General James M. Cole. "Consumers across the country, including those in rural areas and those with lower incomes, benefit from competition among the nation's wireless carriers, particularly the four remaining national carriers. This lawsuit seeks to ensure that everyone can continue to receive the benefits of that competition."

"T-Mobile has been an important source of competition among the national carriers, including through innovation and quality enhancements such as the roll-out of the first nationwide high-speed data network," said Sharis A. Pozen, Acting Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "Unless this merger is blocked, competition and innovation will be reduced, and consumers will suffer."

Mobile wireless telecommunications services play a critical role in the way Americans live and work, with more than 300 million feature phones, smart phones, data cards, tablets and other mobile wireless devices in service today. Four nationwide providers of these services – AT&T, T-Mobile, Sprint and Verizon – account for more than 90 percent of mobile wireless connections. The proposed acquisition would combine two of those four, eliminating from the market T-Mobile, a firm that historically has been a value provider, offering particularly aggressive pricing.



According to the complaint, AT&T and T-Mobile compete head to head nationwide, including in 97 of the nation's largest 100 cellular marketing areas. They also compete nationwide to attract business and government customers. AT&T's acquisition of T-Mobile would eliminate a company that has been a disruptive force through low pricing and innovation by competing aggressively in the mobile wireless telecommunications services marketplace.

The complaint cites a T-Mobile document in which T-Mobile explains that it has been responsible for a number of significant "firsts" in the U.S. mobile wireless industry, including the first handset using the Android operating system, Blackberry wireless email, the Sidekick, national Wi-Fi "hotspot" access, and a variety of unlimited service plans. T-Mobile was also the first company to roll out a nationwide high-speed data network based on advanced HSPA+ (High-Speed Packet Access) technology. The complaint states that by January 2011, an AT&T employee was observing that "[T-Mobile] was first to have HSPA+ devices in their portfolio...we added them in reaction to potential loss of speed claims."

The complaint details other ways that AT&T felt competitive pressure from T-Mobile. The complaint quotes T-Mobile documents describing the company's important role in the market:

- T-Mobile sees itself as "the No. 1 value challenger of the established big guys in the market and as well positioned in a consolidated 4-player national market"; and
- T-Mobile's strategy is to "attack incumbents and find innovative ways to overcome scale disadvantages. [T-Mobile] will be faster, more agile, and scrappy, with diligence on decisions and costs both big and small. Our approach to market will not be conventional, and we will push to the boundaries where possible. . . . [T-Mobile] will champion the customer and break down industry barriers with innovations. . . ."

The complaint also states that regional providers face significant competitive limitations, largely stemming from their lack of national networks, and are therefore limited in their ability to compete with the four national carriers. And, the department said that any potential entry from a new mobile wireless telecommunications services provider would be unable to offset the transaction's anticompetitive effects because it would be difficult, time-consuming and expensive, requiring spectrum licenses and the construction of a network.

The department said that it gave serious consideration to the efficiencies that the merging parties claim would result from the transaction. The department concluded AT&T had not demonstrated that the proposed transaction promised any efficiencies that would be sufficient to outweigh the transaction's substantial adverse impact on competition and consumers. Moreover, the department said that AT&T could obtain substantially the same network enhancements that it claims will come from the transaction if it simply invested in its own network without eliminating a close competitor.

AT&T is a Delaware corporation headquartered in Dallas. AT&T is one of the world's largest providers of communications services, and is the second largest mobile wireless telecommunications services provider in the United States as measured by subscribers. It serves approximately 98.6 million connections to wireless devices. In 2010, AT&T earned mobile

wireless telecommunications services revenues of \$53.5 billion, and its total revenues were in excess of \$124 billion.

T-Mobile, is a Delaware corporation headquartered in Bellevue, Wash. T-Mobile is the fourth-largest mobile wireless telecommunications services provider in the United States as measured by subscribers, and serves approximately 33.6 million wireless connections to wireless devices. In 2010, T-Mobile earned mobile wireless telecommunications services revenues of \$18.7 billion. T-Mobile is a wholly-owned subsidiary of Deutsche Telekom AG.

Deutsche Telekom AG is a German corporation headquartered in Bonn, Germany. It is the largest telecommunications operator in Europe with wireline and wireless interests in numerous countries and total annual revenues in 2010 of €62.4 billion.

###

11-1118

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,  
Department of Justice, Antitrust Division  
450 5th Street, N.W., Suite 7000  
Washington, D.C. 20530

*Plaintiff,*

v.

AT&T INC.,  
One AT&T Plaza  
208 South Akard Street  
Dallas, Texas 75202

T-MOBILE USA, INC.,  
12920 SE 38<sup>th</sup> Street  
Bellevue, Washington 98006

and

DEUTSCHE TELEKOM AG,  
Friedrich-Ebert-Allee  
Bonn, Germany D-53113

*Defendants.*

Case No.

Filed:

**COMPLAINT**

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the merger of two of the nation's four largest mobile wireless telecommunications services providers, AT&T Inc. ("AT&T") and T-Mobile USA, Inc. ("T-Mobile"), and to obtain equitable and other relief as appropriate. Plaintiff alleges as follows:

## I. NATURE OF THE ACTION

1. Mobile wireless telecommunications services are vital to the everyday lives of hundreds of millions of Americans. From their modest beginnings in the 1980s, when handsets were the size of a brick and coverage areas were limited, mobile wireless telecommunications devices have evolved into a profusion of smartphones, feature phones, tablets, data cards, e-readers, and other devices that use the nationwide mobile wireless telecommunications networks. Mobile wireless telecommunications services have become indispensable both to the way we live and to the way companies do business throughout the United States. Innovation in wireless technology drives innovation throughout our 21<sup>st</sup>-century information economy, helping to increase productivity, create jobs, and improve our daily lives. Vigorous competition is essential to ensuring continued innovation and maintaining low prices.

2. On March 20, 2011, AT&T entered into a stock purchase agreement to acquire T-Mobile from its parent, Deutsche Telekom AG (“DT”), and to combine the two companies’ mobile wireless telecommunications services businesses (“Transaction Agreement”). AT&T, with approximately 98.6 million connections to mobile wireless devices, and T-Mobile, with approximately 33.6 million connections, serve customers throughout the United States, with networks that each reach the homes of at least 90 percent of the U.S. population. AT&T and T-Mobile are two of only four mobile wireless providers with nationwide networks and a variety of competitive attributes associated with that national scale and presence. The other two nationwide networks are operated by Verizon Wireless (“Verizon”) and Sprint Nextel Corp. (“Sprint”). Although smaller providers exist, they are significantly different from these four. For instance, none of the smaller carriers’ voice networks cover even one-third of the U.S. population, and the largest of these smaller carriers has less than one-third the number of

wireless connections as T-Mobile. Similarly, regional competitors often lack a nationwide data network, nationally recognized brands, significant nationwide spectrum holdings, and timely access to the most popular handsets. Collectively, the “Big Four” – AT&T, T-Mobile, Verizon, and Sprint – provide more than 90 percent of service connections to U.S. mobile wireless devices.

3. Due to the advantages arising from their scale and scope of coverage, each of the Big Four nationwide carriers is especially well-positioned to drive competition, at both a national and local level, in this industry. T-Mobile in particular – a company with a self-described “challenger brand,” that historically has been a value provider, and that even within the past few months had been developing and deploying “disruptive pricing” plans – places important competitive pressure on its three larger rivals, particularly in terms of pricing, a critically important aspect of competition. AT&T’s elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market. Additionally, T-Mobile’s investment in an advanced high-speed network and its innovations in technology and mobile wireless telecommunications services have provided, and continue to provide, consumers with significant value. Thus, unless this acquisition is enjoined, customers of mobile wireless telecommunications services likely will face higher prices, less product variety and innovation, and poorer quality services due to reduced incentives to invest than would exist absent the merger. Because AT&T’s acquisition of T-Mobile likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, the Court should permanently enjoin this acquisition.

## **II. JURISDICTION AND VENUE**

4. The United States files this Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

5. AT&T, DT, and T-Mobile are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has subject-matter jurisdiction over this action pursuant to Sections 15 and 16 of the Clayton Act, 15 U.S.C. §§ 25 and 26, and 28 U.S.C. §§ 1331, 1337, 1345.

6. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(b)(1), (c). Defendants AT&T, DT, and T-Mobile transact business and are found within the District of Columbia. The Defendants have consented to personal jurisdiction in this judicial district.

## **III. THE DEFENDANTS AND THE TRANSACTION**

7. AT&T, with headquarters in Dallas, Texas, is a corporation organized and existing under the laws of the State of Delaware. AT&T is one of the world's largest providers of communications services, and the second-largest mobile wireless telecommunications services provider in the United States, as measured by subscribers. AT&T provides mobile wireless telecommunications services in 50 states, the District of Columbia, and Puerto Rico, providing approximately 98.6 million connections to mobile wireless devices. In 2010, AT&T's revenues from mobile wireless telecommunications services were \$53.5 billion, and its total revenues were more than \$124 billion.

8. T-Mobile, with headquarters in Bellevue, Washington, is a corporation organized and existing under the laws of the State of Delaware. T-Mobile is the fourth-largest mobile wireless telecommunications services provider in the United States as measured by subscribers. T-Mobile provides mobile wireless telecommunications services in 48 states, the District of Columbia, and Puerto Rico, providing approximately 33.6 million connections to mobile wireless devices. In 2010, T-Mobile's revenues from mobile wireless telecommunications services were approximately \$18.7 billion. T-Mobile is a wholly owned subsidiary of Deutsche Telekom AG.

9. Deutsche Telekom AG is a German corporation headquartered in Bonn, Germany. It is the largest telecommunications operator in Europe with wireline and wireless interests in numerous countries and total annual revenues in 2010 of €62.4 billion.

10. Pursuant to the Transaction Agreement, AT&T will acquire T-Mobile for cash and stock worth approximately \$39 billion. If this transaction is consummated, AT&T and T-Mobile would become the nation's largest wireless carrier. The merged firm would have approximately 132 million connections to mobile wireless devices in the United States, with more than \$72 billion in mobile wireless telecommunications services revenues.

#### **IV. TRADE AND COMMERCE**

##### **A. Relevant Product Markets**

11. Mobile wireless telecommunications services allow customers to engage in telephone conversations and obtain data services using radio transmissions without being confined to a small area during a call or data session, and without requiring an unobstructed line of sight to a radio tower. Mobility is highly valued by customers, as demonstrated by the more

than 300 million connections to mobile wireless devices in the United States. In 2010, revenues from the sale of mobile wireless telecommunications services in the United States were approximately \$160 billion. To provide service, mobile wireless telecommunications carriers typically must acquire FCC licenses to utilize electromagnetic spectrum to transmit signals; deploy extensive networks of radio transmitters and receivers at numerous telecommunications towers and other sites; and obtain “backhaul” – copper, microwave, or fiber connections from those sites to the rest of the network. They must also deploy switches as part of their networks, and interconnect their networks with the networks of wireline carriers and other mobile wireless telecommunications services providers. To be successful, providers also typically must engage in extensive marketing and develop a comprehensive network for retail distribution.

12. Mobile wireless telecommunications services include both voice and data services (e.g., texting and Internet access) provided over a radio network and allow customers to maintain their telephone calls or data sessions wirelessly when traveling. Mobile wireless telecommunications providers offer their services on a variety of devices including mobile phones, smartphones, data cards, tablet computers, and netbooks. In addition, an increasingly important group of customers are building mobile wireless capability into new devices, such as e-readers and vehicle tracking equipment, and contracting for mobile wireless telecommunications services on behalf of their own customers. There are no cost-effective alternatives to mobile wireless telecommunications services. Because neither fixed wireless services nor wireline services are mobile, they are not regarded by consumers of mobile wireless telecommunications services as reasonable substitutes. In the face of a small but significant price increase imposed by a hypothetical monopolist it is unlikely that a sufficient number of customers would switch some or all of their usage from mobile wireless telecommunications



services to fixed wireless or wireline services such that the price increase or reduction in innovation would be unprofitable. Mobile wireless telecommunications services accordingly is a relevant product market under Section 7 of the Clayton Act, 15 U.S.C. § 18.

13. Business customers, sometimes known as enterprises, and government customers often select and contract for mobile wireless telecommunications services for use by their employees in their professional and/or personal capacities. These customers constitute a distinct set of customers for mobile wireless telecommunications services, and sales of mobile wireless telecommunications services covered by enterprise or government contracts amounted to more than \$40 billion last year. The selection and service requirements for enterprise and government customers are materially different than those of individual consumers. Enterprise and government customers typically are served by dedicated groups of employees who work for the mobile wireless carriers, and such customers generally select their providers by soliciting bids, sometimes through an “RFP” (request for proposal) process. Enterprise and government customers typically seek a carrier that can provide services to employees, facilities, and devices that are geographically dispersed. Therefore, enterprise and government customers require services that are national in scope. In addition, prices and terms tend to be more attractive for enterprise and government customers than for individuals, and include features such as pooled minutes as well as favorable device upgrade and replacement policies. Enterprise and government service contracts often are individually negotiated, with carriers frequently providing discounts on particular RFPs in response to their competitors’ offers. There are no good substitutes for mobile wireless telecommunications services provided to enterprise and government customers, nor would a significant number of such customers switch to purchasing such services through ordinary retail channels in the event of a small but significant price

increase in services offered through the enterprise and government sales channels. Accordingly, mobile wireless telecommunications services provided to enterprise and government customers is a relevant product market under Section 7 of the Clayton Act, 15 U.S.C. § 18.

**B. Relevant Geographic Markets**

14. Mobile wireless telecommunications services are sold to consumers in local markets that are affected by nationwide competition among the dominant service providers. It is therefore appropriate both to identify local markets in which consumers purchase mobile wireless telecommunications services and to identify the nature of the nationwide competition affecting those markets. AT&T's acquisition of T-Mobile will have nationwide competitive effects across local markets.

15. Because most customers use mobile wireless telecommunications services at and near their workplaces and homes, they purchase services from providers that offer and market services where they live, work, and travel on a regular basis.

16. The nation's four largest providers of mobile wireless telecommunications services, including AT&T and T-Mobile, provide and market service on a nationwide basis. Other providers have limited networks that cover only particular localities and regions. Those smaller carriers typically do not market to customers outside of their respective network coverage areas, and may not even sell to such customers; therefore, local or regional carriers are not an attractive, or perhaps even available, option for those customers who live and work in areas outside of these smaller providers' respective network coverage areas.

17. Accordingly, from a consumer's perspective, local areas may be considered relevant geographic markets for mobile wireless telecommunications services. The Cellular Market Areas ("CMAs") that the FCC has identified and used to license mobile wireless

telecommunications services providers for certain spectrum bands often approximate the areas within which customers have the same competitive choices. AT&T and T-Mobile compete against each other in local markets across the United States that collectively encompass a large majority of U.S. mobile wireless telecommunications consumers. Indeed, AT&T and T-Mobile compete head to head in at least 97 of the nation's top 100 CMAs as well as in many other areas. These 97 CMAs alone include over half of the U.S. population. Each of these 97 CMAs, identified in Appendix B, effectively represents an area in which the transaction likely would substantially lessen competition for mobile wireless telecommunications services and each constitutes a relevant geographic market under Section 7 of the Clayton Act, 15 U.S.C. § 18. In addition, as described below, the nationwide effects of the transaction likely would substantially lessen competition in local markets across the nation.

18. In competing for customers in the 97 markets identified in Appendix B and other CMAs, AT&T and T-Mobile (as well as Verizon and Sprint) utilize networks that cover the vast majority of the U.S. population, advertise nationally, have nationally recognized brands, and offer pricing, plans, and devices that are available nationwide. For a variety of reasons, there is little or no regional variation in the pricing plans offered by the Big Four nationwide carriers. Nationwide pricing simplifies customer service and billing, reduces consumer confusion that might otherwise result from regional pricing disparities, and allows the carriers to take advantage of nationwide advertising in promoting their services. Similarly, when the Big Four carriers make devices available to the public, they typically make them available nationwide. This too minimizes customers' confusion and dissatisfaction, and allows the carriers to take advantage of nationwide marketing. In addition, the Big Four carriers generally deploy system technology on a nationwide basis, including critical components such as network standards, e.g., LTE or

HSPA+. These technological choices are an important aspect of competition in the mobile wireless telecommunications services market.

19. The national decision-making of the Big Four carriers results in nationwide competition across local markets. Each of the Big Four firms making a competitive choice regarding a pricing plan, or other national competitive attribute, will consider competitive conditions across the United States, as the decision will take effect throughout the United States. Because competitive decisions affecting technology, plans, prices, and device offerings are typically made at a national, rather than a local, level, the rivals that affect those decisions generally are those with sufficient national scale and scope, i.e., the Big Four. As AT&T acknowledged less than three years ago during a merger proceeding, it aims to “develop its rate plans, features and prices in response to competitive conditions and offerings at the national levels – primarily the plans offered by the other national carriers.” As AT&T recognized, “the predominant forces driving competition among wireless carriers operate at the national level.” That remains the case today.

20. Because, as AT&T admits, competition operates at a national level, it is appropriate to consider the competitive effects of the transaction at a national level. There is no doubt that AT&T and T-Mobile compete against each other on a nationwide basis, make many decisions on a nationwide basis, and that this national competition is conducted in local markets that include the vast majority of the U.S. population. Indeed, customers in local markets across the country often face very similar choices from AT&T, T-Mobile, Verizon, and Sprint, regardless of whether local or regional carriers also compete in any particular CMA. It is necessary, therefore, to analyze competition at the national level in order to capture, as AT&T has stated, “the predominant forces driving competition among wireless carriers,” and the impact

of these forces on competitive decisions and outcomes that are fundamentally national in nature. Thus, whereas CMAs are appropriate geographic markets from the perspective of individual consumer choice, from a seller's perspective, the Big Four carriers compete against each other on a nationwide basis and AT&T's acquisition of T-Mobile will have nationwide competitive effects across local markets.

21. Enterprise and government customers often have multiple office and business locations throughout the United States, and employees who may travel frequently. Enterprise and government customers often contract at the same time for employees located at these multiple locations across the country. Therefore, enterprise and government customers generally require a mobile wireless provider with a nationwide network, and are willing to contract with a carrier anywhere in the United States who has such a network. Accordingly, the United States is a relevant geographic market under Section 7 of the Clayton Act, 15 U.S.C. § 18, for mobile wireless telecommunications services offered to enterprise and government customers.

### **C. Concentration**

22. Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index ("HHI"), which is defined and explained in Appendix A to this Complaint. Preliminary market share estimates demonstrate that in 96 of the nation's largest 100 CMAs – all identified in Appendix B as representing relevant geographic markets for mobile wireless telecommunications services – the post-merger HHI exceeds 2,500. Such markets are considered to be highly concentrated. In one additional CMA identified in Appendix B, the post-merger HHI falls just below 2,500 and the market would be considered moderately concentrated.

23. In 91 of the 97 CMAs identified in Appendix B as representing relevant geographic markets for mobile wireless telecommunications services – including all of the

nation's 40 largest markets – preliminary market share estimates demonstrate that AT&T's acquisition of T-Mobile would increase the HHI by more than 200 points. Such an increase is presumed to be likely to enhance market power. In an additional 6 CMAs, the increase would be at least 100, an increase that often raises significant competitive concerns.

24. In more than half of the CMAs identified in Appendix B as representing relevant geographic markets for mobile wireless telecommunications services, the combined AT&T/T-Mobile would have a greater than 40 percent share. In at least 15 of the CMAs, including major metropolitan markets such as Dallas, Houston, Oklahoma City, Birmingham, Honolulu, and Seattle, the combined firm would have a greater than 50 percent share – i.e., more customers than all the other firms combined.

25. Nationally, the proposed merger would result in an HHI of more than 3,100 for mobile wireless telecommunications services, an increase of nearly 700 points. These numbers substantially exceed the thresholds at which mergers are presumed to be likely to enhance market power.

26. In the national market for mobile wireless telecommunications services provided to enterprise and government customers, the proposed merger would result in an HHI of at least 3,400, an increase of at least 300 points. These numbers exceed the thresholds above which mergers are presumed to be likely to enhance market power.

#### **D. Anticompetitive Effects**

##### **1. Overview of T-Mobile's Importance as an Aggressive Competitor**

27. Historically and currently, T-Mobile has positioned itself as the value option for wireless services, focusing on aggressive pricing, value leadership, and innovation. As T-Mobile noted in a document generated in preparation for an investor's conference, the company views

itself as “the No. 1 value challenger of the established big guys in the market and as well positioned in a consolidated 4-player national market.” T-Mobile’s Chief Marketing Officer, Cole Brodman, a 15-year veteran of the company, described T-Mobile as having “led the industry in terms of defining rate plan value.” T-Mobile consumers benefit from the lower prices offered by T-Mobile, while subscribers of Verizon, AT&T, and Sprint gain from more attractive offerings that those firms are spurred to provide because of the attractive national value proposition of T-Mobile.

28. Innovation is well known to be an important driver of economic growth. T-Mobile has been responsible for numerous “firsts” in the U.S. mobile wireless industry, as outlined in an internal document entitled “T-Mobile Firsts: Paving the way one first at a time.” The document lists the first Android handset, Blackberry wireless e-mail, the Sidekick (a consumer “all-in-one” messaging device), national Wi-Fi “hotspot” access, and a variety of unlimited service plans, among other firsts.

29. T-Mobile has also been an innovator in terms of network development and deployment. For instance, T-Mobile was the first company to roll out and market a nationwide network based on advanced HSPA+ technology and marketed as 4G. Such investments in new network technologies – spurred by competition among the Big Four – are valuable to consumers as they increase the efficiency of spectrum use and allow for more mobile wireless services output.

30. AT&T has felt competitive pressure from T-Mobile’s innovation. As a January 2010 AT&T internal document observed in analyzing the roll-out of new competitive broadband networks by several of its competitors:

[T]he more immediate threat to AT&T is T-Mobile. . . . On January 5<sup>th</sup>, 2010, it announced that it had upgraded its entire network with HSPA 7.2 covering 200M POPS.

It also reiterated prior statements that it would add HSPA+, capable of 3x the throughput of HSPA 7.2, across a substantial portion of its network by 2H 2010. . . . The one-two punch of an advanced network and the backhaul required to support the additional data demands should be taken seriously. . . .

By January 2011, an AT&T employee was observing that “TMO was first to have HSPA+ devices in their portfolio . . . . we added them in reaction to potential loss of speed claims.”

(Ellipsis in original.)

31. After a period of disappointing results, T-Mobile recently brought in new management and launched plans to revitalize the company by returning to its roots as the industry value and innovation leader. T-Mobile’s executive team articulated its vision of T-Mobile’s future in a November/December 2010 document titled “T-Mobile USA Challenger Strategy: The Path Forward”:

Our heritage and future is as a challenger brand. TMUS will attack incumbents and find innovative ways to overcome scale disadvantages. TMUS will be faster, more agile, and scrappy, with diligence on decisions and costs both big and small. Our approach to market will not be conventional, and we will push to the boundaries where possible. . . . TMUS will champion the customer and break down industry barriers with innovations . . . .

32. Consistent with its history, and in a clear threat to larger rivals such as AT&T, T-Mobile decided to position itself as the carrier to “make smart phones affordable for the average US consumer.” A key component of T-Mobile’s new strategy is to offer “Disruptive Pricing” plans to attract the estimated 150 million consumers whom T-Mobile believes will want a smartphone but do not yet have one. T-Mobile’s CEO Philipp Humm defined as “disruptive” a rate plan that “Verizon/ATT can’t match.” T-Mobile has designed its new aggressive pricing plans to offer services, including data access, at rates lower than those offered by AT&T and Verizon, and it projects that the new plans will save consumers several hundred dollars per year as compared to similar AT&T and Verizon plans.



33. Relying on its disruptive pricing plans, its improved high-speed HSPA+ network, and a variety of other initiatives, T-Mobile aimed to grow its nationwide share to 17 percent within the next several years, and to substantially increase its presence in the enterprise and government market. AT&T's acquisition of T-Mobile would eliminate the important price, quality, product variety, and innovation competition that an independent T-Mobile brings to the marketplace.

## **2. Competitive Harm: Mobile Wireless Telecommunications Services**

34. AT&T and T-Mobile compete locally and nationally against each other, as well as against Verizon and Sprint, to attract mobile wireless telecommunications services customers, including in the markets identified in Appendix B. They also compete nationally to attract enterprise and government customers for mobile wireless telecommunications services. Competition taking place across a variety of dimensions, including price, plan structure, network coverage, quality, speeds, devices, and operating systems would be negatively impacted if this merger were to proceed.

35. The proposed merger would eliminate T-Mobile, one of the four national competitors, resulting in a significant loss of competition, including in each of the 97 CMAs identified in Appendix B. In some CMAs, AT&T, T-Mobile, Verizon, and Sprint are the only competitors with mobile wireless networks. Although in other CMAs there are also one or two local or regional providers that do serve a significant number of customers, those smaller providers face significant competitive limitations, largely stemming from their lack of nationwide spectrum and networks. They are therefore limited in their ability to competitively constrain the Big Four national carriers. Among other limitations, the local and regional providers must depend on one of the four nationwide carriers to provide them with wholesale

services in the form of “roaming” in order to provide service in the vast majority of the United States (accounting for most of the U.S. population) that sits outside of their respective service areas. This places them at a significant cost disadvantage, particularly for the growing number of customers who use smartphones and exhibit considerable demand for data services. The local and regional providers also do not have the scale advantages of the four nationwide carriers, resulting in difficulties obtaining the most popular handsets, among other things. Due in large part to these limitations and disadvantages, these local and regional providers typically have small shares and none is as effective a constraint as is T-Mobile on AT&T, Verizon, and Sprint. Moreover, because each of the four nationwide firms typically offers prices, plans, and devices on a national basis, the regional and local providers – none of whom has a national share of more than 3 percent – exert little influence on these aspects of competition. As AT&T noted in connection with its acquisition of a regional carrier less than three years ago, that carrier’s pricing was “an inconsequential factor in AT&T’s competitive decision-making.”

36. The substantial increase in concentration that would result from this merger, and the reduction in the number of nationwide providers from four to three, likely will lead to lessened competition due to an enhanced risk of anticompetitive coordination. Certain aspects of mobile wireless telecommunications services markets, including transparent pricing, little buyer-side market power, and high barriers to entry and expansion, make them particularly conducive to coordination. Any anticompetitive coordination at a national level would result in higher nationwide prices (or other nationwide harm) by the remaining national providers, Verizon, Sprint, and the merged entity. Such harm would affect consumers all across the nation, including those in rural areas with limited T-Mobile presence. Furthermore, the potential for competitive harm is heightened given T-Mobile’s recent decision to grow its market share via a “challenger”

strategy. Its new aggressive and innovative pricing plans, low-priced smartphones, and superior customer service would have been likely to disrupt current industry models and require competitive responses from the other national players. Through this proposed merger, AT&T lessens this threat now, and, if the merger is approved, would eliminate it permanently.

37. The proposed merger likely would lessen competition through elimination of head-to-head competition between AT&T and T-Mobile. Mobile wireless carriers sell differentiated services. Among the differentiating characteristics of greatest importance to consumers are price, network coverage, service quality, customer support, and device options. Not only do the carriers' offerings differ, but consumers have differing preferences as well. Because both carriers and consumers are diverse, customers differ as to the firms that are their closest and most desired alternatives. Where there is significant substitution between the merging firms by a substantial share of consumers, anticompetitive effects are likely to result. Documents produced by AT&T and T-Mobile establish that a significant portion of customers who "churn" from AT&T switch to T-Mobile, and vice versa. This shows a significant degree of head-to-head competition between the two companies, as demonstrated by T-Mobile's recent television ads directly targeting AT&T. The proposed merger would, therefore, likely eliminate important competition between AT&T and T-Mobile.

38. Moreover, tens of millions of Americans have selected T-Mobile as their mobile wireless carrier because of its unique combination of services, plans, devices, network coverage, features, and award-winning customer service. By eliminating T-Mobile as an independent competitor, the proposed transaction likely will reduce innovation and product variety – a serious concern discussed in Section 6.4 of the *Horizontal Merger Guidelines*, issued by the U.S. Department of Justice and the Federal Trade Commission. For example, post-merger, AT&T

will no longer offer T-Mobile's lower-priced data and voice plans to new customers or current customers who upgrade their service. Consequently, T-Mobile as a lower-priced option will be eliminated from the market, resulting in higher prices for a significant number of consumers. Furthermore, the innovation that an independent T-Mobile brings to the market – as reflected in the array of industry “firsts” it has introduced in the past, such as the first Android phone, Blackberry e-mail, and the Sidekick – would also be lost, depriving consumers of important benefits.

39. Similarly, competition, including from T-Mobile, has resulted in carriers making greater investments in technology that lead to better service quality. By eliminating T-Mobile as an independent competitor, the proposed transaction likely will reduce the competitive incentive to invest in wireless networks to attract and retain customers.

40. The presence of an independent, competitive T-Mobile, and the competition between T-Mobile and AT&T, has resulted in lower prices for mobile wireless telecommunications services across the country than otherwise would have existed. If the proposed acquisition is consummated, AT&T will eliminate T-Mobile as an independent competitive constraint. As a result, concentration will increase in many local markets and competition likely will be substantially lessened across the nation, resulting in higher prices, diminished investment, and less product variety and innovation than would exist without the merger, both with respect to services provided over today's mobile wireless devices, as well as future innovative devices that have yet to be developed.

### **3. Competitive Harm: Enterprise and Government Mobile Wireless Telecommunications Services**

41. In the national market for mobile wireless telecommunications services provided to enterprise and government customers, the proposed transaction effectively would reduce the

number of significant competitors from four to three. Local and regional providers have an insignificant presence because enterprise and government customers typically require their providers to have nationwide networks, and because local and regional carriers generally refrain from bidding for out-of-network business due to the costs associated with paying roaming rates for services in locations outside of their network footprints. In many instances, enterprise and government customers will contract with more than one of the mobile wireless providers to ensure ubiquitous coverage and provide employees with a choice. In addition, contracting with multiple national carriers preserves the incentives for each carrier to provide competitive service enhancements for the duration of their contracts. The reduction in the number of bidders for enterprise and government contracts to three – and in some cases fewer – significantly increases the risk of anticompetitive effects.

42. T-Mobile historically has been particularly aggressive on price. AT&T's acquisition of T-Mobile therefore removes potentially the most attractive bidder from many bid situations. Accordingly, the merged firm likely will have a reduced incentive to submit low bids. In addition, the remaining bidders – typically Verizon and/or Sprint – also may bid less aggressively. For some customers, such as enterprises whose employees travel extensively internationally, AT&T and T-Mobile are particularly close substitutes.

43. Absent the proposed merger, T-Mobile would likely have an even more important competitive presence in the enterprise and government market going forward. In the past, enterprise and government customers were not a primary focus for T-Mobile. As part of its 2011 business plan, however, T-Mobile re-dedicated itself to becoming a bigger player with the stated goal of growing enterprise revenues substantially by 2013.

44. T-Mobile makes its presence felt competing head to head with AT&T and other

carriers for a number of accounts, winning business in some cases and often pushing prices lower when it does not. The merger's elimination of T-Mobile as an aggressive competitor would likely result in fewer choices and higher prices for enterprise and government customers.

**E. Entry**

45. Entry by a new mobile wireless telecommunications services provider in the relevant geographic markets would be difficult, time-consuming, and expensive, requiring spectrum licenses and the construction of a network. To replace the competition that would be lost from AT&T's elimination of T-Mobile as an independent competitor, moreover, a new entrant would need to have nationwide spectrum, a national network, scale economies that arise from having tens of millions of customers, and a strong brand, as well as other valued characteristics. Therefore, entry in response to a small but significant price increase for mobile wireless telecommunications services would not be likely, timely, and sufficient to thwart the competitive harm resulting from AT&T's proposed acquisition of T-Mobile, if it were consummated.

**F. Efficiencies**

46. The Defendants cannot demonstrate merger-specific, cognizable efficiencies sufficient to reverse the acquisition's anticompetitive effects.

**V. VIOLATION ALLEGED**

47. The effect of AT&T's proposed acquisition of T-Mobile, if it were to be consummated, likely will be to lessen competition substantially in interstate trade and commerce in the relevant geographic markets for mobile wireless telecommunications services, and

enterprise and government mobile wireless telecommunications services, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

48. Unless enjoined, the transaction likely will have the following effects in mobile wireless telecommunications services in the relevant geographic markets, among others:

- a. actual and potential competition between AT&T and T-Mobile will be eliminated;
- b. competition in general likely will be lessened substantially;
- c. prices are likely to be higher than they otherwise would;
- d. the quality and quantity of services are likely to be less than they otherwise would due to reduced incentives to invest in capacity and technology improvements; and
- e. innovation and product variety likely will be reduced.

## **VI. REQUESTED RELIEF**

The Plaintiff requests:

49. That AT&T's proposed acquisition of T-Mobile be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

50. That Defendants be permanently enjoined from and restrained from carrying out the Stock Purchase Agreement dated March 20, 2011, or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to bring the telecommunications businesses of AT&T and T-Mobile under common ownership or control;

51. That Plaintiff be awarded its costs of this action; and

52. That Plaintiff have such other relief as the Court may deem just and proper.

Dated this 31st day of August 2011.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

\_\_\_/s/ Sharis A. Pozen\_\_\_\_\_  
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Acting Assistant Attorney General

\_\_\_/s/ Joseph F. Wayland\_\_\_\_\_  
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\_\_\_/s/ Patricia A. Brink\_\_\_\_\_  
Patricia A. Brink  
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APPENDIX A  
**Herfindahl-Hirschman Index**

The term “HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ( $30^2 + 30^2 + 20^2 + 20^2 = 2,600$ ). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* § 5.3 (issued by the U.S. Department of Justice and the Federal Trade Commission on Aug. 19, 2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets will be presumed to be likely to enhance market power. *Id.* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. *Id.*

**APPENDIX B**  
**Relevant Geographic Market CMAs**

CMA Number and Name	Post-merger share	HHI Post-Merger	Increase in HHI
001-New York, NY-NJ	43.7%	3335	951
002-Los Angeles-Long Beach, CA	41.4%	3174	794
003-Chicago, IL	48.1%	3189	1114
004-Philadelphia, PA	45.2%	3385	918
005-Detroit/Ann Arbor, MI	31.9%	2857	420
006-Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH	40.9%	3495	731
007-San Francisco-Oakland, CA	50.3%	3438	763
008-Washington, DC-MD-VA	39.6%	3282	636
009-Dallas-Fort Worth, TX	58.0%	3980	1267
010-Houston, TX	52.1%	3578	1350
011-St. Louis, MO-IL	46.7%	3269	739
012-Miami-Fort Lauderdale-Hollywood, FL	48.1%	3341	1027
013-Pittsburgh, PA	31.8%	3650	347
014-Baltimore, MD	36.5%	3294	570
015-Minneapolis-St. Paul, MN-WI	45.5%	3596	1033
016-Cleveland, OH	29.7%	3717	365
017-Atlanta, GA	46.6%	3223	886
018-San Diego, CA	40.8%	3248	711
019-Denver-Boulder, CO	41.9%	3227	857
020-Seattle-Everett, WA	53.2%	4044	1376
021-Milwaukee, WI	34.3%	2493	394
022-Tampa-St. Petersburg, FL	39.1%	2935	741
023-Cincinnati, OH-KY-IN	22.6%	2575	215
024-Kansas City, MO-KS	44.0%	3329	948
025-Buffalo, NY	31.6%	3385	362
026-Phoenix, AZ	32.9%	3178	536
027-San Jose, CA	48.6%	3466	675
028-Indianapolis, IN	41.5%	3314	515
029-New Orleans, LA	43.9%	3579	607
030-Portland, OR-WA	47.2%	3629	963
031-Columbus, OH	30.7%	3412	407
032-Hartford-New Britain-Bristol, CT	41.0%	3657	538
033-San Antonio, TX	43.4%	3117	761
034-Rochester, NY	26.5%	4330	228
035-Sacramento, CA	46.2%	3238	697
036-Memphis, TN-AR-MS	49.6%	3136	892
037-Louisville, KY-IN	48.0%	3365	864
038-Providence-Warwick-Pawtucket, RI	42.7%	3509	902
039-Salt Lake City-Ogden, UT	49.6%	3653	1230
040-Dayton, OH	29.2%	2814	298
041-Birmingham, AL	57.8%	4181	1332
042-Bridgeport-Stamford-Norwalk-Danbury, CT	40.3%	3582	602
043-Norfolk-Virginia Beach-Portsmouth, VA/NC	28.3%	3103	384
044-Albany-Schenectady-Troy, NY	30.8%	3607	205
045-Oklahoma City, OK	63.2%	4399	1335
046-Nashville-Davidson, TN	31.8%	3164	347
047-Greensboro-Winston-Salem-High Point, NC	28.2%	3358	250
048-Toledo, OH-MI	17.4%	3822	127

049-New Haven-West Haven-Waterbury-Meriden, CT	47.4%	3671	770
050-Honolulu, HI	55.5%	3821	1531
051-Jacksonville, FL	50.1%	3482	1084
052-Akron, OH	30.1%	3849	354
053-Syracuse, NY	35.9%	3905	227
054-Gary-Hammond-East Chicago, IN	40.3%	3121	739
055-Worcester-Fitchburg-Leominster, MA	38.7%	3968	419
056-Northeast Pennsylvania, PA	42.6%	3935	414
057-Tulsa, OK	57.6%	3827	768
058-Allentown-Bethlehem-Easton, PA-NJ	52.1%	4060	1052
059-Richmond, VA	24.6%	3472	267
060-Orlando, FL	49.3%	3390	1086
061-Charlotte-Gastonia, NC	31.4%	3133	331
062-New Brunswick-Perth Amboy-Sayreville, NJ	37.0%	3753	635
063-Springfield-Chicopee-Holyoke, MA	43.1%	3896	840
064-Grand Rapids, MI	24.5%	3370	174
066-Youngstown-Warren, OH	44.8%	3438	639
067-Greenville-Spartanburg, SC	30.3%	4124	381
068-Flint, MI	25.7%	3168	163
069-Wilmington, DE-NJ-MD	37.3%	3426	469
070-Long Branch-Asbury Park, NJ	28.9%	4427	326
071-Raleigh-Durham, NC	32.0%	3236	279
072-West Palm Beach-Boca Raton, FL	49.7%	3317	788
073-Oxnard-Simi Valley-Ventura, CA	41.9%	3618	500
074-Fresno, CA	53.6%	3680	885
075-Austin, TX	54.4%	3867	1157
076-New Bedford-Fall River, MA	38.4%	3479	582
077-Tucson, AZ	29.7%	3394	431
078-Lansing-East Lansing, MI	21.5%	3689	155
079-Knoxville, TN	27.0%	2812	123
080-Baton Rouge, LA	65.0%	4838	611
081-El Paso, TX	40.9%	2877	751
082-Tacoma, WA	41.8%	3683	866
083-Mobile, AL	57.8%	4048	1177
084-Harrisburg, PA	47.2%	3973	576
085-Johnson City-Kingsport-Bristol, TN-VA	24.7%	4323	241
086-Albuquerque, NM	33.4%	3400	541
087-Canton, OH	27.5%	4242	267
088-Chattanooga, TN-GA	27.6%	3799	262
089-Wichita, KS	40.5%	3081	765
090-Charleston-North Charleston, SC	36.2%	3483	654
091-San Juan-Caguas, PR	54.3%	4022	1134
092-Little Rock-North Little Rock, AR	53.9%	3867	276
093-Las Vegas, NV	45.6%	3076	958
095-Columbia, SC	31.4%	3887	408
096-Fort Wayne, IN	34.0%	3824	314
097-Bakersfield, CA	51.7%	3643	795
099-York, PA	48.6%	3922	656
100-Shreveport, LA	48.9%	3618	197