July 14, 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 July 10, 2015, Matthew M. Polka, President and Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association (“ACA”), and the undersigned, representing ACA, met via teleconference with Jonathan Sallet, General Counsel and Jennifer Tatel, Associate General Counsel, to discuss ACA’s views on the merger-specific harms arising from 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”) and the inadequacy of existing rules and previously imposed merger conditions to address this harm consistent with ACA’s filings in the above-referenced docket.1 Prior to the teleconference, Mr. Sallet and Ms. Tatel received via email a written presentation detailing ACA’s arguments, a copy of which is enclosed for the record.

To start the meeting, ACA highlighted that more than 120 ACA member companies purchase regional sports networks (“RSNs”) currently owned by DirecTV (Root Sports Pittsburgh, Rocky Mountain and Northwest) and/or jointly owned by AT&T and DirecTV (Root Sports Southwest). In the markets of these RSNs, all of these companies compete against DirecTV and some also compete against AT&T U-verse.

ACA explained that its members who carry the Applicants’ RSNs are concerned that when AT&T and DirecTV combine, the RSNs will hold out for higher fees than if the companies did not combine. This harm is merger specific. With 26 million subscribers, AT&T and DirecTV combined will command better programming deals than the companies would alone. This, along with other merger efficiencies alleged by Applicants, means higher video profits for both DirecTV and U-verse services. The Commission has accepted that as the per video-subscriber profits of a vertically integrated MVPD rise, so does its interest in boosting its rivals’ costs for its programming. Accordingly, ACA member companies will feel the pinch when negotiating for the Root Sports RSNs and their customers will pay higher prices as a result.

ACA next discussed how the flaws in the existing program access rules and the remedial conditions previously used by the Commission to address vertical harms in transactions involving

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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 of the American Cable Association at 3-14 (filed Jan. 7, 2015); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary (filed May 1, 2015).
MVPD assets have rendered both of little or no value to smaller MVPDs. In particular, ACA pointed out that the Commission has rarely found that a vertically integrated programmer has charged discriminatory prices to an MVPD in response to a program access complaint. ACA is aware of only two such decisions, one in 1997 and one in 1998.² ACA believes this fact attests to the program access rules’ lack of utility for MVPDs to address the vertical harms of this transaction, particularly for smaller video providers filing their own complaints.

In closing, ACA urged the Commission not to approve the AT&T/DirecTV transaction unless it adopts the remedial conditions proposed by ACA that will offer meaningful protections for smaller MVPDs against both the vertical and horizontal harms of the AT&T-DirecTV merger.

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

Sincerely,

Barbara Esbin

Enclosures (1)

cc: Jonathan Sallet
    Jennifer Tatel

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

Presentation to the Federal Communications Commission

July 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

- **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 HARMS
(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 HARDS

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<tr>
<th>Merger</th>
<th>Covered Programming</th>
<th>Non-Discriminatory Access Condition Adopted</th>
<th>Baseball Style Arbitration Condition Adopted</th>
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<td>News Corp.-Hughes (2004)</td>
<td>RSNs</td>
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<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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<td>National Programming</td>
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<td>Comcast-NBCU (2011)</td>
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<td></td>
<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