

**Before the
Federal Communications Commission
Washington, DC 20554**

In the matter of

Applications of AT&T and DirecTV To
Transfer Control of FCC Licenses and
Other Authorizations

MB Docket No. 14-90

REPLY TO OPPOSITION TO PETITION TO DENY

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January 7, 2015

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Introduction

In this, as in all merger reviews the Commission's task is clear. First, the Commission must be sure that the merger would not cause any competitive or public interest harms. Next, it must be sure that the merger would create positive public interest benefits—it is not enough for the Commission to find a lack of harm, or merely to counteract harms it finds. The burden of proof is on the applicants to make these showings, and unless the Commission is satisfied as to both counts it may not grant the merger. And on both counts, in this transaction, AT&T and DirecTV have so far failed to meet their burden. The record is already clear on these points, and this filing will not reiterate all of them—for example, AT&T and DirecTV have not adequately addressed the loss of MVPD competition in U-Verse markets, which is paradigmatic competitive harm. Instead, this filing will briefly review a few of the most notable problems with this transaction and the applicants' argument in its favor.

I. AT&T's Broadband Buildout Promises are Still Unverifiable

The applicants argue that various efficiencies that result from this merger would result in increased competition in various markets, lower prices for consumers, or increased buildout. But these alleged benefits amount to the applicants' claims that it would be more likely to expand its networks or lower its prices, not verifiable commitments to actually do these things. But incentives are not a public interest benefit—results are. The applicants' burden of proof cannot be satisfied by speculation or economic models—any public interest benefits the applicants claim must be specific, verifiable, and binding. Unless the Commission

demands that the applicants meet this standard, its public interest test will produce nothing more than bold claims and sparse economic projections, not tangible benefits for consumers. If applicants are unable or unwilling to commit to concrete and verifiable benchmarks—specific buildout numbers and pricing commitments along with timetables—then the alleged benefits they cite cannot be used in support of this merger.

AT&T’s vague claims about broadband buildout are a case in point. First, AT&T’s claims on the record are too uncertain to be used to justify this transaction. In its response AT&T claims that it “has committed that it will expand and enhance high-speed broadband service to 15 million customer locations, mostly in underserved rural areas where AT&T does not today provide high-speed broadband service....This commitment will be completed within four years after the transaction closes.”¹ However, examining AT&T’s claims more thoroughly, 13 of the 15 million new households are to be served not by new buildout, but by upgrades to AT&T’s existing wireless network. Leaving aside whether these network upgrades—which AT&T already has an incentive to undertake—are even merger-specific, the Commission should see through AT&T’s attempt to inflate the benefits of its transaction by lumping 13 million wireless households with 2 million wired households. AT&T claims that these 2 million wired households, at least, are beyond its already-announced “GigaPower” wired broadband buildout plans. It backs up these claims with confidential citations the public cannot verify. If the Commission is

¹ Joint Opposition of AT&T Inc. and DirecTV To Petitions To Deny and Condition and Reply To Comments (filed Oct. 16 2014) [hereafter *Applicant Reply*] at 19, note 51.

to give weight to these claims it is not enough for it to require that AT&T build out wired broadband to 2 million households within 4 years—the Commission must require that AT&T build out GigaPower service to the planned, pre-merger number of households contained in its confidential filings, and 2 million households beyond that, within 4 years. Unless the Commission does this, there will be no way for the public to verify, after AT&T has completed two million additional installations, whether it has yet begun to expand into the marginal territory it claims can only be served under the post-merger incentives or not. Only the two million *additional* households can satisfy AT&T’s claim. In short, the Commission cannot grant a merger on the basis of AT&T’s claims it will provide new wired broadband to 2 million households beyond some number. The total number of households AT&T plans to serve, the timetable under which it plans to serve them, and the degree of the change in households served pre-merger and post-merger should all be part of the public record. If business considerations preclude AT&T from making this information public, that may be its prerogative, but the FCC cannot then accept broadband buildout claims as a public interest benefit to this merger.

Second, AT&T’s own statements with regard to its existing commitments show how depending on unenforceable, unverifiable promises of future deployment can lead to no public benefit. AT&T has already threatened to “pause” its fiber investments, only to walk this threat back when the implications for this transaction

became apparent.² Without firm, enforceable commitments as to total buildout numbers AT&T will always have the option of claiming that unforeseen economic or regulatory developments have changed its plans. To accept claims of future buildout as public interest benefits, the FCC must require that AT&T hold to a specific buildout timetable that includes its current plans and the 2 million additional deployments.

II. Harms Related to the IP Transition are Real and Transaction-Specific

AT&T repeats in a talismanic fashion that certain concerns, such as the IP transition, are “not related” to this transaction—indeed, do not even “arguably” raise a concern.³ But Public Knowledge is not claiming that this merger would be the *sole* cause of problems relating to the IP transition, nor that absent the merger that AT&T would have *no* incentive to move customers from wireline to wireless service, even when such service is not suitable to their needs. PK only claims that this merger would *increase* AT&T’s incentive to do these things—and this is enough for these harms to be merger-related. Unless the Commission can find a means to counteract AT&T’s increased post-merger incentive to push some fraction of its customer base to a new, less-tested technology that may not serve its customers’ needs or adequately protect public safety, it should deny this merger.

² See Letter from Jamillia Ferris, FCC to Robert Quinn, AT&T (Nov. 14), and Letter from Robert Quinn, AT&T to Marlene Dortch, FCC (Nov. 25, 2014), in in MB Docket No. 14-90.

³ *Applicant Reply* at 73.

III. AT&T Fails to Rebut the Arguments that This Transaction Would Increase Its Incentive to Discriminate Against Rival Video Providers

After the transaction, AT&T—like all ISP/MVPDs—would have the ability and incentive to discriminate against rival video services, especially online video services. AT&T’s argument to the contrary is simply a restatement of broadband providers’ usual claim that their interests are wholly aligned with their customers and that if they tried to extract additional revenue either by demanding that rival video services pay for preferential treatment of some kind or by nudging their own subscribers toward using AT&T’s video services instead, that they would suffer in the marketplace.⁴ But the FCC and many others have already rejected this argument in numerous contexts for the standard reasons. Among other things, customers’ ability to discipline their ISPs in the marketplace is limited by a lack of competition; subscribers may not always know the cause of degraded performance of online video services; and the transaction costs of changing online video services is lower than the transaction costs of changing ISPs if that is even possible, meaning the rational thing for a consumer to do *even if she knows that her ISP is behaving anticompetitively* is to stick with her ISP and change her online video service.

As a large broadband provider, AT&T already has an incentive to engage in anticompetitive behavior toward online video services to a degree. But to the extent that AT&T, by becoming a much larger MVPD, would have a greater incentive to direct its customers to subscribe to its MVPD video service instead of the video service of rivals, or to use some new online video service it may launch instead of

⁴ *Applicant Reply* at 34-39.

that of rivals, this increased incentive to discriminate is a transaction-specific harm. The simplest way for the FCC to avoid these harms is for it to block this transaction. However, a strong, permanent, and enforceable commitment by AT&T to operate its network according to the nondiscrimination rules that telecommunications providers have typically been subject to under Title II of the Communications Act may alleviate some of the network discrimination harms (while leaving the other harms PK and others have raised to be remedied in some other way). Such a commitment should address both ways that applicants could leverage interconnection points as well as prioritize or degrade traffic on the last mile.

Such nondiscrimination rules, however, may not be sufficient to address the ways that AT&T/DirecTV, as an MVPD, would be able to leverage the “authentication” process for TV Everywhere apps or control access to its own set-top boxes in ways that disadvantage rival video providers. Applicants’ responses on these points are not on point.⁵ PK is not asking the Commission to impose conditions on AT&T/DirecTV in lieu of its rulemaking authority under Section 629. Rather, in response to applicants’ increased incentive, post-transaction, to engage in anticompetitive behavior with regard to video devices generally, including streaming devices such as the Roku that are not covered by Section 629, the Commission should at a minimum impose certain conditions. Namely, it should ensure that applicants authenticate video streaming apps that require an MVPD subscription in a timely fashion, and make their own video services available on third-party devices.

⁵ *Applicant Reply* at 63 et seq.

Conclusion

The harms that PK has raised in its initial petition, in this response, and the harms that other petitioners have noted in the record together provide the Commission with ample reason to block this transaction. Additionally, any benefits of this transaction that applicants can point to remain either speculative, unverifiable, or both. Unless the Commission can be certain that any purported consumer benefits of this merger are real and verifiable and can hold AT&T to account for them, and unless it can eliminate the harms that PK and others have identified, it should block this transaction.

Respectfully submitted,

/s John Bergmayer

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PUBLIC KNOWLEDGE

January 7, 2015

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I, John Bergmayer, certify that today, January 7, 2015, I have served copies of this Petition to Deny on the following parties and staff via email:

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