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REDACTED—FOR PUBLIC INSPECTION

By ECFS

May 4, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90

Dear Ms. Dortch,

Pursuant to the *Second Amended Modified Joint Protective Order*[1] ("*Modified JPO*") in the above-captioned proceeding, Netflix, Inc. ("Netflix") submits a public, redacted version of the attached ex parte letter dated May 4, 2015. Netflix has denoted with "{{ }}" symbols information that it has deemed Highly Confidential Information pursuant to the *Modified JPO*. A version of the letter containing Highly Confidential Information is being filed simultaneously with the Commission and will be made available pursuant to the terms of the *Modified JPO*.

Please contact me with any questions.

Sincerely,

Markham C. Erickson
Counsel to Netflix, Inc.

[1] Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, *Second Amended Modified Joint Protective Order*, DA 14-1640 (Nov. 12, 2014) ("*Modified JPO*").

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REDACTED—FOR PUBLIC INSPECTION

May 4, 2015

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street NW
Washington, DC 20554

Re: Notice of Ex Parte, Applications of AT&T Inc. and DirecTV to Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-90

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, Netflix, Inc. ("Netflix") files this letter to provide notice of its meeting with Commission staff on April 30, 2015. A list of the individuals attending that meeting is attached.[1] During the meeting, Netflix discussed issues raised in its prior pleadings[2] and responded to AT&T's ex parte submitted on April 21, 2015.[3]

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[1] *See* Attachment 1: List of Attendees.

[2] Comments of Netflix, Inc., MB Docket No. 14-90 (Sept. 16, 2014) ("Netflix Comments"); Reply Comments of Netflix, Inc., MB Docket No. 14-90 (Jan. 7, 2015).

[3] Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., and William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, FCC, MB Docket No. 14-90 (Apr. 21, 2015).

The Merger Would Increase the Merged Entity's Ability and Incentive to Harm OVDs. If approved by the Commission, this merger would result in a combined entity with increased incentive and ability to harm online video distributors ("OVDs") and other edge-based Internet content that Applicants view as a threat to their broadband and video programming businesses.

Comcast's withdrawal of its merger application means that, if approved, AT&T would become the nation's largest multichannel video programming distributor ("MVPD"). After AT&T's projected broadband investments, it could become the largest ISP as well. These two dynamics create a powerful incentive for AT&T to protect its investment in DIRECTV's bundled programming by using its ability to harm OVDs to prevent or delay cord-cutting and cord-shaving.

AT&T already has a demonstrated ability to harm OVDs by leveraging its control over interconnection to degrade its own customers' access to Netflix's service.[4] AT&T also has shown an interest in using data caps and usage-based pricing methods, which it can apply discriminatorily to advantage its own services. If AT&T is able to slow the development of the OVD industry, either by foreclosing access to broadband customers or imposing discriminatory data caps, AT&T would be able to preserve its market advantage by slowing or even reversing the shift toward competitive online video offering and away from bundled video/broadband offerings.[5]

The Applicants Have Failed to Rebut the Likelihood of these Harms. In a recent ex parte, AT&T argues that it lacks the incentive to harm.[6] But its arguments ignore both AT&T's substantial investment in DIRECTV's video services and AT&T's recent behavior.

AT&T says that it "views itself as fundamentally a broadband company" and that the "combined company can remain competitive only if it provides customers with as rich an entertainment environment as possible" including OVDs.[7] Even if true, consummation of its $48 billion

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[4] Netflix Comments at 23-25.

[5] Notably, an internal AT&T document indicates that AT&T expected to charge its customers over {{ }}, once Netflix traffic returned to optimal levels. {{ }}, ATT-FCC-00438546. AT&T's own services would likely not be subject to such a fee.

[6] Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., and William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, FCC, MB Docket No. 14-90 (Apr. 21, 2015) ("April 21 Ex Parte").

[7] *Id.* at 5

merger with DIRECTV would transform the broadband company into the largest MVPD in the country. DIRECTV views cord-cutting and cord-shaving as significant threats to its business.[8] AT&T's proposed $48 billion purchase of a legacy video business that profits by selling bundled programming packages will result in a powerful incentive to protect that model from a shift by consumers toward on-demand, over-the-top content.

The Applicants also attempt to distinguish themselves from Comcast by noting that they are not vertically integrated with a significant video programmer.[9] This is beside the point. AT&T's investment in a business model that profits by selling bundled programming packages will result in a powerful incentive to protect that model.

The Applicants' economist admits that the merged entity will offer products that compete directly with OVDs.[10] Yet Applicants argue that the merged entity would lack incentive to harm OVDs. Specifically, Professor Katz argues that degradation would decrease consumers' perception of the quality of AT&T's broadband services—the economic equivalent of raising the price of AT&T's broadband services.[11] Professor Katz claims that this would lead directly to "AT&T's sales of both broadband and video [falling]."[12]

AT&T's degradation of its customers' access to Netflix in 2013 and 2014 provides a natural experiment to test this proposition. During this time, Netflix's members using AT&T's DSL and U-verse network declined to 1.0 Mbps and 1.5 Mbps, respectively, at their lowest points.[13] Netflix recommends at least 3 Mbps for DVD quality video and 1.5 Mbps for VHS quality. A drop below 1.5 Mbps can cause service interruptions.[14]

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[8] Netflix Comments at 12-13.

[9] April 21 Ex Parte at 4-5.

[10] Declaration of Michael L. Katz, MB Docket No. 14-90, ¶ 51 (June 11, 2014).

[11] Reply Declaration of Michael L. Katz, MB Docket No. 14-90, ¶ 78 (Oct. 15, 2014) ("Katz Reply Declaration").

[12] April 21 Ex Parte at 6 (citing Katz Reply Declaration ¶ 78).

[13] Netflix Inc., ISP Speed Index Results Graph, http://ispspeedindex.netflix.com/results/usa/graph (select August 2013 "Start Date" and December 2014 "End Date"; then select "AT&T U-Verse" and "AT&T DSL") (last visited Apr. 30, 2015).

[14] The degradation experienced by Netflix members on AT&T's network was not caused by capacity failure in the last mile network or by consumers failing to purchase a broadband package with sufficient speed and capacity. Nor was it caused by any capacity failure in any of the 6 transit providers Netflix used to deliver content to AT&T. It was caused by AT&T refusing

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May 4, 2015
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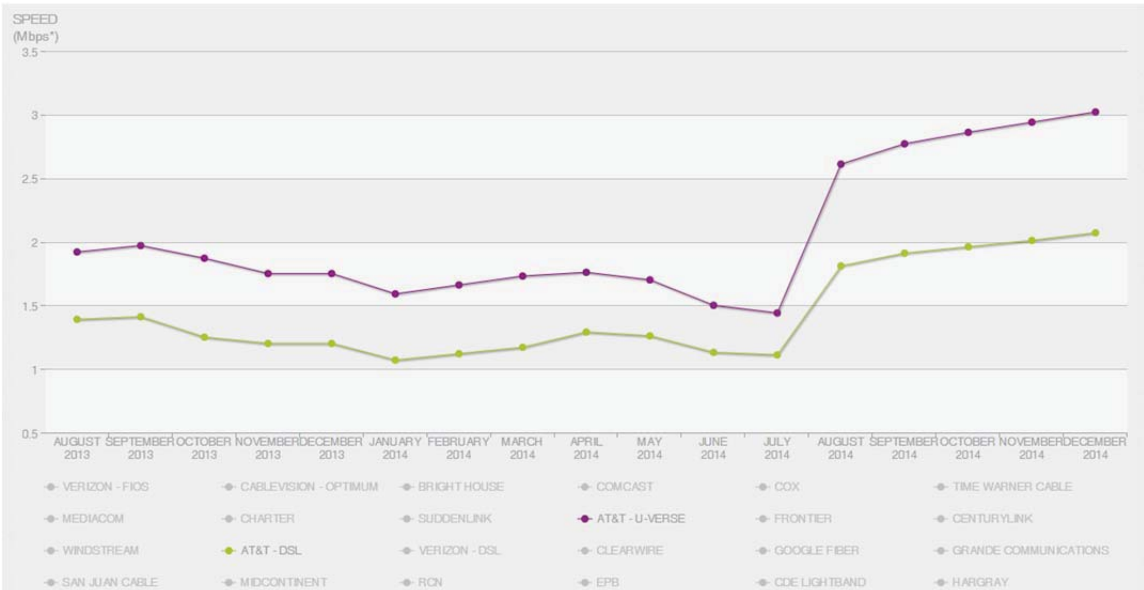
Figure 1[15]



Despite the significant and sustained service degradation to its customers during this period, AT&T has provided no subscriber churn data that supports the theory advanced by Prof. Katz -- nor is it likely to. To the contrary, internal documents make clear that AT&T did not view such a response by consumers to be plausible: {{

}}[16]

This lack of churn is not surprising. Switching ISPs is notoriously difficult, costly, and time consuming. A Netflix study, commissioned in the ordinary course of business, confirms {{

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to allow sufficient interconnection capacity with Netflix to enable consumers to access Netflix content at the speeds that consumers pay AT&T to deliver. Once Netflix paid AT&T an access fee, AT&T's subscribers were immediately able to access Netflix content at rates 63% and 85% higher on DSL and U-verse, respectively.

[15] Netflix, Inc., ISP Speed Index Results Graph, http://ispspeedindex.netflix.com/results/usa/graph (select August 2013 "Start Date" and December 2014 "End Date"; then select "AT&T U-Verse" and "AT&T DSL") (last visited Apr. 30, 2015).

[16] {{ }}, ATT-FCC-02459548.

}}.[17] {{ }}.[18] {{ }}[19]

Moreover, during the congestion episode, AT&T publicly blamed Netflix for the degradation of Netflix's service, leaving consumers in doubt as to the cause of the problem. Indeed, as AT&T's own internal documents show, {{ }}.[20] Short of admitting fault, AT&T would have to degrade all OVDs at the same time for its behavior to be so obvious and so notorious as to impel the kind of consumer reaction that Professor Katz claims. But such a strategy is not necessary for AT&T to slow the growth of OVDs; nor is it likely. Instead, AT&T can simply degrade OVDs one at a time as opportunities and competitive threats arise—just as it did with Netflix.

The Applicants also argue that degrading OVDs would cause the merged entity to lose "an enormously valuable opportunity to differentiate its own high-quality service offerings to attract subscribers" from a rival that was foreclosing OVDs.[21] The circumstances AT&T describes have already occurred: Comcast degraded Netflix's service in late 2013 and early 2014. AT&T presumably could have used this episode to take customers from Comcast. Instead it engaged in a similar long-term degradation of its customers' access to Netflix.

The proposed merger would make AT&T the largest MVPD in the country, and potentially lead to its becoming the largest ISP in the country as well. Such market power creates new incentives and abilities to harm entities that AT&T perceives as competitive threats, and will exacerbate the

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[17] {{ }}

[18] {{ }}

[19] {{ }}

[20] {{ }}, ATT-FCC-00438444.

[21] April 21 Ex Parte at 5-6.

anticompetitive behavior in which AT&T has already engaged. Netflix urges the Commission to reject the merger as currently proposed.

Respectfully submitted,

Markham C. Erickson
Counsel to Netflix, Inc.

Attachment 1

April 30, 2015 Ex Parte Attendees

Name	Bureau
Elizabeth Andrion	OSP
Jim Bird	OGC
Tim Brennan	OSP
Robert Cannon	OSP
Christopher Clark	MB
William Dever	OGC
Jack Erb	OSP
Jamillia Ferris	OGC
Chad Guo	MB
Nese Guendelsberger	IB
Brendan Holland	MB
Jamila Bess Johnson	MB
Scott Jordan	OSP
Eugene Kiselev	MB
Charles Mathias	WTB
Alison Neplokh	OSP
Jeffrey Neumann	MB
Daniel Shiman	MB
Marilyn Simon	IB
Susan Singer	MB
Christopher Sova	WCB
Weiren Wang	WTB
George Williams	MB