

May 12, 2015

EX PARTE PRESENTATION

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

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

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the following representatives (collectively, the "parties") met with the Transaction Team reviewing the above referenced merger:

- Robert M. Cooper of Boies, Schiller & Flexner LLP for Cogent Communications, Inc.
- Jeffrey Blum, Alison Minea and Hadass Kogan for DISH Network Corporation
- Matt Wood for Free Press
- Josh Stager for New America's Open Technology Institute; and
- John Bergmayer for Public Knowledge.

The following Commission staff attended the meeting: Jon Sallet (by telephone), Jamillia Ferris (by telephone), Hillary Burchuk, Joel Rabinovitz, Jim Bird, and Bill Dever from the Office of General Counsel; Susan Singer, Brendan Holland, Jeffrey Neumann, Chad Guo, Kathy Berthot, and Chris Clark from the Media Bureau; Elizabeth Andrion, Scott Jordan, Tim Brennan, Robert Cannon, and Katherine LoPiccalo from the Office of Strategic Planning and Policy Analysis; Nese Guendelsberger, Marilyn Simon, and Clay DeCell from the International Bureau; Paroma Sanyal, William Beckwith, and Stacy Ferraro (by telephone) from the Wireless Telecommunications Bureau; and Christopher Sova (by telephone) and Soumitra Das from the Wireline Competition Bureau.

Consistent with their respective filings regarding the AT&T/DIRECTV merger,¹ the parties reiterated concerns that the merger will give the post-transaction AT&T greater incentive

¹ See, e.g., Comments of Cogent Communications Group, Inc., MB Docket No. 14-90 (Sept. 16, 2014); Reply Comments of Cogent Communications Group, Inc., MB Docket No. 14-90 (Jan. 7, 2015); Petition to Impose Conditions of DISH Network Corporation, MB Docket No. 14-90 (Sept. 16, 2014); Reply of DISH Network Corp., MB Docket No. 14-90 (Jan. 7, 2015); Petition to Deny of Free Press, MB Docket No. 14-90 (Sept. 16, 2014); Petition to Deny of Public Knowledge and Institute for Local Self-Reliance, MB Docket No. 14-90 (Sept. 16, 2014); Reply to Opposition to Petition to Deny of Public Knowledge, MB Docket No. 14-90 (Jan. 7, 2015).

and ability to, among other things, thwart the success of over-the-top (“OTT”) video services. The Applicants themselves have explained that the primary purpose of the proposed transaction is to provide “an integrated and efficient bundle of high-speed broadband and high-quality video from a single provider”² and further noted that “providing high quality broadband services aimed at attracting and retaining profitable broadband and bundle customers is, and will remain, at the heart of AT&T’s business.”³ Indeed, as a result of buying the nation’s second-largest MVPD, AT&T will have a greater incentive to promote its own video services, while making competing OTT services less attractive. Should the transaction proceed, AT&T will obtain a massive video distribution business that it will have every incentive to protect from competitive threats, including existing and emerging OTT services such as Sling TV and Netflix, among others.⁴ Thus, AT&T’s increased stated incentive to favor its own video services for the benefit of bundle customers, combined with its technical ability to thwart competing OTT services, threatens serious harms for such competing OTT services. The parties explained that in order to remedy these potential harms, if the Commission decides to approve the proposed merger it should, at a minimum, impose the following conditions:

STANDALONE BROADBAND⁵

Definitions:

“Broadband Internet Access Service” means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the Conditions.

1. AT&T shall provide standalone Broadband Internet Access Service at speeds of at least 25 Mbps (download) for any portions of its network where it is technically able to do so at a price no greater than \$29.95 for seven (7) years from the date of this Order (provided that the

² Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Description of Transaction, Public Interest Showing, and Related Demonstrations, MB Docket No. 14-90, p. 1 (filed Jun. 11, 2014).

³ See Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, FCC, MB Docket No. 14-90, p. 2 (May 6, 2015).

⁴ See Letter from Robert M. Cooper, Boies, Schiller & Flexner LLP for Cogent Communications Group, Inc., to Marlene H. Dortch, FCC, MB Docket No. 14-90, p. 2 (Apr. 30, 2015).

⁵ AT&T’s CEO, Randall Stephenson, has already committed to a standalone broadband offering when testifying before Congress. See, e.g., Edward Wyatt, *DirecTV and AT&T Make Case to Congress*, NEW YORK TIMES (June 24, 2014), available at <http://www.nytimes.com/2014/06/25/technology/congress-to-tackle-merger-of-att-and-directv.html> (when asked whether AT&T would commit to a “clear and visible” sales plan for standalone broadband, Mr. Stephenson responded: “without equivocation I can make that commitment”).

price can be increased by no more than any increase in the CPI-U for Communications after two years). If the Commission updates its official broadband benchmark speed during the seven year period then AT&T shall offer at least the new Commission-defined broadband benchmark speed in its standalone offering under the terms and conditions herein, for any portions of its network where it is technically able to do so. This standalone service shall be made available on equivalent usage terms and conditions (including but not limited to usage caps) to the 25 Mbps (or new Commission-defined benchmark broadband speed) Broadband Internet Access Service included in any bundled offering.

2. If AT&T offers a 25 Mbps (download) Broadband Internet Access Service as part of a bundled service package, then the price of the bundle shall be reasonable and take into account the costs (including, but not limited to COGS, variable, acquisition, infrastructure, and administrative costs, among others) of providing each of the services included in the bundle (*i.e.*, video, wireless, landline phone, etc.).

3. If AT&T offers any broadband speeds in conjunction with bundled service packages, AT&T shall also offer such speeds pursuant to the following terms and conditions:

(A) Any broadband speed offered as part of a bundled package must also be made available on a standalone basis. In each case, the standalone offering shall be made available on equivalent usage terms and conditions (including but not limited to usage caps) to the most comparable Broadband Internet Access Service offered in a bundled offering.

(B) The price of such standalone Broadband Internet Access Service offerings shall be reasonable and take into account the cost savings (including, but not limited to COGS, variable, acquisition, infrastructure, and administrative costs, among others) of not having to provide bundled services (*i.e.*, video, wireless or landline phone).

4. Starting no later than 30 days after the date of this Order, AT&T shall visibly offer and actively market standalone Broadband Internet Access Service (as described in paragraph 1-3, above) through any sales channel through which it offers bundled services, including but not limited to:

(A) Web Page Advertising and Sales: Any time AT&T sells, markets, promotes or offers Broadband Internet Access Service on any of its web sites, it must display the standalone Broadband Internet Access Service offering with prominence equal to that of bundled offerings, including but not limited to: (i) AT&T's home page, <http://www.att.com> (and successor home pages); (ii) a linkable web page devoted exclusively to describing (e.g., price and speed) and permitting online purchase of all retail Broadband Internet Access Service standalone options; (iii) any AT&T web page where Broadband Internet Access Service is sold, marketed, promoted or offered; (iv) any AT&T web page where a consumer can check the availability of AT&T's services based on service location; (v) the checkout page or shopping cart for purchasing Broadband Internet Access Service; and (vi) any other

window, tab, pop-up or other location where Broadband Internet Access Service is sold, marketed, promoted or offered; and

(B) Telephone Sales: If a consumer asks an AT&T representative about the availability of standalone broadband services or broadband services generally, the representative must clearly and accurately describe to the consumer the availability, pricing (both regular and promotional) and speeds for AT&T's standalone Broadband Internet Access Service.

5. Wherever on any of its websites that AT&T describes or lists any pricing for:

(A) standalone Broadband Internet Access Service, video, wireless or landline phone offerings, it must prominently and clearly disclose both the promotional/introductory price and the regular price outside of any promotional or introductory period of such service; and

(B) bundled service offerings, it must prominently and clearly disclose both (i) the promotional/introductory price and the regular price outside of any promotional or introductory period of each such bundled service offering, and (ii) the promotional/introductory price and the regular price outside of any promotional or introductory period for each constituent component of each such bundled service offering on a standalone basis.

6. AT&T shall not make it more difficult or burdensome for a consumer to purchase standalone Broadband Internet Access Service compared to the process for purchasing bundled Broadband Internet Access Service.

7. AT&T shall not make it more difficult or burdensome for a consumer to unbundle to a standalone Broadband Internet Access Service compared to the process for a consumer to bundle services (including Broadband Internet Access Service, video, wireless, and landline phone).

8. Starting no later than 30 days after the date of the Commission's approval of the transaction and for the seven-year duration of this condition, AT&T shall run at least one major advertising promotion annually that offers and promotes a standalone 25 Mbps service (or new Commission-defined benchmark broadband speed) or where it is technically not able to offer such speeds, offers and promotes such other speeds suitable for the robust delivery of OTT substitutes.

INTERCONNECTION⁶

1. AT&T shall interconnect on a bill-and-keep basis with other network operators or edge providers for the exchange of Internet traffic between AT&T's Broadband Internet Access Service ("BIAS") customers and the other network operator's customers or the edge provider, provided that the entity requesting interconnection will transmit to or receive from AT&T's network at least a reasonable minimum amount of traffic and the entity requesting interconnection agrees (i) to interconnect at **reasonable locations** and (ii) to **reasonably localize** the exchange of Internet traffic. The terms of interconnection as described in the foregoing sentence shall be just, reasonable and nondiscriminatory.
2. If any interconnection port between AT&T and another entity with whom it interconnects pursuant to paragraph (1) reaches 70% capacity average utilization for more than 3 hours in any 24-hour period on more than 5 separate occasions within any 30-day period, then AT&T must promptly undertake to upgrade the ports and cross-connects to augment capacity and thereby avoid the congestion and resulting packet loss and degradation of service that will occur if the interconnection capacity extends much beyond that point. The interconnecting parties shall each bear all costs associated with upgrades to their own network facilities, including port costs, and the parties shall alternate paying for cross-connects.
3. AT&T shall not seek to enforce any contract that is inconsistent with its duty to interconnect on a bill-and-keep basis under this condition, and upon request, shall modify any agreement with a qualifying network operator or edge provider to provide for interconnection on a bill-and-keep basis.
4. The bolded terms in paragraph (1) shall have the following meanings:
 - a. "**Reasonable locations**" means Internet exchange points or alternative locations agreed to by the interconnecting parties. AT&T may not require a requesting party to interconnect at any location at which the entity requesting interconnection is unable to interconnect on terms and conditions (*e.g.*, costs for renting space, electricity, air conditioning, cross connect, transit) at least as favorable as at the nearest Internet exchange point.

⁶ The Open Technology Institute at New America has not taken a position on this proposal, but strongly supports the need for FCC action that protects consumers from interconnection abuse. *See* Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (November 18, 2014); Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (December 22, 2014); "Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes," Open Technology Institute, November 2014; "ISP Interconnection and its Impact on Consumer Internet Performance," Measurement Lab, October 28, 2014.

- b. “Reasonably localize” means interconnecting at any reasonable location that allows Internet traffic to be delivered to a port that is geographically closest to the Internet traffic’s end destination.

DATA CAPS

To the extent that AT&T uses usage-based tracking, metering, or billing on its Broadband Internet Access Service, it shall not exempt any video service offered over broadband from such tracking, metering, or billing.

OPEN INTERNET

AT&T will adhere to the rules established in the Commission’s 2015 *Open Internet Report and Order*,⁷ including the Title II framework established, for seven years after closing, regardless of the outcome of any challenges to these rules in any court of law.

* * *

Consistent with previous filings in the above-referenced proceeding, some of the parties also raised the other issues from their respective petitions:

Satellite-TV Market Competition. DISH reiterated its proposal⁸ that the Commission should address potential harm to competition in the satellite-TV market by conditioning any merger approval on an agreement between DIRECTV and DISH for the divestiture of channels 28, 30, and 32 at 110° W.L. to DISH within six months of closing and, failing an agreement, require baseball-style arbitration to determine the fair market value of the channels, with divestiture based on the arbitrator’s decision to be completed within one year of closing.⁹

Regional Sports Networks. DISH also suggests that AT&T and DIRECTV, and their existing or future Regional Sports Networks (“RSNs”), regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any multichannel video programming distributor (“MVPD”), and AT&T, DIRECTV and their RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. Any disputes brought pursuant to this condition by an

⁷ See In the Matter of Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28 (rel. Mar. 12, 2015).

⁸ See Petition to Impose Conditions of DISH Network Corporation, MB Docket No. 14-90, pp. 18-23 (Sept. 16, 2014); Reply of DISH Network Corporation, MB Docket No. 14-90, pp. 3-5 (Jan. 7, 2015).

⁹ See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238, 4259-62, ¶¶ 49-59 (2011) (“*Comcast/NBCU Order*”).

aggrieved MVPD should be arbitrated using the standstill and baseball-style arbitration procedures imposed in the Comcast/NBCU transaction.¹⁰

Quality of Wired Connections. Public Knowledge explained that this merger would increase AT&T's incentive and ability to move customers off copper connections and toward wireless-only service within those parts of its wireline service territory it does not intend to upgrade to fiber. The FCC should therefore require that AT&T adopt an adequate process for handling complaints about the quality of service of both copper and wireless service, publish copper repair deadlines, publish public reports on complaints, provide assurance that a person who finds that a wireless product is unsuitable can get wired service back, provide public reporting on the results of IP transition trials, and ensure clarity about the future of wired service for businesses and the interconnection rights of competitive carriers.¹¹

Verification of Public Interest Benefits. Public Knowledge also reiterated that any public interest benefits of this transaction must be reviewable, and auditable after the fact, by members of the public, without recourse to confidential data or protective orders. In particular, in this merger, AT&T has claimed that efficiencies, particularly reduced per-subscriber video cost, would enable it to bring fiber service to 2 million additional households beyond its current plans. To verify this claim, the public would need to know the precise number AT&T currently plans to serve. Otherwise, as soon as AT&T deploys fiber to slightly more than 2 million households, it would be able to claim that it has met its public interest commitments. Therefore, Public Knowledge explained that as it stands, this proposed public interest benefit cannot be used as an argument in favor of the merger.¹²

Interconnection Transparency. The Open Technology Institute explained that interconnection disputes have led to widespread consumer harms partly due to the opaqueness of ISP activity at interconnection points. Transparency reporting would enable the FCC to more effectively police disputes and their impact on consumers. Accordingly, OTI recommends that AT&T be required to publicly disclose to the FCC the following information about its interconnection practices: (1) the date AT&T reaches an interconnection agreement with any network operator or edge provider; and (2) the date that AT&T augments an interconnection port and the location of the augment. This information should be disclosed to the FCC within 30 days of any interconnection agreement or port upgrade.

Horizontal Concentration in the MVPD Market. Free Press briefly reiterated its analysis, from its Petition to Deny, of the impact that the transaction would have on an already highly concentrated market for pay-TV services. The transaction would cause an average increase of 450 points in the Herfindahl-Hirschman Index ("HHI") across the 64 markets where AT&T offers its own pay-TV service already. The average post-merger HHI in these markets would exceed 3,300 – indicating an extraordinary level of concentration “likely to enhance

¹⁰ *Id.* at 4364-4369, Appendix A: VII. Commercial Arbitration Remedy.

¹¹ See Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, FCC, MB Docket No. 14-90, p. 2 (Apr. 24, 2015).

¹² *Id.*

market power” and “likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”¹³ And this market-level HHI analysis likely overstates the level of competition for MVPD services by incorrectly assuming that all wired MVPDs compete against each other, when in reality they most often serve non-overlapping franchise areas. To begin to ameliorate concerns about the loss of choice and the likely increase in price for standalone video, the FCC should require AT&T to maintain existing DIRECTV service tiers and pricing plans for current and new customers for seven years after the close of the transaction.

* * *

Respectfully submitted,

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¹³ U.S. Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines,” p. 2 (Aug. 19, 2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

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