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Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on: "The Proposed Merger of AT&T and DirecTV"

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Good morning Chairman Bachus, Ranking Member Johnson, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. My name is John Bergmayer, and I work for Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a media marketplace that is open, competitive and affordable. Today, I will argue that AT&T's proposed purchase of DirecTV would substantially lessen competition and would harm the public interest.

## **Introduction.**

AT&T may think it has chosen an opportune time to try to acquire DirecTV. Policymakers and the press have been paying so much attention to long-rumored deals, such as Sprint/T-Mobile, and pending ones, such as Comcast/Time Warner Cable, that merger fatigue may be setting in. But during this time of industry consolidation, policymakers must ensure they pay close attention to the specifics of each new deal as it is announced. While it is important to analyze each proposal on its individual merits, policymakers should be attuned to the risks of an ever more consolidated communications marketplace. Thus, Public Knowledge appreciates that this subcommittee recognizes the need to closely scrutinize each merger that could significantly reduce competition and harm the public interest.

AT&T is one of the nation's leading telecommunications companies. It has millions of mobile and wireline telephone customers, broadband subscribers, and pay TV viewers. DirecTV is one of the nation's largest pay TV providers, with nearly 20 million customers in the US (and nearly 10 million in Latin America). It operates a major satellite fleet and several sports networks. If AT&T buys DirecTV, it will significantly increase its scale as a communications provider. In addition to being one of the most significant telephone, broadband, and wireless providers, overnight, it will become a major pay TV provider as well, with a nationwide footprint. A merger of this scale—valued at nearly \$50 billion dollars—cannot be approved unless AT&T shows both that it will not substantially lessen competition, and that it would result in significant public interest benefits. AT&T has not done so.

AT&T has failed to make its case that this merger would not harm competition. The proposed merger would remove a pay TV competitor from many local TV markets—a direct competitive harm. Yet it offers only to do some limited price-matching for three years to ameliorate this. Temporary, limited relief such as this cannot overcome the harm to consumers.

AT&T has also failed to make its case that this merger will benefit the public interest. It makes several public interest promises that are much weaker than they first appear—and its record

of following through on past public interest commitments gives good reason to be skeptical even of the limited claims it makes.

AT&T claims that cost savings on content will give it the incentive to upgrade its wireline network at a slightly faster pace. But it does not provide enough information for policymakers to fully distinguish between its existing upgrade plans from any new investment. Past experience with AT&T shows that it has a habit of “promising” its existing business plans as merger commitments. Without specific, verifiable commitments that go well beyond what AT&T has offered thus far, it would be impossible for policymakers to verify later whether AT&T was living up to its promises. AT&T claims that these cost savings will allow it to become more competitive with cable—but it does not commit to actually lowering its prices or improving its service in any specific, verifiable ways.

AT&T also claims that buying DirecTV will allow it to internalize the transaction costs associated with providing “synthetic” bundles—bundles of services provided by independent companies.<sup>1</sup> Currently, AT&T bundles its DSL service with DirecTV in many markets,<sup>2</sup> and it could easily bundle a fixed wireless product with DirecTV, as well. AT&T argues that these “synthetic” bundles are not cost-competitive with the cable broadband/video bundle.<sup>3</sup> It promises the claimed cost savings associated with these more efficient bundles to perform slight upgrades to its LTE network, adding a fixed LTE service to its mobile LTE coverage areas. But the evidence suggests that even without this merger, AT&T plans to go ahead with its fixed LTE plans. These fixed wireless commitments do not amount to a public interest benefit sufficient to offset this deal’s competitive harms.

AT&T has simply failed to meet its burden. The burden is on AT&T to show that this merger would not harm competition. It has not done so. The burden is also on AT&T to show that this merger would have specific public interest benefits. It has not done that either. Instead, the evidence shows that this merger would hamper competition in many markets, further the digital divide, and exacerbate harmful industry trends. Based on this record, the deal must be blocked.

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<sup>1</sup> Description of Transaction, Public Interest Showing, & Related Demonstrations, *Public Interest Statement*, MB Docket No. 14-90, 66 (2014) [hereinafter *Public Interest Statement*].

<sup>2</sup> *Public Interest Statement* at 3.

<sup>3</sup> Some analysts dispute AT&T’s cost-savings claims, and there is little reason to think that customers who buy one wire, one box cable bundles will necessarily find AT&T’s promised bundles—which may require a satellite dish as well as a fixed LTE antenna to be installed on the customers premises—more appealing than purchasing standalone services. See Daniel Frankel, *Analyst casts doubt on AT&T’s professed bundling efficiencies*, Fierce Cable (Jun. 16, 2014), <http://www.fiercecable.com/story/analyst-casts-doubt-atts-professed-bundling-efficiencies/2014-06-16>.

## **The Merger Would Result in a Significant Loss of Pay TV Competition.**

AT&T, a pay TV company, wants to remove DirecTV, another pay TV company, from the marketplace. This is a classic horizontal merger, and it would harm consumers. Antitrust laws do not permit mergers that would “substantially...lessen competition.”<sup>4</sup> But instead of addressing the anticompetitive harms its merger would cause, AT&T attempts to distract from them.

In a transaction where it seeks to buy a standalone pay TV service, AT&T argues that pay TV as a standalone product is decreasingly significant.<sup>5</sup> But the millions of DISH, DirecTV, and cable customers who purchase only pay TV and not a pay TV/broadband bundle demonstrate otherwise, and speak to the continuing relevance of this market. AT&T has been a broadband provider for longer than it has been a pay TV provider, so it is not surprising that it has more broadband-only than video-only customers. (Cable companies tend to have more video-only than broadband-only customers for a similar reason.) In any event, AT&T has almost 6 million pay TV customers.<sup>6</sup> It makes a bold attempt to define itself out of the pay TV market, hoping this will distract regulators. But its attempt fails.

Antitrust regulators must base their analyses on the here and now. They do not simply write off real competitive harms to a real market based on one company’s prediction that that market will one day go away or shrink in importance relative to some other market. As the Supreme Court has explained, antitrust law “focuses on tangible economic injury,” not “some abstract conception or speculative measure of harm.”<sup>7</sup> It follows that when there is real harm, “some abstract conception or [speculation]” cannot be enough to dismiss it. The communications marketplace is indeed dynamic. Pay TV or even broadband Internet access may one day be replaced by something else. Yet antitrust laws must still apply.

By reducing the number of pay TV competitors in each market where AT&T currently offers video service, this proposed merger would reduce consumer choice and violate the law. As Free Press’s Derek Turner has noted, in 64 local TV markets, the level of market concentration would exceed the Department of Justice’s merger guidelines.<sup>8</sup> This concentration would harm consumers in numerous ways. Less competition would lead to higher prices, worse service, and reduced access to diverse content. Even AT&T admits that this merger could exert upward

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<sup>4</sup> 15 U.S.C. § 18 (2014).

<sup>5</sup> *Public Interest Statement* at 68.

<sup>6</sup> AT&T, *U-verse Update: 1Q14*, [https://www.att.com/Common/about\\_us/pdf/uverse\\_update.pdf](https://www.att.com/Common/about_us/pdf/uverse_update.pdf) (last visited Jun. 20, 2104).

<sup>7</sup> *Blue Shield of Va. v. McCready*, 457 US 465, 475 n.11 (1982).

<sup>8</sup> S. Derek Turner, *How the AT&T–DirecTV Merger Fails the Antitrust Test*, Free Press (May 28, 2014), <http://www.freepress.net/blog/2014/05/28/how-att-directv-merger-fails-antitrust-test>.

pressure on “the prices of standalone video or broadband,”<sup>9</sup> suggesting only that this *could* be offset by cheaper bundles (though it is not *committing* to offering cheaper bundles).

To ameliorate this, AT&T is merely proposing only to offer, “for three years,” “standalone DirecTV satellite video service at nationwide package prices that do not differ between customers in AT&T’s wireline footprint and customers outside the footprint.”<sup>10</sup> But AT&T does not explain why, after three years, it would be acceptable for it to charge more to consumers in some markets. Nor does it commit to actually pause price hikes or keep prices low.

This is straightforward. AT&T proposes to remove a video competitor from many local markets. This would cause real harms, and AT&T has articulated no offsetting benefits. Based on this record, antitrust authorities must block this deal.

### **AT&T Has Not Shown That Any Public Interest Benefits Would Flow from This Transaction.**

The Federal Communications Commission (FCC) cannot approve a deal of this kind unless AT&T can show that it would benefit the public.<sup>11</sup> AT&T has not done this.

AT&T states that it plans to “use the merger synergies to expand its plans to build and enhance high-speed broadband service to 15 million customer locations.”<sup>12</sup> In a number of places, it touts an even higher number, stating that “[w]ith this expansion, AT&T’s high-speed fixed broadband networks will cover 70 million customer locations.”<sup>13</sup> It requires some careful reading to figure out exactly what AT&T is promising.

The 70 million figure is not new. In fact, AT&T has already promised more. In its 2012 press release touting “Project VIP,” AT&T promised to provide wireline broadband service to 57 million customer locations, and wireless broadband to 19 million additional customer locations.<sup>14</sup> That’s a plan to serve 76 million customer locations with a broadband product—6 million more

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<sup>9</sup> *Public Interest Statement* at 81.

<sup>10</sup> *Public Interest Statement* at 55.

<sup>11</sup> See 47 U.S.C. § 310(d) (2014); Verizon/ALLTEL/AT&T Divestiture Order, 25 FCC Rcd at 8716 ¶ 22; AT&T/Centennial Order, 24 FCC Rcd. at 13,927 ¶ 27.

<sup>12</sup> AT&T, *AT&T to Acquire DIRECTV*, AT&T Newsroom (May 18, 2014), [http://about.att.com/story/att\\_to\\_acquire\\_directv.html](http://about.att.com/story/att_to_acquire_directv.html).

<sup>13</sup> *Public Interest Statement* at 39.

<sup>14</sup> AT&T, *AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services*, (Nov. 7, 2012), [http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode=\[hereinafter Project VIP\]](http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode=[hereinafter Project VIP]).

than the number it is promising to serve after this deal.<sup>15</sup> A commitment to serve 70 million customers with broadband cannot count as a merger-specific public interest benefit when AT&T already plans to serve 76 million.

The 15 million figure, meanwhile, primarily refers only to marginal upgrades and not new build-out. 13 million of the 15 million are accounted for by AT&T's plan to offer customers fixed wireless service—what it is now calling WLL, or wireless local loop.<sup>16</sup> While AT&T claims that offering WLL requires “upfront investments,”<sup>17</sup> it never quantifies what these are. Given that WLL is merely a specialized kind of LTE service, any additional investment to offer it in markets that already have LTE is likely to be minimal. AT&T will already have made the necessary investments in towers, electronics, and other necessary infrastructure. As an AT&T executive confirmed, “this new fixed WLL technology will make use of wireless spectrum and AT&T's LTE network infrastructure.”<sup>18</sup> AT&T's claim that 85% of WLL customer locations “are expected to be outside of AT&T's wireline footprint”<sup>19</sup> must be viewed in this light: If these locations are in territory that AT&T already covers with mobile LTE service, then any additional investments are likely to be marginal. Even if these marginal upgrades were considered to be a public interest benefit, their small scale is not enough to counteract the harms stemming from the loss of competition.

For the 15% of projected WLL customers that are within AT&T's wireline footprint, this is nothing new. AT&T has planned to discontinue wireline service and offer wireless service to many of its rural customers for some time.<sup>20</sup> It has every incentive to do this already, since fixed LTE is cheaper to deploy and maintain than copper or fiber.<sup>21</sup> But more fundamentally, it is difficult to see a transition from wireline service to wireless service as a benefit at all, much less a merger-specific benefit. Wireless service is less reliable than wireline service, has usage caps that limit what users can do with it,<sup>22</sup> and lacks many of the features that many customers (especially small businesses)

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<sup>15</sup> *Project VIP*.

<sup>16</sup> *Public Interest Statement* at 44; Declaration of John T. Stankey, Group President & Chief Strategy Officer, AT&T Inc., ¶ 53 (June 10, 2014), (*Public Interest Statement*) [hereinafter *Stankey Declaration*].

<sup>17</sup> *Stankey Declaration* at ¶ 40.

<sup>18</sup> *Stankey Declaration* at ¶ 48.

<sup>19</sup> *Stankey Declaration* at ¶ 54.

<sup>20</sup> Stacey Higginbotham, *Here's AT&T's \$14B plan to kill its copper network and leave rural America behind*, Gigaom (Nov. 7, 2012, 6:57 AM),

<http://gigaom.com/2012/11/07/heres-atts-14b-plan-to-kill-its-copper-network-and-leave-rural-america-behind>; Ryan Knutson, *AT&T's Plan For the Future: No Landlines, Less Regulation*, Wall Street Journal (Apr. 7, 2014, 10:39 PM), <http://online.wsj.com/news/articles/SB10001424052702304834704579403090132882148>.

<sup>21</sup> *The Difference Engine: Scrap the copper*, The Economist (Jan. 7, 2011, 3:16 PM), [http://www.economist.com/blogs/babbage/2011/01/last\\_mile](http://www.economist.com/blogs/babbage/2011/01/last_mile).

<sup>22</sup> WLL “will have a usage allowance that will readily satisfy most customers' needs.” *Public Interest Statement* at 43.

depend on.<sup>23</sup> Finally, if any of the customers that AT&T plans to make WLL available to that it says currently have no terrestrial broadband<sup>24</sup> are within AT&T's wireline footprint, policymakers should ask whatever became of AT&T's 2006 commitment to serve 100% of the population in its footprint with broadband (wired and wireless).<sup>25</sup> Why have these customers gone without AT&T broadband for so long, and why should we think that promises in this merger will turn out any different than past unmet merger promises?

The remaining 2 million of AT&T's 15 million number likewise does not consist of new buildout, but instead references fiber-to-the-premises upgrades to AT&T's existing network. These upgrades are for the most part already in planning<sup>26</sup> (and are therefore not merger-specific). While AT&T claims these 2 million customer locations go beyond its current plans for fiber-to-the-premises ("FTTP") upgrades<sup>27</sup>, there is no baseline for comparison, since AT&T's current FTTP plans are not public. Further, this plan's timeframe is uncertain: AT&T has "committed" to completing these upgrades in 4 years<sup>28</sup>—but if FTTP upgrades are already underway, does this 4-year commitment apply to the final 2 million beyond its existing plans (meaning that within 4 years, AT&T's entire FTTP rollout will be substantially complete) or only to the *next* 2 million upgrades? AT&T does not say. AT&T also states that "[of] these additional customer locations, [its] current assessment is that most have access only to AT&T's [DSL] or no AT&T wireline broadband Internet offering at all."<sup>29</sup> Again, without firm numbers it is impossible to weigh the public interest benefit, if any, of these claims. And there are further questions: Do any of these customer locations that have no AT&T broadband service currently have AT&T wired telephone service? Are they areas unserved by any form of wired communications technology at all? Or are they new, "greenfield" development—where one would *expect* AT&T to deploy FTTP technology instead of fiber-to-the-node or copper? The only network upgrades that policymakers can even consider in weighing this transaction are those that would not have happened but for this transaction. AT&T has not provided enough data to begin to address these questions. The data that

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<sup>23</sup> Public Knowledge, *Protecting Businesses and Consumers in the Phone Network Transition* (March 15, 2014), <https://www.publicknowledge.org/documents/protecting-businesses-and-consumers-in-the-phone-network-transition>.

<sup>24</sup> AT&T claims that about 2.6 million of the customer locations it will make WLL available to "have no access to terrestrial broadband services today." *Public Interest Statement* at 44. It bases this on NTIA data. *Stankey Declaration* at 23. It is unclear if AT&T means to say that it will expand WLL to areas that currently have no LTE service (LTE meets AT&T's and the NTIA's definition of terrestrial broadband) or whether, as seems more likely, that AT&T means to say that it will expand WLL to areas that have no access to terrestrial *fixed* broadband today.

<sup>25</sup> FCC Approves Merger of AT&T Inc. & BellSouth Corp., FCC (Dec. 29, 2006), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-269275A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf) [hereinafter *BellSouth Merger Press Release*].

<sup>26</sup> AT&T is expanding its "U-Verse with GigaPower" service, which it launched in Austin to compete with Google Fiber, to "more cities." AT&T, *AT&T U-verse with GigaPower is expanding*, <http://www.att.com/att/gigapowercities/> (last visited Jun. 20, 2014).

<sup>27</sup> *Public Interest Statement* at 41.

<sup>28</sup> *Public Interest Statement* at 41.

<sup>29</sup> *Stankey Declaration* at ¶ 46.

are available tend to show that AT&T's promised network upgrades are already underway, and are unrelated to this proposed merger.

In any case, which version of AT&T's FTTP commitments should policymakers put stock in: the sworn declarations of AT&T executives, or the not-quite-accurate paraphrase of these statements in AT&T's FCC public interest filing? John T. Stankey, AT&T Group President and Chief Strategy Officer, stated in the record that "Our analysis confirms that this transaction *will justify deploying* [FTTP] to at least 2 million additional customer locations."<sup>30</sup> He was only willing to commit to stating his view of the economic incentives, and plans for future AT&T network financing. Yet in its filing, citing only Stankey's statement (and a similar incentives analysis by Michael Katz, an economist), AT&T claims that "AT&T *will deploy* its highest-speed fiber connections...to at least 2 million more customer locations."<sup>31</sup> Needless to say, there is a difference between whether a network upgrade, under some analysis, is "justified," versus a firm commitment to complete that upgrade. AT&T should clarify whether it will actually deploy new FTTP upgrades or whether its commitment is only that such upgrades might be "justified."

AT&T's promises in this merger proceeding should be put in the context of its previous build-out/upgrade promises from past proceedings. In 2006, pursuant to its merger with BellSouth, AT&T committed to providing broadband to 100% of the residences in its wireline footprint.<sup>32</sup> This commitment included a promise to provide wireline broadband to 85% of the residences, with other residences offered some form of wireless service (a precursor to its current wireless local loop ("WLL") promises).<sup>33</sup> Yet by 2012, promises of future broadband buildout were still on the table, as AT&T again promised to finally provide wired broadband to 75% of the "customer locations" (residences plus businesses) in its footprint.<sup>34</sup> AT&T's shifting terms of reference (residences, population, customer locations) can make it difficult to pin down to what extent it has even attempted to comply with its past promises, but recent documents<sup>35</sup> confirm longstanding customer reports<sup>36</sup> that there are areas within AT&T's service territory where it offers no broadband service at all, wireless or wireline, contrary to its 2006 commitment.

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<sup>30</sup> *Stankey Declaration* at ¶ 44 (emphasis added).

<sup>31</sup> *Stankey Declaration* at ¶ 44 (emphasis added).

<sup>32</sup> *BellSouth Merger Press Release*.

<sup>33</sup> *BellSouth Merger Press Release*.

<sup>34</sup> *Project VIP*.

<sup>35</sup> AT&T Proposal for Wire Center Trials, GN Docket No. 13-5, GN Docket No. 12-353, at 8 fn 9 (Feb. 27, 2014) [http://connected.att.com/external/publicpolicyviewsnews/as\\_filed\\_redacted\\_wire\\_center\\_trial\\_plan.pdf](http://connected.att.com/external/publicpolicyviewsnews/as_filed_redacted_wire_center_trial_plan.pdf).

<sup>36</sup> Gerry Smith, *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, HuffPost Tech (Nov. 18, 2012), [http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet\\_n\\_1914508.html](http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html).

Again and again, AT&T makes the same arguments and the same promises when it wants to acquire a competitor.<sup>37</sup> Yet no merger ever seems to be quite enough for it to achieve its goals, leaving AT&T ample headroom to re-promise and re-commit to the same goals the next time around. In the T-Mobile proceeding in 2011, Consumer Watchdog made this very clear with a letter highlighting the similarities between what AT&T was claiming in that transaction to what it promised in the Cingular proceeding.<sup>38</sup> At some point, policymakers should simply demand that AT&T live up to its existing commitments rather than allowing it to commit to them once more.

AT&T also has a history of claiming that mergers are necessary for investments even when its own behavior proves otherwise. In 2011, AT&T committed to cover 250 million Americans with LTE by the end of 2013, “as a result” of the AT&T/T-Mobile transaction.<sup>39</sup> Of course, regulators rightly blocked that merger. Yet by the end of 2013, AT&T covered 270 million Americans with LTE.<sup>40</sup> A clear example of AT&T not only meeting, but exceeding, a past build-out commitment nevertheless shows that AT&T’s claims must be taken with a grain of salt. While AT&T said at the time that the T-Mobile transaction was a necessary prerequisite to this investment its own actions prove that this was not the case. This is another reason for policymakers to be skeptical of any claims AT&T makes today.

The balance of AT&T’s public interest argument is similarly thin. It is not promising any new kinds of services—just new bundles. Instead of promising lower prices for consumers, AT&T talks about cost savings for itself. It is agreeing to abide by net neutrality rules which largely exempt wireless. In short, AT&T has not provided the compelling public interest justification it needs if it is to be allowed to purchase DirecTV.

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<sup>37</sup> Jon Brodtkin, *AT&T makes the same promises every time it buys a new company*, Ars Technica (Jun. 16, 2014, 5:20 PM) <http://arstechnica.com/business/2014/06/att-makes-the-same-promises-every-time-it-buys-a-new-company/>; Bruce Kushnik, *AT&T Can 'Say Anything': AT&T IP Transition Trials and the Direct TV Merger Documents Contradict Previous Broadband Commitments*, Huffpost Business (Jun. 13, 2014, 2:10 AM) [http://www.huffingtonpost.com/bruce-kushnik/att-can-say-anything-att\\_b\\_5490714.html](http://www.huffingtonpost.com/bruce-kushnik/att-can-say-anything-att_b_5490714.html).

<sup>38</sup> Consumer Watchdog, *Re: AT&T and Deutsch Telekom AG Application Seeking FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile Acquisition of T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65 (Aug. 9, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021701394>.

<sup>39</sup> Marlene H. Dortch, *Notice of Ex Parte Presentation: In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Dkt No. 11-65 (Aug. 8, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021701223>.

<sup>40</sup> AT&T, *More Than 270 Million People Now Covered by the Nation's Most Reliable 4G LTE Network* (Jan. 6, 2014), <http://www.att.com/gen/press-room?pid=25187&cdvn=news&newsarticleid=37370&mapcode=consumer|mk-att-wireless-networks>.

## **If This Transaction Goes Forward, There Would Be Public Interest Harms That Go beyond Loss of Competition in the Pay TV Market.**

Because AT&T and DirecTV have not shown any public interest benefits that would flow from this transaction, and because they have not made the necessary public interest showing, regulators must block this transaction. But policymakers should also consider public interest harms that may flow from this transaction. This testimony will focus on just two of these, but there are likely many more.

### *Second-class service for rural America*

“Universal service” is the concept that all Americans should have access to adequate communications facilities, and that they should be able to use them to access whatever information and speak to whoever they wish.<sup>41</sup> It is not a telephone-specific concept—its origins come from the postal service, and policymakers increasingly apply universal service concepts to broadband. AT&T should be familiar with the concept. While the goal of universal service pre-dates AT&T, Theodore Vail, a seminal figure in AT&T’s history, coined the term.<sup>42</sup> The principles of universal service for telecommunications are enshrined in law. One relevant provision states,

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>43</sup>

AT&T’s plan to shift its rural wireline customer base to WLL flies in the face of this standard. To be sure, our communications policies should be technology-neutral. When analyzing whether service is “comparable” between urban and rural areas, policymakers should look to objective metrics such as bandwidth, throughput, latency, and reliability. The problem with WLL is not that it is wireless, but that it falls short under these objective and neutral metrics. While AT&T claims that WLL will be “comparable, and typically superior, to the best wireline services available in the areas in which the fixed WLL solution will be deployed,”<sup>44</sup> this is not the standard its service should be held to. Rural service should be comparable to that offered in urban areas. WLL is

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<sup>41</sup> FCC, *Universal Service*, FCC Encyclopedia <http://www.fcc.gov/encyclopedia/universal-service> (last updated Jun. 20, 2014).

<sup>42</sup> Milton Mueller, *“Universal service” and the new Telecommunications Act: Mythology Made Law*, Rutgers University SCILS, <http://www.vii.org/papers/cacm.htm> (last visited Jun. 20, 2014).

<sup>43</sup> 47 U.S.C. § 254 (2014) (emphasis added).

<sup>44</sup> *Stankey Declaration* at ¶ 48.

hardly comparable to AT&T's fiber-to-the-node and fiber-to-the-premises products, and even falls short of DSL (and TDM telephony) in several ways as well. Even basic copper line service can outperform WLL—by working with a wider variety of third-party equipment, for example, and by having an independent power supply.<sup>45</sup>

Neither are the rates comparable. With WLL, you pay more for what you get, and have to abide by a rate plan with usage caps.<sup>46</sup> Policymakers should be wary of any deal that furthers the urban/rural digital divide and enables AT&T to consign rural Americans with second-class service. While policymakers should welcome new competition, including from fixed wireless services, this does not mean that rural Americans should *only* have access to less-capable technology.

### *Discriminatory treatment of video traffic*

Prior to this transaction, AT&T had plans to enter the online video market,<sup>47</sup> and AT&T expects that this deal would “propel the development of new [online video] products.”<sup>48</sup> AT&T would likely be able to use DirecTV's buying power as a large content distributor to access content on more favorable terms. Of course, new competition in the video marketplace (whether online or otherwise) could benefit consumers, provided it was made available to customers of any ISP or wireless carrier. But, as a vertically integrated ISP, AT&T would have the incentive to discriminate in favor of its own services, and to make an online video product available only to its own broadband subscribers. The FCC's Open Internet policies—at least during those windows in which they are in effect—are supposed to protect consumers and competition from this sort of behavior. But because the FCC's Open Internet rules have been vacated in part, policymakers should be wary of a deal that enhances AT&T's incentive to discriminate in favor of its proprietary services. While AT&T has agreed to abide by the terms of those previous rules for a brief period of time, it should be noted that the rules in question did not offer full protection to mobile users. AT&T in particular has a history of flouting net neutrality principles when it comes to wireless,<sup>49</sup>

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<sup>45</sup> *Preserving Public Safety and Network Reliability in the IP Transition: Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science, and Transportation*, 113th Cong. (2014) (Testimony of Jodie Griffin, Senior Staff Attorney, Public Knowledge)(available at <https://www.publicknowledge.org/assets/uploads/documents/IPTransitionTestimony.pdf>).

<sup>46</sup> *Public Interest Statement* at 43.

<sup>47</sup> See Press Release, AT&T, *The Chernin Group and AT&T Create New Venture to Acquire, Invest In and Launch Online Video Businesses* (April 22, 2014), [http://about.att.com/story/the\\_chernin\\_group\\_and\\_att\\_create\\_new\\_venture\\_to\\_acquire\\_invest\\_in\\_and\\_launch\\_online\\_video\\_businesses.html](http://about.att.com/story/the_chernin_group_and_att_create_new_venture_to_acquire_invest_in_and_launch_online_video_businesses.html).

<sup>48</sup> *Public Interest Statement* at 29.

<sup>49</sup> John Bergmayer, *AT&T Will Eventually Do the Minimum Users Expect*, Public Knowledge (May 21, 2013), <https://www.publicknowledge.org/news-blog/blogs/att-will-eventually-do-minimum-users-expect>; John Bergmayer, *Holding AT&T to Account for Blocking FaceTime on iPhones and iPads*, Public Knowledge (Sept. 18, 2012),

and certain behaviors that work against the open Internet (e.g., AT&T not counting its own video services against data caps, which disadvantages competitors and reduces consumer choice) would become much more likely if this merger is approved.

**Conclusion.**

AT&T has not shown that any public interest benefits would overcome the competitive, public interest, and other harms that would flow from this merger. On this record, it must be blocked.