BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications of AT&T Inc. and DirecTV	)	**MB Docket No. 14-90**
	)	
For Consent To Assign Or Transfer Control	)	
Of Licenses and Authorizations	)	

REPLY COMMENTS OF COMPTEL

COMPTEL, through undersigned counsel, hereby submits its response to the Petitions and Comments filed on the above-captioned application of AT&T to acquire DirecTV (collectively "AT&T"). COMPTEL's members offer telecommunications, high speed broadband and often video services that compete with the services offered by AT&T and that will compete with the standalone and bundled services offered by the merged company. In providing their services, COMPTEL members often require wholesale inputs purchased from AT&T, including among other things, interconnection and last-mile access to connect their cutting edge services and advanced networks to individual customer sites.

I. The Commission Must Ensure That AT&T's Promises Of Enhanced Competition Survive The Transition To IP

AT&T's wireline network covers portions of 21 states. DirecTV is a satellite multichannel distribution network with a nationwide footprint.[1] Seeking to justify the combination of these two entities, AT&T extols the benefits that consumers allegedly will reap from transaction-specific efficiencies in terms of enhanced competition in the provision of

[1] Description of Transaction, Public Interest Showing and Related Demonstrations at 1 ("AT&T Application").

broadband service and bundled broadband and video service packages, including downward pressure on prices.[2] As AT&T is well aware, competition in the provision of telecommunications and broadband services brings such benefits to the many businesses, nonprofits, and government entities served by COMPTEL members.

AT&T bears the burden of proving by a preponderance of the evidence that the potential benefits of its proposed transaction outweigh the potential harms. The Commission's analysis must incorporate the broad objectives of the Act, "which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public. . . ."[3] COMPTEL supports the arguments made by certain filing parties that identified the potential anticompetitive impacts the proposed merger may have for both wholesale and retail wireline customers.[4] While COMPTEL agrees with the petitioners/commenters that contend that AT&T has fallen short of meeting its burden of proving that the potential benefits of the transaction outweigh the potential harms, to the extent that the Commission is inclined to approve the transaction, COMPTEL supports the requests that any approval be accompanied by a reminder that Sections 251 and 252 of the Communications Act apply to the merged entity both during and after the transition of AT&T's wireline network to IP,

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[2] *Id.* at 52, 56-63.

[3] *In the Matter of Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-194, Memorandum Opinion and Order, FCC 10-116, at ¶23 (rel. June 22, 2010) (*"AT&T/Verizon Order")*.

[4] *See e.g.*, Petition To Deny of Public Knowledge and Institute For Local Self-Reliance filed in MB Docket No. 14-90 at 11-13; Petition to Condition Consent of Cox Communications, Inc. filed in MB Docket No. 14-90 at iii, 21-26; Cox Reply to Opposition at iv, 10-11.

as proposed by Cox Communications[5] and Public Knowledge.[6] Specifically, any Commission decision approving the transaction should confirm that AT&T's obligations to provide unbundled DS1 and DS3 loops and to interconnect upon request and where technically feasible are not affected by conversion from TDM to IP-based transmission technology or from copper to fiber.[7]

AT&T alleges that the concerns raised by Cox and Public Knowledge should be rejected because they are not transaction-specific and are being addressed in other proceedings,[8] including the Technology Transitions proceeding.[9] AT&T is mistaken. It is true that AT&T has taken the position in other proceedings that Section 251 does not obligate it to interconnect with competitive providers on an IP-basis[10] or provide unbundled DS1 and DS3 capacity loops once it

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[5] Cox Petition to Condition Consent at 21-26 and Cox Reply to Opposition at 10-11. While Cox focuses on competitive carriers rights' to interconnection, equally important are competitors' rights to unbundled network elements pursuant to Section 251(c)(3).

[6] Public Knowledge Petition at 12. Public Knowledge urges the Commission to ensure that the transaction gives the Commission the opportunity to make the IP transition process go more smoothly and prevent AT&T from taking actions that would limit its options by, among other things, providing "Clarity about the future of wired service for businesses and the interconnection rights of competitive carriers."

[7] Windstream elaborates on the legal and policy reasons in support of such action in its recently filed Petition for Declaratory Ruling, WC Docket No. 15-1, GN Docket No. 13-5, filed December 29, 2014.

[8] Joint Opposition of AT&T Inc. and DirecTV to Petitions To Deny and Condition and Reply to Comments at 59, 72.

[9] *In the Matter of Ensuring Customer Premises Equipment Backup Power For Continuity of Communications, et al.*, PS Docket No. 14-174, *et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 (rel. Nov. 25, 2014).

[10] *See e.g.*, Comments of AT&T filed in GN Docket No. 12-353 at 11 (January 28, 2013) ("Commission lacks Title II authority to regulate interconnection between two providers of IP-based" services, including retail VoIP service.")

converts from TDM to Internet-protocol based transmission technology.[11] That does not mean, however, that the Commission cannot consider those issues in the context of evaluating whether the proposed merger will yield affirmative public interest benefits. Indeed, the Commission must do so.

Both interconnection and access to unbundled last-mile high capacity loops are critical wholesale inputs that competitive providers need to continue serving their customers as AT&T transitions its network from TDM to IP and from copper to fiber. To the extent that AT&T wants the Commission to credit its assertion that the public interest benefits of the merger include expanded fiber deployment and enhanced broadband bundle competition,[12] it cannot simultaneously take steps to eliminate its competitors' access to the interconnection and unbundled high capacity loops, guaranteed by Sections 251 and 271, that they need to provide service to their customers.[13] The competition on which AT&T wants the Commission to rely in approving the transaction must be able to navigate successfully the transition of AT&T's network from TDM to IP and its conversion from copper to fiber.[14] The only way to ensure that competition in the retail market survives and thrives is for the Commission to make clear that the merged entity must comply with Sections 251 and 252 during and after the transition of AT&T's

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[11] *See e.g.,* AT&T Reply Comments filed in GN Docket Nos. 13-5, *et al.,* at 40 (April 10, 2014) ("[A]ny obligation . . . to provide unbundled access to DS1s and DS3s is limited to those situations where TDM remains in place. As a result, no high capacity loop unbundling obligation would survive the complete transition to IP."); May 30, 2014 letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC filed in GN Docket Nos. 13-5, *et al.,* at 11 ("no high capacity [DS1/DS3] loop UNE requirement in all IP environment").

[12] AT&T Application at 52, 56-63. The traditional bundle includes, voice, video and broadband.

[13] The Commission should affirmatively act to ensure that all services provided by competitors dependent upon wholesale inputs from AT&T, including those using UNE-P replacement products, survive the transition from TDM to IP and from copper to fiber.

wireline network to IP. In particular, any Commission decision approving the proposed transaction should confirm that AT&T's obligations to provide unbundled DS1 and DS3 capacity loops and to interconnect upon request and where technically feasible are not affected by conversion from TDM to IP-based transmission technology or from copper to fiber.

II. AT&T's Program Cost Savings Are Likely To Result In Increased Costs For Smaller Providers

AT&T currently has 5.7 million U-verse video customers,[15] far more than the majority of MVPDs, other than the largest cable operators. Nonetheless, AT&T contends that it "cannot achieve the critical scale and value necessary for AT&T to negotiate for programming at costs that are competitive with those of larger cable operators, particularly Comcast and Time Warner Cable," which together will serve almost 30 million video subscribers if their merger is approved.[16] Content is critical to MVPDs and content costs are the largest variable costs for MVPDs. Because content costs are closely tied to subscriber scale, AT&T alleges that it had "only one reliable option to lower its content costs in a reasonable time frame to compete effectively with Comcast: expand its customer base significantly."[17] Through its acquisition of DirecTV, AT&T's video subscriber base will increase to almost 26 million and AT&T anticipates that this increase in scale will reduce its expected per subscriber content costs as a standalone company by almost 20 percent.[18]

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[15] AT&T Application at 23.

[16] *Id.* According to AT&T, if Comcast's acquisition of Time Warner Cable is approved, Comcast will be able to offer competing video service to approximately 67 percent of U-verse video homes.

[17] AT&T Application at 25.

[18] *Id.*at 36; Joint Opposition at 16.

The industry consolidation that will result from the Comcast/Time Warner Cable acquisition and the AT&T/DirecTV acquisition will produce substantial savings in content acquisition costs for the merged companies. The dollars saved by the merged companies are likely to be passed on by the programmers in the form of higher prices to MVPDs with much smaller subscriber scale, including COMPTEL's members.[19] With video already being a loss leader for smaller MVPDs, the additional program pricing disparities that will result from this merger will make it even more difficult for smaller MVPDs to compete outside of the service areas of the combined Comcast and the combined AT&T and nearly impossible for them to compete head to head against Comcast and/or AT&T.

To the extent that even large MVPDs find it necessary, as AT&T has done here, to consolidate in an effort to gain better prices for programming and compete more effectively, the number of available competitors will continue to diminish, limiting choice for consumers. At the same time, the smaller MVPDs that remain in the market will be operating at a significant cost disadvantage on the video side. For this reason, COMPTEL supports the American Cable Association's request that the Commission adopt solutions to protect competition and consumers by mitigating the harms to both from ever increasing programming costs.[20]

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[19] See Comments of American Cable Association at 19 (relating that in the experience of small cable operators, when larger MVPDs demand lower prices from programmers, the programmers make up the difference by charging higher prices to smaller providers that lack the bargaining leverage to resist).

[20] *Id.* at 2, 32.

III. The Commission Must Ensure That The Merged Entity Does Not Impede The Delivery Of Competitive Content To Its Broadband End Users

AT&T alleges that the cost savings and synergies of the transaction will enable it to expand broadband deployment to an additional 15 million customer locations.[21] Edge providers, including online video distributors ("OVDs") whose content will compete with the merged entity's video content, must pass through AT&T's terminating access monopoly in order to deliver their services to the AT&T broadband customers that order it.[22] AT&T's gatekeeper status gives it the power both to restrict edge provider traffic and to charge edge providers for access to its customers.[23] The additional scale that AT&T will gain as a result of the proposed transaction will give it additional leverage to degrade delivery of traffic (by failing to relieve congestion at interconnection points, for example) and to demand access fees from edge providers. Consumers, edge providers and competition will be harmed unless the Commission takes action to restrain AT&T's ability to engage in such anticompetitive acts. For this reason, COMPTEL supports the conditions on approval of the merger proposed by Netflix and Cogent.[24]

CONCLUSION

To the extent the Commission is inclined to approve AT&T's acquisition of DirecTV, that approval should be appropriately qualified/conditioned as specified herein in an effort to preserve, promote and enhance competition on a going forward basis.

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[21] AT&T Application at 41-44.

[22] *See Verizon v. FCC*, 740 F.3rd 623, 646 (D.C. Cir. 2014) (broadband providers function as "'terminating monopolist[s]'" with power to act as gatekeepers with respect to edge providers seeking to reach their end users).

[23] *Id.*

[24] Netflix Comments at 34; Comments of Cogent Communications Group, Inc. at 20-22.

January 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2015, I served copies of the foregoing Reply Comments of COMPTEL by electronic mail on the following:

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