



Responses to Written Questions for the Record  
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Before the  
**United States Senate**  
**Committee on the Judiciary**  
**Subcommittee on Antitrust, Competition Policy & Consumer Rights**

Hearing On:  
**"Examining the Competitive Impact of the AT&T-Time Warner Transaction"**

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## **Responses to Chairman Chuck Grassley Written Questions for the Record**

### **Question 1:**

Proponents of the AT&T-Time Warner merger argue that the transaction will result in more choice and other benefits for consumers all across the country. In your opinion, how will this merger impact consumers in rural America?

### **Question 2:**

Media, entertainment, information and telecommunications markets are rapidly evolving, with internet and technology firms challenging traditional telecom companies. In your opinion, how should the Justice Department be looking at this market? Do you believe traditional merger analysis methods work in the context of the AT&T-Time Warner merger?

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### **Answer 1:**

The proposed AT&T-Time Warner merger has significantly more potential to harm consumers and competition than it does to benefit them. New choices made available to consumers as a result of the merger are likely to be accompanied by higher prices and a loss of independent programming. Combining AT&T and Time Warner is also unnecessary to provide the benefits the parties claim will accrue as a result of the merger. The claimed benefits are wholly achievable via contract between AT&T and Time Warner, and thus not merger specific. Further, an independent Time Warner could contract with other mobile broadband and pay TV distributors to experiment with innovative, pro-consumer content distribution models—a significantly more pro-consumer and pro-innovation outcome than allowing AT&T and Time Warner to merge.

Rural consumers are likely to suffer harm if AT&T and Time Warner are permitted to merge. Rural consumers are likely to pay higher prices for both Time Warner and independent programming, and see reduced access to both types of programming.

A vertically integrated AT&T-Time Warner will have the power and financial incentives to withhold Time Warner content from content distribution rivals (pay TV, fixed and mobile broadband providers, and online video distributors), and/or to raise the price rivals must pay to carry must-have Time Warner content. Many of these distributors are rural telcos, cable companies, and small wireless carriers. As a result, the merger has the potential to raise the prices that rural customers of AT&T's distribution competitors pay for Time Warner content, or reduce the availability of highly desirable programming to rural consumers whose pay TV provider chooses not to pay inflated prices for Time Warner content.

The proposed AT&T-Time Warner combination may also harm rural consumers by making it more difficult and more expensive for rural consumers to access programming from independent content creators, including local content creators. The combined firm will have incentives to prioritize its affiliated Time Warner content, to the detriment of competing content by third-party creators. As a result, AT&T's rural subscribers may be unable to access independent content. Alternatively, if independent content is available through AT&T at all, it may become more difficult and expensive for consumers to access. AT&T will also have incentives to use its power as a programmer to negotiate anticompetitive terms and conditions with other content distributors, making access and competitive prices for Time Warner content contingent on favorable treatment that could harm independent content creators whose programming is carried by competing pay TV distributors. As a result, rural consumers of both AT&T and non-AT&T pay TV services could lose access to independent programming, or pay higher prices for such programming.

**Answer 2:**

The markets where this transaction has the most potential to harm competition and consumers are the pay TV market (delivered via cable, satellite, copper loop, or fiber), the emerging online video distribution market (e.g., Netflix, Amazon Prime, etc.), and the video programming market. The Department of Justice should evaluate the business incentives of a combined AT&T-Time Warner that would harm competition and consumers in these markets. Additionally, any claims of consumer benefits and new services must be merger specific. If AT&T and Time Warner could separately contract to provide the same services and benefits they claim will accrue as a result of the merger, then those benefits are not transaction specific and should not weigh in favor of the merger during antitrust enforcers' transaction review.

Traditional antitrust analysis does have the tools to deal with these markets; however, antitrust enforcers must be willing to apply them. The Department of Justice should look not only at the effects that this merger would have on competition as it stands, but take account of the direction the markets are moving in terms of new technologies, new business models, and the likelihood of further attempts at consolidation.

**Responses to Senator Dianne Feinstein  
Written Questions for the Record**

**Question 1:** What impact do you anticipate that this merger would have on TV content delivered via broadcast, cable or satellite?

**Question 2:** What impact do you believe the merger would have on popular video streaming services, like Netflix and Amazon Prime, which many consumers use?

**Question 3:** Do you believe that consumers would be harmed by this merger? Please provide specifics.

**Question 4:** Assuming the merger goes forward, what conditions do you believe should be placed on it?

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**Answer 1:**

The proposed AT&T-Time Warner merger has the potential to raise the price of, and reduce consumer access to, both Time Warner and independent programming.

If allowed to combine, a merged AT&T-Time Warner will have the market power and financial incentives to withhold Time Warner content from telco, cable, and satellite distribution rivals, and/or to raise the price those rivals pay to carry must-have Time Warner content. As a result, distributors will either choose to carry Time Warner content and raise prices on subscribers, or decline to carry Time Warner content, reducing the availability of highly desired programming to consumers.

A vertically integrated AT&T-Time Warner will also have the market power and incentives to curtail access to programming that competes against Time Warner content. AT&T could decline to carry competing channels on its DirecTV or U-Verse services, or make those channels more difficult and expensive for subscribers to access. AT&T could also use its market power as a broadband provider to prioritize or zero-rate affiliated Time Warner content, making it less likely that AT&T's hundreds of millions of broadband customers choose to access independent content. AT&T will also have incentives to use its power as a programmer to negotiate anticompetitive terms and conditions with other content distributors, making access and competitive prices for Time Warner content contingent on favorable treatment that could harm independent content creators.

**Answer 2:**

Just as a vertically integrated AT&T-Time Warner would have the market power and incentives to raise programming prices and/or deny programming to its traditional pay TV rivals, those same incentives exist, and are perhaps even greater, with regards to streaming online video distributors, such as Netflix and Amazon Prime. AT&T-Time

Warner could deny must-have content to online video distributors, or raise the prices those distributors pay to continue to carry Time Warner content.<sup>1</sup>

AT&T's incentives to withhold critical programming inputs or raise prices are two-fold. First, AT&T's traditional pay TV services, DirecTV and U-Verse, are threatened by consumers who may choose to access their video content online and forego services like cable or satellite television. AT&T may attempt to stave off subscriber losses by making it impossible or prohibitively expensive for "cord cutters" to access Time Warner content. Second, both AT&T and Time Warner offer their own competing streaming online video services (e.g., DirecTV Now, HBO Now, HBO Go, etc.). As the sole online streaming video service that offers Time Warner's content, or being able to raise its competitors' prices, AT&T could give itself an advantage over existing and emerging competitors in this marketplace.<sup>2</sup>

AT&T could also use its market power as a broadband provider to hundreds of millions of Americans to harm online video distributors by prioritizing or zero-rating affiliated Time Warner content and AT&T's streaming video service. The result would have the potential to extract payments from mature online video competitors, raising their costs, and likely the prices consumers pay. Additionally, nascent and emerging competitors would likely be unable to afford to pay for prioritization or zero rating over AT&T's networks, further stifling the development of new businesses and innovative services.<sup>3</sup>

### **Answer 3:**

Yes, consumers are likely to be harmed by allowing AT&T and Time Warner to merge. The market power and business incentives of the combined firm make it likely that consumers will pay higher prices and have less access to Time Warner and independent video programming.

Permitting AT&T and Time Warner to merge would likely spur an arms race of consolidation in the technology, media, and telecom industries, as dominant content distributors attempt to acquire the few remaining large content creators. The result would be a marketplace with a handful of dominant, vertically integrated firms with tremendous power and incentives to collude, raise prices, reduce output, and stifle innovations that threaten their business models and profit margins.

Additionally, the two Republican members of the Federal Communications Commission ("Commission") recently vowed to revise both the Commission's 2015 Open Internet rules and the classification of broadband as a Title II telecommunications service "as

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<sup>1</sup> Michael Hiltzik, *The AT&T-Time Warner deal would be a disaster for the public interest*, Los Angeles Times, Oct. 24, 2016, available at <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-att-time-warner->

<sup>2</sup> *Examining the Competitive Impact of the AT&T-Time Warner Transaction: Hearing Before the U.S. Senate Committee on the Judiciary*, at 6 (statement of Gene Kimmelman, President & CEO of Public Knowledge).

<sup>3</sup> *Id.* at 3.

soon as possible.”<sup>4</sup> Without rules in place to ensure that internet service providers respect consumer choice and the free and open internet, an integrated AT&T-Time Warner will have even more financial incentives and power to prioritize Time Warner content and legally block or throttle unaffiliated content.

Further, acquiring Time Warner would give the new AT&T-Time Warner access to a trove of data from consumers of Time Warner content that is unavailable to AT&T’s competitors. AT&T could use that data to impinge on consumer privacy interests and harm competition in ways that may not be constrained by industry-wide privacy rules.

#### **Answer 4:**

It is likely premature to discuss conditions at this stage of analysis, since the various harms that this merger could cause are still being quantified. As a general matter, behavioral remedies are not preferred by competition authorities—they can be burdensome and costly for the government to administer, can be circumvented by the merged firm, and incentivize the merged firm to evade the spirit of the remedy without violating its letter.<sup>5</sup> Structural remedies are typically preferable, but in this case, structural remedies would amount to requiring AT&T to spin off Time Warner programming assets, which would amount to blocking the transaction.

However, if antitrust enforcers choose to impose behavioral remedies, they should be as clear and enforceable as possible. Simple conditions that make it plain whether a company is in compliance are generally easier to enforce and more effective. Also, conditions should provide the opportunity for consumers, competitors, entrepreneurs, and smaller entities, along with the Department of Justice, to trigger enforcement.

It is improbable that competition authorities can devise and convince the parties to accept remedies that could successfully address the major risks of the AT&T-Time Warner merger. To address the likely harms to consumers and competition, conditions on the AT&T-Time Warner combination would have to prevent the integrated firm from giving itself any preference regarding prices, quality, and speed, as well as other relevant terms and conditions for transmission, interconnection, content distribution and carriage, and any relevant contracts. These remedies would need to be quickly and thoroughly implemented, vigorously enforced, and apply for significantly longer than conditions on prior transactions.

Lastly, merger conditions on the AT&T-Time Warner merger, or on other transactions, will not prevent the long-term dangers of a consolidation arms race among technology, media, and telecommunications companies.<sup>6</sup> Dangerous market power among a few

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<sup>4</sup> Letter from Commissioners Ajit Pai and Michael O’Rielly, Federal Communications Commission, to Internet Service Provider Trade Associations, at 2 (Dec. 19, 2016), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1219/DOC-342677A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1219/DOC-342677A1.pdf).

<sup>5</sup> See Department of Justice, Antitrust Division Policy Guide to Merger Remedies, at 7-8 (2004).

<sup>6</sup> See Aaron Pressman, *Investors Need to Cool It on Sprint-T-Mobile Speculation, Analysts Say*, Fortune, Dec. 8, 2016 (noting that analysts are predicting mass consolidation of the telecom and media landscape).

oligopolistic firms must be addressed by clear rules to protect consumers and prevent anti-competitive behavior.

## **Responses to Senator Dick Durbin Written Questions for the Record**

**Question 1:** AT&T's proposed acquisition of Time Warner will be carefully scrutinized by the experts at the Department of Justice's Antitrust Division, and I urge the Department to conduct a vigorous review to assess the proposed deal's impact on consumers and on competition.

At the same time that antitrust regulators review the particulars of this transaction, I would urge the regulators to take a step back and look at the overall trend toward massive consolidation in many American industries. The trend has become too great to ignore.

As you note in your testimony, we've seen a series of recent mergers in telecommunications and media and this consolidation creates pressure for other competitors to merge in order to keep up with the new giant companies. But, as your testimony points out, consolidation is not the solution to consolidation. When our markets are dominated by just a few massive companies, it can lead to diminished competition, higher prices, less choice and diversity for consumers, and significant barriers to entry for new competitors.

Can you comment on the need for antitrust regulators to take into account this overall trend of consolidation when conducting their antitrust reviews of specific proposed mergers?

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### **Answer 1:**

Currently, just four companies (AT&T, Verizon, Comcast, and Charter) control the vast majority of the content distribution market (mobile broadband, last-mile fixed broadband, pay television, and business data services),<sup>7</sup> while only six companies (Comcast/NBCU, Disney, 21st Century Fox, Time Warner, CBS, and Viacom) control the media programming market through which Americans receive the vast majority of their televised news and entertainment.<sup>8</sup>

At some point, antitrust authorities must stop the ongoing trend of consolidation in the technology, media, and telecommunications industries. Permitting additional consolidation creates substantially greater opportunities and incentives for collusion and coordination between firms. This is particularly crucial when a few vertically integrated firms buy and sell to each other and/or know the key elements of each other's contracts.

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<sup>7</sup> See Mark Cooper, Consumer Federation of America, *Overcharged and Underserved: How A Tight Oligopoly on Steroids Undermines Competition and Harms Consumers In Digital Communications Markets* X, 3-4, 2016, *available at* <http://consumerfed.org/wp-content/uploads/2016/12/Overcharged-and-Underserved.pdf>.

<sup>8</sup> See Ashley Lutz, *These 6 Corporations Control 90% of the Media in America*, Business Insider, July 14, 2012, <http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6>.



Just as antitrust officials can consider the possibility of new competitors, market entry, and technological and market changes to justify permitting mergers that otherwise appear likely to reduce competition and harm competitors, they also have the authority to determine whether a transaction will lead to even more market consolidation. Permitting the AT&T-Time Warner merger will further normalize and entrench vertical integration between the most powerful content distributors and programmers, and will pressure the remaining firms to explore similar mergers to remain competitive. Antitrust enforcers should take these market dynamics into account as a likely harm to consumers and competition when they review both the AT&T-Time Warner transaction and any future mergers in these industries.

## Responses to Senator Al Franken Written Questions for the Record

**Question 1:** As I understand it, AT&T does not have a “flawless” track record when it comes to compliance with past promises and engaging in anti-consumer behavior. For example, it allegedly failed to deploy broadband in accordance with its BellSouth and DirecTV merger commitments. It also raised prices on DirecTV customers immediately after the deal was finalized. A little over two years ago, Mr. Stephenson and I discussed how his company lobbied to prevent municipalities from building their own broadband networks to meet their communities’ needs. And a year ago, AT&T was slapped with a \$25 million fine for failing to protect its subscribers’ personal information.

Mr. Kimmelman, in your view, what does AT&T’s past behavior tell us about the likelihood that merger conditions would prevent it from engaging in anticompetitive behavior with its newly acquired content? And, in light of AT&T’s demonstrated history of violating consumer privacy, should AT&T’s fitness for assuming control of large amounts of private consumer data be considered by regulators?

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### Answer 1:

AT&T’s track record of merger compliance, and the track record of merger condition compliance more generally, makes it unlikely that behavioral remedies will effectively constrain AT&T from engaging in anticompetitive behavior if it has the market power and business incentives to harm competition and raise prices on consumers. As you have pointed out, AT&T’s history of complying with merger conditions is not flawless.<sup>9</sup> Additionally, even when merger conditions are robust, well targeted, and vigorously enforced, they do not continue into perpetuity. When merger conditions expire, the firm no longer has any obligation to comply with them, regardless of whether the conditions that precipitated their adoption still exist.

Additionally, as you note, AT&T’s has a history of indifference toward consumer privacy, which should be considered by antitrust enforcers as they weigh the potential benefits and harms of this transaction. For example, in 2015, the Federal

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<sup>9</sup> See e.g., Gerry Smith, *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, The Huffington Post, Nov. 18, 2012, [http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet\\_n\\_1914508.html](http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html) (explaining that when AT&T acquired BellSouth in 2006, it agreed to offer broadband service throughout its service area. Years after it was required to comply with that condition, it was reported that AT&T had yet to deploy to rural areas, exacerbating the digital divide); Jon Brodtkin, *AT&T refuses to offer low-income discounts for sub-3Mbps internet*, Ars Technica, Sept. 9, 2016, <http://arstechnica.com/information-technology/2016/09/att-refuses-to-offer-low-income-discounts-for-sub-3mbps-internet/> (explaining that to win support of its 2015 acquisition of DirecTV, AT&T promised to offer low-priced internet service to low-income consumers. However, in markets like Cleveland, OH, AT&T refused to offer low-income consumers these discounted rates on the grounds that in poor neighborhoods, its network was so dilapidated that it couldn’t even provide the minimum speeds contemplated by the merger conditions. As a result, poor Clevelanders paid more for sub-3 Mbps internet service than other low-income communities were paying for 5 and 10 Mbps service).

Communications Commission (“FCC”) fined AT&T \$25 million for failing to protect the personal information of consumers, including Social Security numbers—the largest penalty the FCC has ever imposed for a violation of consumer privacy.<sup>10</sup> Additionally, AT&T has been one of the loudest opponents of the FCC’s new broadband privacy rules, which protect consumers’ control over how broadband providers can use their personal information.

AT&T’s disregard for consumer privacy is critical for antitrust enforcers to consider in this transaction because access to consumer data, and the ability to monetize this data by selling advertising against Time Warner programming, is a key motivation for AT&T to acquire Time Warner. By purchasing Time Warner, AT&T will gain access to a treasure trove of data about the content consumers prefer and how consumers interact with programming and advertising. AT&T has been a staunch opponent of the FCC’s Title II rules for broadband internet service. A change in FCC policy that broadband is no longer a Title II service would render the FCC powerless to protect broadband customer privacy, allowing AT&T to seamlessly integrate its broadband customer data with data compiled about consumers who view Time Warner and other AT&T content and eliminating consumer choice and control over how their personal information is used.

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<sup>10</sup> Federal Communications Commission, AT&T To Pay \$25 Million To Settle Consumer Privacy Investigation, Press Release (April 8, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-332911A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-332911A1.pdf).