Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Applications of AT&T and DirecTV To	)	
Transfer Control of FCC Licenses and Other	)	MB Docket No. 14-90
Authorizations	)	

REPLY TO JOINT OPPOSITION

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SUMMARY

AT&T and DirecTV have failed in their Opposition to allay substantial concerns raised by Cox and other parties regarding the threats the merged company poses to competition in bundled video, voice, and data markets nationwide. This merger will create a massive company with an unprecedented mix of video, wireline and wireless voice, and data assets that will make AT&T/DirecTV a potentially dominant service provider throughout the country. Yet AT&T and DirecTV continue to argue that they should be granted advantages conferred on small new market entrants, and they demand that the merged company be permitted to continue operating as if cable operators were the real threat to competition. The FCC should put those outdated notions to rest and address the competitive threats that the merger of AT&T and DirecTV will create through several carefully crafted conditions that will establish a level competitive playing field for the video and bundled services market.

Level Playing Field for Video. AT&T and DirecTV resist Cox's proposition that the merged company should face the same regulations faced by much smaller cable operators. Specifically, AT&T/DirecTV argues that it should not be subject to the program access and unfair competition provisions of Section 628 of the Act, or even be bound to abide by the same rules for basic service tier offers. In making these arguments, AT&T and DirecTV fail to explain why the company should be free of Section 628 obligations in light of Section 628(j), which makes these rules applicable to telephone companies, such as AT&T, and their affiliates that provide video programming. They also fail to explain why the merged company should be free of unfair competition rules that apply to all cable operators regardless of size. And they even dismiss as not "transaction related" conditions that would assure common video regulations apply to one of the largest video providers in every market.

Congress and the FCC have decided that Section 628 providers have certain obligations to all their customers in the delivery of broadcast channels and other local services, and the obligation to compete for video customers without unfair influence or advantage. AT&T/DirecTV should not be excepted from any of these requirements because it entered the market after the passage of the 1992 Cable Act, which introduced these requirements. And the FCC should apply a heightened sense of scrutiny and more than minimum constraints on practices of AT&T/DirecTV that will unfairly tip the scales to the detriment of competitors that do not have the same scope and reach. The days when AT&T and DirecTV introduced new competition are over; the FCC now needs to ensure that the competition the merged entity provides to cable operators is fair – not deformed by regulatory advantages or free of special oversight inappropriate for a company of AT&T/DirecTV's size and scope.

Exclusive Programming Restrictions. AT&T and DirecTV fail to explain why they should be permitted to use exclusive programming deals as a competitive hammer against smaller operators. Instead, they simply cite back to previous FCC approval of DirecTV's exclusive programming packages when DirecTV was a standalone new market entrant, and argue that the same rule should apply to the powerful merged entity.

Cox showed in its Petition that there is no justification for a company with the size and competitive reach of AT&T/DirecTV to be permitted to use exclusive contracts for marquee programming as a way of driving increased market share. Few video companies have the resources or household reach to make national exclusive programming deals economically viable or desirable. As a result of the merger, AT&T and DirecTV will have both the ability and incentive to use such exclusive distribution deals to sell their bundled video, voice, and data services in nearly every market. The merged company already controls exclusive NFL programming and will have the resources to acquire additional exclusive programming. AT&T/DirecTV should be required to compete for customers based on differentiators that do not center around programming that has been put off-limits to all other providers.

Protection of Competition for Bundled Services. While AT&T/DirecTV mention the attractiveness of their bundled services more than 80 times in the Opposition, they steadfastly resist Cox's proposed conditions that would ensure fair competition for bundled services among the merged company and its competitors. Again, AT&T/DirecTV claim that conditions related to Section 251 and 252 telephone interconnection are not transaction specific, but the reality is that if AT&T/DirecTV can interfere with competitors' provision of telephone service, then those competitors' service bundles will become significantly less attractive than those offered by the merged company. AT&T/DirecTV continues to control a vast unique resource in the form of its core wireline network. The merger will turn that resource into a potential competitive battering ram for DirecTV/AT&T's bundled services. Ensuring that competitors continue to have access to AT&T/DirecTV's telephone network following the merger (regardless of when or if it transitions to IP delivery of voice traffic) should be a simple and obvious step for the FCC to take.

AT&T/DirecTV also dismisses Cox's request for conditions to ensure fair competition in multi-dwelling unit settings ("MDUs"). Specifically, AT&T/DirecTV demands the right to maintain and enter into new exclusive access contracts to serve tenants in MDUs. As with exclusive programming, there is no justification for permitting a company the size and competitive strength of the merged AT&T/DirecTV to exclude competitors from any service environment. Much smaller cable operators cannot do that and there is simply no reason why the merged company should enjoy that advantage.

The FCC also should add conditions that require AT&T/DirecTV to permit competition for individual video, voice, or data services in MDU settings. AT&T/DirecTV belittles Cox's concerns as "parochial," but the FCC should recognize that every customer deserves a fair choice and does not have to take a bundled service product from one service provider. DirecTV's efforts to commandeer wiring Cox has installed in buildings and to thereby exclude customers from retaining Cox-provided data service is a blueprint for the type of anti-competitive misconduct that the FCC should guard against from the merged AT&T/DirecTV.

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REPLY TO JOINT OPPOSITION

Cox Communications, Inc. ("Cox"), by its attorneys, hereby files this reply to the Joint Opposition of AT&T Inc. and DirecTV to Petitions to Deny and Condition and Reply to Comments (the "Opposition").

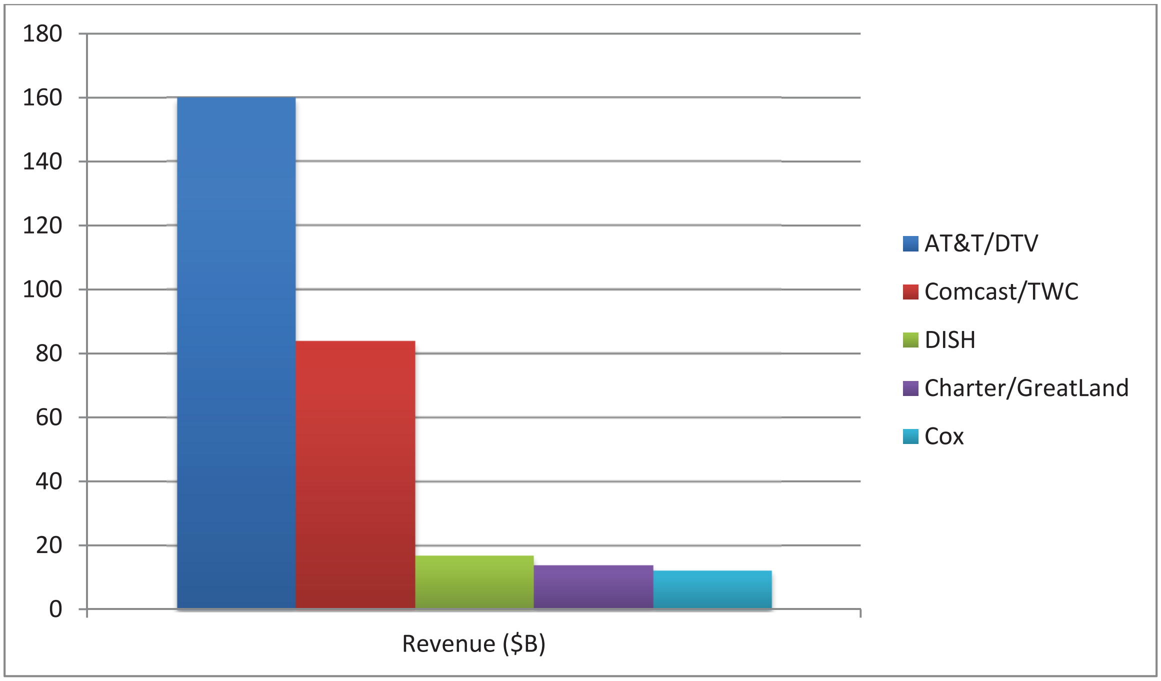
I. INTRODUCTION

AT&T/DirecTV's Opposition further shows that, without appropriate, FCC-established safeguards, this first-of-its kind merger – in combined size, scope and revenues – will give the merged AT&T/DirecTV unfair competitive advantages that will harm the public interest. The following table and chart illustrate the dramatic imbalance in the wholesale and retail video market that will be created by this merger – and the dominant position that AT&T/DirecTV will have in that market from a revenue perspective.[1]

[1] The data in this table and chart are derived from the following sources: Cox Enterprises, *Cox Revenues*, http://www.coxenterprises.com/about-cox/annual-review/revenues.aspx#.U3EFHoFdVu0; Charter Communications, *Investor Resources*, http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-irhome; AT&T, *Investor Relations*, http://www.att.com/gen/investor-relations?pid=268; DirecTV, *Quarterly Results*, http://investor.directv.com/financial-information/quarterly-results/default.aspx; Comcast, *Financials*, http://www.cmcsk.com/financials.cfm; Time Warner Cable, *Quarterly Earnings*, http://ir.timewarnercable.com/investor-relations/quarterly-earnings/default.aspx; Dish Network, *Investor Relations*, http://dish.client.shareholder.com/; MoffettNathanson Research, C*harter: The Case for CHTR…Our Pro Forma Model (and Did We Mention $24 of FCF Per Share in 2018?)*, June 2, 2014 (subscription required). The data for Charter and GreatLand Connections data is presented on a consolidated basis as press reports indicate that the GreatLand Connections systems will be managed by Charter.

	AT&T/DirecTV	Comcast/Time Warner Cable	Charter/GreatLand Connections	DISH	Cox
Annual Revenues	$160B	$84B	$17B	$14B	$12.5B

Comparison of Media and Telecom Revenues



AT&T/DirecTV's company-wide revenues from services it intends to bundle and sell to customers nationwide will be nearly twice as high as its nearest competitor and ten times or more that of any other MVPD. Before the FCC approves the creation of such a colossus, it must adopt appropriate conditions to ensure that the new company does not use its unprecedented size and scope to dominate the video and bundled services markets.

Cox and others have demonstrated the variety of ways that an unconstrained AT&T/DirecTV would pose substantial threats to competition in both the video and bundled services sectors. But AT&T and DirecTV offer only cursory responses that fail to address the many concerns raised by parties seeking conditions on the merger. The FCC must respond to these concerns by adopting appropriate conditions that protect fair competition.

As reflected in its Opposition, AT&T and DirecTV would prefer to keep the FCC's attention focused on the alleged competitive and consumer benefits of the transaction. However, the reality is that most of those supposed benefits can only materialize, if at all, if the FCC gives AT&T and DirecTV regulatory advantages that would harm competition and are entirely inappropriate for a nationwide, multi-platform behemoth. Without conditions that are carefully crafted to maintain a fair competitive environment, the proposed merger will make AT&T/DirecTV a dominant video provider that is governed only by regulations designed for upstart competitors. The first priority of the merger review should be an FCC commitment to treat the merged AT&T/DirecTV like the market heavyweight it will be, and that should lead the FCC to adopt appropriate conditions to ensure fair competition for the merged company's smaller rivals.

II. AT&T/DIRECTV SHOULD BE PROHIBITED FROM MAINTAINING OR ENTERING INTO NEW EXCLUSIVE PROGRAMMING ARRANGEMENTS.

Cox sought conditions that would prohibit AT&T from maintaining or entering into new exclusive programming arrangements.[2] Such conditions should be practically assumed, because no company of the size and multi-platform scope of the merged AT&T/DirecTV should be permitted to maintain exclusive arrangements for valuable national programming, and in fact, other than AT&T/DirecTV, it appears that none do. Moreover, AT&T fails to address or even acknowledge its previous position before the FCC explicitly opposing exclusive programming arrangements.[3] According to AT&T, "an exclusive contract between a cable operator and an affiliated national sports network . . . is highly likely to be predominantly anti-competitive and a

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[2] *See* Cox Petition at 7-13; *see also* DISH Petition at 16-18.

[3] *See* Cox Petition at 8 (citing Comments of AT&T Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 20-22 ("AT&T Program Access Comments").

significant hindrance to competing MVPDs.[4] Nor does AT&T try to justify its own history of abusing exclusive arrangements for products like the iPhone, which deterred new entry into the wireless telephone market, deprived millions of Americans of the opportunity to use the iPhone and had a strongly depressing effect on competition.[5] Those facts alone strongly support the case for the requested conditions in this case, but the combined AT&T/DirecTV ignores them.

Rather than answering the legitimate concerns raised by Cox and others, AT&T/DirecTV relies heavily on previous FCC merger decisions approving DirecTV's access to exclusive programming agreements.[6] But those past decisions are irrelevant to this transaction. The FCC allowed a standalone DirecTV to retain exclusive programming agreements to encourage competition,[7] a rationale that fails with this merger with its elimination of a competitor and creation of a company of unprecedented size and customer reach. The FCC simply cannot treat the merged AT&T/DirecTV as an upstart competitor and give it the advantages it has previously given to service providers seen as challengers to legacy cable operators. Instead the FCC must treat AT&T/DirecTV as the potentially dominant market actor it proposes to become. That

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[4] AT&T Program Access Comments at 5.

[5] *See* Cox Petition at 7 & n.12. *See also* Letter from Sens. Kerry (D-Mass.), Wicker (R-Miss.), Dorgan (D.-N.D.), and Klobuchar (D-Minn.) to Acting Chairman Michal J. Copps, dated June 15, 2009, *text available at* http://www.fiercewireless.com/press-releases/kerry-wicker-dorgan-klobuchar-call-increased-choice-wireless-consumers; Remarks of FCC Acting Chairman Michael J. Copps, Pike & Fischer's Broadband Policy Summit V, June 18, 2009, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-291492A1.pdf; Phil Goldstein, *FCC Will Investigate Handset Exclusivity Deals*, FIERCE WIRELESS, June 19, 2009, *available at* http://www.fiercewireless.com/story/fcc-will-investigate-handset-exclusivity-deals/2009-06-19; Phil Goldstein, *Senators Probe Carriers on Exclusive Handset Deals*, FIERCE WIRELESS, June 19, 2009, *available at* http://www.fiercewireless.com/story/senators-question-carriers-handset-exclusivity-deals/2009-06-18.

[6] *See* Opposition at 56-57 (citing General Motors Corp. and Hughes Electronics Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 473, 532 (2004) ("*General Motors/Hughes Order*"); News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp. Transferee; For Authority to Transfer Control, *Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3319-20 (2008) ("*Newscorp/DirecTV Order*")).

[7] *General Motors/Hughes Order*, 19 FCC Rcd at 599-601; *Newscorp/DirecTV Order*, 23 FCC Rcd at 3319-20.

company will not need and should not be permitted to have exclusive programming agreements, particularly for marquee sports and entertainment programming.

AT&T/DirecTV also seeks to rely on past FCC precedent holding that exclusive programming arrangements can be in the public interest.[8] Of course, AT&T ignores other FCC precedent holding that "must-have" sports programming is different in the context of regional sports networks.[9] In any event, the FCC's past findings related to then-existing MVPDs have little applicability to AT&T/DirecTV in this merger review, because the proposed merged entity seeks to combine to gain a stranglehold (rather than solidify a foothold) on the market. No MVPD before has had the ability to compete in the bundled services market on a nationwide basis, so there is no precedent for permitting a company like AT&T/DirecTV to enter into exclusive programming arrangements. Permitting a company with national reach to combine bundled video, voice, and data services with exclusive access to marquee programming would court competitive disaster.

In arguing that it should not be the only MVPD precluded from entering into exclusive programming arrangements, AT&T ignores the size and multi-platform reach of the merged company that is at the center of this review.[10] It also fails to acknowledge that virtually no large MVPD other than its acquisition target, DirecTV, currently has any exclusive programming arrangements for national or competitively significant programming.[11]

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8 *See* Opposition at 57 (citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, *First Report and Order*, 8 FCC Rcd 3359, 3384 (1993); *Revision of the Commission's Program Access Rules*, Report and Order, 27 FCC Rcd 12,605, 12631 (2012). *See also* Fifteenth Video Competition Report, 28 FCC Rcd at 10539 (2013).

9 *See, e.g.*, Review of the Commission's Program Access Rules and Elimination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd 746, 782-83 (2010).

10 *See* Opposition at 58.

11 *See* Revision of the Commission's Program Access Rules, *Report and Order in MB Docket Nos. 12-68, 07-18, 05-192; Further Notice of Proposed Rulemaking in MB Docket No. 12-68, and Order on*

III. THE FCC SHOULD IMPOSE CONDITIONS THAT ELIMINATE REGULATORY ADVANTAGES PREVIOUSLY EXTENDED TO AT&T AND DIRECTV AS STANDALONE COMPANIES.

The unprecedented scale and scope of AT&T/DirecTV's proposed multi-platform distribution network also eliminates any basis for giving the merged companies any of the competitive advantages that the FCC's rules have traditionally conferred on DBS and telco video providers. In particular, Cox has advocated that the FCC (1) confirm that the program access and unfair competition prohibitions of Section 628 of the Act will apply to the merged entity; and (2) ensure that requirements that are applied to cable operators, like the "must-buy" of the basic service tier, are applied equally to AT&T/DirecTV.[12]

AT&T/DirecTV claims that a program access condition is unnecessary because it controls very little vertically integrated programming.[13] This argument is a non-sequitur. The program access rules apply to all cable operators, not merely those that control vertically integrated programming. AT&T's argument ignores the fact that exempting AT&T/DirecTV from these restrictions would leave it unconstrained by the rules that apply to its smaller, less powerful competitors. And AT&T/DirecTV also fails to explain why Section 628 should not apply to it in light of Section 628(j)'s explicit application of this section to wireline telephone companies that enter the video market and their affiliates.[14] The FCC should use this proceeding to ensure that AT&T/DirecTV will not have the ability or incentive to exploit regulatory

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Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605, 12627-28 (2012) (recognizing rarity of exclusive national programming contracts). AT&T/DirecTV's citation to Verizon's exclusive deal to deliver NFL games to mobile devices has little in common with AT&T/DirecTV's plans for multi-platform distribution of *NFL Sunday Ticket*. *See* Opposition at n.213. Verizon's wireless service does not compete directly with MVPDs' linear programming services and Verizon does not provide its NFL content to its FiOS customers.

12 *See* Cox Petition at 13-21, 26-28.

13 *See* Opposition at 54-56.

14 *See* 47 U.S.C. § 548(j).

advantages over its smaller competitors. Allowing AT&T/DirecTV to assert exemption from these provisions would confer an unreasonable competitive advantage on a company that will not need any.

AT&T/DirecTV also claims that issues related to the merged entity's basic service tier obligations are "unrelated to this transaction."[15] This is a puzzling claim because the FCC's review of this transaction should be primarily directed at ensuring that the proposed merger does not harm competition or consumers. Allowing AT&T/DirecTV to maintain regulatory advantages over those same competitors is practically guaranteed to harm consumers by limiting competition. This is a textbook transaction-specific harm. The FCC should remedy that harm by applying the same basic service tier requirements to the merged entity as apply to its MVPD competitors.

The FCC's goal in this proceeding should be to create a level competitive playing field that subjects AT&T/DirecTV to the same regulatory requirements that its cable competitors face. Accordingly, Cox renews its request that the FCC apply the full panoply of Section 628 program access and unfair competition restrictions as well as the basic service tier requirements that apply to AT&T/DirecTV's smaller cable competitors. Moreover, Cox invites the FCC to identify other regulatory advantages that DirecTV/AT&T might enjoy under its rules and eliminate those advantages as well.

IV. THE FCC SHOULD REJECT AT&T/DIRECTV'S CLAIMS THAT THE MERGER WILL HAVE NO IMPACT ON THE CONTENT ACQUISITION MARKET AND IMPOSE THE CONDITIONS COX PROPOSES.

Cox and other parties seeking conditions on the AT&T/DirecTV merger have demonstrated that the increased program purchasing power of the merged company would lead

[15] *See* Opposition at 59.

to higher programming prices for smaller MVPDs and higher prices for consumers.[16] This unfair "volume discount" problem and its deforming effect on the wholesale programming market has been before the Commission for several years.[17] But as Cox demonstrated in its Petition, the AT&T/DirecTV merger makes this issue more urgent than ever due to the unprecedented purchasing and distribution power that the merged company will possess.[18] Although AT&T freely admits that it has been subject to higher programming prices due to its smaller size,[19] AT&T/DirecTV still objects to any condition that would protect other small operators from the same fate, offering two responses to these concerns, neither of which is remotely plausible.

First, AT&T/DirecTV argues that even if programmers are forced to accept lower programming fees from AT&T, those programmers will increase their overall revenue due to the increased advertising reach that the AT&T/DirecTV platform will create.[20] AT&T/DirecTV provides no evidence to support this claim and industry data shows it to be a highly unlikely result. In 2014, net advertising revenue typically makes up about 40% of basic cable networks gross operating revenue, while affiliation fees make up nearly 57% of gross revenues.[21] That means a 20% decrease in affiliate fees from AT&T/DirecTV would have to result in a 29% increase in advertising revenue for basic cable networks advertising to AT&T/DirecTV customers to make up for the lost revenue. AT&T/DirecTV offers only vague speculation about how this new advertising bonanza would result merely from combining two pre-existing

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16 *See* Cox Petition at 13-16; ACA Comments at 19-20 (citing Gary Biglaiser, *The Harms of AT&T-DirecTV Merger*, Sept. 15, 2014, at 15-16 ("Biglaiser Study")); DISH Petition at 10-14).

17 *See* Cox Petition at 13-15 (citations omitted).

18 *See id.* at 15-16.

19 *See* Opposition at 16-17;

20 *See Opposition* at 53-54.

21 *See* SNL Kagan, TV Network Industry Benchmarks (data for 2014).

subscriber bases,[22] and the FCC cannot assume that such a dramatic increase in advertising revenue will in fact take place. And AT&T's argument entirely excludes from the equation high-prices premium cable networks that realize no revenue from advertising and will therefore have no opportunity to offset the licensing fees that they will lose from AT&T/DirecTV with increasing advertising revenue. The reality is that both basic and premium cable networks forced to take lower licensing fees from the powerful AT&T/DirecTV will realize significantly lower revenues as a result of the merger. As Cox and others have shown, those networks will seek to recoup that lost revenue from smaller MVPDs.[23]

AT&T/DirecTV next argues that even if cable networks realize less revenue from AT&T/DirecTV – which will make up more than 25% of program purchasing market – those networks will not be able to make up that revenue through higher fees for smaller operators because "[t]here is no basis in the economics of bargaining to conclude that a better deal for AT&T should result in a worse deal for other MVPDs."[24] Unfortunately for small MVPDs and their customers, this is nothing more than a blackboard theory that bears no relationship to the real world of programming contract negotiation.

Accepting AT&T/DirecTV's claim that its programming price decreases will not lead to price increases for smaller operators would require the FCC to conclude that powerful programmers will simply settle for lower revenues overall because AT&T/DirecTV decided to merge. The real world doesn't work that way. AT&T/DirecTV's merger will reduce the bargaining leverage every smaller operator has to secure national programming, and, to remain competitive, smaller operators will be forced to pay what programmers ask in order to compete

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22 *See* Opposition at 53 & n.190.

23 *See* ACA Petition at 19; Cox Petition at 13-14; DISH Petition at 13.

24 Opposition at 53-54 (quoting Katz Reply Dec. ¶ 29).

with AT&T/DirecTV's formidable service bundles.[25] As ACA's economist explained, in the real world, cable networks face enormous pressure to deliver to their investors year-over-year increases in programming licensing fees derived from MVPDs.[26] "Accordingly, if the programmer must give the new AT&T a lower price in return for carriage of its programming, then it will be inclined to turn to other buyers, particularly those with less bargaining leverage – the smaller MVPDs."[27] In other words, programmers will continue to take advantage of smaller operators' need for their programming by charging higher rates. The FCC already has evidence of this practice, and the merger will only exacerbate the problem.

For these reasons, the record in this proceeding requires that the FCC adopt the conditions advocated by Cox to remedy the distorting effects that the merger will have on the wholesale market for MVPD programming.

V. THE FCC MUST ENSURE THAT THIS MERGER DOES NOT STIFLE BUNDLED SERVICE COMPETITION.

A. The FCC Should Adopt Conditions To Ensure Competitors Retain Access to AT&T's Telephone Network To Permit Continued Marketing of Competitive Service Bundles.

AT&T/DirecTV practically ignores Cox's request that the FCC ensure that the merged entity remains subject to Section 251 and 252 obligations, claiming that such concerns are not "transaction specific."[28] This is a surprising claim because AT&T/DirecTV has made its ability

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25 *See, e.g.*, Joe Flint and Jim Puzzanghera, *AT&T Deal for DirecTV Driven by Desire To Pare Programming Costs*, L.A. TIMES, May 19, 2014, *available at* http://www.latimes.com/business/la-fi-ct-att-directv-video-20140520-story.html#page=1 ("One of the unintended consequences of the consolidation spree is that those left without a new partner may end up paying more for content. Programmers who get squeezed by the big broadcasters then turn around and squeeze the smaller players.").

26 ACA Petition at 20 (quoting Biglaiser Study at 16).

27 *See id.*

28 *See* Opposition at 59 & n.216.

to offer attractive bundles a centerpiece of its public interest showing,[29] and the Opposition uses the term "bundle" more than 80 times. Since wireline telephone services are a full third of the traditional service bundle, it is hard to fathom how conditions related to AT&T/DirecTV's participation in the telephone services market could not be "transaction specific."

The reality is that if this merger allows AT&T/DirecTV to discriminate against its MVPD competitors in the provision of telephone service, then the merged entity will gain yet another competitive advantage that it should not need. The main constraints on AT&T's ability to interfere with its competitors' provision of telephone service are the interconnection requirements of Section 251 and 252. Absent these requirements, competing bundled service providers are severely compromised in their ability to deliver telephone calls to vast numbers of customers in AT&T's traditional wireline service territory.[30] That would make providing competing service bundles nearly impossible in a huge swath of the country.

It is therefore entirely appropriate that the FCC use conditions in this proceeding to guarantee that competitors can continue to offer telephone service as part of their competing service bundles. The only way to accomplish that is by confirming the applicability and the vitality of the Section 251 and 252 interconnection requirements both today and in the future.[31] The FCC should therefore adopt Cox's proposed condition that Sections 251 and 252 remain applicable to AT&T/DirecTV following the merger regardless of whether AT&T/DirecTV provides telephone service using a traditional or an IP traffic delivery system.

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[29] *See* Application of AT&T Inc. for Transfer of Control of Satellite Space and Earth Station Authorizations, File No. SAT-T/C-20140611-00060, filed June 11, 2014, Exhibit A, Public Interest at, *e.g.*, 20, 45, 56.

[30] *See* Cox Petition at 23 (citing, *e.g.*, Comments of Cox Communications, Inc., GN Docket No. 12-353, filed Jan. 28, 2013, at 9-11).

[31] *See* Cox Petition at 24-26.

B. Absent the Conditions Set Forth in Cox's Comments, the Transaction Will Harm Consumer Choice and Broadband Competition in MDUs.

As Cox explained in its Petition, the transaction creates new incentives for the merged company to act anti-competitively in the market for multi-dwelling unit ("MDU") customers particularly with respect to exclusive service arrangements and through interference to existing cable-provided broadband service.[32]

First, while the Commission's rules bar cable operators and common carriers providing video service from entering into exclusive agreements at MDUs, that prohibition has not been extended to DBS providers.[33] It is clear from the Opposition that AT&T/DirecTV intends to preserve DirecTV's ability to enter into and maintain exclusive access arrangements in MDUs after the transaction closes. They incorrectly aver that the issue of whether DirecTV and DBS providers should be subject to the MDU exclusivity ban is "an open question in a proceeding of general applicability" that has no transaction-specific significance.[34] However, because the merger transforms DirecTV into an affiliate of a common carrier providing video programming, the transaction renders DirecTV subject to the MDU exclusivity ban.[35] But even if that were not the case, a condition that requires AT&T/DirecTV to compete on a level playing field in MDUs is appropriate here. The transaction heightens the merged entity's incentive to use video exclusive arrangements in MDUs to harm broadband competition because, as AT&T/DirecTV

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32 *See id* at 28.

33 *See* 47 C.F.R. § 76.2000.

34 *See* Opposition at 71.

35 *See* Exclusive Contracts for Provision of Video Service in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 at ¶ 51 (2007) ("*MDU Exclusivity Order*") ("our prohibition on exclusivity clauses for the provision of video services applies to both any common carrier or its affiliate"). *See also* 47 U.S.C. § 548(j); *see also* Cox Petition at 28-29.

repeatedly acknowledges,[36] DirecTV presently lacks a viable broadband Internet offering and also has no telephony business of its own. After the merger, however, any DirecTV exclusive arrangement at an MDU would impede consumer choice not just for video service, but also for broadband and telephony.[37] Accordingly, the Commission should expressly confirm that any video programming services offered by AT&T/DirecTV to MDUs – whether furnished through U-Verse or DBS – are covered by the restrictions on exclusive contracts imposed by the *MDU Exclusivity Order*, and that those restrictions apply to both existing and future agreements at MDUs.[38]

Second, AT&T/DirecTV also expresses no intention in the Opposition to cease exploiting gaps in the FCC's MDU cable wiring rules to the detriment of consumer choice. And it presents no argument or analysis to counter Cox's showing that the transaction will exacerbate the harms arising from DirecTV practices in MDUs stemming from the draconian measures it takes to commandeer Cox cable wiring without regard to interference with Cox broadband Internet services. Because DirecTV has been unwilling to consider reasonable solutions to the interference problems caused by its diplexers on shared MDU internal wiring in which both sides bear burdens in order to preserve consumer choice, Cox must either decline to serve units that

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[36] *See* AT&T DirecTV Public Interest Statement at 1; Katz Reply Declaration at ¶ 62.

[37] *See*, *e.g.*, *MDU Exclusivity Order* at ¶ 16 (Noting that MDU exclusivity arrangements "discourage the deployment of broadband facilities to American consumers").

[38] *See MDU Exclusivity Order* at ¶ 35 ("The rule we adopt in this proceeding prohibits both the enforcement of existing exclusivity clauses and the execution of new ones. Both have the same competition- and broadband-deterring effect that harms consumers").

wish to receive our DOCSIS 3.0 cable modem service or incur the costs of running a second wire.[39] This is not a sustainable method of providing DOCSIS 3.0 at MDUs.[40]

As Cox explained, the transaction will only worsen this circumstance.[41] Unlike DirecTV, AT&T offers a broadband Internet access service and will therefore have even less incentive to act reasonably in circumstances where MDU tenants wish to retain Cox as their broadband provider. Those circumstances may be particularly prevalent in areas where AT&T's broadband offering consists only of DSL service, given the disparity in service quality between DOCSIS 3.0 broadband and convention and DSL speeds.[42] AT&T/DirecTV will have a heightened incentive to attempt to exploit the ambiguity surrounding application of the Commission's cable inside wiring rules in circumstances where MDU tenants receiving DirecTV video wish to retain Cox for broadband Internet service. Accordingly, to preserve meaningful broadband competition and consumer choice at MDUs where AT&T/DirecTV provides service, the Commission should impose the MDU-related conditions outlined by Cox in its initial comments.[43]

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[39] In fact, Cox has offered two reasonable proposals to address this circumstance, both of which have been summarily rejected by DirecTV with little justification. First, Cox proposed that DirecTV switch to diplexers that operate above 1.7G, which could potentially mitigate interference issues at least in the near-term. Alternatively, Cox proposed that the parties establish that the second party to provide service to a unit in an MDU would run a second wire to that unit to avoid service interference. In any instance in which Cox is the second provider to provide service in a building (or to a unit in a building), Cox would deploy a second wire. In those cases where DirecTV is the second provider, DirecTV would run the second wire. There are, in fact, numerous MDUs where DirecTV and Cox offer service in which Cox is the second provider, so the burden of running the second wire would be equitably shared.

[40] Cox cannot change the frequencies at which DOCSIS 3.0 service operates without re-engineering its entire cable plant, which is not a viable solution to an interference problem that arises only at MDUs where DirecTV provides service and declines to deploy its own wiring infrastructure.

[41] *See* Cox Petition at 31-34.

[42] *See* Puneet Sikka, *Must know: Why AT&T's Wireline Business Continues To Decline*, MARKET REALIST, Sept. 3, 2014, *available at* http://marketrealist.com/2014/09/must-know-atts-wireline-business-continues-decline/ ("AT&T's total wireline broadband subscribers decreased by 55,000 in the quarter. This decline was mainly due to the churn of DSL subscribers").

[43] *See* Cox Petition at 34-35.

VI. CONCLUSION

For the reasons stated herein and in the Petition, Cox requests that the FCC adopt the conditions that Cox has requested before granting the proposed merger of AT&T and DirecTV.

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