



Federal Communications Commission
Washington, D.C. 20554

November 9, 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:

I am writing to express serious concerns about the impact of AT&T Mobility's "Sponsored Data" program¹ on competition for mobile video services. Based on public reports as well as information you have provided to us, the Wireless Telecommunications Bureau believes that the terms and conditions under which Sponsored Data is offered to content providers unaffiliated with AT&T, combined with AT&T's current practice of zero-rating DIRECTV video applications for AT&T Mobility subscribers, may obstruct competition and harm consumers by constraining their ability to access existing and future mobile video services not affiliated with AT&T. We request that you respond to address these concerns by no later than November 21, 2016.

On September 7, AT&T announced the "Data Free TV" feature of its DIRECTV App. The feature allows AT&T Mobility customers who also subscribe to DIRECTV's satellite TV service to stream DIRECTV content through the App on a zero-rated basis, *i.e.*, without such usage counting against subscribers' monthly data allowances under their mobile service plans.² AT&T has also announced plans to launch another broadband-delivered video offering – DIRECTV Now – in the near future, which will be zero-rated for AT&T Mobility subscribers who choose to use it, regardless of whether they subscribe to DIRECTV's satellite TV service.³

Our concern is not with zero-rating *per se*. To the contrary, the Commission acknowledged in the *2015 Open Internet Order* that zero-rating-based business models may, in some instances, provide consumer and competitive benefits.⁴ The Commission explained that it would "look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each

¹ The phrase "Sponsored Data" as used in this letter refers to AT&T's specific program.

² AT&T Newsroom, *Watch It Anywhere with AT&T DIRECTV*, Sept. 7, 2016, http://about.att.com/story/watch_it_anywhere_with_att_directv.html.

³ Colin Gibbs, *AT&T's Stephenson: DirecTV Now to Offer 100-plus Channels of Zero-Rated Video for Wireless Subs*, Fierce Wireless, Sept. 21, 2016, <http://www.fiercewireless.com/wireless/at-t-s-stephenson-directv-now-to-offer-100-plus-channels-zero-rated-video-for-wireless>; Thomas Gryta, *AT&T Seeks to Shake Up Pay TV*, Wall Street Journal, Oct. 19, 2016, <http://www.wsj.com/articles/at-t-seeks-to-shake-up-pay-tv-1476882003>.

⁴ *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5666-67, para. 151 (2015) (*2015 Open Internet Order*), *aff'd*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for reh'g pending*. As we noted there, some commenters argued that zero-rating may "increase choice and lower costs for consumers" and "support continued investment in broadband infrastructure." *Id.*

individual case, and take action as necessary.”⁵ Consistent with this guidance, the focus of this letter is the specific impact of AT&T’s zero-rating practice on competition, as implemented through the terms and conditions of AT&T’s Sponsored Data program.

As we understand it, Sponsored Data is an integral element of the Data Free TV and DIRECTV Now offerings. Press reports have described the AT&T position as “[o]ther content providers can do the same thing [zero-rate their offers] through our Sponsored Data program.”⁶ According to AT&T, DIRECTV’s internal transfer payment is made at the same rate charged to other, unaffiliated, Sponsored Data participants. Based on these statements, we understand that AT&T views DIRECTV’s participation in Sponsored Data as nondiscriminatory because it is on equal footing with that of third parties who elect to participate in the program.

The position that the participation of DIRECTV in Sponsored Data is the same as that of third parties, however, fails to take account of the notably different financial impact on unaffiliated providers. For example, while there is no cash cost on a consolidated basis for AT&T to zero-rate its own affiliate’s mobile video service (since DIRECTV’s “cost” of Sponsored Data is equal to AT&T Mobility’s Sponsored Data “revenue”), an unaffiliated provider’s Sponsored Data payment to AT&T Mobility is a true cash cost. Moreover, based on the information you have provided,⁷ it appears that, at foreseeable usage levels of zero-rated mobile video services, the Sponsored Data charge to a third-party video competitor could be significant. Indeed, it is not difficult to calculate usage scenarios in which an unaffiliated provider’s Sponsored Data charges alone could render infeasible any third-party competitor’s attempt to compete with the \$35 per month retail price that AT&T has announced for DIRECTV Now.⁸

Unaffiliated video providers not purchasing Sponsored Data would likewise face a significant competitive disadvantage in trying to serve AT&T Mobility’s customer base without zero-rating. Their potential subscribers would have to take into account the total cost they would incur by using the unaffiliated provider’s service – which would include not only the proportional monthly usage costs of their AT&T Mobility data plan, but also overage fees and/or reduced transmission speeds if their consumption of the third party’s video content results in data usage in excess of the maximum allowed under their plan.⁹ AT&T Mobility customers subscribing to AT&T’s own zero-rated DIRECTV services would not encounter these costs or impacts.

Under either option for competing with AT&T’s video services, unaffiliated video content providers appear to confront significant disadvantages from the combined impact of AT&T Mobility’s

⁵ *Id.* at 5668, para. 152.

⁶ Jon Brodtkin, *AT&T, Owner of DirecTV, Exempts DirecTV from Mobile Data Caps*, Ars Technica, Sept. 7, 2016, <http://arstechnica.com/information-technology/2016/09/att-owner-of-directv-exempts-directv-from-mobile-data-caps/>.

⁷ See Letter from Melissa Waksman, Executive Director, Senior Legal Counsel, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (Oct. 25, 2016) (requesting confidential treatment of certain information contained in an attached letter from Matthew Nodine, Assistant Vice President-Federal Regulatory, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (Oct. 25, 2016)).

⁸ Marguerite Reardon, *AT&T Prices DirecTV Now at \$35 a Month*, CNET, Oct. 25, 2016, <https://www.cnet.com/news/at-t-prices-directv-now-at-35-a-month/> (reporting AT&T’s announcement of the \$35 per month retail price).

⁹ We understand that AT&T typically does not charge overage fees for most subscribers who exceed their data allotments, but does reduce those subscribers’ speeds to 128 Kbps.

Sponsored Data fees and zero-rating of its own DIRECTV offerings. We are therefore concerned that this combination appears to present significant anti-competitive effects.

Charges and practices by telecommunications carriers that risk such harms have long been the subject of review by the Commission to determine whether they are unjust, unreasonable, or unreasonably discriminatory. Specifically, with respect to zero-rating, the Commission has noted mobile broadband providers' zero-rated plans as having "the potential to distort competition."¹⁰ Section 8.11 of the Commission's rules prohibits broadband providers from engaging in practices that "unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or edge providers' ability to make lawful content, applications, services, or devices available to end users."¹¹ When applying this standard, one of the specifically identified factors in the analysis is the effect of a provider's practices on competition. As the Commission explained:

Practices that have anti-competitive effects in the market for applications, services, content, or devices would likely unreasonably interfere with or unreasonably disadvantage edge providers' ability to reach consumers in ways that would have a dampening effect on innovation, interrupting the virtuous cycle. As such, these anticompetitive practices are likely to harm consumers' and edge providers' ability to use broadband Internet access service to reach one another.¹²

The Commission anticipated that broadband providers' "incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with the providers' own services" would lead them to seek to "gain economic advantages by favoring their own or affiliated content over [content from] third-party sources."¹³ Accordingly, the Commission cautioned that it would "review the extent of an entity's vertical integration as well as its relationships with affiliated entities" when assessing whether a practice harms competition.¹⁴

AT&T's practices appear to mirror these harmful scenarios, in that AT&T seems to be "acting in ways that may harm the open Internet, such as preferring [its] own or affiliated content [and] demanding fees from edge providers."¹⁵ The Sponsored Data charges imposed on unaffiliated edge providers appear to "target competitors, including competitors to their own video services," which the *2015 Open Internet Order* characterized as being of particular concern for potentially disrupting the virtuous cycle of competition and innovation in Internet services.¹⁶

¹⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5668, para. 152; *see also id.* at 5667, para. 151 (noting that "some commenters strongly oppose sponsored data plans, arguing that they give broadband carriers the power to exempt selective services from data caps," which "seriously distorts competition, . . . prevents consumers from exercising control over what they are able to access on the Internet," and is "a harmful form of discrimination") (citations omitted).

¹¹ 47 CFR § 8.11.

¹² *2015 Open Internet Order*, 30 FCC Rcd at 5662, para. 140.

¹³ *Id.* at 5632, 5662, paras. 82, 140.

¹⁴ *Id.* at 5662, para. 140.

¹⁵ *Id.* at 5629, para. 80.

¹⁶ *Id.* at 5608, para. 20.

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We therefore request that AT&T address the concerns expressed in this letter, including providing additional information or clarification if you believe that we have misunderstood relevant aspects of AT&T's current and announced offerings. If AT&T believes that its arrangements do not unreasonably interfere with or disadvantage unaffiliated edge providers' ability to provide video content and services to AT&T's mobile broadband subscribers, or that they do not improperly restrict or skew end-users' choices among mobile streaming video services, we invite you to explain why.

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

Sincerely,



Jon Wilkins
Chief, Wireless Telecommunication Bureau
Federal Communications Commission