Public Knowledge

June 8, 2015

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

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

Dear Ms. Dortch:

On June 4th, Gene Kimmelman, John Bergmayer, Meredith Rose, Edyael Casaperalta, and Ariel Diamond of Public Knowledge (PK) met with Jamillia Ferris, Jon Sallett, Jim Bird, and Joel Rabinovitz from the Office of General Counsel; William Lake, Brendan Holland, Chad Guo, Jazmine Dorsey, Jeffrey Neumann, Chris Clark, Alexis Zayas, and Susan Singer from the Media Bureau; Chris Sova and Megan Capasso from the Wireline Competition Bureau; Elizabeth Andrion from the Office of Strategic Planning & Policy Analysis; Charles Mathias from the Wireless Telecommunications Bureau; and Marilyn Simon from the International Bureau. They discussed the proposed merger of AT&T and DirecTV.

PK focused on one of this merger's transaction-specific harms: By becoming a larger MVPD, AT&T would have an increased incentive to discriminate against competing video services. To that end, PK reiterated its support for four merger conditions designed to partially alleviate that increased incentive: 1) AT&T should be required to offer standalone broadband, 2) AT&T should be not be permitted to engage in unfair interconnection practices, 3) AT&T should be required to abide by the 2015 Open Internet Order, and 4) AT&T should not be permitted to zero rate video content when it applies data usage restrictions on its customers.

Standalone Broadband

PK argued that AT&T should be required to offer fixed broadband on a standalone basis after the transaction, with an end toward ensuring that subscribers who want to "cut the cord" and obtain video from online sources can do so. The Commission has found that 25 Mbps downstream is a broadband speed that is well-suited to online video, but to the extent that AT&T's speeds are higher or lower in particular areas, the speeds that it makes available as part of a broadband bundle should generally be made available on a standalone basis. Additionally, AT&T should be required to give equal prominence in its marketing materials to standalone options, and its customer service representatives should be able to inform customers of their standalone options. Given the complex and changing ways in which communications services are marketed, the Commission should ensure it has the enforcement flexibility to carry out the intent of such a condition.

Zero-Rating

PK reiterated its argument that AT&T should be agree not to zero-rate video content, to the extent that it meters data usage. By becoming a larger video provider, AT&T's incentive to discriminate against competing video service by giving certain video services preferential treatment would increase, and a ban on zero-rating, to the extent that AT&T's wired and wireless services have data caps, would partly counter this increased discriminatory incentive. This is a narrow condition: PK is not asking for the Commission here to issue any broad policy statements on zero-rating generally, nor even to specifically prohibit AT&T from zero-rating more broadly. Rather, a tailored (and time-limited) prohibition on exempting video services from data caps or metering would alleviate a merger-specific harm and help maintain the competitive status quo with respect to online video. There is precedent for the Commission adopting narrow, Open Internet-related conditions such as this that go beyond the existing Open Internet rules. For example, when the Commission approved the Comcast/NBCU transaction, one condition was that "Comcast and C-NBCU shall not offer a Specialized Service that is substantially or entirely comprised of Comcast or C-NBCU affiliated content."[1] Even though specialized services were permitted by the 2010 rules, the Commission found it wise to adopt this narrow prohibition. Here, while the 2015 Open Internet rules do not expressly prohibit zero-rating, a similar narrow prohibition, responsive to facts specific to this merger, is likewise called for.

Open Internet

While the Commission's Open Internet rules protect far more than online video, the harms to online video that this transaction could cause justify a requirement that AT&T abide by those rules, regardless of the outcome any ongoing litigation. There is precedent for requiring compliance with an existing document as a merger condition: AT&T itself, as a condition of buying BellSouth, agreed to "conduct business in a manner that comports with the principles set forth in the Commission's [Open Internet] Policy Statement...."[2]

Interconnection

Consistent with past mergers,[3] the Commission here should adopt conditions designed to prevent AT&T from abusing interconnection arrangements anticompetitively.

Other Issues

PK also briefly covered a few other issues. Given the difficulty in determining a proper baseline, the Commission should not accept broadband build-out as a public interest benefit

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[1] 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, 26 FCC Rcd 4238, Appendix A (2011).
[2] AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662, Appendix F (2007).
[3] For instance, AT&T/BellSouth imposed conditions on interconnection agreements, special access, transit service, and Internet backbone. *See* id.

unless it would be possible for members of the public as well as the Commission to verify whether such a build-out commitment has been met. For example, if AT&T were to commit to build 2 million more additional fiber-to-the-premises deployments, it should be possible to determine that those 2 million deployments were over and above already-existing plans. Additionally, the Commission should ensure that offering new bundles of wireless service does not increase AT&T's incentive to transition customers away from copper connections, when those customers may not find wireless-only home service adequate.

Respectfully submitted,

/s/ John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

cc:
Jamillia Ferris
Jon Sallett
Jim Bird
Joel Rabinovitz
William Lake
Brendan Holland
Chad Guo
Jazmine Dorsey
Jeffrey Neumann
Chris Clark
Alexis Zayas
Susan Singer
Chris Sova
Megan Capasso
Elizabeth Andrion
Charles Mathias
Marilyn Simon