Comments of AT&T Global Network Services France, SAS: ARCEP Consultation on the Draft Decision on the Implementation of a Quarterly Campaign for Gathering Information on the Technical and Pricing Terms Governing Data Conveyance and Interconnection

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INTRODUCTION AND SUMMARY

AT&T Global Network Services France SAS ("AT&T") respectfully submits these comments on the ARCEP Public Consultation on the Draft Decision on the Implementation of a Quarterly Campaign for Gathering Information on the Technical and Pricing Terms Governing Data Conveyance and Interconnection (the "Consultation Paper").

AT&T's parent, AT&T Inc., operates globally under the AT&T brand and, through its affiliates, is a worldwide provider of Internet Protocol (IP)-based communications services to businesses, and a leading U.S. provider of wireless, high speed Internet access, IPTV, local and long distance voice, directory publishing and advertising services. In France and other EU Member States, AT&T Inc., through its affiliates, is a competitive provider of business connectivity and managed network services. AT&T Inc., through its affiliates, also is a leading provider of bilateral connectivity services linking the U.S. with France and all other EU Member States.

AT&T appreciates the opportunity to express its views in this public consultation on the Authority's proposed quarterly information reporting requirements for data conveyance and interconnection arrangements. Under these proposals, French network operators and ISPs, and all operators anywhere in the world that interconnect with French network operators, would be required to report, on a quarterly basis, details of their interconnection agreements for Internet traffic, including financial terms and traffic volumes. The Consultation Paper states that the Authority requires this information to increase its knowledge of Internet interconnection markets to assist in possible dispute settlement, verify compliance with nondiscrimination requirements, and identify problems requiring possible new regulation.

AT&T hopes that the Authority will recognize the significant concerns that are raised by this proposal and instead use alternative approaches to meet its objectives. In the absence of any market failure or other systemic problem in Internet interconnection markets requiring such

detailed regulatory oversight, there is no reason for the Authority to impose the highly burdensome and unprecedented information collection requirement described in the Consultation Paper. To AT&T's knowledge, no regulator or government, in any country, has required, or proposed, any similar reporting requirement for IP peering or transit arrangements. Instead, other governments and regulators properly treat these arrangements as unregulated, commercial transactions negotiated in a competitive marketplace and requiring neither regulation nor detailed oversight to ensure that consumers and other users are properly served.

Internet traffic arrangements are negotiated in highly competitive markets, in which prices for transit services are continually declining, Internet traffic volumes are continually increasing, there are many options for ISPs and content providers to exchange traffic and reach users quickly and reliably, and no Internet backbone providers possess market power. The proposed reporting requirement is not only unnecessary to address any market failure but also fails to comply with the EU common regulatory framework for electronic communications, which allows "*ex-ante* regulatory obligations only [to] be imposed where there is no effective and sustainable competition."[1]

The Authority also fails to show that the proposed reporting obligation is required for the reasons set forth in the Consultation Paper. Rather than seeking to impose such broad and burdensome reporting requirements on operators throughout the world, the Authority may obtain ample information to meet its objectives of monitoring the Internet interconnection marketplace and deepening its understanding of Internet traffic arrangements by using publicly available data and reports and commissioning studies from knowledgeable consulting groups and other third party observers.

A further significant concern is that the adoption of these reporting rules for Internet interconnection arrangements is likely to encourage the efforts by some countries to regulate Internet traffic arrangements based on traffic volumes between countries, which could suppress traffic flows and investment incentives. AT&T hopes that the Authority will avoid taking action that would likely be viewed as supporting such unnecessary and potentially damaging measures.

In addition, ARCEP lacks authority under French law to require the filing of Internet interconnection data by foreign operators interconnecting with French network operators, as

[1] *See, e.g.*, Directive 2009/140/EC of the European Parliament and the Council of 25 November 2009, OJ L337/37.

proposed here. This requirement is also duplicative and unnecessary, since all information may be obtained from the French operator. Any reporting requirements should instead be limited to entities that are established, or have interconnection arrangements, in France.

These concerns are described in more detail below.

1. INTERNET INTERCONNECTION MARKETS ARE HIGHLY COMPETITIVE AND REQUIRE NEITHER REGULATION NOR DETAILED OVERSIGHT

Internet interconnection markets handle massive, exponentially growing traffic volumes, and have changed significantly and continually as the Internet itself has changed in response to huge increases in the numbers of Internet users (1.8 billion in 2010, with 5 billion users expected by 2020), the massive growth of new Internet services, applications and devices, and the ongoing evolution of the Internet ecosystem. By any measure, these markets are highly competitive, with many options for ISPs and content providers to exchange traffic, and continual reductions in prices ensuring that application and content providers can reach users quickly and reliably.

Peering and Transit: The bilateral agreements that enable traffic to travel between two different backbone networks have traditionally followed one of two different business models: peering and transit. Under peering agreements, each network interconnects for the purpose of terminating packets sent from the other peer to end points served by the terminating peer's network. These arrangements typically anticipate, among other things, that the traffic exchanged between the two networks will be roughly equal in volume, such that each backbone network will incur roughly the same costs in handling the traffic originated by the other network. To avoid administrative overhead, parties to these bilateral peering agreements typically forgo the mutual exchange of compensation and peer on a settlement-free basis. But in some cases, where the traffic volumes exchanged are unequal, or where one network otherwise falls short of the other's peering criteria, the parties may enter into a paid peering arrangement.

Under transit arrangements, Network X pays Network Y to arrange delivery of Network X's packets to any destination on the Internet and to accept delivery of packets destined for Network X's customers from any location on the Internet.[2] Rather than exchanging traffic

[2] *See* Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC, Office of Plans and Policy, OPP Working Paper No. 32, at 7 (Sept. 2000), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf.

through peering links with Network Y, Network X typically buys a robust, enterprise-class Internet access service from Network Y, which supplies the interconnection facilities.

From their inception, these peering and transit relationships have been unregulated, and the market for peering and transit has functioned with great efficiency. A key reason is that the larger backbones "compete for the transit business of smaller backbones in order to increase their revenues," and this competition has driven transit prices down significantly.[3] As described in the attached May 2011 study by Analysys Mason, *Overview of Recent Changes in the IP Interconnection Ecosystem*, in recent years massive increases in Internet traffic, bandwidth and the value generated by Internet content have resulted in significant changes in interconnection arrangements to allow greater traffic volumes to be carried with lower latency and to reduce transit costs.[4]

***Expanding Choices*:** In particular, the development of Internet Exchange Points (IXPs) around the world has led to distributed interconnection arrangements between peers and transit customers and has also led transit customers to interconnect directly at those points. As a result, ISPs and content providers now have many options for avoiding Internet backbone transit costs, including secondary peering arrangements between ISPs and paid peering arrangements between ISPs and content providers. Additionally, content providers have constructed huge content delivery networks (CDNs) to deliver their content to cache servers closer to ISP networks and reduce transit costs. In turn, backbone providers have adapted by offering partial transit arrangements to ISPs.

These expanding choices for delivering and exchanging traffic have reduced the demand for transit services and further increased competition between backbones on the price of transit to generate the traffic volumes required to continue their peering relationships.[5] As the result of these various developments, transit prices have fallen from approximately $1200/Mbps in 1998 to less than $12/Mbps in 2008 and *less than $1/Mbps* today.[6]

These developments have also resulted in substantial changes in global inter-regional and intra-regional Internet traffic flows, resulting in more efficient network usage, improved network

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[3] *Id*. at 20.

[4] Attachment at 2-3.

[5] *Id*. at 3.

[6] *See* http://drpeering.net/white-papers/Internet-Transit-Pricing-Historical-And-Projected.php

performance and investment growth. The growth of IXPs around the world combined with market liberalization has had notable impacts on the market for Internet interconnectivity: a significant decline in Internet bandwidth connections from each region of the world to North America; the use of local exchange points replacing much of the prior need for international connectivity in Asia and Europe; and the increasing use of IXPs in emerging markets, including in Africa, where 20 countries had IXPs by 2010.[7]

All of these important changes have occurred as the result of competitive market forces and without any regulatory intervention. Indeed, the unregulated nature of the Internet has greatly assisted these changes, as prescriptive regulation would likely have locked in place specific technologies and business models. To AT&T's knowledge, apart from the withdrawn Polish regulation described below, no country has regulated Internet interconnection arrangements (other than some temporary limits on changes in peering arrangements required in a merger proceeding) and there is no reason for regulatory intervention in these markets today. This is because the multiplicity of Internet interconnection relationships among thousands of market participants in this global "network of networks" allow any provider to reach all Internet destinations at low cost, and prevent Internet backbone operators from exercising market power.

No Basis For Ex Ante Regulation: The European Commission similarly found in 2010 that Internet interconnection markets in Poland do not qualify for *ex ante* regulation, and required UKE, the Polish regulator, to withdraw its proposed regulation of Internet interconnection arrangements provided by Telecomunikacja Polska (TP), the incumbent operator.[8] The Commission found IP peering and IP transit to be "functionally substitutable . . . at both [the] national and international level," rejected UKE's arguments that separate markets exist for these services, and found no evidence to support UKE's claim that TP has significant market power over these arrangements. In dismissing UKE's arguments, the Commission noted that "[t]he large number of transit agreements signed by ISPs with national and international transit operators, the need to interconnect at only one of the public IXPs in Poland, and the

[7] *See* ICC Discussion Paper, Internet Backbone Agreements, Jul. 27, 2011. *See also*, Analysys Mason, *Overview of Recent Changes in the IP Interconnection Ecosystem*, May 2011.

[8] *Commission Decision of 3 March, 2010 Pursuant to Article 7(4) of Directive 2002/21/EC (Withdrawal of Notified Draft Measures)*, Mar. 3, 2010.

resulting low entry barriers" indicated the existence of a competitive market.[9] In ruling that UKE must withdraw its proposed regulation, European Commissioner Neelie Kroes noted that "our assessment is that regulation of these particular markets for Internet traffic exchange services is not necessary to protect consumers or competition. If the market itself is able to provide for fair competition, don't disturb it with unnecessary regulations."[10]

Similar competitive circumstances apply to Internet traffic arrangements in France and likewise provide no basis for the Internet traffic reporting requirements that are proposed here. AT&T submits that ARCEP's proposed reporting requirements are so extensive that they themselves constitute *ex ante* regulatory obligations (over and above the Authority's reasonable and legitimate information gathering powers), even if they were not to lead to any further regulatory intervention. However, the Consultation Paper does not attempt to demonstrate that Internet interconnection markets in France satisfy the "three criteria" test for *ex ante* regulation that Commission Recommendation 2007/879/EC requires – high and non-transitory entry barriers, the structure of the market must not tend towards effective competition, and the application of competition law alone must not be able to adequately address the market failure concerned.[11] The Consultation Paper does not address these criteria, and AT&T submits that no such showing can be made.

2. THERE IS NO SHOWING THAT THE PROPOSED REPORTING RULES ARE REQUIRED TO ACHIEVE ARCEP'S STATED OBJECTIVES OR ANY APPROPRIATE REGULATORY TASK UNDER THE EU FRAMEWORK

The Consultation Paper states that each reporting entity would be required to provide, for each calendar quarter, information about each interconnection agreement with its 30 largest

[9] Notably, the Commission also refused to find TP's lack of a peering policy as indicating the existence of significant market power. The Commission found that the growth of the Internet, the increased diversity of Autonomous Systems, and the growth of content-heavy ISPs and large content providers downloading large volumes of traffic "lead to traffic patterns that are highly asymmetric and impact how IP traffic exchange agreements are negotiated, i.e. whether a price is charged for the exchange of traffic or whether a (free) peering solution is acceptable to the parties." *Id.*, ¶ 52. Thus "it is in principle not unusual that smaller networks or content-heavy networks conclude transit (rather than peering) agreements with larger networks and agree to pay the larger providers to deliver their traffic." *Id.*

[10] *Telecoms: Commission rules against plans to regulate Internet traffic exchange services in Poland*, Commission Press Release IP/10/240, Mar. 5, 2010

[11] *See* Commission Recommendation of 17 December 2007 on Relevant Product and Service Markets, Art. 2, 2007/879/EC.

interconnection partners, and all other interconnection partners listed as "FR" or "EU" in the RIPE database with interconnection capacity of 500 Mbps or above.[12] For each agreement, the reporting entity would be required to identify the type of interconnection arrangement (peering, partial transit or global transit), and to disclose the financial terms and tariff structure, the location of the interconnection point, the capacity of the interconnection link, and the volumes of inbound and outbound traffic exchanged. This reporting would be required by: (1) French network operators and providers of public online communications services; (2) operators "who have an interconnection relationship with at least one" French network operator; and (3) providers of public online communications services "not established in France, but who have actively taken steps to have their services and content accessed by French users."[13]

The Consultation Paper states (p. 6) that the requested information is necessary to: (1) "deepen" the Authority's knowledge of Internet interconnection markets for use in the settlement of possible disputes (*id*.); (2) assist in identifying problems that could require prescriptive regulatory measures (*id*.); and (3) verify compliance with non-discrimination requirements (p. 8). None of these attempted justifications withstand scrutiny.

The mere fact that data conveyance and interconnection may be "disparate and complex," as stated by the Consultation Paper (p. 6), does not support these proposed requirements. The disparate and complex nature of Internet interconnection markets is the result of the ever-increasing complexity and dynamism of the Internet itself, and demonstrates the highly competitive nature of these markets, rather than any need for government regulation or oversight. Additionally, the mere *possibility* of a future dispute occurring, whether concerning alleged discrimination or other matters, that may require settlement by the Authority does not support imposing such broad and burdensome reporting requirements on an industry-wide and world-wide basis, as proposed by the Consultation Paper. Any information gathering required for this

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[12] *Consultation Paper*, Appendix.

[13] Consultation Paper, at 10. The Authority proposes to allow entities not established in France to exclude from their answers interconnection relationships with partners not established in France where the interconnection has "no significant impact on end users in France." *Id.* However, entities not established in France would be required to provide information concerning interconnection arrangements with partners established in France regardless of the location of those arrangements. The Consultation Paper also provides no guidance regarding the circumstances under which the Authority would consider an interconnection relationship between partners not established in France to have "no significant impact on end users in France."

purpose may be conducted in a more efficient, timely and less burdensome manner in response to specific disputes.

The reporting proposals also cannot be justified as necessary to identify the possible need for prescriptive regulatory measures. As described above, EU law allows the imposition of prescriptive regulatory measures only where a market fulfills the "three criteria" test for *ex ante* regulation, and no such showing can be made here. While Directive 2009/140/EC states that it is appropriate for regulatory authorities to impose obligations on operators that do not have significant market power "in some circumstances . . . in order to achieve goals such as end-to-end connectivity or interoperability of services," no such goals are served by the proposed reporting.[14] Any ongoing regulatory monitoring to identify the potential existence of the "three criteria" – to the extent it is required at all in such a competitive marketplace – does not require these broad and burdensome reporting requirements. Instead, ample information for this purpose may be obtained from publicly available data or by commissioning studies from knowledgeable consulting groups and other third party observers.[15]

These proposals also cannot be supported under the 2009 EU Framework, which, on Internet matters, addresses only transparency, ease of switching and quality of service, none of which require any reporting of the traffic volume and pricing data proposed here.[16] The Consultation Paper (p. 5) does not justify this proposed reporting under the EU Framework as "information concerning future network or service improvements that could have an impact on the wholesale services" made available to competitors. The broad reporting proposed by the Authority has no relationship to any reporting that might be required to identify such

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[14] *Directive 2009/140/EC of the European Parliament and of the Council*, Nov. 25, 2009, ¶ 65.

[15] For example, the European Commission is using a consultant, U.K.-based SamKnows, to collect similar performance data across EU broadband networks. The U.S. Federal Communications Commission (FCC) also has used SamKnows to collect performance data on U.S. broadband networks. *See* FCC Public Notice, DA 10-670 (Apr. 20, 2010). The FCC similarly relies on third party analysts for the pricing information used to its annual report to the U.S. Congress on the state of competition for U.S. commercial mobile services. *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 26 FCC Rcd. 9664 (2011). The Authority may similarly use third party analysts and consultants for information to evaluate the state of competition in Internet interconnection markets.

[16] *See, e.g.,* European Commission, *The Open Internet and Net Neutrality in Europe,* Apr. 19, 2011, at 4-5.

improvements, and therefore is not "proportionate to the performance of that task," as the EU Framework requires.[17]

The Consultation Paper further states that it is "limiting the frequency" of the proposed reporting requirement, but nonetheless proposes to require the submission of this data on a quarterly basis. [18] Additionally, the Authority will make additional inquiries to the operators involved in each reported interconnection relationship "as often as possible" in order to "compare and verify the reliability of the reported information."[19] The Consultation Paper offers no explanation for these substantial compliance burdens beyond stating that this approach will provide "regularly updated" information and is "consistent with" the Authority's "other information gathering campaigns."[20] AT&T submits that such burdensome reporting and verification procedures should not be required in a highly competitive and hitherto unregulated marketplace.

In sum, there is no showing that the broad and burdensome information collection rules proposed by the Consultation Paper are required to achieve the underlying objectives described by the Consultation Paper or to perform any regulatory responsibility under the EU Framework.

3. THE ADOPTION OF THE PROPOSED REPORTING RULES WOULD ENCOURAGE MORE HARMFUL REGULATION OF INTERNET INTERCONNECTION ARRANGEMENTS

This proposed regulation would also encourage the efforts by some countries to impose more onerous regulation of Internet interconnection arrangements. As described above, the commercially-negotiated Internet interconnection arrangements that support the success of the global Internet have evolved in response to changes in applications, services and technologies, and the rapid growth of user demand. To date, the dynamism and flexibility of these

[17] *Directive 2009/140/EC of the European Parliament and of the Council*, Nov. 25, 2009, Art. 1(5).

The attempted justifications for this proposed reporting set forth in the Consultation Paper also provide no basis for requiring entities located outside France to submit these reports. Since ARCEP has no authority to impose any dispute settlement or prescriptive regulatory measures on any entities outside France, including foreign operators interconnecting with French operators and foreign providers of online communication services, the proposed reporting requirement for such entities fails to provide the proportionality that is required under both EU and French law.

[18] *See* Consultation Paper at 7.

[19] *Id*.

[20] *Id*. at 9.

arrangements has not been limited by burdensome regulation. Some countries nonetheless seek to regulate Internet traffic arrangements based on traffic volumes between countries, which would likely suppress traffic flows and investment incentives and reduce connectivity to countries adopting such regulation. EU Member States, including France, have been at the vanguard of resistance to such proposals.

Rather than adopt such misguided measures, the countries advocating such regulation should seek to make their Internet sectors more efficient, and thus reduce their per-unit Internet access costs, by adopting pro-competitive policies encouraging greater investment in local Internet infrastructure, increased local traffic volumes and more local caching of popular content. European countries were early beneficiaries of the dynamic evolution of Internet traffic flows that has occurred over the past 15 years away from the U.S.-centric routing of Internet traffic that predominated in the early years of the commercialization of the Internet backbone.[21] As the result of the establishment of IXPs in Europe, traffic became more localized and both Internet interconnection costs and latency were reduced. This market-based evolution has also benefited Asian countries, which have similarly greatly reduced their former usage of expensive international bandwidth for Internet access as the result of the greater localization of Asian country Internet traffic, and is now apparent in African countries, which have seen growth in IXPs.

However, any decision by the Authority to impose an unprecedented requirement for the reporting of the volumes and prices of Internet traffic exchanged between operators is likely to be viewed as supporting the potentially harmful regulation sought by some countries, rather than as affirming the importance of continuing market-based, deregulatory policies in these markets. AT&T hopes that the Authority will avoid establishing this potentially harmful precedent.

[21] *See* ICC Discussion Paper, Internet Backbone Agreements, Jul. 27, 2011. *See also*, Analysys Mason, *Overview of Recent Changes in the IP Interconnection Ecosystem*, May 2011.

4. THE PROPOSED DUPLICATIVE REPORTING BY FOREIGN OPERATORS INTERCONNECTING WITH FRENCH OPERATORS IS UNNECESSARY AND EXCEEDS ARCEP'S AUTHORITY

The Consultation Paper proposes to require reporting by *all* entities interconnecting with a French network operator, with no geographic limitation on the place of interconnection or the country of establishment of the interconnecting operator.[22] French network operators likely have Internet interconnection arrangements with operators in many foreign countries, and each such agreement may involve the exchange of traffic at locations anywhere in the world. The proposals set forth in the Consultation Paper, therefore, could require the submission of extensive data on a quarterly basis by large numbers of foreign operators that have no presence within France. This proposed filing requirement for operators not established in France is duplicative and unnecessary, is not supported by French law, and raises further concerns because of its extraterritorial effects.

To AT&T's knowledge, no telecommunications regulator has imposed reporting obligations on operators that are established and do business outside its jurisdiction, and there is no reason for the Authority to establish such requirements here. The U.S. Federal Communications Commission (FCC), for example, requires the reporting of international telecommunications service traffic only by operators holding U.S. Section 214 authorizations, and requires no reporting of this traffic by the U.S. operators' foreign interconnection partners.[23] The Consultation Paper offers no explanation for the proposal to require the reporting of Internet interconnection arrangements by entities not established in France, when the same information is to be reported by the other party to the arrangement (*i.e.*, the interconnecting French operator). AT&T submits that such duplicative reporting is therefore unnecessary.

Moreover, French law provides no support for this proposed extraterritorial regulation. Article L. 32-4 of the French Postal and Communications Code, which is quoted in substantial part in the Consultation Paper (p. 5), provides no authorization for the Authority to collect data from any foreign operator that has an interconnection relationship with a French operator. Instead, ARCEP only has authority to require reporting by operators that are subject to "the

[22] Consultation Paper at 10.

[23] *See* FCC Rule 43.61, 47 C.F.R. Sect. 43.61. AT&T also draws attention to the fact that these FCC rules require the reporting of international telecommunications service traffic, but do *not* require the reporting of Internet peering and transit arrangements.

principles set out in Articles L.32-1 and L. 32-3," which are the operators "declared to" (*i.e.*, registered with) ARCEP, and by providers of online communications services.[24]

The extraterritorial nature of this proposed requirement for the submission of reports by foreign operators and other entities established outside France that have no Internet interconnection arrangements in France also raises further concern. Indeed, if all national telecommunications regulators sought to impose such information requests on entities outside their jurisdiction, each country's international telecommunications operators would potentially need to provide extensive data on a regular basis to regulators in every country in the world. Instead, to avoid such duplicative and overbroad measures and in accordance with the limits of its authority, ARCEP should restrict the application of any reporting requirements here to entities that are established or have interconnection arrangements in France.

5. THE AUTHORITY PROPERLY PROPOSES TO PREVENT ANY DISCLOSURE OF COMPANY-SPECIFIC INFORMATION

The Consultation Paper does not identify any plans by the Authority to publish the reported information, but states that the Authority may communicate this information in submissions to the Competition Authority, the European Commission, and Parliament and may also provide this data to other national regulators. Importantly, the Authority proposes to use and communicate this data in those submissions only in aggregate form, and to require other national regulators to use or communicate this data in the same manner. The Authority thus appropriately recognizes the significant harm that would likely result to filing entities, and to competition in these markets, from any disclosure of private contract details. AT&T supports this approach, and suggests that all information filed in response to any reporting requirements adopted in this proceeding should be protected as trade secrets.

However, AT&T also emphasizes that the significant concerns described in the foregoing sections of these comments apply regardless of the avoidance of the disclosure of company-specific information. For the reasons previously discussed, AT&T therefore hopes that the Authority will instead use alternative approaches to meet its objectives.

[24] Consultation Paper at 4, quoting Article L. 32-4(1) & (2).

AT&T would be pleased to answer any questions concerning these comments.

Respectfully submitted,

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