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January 7, 2015

By HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer
Control of Licenses and Authorizations, MB Docket No. 14-90**

Dear Ms. Dortch:

Pursuant to the *Second Amended Modified Joint Protective Order*¹ in the above-captioned proceeding, DISH Network Corporation (“DISH”) hereby submits a public, redacted version of its January 7, 2015 Reply. The “{{ }}” symbols denote where Highly Confidential Information has been redacted. The Highly Confidential version of this filing is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Modified Joint Protective Order*.

Please contact me with any questions.

Respectfully submitted,


Stephanie A. Roy
Counsel for DISH Network Corporation

¹ Applications of AT&T, Inc. and DIRETV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, *Second Amended Modified Joint Protective Order*, DA 14-1640 (Nov. 12, 2014) (“*Modified Joint Protective Order*”).

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Applications of) MB Docket No. 14-90
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AT&T, Inc. and)
DIRECTV)
)
For Consent To Assign or Transfer Control)
of Licenses and Authorizations)
)

REPLY OF DISH NETWORK CORPORATION

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January 7, 2015

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REPLY OF DISH NETWORK CORPORATION

DISH Network Corporation (“DISH”) replies to the Joint Opposition to Petitions to Deny and Condition and Reply to Comments (“Opposition”) filed by AT&T, Inc. (“AT&T”) and DIRECTV (collectively, the “Applicants”) in the above-captioned proceeding.¹ AT&T and DIRECTV still have not demonstrated, either in their Application² or in their Opposition, that this merger would serve the public interest. Instead, the Applicants respond to the serious competitive concerns raised in the record in a cavalier and perfunctory manner, often dismissing them in footnotes. Among other things, these concerns include the increased risk of spectrum warehousing, as well as the fear that AT&T will use its broadband pipe to harm online video distributors (“OVDs”) such as DISH.

¹ See Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, MB Docket No. 14-90 (filed Oct. 16, 2014) (“Opposition”).

² See Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Description of Transaction, Public Interest Showing, and Related Demonstrations, MB Docket No. 14-90 (filed Jun. 11, 2014) (“Application”).

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This proposed merger would consolidate the largest Direct Broadcast Satellite (“DBS”) provider with AT&T, already a dominant player in several telecommunications market segments, create a nationwide pay-TV competitor with approximately 26 million subscribers, and eliminate current horizontal competition between the two companies in many areas. Just as important, the benefits that would supposedly offset these anti-competitive effects remain unproven in the Opposition, as they were in the Application. If the Commission approves this merger, it should impose the conditions proposed by DISH to reduce the harms to competition and consumers that would result.

I. INTRODUCTION AND SUMMARY

A post-transaction AT&T/DIRECTV will have the size, resources, and incentives to harm competition and consumers in the pay-TV, broadband, and wireless markets.³

The Risk of Thwarting DBS Competition. The merger will create a lopsided imbalance of bandwidth between AT&T/DIRECTV and DISH, DIRECTV’s principal DBS competitor. In their Opposition, the Applicants concede, as they must, that DIRECTV is underutilizing its three DBS channels at the 110° W.L. orbital slot. The Applicants dismiss the relevance of this underutilization on the ground that it predates the merger. However, the underutilized spectrum is part and parcel of the bandwidth arsenal that would give a combined AT&T/DIRECTV overwhelming superiority to DISH. In addition, by endowing DIRECTV with AT&T’s bandwidth, the merger will further reduce DIRECTV’s incentive to ever put that spectrum to use.

MVPD and Over-the-Top (“OTT”) Foreclosure. As a result of this transaction, the distribution business of DIRECTV will come under the same roof as one of the country’s largest

³ Because the Commission’s anti-collusion rules are in effect, DISH will address arguments related to the transaction’s harms to the wireless market and related conditions at a later time.

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Internet Service Providers (“ISP”). This will increase the combined company’s incentive to use its broadband pipe in the U-verse footprint to harm the online offerings of its competitors. The Applicants fail to address these concerns. The wholesale broadband condition requested by DISH, dismissed in a footnote in the Opposition, is necessary to mitigate this risk.

Fixed Wireless Service Is Not a Merger-Specific Benefit. The documents produced by the Applicants contradict many of their claims about the benefits that will supposedly flow from the proposed transaction. In particular, the claimed benefit of wireless local loop deployment should not be credited to the Applicants as merger-specific. In fact, the merger would not render that deployment substantially more attractive for AT&T than it is today.

II. THE APPLICANTS CONCEDE THAT THE 110° W.L. ORBITAL SLOT IS UNDERUTILIZED, BUT IMPROPERLY DISMISS THE RELEVANCE OF THAT FACT

This merger directly implicates DIRECTV’s underutilization of some of its licensed spectrum. In its petition, DISH explained that DIRECTV is wasting scarce orbital spectrum capable of serving the entire continental United States (“CONUS”)—namely, its three DBS channels at 110° W.L. DISH pointed out that, to its knowledge, DIRECTV has never fully used these three nationwide channels, and is now using them to provide programming to a geographically limited portion of the country—Puerto Rico—even though the DIRECTV 5 satellite that DIRECTV placed at the 110° W.L. slot was designed for CONUS service and does not even possess spot beam technology.⁴

In their Opposition, the Applicants confirm that, “[a]t present, the DIRECTV 5 satellite uses [the 110° W.L. channels] to meet an urgent need to support service to subscribers in Puerto

⁴ See DISH Network Corporation, Petition to Impose Conditions, MB Docket No. 14-90, at 21-22 (Sept. 16, 2014) (“DISH Petition to Condition”).

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Rico, including 30 channels of programming[.]”⁵ This answers one question, but leaves others unaddressed. Usually, an “urgent need” to use a resource in a sub-optimal manner implies that it had been used fully before, and that it will return to full use once the urgency subsides. But the Applicants do not make either claim: they do not claim that their channels at 110° W.L. had previously been used fully for CONUS programming (the apparent reason is that they were never put to such use); nor do they provide a date when they expect the urgency to end.

The Applicants backhandedly seek to dismiss their spectrum warehousing as irrelevant to this proceeding. They are of course correct that the underutilization “long predates this proposed merger.” But that hardly means that there is “no reason it should be addressed here,”⁶ as the Applicants have asserted. In fact, the 110° W.L. underutilization problem is directly implicated in the merger for three reasons. First, these channels are part and parcel of the huge bandwidth superiority that DIRECTV will enjoy over DISH. Previously, the fact that DIRECTV had less fragmented and more centrally located full CONUS DBS spectrum than DISH was perhaps bearable.⁷ But, this merger will create a bandwidth imbalance that renders it intolerable. Second, the merger will reduce DIRECTV’s incentive to ever put the spectrum to full and efficient use. Third, the divestiture proposed by DISH is the most meaningful way to mitigate the huge bandwidth imbalance between the two companies that the merger would produce. This will serve the public interest.

⁵ Opposition at 69.

⁶ *Id.* at 68.

⁷ DISH Petition to Condition at 20-22. DISH does not have full access to any one full CONUS DBS slot, unlike DIRECTV. Also, DIRECTV’s 101° W.L. slot is more centrally located than either the 110° W.L. or 119° W.L. slots used by DISH. *Id.* at 19.

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Indeed, this requested divestiture is not prejudicial to DIRECTV, precisely in light of its limited use. In that respect, DIRECTV admits that its DIRECTV 14 satellite will have the ability to serve Puerto Rico, as DISH has argued. DIRECTV states:

The DIRECTV 14 satellite to which DISH refers . . . will be capable of providing Ka-band service to Puerto Rico. However, because that satellite is not even scheduled to be launched until later this year, it is misleading for DISH to assert that DIRECTV has refused to use targeted capacity on this satellite for service to Puerto Rico.⁸

If this is the case, then the FCC can consider this fact, and require DIRECTV to divest the 110° W.L. channels after it migrates Puerto Rico traffic to DIRECTV 14 next year.

DISH can immediately put the 3 channels at 110° W.L. to efficient use to better service consumers across the entire United States.⁹ A condition requiring that these channels be divested to DISH is necessary in order to offset the significant video industry consolidation that would result from the proposed merger, and give DISH at least some tools to help it compete against a new competitor with 26 million nationwide pay-TV subscribers.

III. THE APPLICANTS FAIL ENTIRELY TO REFUTE THE NEED FOR A WHOLESALE BROADBAND CONDITION

The Applicants fail to address the need for a wholesale broadband condition in their Opposition. Once again, their sole response to this proposal is a dismissive remark buried in a footnote: “The Commission also should reject the self-serving and unsubstantiated request to require AT&T to offer its U-verse broadband on a wholesale basis.”¹⁰ But the request is

⁸ Opposition at 69 n.252.

⁹ DISH Petition to Condition at 22-23.

¹⁰ Opposition at 67 n.243.

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substantiated: it is necessary because the combined AT&T/DIRECTV will have an increased incentive and ability to harm the online offerings of its MVPD and OTT competitors.

Today, neither DISH nor DIRECTV independently provides the broadband connection that is necessary to supplement traditional pay-TV offerings. But, as a result of this transaction, the combined AT&T/DIRECTV will have a greater incentive to degrade DISH's online video offerings because it will have access to programming and the means of delivery – the broadband pipe in the U-verse footprint. A combined AT&T/DIRECTV will be able to degrade the quality of DISH's various broadband-powered online video services (and those of other OTT video providers) by manipulating traffic on the AT&T network en route to the end user to disadvantage DISH's video content. In addition, AT&T will have the ability to undermine the competitiveness of DISH's online video offerings by imposing discriminatory data caps that divert consumers towards AT&T/DIRECTV's own affiliated video services.¹¹

The Applicants are also incorrect that DISH's request is "self-serving." It is true, of course, that OVD distributors—and competition—would benefit if it becomes harder for AT&T to foreclose their access to consumers. But beyond that benefit, DISH is not asking for free wholesale last-mile broadband capacity. As DISH has explained, the requested condition "would enable an unaffiliated company to pay wholesale rates for AT&T's U-verse broadband access service, and in turn, market a broadband access service under the company's own brand name."¹²

DISH's proposed condition—requiring AT&T to make its U-verse product available on a wholesale basis—would help preserve video competition in at least two ways. First, it would reduce AT&T's incentive to block or degrade competing online content traveling on AT&T's U-

¹¹ DISH Petition to Condition at 26-27.

¹² *Id.* at 28.

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verse residential broadband network, because consumers could switch to another broadband access provider that did not engage in such practices.¹³ Second, it would ensure that consumers who want to subscribe to DISH can easily obtain a standalone broadband connection to power DISH's online video offerings. The Applicants have not refuted, or even substantively addressed, the benefits of this condition.

IV. FIXED WIRELESS SERVICE IS NOT A MERGER-SPECIFIC BENEFIT

The Applicants claim that fixed wireless service is “a merger-specific benefit that flows directly from the efficiencies of this transaction,” and that its economic model as submitted to the Commission is “substantial and verifiable evidence” of this merger specificity.¹⁴ But documents submitted by AT&T show that this is not the case.

A. {{

}}

{{

¹³ *Id.*

¹⁴ Opposition at 24.

¹⁵ {{

}}

}}¹⁶

The facts are clear. AT&T has tried to obfuscate them by making assertions that are belied by its own confidential documents. Thus, AT&T avers that it “does not, in the ordinary course compare the costs of providing fixed [wireless] service with the costs of providing other broadband services.”¹⁷ {{

}} In a related vein, {{

}}

**B. {{
}} Deploy a Fixed Wireless Service**

{{

¹⁶ {{

}}

¹⁷ Response to Request 59.i.

¹⁸ {{

}}

¹⁹ {{

}}

²⁰ {{ }}

²¹ {{

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²² {{ }}

²³ {{ }}

²⁴ {{ }}

²⁵ {{ }}.

}}

In short, {{

}} And the company was well down the path of rolling out the service {{
}} before it announced its intent to acquire DIRECTV.

C. {{ }}

Although AT&T projects that the merger will {{ }} the projected Variable LTV
for a fixed wireless subscriber, this {{ }} does not “substantiate” and “verify” the
merger specificity of the fixed wireless service rollout. This is because: 1) as discussed above,
the Variable LTV for the fixed wireless service {{ }} even

²⁶ {{

}}

²⁷ {{

}}

²⁸ {{

}}

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without the merger;²⁹ and 2) a review of the assumptions underlying that difference in Variable LTV undercuts its reliability. AT&T varies the following assumptions between its pre- and post-merger financial models: {{

}}

Given the {{ }} difference {{ }} pre- and post-merger,³¹ the bulk of the difference between the Variable LTV per subscriber in AT&T's model appears to arise from the differences in {{

²⁹ {{

}}

³⁰ {{

}}

³¹ {{

}}

}}

In sum, for AT&T to say that it can now “conclude, for the first time, that fixed [wireless] should be funded” because of the business case improvements presented by the DIRECTV merger³⁵ lacks credibility. {{

}} At best, AT&T has taken advantage of the coincidence between its fixed wireless field trials and its merger announcement to marry the two, but it is, at best, a marriage of convenience. AT&T’s fixed wireless service is not a merger-specific public interest benefit.

³² See {{

}}

³³ See {{ }}

³⁴ See {{

}}

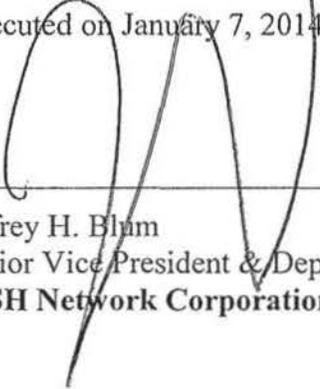
³⁵ Opposition at 25.

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DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Reply, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Modified Protective Orders* in MB Docket No. 14-90, are true and correct to the best of my information, knowledge, and belief.

Executed on January 7, 2014.



Jeffrey H. Blum
Senior Vice President & Deputy General Counsel
DISH Network Corporation

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2015, I caused true and correct copies of the foregoing Reply of DISH Network Corporation to be served by electronic mail upon the following counsel:

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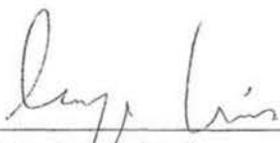
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