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Via Electronic Submission

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353*

Dear Ms. Dortch:

On September 5, 2014, Frank Simone and I met with Matt DelNero and Dan Kahn of the Wireline Competition Bureau, and Joel Rabinovitz (by telephone) of the Office of General Counsel concerning the challenge by Public Knowledge and the National Consumer Law Center (collectively "challengers") to AT&T's designation of the dates on which AT&T intends to submit 214 applications to grandfather, and subsequently sunset, TDM services as part of AT&T's Wire Center trials as confidential or highly confidential.[1] Specifically, we responded to challengers' contention that the wire center experiments are public policy trials, the details of which (including timing) are essential to the public debate and would not confer a competitive advantage on rivals (unlike the timing of a product launch).[2] We also responded to the staff's questions concerning the appropriate standard for evaluating AT&T's designation of the dates as highly confidential. During the discussion, we made the following points:

- Challengers' characterization of AT&T's wire center trials as "public policy" trials is incorrect. As the Commission itself made clear in the *Technology Transitions Order*, the service-based experiments invited by that order are not intended to "resolve the legal and

[1] Challenge to Confidentiality Designation of Public Knowledge and the National Consumer Law Center on Behalf of its Low-Income Clients, GN Docket Nos. 12-353 and 13-5 (filed April 8, 2014) ("Challenge").

[2] Letter of Jodie Griffin, Public Knowledge, to Marlene H. Dortch, GN Docket Nos. 13-5, 12-353 at 1-2 (filed Aug. 1, 2014); Letter of Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353 at 2 (filed Dec. 6, 2013) ("This is not a product launch. This is a pilot program for the express purpose of testing whether AT&T can discontinue TDM services under the "impairment" standard of Section 214(a). Unlike a product launch, where details of timing could confer competitive advantage to a rival, details of timing in a pilot project are essential to the public debate and have no commercial value.").

policy question arising from the technology transitions in the context of an experiment."[3] Rather they are intended to "test *real-world* applications of planned changes in technology that are likely to have tangible effects on consumers," and "examine the impacts of replacing existing customer services with IP-based alternatives in discrete geographic areas or ways"[4] to determine how the transition is affecting achievement of the Commission's statutory objectives.[5] And the Commission emphasized that "for that we need *real-world* data."[6]

- Consistent with these principles, the wire center trials were designed to replicate on a small-scale the broader TDM-to-IP transition in order to identify and resolve the operational, technical, logistic and other issues that could arise when existing TDM-based networks and services are discontinued and customers are transitioned to next-generation wireless and wireline IP-based alternatives. To that end, the trials will occur in the commercial marketplace, and will utilize proprietary business and marketing processes and plans, as well as existing regulatory procedures — including the section 214 process. Requiring AT&T to disclose its timeline now, far in advance of the date on which AT&T intends to file section 214s, would defeat the goal of providing *real-world* data regarding the impact of transitioning customers from TDM to IP under existing procedures.

- In response to questions posed by the staff, AT&T already has announced that it will not file section 214 applications to grandfather (and later withdraw) existing TDM services until the second half of 2015, at the earliest. Additionally, under AT&T's wire center trial plan, AT&T will separate 214 applications — one to grandfather and a second to sunset — for such services (rather than only one), providing consumers and other interested parties multiple opportunities to comment before any services are retired. As a consequence, challengers' fears that the public will not have an opportunity to engage on the issues posed by the transition are unfounded.

- Contrary to challengers' claims, the details regarding AT&T's timeline for grandfathering, and later sunsetting, existing services is highly sensitive, competitive information that has commercial value. The timeline reflects AT&T's business and marketing plans for transitioning existing customers in the two wire centers to IP-based services. Competitors can use that information to develop responsive business and marketing strategies to win customers away from AT&T. Although the 214 process itself

[3] *Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, et al.*, GN Docket Nos. 13-5, 12-353, *et al.*, FCC 14-5 at ¶ 8 (2014) (*Technology Transitions Order*).

[4] *Id.* at ¶ 5 (emphasis added).

[5] *Id.* at ¶ 8.

[6] *Id.* (emphasis added).

provides competitors some advance information about the timing of service changes, the relief challengers seek would provide competitors at least 8 additional months notice to develop their plans. For example, a competitor could use that time to develop a detailed marketing plan to target residential developments, home-owners associations, and commercial real estate developments and developers (which frequently enter long term contracts for voice, video and data services) in the trial wire centers, and convince them to switch from AT&T. And once those customers switch, it could be difficult to win them back. Thus, revealing AT&T's timeline has real world competitive implications and consequences.

- AT&T's business and marketing plans, such as those at issue here, constitute some of AT&T's most sensitive business information. AT&T does not release information regarding product development and migration plans and timelines to the public until it reaches the implementation phase of those plans. Nor does it allow its employees to share such information with outside parties without first obtaining a non-disclosure agreement. Premature release of such information would enable competitors to develop and implement counter-strategies to win customers away from AT&T, and thus obtain a significant competitive advantage in the marketplace.

- The Commission and courts have long recognized that business and marketing plans by their nature contain information that would cause substantial competitive harm if disclosed.[7] Indeed, such plans are precisely the sort of competitively sensitive information that FOIA Exemption 4 and the *Second Protective Order* were intended to protect.

- The disclosures at issue here unquestionably were voluntary. In the *Technology Transitions Order*, the Commission repeatedly emphasized that such "experiments are voluntary on the part of the providers. No provider will be forced to participate in an experiment, and no provider, once an experiment has been initiated, will be forced to continue an experiment if it otherwise decides the experiment is no longer worth pursuing."[8]

- AT&T was under no obligation to submit its proposal for the wire center trials, and could have proceeded without providing any advance notice of its plans — apart from that required under section 214. It submitted the plan with the understanding that highly

[7] *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities*, First Report and Order, 85 F.C.C.2d 1, at ¶ 12 (1980) ("effective competition is clearly curtailed when firms are required to give advance notice of innovative marketing plans"); *National Community Reinvestment Coalition v. National Credit Union Admin.*, 290 F. Supp. 2d 124, 135 (D.D.C. 2003).

[8] *Technology Transitions Order* at ¶ 32.

confidential business and marketing information would be protected, and would not have submitted such information if it thought such information would be disclosed prematurely to the public — and thus competitors. If the Commission were to grant challengers' request to disclose the information, other providers may be reluctant to submit proposals for trials, and thus discourage cooperation with the government, which is one of the principal reasons FOIA exemption 4 protects confidential business information from disclosure.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed in the above-referenced docket. Please do not hesitate to contact me with any questions regarding this matter.

Respectfully submitted,

/s/*Christopher M. Heimann*

Cc: Matt DelNero
Dan Kahn