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Hearings on Competition and Consumer Protection in the 21st Century	)	Project No. P181201

COMMENTS OF AT&T SERVICES INC.

RESPONSE TO ISSUE 2

David L. Lawson
James R. Wade
Robert C. Barber
AT&T SERVICES INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2121

Timothy J. Muris
Jonathan E. Nuechterlein
C. Frederick Beckner III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

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<u>RESPONSE TO ISSUE 2</u>:

"Competition and consumer protection issues in communication, information, and media technology networks."

1. Competition and Technological Convergence Have Undermined Any Rationale for the Traditional Siloed Approach to Internet Policy.

Section 5 of the FTC Act authorizes the Commission to police "[u]nfair methods of competition" and "unfair or deceptive acts and practices" throughout most of the economy. 15 U.S.C. § 45(a)(1). But Congress also subjected certain industries to comprehensive regulation by sector-specific agencies such as the Federal Communications Commission. *See*, *e.g.*, 47 U.S.C. § 201 *et seq*. That siloed approach may have been appropriate for most of the twentieth century, before competition took hold in communications markets. But it has become increasingly counterproductive as competition and convergence have transformed these markets beyond recognition and blurred the distinctions between them and various online service markets. And the FCC itself has now encouraged this Commission to fold ISPs into the larger Section 5 framework applicable to "the entire Internet ecosystem."[1]

That step is not only appropriate, but necessary, as technological convergence has placed communications infrastructure companies in direct competition with tech companies. The internet has created incalculable consumer benefits by enabling online upstarts to redraw traditional market boundaries and expose industry incumbents to disruptive and often fatal competition. Such disruption is now as prevalent in communications markets as any other.

Consider the video entertainment industry, which has traditionally been divided into three market levels: video production (studios), programming aggregation (broadcast and cable TV

[1] *See* Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 ¶ 142 n.514 (2018) (*"FCC Internet Freedom Order*"); *see also id.* ¶ 208 (noting "the return of jurisdiction to the Federal Trade Commission to police ISPs for anticompetitive acts or unfair and deceptive practices").

networks), and subscription-based distribution (cable and satellite pay-TV providers).[2] Until recently, there has been only limited vertical integration between studios or programmers and distributors.[3] Today, however, online insurgents are erasing the distinctions between those long-stable categories of market participants. For example, Netflix is simultaneously the world's largest video distributor, with more than 130 million streaming subscribers,[4] and one of the world's preeminent content producers. Indeed, "Netflix will spend $12-13 billion on original programming this year," which is "vastly more than legacy studios are spending: HBO spent $2.5 billion on content in 2017, and even CBS spent just $4 billion."[5] And online video-streaming companies such as Netflix and Amazon "continue to gain market share in the video programming and distribution industry," while traditional cable and satellite TV providers "are losing subscribers at a steady clip."[6]

These online video providers are fundamentally reshaping the video entertainment industry, and they are succeeding largely because they are breaking down traditional industry distinctions. In particular, these online firms have used the data they glean from their millions of

[2] Distributors include all companies that contract directly with consumers to deliver video content. Distributors today deliver that content either via their own dedicated physical transmission facilities (as traditional cable or satellite companies do) or "over the top" of internet infrastructure. The largest online video distributors, such as Netflix or Google, operate multi-billion dollar content-delivery networks that they use to ensure high-quality streaming experiences for their subscribers.

[3] There has, however, been considerable vertical integration between studios and aggregators (*e.g.*, ABC/Disney and NBC/Universal) since the 1990s, when the FCC eliminated regulatory restrictions designed to prop up "independent" programmers. *See Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (invalidating "financial interest and syndication" rules).

[4] Statista, *Number of Netflix streaming subscribers worldwide from 3rd quarter 2011 to 1st quarter 2018 (in millions)*, https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/ (visited Aug. 17, 2018).

[5] David Morris, *Netflix Is Expected to Spend up to $13 Billion on Original Programming This Year*, Fortune (July 8, 2018); *see also Netflix Is Moving Television Beyond Time-Slots and National Markets*, The Economist (June 30, 2018) (Netflix "will spend $12bn-13bn this year—more than any studio spends on films, or any television company lays out on stuff that isn't sport").

[6] *United States v. AT&T Inc.*, No. 17-2511, slip op. at 14 (D.D.C. June 12, 2018).

direct customer relationships as distributors to enhance the appeal of their programming—for example, by making content more responsive to the preferences of specific viewer categories and by fine-tuning personalized recommendations to individual subscribers.[7]

Much the same disruptive dynamic can be seen in the ascendance of digital advertising over conventional mass-media advertising models. Traditionally, television networks and, to a lesser extent, cable and satellite pay-TV companies have funded their operations by selling time slots to advertisers, who show the same commercials to everyone within a viewing area. That method guarantees broad distribution of each commercial but suffers from an obvious inefficiency: most viewers of any given commercial have no interest in the products being advertised. Google, Facebook, and other digital advertising giants are dramatically disrupting that traditional business model by using consumer data to target ads to the consumers most likely to respond favorably to them—and then supplying advertisers with valuable metrics on the success of these campaigns.[8]

Traditional communications companies must now respond to these competitive challenges by harnessing many of the same efficiencies that have propelled Netflix, Google, and Facebook to success in their respective markets. As discussed next, consumers benefit when policymakers and enforcement officials enable these communications companies to compete free from asymmetric regulatory burdens.

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[7] *Id.* at 19-20.

[8] *See*, *e.g.*, Dana Feldman, *U.S. TV Ad Spend Drops As Digital Ad Spend Climbs To $107B In 2018*, Forbes (Mar. 28, 2018), https://www.forbes.com/sites/danafeldman/2018/03/28/u-s-tv-ad-spend-drops-as-digital-ad-spend-climbs-to-107b-in-2018/ ("With the swift acceleration of cord-cutting and the upsurge of over-the-top (OTT) viewing, spending on TV ads will slip 0.5% in 2018 to $69.8 billion …. Meanwhile, total digital ad spending in the U.S. will climb 18.7% this year to $107.3 billion.").

2. The Commission Should Apply a Unified Framework for Analyzing Competition and Consumer-Protection Issues in This Convergent Environment.

Consumers benefit when policymakers eliminate outdated industry-specific restrictions and thereby enable traditional communications companies to compete on a level playing field with online giants. The FCC's recent elimination of intrusive broadband regulation is an important step in the right direction. As the FCC recognized, hamstringing ISPs with asymmetric regulatory burdens would serve no valid regulatory objective and would merely stifle competition with online incumbents to the detriment of consumers. This Commission should take account of the lessons the FCC has learned from its own excessively regulatory efforts to subject ISPs to radically different rules from the rest of the ecosystem on two critical subjects: privacy and net neutrality.

Privacy and data security. In its 2016 comments in the FCC's broadband privacy proceeding, this Commission's staff made two points of central importance here. First, because information is the fuel of the modern economy, policymakers must carefully tailor any intervention in the collection and use of consumer data to target genuinely harmful practices without undermining productive uses.[9] Second, any rules applicable to ISPs should be harmonized with the general privacy and data security framework long employed by this Commission.[10] Indeed, saddling ISPs with special privacy-related burdens would be particularly counterproductive because it would disable them from posing a much-needed competitive challenge to the digital advertising incumbents.

[9] *See*, *e.g.*, Comments of BCP Staff, FCC WC Docket No. 16-106, at 22-23 (May 27, 2016).

[10] *See id.* at 8; *see also id.* at 27 ("The FTC has taken a technology-neutral, process-based approach to security for two decades.").

The FCC did not heed that call for competitive neutrality and instead subjected one set of internet companies—ISPs—to a battery of onerous regulatory obligations. Congress quickly nullified those rules under the Congressional Review Act,[11] and the FCC's *Internet Freedom Order* has now "return[ed] jurisdiction to regulate broadband privacy and data security to [this Commission], the nation's premier consumer protection agency and the agency primarily responsible for these matters in the past."[12] As it resumes that role, the Commission should take an important lesson from the FCC's failed experiment with ISP-specific privacy rules. Those rules ultimately rested on the premise, pressed by FCC-focused interest groups, that ISPs have greater visibility into online user behavior than so-called "edge" providers. As we discuss in our separate response to Issues 4 and 5, that premise is demonstrably false, and there also is no other basis for subjecting ISPs to asymmetrically burdensome privacy or data security requirements.

Net neutrality. When the FCC restored ISP jurisdiction to this Commission in the *Internet Freedom Order*, it did so in the context of repealing an open-ended, ISP-specific set of regulatory prohibitions. This Commission should respect the policy judgment underlying that FCC decision.

AT&T and all other major ISPs have always supported core internet openness principles, such as transparency and no-blocking/no-throttling rules.[13] But the FCC superimposed on those unobjectionable requirements an additional battery of vague and intrusive rules rooted in the "dumb pipe" mode of public-utility-style regulation applicable to twentieth-century telephone

[11] Pub. L. No. 115-22, 131 Stat. 88 (2017), *nullifying* Report & Order, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 31 FCC Rcd 13911 (2016).

[12] *FCC Internet Freedom Order* ¶ 181 (footnote omitted).

[13] *E.g.*, Randall Stephenson, AT&T Chairman and CEO, *Consumers Need an Internet Bill of Rights*, Jan. 24, 2018 ("Stephenson Letter"), https://www.attpublicpolicy.com/consumer-broadband/consumers-need-an-internet-bill-of-rights/.

monopolists. Those rules failed even the most basic cost-benefit analysis. As the FCC explained when rescinding them:

> [E]conomic theory, empirical studies, and observational evidence support reclassification of broadband Internet access service as an information service rather than the application of public-utility style regulation on ISPs. We find the [common carrier] classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation. At the same time, [that] classification … has had no discernable incremental benefit …. The regulations promulgated under the Title II regime appear to have been a solution in search of a problem.[14]

In particular, these public-utility-style rules harmed consumers both because they were interpreted to ban business practices under a competitor-focused interpretation of "discrimination" that ignored consumer welfare and because unpredictability in the FCC's application of those rules suppressed innovative business models from their inception.[15] Moreover, any "neutrality" or "nondiscrimination" principles, insofar as they are imposed, should be not only predictable in application, but applied evenhandedly. With these concerns in mind, AT&T continues to urge Congress to enact an Internet Bill of Rights that would apply to all internet companies, preserve the open internet, and protect consumer privacy.[16]

The Commission should also recognize the work of industry stakeholders to develop "best practices" that can be enforced through voluntary commitments. For example, AT&T and

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[14] *FCC Internet Freedom Order* ¶ 87.

[15] For example, the FCC's Internet Conduct standard prohibited any business plan that, as viewed by a majority of FCC Commissioners, violated amorphous, eye-of-the-beholder principles of internet "openness" and "neutrality," as informed by half a dozen non-exhaustive "factors," such as "free expression" by edge providers. This radically indeterminate regime chilled ISPs from experimenting with innovative business models and prohibited them from offering optional service features—such as sponsored data—that demonstrably benefited consumers by offering them the economic equivalent of bundled discounts. *See* Comments of AT&T Servs., WC Docket No. 17-108, at 55-59 (FCC July 17, 2017), https://www.fcc.gov/ecfs/.

[16] *See* Stephenson Letter, *supra.*

other major ISPs have made public and enforceable commitments to core internet openness principles in their terms of service.[17] As this and similar initiatives illustrate, industry self-governance, combined with transparency and this Commission's oversight, can be a highly successful mechanism for protecting consumer interests.

[17] *See id.* ("AT&T is committed to an open internet. We don't block websites. We don't censor online content. And we don't throttle, discriminate, or degrade network performance based on content. Period.").