

**STATEMENT OF  
COMMISSIONER AJIT PAI  
APPROVING IN PART AND DISSENTING IN PART**

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

The Commission's comprehensive record conclusively demonstrates that AT&T's acquisition of DirecTV is in the public interest. The combined entity will compete more effectively in our nation's video and broadband markets. In particular, the transaction will allow the combined entity to offer integrated bundles of video and broadband to far more Americans than AT&T could alone. The end result will be lower-priced bundles for consumers and greater high-speed broadband deployment. I therefore support the Commission's decision to approve this transaction.

However, I cannot support the Commission's decision to place 17 pages of conditions on that approval.<sup>1</sup> The transaction's benefits clearly outweigh any harms. As a result, there is no need to impose conditions upon it. Indeed, earlier this week, the U.S. Department of Justice "concluded that the combination of AT&T's land-based internet and video business with DirecTV's satellite-based video business does not pose a significant risk to competition."<sup>2</sup> It therefore concluded its "extensive investigation" into the transaction without asking for *any* conditions.<sup>3</sup> The Commission should have done the same.

But the FCC goes much further, demanding that AT&T satisfy a regulatory wish-list that has nothing to do with the transaction at hand. These conditions are the forced tribute that the company must offer to mollify the Capitol.<sup>4</sup> In this regard, I dissent.

Some conditions are nothing more than policymaking through the merger review process. Consider, for example, the decision (however nobly intended) to require AT&T to offer discounted broadband service. The Commission concedes that its economic model "predicts very little change in the price of AT&T's standalone broadband post-transaction."<sup>5</sup> Depending upon the assumptions used, the price adjustment will range from a 0.73% decline to a 0.46% increase. Moreover, the Commission concedes that the transaction will lead to "little change (positive or negative)" in the stand-alone broadband prices offered by AT&T's competitors.<sup>6</sup>

Notwithstanding these findings, the Commission effectively decides to get into the discount broadband business, using AT&T as its agent. For example, where technically available, the company is required to offer "qualifying households"<sup>7</sup> wireline broadband service with download speeds of at least 10

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<sup>1</sup> *Order* at Appendix B.

<sup>2</sup> Justice Department Will Not Challenge AT&T's Acquisition of DirecTV, Press Release (July 21, 2015), <http://go.usa.gov/37rkh>.

<sup>3</sup> *See id.*

<sup>4</sup> *Cf.* President Snow, *The Hunger Games* (Lionsgate 2012) ("And so it was decreed that, each year, the various districts of Panem would offer up, in tribute, one young man and woman to fight to the death in a pageant of honor, courage and sacrifice.").

<sup>5</sup> *Order* at para. 142.

<sup>6</sup> *Order* at para. 143.

<sup>7</sup> Qualifying households are those where at least one individual participates in the Supplemental Nutrition Assistance Program and that do not have certain outstanding debts to AT&T. *See Order* at Appendix B § VI(2)(c).

Mbps (which, according to the majority on a different day, isn't broadband<sup>8</sup>) for no more than \$10 a month.<sup>9</sup>

When the Commission instructs a regulated entity that it must offer a particular service for no more than a particular price, there is a name for that. It is called *rate regulation*. So notwithstanding the repeated claims by some over the past few months that the FCC has no interest in regulating retail broadband rates, the reality is far different. When given the opportunity, the Commission did not hesitate to impose rate regulation upon a broadband provider. This is merely a preview of coming attractions.

Moreover, the rate regulation imposed by the Commission is not even designed to prevent price increases from occurring in the wake of the transaction. It is merely intended to cut pre-transaction prices. To give just one example, the price of AT&T's stand-alone 6 Mbps broadband service in Austin, Texas is currently \$34.95 a month.<sup>10</sup> And the 6 Mbps broadband service portion of an Internet/phone bundle is \$14.95 a month.<sup>11</sup> Given these figures, how could requiring AT&T to offer a 10 Mbps stand-alone broadband service for no more than \$10 a month possibly be necessary to remedy a harm caused by the transaction? The Commission doesn't even make a cursory attempt to explain how it arrived at this \$10 price point.

Shifting gears, the Commission imposes conditions designed to remedy what it contends would be the combined entity's increased incentive to discriminate against unaffiliated over-the-top video providers. Specifically, the Commission claims that, after the merger, AT&T would seek to hinder those over-the-top providers in order to protect DirecTV's video product or AT&T's own online video products.

But the only detailed economic analysis and econometric modeling in the record (not to mention the Justice Department's approval, which implies rejection of the FCC's argument) point to the opposite conclusion. They demonstrate that any attempt by AT&T to hamper its broadband customers' access to over-the-top video providers would only end up hurting the company.<sup>12</sup> It would encourage customers to switch broadband providers, and many customers purchasing bundles from AT&T would likely end up taking their video business elsewhere as well. Indeed, AT&T benefits when its customers use over-the-top video providers, such as Netflix and Amazon, since "[o]nline video is a major driver of broadband demand, and desire to consumer online video leads consumers to purchase more broadband service, including higher speed tiers."<sup>13</sup> Thus, it should come as no surprise that AT&T offers a promotional package in conjunction with Amazon Prime in four cities.

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<sup>8</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1485 (Dissenting Statement of Commissioner Ajit Pai) (2015), <http://go.usa.gov/372yw>.

<sup>9</sup> Order at Appendix B § VI(2)(a).

<sup>10</sup> See AT&T, Check for U-Verse Availability, <https://www.att.com/shop/u-verse/offers.html> (entering address for Austin, Texas and selecting Internet-phone bundle).

<sup>11</sup> See *id.* (entering Austin, Texas address and selecting stand-alone broadband service).

<sup>12</sup> Joint Opposition, "An Economic Assessment of AT&T's Proposed Acquisition of DIRECTV," Reply Declaration of Michael L. Katz, transmitted by letter from Maureen R. Jeffreys, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (Oct. 16, 2014).

<sup>13</sup> *Id.*

The Commission's theory is also internally contradictory. For example, the Commission contends on one hand that AT&T would seek to harm unaffiliated over-the-top video providers in order to encourage customers to subscribe to DirecTV's video package. Yet it concludes in another section that over-the-top video providers are in a different product market than multichannel video programming distributors such as DIRECTV because "for most consumers today, OVD [online video distribution] services are not substitutes for MVPD services."<sup>14</sup> Well, which is it? Do over-the-top video providers compete with DirecTV or not? The FCC's creative heads-we-win-tails-AT&T-loses view of the video marketplace embraces Wilde's dictum that "consistency is the hallmark of the unimaginative."<sup>15</sup>

On top of this, the conditions pertaining to over-the-top video providers are highly intrusive. For example, AT&T must fork over to the FCC each and every interconnection agreement for the next four years. It also must retain an Independent Measurement Expert, approved by the FCC's Office of General Counsel, to develop a methodology for measuring specified performance metrics for traffic exchanged at its interconnection points. And it must report regularly to the Commission on those metrics. This government-mandated surveillance is entirely unnecessary and is just another step towards putting the FCC at the core of the Internet. It has been said that the Commission's Title II order makes the FCC the referee on the field, ready to throw the flag whenever a broadband service provider does something that it doesn't like. This condition goes beyond that and injects the FCC into the huddle, monitoring a team's play calling.

Speaking of surveillance, the conditions imposed by the Commission in this item also place a FCC-designated monitor inside of AT&T. Specifically, the company and the Commission's Office of General Counsel must appoint an Independent Compliance Officer to monitor AT&T's compliance with the Commission's demands and provide regular reports to the Commission. And if the company and Commission's Office of General Counsel are unable to agree on an Independent Compliance Officer, the Office of General Counsel will pick one.<sup>16</sup>

This Independent Compliance Officer will have wide-ranging powers. Among other things, he or she will have the authority to interview any company personnel, to inspect and copy any document, email, or contract, and to require the company to provide any data or submit any reports for any purpose that he or she believes to be reasonably related to his or her duties.<sup>17</sup> And he or she may hire a staff to help do all of these things.<sup>18</sup>

There is no justification for the Commission to adopt this extraordinary condition. The Commission does not point to any credible evidence that the company has failed to comply with the conditions imposed upon it by the FCC in prior transactions. And there is no reason to presume that AT&T will fail to abide by the conditions contained here.

This also establishes a dangerous precedent. I have little doubt that when we consider future transactions, there will be calls for future applicants to accept Independent Compliance Officers as a

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<sup>14</sup> *Order* at para. 68.

<sup>15</sup> Moreover, to the extent that the Commission believes that the company will attempt to hurt unaffiliated, over-the-top video providers in order to assist AT&T's over-the-top video products—a theory that is not supported by the record—it is difficult to see how such a harm would be specific to this transaction because such an incentive would already exist.

<sup>16</sup> *Order* at Appendix B § VII(3)(a).

<sup>17</sup> *Order* at Appendix B § VII(3)(i).

<sup>18</sup> *Order* at Appendix B § VII(3)(k).

condition of approval. Virtually any transaction involving companies we regulate could result in the injection of a Commission-selected solon with vast powers. Government-approved monitors placed throughout the communications industry would represent a pernicious intrusion into the affairs of private businesses and a dramatic expansion of the Commission's authority.

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Substance aside, I also have concerns about process. The Commission has established a 180-day shot-clock for transactional review. But it has been 408 days since AT&T and DirecTV filed their application with the Commission! In that amount of time, Jules Verne's Phileas Fogg from *Around the World in 80 Days* could have circumnavigated the globe five times in the 1870s.

To state the obvious, this matter has taken far too long to resolve and has made a joke of the Commission's 180-day shot-clock.

What took so long? Part of the time was wasted, over my objection, on a pointless and misguided quest to permit third-parties to review programming contracts. This dispute ended with the Commission suffering a resounding defeat in the U.S. Court of Appeals for the D.C. Circuit, which held unanimously that the Commission "offer[ed] an exceedingly thin rationale" for a "substantive and important departure from prior Commission policy."<sup>19</sup> And even though the D.C. Circuit gave the FCC the option on remand of trying again to give third-parties access to programming contracts, the agency approves this transaction without taking that step, belying any assertion that third-party inspection of these materials was necessary to the Commission's consideration of this transaction.<sup>20</sup>

But this litigation was not responsible for most of the delay here. Instead, it appears that the Commission adopted a "four corners" strategy for handling this transaction that would have made the late, great University of North Carolina basketball coach Dean Smith proud. This is unacceptable. I understand that some savor the leverage gained by keeping a regulated entity under the Commission's thumb for as long as possible. But the speed of today's digital economy makes it critical for the FCC to move quickly. When companies remain stuck in purgatory for over a year waiting for an answer from the Commission, their business plans are placed on hold while their rivals move full speed ahead. That isn't good for competition, it isn't good for consumers, and it isn't good government.

For these reasons, I hope that in the future, the Commission abides by its self-imposed deadline and completes its consideration of proposed transactions much more quickly than it did here.

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<sup>19</sup> *CBS Corp. v. FCC*, 785 F.3d 699, 708–09 (D.C. Cir. 2015).

<sup>20</sup> *Cf. id.* at 707 ("Nowhere does either the [Media] Bureau or the Commission make the jump from useful or relevant or central to necessary.").