Federal Communications Commission
Washington, D.C. 20554

December 1, 2016

Robert W. Quinn, Jr.
Senior Executive Vice President, External and Legislative Affairs
AT&T
1120 20th Street NW, Suite 1000
Washington, DC 20036

RE: AT&T's Sponsored Data Program

Dear Mr. Quinn:

The Wireless Telecommunications Bureau has reviewed the letter and white paper you submitted on November 21, 2016. We find that those responses fail to alleviate the serious concerns expressed in our November 9 letter regarding the potential anti-competitive impacts of AT&T's wholesale Sponsored Data program for zero-rated mobile video services. 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. In order to finalize the Bureau's review of this matter, we have set forth below a set of detailed questions and request your response by December 15.

I once again emphasize that we are neither critiquing AT&T's end-user prices for DIRECTV Now nor its strategy for competing in the retail video market. Indeed, as an over-the-top (OTT) offering that is available over any Internet service provider's network – including those owned by video market incumbents such as cable operators – DIRECTV Now relies on the safeguards provided by the *Open Internet Order*'s pro-competition rules. Nor do we question bundled retail offerings[1] or vertical integration *per se*.[2] Our concern is that AT&T's Sponsored Data program – *i.e.*, the terms and conditions on which AT&T makes its own network available to similarly situated unaffiliated providers – denies unaffiliated third parties the same ability to compete over AT&T's network on reasonable terms.[3] This concern arises not from AT&T's retail rates,[4] but from the different financial impact of the Sponsored Data program on unaffiliated providers versus on AT&T's affiliates, such as DIRECTV.

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[1] White Paper at 5-6, 9-10.

[2] The white paper mistakenly contends that our concerns amount to a "sweeping," general "condemnation of vertical integration." *Id.* at 10. To the contrary, our letter mentioned vertical integration only in the context of the unremarkable proposition that vertical integration heightens broadband providers' incentive to favor their affiliates' offerings over those of their competitors. Wilkins 11/9/16 Letter at 3 & n.14 (citation omitted).

[3] Wilkins 11/9/16 Letter at 2-3.

[4] *Cf.* White Paper at 11 (alleging that we are effectively "request[ing] that DIRECTV raise [its retail] rates").

Using the reference example from your white paper stating that your Sponsored Data rates are similar to the discounted wholesale rates paid by major wireless resellers,[5] we estimate for purposes of illustrating our concerns that an unaffiliated mobile video service provider would have to pay AT&T $16 a month to offer zero-rated service to a customer who uses just 10 minutes of LTE video per day, increasing to $47 for a customer using 30 minutes per day.[6] These costs alone would represent 46 percent to 134 percent of DIRECTV Now's $35 retail price, against which third parties will be competing for AT&T Mobility customers,[7] and would be borne in addition to all other costs of providing service by the unaffiliated provider.[8] As consumers increasingly use mobile video services – a process which the practice of zero-rating mobile video usage will accelerate[9] – these Sponsored Data charges could reasonably be expected to increase even more. By contrast, AT&T incurs no comparable cost to offer its own DIRECTV Now service on a zero-rated basis. If we understand these facts correctly, AT&T seems to present the unaffiliated provider with a choice that is unreasonable on its face: either pay a Sponsored Data rate (resulting in a $16-$47 per month – or higher – incremental cash cost not incurred by AT&T) that would make it very difficult, if not infeasible, to offer a competitively-priced service, or instead require its customers to pay significant amounts for their own usage of data while AT&T's zero-rated DIRECTV Now service offers customers the same usage for free.

Your white paper also states that AT&T's practices here match analogous arrangements that the Commission has permitted in other affiliate transaction contexts over the years.[10] As an initial observation, the fact that the Commission has found transactions between upstream and downstream affiliates to be reasonable in some circumstances in the past does not in and of itself indicate that the specific program at issue here is reasonable. In fact, the examples you cite – and the distinctions between

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[5] Your white paper does not explain the basis for (or relevance of) its claim that the price AT&T charges unaffiliated video content providers for Sponsored Data is "is as low as the competitive wholesale rates that major wireless resellers pay AT&T for network capacity today when they commit to large purchase volumes." White Paper at 10; *see* question 7 in the attached Information Requests (requesting information on wholesale rates paid by wireless resellers). Nonetheless, we accept that claim for illustrative purposes, and use a relatively low estimate of $5.00 per gigabyte. One recent research report provided an estimate of reseller high-volume pricing of $8.00 per gigabyte in 2016, declining to around $4.40 over the next few years. JP Morgan Telecom, *Cable and Satellite: Industry Update, Election Impact and Wireless M&A Discussion* (Nov. 2016).

[6] These estimated monthly costs assume a Sponsored Data price of $5.00 per gigabyte and a video streaming rate of 1.5 megabits per second. *See, e.g.*, FCC, Broadband Speed Guide, https://www.fcc.gov/reports-research/guides/broadband-speed-guide (minimum download speed of 1.5 Mbps for streaming feature movies). The video streaming rate of 1.5 Mbps also is used as a benchmark for T-Mobile's Binge On service and for AT&T's Stream Saver feature. *See* AT&T, Frequently Asked Questions about Stream Saver, https://www.att.com/offers/streamsaver.html (last visited Dec. 1, 2016); T-Mobile, Company Information, Internet Services, http://www.t-mobile.com/company/company-info/consumer/internet-services.html. The LTE usage in this example was assumed to be the residual used after any customer use of Wi-Fi. *See* question 4 in the attached Information Requests (requesting additional information about actual Wi-Fi offload levels).

[7] AT&T, *The Revolution is Here: AT&T Offers 3 Ways to Stream Premium Video Content*, Nov. 28, 2016, http://about.att.com/story/att_offers_three_ways_to_stream_premium_video_content.html.

[8] Recent third-party commentary on the DIRECTV Now service suggests that costs such as programming, marketing, and other overhead approximate AT&T's retail rates for the service. *See* Moffett/Nathanson Research, *AT&T and DIRECTV Now: Did AT&T Really Blink? Running With Scissors (Part II)*, Nov. 29, 2016. DIRECTV, of course, makes no cash payment to participate in AT&T's Sponsored Data program.

[9] *See, e.g.*, *T-Mobile Quadruples Binge On Services, Now Over 100 Video Providers Stream Data-Free*, July 26, 2016, https://newsroom.t-mobile.com/news-and-blogs/binge-on-100-providers.htm (indicating that, based on T-Mobile's survey of edge providers participating in zero-rated Binge On service, 80% "are seeing customers watch longer, watch more frequently or watch more on mobile phones."). We note that the average adult who watches live and time-shifted television at home does so for approximately six hours per day. *See* Nielsen Total Audience Report, Q2 2016, Sept. 26, 2016, p.10, http://www.nielsen.com/us/en/insights/reports/2016/the-nielsen-total-audience-report-q2-2016.html.

[10] White Paper at 7.

those situations and the circumstances presented here – only confirm the seriousness of our concerns. As your white paper points out, in past cases where telecommunications carriers were vertically integrated with edge providers and provided network inputs both to their own affiliates and to unaffiliated providers, Congress and the Commission took steps to prevent the very well-recognized risks of unreasonable discrimination by incumbent carriers by requiring such carriers to "charge any unaffiliated edge provider the same nondiscriminatory rates that [they] charge[ ] [their] affiliates for use of the same telecommunications inputs."[11] In each of those cases, however, the validity of the comparisons between rates charged to affiliates and rates charged to third-party competitors were reinforced and accompanied by additional restrictions such as (1) structural separation and arm's-length dealings between the telecommunications carrier and edge provider affiliates[12] and/or (2) accounting safeguards and cost allocation requirements.[13] No such safeguards are present here.[14]

For the reasons outlined above and in our letter of November 9, we remain very concerned that AT&T's Sponsored Data program will "unreasonably interfere with or unreasonably disadvantage . . . edge providers' ability to make lawful content [or] . . . services . . . available to end users"[15] in violation of the Commission's Open Internet rules, and that the effect of AT&T's practice will be to preserve its already leading position in the market for multi-channel video services,[16] to the detriment of consumers and edge provider innovation. We are also concerned that the impacts of these practices, which could be reasonably expected to be extended to additional edge markets if permitted here, will go beyond video, potentially advantaging AT&T (or any other network owner employing similar practices) and its affiliates in a wide-range of usage-intensive services that rely on cloud-based solutions for businesses or consumers – such as hosted enterprise software or remote data storage – to the detriment of competing services not affiliated with an incumbent network operator.

I do agree that "transparency is essential" for the basis of the Bureau's final conclusions.[17] Your white paper accurately points out several such issues where additional facts are relevant, including the details of the pricing, packaging, and usage profiles for DIRECTV Now customers.[18] In order for the

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[11] *Id.* As "analogous" examples, the white paper cites Sections 272 and 274, enacted as part of the Telecommunications Act of 1996, *see* White Paper at 6 n.16 (citing 47 U.S.C. §§ 272, 274), and the Commission's *Computer II* and *Computer III* regimes, *see* White Paper at 17 n.7 (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (*Computer II*), subsequent history omitted; *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958 (1986) (*Computer III*), subsequent history omitted).

[12] *See* 47 U.S.C. § 272(a)(1)(A), (b)(1)-(9); § 274(a), (b)(1)-(5); *Computer II*, 77 FCC 2d at 475-83, paras. 233-54.

[13] *See* 47 U.S.C. § 272(b)(2); § 274(b)(3)-(4); *Computer II*, 77 FCC 2d at 476-77, paras. 236-37; *Computer III*, 104 FCC 2d at 1074-76, paras. 234-36. *See also* 47 U.S.C. § 252(d)(1); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15656-61, 15846-60, paras. 307-16, 679-711 (1996), *aff'd in pertinent part*, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 501-06 (2002) (non-discriminatory, forward-looking standard for prices of network inputs to safeguard competition).

[14] *See Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5853, 5858-260, paras. 517, 528 (2015) (*Open Internet Order*) (forbearing from applying cost allocation/accounting and Section 272 safeguards), *aff'd, United States Telecom Ass'n v. FCC*, 825 F.2d 674 (D.C. Cir. 2016), *pets. for rehearing pending*. *See also Open Internet Order*, 30 FCC Rcd at 5612, para. 37 (explaining benefits of forbearance and "'light-touch' approach for the use of Title II" to "directly further the public interest in an open Internet and more, better, and open broadband"); *id.* at 5804-08, 5814, paras. 434-39, 451 (same).

[15] 47 C.F.R. § 8.11.

[16] *See* Mike Dano, *Top 7 cable, satellite and telco pay-TV operators in Q3*, Nov. 15, 2016, http://www.fiercecable.com/cable/top-7-cable-satellite-and-telco-pay-tv-operators-q3-ranking-comcast-to-directv-to-charter-to.

[17] White Paper at 10.

[18] *Id.*

Bureau to complete this review and ensure such transparency, I therefore request that AT&T provide answers to the additional questions set forth in the attached Information Requests by December 15.

I look forward to your response. Please contact me with any questions.

Sincerely,

Jon Wilkins
Chief, Wireless Telecommunications Bureau
Federal Communications Commission

## INFORMATION REQUESTS[1]

*Usage of Video Services on Mobile Broadband Networks*

1. a. Please provide the following information regarding usage of the DIRECTV App (*i.e.*, the version offered prior to the introduction of DIRECTV Now):

   - average and median monthly usage (expressed both in minutes and in gigabytes), and
   - average and median percentage of usage (expressed both in minutes and in gigabytes) that such users stream and/or download video via Wi-Fi rather than the cellular network.

   For each of the foregoing, please provide separate usage data for subscribers whose usage is zero-rated (*i.e.*, using features such as AT&T's "Data Free TV" and T-Mobile's "Binge On") and those whose usage is not zero-rated by their network provider.[2]

   b. Please provide the same usage information described above for AT&T Mobility subscribers who utilize the video streaming apps of leading unaffiliated mobile video services such as Netflix, Hulu and Sling.

2. Please provide complete information on the various "channel packages and pricing for DIRECTV Now bundles"[3] for each service tier, including (a) the current and any planned future prices for each package or bundle, (b) the current and any planned future channels made available to users of each tier, and (c) the current and projected number of subscribers to each tier.

3. The white paper states that DIRECTV is vigorously seeking to "challenge cable TV incumbents" by marketing "consumer-friendly . . . video delivery models;" and the average adult who watches live and time-shifted television at home does so for approximately six hours per day.[4] What monthly usage levels (expressed both in minutes and in gigabytes) does AT&T expect for DIRECTV Now per average and median subscriber?

4. Based on current experience with other mobile video content delivered over AT&T's network, what percentage of time (in minutes) and data usage (in gigabytes) does AT&T expect DIRECTV Now users to consume in streaming or downloading video via Wi-Fi rather than cellular networks, on average?

5. Please indicate the average and median quantities of data (expressed in gigabytes) that AT&T Mobility subscribers consume each month for streaming or downloading video of any form, and the average and median percentages of such data used by each subscriber to stream or download video from DIRECTV or other providers affiliated with AT&T vs. unaffiliated providers.

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[1] We would entertain a request for confidential treatment of the responses to these questions pursuant to 47 C.F.R. §§ 0.457(d) & 0.459.

[2] Please exclude subscribers who have not used the app more than a *de minimis* amount (*i.e.*, those who may have downloaded, activated, and/or tried out the app but ultimately did not become regular users).

[3] White Paper at 10.

[4] *Id.* at 1; Wilkins 12/1/16 Letter at 2 n.9.

*Sponsored Data Arrangements with Unaffiliated Video Providers*

6. Please identify each unaffiliated provider of video content with which AT&T has conducted (or is currently in the process of conducting) discussions or negotiations, or has entered formal or informal agreements, regarding their participation in AT&T Mobility's Sponsored Data program, and describe such pending or past discussions, negotiations, and agreements. How many unaffiliated providers have been informed of the Sponsored Data rate after executing required non-disclosure agreements?

*Basis for Assertions in White Paper*

7. The white paper refers to the "wholesale rates that major wireless resellers pay AT&T for network capacity today when they commit to large purchase volumes."[5] What are those rates?

8. Please provide us with information to support the statement in the white paper that AT&T's "mobile consumers [pay] . . . retail rates [that] are almost always higher per unit of actual consumption than the wholesale rates paid by sponsored data participants,"[6] given that the retail-level impact of sponsored data is to make usage free to the end-user. Please describe in detail how AT&T Mobility calculates the rates retail customers pay per unit of actual consumption.

9. In your white paper, you note that "AT&T Mobility incurs major costs in providing Data Free TV" and other streaming video offerings.[7] How does AT&T account for AT&T Mobility's recovery of such costs from its DIRECTV affiliate for the latter entity's usage of sponsored data? Do the respective corporate entities record payments from DIRECTV to AT&T Mobility for sponsored data usage on their books of account? What accompanying network cost does AT&T Mobility associate with that revenue?

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[6] White Paper at 8.

[7] *Id.* at 3.