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VIA ECFS

June 4, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

**RE: Ex Parte Presentation
Cox Communications, Inc.
MB Docket No. 14-90**

Dear Ms. Dortch:

This letter is in response to AT&T/DirecTV's recent filing addressing, among other things, conditions requested by Cox Communications, Inc. ("Cox") in the above-referenced merger review.¹ As with its previous filings, AT&T/DirecTV has again failed to provide any credible basis for concluding that the proposed merger will serve the public interest absent the conditions Cox seeks. AT&T/DirecTV refuses to acknowledge the substantial dangers the merged company will pose to competition for bundled video, voice, and data services or accept conditions to protect against those harms. This serves only to confirm the assertions of Cox and other parties that the merged company intends to leverage its dominant market place position to compete unfairly. Cox responds to each of AT&T/DirecTV's arguments in turn and demonstrates why each condition is specific to the facts of the transaction to address the market power over video, bundled services, and must-have content that AT&T proposes to acquire through the acquisition of DirecTV.

Section 628 Must Be Used to Eliminate Regulatory Disparities Created by this Merger

It is first worth emphasizing that post-merger, AT&T/DirecTV would arguably be the largest telecom/media company in the United States with \$160+ billion in revenues (more than twice Comcast in comparison). The merged company will control three separate distribution platforms (wired, wireless, and satellite service) covering the United States more than twice over and will be capable of offering bundles of service to its customers that no other company can match. The company that AT&T and DirecTV propose to create will include:²

¹ See Letter from William M. Wiltshire, Counsel for DirecTV and Maureen R. Jeffreys, Counsel for AT&T Inc. to Marlene H. Dortch, Esq., MB Docket No. 14-90, filed May 26, 2015 (the "AT&T May 26 Letter").

² See Petition to Condition Consent of Cox Communications, Inc., MB Docket No. 14-90, filed Sept. 16, 2014, at 1-2.

- More than 26 million video customers and the ability to serve video customers nationwide;
- The largest incumbent wireline telephone and data network in the country, spanning 22 states, serving nearly 27 million voice connections, and passing approximately 81 million customer locations;
- More than 16 million wireline broadband connections, with the ability to expand broadband coverage to 70 million customer locations; and
- A nationwide wireless voice and data network serving more than 116 million telephone and data customers and covering 300 million people with 4G LTE.

It is long overdue for the FCC to eliminate any regulatory advantages that AT&T and DirecTV previously enjoyed as “upstarts” or competitors to cable. It should be considered beyond discussion that the merged entity should be subject to the full range of requirements included in Section 628 of the Communications Act and the FCC’s program access rules. These rules apply to AT&T/DirecTV by the terms of Section 628(j)’s common carrier provision, but any order approving this merger should explicitly state that the provision applies to the full range of video services offered by the merged company. To use a poker term, a Section 628 condition is simply “table stakes” for AT&T/DirecTV in asking for FCC approval of their transaction.³

Interference with Broadband Competition at MDUs

As Cox has explained previously,⁴ DirecTV has been exploiting a gap in the FCC’s cable inside wiring rules to the detriment of consumer choice, by unreasonably interfering with Cox’s provision of broadband Internet service to multi-dwelling unit (“MDU”) customers that wish to receive video from DirecTV while still retaining Internet access service from Cox. AT&T/DirecTV’s discussion of this issue in its May 26 ex parte is inaccurate in several respects:

- (1) AT&T/DirecTV wrongly contends that interference caused by DirecTV’s diplexers is the fault of Cox and not DirecTV.⁵ DirecTV wrongly attributes blame to Cox because of its own faulty “assumption” that Cox would not serve consumers with additional bandwidth gained with the investments it began making to upgrade its networks to 1GHz, which

³ In light of AT&T/DirecTV’s defense of DirecTV’s unfair practices in Multiple Dwelling Units (“MDUs”) in Cox’s service territories, it is even more important that the FCC grant Cox’s requested condition that the merged entity be subject to Section 628(b)’s prohibition on unfair competitive practices. In particular, AT&T/DirecTV should be subject to the same ban on exclusive MDU service agreements. MDUs comprise about thirty percent (30%) of the customers in Cox’s service territories, and AT&T/DirecTV should be required to compete on a fair and level playing field for all of those customers without regulatory advantages.

⁴ Cox Petition to Condition Consent at 29-35; Cox Reply to Joint Opposition at 13-14.

⁵ See AT&T May 26 Letter.

were widely publicized as early as 2007.⁶ DirecTV claims that Cox did not adhere to an “industry standard frequency range for broadband service” but no such standard exists that would prohibit Cox from enhancing its service.⁷ DirecTV also suggests it cleared its use of the diplexer with Cox but it did not and cannot point to a proper channel where this may have occurred. As previously explained, Cox has consistently and formally taken exception to DirecTV’s use of the diplexers yet still proposed two consumer-focused solutions to the problem of interference caused by the diplexers, but DirecTV has summarily refused to consider either one.⁸ Further, Cox has been anything but uncooperative, as evidenced by the numerous instances in which Cox has deployed a second wire to enable an MDU resident to receive video from DirecTV and DOCSIS 3.0 Internet service from Cox, thereby effectively wiring the unit twice, for both DirecTV and Cox.

- (2) AT&T/DirecTV erroneously states that Cox’s proposed condition would harm competition by requiring DirecTV to “replicate inside wiring.”⁹ In fact, however, Cox faces competition in many MDUs it serves from providers other than DirecTV that deploy their own wiring to individual units, rather than depend upon plant deployed by their competitors. These providers have no difficulty competing effectively. Indeed, their reliance upon their own MDU wiring infrastructure makes it easier for building residents to switch services among competitors and take standalone services from multiple providers.
- (3) The May 26 letter claims that Cox should not have changed its frequency range to enhance its broadband service. This assertion that Cox should yield to DirecTV’s “design” of equipment to share wiring that would limit the ability of consumers to receive enhanced services runs counter to the very core priorities of the FCC. Moreover, Cox has every right to upgrade its service offerings, and its deployment of DOCSIS 3.0 to consumers living in MDUs should not be held hostage to the possibility that DirecTV may one day wish to provide service at MDUs using Cox wiring. Such a position directly conflicts with the FCC’s stated policy objective of accelerating deployment of advanced broadband capabilities for all Americans. Finally, DOCSIS 3.0 is today operated above 750 MHz by a number of cable operators, and its successor standard, DOCSIS 3.1, is expected to rely even more heavily on frequency ranges above 800 MHz and beyond 1GHz. Cox is an early user of this spectrum, so the problems it is experiencing with broadband service interference from DirecTV diplexers may be

⁶ See Press Release, Cox’s Network Enhancements Enable New Services and Power Second Quarter Growth (July 28, 2007), available at <http://newsroom.cox.com/index.php?s=43&item=27>.

⁷ Cox began deploying DOCSIS carriers in 2009 in Las Vegas, one of the early markets where the interference of the diplexers was raised.

⁸ Cox Reply to Joint Opposition at 14 & n. 39.

⁹ AT&T May 26 Letter at 11.

replicated in other areas as other operators move to DOCSIS 3.1.

- (4) The May 26 letter asserts that DirecTV has transferred rights of entry to Cox-served MDUs and focused on other properties where interference caused by its diplexers is not an issue.¹⁰ Cox is not aware of any pattern of DirecTV declining to serve MDUs due to its inability to use diplexers on wiring deployed by its competitors, and the letter offers no specific examples of where this has taken place. In any event, a temporary lull in conduct that is inhibiting broadband competition at MDUs pending resolution of DirecTV's \$48 billion transaction with AT&T militates in favor - and not against - the conditions sought by Cox.

The May 26 letter is noteworthy in its failure to engage with the fundamental problem caused by DirecTV's use of diplexers and its reliance upon MDU wiring deployed by others: the detrimental impact such an approach has on broadband competition. As Cox has explained, this problem is likely to become worse as a result of the transaction. Cox believes that post-transaction, there will still be many MDU tenants that may be interested in DirecTV video – and, if the FCC does not prohibit it, DirecTV's exclusive offerings such as NFL Sunday Ticket - that will still wish to retain Cox for broadband service, particularly in areas where AT&T provides broadband via DSL or IPDSL, which currently is more than half of AT&T's wireline footprint.

The merged entity, however, will seek to have tenants that switch to DirecTV purchase AT&T's Internet access service, notwithstanding the inferior speeds offered by DSL, IPDSL and even AT&T's FTTN offering.¹¹ As a result, the merged entity will have even greater incentive to commandeer Cox's internal MDU wiring, since that would inhibit potential broadband competition and enhance the overall throughput available for its bundled offering.

AT&T/DirecTV implicitly confirmed this latter point in its April 21, 2015, *ex parte*, stating that one of the advantages of the transaction is that it enables the merged entity to “offload” the video transmission onto DirecTV's architecture, freeing up more throughput for broadband.¹² Importantly, AT&T/DirecTV goes on to acknowledge that, even with this offloading, most of its broadband offerings still will not be competitive with cable.¹³ But if the merged entity takes over the wire used by Cox to offer DirecTV's video service, it has effectively sidelined a broadband competitor offering that AT&T/DirecTV itself acknowledges is a superior product.

¹⁰ AT&T May 26 Letter at 12.

¹¹ *See also* AT&T/DirecTV Public Interest Statement at 12 (Noting that IPDSL speeds top out at 18 Mbps); *id.* at 12, n. 14 (Noting that DSL speeds reach only 6 Mbps). Further, if AT&T discontinues standalone DirecTV service consumers will be forced to accept inferior Internet speeds to gain access to DirecTV and any exclusive programming it may have; *see also infra* at nn.12-13.

¹² Letter of April 21, 2015 to Marlene Dortch, Secretary, Federal Communications Commission, from Maureen R. Jeffreys, Counsel for AT&T, at 3.

¹³ *See id.* at 3-4.

Accordingly, to preserve broadband competition and choice in MDUs, the Commission should either require AT&T/DirecTV to employ its own internal wiring infrastructure to any MDU unit it serves or require the merged entity, if it uses MDU wiring deployed by another provider to furnish DirecTV video to a given unit, to avoid taking any action that would interfere with that competitor's provision of broadband Internet access service to that unit.

Limits on Volume Discounts and Exclusive Programming

Volume Discounts. As in previous filings, AT&T/DirecTV denies the dangers the merged entity will pose to the wholesale market for video programming, claiming that its plans to demand massive volume discounts from programming distributors will have no impact on the prices those programmers charge to smaller video providers like Cox.¹⁴ AT&T/DirecTV seeks to wave these concerns away with the magic wand of what it calls "economic logic," but the reality is that the market for cable programming doesn't work the way AT&T/DirecTV says it does. Moreover, Cox does not argue to deny AT&T/DirecTV all volume discounts, just those discounts that are not justifiable.

AT&T/DirecTV has repeatedly told the FCC it intends to save billions of dollars by cutting its programming costs by twenty percent (20%). That will reduce the revenues of AT&T/DirecTV's programming partners by billions of dollars. Programmers will then have two choices: they can either absorb that loss on their bottom lines, or they can seek to recover those costs by charging higher prices to smaller providers. Programmers will, of course, choose the latter, increasing the programming costs of operators like Cox. Since providing a competitive multichannel video service depends on maintaining a full slate of the channels customers expect, smaller operators will have little choice but to accept these AT&T/DirecTV-driven price hikes. AT&T/DirecTV has not and cannot provide a plausible alternative to that sequence of events. The consequences of this entirely foreseeable, merger driven, result will be increased prices for consumers, reduced investments in network and service improvements, and, eventually, additional consolidation of video providers seeking fair programming costs.

AT&T/DirecTV's complaint that adopting the conditions Cox proposes would prevent the merged company from "fully realizing substantial cost savings" and providing "stronger competition with cable" simply confirms that AT&T/DirecTV knows the market will operate precisely as Cox predicts. But what AT&T/DirecTV is asking the FCC to do is to create stronger unfair competition to cable. The FCC should be very wary of a company with the size and competitive strength of AT&T/DirecTV representing itself as the upstart competitor to companies like Cox, which have a small fraction of the merged company's market power. Without conditions like Cox's proposed volume discount limitations, the merged company is going to inhibit fair competition, not provide it.

¹⁴ See AT&T May 26 Letter at 12.

The FCC should address these problems by adopting the limitations on volume discounts that Cox and others have sought in this proceeding.¹⁵ The FCC should require AT&T/DirecTV to refrain from entering into contracts that include volume discounts above a level that can be justified by whatever demonstrable economic benefits (if any) flow to programmers as a result of scale distribution. This is a fair result that would allow AT&T/DirecTV to realize the reasonable economic benefits of the merger without further distorting the wholesale cable programming industry, which already assigns far too much of its costs to smaller operators like Cox.

Exclusive Programming. AT&T/DirecTV only briefly mentions Cox's request for conditions limiting the merged entity from monopolizing must-have cable programming by entering into exclusive programming agreements. Cox, however, maintains that a company with the size and competitive presence of AT&T/DirecTV should not be permitted to enter into or continue existing exclusive programming arrangements. When it was a newcomer in the video market, AT&T/DirecTV strongly opposed exclusive programming agreements entered into by its larger competitors. Now that the merged company seeks to become one of the largest bundled services providers in the nation, with an unmatched national service platform, AT&T/DirecTV has changed its position to favor continuation of its own exclusive agreements. Allowing AT&T/DirecTV to engage in exclusive distribution contracts will give it an unfair competitive advantage and likely lead to a downward spiral in which the largest bundled services providers compete to secure exclusive distribution rights, leaving out smaller competitors like Cox – and their customers. The FCC can and should eliminate that risk by adopting the merger condition prohibiting exclusive programming contracts that Cox requests.

Standstill Condition Regarding Section 251 and 252 Interconnection

AT&T/DirecTV dismisses in a footnote Cox's ongoing request for conditions requiring the merged AT&T/DirecTV to continue offering Section 251 and 252 interconnection to its competitors pending the resolution of the FCC's ongoing IP transition proceeding.¹⁶ Cox's request for continued interconnection with AT&T's legacy telephone network is essential to continued fair competition in the consumer bundled services market and is a concern other commenters share.¹⁷ Absent non-discriminatory interconnection under Sections 251 and 252, AT&T/DirecTV will be able to hamper their competitors' ability to offer the voice component of their bundled services either by excluding competitors from their network or raising their costs of providing service. In either event, the results will be less choice for consumers and less competition in the bundled services market.

AT&T/DirecTV has made its intention to offer competitive bundled services a centerpiece of its argument in favor of the merger, using the term "bundle" and its variations over 700 times in its public interest statement. That may be a public benefit, but only if it offers such competition in a fair and equitable way. AT&T/DirecTV's focus on the bundle increases

¹⁵ See Letter from Angie Kronenberg, Comptel, to Ms. Marlene H. Dortch, MB Docket No. 14-90, filed June 1, 2015 ("Comptel Letter").

¹⁶ See AT&T May 26 Letter at n.51.

¹⁷ See Comptel Letter at 4, n. 11.

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AT&T's incentive to engage in anti-competitive interconnection practices to interfere with competitors' bundles. The conditions requested by Cox are tailored to ensure that the FCC addresses only these merger-specific harms. Cox requests that the FCC: (1) confirm the merged entity's responsibilities to continue providing competitors with access to AT&T's network under Section 251 and 252; and (2) maintain those obligations as they exist today until the FCC resolves issues regarding incumbent LECs obligations to provide interconnection with future IP networks. The unobtrusive conditions would do no more than maintain the status quo and ensure that the merged company does not use this merger to gain ant-competitive advantages that will produce anti-consumer results.

Respectfully submitted,

/s/

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