

July 9, 2015

VIA ECFS

The Honorable Thomas Wheeler
Chairman
Federal Communications Commission
455 12th Street, SW
Washington, DC 20544

Re: Ex Parte Submission, Applications of AT&T Inc. and DirecTV to Transfer Control of FCC Licenses And Other Authorizations, MB Docket No. 14-90

Dear Chairman Wheeler:

The undersigned¹ – all members of the American Cable Association (“ACA”) – are smaller multichannel video programming distributors (“MVPDs”) that are extremely concerned that following the completion of the AT&T and DirecTV merger, the combined company will charge us higher carriage fees for its Root Sports regional sports networks (“RSNs”) than the two could charge remaining as separate entities. Our concerns are no different from those recently expressed by enTouch, another small ACA member company that has explained its difficulty in negotiating fair and non-discriminatory rates with AT&T and DirecTV for Root Sports Southwest and its expectation of greater difficulties in the future if the AT&T/DirecTV merger is approved.² Because our concerns are based on our experience and supported by economic analysis, we urge the Commission not to approve this transaction unless it adopts conditions that will mitigate these and other merger-specific harms.

Each of us purchases RSN programming owned by DirecTV or jointly by AT&T and DirecTV – either Root Sports Pittsburgh, Rocky Mountain (Denver), Northwest (Seattle), or Southwest (Houston). Where we offer this programming, we compete head-to-head against DirecTV and some of us also compete directly with AT&T’s U-verse pay-TV service. Because of this vertical integration, DirecTV and AT&T have an economic incentive and ability to charge us higher programming fees for their RSNs than would a non-vertically integrated programmer. Fortunately for most of us, because DirecTV agreed to comply with a non-discriminatory access condition and a baseball-style arbitration remedy on its Root Sports Pittsburgh, Rocky Mountain, and Northwest RSNs in order to receive Commission approval of past mergers, DirecTV has been somewhat restrained in its ability to act on its incentive against us in our last negotiations. Because these protections lasted 10 years and expired in 2014, we have been very concerned that DirecTV will soon start acting on its incentive to extract higher prices from us in our next carriage talks.

¹ The 27 signatories represent multiple and single system MVPDs, providing service in more than 12 states, that primarily serve consumers in small and medium-sized markets.

² Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Letter from J Lyn Findley to FCC Chairman Tom Wheeler (filed June 30, 2015).

However, with the proposed AT&T/DirecTV merger, we have an even greater concern. After AT&T and DirecTV merge, we expect the combined entity will charge even higher programming prices for its RSNs. Because the merged firm will have lower costs and higher profits as well as the capability of offering a better service than either company could standing alone, the combined company will be in a stronger bargaining position in negotiations for its RSN programming. The merged firm will be better positioned to attract our customers in the event we cannot reach a carriage agreement, and these new customers will be more profitable to AT&T/DirecTV than they would be if the companies remained separate. In light of this, the Root Sports RSNs, when owned by the merged firm, will be more willing to demand and be able to secure higher prices – costs that we must pass along to our customers in whole or in part. Our concerns are consistent with economic theory presented by University of North Carolina Professor Gary Biglaiser in an economic report contained in ACA’s initial comments in this proceeding.³

Our companies welcome head-to-head competition with other distributors, but we are put in a bind when purchasing “must have” RSN programming from direct rivals like DirecTV and AT&T. Each of us offers triple-play packages of service including cable TV, digital voice, and broadband Internet access. Our cable TV service today remains an essential part of our line-up, a critical draw for getting customers to sample our other services. From experience we know we must offer RSN programming in order to retain and attract the subscribers necessary to justify our investments in our broadband networks and to have sufficient capital to continue to invest in deploying broadband in the future. Receiving worse treatment from AT&T/DirecTV after the merger will definitely factor into our decisions, and those of other providers, about whether to invest in and deploy broadband. This is because of the increased uncertainty over our ability to reach a deal at all or on non-discriminatory and fair market rates for “must have” RSN content essential to the successful offering of a triple-play bundle. In short, if this deal is not properly conditioned, it will not just mean that we’ll pay higher prices, but also mean that consumers and competition will be harmed in the video and broadband markets of greater Pittsburgh, Denver, Seattle, and Houston.

To prevent AT&T/DirecTV from charging higher fees as a result of the merger, ACA proposed a series of remedies (included in full as an attachment to this letter), including an improved version of the Commission’s non-discriminatory access and baseball-style commercial arbitration remedies for carriage disputes involving the Root Sports RSNs.⁴ We affirm that ACA’s proposed remedial conditions would be of great help to our companies and other small providers, particularly knowing that existing program access rules are ineffective in addressing discriminatory pricing because of flaws in the way the FCC implemented the rules years ago.

³ *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Comments of the American Cable Association, Exhibit A, Gary Biglaiser, *The Harms of AT&T-DirecTV Merger* (filed Sept. 15, 2014).

⁴ *Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Reply of the American Cable Association at 3-14 (filed Jan. 7, 2015). See also *Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary (filed May 1, 2015); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary (filed June 9, 2010).

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In closing, we urge you not to approve the AT&T/DirecTV transaction without adopting these conditions.

Thank you for your consideration.

Sincerely,

Bridget Watkins
Vice President Marketing and Sales
All West Communications
50 N 100 West Kamas, UT 84036
Total Subs Served by Cable Operator: 2,150
Carries Root Sports Rocky Mountain
Offers Fiber-to-the-Home Service in Market

Richard J Sellers
Title Manager
Beulahland Communications
PO Box 188. Beulah, CO 81023
Total Subs Served by Cable Operator: 210
Carries Root Sports Rocky Mountain

Joann Conner
Vice President
Blue Devil Cable
116 S 4th Street, Toronto, OH 43964
Total Subs Served by Cable Operator: 2,100
Carries Root Sports Pittsburgh

David Shipley
Vice President / Business Manager
Cable Co, LLC and Dalton
Telecommunications, Inc.
PO Box 19759, Colorado City, CO 81019
Total Subs Served by Cable Operator: 1,150
Carries Root Sports Rocky Mountain

Chris Hilliard
President
CAP Antilles and Montana
920 E 56th St Building B Kearney NE
68847
Total Subs Served by Cable Operator: 7,800
Carries Root Sports Rocky Mountain

Mitchell Moore, President
Clear Creek Communications
18238 S Fischers Mill Road, Oregon City,
OR 97045
Total Subs Served by Cable Operator: 1,700
Carries Root Sports Northwest

Dennis K. Cutrell
President
Citizens Cable Communications
2748 State Route 982, P.O. Box 135,
Mammoth, PA 15664
Total Subs Served by Cable Operator: 2,478
Carries Root Sports Pittsburgh
Offers Fiber-to-the-Home Service in Market

Chris Lovell
General Manager
Coaxial Cable Television Corp.
105 Walker Dr, Edinboro, PA 16412
Total Subs Served by Cable Operator: 3,459
Carries Root Sports Pittsburgh

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Gary Shorman
President & CEO
Eagle Communications, Inc.
2703 Hall St. Suite 15
Hays, KS 67601
Total Subs Served by Cable Operator:
14,000
Carries Root Sports Rocky Mountain

James J. Bruder
Chairman and CEO
Harron Communications LP d/b/a
MetroCast
70 East Lancaster Avenue, Frazer, PA
19355
Total Subs Served by Cable Operator:
115,582
Carries Root Sports Pittsburgh

John Kusky
President
J & N Cable Systems, Inc.
614 S Columbus Avenue, Goldendale, WA
98620
Total Subs Served by Cable Operator: 800
Carries Root Sports Northwest

James J. Kail
President & CEO
Laurel Highland Television Company
4157 Main Street, Stahlstown, PA 15687
Total Subs Served by Cable Operator: 3,500
Carries Root Sports Pittsburgh
Offers Fiber-to-the-Home Service in Market

Greg Lundwall
Vice President
Northstar Broadband, LLC
PO Box 2576, Post Falls, ID 83877
Total Subs Served by Cable Operator: 513
Carries Root Sports Northwest

Darren Woolsey
CFO
Emery Telcom Video, LLC
PO Box 629, Orangeville, UT 84537
Total Subs Served by Cable Operator: 4,144
Carries Root Sports Rocky Mountain

Richard "Rick" Buechel
President & General Manager
Hood Canal Communications
PO Box 249
Union, WA 98592
Total Subs Served by Cable Operator: 3,642
Carries Root Sports Northwest
Offers Fiber-to-the-Home Service in Market

Gary Shields
President/Owner
K2 Communications, LLC
322 Main Street, PO Box 232, Mead, CO
80542
Total Subs Served by Cable Operator: 170
Carries Root Sports Rocky Mountain

Tonya Mayer
General Manager
Mobius Communications Company
PO Box 246, 523 Niobrara Avenue
Hemingford, NE 69348
Total Subs Served by Cable Operator: 235
Carries Root Sports Rocky Mountain

John Bova
Council President
Pitcairn Borough
582 Sixth Street, Pitcairn, PA 15140
Total Subs Served by Cable Operator: 486
Carries Root Sports Pittsburgh

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Earle A. MacKenzie
EVP/COO
Shenandoah Telecommunications Company
(Shentel)
500 Shentel Way, Edinburg, VA 22824
Total Subs Served by Cable Operator:
71,850
Carries Root Sports Pittsburgh
*Offers Fiber-to-the-Home Service in Market
(in part)*

Robert D. Stemler
President
Tele-Media Corporation of Delaware
PO Box 39, Bellefonte, PA 16823
Total Subs Served by Cable Operator: 3,006
Carries Root Sports Pittsburgh

Steve Weed
CEO
Wave Broadband
401 Parkplace Center, Suite 500, Kirkland
WA 98033
Total Subs Served by Cable Operator:
450,000
Carries Root Sports Northwest
*Offers Fiber-to-the-Home Service in Market
(in part)*

James M Gleason
CEO
Vast Broadband
104 E Center, Sikeston, MO 63801
Total Subs Served by Cable Operator:
31,000
Carries Root Sports Rocky Mountain (in
Rapid City, SD market)

Janelle Allison
CFO/COO
Great Plains Communications
1600 Great Plains Centre, Blair NE 68008
Total Subs Served by Cable Operator: 9,000
Carries Root Sports Rocky Mountain

Michael J. Diehl
Owner
Somerset Cable TV
6511 National Pike, Addison, PA 15411-
2153
Total Subs Served by Cable Operator: 500
Carries Root Sports Pittsburgh

Richard Wardell
CTO
TCT WEST INC
1601 S. Park Drive, Cody, WY 82414
Total Sub Served by Cable Operator: 3,500
Carries Root Sports Rocky Mountain
Offers Fiber-to-the-Home Service in Market

William D. Bauer
WinDBreak Cable
1140 10th Street, Gering, NE 69341
Total Subs Served by Cable Operator: 454
Carries Root Sports Rocky Mountain

Grier Adamson
Treasurer, CEO
HTC Communications
75 Main St., Hickory, PA 15340
Total Subs Served by Cable Operator: 475
Carries Root Sports Pittsburgh
Offers Fiber-to-the-Home Service in Market

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cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel Commissioner Ajit Pai
Commissioner Michael O'Rielly
Jonathan Sallet
Jamillia Ferris

Attachment

Remedial Conditions That Will Offer Meaningful Protections Against Vertical Harms

Non-Discriminatory Access Condition. The Commission must not only impose a non-discriminatory access condition to prohibit AT&T-DirecTV-affiliated programmers from engaging in discriminatory practices with respect to all classes of programming, including assets acquired in the future, regardless of means of distribution, it also must ensure that procedures for enforcing this condition are effective for small and medium-sized MVPDs. The Commission must include in its remedial conditions the following added protections and features:

- An aggrieved MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to an MVPD that is similarly situated regardless of whether the MVPD is the complainant's direct competitor or has the same geographic scope of operations.
- AT&T-DirecTV-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are non-discriminatory compared to those charged similarly situated distributors.
- MVPDs must have the opportunity to audit AT&T-DirecTV-affiliated programmers on an annual basis to ensure against discrimination, including post-agreement discrimination.
- A bargaining agent designated by an eligible MVPD shall have the protections under, and the rights to utilize, the non-discriminatory access condition just as it has protections and rights under the commercial arbitration remedy.
- AT&T-DirecTV-affiliated programmers shall not withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Commercial Arbitration Remedy. Not only must an MVPD have protections against an AT&T-DirecTV-affiliated programmer acting on its incentive and ability to impose discriminatory prices, terms and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms and conditions above fair market value through a uniform price increases strategy. The Commission must adopt a set of targeted reforms to its baseball-style arbitration remedy to render it effective, particularly for small and medium-sized MVPDs.

- Upon request of an MVPD, an AT&T-DirecTV-affiliated programmer must provide data and information that permits an MVPD to determine whether the offered prices, terms, and conditions are equivalent to fair market value and to formulate an informed “final offer” in an arbitration.
- The baseball-style arbitration process should be modified to require the AT&T-DirecTV-affiliated programmers to submit the first final offer that may then be reviewed by the MVPD before submitting its own final offer.

Conditions to Address Horizontal Harm

ACA has demonstrated that the AT&T-DirecTV transaction will greatly expand the bargaining leverage that AT&T and DirecTV have as MVPD purchasers of programming from third parties. This will result either in AT&T-DirecTV paying lower prices per-subscriber for video programming based on increases in the number of subscribers it will serve or foregoing lower prices in lieu of obtaining concessions that obstruct the ability of other MVPDs to secure the same programming at all or at fair rates, terms, and conditions. The Commission should impose a condition aimed at ameliorating this harm.

- AT&T-DirecTV should be prohibited from interfering with a third-party programmer’s ability to provide any prices, terms, or conditions to an MVPD.

Duration of Conditions

Any conditions imposed must remain in effect for at least nine years following the close of the transaction. After nine years, AT&T-DirecTV should be required to return to the Commission and apply for relief, making the case at the time that conditions have changed sufficiently to warrant relief from one or more of the conditions, rather than allow the conditions to expire by their terms.