June 25, 2015

Via ECFS

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

Re: 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:

On June 23, 2015 Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association (“ACA”) and the undersigned, representing ACA, met with Chanelle Hardy, Chief of Staff and Media Legal Advisor, and Rebekah Goodheart, Legal Advisor - Wireline, to discuss its views on the combination of the multichannel video programming distributor (“MVPD”) distribution and programming assets of AT&T, Inc. (“AT&T”) with the MVPD distribution and programming assets of DirecTV (together, the “Applicants”) consistent with ACA’s filings in the above-referenced docket.¹

ACA began by stating that the merger of AT&T and DirecTV will create the single largest MVPD in the nation by combining AT&T’s 5.7 million U-verse video subscribers with over 20 million subscribers served by DirecTV’s direct broadcast satellite MVPD service. The deal thus combines two companies having very significant roles in the downstream MVPD industry with three important regional sports network (“RSN”) assets in the upstream video programming industry currently owned by DirecTV (Roots Sports Pittsburgh, Rocky Mountain and Northwest) and an RSN in Houston (Roots Sports Southwest) recently sold by Comcast Corp. to both AT&T and DirecTV. All ACA members compete against DirecTV, some ACA members compete against AT&T U-verse, and more than 120 ACA members purchase an RSN from the Applicants.

During the course of the meeting, ACA discussed the vertical and horizontal harms the proposed transaction will inflict upon competition and consumers and outlined the remedial conditions needed to address them as reflected in a written presentation, a copy of which is enclosed for the record.

ACA described how vertical harm will result from the increased incentive and ability of the merged company to charge its MVPD rivals higher fees for DirecTV’s existing RSN programming and how these added costs on rivals will undermine competition and consumers who will ultimately pay higher fees for pay television service. These same factors will cause increased harm in the region where AT&T and DirecTV own and operate their newly acquired RSN, Roots Sports Southwest. The transaction will cause horizontal harm due to the merged company’s ability to wield its increased

¹ In the Matter of Applications of AT&T Inc. 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 of the American Cable Association at 3-14 (filed Jan. 7, 2015) (“ACA Reply Comments”).
bargaining power over programmers to extract terms in its agreements that could impede the ability of rivals to obtain the same programming at all or at non-discriminatory or fair market rates.

ACA next discussed remedial conditions previously used by the Commission to address vertical harms in transactions involving MVPD assets and identified flaws rendering them of little or no value to smaller MVPDs. Finally, ACA described its proposed remedial conditions and how they will offer meaningful protections for smaller MVPDs against both the vertical and horizontal harms of the AT&T-DirecTV merger.

In response to a question, ACA explained that the non-discriminatory access condition proposed by ACA is necessary in order to provide smaller MVPDs a means of recourse against discriminatory prices, terms and conditions that will work.\(^2\) Although the DirecTV RSNs remain subject to the program access rules as a result of a previous license condition, flaws in the functioning of the program access enforcement rules prevent them from being of use for smaller MVPDs, as ACA has detailed in its filings in this docket.\(^3\) Applicants themselves have previously recognized the harms of vertical integration of video programming and distribution assets and have previously argued on numerous occasions that the program access rules have significant flaws that undermine their utility in addressing unfair acts in negotiations.\(^4\) Moreover, in several previous merger reviews, DirecTV itself has sought conditions on other vertically integrated entities that are similar to the conditions sought by ACA.\(^5\) Nothing about the transaction under review calls for deviation from the Commission’s traditional practice of imposing both a non-discriminatory access and a commercial arbitration condition.

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

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\(^2\) Additionally, in previous transaction involving vertical integration of “must have” programming and MVPD assets, the Commission has regularly applied the non-discriminatory access condition to programming already subject to program access rules. See *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferring, and The News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order*, 19 FCC Rcd 473 ¶¶ 113, 219 (2004) (applying non-discriminatory access condition to both satellite-delivered programming, including RSNs, already subject to program access rules and broadcast television stations); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries, Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferees, to Comcast Corporation (subsidiaries), Assignees, and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8373, Appx. B, Remedies and Conditions, Section B.1.a. (2006) (applying non-discriminatory access condition to Comcast and TWC RSNs, including satellite-delivered RSNs already subject to program access rules and broadcast television stations); In the Matter of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3340-41, Appendix B, Conditions, Section III, ¶¶ 1, 7 (2008) (applying non-discriminatory access condition to Liberty Media RSNs, including satellite-delivered RSNs already subject to program access rules, satellite-delivered national cable programming already subject to program access rules, and broadcast television stations).

\(^3\) See ACA Reply Comments at 26-40.


\(^5\) Jun. 17 ACA Ex Parte at 2.
Enclosure

cc: Chanelle Hardy
Rebekah Goodheart

Sincerely,

Barbara Esbin
HARMS OF THE PROPOSED AT&T/DIRECTV TRANSACTION AND CONDITIONS NEEDED TO ADDRESS THEM

Presentation to the Federal Communications Commission

June 2015
OVERVIEW OF AT&T/DIRECTV MERGER
HARMS AND REMEDIES

• Merger Will Results in Two Types of Harms to Competition and Consumers:
  • Vertical Harms: Merger will Exacerbate Existing Harms of DirecTV’s and Pre-Merger AT&T/DirecTV’s Vertical Integration with “Must Have” RSN Programming Resulting in Higher Programming Costs for Rival MVPDs and their Customers.
  • Horizontal Harms: Merger will Allow Combined Company to Wield Increased Bargaining Power Over Third-Party Programmers to Extract Terms That Could Impede Ability of Rival MVPDs to Obtain Programming at All or at Non-Discriminatory Market Rates

• As It Has in Past, to Address the Vertical Harms the FCC Should Impose Two Types of Conditions with Improvements to Make Them More Useful, Particularly for Smaller MVPDs:
  • A Non-Discriminatory Access Condition to Protect Against Discriminatory Prices (Enforced by the Program Access Complaint Process); and
  • A Commercial Arbitration Remedy to Protect Against Above Fair Market Value Pricing Through a Uniform Pricing Strategy

• Additionally, to Address Horizontal Harms, the FCC Should Impose Restrictions on AT&T/DirecTV’s Ability to Interfere With or Otherwise Influences Rates, Terms, and Conditions Third-Party Programmers Enter Into with Other MVPDs
ACA MEMBERS COMPETE WITH AT&T/DIRECTV

- There are 840 small and medium-sized MVPDs who are members of ACA providing video programming to subscribers
  - All ACA members compete against DirecTV
  - Some ACA members compete against AT&T U-verse
ACA MEMBERS OFFER PROGRAMMING OWNED BY DIRECTV OR PRE-MERGER AT&T/DIRECTV

- More than 120 ACA members purchase regional sports networks (RSNs) owned by DirecTV or Pre-Merger AT&T/DirecTV
  - Roots Sports Pittsburgh (owned by DirecTV)
    - Purchased by 42 members who negotiate directly with DirecTV
  - Roots Sports Rocky Mountain (owned by DirecTV)
    - Purchased by 35 members who negotiate directly with DirecTV
  - Roots Sports Northwest (owned by DirecTV)
    - Purchased by 44 members who negotiate directly with DirecTV
  - Roots Sports Southwest (owned by Pre-Merger AT&T/DirecTV*)
    - Purchased by 5 members who negotiated directly with Comcast

* AT&T and DirecTV recently acquired shares of this RSN (formally known as Comcast SportsNet Houston).
VERTICAL HARMS

• DirecTV and Pre-Merger AT&T/DirecTV have an incentive and ability to charge rival MVPDs higher prices for its RSNs, as the FCC has repeatedly recognized
  • From 2004-2014, pursuant to News Corp./Hughes and Liberty/DirecTV merger conditions, MVPDs had the right to either bring a non-discriminatory access complaint (enforced by the program access complaint process) to the FCC or use baseball-style arbitration in the event of a negotiation impasse with DirecTV-affiliated RSNs.
  • Without any finding that the DirecTV-affiliated RSN’s incentive to harm DirecTV’s rivals ceased to exist, the arbitration condition expired by its terms in February 2014.
VERTICAL HARMs
(FCC’S BARGAINING MODEL ANALYSIS)

• The FCC traditionally uses a bargaining model framework when evaluating harm of a vertically integrated MVPD selling affiliated programming to a rival MVPD.
  • According to model, increases in a vertically-integrated MVPD’s profits per subscriber will increase its opportunity cost of selling its programming to its rivals.
  • Vertically integrated programmers/MVPDs recoup these higher opportunity costs by negotiating with their rivals for higher programming fees.
  • Rival MVPDs who pay higher programming fees pass along some or all of these higher costs to their subscribers.
VERTICAL HARMS (MERGER SPECIFIC)

• AT&T/DirecTV merger will increase the merged firm’s incentive to extract higher prices for its affiliated RSNs from its MVPD rivals because it increases AT&T/DirecTV’s profits per video subscriber.

• AT&T asserts deal will create merger-related operational and marketing efficiencies. If true, this will increase AT&T/DirecTV’s profits per video subscriber.

• ACA agrees with AT&T’s assertion that deal will lower its programming costs; this will also increase AT&T/DirecTV’s profits per video subscriber

  • Applicants admit that the merged entity – the largest MVPD with 26 million subscribers – will likely secure better programming rates due to its size than either AT&T or DirecTV could obtain independently.
VERTICAL HARMs
(ACA RESPONSES TO AT&T)

Applicants Are Wrong That The Deal Causes No Vertical Harm:

• **It’s Not About the Amount of Programming that AT&T/DirecTV Will Own:** Amount of programming owned is irrelevant – it’s whether the merger increases the combined company’s incentive and ability to charge higher prices to its rivals for its programming. It does.

• **It’s Not About AT&T/DirecTV’s Post-Merger Market Share in its Programmers’ Markets:** Lack of increase in the merging parties’ market share in their RSN markets is immaterial – it’s whether the merger increases the combined company’s profits per video subscriber for the MVPD services already offered in these markets. It does.

• **It’s Not about AT&T/DirecTV’s Interest in Withholding Access to Roots Sports Southwest:** The combined company’s lack of interest in utilizing a permanent foreclosure strategy against MVPD rivals is irrelevant – what matters is whether there is an increase in the combined entity’s incentive and ability to charge its rivals higher prices for its programming post-merger. There is.
HORIZONTAL HARMs (MERGER SPECIFIC)

• The merged firm’s increased bargaining power over third-party programmers can be employed in a manner that frustrates the ability of its MVPD rivals to obtain the same programming at fair market rates.
  
• Instead of using its increased bargaining power to seek lower programming fees, the merged firm may seek other concessions from third-party programmers, including conditions that may prevent the merged entity’s MVPD rivals from gaining access to the same programming at all or on fair terms – e.g., use of most favored nation (MFN) clauses.
HORIZONTAL HARDS
(ACA RESPONSES TO AT&T)

Applicants Are Wrong That the Deal Causes No Horizontal Harm:

• **AT&T’s Enhanced Bargaining Power Can Be Used to Harm Other MVPDs:** AT&T’s economist acknowledges the merged company will have more bargaining power than either AT&T or DirecTV has independently. AT&T does not refute that it can be used to seek concessions from third-party programmers that prevent other MVPDs from reaching fair deals with these same programmers.
FCC CONDITIONS ADOPTED IN PAST TO ADDRESS VERTICAL HARMs

In the past, to address competitive harms associated with vertical integration of MVPD distribution and programming assets, in prior merger approvals, the FCC has relied on a combination of:

- **The nondiscriminatory access condition** to protect against discriminatory practices (*enforced by the program access complaint process*); and
- **The commercial arbitration remedy** to protect against above fair market value pricing through a uniform pricing strategy.
## FCC CONDITIONS ADOPTED IN PAST TO ADDRESS VERTICAL HARMs

<table>
<thead>
<tr>
<th>Merger</th>
<th>Covered Programming</th>
<th>Non-Discriminatory Access Condition Adopted</th>
<th>Baseball Style Arbitration Condition Adopted</th>
<th>Already Subject to Program Access Rules</th>
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<tr>
<td>News Corp.-Hughes (2004)</td>
<td>RSNs</td>
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<td></td>
<td>Broadcast Stations</td>
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<td>Adelphia-Comcast-TWC (2006)</td>
<td>RSNs (Regardless of Means of Delivery)</td>
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<td>Yes</td>
<td>Yes (satellite delivered) No (terrestrially delivered)</td>
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<td>Liberty-DirecTV (2008)</td>
<td>RSNs (Regardless of Means of Delivery)</td>
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<tr>
<td></td>
<td>Broadcast Stations</td>
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<td></td>
<td>National Programming</td>
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<td>Comcast-NBCU (2011)</td>
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<td>Broadcast Stations</td>
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<td>National Programming</td>
<td>No</td>
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*FCC did not consider Liberty-DirecTV’s national programming to be “must have.”

**Non-discriminatory access condition not adopted by FCC despite Comcast volunteering to be subject to it.
PROPOSED CONDITIONS TO ADDRESS VERTICAL HARMs

To Address Harms From the Combination of Applicants’ MVPD and Video Programming Assets, the FCC Should:

• **Apply the non-discriminatory access condition** – requiring AT&T/DirecTV to provide access to its RSNs on non-discriminatory prices, terms, and conditions

• **As part of the enforcement process, the Commission should** –
  • Enable an aggrieved MVPD to bring a complaint comparing itself to a “similarly situated” MVPD regardless of whether the MVPD is the complainant’s direct competitor or serves the same geography;
  • Require AT&T/DirecTV to provide evidence to MVPDs that the rates, terms, and conditions offered are non-discriminatory;
  • Permit MVPDs to audit annually the rates, terms, and conditions AT&T/DirecTV’s video programmers provide to other MVPDs;
  • Prohibit AT&T/DirecTV from withdrawing programming during the pendency of a complaint; and
  • Permit smaller MVPDs to use bargaining agents (e.g. NCTC) to enforce their rights
PROPOSED CONDITIONS TO ADDRESS VERTICAL HARMs

To Address Harms From the Combination of the Applicants’ MVPD and Video Programming Assets, the FCC Should:

• **Apply the baseball-style arbitration condition** – requiring AT&T/DirecTV to provide access to their RSNs at fair market value

• **As part of the enforcement process, the FCC should**
  - Require that AT&T/DirecTV provide data and information to the complainant enabling it to determine whether the rate offered by AT&T/DirecTV is at fair market value and to formulate an informed final offer in an arbitration
  - Require that AT&T/DirecTV submit the initial final offer and permit complainant an opportunity to review this offer before submitting its own
PROPOSED CONDITIONS TO ADDRESS HORIZONTAL HARMs

To Address Harms From the Combination of the Applicants’ Distribution Assets, the FCC Should:

- Prohibit AT&T/DirecTV from interfering with or otherwise influencing the rates, terms, and conditions for video programming that a third-party programmer offers to an MVPD
PROPOSED CONDITIONS TO ADDRESS HARMS

• **Duration of Conditions**: At least 9 years, and the conditions should expire only after the Commission conducts a proceeding to determine whether they are no longer warranted.