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COMMENTS OF AT&T SERVICES INC.

RESPONSE TO ISSUES 1 AND 3

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RESPONSE TO ISSUES 1 AND 3:

"The state of antitrust … law and enforcement," including "the continued viability of the consumer welfare standard," particularly for "platform business models."

For several decades, American antitrust law has benefited from increasing doctrinal rigor rooted in sound economic analysis, and this Commission has played a central role in that welcome development. Antitrust's focus on consumer welfare is a key reason why America has such a vibrant and innovative economy today—and why the world's technology leaders are headquartered in the United States rather than in foreign jurisdictions, where regulators more readily blur the line between harm to consumers and harm to competitors and are thus more likely to protect competitors at the expense of innovation and consumers.[1]

Nonetheless, various critics have attacked current antitrust doctrine precisely *because* it focuses singlemindedly on consumer welfare. As discussed below, these critics would fundamentally alter antitrust law to serve objectives apart from—and often inconsistent with—the interests of consumers, such as protecting inefficient or non-innovative businesses from vigorous competition by larger companies that are more efficient or more innovative. They express nostalgia for the antitrust policies of the 1950s and 1960s, when courts applied a loose collection of such incommensurable values to decide, on a case-by-case basis, whether to condemn a company's conduct as "unfair" or "predatory" even if it demonstrably benefited consumers. Acknowledging this critique, the Commission has now sought comment on "the continued viability of the consumer welfare standard for antitrust law enforcement and policy."

[1] *See*, *e.g.*, Remarks of Deborah Platt Majoras, Dep. Ass't A.G., *GE-Honeywell: The U.S. Decision* (Nov. 29, 2001) ("[W]e may have a fundamentally different view about the comparative ability of markets vs. government regulators to get it right.… Some have suggested … that the EU is much more receptive to complaints from competitors than are the Antitrust Division and the FTC."), https://www.justice.gov/atr/speech/ge-honeywell-us-decision; *see also* Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 Mich. L. Rev. 955 (2017).

The Commission should see this criticism of the consumer welfare standard for what it is: a well-intentioned but analytically unsound movement that, if applied, would harm consumers and threaten America's status as the world leader in innovation. Instead, this Commission should continue to champion the consumer welfare standard as the sole criterion for antitrust intervention in all settings, including online platform markets. And it should reaffirm the importance of economic rigor and empirical analysis in evaluating how best to measure and promote consumer welfare.

1. Remembering the Mistakes of the Past.

Fifty years ago, antitrust was an untenable hodgepodge of subjective value judgments, often applied to protect inefficient businesses against low-priced competitors at the expense of consumers. A brief sampling of some mid-century cases illustrates what happens when antitrust becomes unmoored from a serious economic inquiry into consumer welfare.

In *Brown Shoe Co. v. United States*,[2] the Supreme Court upheld an injunction barring the merger of a shoe manufacturer and a shoe distributor in part because the merger "foreclosed" competitors from 2%-5% of the relevant markets, which were unconcentrated. *Brown Shoe* is often cited for its irrational and now-superseded hostility to vertical integration.[3] But the most astonishing passage in *Brown Shoe* holds that sometimes the interests of inefficient competitors *should* trump consumer interests. While acknowledging that vertical integration can be

[2] 370 U.S. 294 (1962).

[3] *See*, *e.g.*, 7 Areeda, *Antitrust Law* ¶ 1511e2, at 517-18 (4th ed. 2017) (older Supreme Court precedent addressed vertical mergers "under an aggressive standard that struck down many mergers that would never be challenged today" because "our theory and most of our law of vertical integration have changed very considerably since that time"); *see also United States v. Von's Grocery Co.*, 384 U.S. 270, 272, 277 (1966) (condemning, as part of a "threatening trend toward concentration," a cost-reducing merger between two grocery chains that together accounted for 7.5% of the relevant market). AT&T discusses vertical integration in greater detail in its separate response to Issue 6.

"beneficial to consumers" by enabling the merged firm to increase its own efficiency and lower retail prices, the Court nonetheless considered it preferable "to promote competition through the protection of viable, small, locally owned business[es]" even though "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[4]

The Supreme Court's 1967 decision in *Utah Pie Co. v. Continental Baking Co.*[5] illustrates just how irrational antitrust enforcement could become under this approach. The Court there upheld a jury award against national frozen-pie companies that, without "cost justification," had selectively lowered their prices to compete more effectively with a local pie company that controlled two-thirds of the Salt Lake City market. The defendants were not engaged in "predatory pricing" under modern standards—for example, no defendant plausibly hoped to drive competitors from the market and then raise its own prices to monopoly levels.[6] Indeed, the "targeted" local company retained more than 45% of the market years after entry by the national companies.[7]

The Court nonetheless found it troubling that the national competitors had selectively lowered prices in Utah and not elsewhere in order to undersell the local incumbent, which—the Court took pains to note—was family-operated and had "only 18 employees."[8] Most remarkably, the Court held that antitrust should protect such incumbents from "the financial pinch" they feel when competition forces them to "reduce [their] price to a new all-time low in a

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[4] 370 U.S. at 344.

[5] 386 U.S. 685 (1967).

[6] *Cf. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). *Brooke Group* dismissed *Utah Pie* as an "early judicial inquiry" and effectively overruled it. *Id.* at 221.

[7] 370 U.S. at 689.

[8] *Id.*

market of declining prices."[9] Antitrust scholars did not need to await the ascendance of the Chicago School a decade later to see the paradox. As Yale professor Ward Bowman remarked the same year, *Utah Pie* exemplified the Court's "disregard for the central purpose of antitrust, the promotion of consumer welfare through the promotion of a competitive market process."[10]

The Justice Department's successful war on supermarket chain A&P also vividly illustrates antitrust's mid-century disregard of economic logic. In the late 1940s, DOJ persuaded a district court and then the Eighth Circuit to hold A&P and its senior executives criminally liable for using the company's unmatched scale and scope to bypass food wholesalers and undersell smaller and less efficient grocery stores.[11] The government's basic submission was that A&P's aggressive tactics may have been good for its customers but were too hard on its retail competitors and the displaced middlemen. In the words of one prosecutor, "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."[12] The district court embraced that theme in a lengthy opinion devoid of limiting principles that would protect any large business from criminal liability for using its efficiencies to cut prices and win customers away from smaller competitors. Instead

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[9] *Id.* at 699-700.

[10] Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70, 70 (1967). Justice Stewart made much the same point in his *Utah Pie* dissent: "[T]he Court has fallen into the error of … protecting competitors, instead of competition …. [The] cases [on which defendants relied] are said [by the majority] to be inapposite because they involved 'no general decline in price structure,' and no 'lasting impact upon prices.' But lower prices are the hallmark of intensified competition." 386 U.S. at 705-06 (Stewart, J., dissenting).

[11] *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). *See generally* Timothy Muris & Jonathan Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, Geo. Mason L. & Econ. Research Paper No. 18-15 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186569.

[12] Marc Levinson, *The Great A&P and the Struggle for Small Business in America* 83 (2011). As one scholar noted a decade later, "the government lawyers, although competent in their profession, were so sadly illiterate in economic facts and economic analysis that they simply did not realize what they were saying." *See* Morris Adelman, *A&P: A Study in Price-Cost Behavior and Public Policy* 16 (1959).

of analysis, the district court offered impressionistic value judgments, often delivered with sensory metaphors: A&P's business model, it found, was "odorous" and "t[ook] on a polluted colored light," though only when "considered as a whole."[13]

Here, too, antitrust scholars did not need to wait for any particular "school" of antitrust to develop before recognizing that such decisions undermined consumer interests and thus the whole purpose of the antitrust laws. In 1949, a young Donald Turner—who later coauthored the leading antitrust treatise and led the Antitrust Division in the Johnson Administration—sharply criticized a "serious contradiction" in the *A&P* court's theory of liability.[14] As he noted, DOJ and the court had not even tried to "draw the line between 'predatory' and 'competitive' price cutting," and thus their "general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process.… Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo."[15]

2. The Commission should continue to champion antitrust's singular focus on consumer welfare, including in "platform" markets.

The chilling effect of *A&P*, *Utah Pie*, and similar decisions did in fact "consign a good share of competition to limbo" throughout the mid-twentieth century. That approach harmed consumers and the economy at large by forcing consumers to pay higher prices simply to protect the margins of inefficient firms, suppressing the innovation permitted by scale economies and vertical integration, and creating a climate of radical regulatory uncertainty, given the absence of clear guidelines for lawful business conduct.

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[13] *A&P*, 67 F. Supp. at 658, 678.

[14] Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case*, 58 Yale L.J. 969, 970 (1949); *see also* Adelman, *supra* (similar analysis).

[15] 58 Yale L.J. at 977.

Fortunately, current antitrust law, which this Commission has beneficially shaped for many decades, has replaced that doctrinal morass with a more coherent approach rooted firmly in economic analysis of consumer welfare. Among its basic precepts, current doctrine now encourages conduct that increases or reflects efficiency, including vertical integration;[16] observes bright-line rules that keep regulatory uncertainty from chilling discounts, investment, and innovation;[17] and overall elevates consumer interests over the interests of individual competitors.[18] Antitrust is a big tent, and there is obviously room for disagreement about which principles will best serve consumers over the long term. But there is broad consensus among serious antitrust lawyers and economists that antitrust should serve consumer welfare above competing values.[19]

Policymakers should continue following that consensus and heed the lessons of cases like *Utah Pie* and *A&P* as they consider proposals from both the left and the right for a return to antitrust populism disconnected from sound economics.[20] As BC Director Bruce Hoffman explains:

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[16] *See*, *e.g.*, *Comcast Cable Commc'ns, LLC v.* FCC, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (discussing evolution of case law regarding vertical transactions).

[17] *See*, *e.g.*, *Brooke Grp.*, 509 U.S. at 221-224; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 408, 414 (2004).

[18] *See*, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

[19] *See*, *e.g.*, Carl Shapiro, *Antitrust in a Time of Populism* (Oct. 24, 2017), https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf; Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI Antitrust Chron. 1 (Oct. 2017).

[20] *See*, *e.g.*, Barry Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law*, The Nation (June 8, 2011) (criticizing antitrust for promoting "efficiency" and "the 'welfare' of the 'consumer'" rather than "protect[ing] the opportunity of the citizen producer") (some internal quotation marks omitted); Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, The Am. Conservative, Sept. 19, 2017 (exhorting conservatives "to break from the principles of free market fundamentalism" and join "in a bipartisan war" against "modern-day robber barons").

> [T]he consumer welfare standard that is currently the touchstone for antitrust enforcement in the United States … is the result of decades of experience in the United States with failed standards, such as protecting competitors at the expense of consumers. This prolonged experiment is somewhat unique to United States, largely because we've had antitrust laws on the books and actively enforced them for so long that we've had lots of opportunities to get our approach wrong—opportunities that we have often taken. But having made those mistakes, we want to make sure we don't repeat them.[21]

Some critics argue that "a consumer welfare-based approach is failing to detect and deter anticompetitive harms in the context of internet platforms,"[22] implying that platform markets are a new phenomenon and that addressing them requires dispensing with consumer welfare as the main focus of antitrust analysis. But platform markets are not new. For example, A&P was a vertically integrated platform, intermediating between consumers and a vast range of suppliers. And current antitrust doctrine, based on consumer welfare, would have supplied a far better outcome in that case than did the competitor-focused doctrine to which today's critics would return. There is also an extensive economic scholarship today on multi-sided platforms, providing useful guidance for courts and enforcement authorities as they apply antitrust principles to online platform markets.[23] Again, reasonable economists and jurists can disagree about what types of intervention in those markets would promote consumer welfare, as illustrated by the majority and dissenting opinions in *American Express*.[24] But consumer welfare

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[21] Remarks of D. Bruce Hoffman, Acting BC Director, *Competition Policy and the Tech Industry—What's At Stake?*, CCIA, at 2 (Apr. 12, 2018) ("Hoffman CCIA Remarks").

[22] Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 745 n.187 (2017).

[23] *See*, *e.g.*, Filistrucchi, Geradin, van Damme, & Affeldt, *Market Definition in Two–Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293 (2014); Evans & Schmalensee, *Markets With Two–Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); Klein, Lerner, Murphy, & Plache, *Competition in Two–Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571 (2006); Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two–Sided Markets*, 2005 Colum. Bus. L. Rev. 515; Evans & Noel, *Defining Antitrust Markets When Firms Operate Two–Sided Platforms*, 2005 Colum. Bus. L. Rev. 667.

[24] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

itself, as understood by modern economic analysis, can and should remain the focus of antitrust policy. "[A]ntitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy."[25]

At bottom, many of the new antitrust populists are not arguing about how best to promote consumer welfare in the first place, as they acknowledge. Instead, they seek to reshape antitrust to promote values *apart from* consumer welfare,[26] even at the expense of higher prices or more limited consumer choice. Whatever the merit of these critics' underlying policy objectives, use of *antitrust law* to pursue them would greatly reduce consumer welfare, both by deterring large firms from offering consumers a better deal than their rivals can match and also by injecting enormous uncertainty into what types of conduct will subject companies to enforcement actions. For example, at what point should a large, highly efficient firm be subject to treble-damages liability under the Sherman Act for persistently offering consumers low prices that are above its own costs but below those of less efficient mom-and-pop retailers? How is an enforcement agency or court to know how to balance the interests of consumers in low prices against the desire of less efficient retailers to face weaker competition from larger competitors? And how should this Commission weigh the consumer-benefiting efficiencies of a horizontal merger, which may well involve the elimination of redundant jobs, against a new policy objective of maintaining employment levels? There are no sensible competition policy answers to questions

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[25] Richard Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001); *see also* Hoffman CCIA Remarks at 12 ("[T]he antitrust laws are robust, forward-looking, and demonstrably capable of evolving with the times. Those laws are fully applicable to the technology industry."); Jonathan Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, ANTITRUST 89 (Fall 2001).

[26] *See*, *e.g.*, Khan, *supra*, at 737 (advocating that antitrust be reoriented to protect, *inter alia*, "our interests as workers" and "producers"); Lynn, *supra* (advocating that antitrust be reoriented to protect "liberty" rather than "more stuff").

like these, which explains why economists and legal scholars across the political spectrum broadly support maintenance of antitrust's singular focus on consumer welfare.

In sum, whatever the underlying merit of the policy concerns underlying the new populism, antitrust is not the appropriate means of addressing them. This Commission should hold fast to that point, both in its enforcement decisions and in its public advocacy.