

May 28, 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:

On May 26, 2015, Matt Wood of Free Press, John Bergmayer of Public Knowledge, and Joshua Stager of New America’s Open Technology Institute (collectively, “public interest advocates”) met with Chanelle Hardy, Chief of Staff and Media Legal Advisor to Commissioner Clyburn, and Louis Peraertz, Senior Legal Advisor to the Commissioner, to discuss the proposed merger of AT&T and DirecTV. The public interest advocates reiterated their concerns about the transaction’s impact on consumers and competition in the broadband and pay-TV markets—particularly AT&T’s increased incentives to discriminate against over-the-top (“OTT”) video marketplace rivals to AT&T’s legacy video services. While public interest advocate organizations Free Press and Public Knowledge have made the case in this docket for denying the merger, at a minimum the Commission should impose the following types of conditions that address these incentives and protect consumers from anticompetitive harm.

Standalone Broadband. The Commission should require that AT&T offer consumers standalone broadband service on clear and reasonable terms. The Commission has suggested that today’s streaming video users are served best by a 25 Mbps downstream offering. Whether or not AT&T offers such speeds in all of its service territory at present, AT&T should be required to offer standalone broadband service at whatever speeds it offers as part of a bundle. The public interest advocates noted that AT&T’s CEO testified to Congress that he would commit to offering standalone broadband as a condition of this transaction,¹ and suggested that the Commission take the company up on this commitment while making it more specific and making such service more broadly available.

The public interest advocates also suggested that AT&T be required to make affordable broadband service available to all low-income customers and under-served communities as a condition of approval, should the Commission grant permission for this acquisition. Any such

¹ See Testimony of Randall Stephenson, U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, *The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond*, June 24, 2014 (“We very much aspire to have a standalone broadband product ... That is our primary product that we sell in the consumer home solution space today. So absolutely I will make you without equivocation of that commitment.”).

commitment should be coupled with sufficiently specific and enforceable conditions regarding the availability and marketing of such services, in order to ensure that all individuals within the merged entity's service territory may share in the alleged, merger-specific broadband deployment public interest benefits of the transaction.

Open Internet Rules. The parties believe the Commission's *Open Internet Order* will withstand the legal challenge recently brought by AT&T, other broadband providers, and their trade associations. However, given AT&T's ongoing efforts to overturn the Order and the company's past conduct blocking users' access to competitive voice and video telephony applications, it is imperative that AT&T agree as a condition of this transaction to abide by the *Order* regardless of the outcome of the litigation.

Zero-Rating of Video Services. AT&T currently imposes data caps on all its broadband offerings, both wired and wireless. As long as AT&T has these caps in place, it should not exempt any video services from monitoring, tracking, or billing under those data caps.

Interconnection. AT&T should be required to interconnect with network operators and edge providers on reasonable and nondiscriminatory terms. Recent network congestion patterns suggest that AT&T has strategically manipulated interconnection points to extract access fees from transit providers and edge service providers.² This congestion harms many AT&T customers who are not getting the connection speeds they pay for—with actual downstream speeds in some cases falling well below 4 Mbps. Furthermore, this congestion was not limited to AT&T's dispute with Netflix last year. Recent data collected by Measurement Lab, a research consortium that includes the Open Technology Institute, showed continued congestion at interconnection points between AT&T and transit providers such as GTT (see Appendix A).³ This conduct is evidence of a market failure in what historically was a healthy and competitive transit market. Given the serious risk to consumers and the public interest, AT&T should, as a condition of acquiring DirecTV, be prohibited from charging such access fees.

Moreover, the Commission should require AT&T to periodically disclose information about its interconnection practices, including (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. Such transparency would enable the FCC to more effectively police disputes and assess their impact on consumers, as well as foster public accountability.

Verification of Public Interest Benefits. The Commission should be skeptical of AT&T's claim that any reduced video programming costs it might enjoy as a result of buying DirecTV

² See "ISP Interconnection and its Impact on Consumer Internet Performance," Measurement Lab, October 28, 2014; "Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes," Open Technology Institute, November 2014.

³ See also "Netflix war is over, but money disputes still harm Internet users," Jon Brodtkin, *Ars Technica*, March 13, 2015, available at <http://arstechnica.com/information-technology/2015/03/netflix-war-is-over-but-money-disputes-still-harm-internet-users/>.

would increase its incentive to build out fiber and offer new broadband/video bundles. In general, high-bandwidth usage applications like streaming video are a key driver of broadband demand and build-out. But this acquisition would increase both the revenues that AT&T derives from the legacy video platform and the number of customers it serves on such legacy video platforms with those it would acquire from DirecTV. Expanding its fiber deployment and increasing available broadband speeds could cause AT&T to lose some of these legacy video revenues and customers it hopes to acquire, if and when such customers choose to cut or shave back their pay-TV subscriptions. A post-merger AT&T's ability to direct DSL users, for whom streaming video does not work well, to DirecTV for their video demand could also reduce AT&T's incentive to upgrade its network. Together with the uncertainty and vagueness around AT&T's build-out plans and AT&T's poor record with regard to compliance with its past broadband build-out commitments,⁴ these decidedly mixed incentives provide further reason for the Commission to be skeptical of AT&T's build-out claims and the supposed merger-specific benefits of the transaction.

IP Transition. Public Knowledge also reiterated its argument that, because this merger would increase AT&T's incentive to accelerate copper retirement, the Commission should ensure the transaction does no harm to the Commission's ongoing work with respect to the IP transition.

Horizontal Concentration in the MVPD Market. Free Press briefly reiterated its analysis, from its initial Petition to Deny, of the impact that the transaction would have on an already highly concentrated market for pay-television 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 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.”⁵ 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 these 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.

* * *

⁴ Testimony of Matt Wood, Policy Director, Free Press, U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, *The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond*, June 24, 2014, available at <http://www.judiciary.senate.gov/download/06-24-14-wood-testimony>; Testimony of John Bergmayer, Senior Staff Attorney, Public Knowledge, U.S. House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, *The Proposed Merger of AT&T and DirecTV*, June 24, 2014, available at http://judiciary.house.gov/_cache/files/fbf5aabf-d9a5-45d4-8ef7-98506911859f/bergmayer-testimony.pdf.

⁵ U.S. Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines” (Aug. 19, 2010), at 2.

Respectfully submitted,

/s/

John Bergmayer
Public Knowledge

/s/

Joshua Stager
New America's Open Technology Institute

/s/

Matt Wood
Free Press

cc: Jon Sallet
Jamillia Ferris
Hillary Burchuk

APPENDIX A

Measurement Lab Data Reveals Degraded Service for AT&T Broadband Customers

AT&T Download Speeds Over GTT *Chicago, September 2014 — February 2015*

The following data demonstrates that AT&T customers began experiencing degraded speeds over GTT's transit network in November 2014:

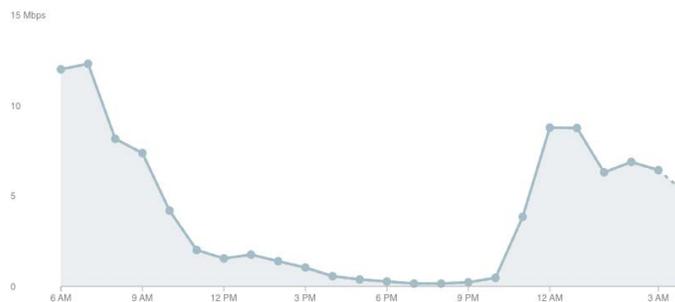
Download Speed for AT&T on GTT in Chicago
HOURLY MEDIAN FOR SEP 2014



Download Speed for AT&T on GTT in Chicago
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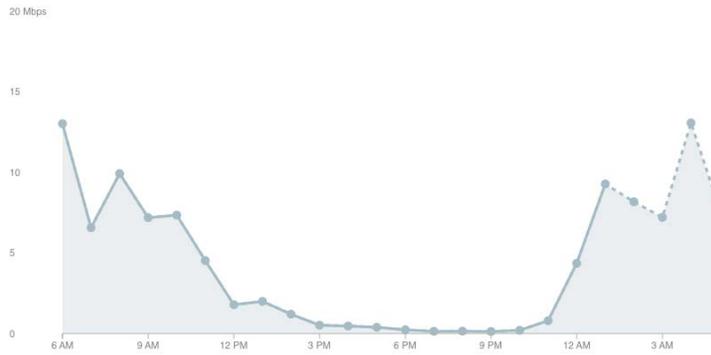


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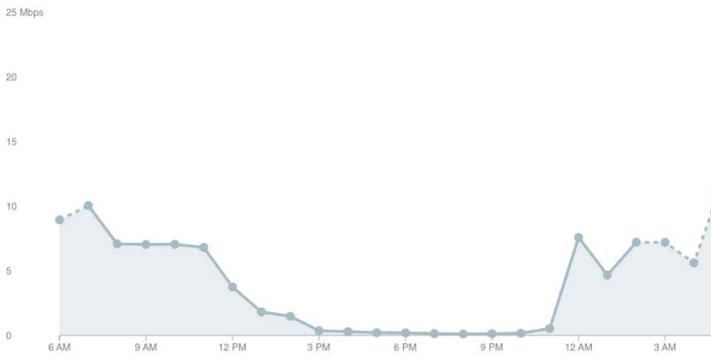
Download Speed for AT&T on GTT in Chicago

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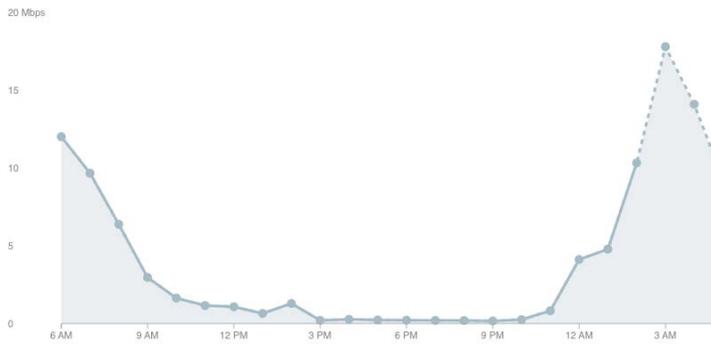
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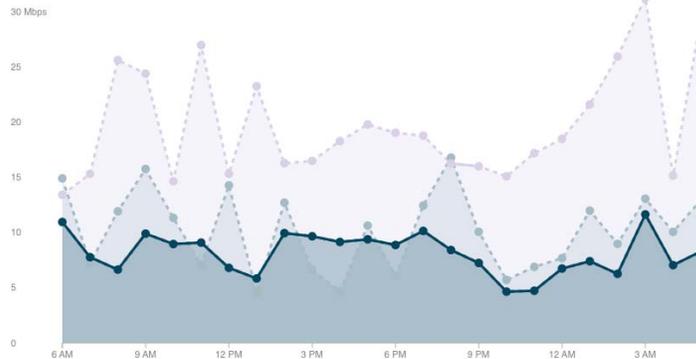
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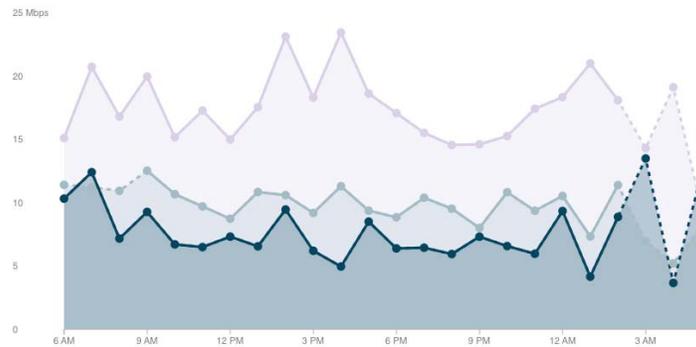
AT&T Download Speeds Over GTT and Level 3 *Atlanta, September 2014 — February 2015*

The following data demonstrates that AT&T customers began experiencing degraded speeds over GTT's transit network in December 2014, but not over Level 3. Comcast customers in the same area have not experienced degradation over GTT:

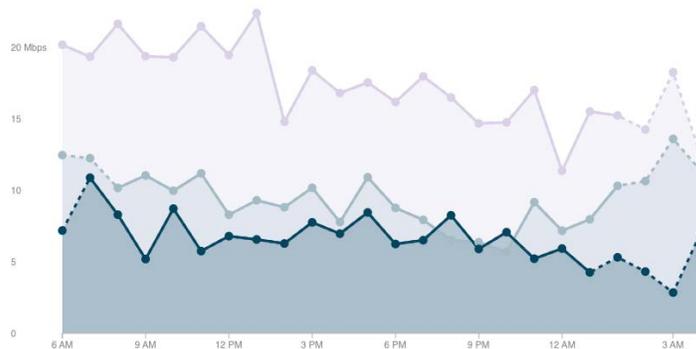
Download Speed for AT&T, Comcast on GTT, AT&T on Level3 in Atlanta
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Download Speed for AT&T, Comcast on GTT, AT&T on Level3 in Atlanta
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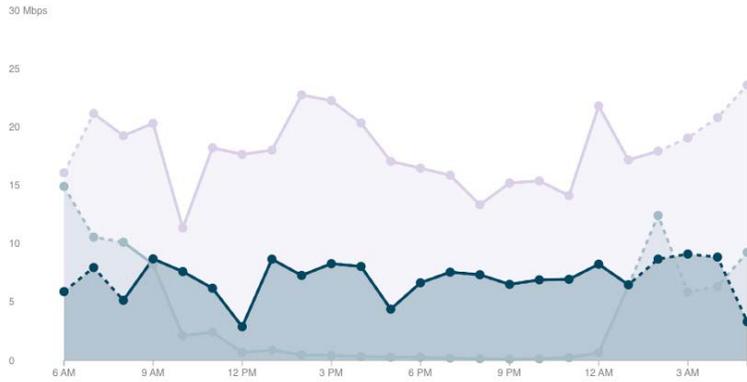


Download Speed for AT&T, Comcast on GTT, AT&T on Level3 in Atlanta
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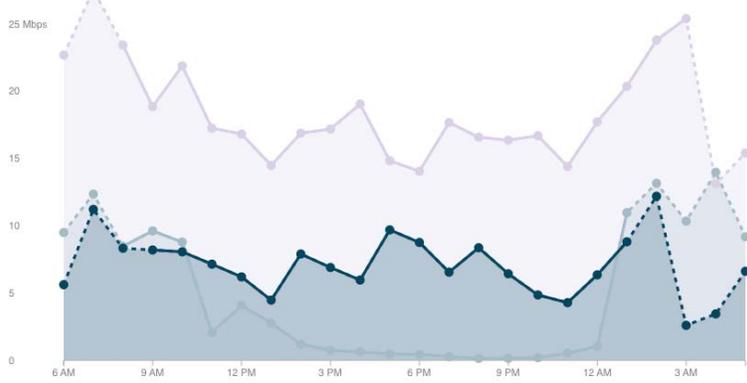
Download Speed for AT&T, Comcast on GTT, AT&T on Level3 in Atlanta

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