STATEMENT OF

JONATHAN SCHWANTES
GEORGE P. SLOVER
CONSUMERS UNION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
SENATE COMMITTEE ON THE JUDICIARY

ON

EXAMINING THE COMPETITIVE IMPACT OF THE AT&T-TIME WARNER TRANSACTION

December 7, 2016

Chairman Lee, Ranking Member Klobuchar, Subcommittee Members, thank you for the opportunity to submit a written statement to explain our concerns regarding the proposed acquisition of Time Warner by AT&T, and how, most importantly, it will impact consumers and affect competition in the telecommunications, media, and wireless industries.

Consumers Union is the public policy and mobilization arm of Consumer Reports. Our mission is to work for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. One key to empowering consumers to protect themselves is working to ensure meaningful consumer choice, through effective competition.

By meaningful choice, we mean easy for consumers to understand and compare, and sensitive to what is important to consumers. When consumers have meaningful choice, businesses are stimulated to provide more affordability, better quality, and new innovative thinking.

By effective competition, we mean a marketplace marked by a fair and level playing field, where companies earn consumers with better products, lower prices, and attractive offerings and can compete free of exclusive deals and other monopolistic and anti-competitive barriers.

As the telecommunications industry has exploded in the last 25 years with a dizzying array of new products and technologies, one of our top

priorities has been to make sure all consumers can enjoy and afford what is being offered. This means more than just having the latest smartphone or flat screen TV. It means being able to participate in the digital marketplace with affordable access to broadband, wireless communications, and diverse content accessed via a choice among those connections.

Consumers Union has a proud record of being actively engaged in helping assess the effects of proposed mergers on competition and consumers, not unlike the proposed AT&T-Time Warner merger the Subcommittee is reviewing today. In recent years, for example, we opposed Comcast's purchase of NBC-Universal in 2010, and Comcast's attempted acquisition of Time Warner Cable in 2014. We also urged regulators to undertake a careful review of the Charter-Time Warner Cable merger in 2015, with strong safeguards for consumers in the event the merger was permitted.

Consumers Union does not believe the consolidation we have witnessed in the media and multi-video programming distributor (MVPD) marketplaces has benefitted consumers, despite the claims to the contrary always put forward by the merging parties.

All sorts of promises are made to consumers and regulators to court favor during the merger review process. Regardless of what assurances were made, one thing is for certain: none of the aforementioned mergers that were approved resulted in lower prices. In fact, cable prices increased by nearly

triple the rate of inflation in the past twenty years.[1] Therefore, we would be wise to be very skeptical of the touted benefits put forth by AT&T in the context of this merger.

Why do this deal? That is the $85 billion dollar question. A likely reason is that AT&T, as one of the nation's largest providers of wireless, pay-TV, and broadband service, is trying to position itself not to be relegated to the simple function of a utility just providing the connection that others use to make money supplying program content to consumers. If we believe the conventional wisdom that "content is king," then acquiring content created and owned by Time Warner is AT&T's gambit to prevent itself from being commoditized into, and to enable it to evolve into something more than, a mere telecommunications company. As a recent *Wired* article observed:

> Telecommunications companies are becoming media companies. That explains AT&T's agreement to buy Time Warner for $85.4 billion. But something else explains it, too. Media companies are becoming telecoms.[2]

That said, we have serious concerns regarding how AT&T could seek to maximize the value of this premium content (*e.g.,* HBO, CNN, Warner Brothers, DC Comics, TBS, TNT, and more) in ways that could hurt consumers and competition.

[1] Steven Lovely, Cable Prices Have Risen Faster Than Inflation For Each Of The Past 20 Years, CORDCUTTING.COM, Oct. 31, 2016, http://cordcutting.com/cable-prices-have-risen-faster-than-inflation-for-

[2] Klint Finley, AT&T Is Buying Time Warner Because the Future is Google, NYTIMES.COM, Oct. 25, 2016. https://www.wired.com/2016/10/att-buying-time-warner-future-google/.

We envision a consumer-friendly future of television, achieved by a diverse industry with multiple, robust broadband platforms (wired and wireless alike) delivering all sorts of content to consumers live, on-demand and in ways not yet imagined, in a highly competitive environment where successful business models—not monopolies or restrictive, exclusive deals—win in a fair and open marketplace.

By acquiring Time Warner, does AT&T move us closer to realizing this future? We have serious doubts. AT&T's CEO, Randall Stephenson, has tried to assure us that since this is a vertical merger, competition and consumers cannot be harmed: "You'd be hard pressed to find a vertical merger denied by the regulators."[3] But we believe the potential for AT&T to use its new vertical reach to restrict choices for consumers and shut out or burden its competitors is a very real and serious concern, warranting the thorough attention of the Justice Department, the FCC, and this Subcommittee.

The Marriage of Content and Distribution: the Potential Harm to Competition and Consumers

AT&T is the largest MVPD in the country, with 25 million DIRECTV and U-Verse subscribers, and the second largest wireless provider, with more than 90 million retail customers. If AT&T's purchase of Time Warner

---

[3] James B. Stewart, Why a Media Merger That Should Go Through Might Not, NYTIMES.COM, Oct. 25, 2016, http://www.nytimes.com/2016/10/26/business/economy/why-a-media-merger-that-should-go-through-might-not.html.

is approved, premium content would provide the combined company the leverage to create bundles that would undoubtedly be promoted as good for consumers, but could actually hurt competition, limit consumer choice, and undermine net neutrality protections. Though current FCC regulations discourage exclusive deals (*e.g*., a business model where AT&T might distribute HBO only to its own DIRECTV and wireless subscribers and block or restrict it from competing MPVDs), there is currently no outright prohibition on hoarding content—behavior we believe would be very anti-competitive and anti-consumer, but very tempting to AT&T with its expanded market power.

An MVPD's ability to hoard its own content has become somewhat easier since the FCC allowed the prohibition on "exclusive program contracts"—a product of the 1992 Cable Act—to expire in 2012. However, part of the reason this rule was allowed to sunset was because cable and content seemed at the time to be getting out of each other's business (*e.g.,* Time Warner spun off Time Warner Cable in 2009, and Comcast sold its stake in A&E in 2012). A notable exception to this apparent trend was the Comcast-NBCU merger completed in 2011. Conditions were placed on that deal requiring Comcast to make NBCU content available to its competitors as protection against anti-competitive exclusives—but those conditions have been criticized as ineffective, and in any event, they expire in 2018. So they do not provide a reliable model for protecting competition and consumers against the harms that could flow from the kind of permanent alteration of market structure that this merger would bring.

Although there is no longer a prohibition on exclusive contracts, current regulations permit the FCC to review complaints (brought by competitors) on a case-by-case basis to look for possible violations of Section 628(b) of the Communications Act, which prohibits unfair contracts or practices that have the purpose or effect of significantly hindering or preventing the complainant from providing programming to consumers. The complainant bears the burden of proof in an administrative proceeding.

AT&T says it has no intention of restricting Time Warner's content to its competitors—after all, it says, what's the value of premium content if not to sell it to as many buyers as possible? However, we are concerned that AT&T will conclude that making selected parts of its content available only to its own customers, or charging its rivals more for it, makes smart business sense, and that after-the-fact regulatory conditions cannot effectively prevent such misbehavior. Then what?

AT&T might decide not to restrict content when negotiating with other large MVPDs who also own content—and therefore, have their own leverage—like Comcast-NBCU. But what about a small rural cable operator who does not own content, and possesses such a small subscriber base as to be at the mercy of whatever price AT&T decides to insist on for HBO or CNN? Needless to say, such behavior would substantially lessen competition in small markets where consumers would have little or no choice other than DIRECTV for viewing Time Warner content.

Harm to Consumers From “Zero Rating” of Video Content

We are already seeing the emergence of one threat from AT&T to the kind of robust competition that we hope for—AT&T’s “zero-rated” streaming video plans. We are concerned that the merger could heighten the potential for harm to competition and consumers from these plans.

AT&T’s first zero rating plan was originally offered to AT&T’s wireless service customers who also subscribe to DIRECTV, allowing them to watch DIRECTV programming on their mobile devices without it counting against their AT&T wireless data cap. Zero rating is now being offered as well to AT&T wireless customers who subscribe to DIRECTV Now, AT&T’s newly-launched over-the-top (OTT) video streaming service.

These zero rating offers have the potential to anti-competitively discriminate against other video providers and ultimately restrict consumer choice. Under the “Sponsored Data” plan, DIRECTV pays AT&T Mobility for zero-rated data service, and other, unaffiliated video providers, such as Netflix or Charter, are reportedly able to obtain the service at the same rate. But because the payment from DIRECTV to AT&T Mobility is AT&T simply moving money from one of its pockets to another, there is a potential for anti-competitive cross-subsidization—the same payment does not “cost” them as much as it costs the independents.

Even though DIRECTV Now is available to all consumers, and not just AT&T wireless customers, consumers who stream DIRECTV Now over a different wireless plan with data caps may incur expensive overage charges or quality-reducing speed throttling when the caps are reached.

Concerns about the competitive effects of AT&T's zero-rating plans were raised in a November 9 letter the FCC sent to AT&T. As the letter points out, the internal transfer of fees from DIRECTV to AT&T Mobility to "pay" for the data under the Sponsored Data program nets to the overall company at zero, whereas for a third party provider, the same payment for data to be zero-rated represents a real cash cost.[4] Given that cost, third parties may be unable to effectively compete with the new $35/month DIRECTV Now offering. Alternatively, if a third party competitor chooses not to participate in the Sponsored Data program, AT&T wireless customers will be less likely to select a competing streaming video service where their capped data could be quickly exceeded and expensive overage charges assessed. We view the choice between these two outcomes as a "double whammy" that hurts competition in the emerging market of streaming, over-the-top wireless video.

AT&T's response dated November 21 contended that the FCC's concerns with its zero ratings plans were "flatly incorrect" and "would upend decades of commercial arrangements between telecommunications

[4] FCC (Jon Wilkins, Wireless Bureau) Letter to AT&T (Robert W. Quinn, Jr., External and Legislative Affairs), Nov. 9, 2016.

carriers and their vertically integrated affiliates."[5] But the FCC was not persuaded, and in its December 1 reply letter to AT&T concluded:

> Indeed, your submission tends to confirm our initial view that the Sponsored Data program strongly favors AT&T's own video offerings while unreasonably discriminating against unaffiliated edge providers and limiting their ability to offer competing video services to AT&T's broadband subscribers on a level playing field. We have therefore reached the preliminary conclusion that these practices inhibit competition, harm consumers, and interfere with the "virtuous cycle" needed to assure the continuing benefits of the Open Internet.[6]

As the exchange between the FCC and AT&T illuminates, these zero-rating plans have the potential to significantly harm consumer choice and competition. Competitors unable to afford a comparable offering on another platform or through AT&T's Sponsored Data plan could fail, or be forced to pass the additional costs onto their customers. In either case, consumer choices will become more limited and more expensive.

The addition of new premium content to AT&T's content offerings as a result of the merger has the potential to exacerbate the anti-competitive effects of these zero rating plans. Why would a consumer stick with a competitor's capped data plan when HBO Go might be streamed zero-rated if only the consumer switched to AT&T wireless?

---

[5] AT&T (Robert W. Quinn, Jr., External and Legislative Affairs) Letter to FCC (Jon Wilkins, Wireless Bureau), Nov. 21, 2016.

[6] FCC (Jon Wilkins, Wireless Bureau) Letter to AT&T (Robert W. Quinn, Jr., External and Legislative Affairs), Dec. 1, 2016.

One of the principal tenets of net neutrality codified in the FCC's 2015 *Open Internet Order* was the prevention of paid prioritization plans, where some internet content is given preference over others, with faster speeds or quality—for a fee. We are concerned that zero-rated plans as currently constructed by AT&T's Sponsored Data program look, feel, and operate in much the same way, and flout net neutrality. And we are concerned that their anti-competitive effects will only become more potent, and more harmful, if this merger goes forward.

Conclusion

The Justice Department's antitrust review is just getting underway. It is not yet clear whether the FCC will have jurisdiction to review the merger as part of a license transfer review, for it is unknown if any of Time Warner's broadcast or satellite licenses will be acquired by AT&T. Other issues may become important, including the merger's implications for consumer privacy, as AT&T, already a massive telecommunications and media company with access to an enormous amount of detailed data about its subscribers, would stand to further extend its reach.

We do not here prejudge the work of the Antitrust Division or, potentially, the FCC. But for all of the reasons discussed above, we are highly doubtful that this merger should pass muster under the Clayton Act and the FCC's public interest standard. We are concerned that the merger would leave consumers facing fewer choices, higher prices, and greater

exposure to harm. So we are calling for a thorough and comprehensive investigation to ensure that competition and consumers are fully protected. And if, after that investigation, a merger of this far-reaching magnitude is ultimately not challenged, we would want a clear and convincing explanation as to why, and how they have imposed strong enough conditions to ensure consumers are not harmed. At this time, however, we are deeply skeptical that this is possible.

Thank you again for the opportunity to submit written testimony on this important merger that could have serious consequences for consumers.