June 17, 2015

Via ECFS

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

Re: Ex Parte Submission: Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations; MB Docket No. 14-90

Dear Ms. Dortch:

In its submissions to the record in this proceeding, the American Cable Association (“ACA”) has established that the proposed transaction between AT&T Inc. (AT&T”) and DirecTV (collectively, “Applicants”) will inflict both vertical and horizontal harms upon competition and consumers and outlined the remedial conditions that are needed to ameliorate these harms, particularly for smaller multichannel video programming distributors (“MVPDs”). In particular, ACA has demonstrated that the transaction will increase the Applicants’ incentives to charge higher prices to their MVPD rivals for access to their four regional sports networks (“RSN”) – programming that is considered “must have” by the Commission. ACA has explained that due to flaws in the program access rules, they are insufficient alone to mitigate this vertical harm, and urged the Commission to, as it has in the past, adopt a non-discriminatory access condition and a baseball style arbitration remedy with improvements to make them more useful, particularly for smaller MVPDs.

Applicants have argued that ACA’s proposed remedial conditions are not needed because “[n]either AT&T nor DirecTV has substantial content holdings and DirecTV remains subject to program access conditions with respect to that programming.” These claims fail under scrutiny for the many reasons already established by ACA in the record. In addition, as discussed below, ACA now notes that AT&T and DirecTV themselves have a long history of raising the same concerns as ACA about vertically integrated programmers, particularly with respect to access to RSN programming, the very programming assets at issue in this proceeding. Further, Applicants have previously argued on numerous occasions that the program access rules have significant flaws that undermine their utility in

1 Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Comments of the American Cable Association at 8-20 (filed Sept. 16, 2014); Reply Comments of the American Cable Association at 3-14 (filed Jan. 7, 2015) (“ACA Reply Comments”); see also Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary (filed May 1, 2015) (May 1 ACA Ex Parte”); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary (filed June 9, 2010) (“June 9 ACA Ex Parte”).

2 ACA Reply Comments at 6-9; June 9 ACA Ex Parte, Presentation at 8; May 1 ACA Ex Parte, Presentation at 7.

3 ACA Reply Comments at 14-60.

4 Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, AT&T-DirecTV Written Ex Parte Presentation at 13, n.55 (filed May 26, 2015) (“AT&T-DirecTV May 26 Ex Parte”).
addressing unfair acts in negotiations. Finally, in several previous merger reviews, DirecTV itself has sought conditions on other vertically integrated entities that are similar to the conditions sought by ACA.

Applicants have long recognized that RSN programming is “must have” and that rivals can be harmed by loss of access, discriminatory access or other forms of anticompetitive behavior by a vertically integrated programmer.5 AT&T has previously described the problem regarding access to vertically affiliated RSNs:

As the Commission repeatedly recognized, regional sports network access is essential to competition in the video marketplace because of the high demand for such programming by a large and important segment of consumers, and because such programming is non-duplicable. While there is plenty of competition for most programming, there simply are no alternatives for those who want to watch their favorite local team’s games. RSNs have used their control over such programming to demand ever-higher access fees, which, in turn, has contributed to the upward spiral in pay-TV rates. As AT&T’s own experience . . . demonstrate, incumbent cable operators have used their control over access to affiliated RSNs to hinder competition in downstream video distribution markets. As a consequence, the Commission should consider extending the RSN access conditions adopted in the Adelphia Order not only temporally but also to all RSNs vertically affiliated with a cable operator or other multichannel video programming distributor (MVPD).6

In light of AT&T’s prescient call for the extension of the Adelphia Order RSN access conditions to all RSNs vertically affiliated with either a cable operator or other MVPD, there should be no serious dispute as to the need for the non-discriminatory access and commercial arbitration remedial conditions called for by ACA to ameliorate the harms of the merger of AT&T and DirecTV.

5 See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, Comments of AT&T at 9-10 (filed Mar. 21, 2014) (“AT&T 2014 Video Competition Comments”) (noting that RSNs “are almost always non-replicable and highly valued by consumers”); Comments of DirecTV, LLC at 13-14 (filed Mar. 21, 2014) (“DirecTV 2014 Video Competition Comments”) (discussing the rise in sports programming costs); Revision of the Commission’s Program Access Rules, MB Docket No. 12-68, Comments of DirecTV, LLC at 8 (filed Dec. 14, 2012) (“DirecTV Program Access FNPRM Comments”) (discussing importance of time-sensitive and non-replicable sports programming); Comments of AT&T Inc. at 15 (filed Dec. 14, 2012) (“AT&T Program Access FNPRM Comments”) (arguing that MVPDs will suffer irreparable harm without a standstill provision to provide access to RSN programming throughout the duration of a program access complaint); Comments of AT&T Inc. at 13 (filed June 22, 2012) (noting that the Commission has recognized that RSN programming is “must have,” and critical to the competitive viability of any MVPD); The Regional Sports Network Marketplace, MB Docket No. 11-128, Comments of AT&T at 1 (filed Sept. 9, 2011) (“AT&T RSN Marketplace Comments”) (“As the Commission repeatedly has recognized, [RSN] access is essential to competition in the video marketplace because of the high demand for such programming by a large and important segment of consumers, and because such programming is non-duplicable.”); Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., For Authority to Assign and/or Transfer Control of Various Licenses, MB Docket No. 05-192, Comments of DirecTV, Inc. at 11 (filed July 21, 2005) (“DirecTV Adelphia Comments”) (“[A] cable operator with sufficient power in the market for RSN programming can exercise that power by denying RSN programming to its rivals or by raising its rivals’ costs for such programming.”).

6 AT&T RSN Marketplace Comments at 1-2. AT&T has argued that discrimination among MVPDs for access to another form of “must have” programming – local broadcast television signals – undermines the Commission’s objectives for video competition and broadband deployment by depressing incentives for entry into the MVPD market. See Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71, Reply Comments of AT&T at 8-9 (filed Jun. 27, 2011).
Significantly, while Applicants tell the Commission that it need not worry about vertical integration of the RSNs in this proceeding because they continue to be covered by program access conditions placed on DirecTV in the Liberty-DirecTV Order, Applicants admit that the program access rules have flaws and loopholes.\(^7\) Specifically, both AT&T and DirecTV have complained that the rules do not prohibit exclusive contracts, fail to protect against uniform price increases, and fail to protect MVPDs and their subscribers from the loss of access to programming during disputes.\(^8\) For these reasons, both have strenuously advocated for the adoption of rebuttable presumptions and standstill relief in program access disputes involving RSN programming.

Notably, in recognition of shortcomings with the program access rules, DirecTV itself has previously called for the imposition of license conditions in transactions involving the combination of MVPD distribution and regional sports programming assets similar to those proposed by ACA in this proceeding.\(^9\)

In short, Applicants have long worried about the vertical integration of MVPD distribution and RSN programming assets, and have attested to flaws in the operation of the program access rules. The Commission should take heed of their prior advocacy, and adopt remedial conditions on the Applicant’s licenses that will actually work to ensure fair and non-discriminatory access to Applicants’ RSN programming, particularly for smaller MVPDs as proposed by ACA.

This letter is being filed electronically pursuant to section 1.1206 of the Commission’s rules.

Sincerely,

Barbara Esbin

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\(^7\) AT&T-DirecTV May 26 Ex Parte at 13; Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Joint Opposition of AT&T Inc. and DirecTV to Petition to Deny and Condition and Reply to Comments at 54-56 (filed Oct. 16, 2014). The Liberty-DirecTV license conditions applicable to DirecTV’s RSNs are enforced through the Commission’s program access rules. See News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, ¶ 72 (2008). Therefore, the omissions and flaws in the program access rules complained of by Applicants are equally applicable to the RSN non-discriminatory access conditions currently applicable to DirecTV’s RSNs.

\(^8\) AT&T 2014 Video Competition Comments at 9-10 (urging Commission to adopt a rebuttable presumption that exclusivity contracts between cable operators and RSNs are “unfair acts” under section 628(b)); AT&T Program Access FNPRM Comments at 3 (arguing that the Commission should have retained the exclusivity ban); DirecTV Program Access FNPRM Comments at 12-13 (describing the incentives vertically integrated cable operator have to withhold programming and entice consumers to switch to their service); Revision of the Commission’s Program Access Rules, MB Docket No. 12-68, Reply Comments of DirecTV, LLC at 3 (filed Jan. 14, 2013) (recommending adoption of a standstill provision during the pendency of a complaint); DirecTV Adelphia Comments at 19-21 (program access rules fail to prevent price hikes to competitors through the mechanism of uniform price increases).

\(^9\) Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and/or Transfer Control of Licensees, MB Docket No. 10-56, Comments of DirecTV, Inc. at 27-28 (filed June 21, 2010) (urging that conditions imposed in prior MVPD consolidations must serve as a minimum baseline for the transaction); DirecTV Adelphia Comments at 42-45 (proposing program access and arbitration conditions similar to those imposed on the News Corp.-DirecTV merger).