CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

May 1, 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 April 30, 2015, Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association ("ACA"), Gary Biglaiser (via teleconference), and the undersigned, representing ACA, met with Commission staff to discuss its views on the combination of the multichannel video programming distributor ("MVPD") distribution assets of AT&T, Inc. ("AT&T") with the MVPD distribution and programming assets of DirecTV consistent with ACA's filings in the above-referenced docket.[1] Attending the meeting on behalf of the Commission were: William Lake, Chief of the Media Bureau, Sarah Whitesell, Deputy Chief of the Media Bureau, Jamillia Ferris, Attorney Advisor of the Office of General Counsel, James Bird, Senior Counsel of the Office of General Counsel, Marilyn Simon, Daniel Shiman, Chris Clark, Chad Guo, Susan Singer, Brendan Holland, Charles Mathias, and Bill Dever. Kathryn Berthot, Octavian Carare, Andrew Wise, Tim Brennan, Christopher Sova and Elizabeth Andrion participated via teleconference.

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 over 100 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 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 for

[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).

them in the form of 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 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 flaws rendering them of little or no value to smaller MVPDs. Finally, ACA described proposed remedial conditions that will offer meaningful protections 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

Barbara Esbin

Enclosures (1)

cc: Marilyn Simon
Daniel Shiman
Chris Clark
Chad Guo
Sarah Whitesell
Susan Singer
Christopher Sova
Elizabeth Andrion
Brendan Holland
Jamillia Ferris
Charles Mathias
Bill Dever
Kathryn Berthot
Octavian Carare
William Lake
Andrew Wise
James Bird
Tim Brennan

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

Presentation to the Federal Communications Commission

April 30, 2015

CONNECTING HOMETOWN AMERICA

ACA MEMBERS COMPETE WITH AT&T/DIRECTV

- **There are 840 small and medium-sized MVPDs who are members of the 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 AT&T/DIRECTV

- **Many ACA members purchase regional sports programming owned by DirecTV or 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 AT&T and 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

- **RSNs affiliated with DirecTV or AT&T/DirecTV have an incentive and ability to charge its affiliated MVPDs' rivals higher prices for its programming.**
  - FCC has long recognized and consistently concluded (most recently in Comcast-NBCU) that vertical integration between MVPDs and programmers can result in competitive and consumer harms.
  - Since 2004, MVPDs that reached a negotiation impasse with DirecTV-affiliated RSNs have had a right to bring either a non-discriminatory access complaint to the FCC or take these RSNs to baseball-style arbitration pursuant to conditions imposed by the FCC as part of license transfer approvals involving DirecTV.
  - Without any finding that the DirecTV-affiliated RSN's incentive to harm DirecTV's rivals ceased to exist, the baseball style arbitration condition was lifted on February 2014 by its term.

VERTICAL HARMS (FCC'S BARGAINING MODEL ANALYSIS)

- **In previous merger reviews involving vertical integration, the FCC relied upon a bargaining model framework that computed the opportunity cost that a vertically integrated MVPD incurs by selling affiliated programming to a rival MVPD.**
- **The opportunity cost, C, for an MVPD to sell its programming assets to a rival MVPD is equal to:**

$$C = \alpha d \pi$$

- **The variables in the equation are defined as follows**
  - α is the share of subscribers that leave the rival MVPD that go to the affiliated MVPD
  - d is the diversion rate; the probability that a given consumer leaves the rival provider if the programming is withdrawn
  - π is the affiliated MVPD's monthly profits per video subscriber

VERTICAL HARMS (MERGER SPECIFIC)

- **The merger will increase the merged firm's incentive to extract higher prices for its affiliated RSNs from MVPD rivals because it increases AT&T/DirecTV's profits per video subscriber.**
- **AT&T asserts deal will create merger related efficiencies. If true, this will increase AT&T/DirecTV's profits per video subscriber. AT&T asserts the deal will:**
  - Permit integrated billing
  - Combine merging parties' respective expertise and tech capabilities
  - Eliminate redundancies in the employee base
  - Provide additional marketing opportunities and new sales channels
    - AT&T can market its mobility products to DirecTV subs and use DirectTV's distribution network
    - DirecTV can utilize AT&T's retail distribution channels
  - In markets served by both MVPDs, create installation cost savings.
- **AT&T asserts deal will lower its programming costs. ACA agrees. This too will increase AT&T/DirecTV's MVPD profits per video subscriber.**
  - Applicants admit the merged entity, at 26 million video subscribers – the largest MVPD in the country, will likely receive 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:

- **<u>It is Not About the Amount of Programming that AT&T/DirecTV Will Own</u>:** It is irrelevant that AT&T won't own a large number of video programming assets post-merger. It only matters whether the programming is considered "must have." It is.

- **<u>It is Not About AT&T/DirecTV's Post-Merger Market Share in its Programmers' Markets</u>**: It is immaterial that AT&T/DirecTV's market share in its programmers' markets won't increase due to the deal. The relevant issue is if AT&T/DirecTV's profits per video subscriber for the MVPD service it already offers in these markets increases post-merger.

- **<u>It is Not about AT&T/DirecTV's Withholding Access to the Roots Sports Southwest:</u>** AT&T's claim that it won't employ a permanent foreclosure strategy against their MVPD rivals with respect to the once struggling Roots Sports Southwest is irrelevant. It matters whether the deal will increase the combined entity's incentive and ability to charge its rivals higher prices for it. It does.

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 from programmers, the merged firm may seek other concessions, including conditions that may prevent the merged entity's MVPD rivals from gaining access to the same programming at all or on fair terms, like most favored national (MFN) clauses.

HORIZONTAL HARMS (ACA RESPONSES TO AT&T)

Applicants are wrong that deal causes no horizontal harm:

- **<u>AT&T's Enhanced Bargaining Power Can Be Used to Harm Other MVPDs</u>:** AT&T's economist acknowledges that the merged company will have more bargaining power than either AT&T or DirecTV has independently. AT&T can use its increased bargaining power to seek concessions from 3rd party programmers that prevent other MVPDs from reaching fair deals with these same programmers.

FCC CONDITIONS ADOPTED IN PAST TO ADDRESS VERTICAL HARMS

- To address competitive harms associated with vertical integration of MVPD distribution and programming assets, in prior merger Orders, the Commission relied on a combination of:
  - **The nondiscriminatory access condition** (*enforced by the program access complaint process*)– to protect against discriminatory practices; 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

Merger	Covered Programming	Non-Discriminatory Access Condition Adopted	Baseball Style Arbitration Condition Adopted	Already Subject to Program Access Rules
News Corp.-Hughes (2004)	RSNs	Yes	Yes	Yes
	Broadcast Stations	Yes	Yes	No
Adelphia-Comcast-TWC (2006)	RSNs (Regardless of Means of Delivery)	Yes	Yes	Yes (satellite delivered) No (terrestrially delivered)
Liberty-DirecTV (2008)	RSNs (Regardless of Means of Delivery)	Yes	Yes	Yes (satellite delivered) No (terrestrially delivered)
	Broadcast Stations	Yes	Yes	No
	National Programming	Yes	No*	Yes
Comcast-NBCU (2011)	RSNs	No	Yes	Yes
	Broadcast Stations	No*	Yes	No
	National Programming	No	Yes	Yes

*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 the Applicants' MVPD and video programming assets, the Commission should:**
- **<u>Apply the non-discriminatory access condition</u> - requiring AT&T/DirecTV to provide access to its video programming on non-discriminatory price, 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 in 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 Commission should:**
- **<u>Apply the baseball-style arbitration condition</u> - requiring AT&T/DirecTV to provide access to their video programming at fair market value.**
- **As part of the enforcement process, the Commission 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 a 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 Commission should:
- Prohibit AT&T/DirecTV from interfering with or otherwise influencing the rates, terms, and conditions for video programming that an unaffiliated programmer offers to an MVPD.

PROPOSED CONDITIONS TO ADDRESS HARMS

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