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 Authorizations	)))	MB Docket No. 14-90

PETITION TO CONDITION CONSENT OF COX COMMUNICATIONS, INC.

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SUMMARY

The proposed acquisition of DirecTV by AT&T would make the largest telecommunications company the FCC regulates even larger and create an unprecedented multi-platform company capable of offering video, voice, and data services over its wireline, wireless, and satellite networks. The companies collectively report nearly 170 million service connections and are capable of serving hundreds of millions more. If approved, the transaction will provide AT&T/DirecTV with unprecedented opportunity and substantial incentive to use this scale, scope, and bundle of services to undermine competition throughout the country. Cox asks the FCC to consider the potential harms of this merger to consumers and the competitive marketplace and to address those harms by adopting reasonable, narrowly crafted conditions.

The Merger Will Harm The Wholesale Video Programming Market.

AT&T and DirecTV have promised their investors that they will more effectively exploit DirecTV's exclusive distribution arrangement for *NFL Sunday Ticket* and use this merger to reduce both companies' costs of acquiring programming for their combined video distribution system. Underlying both of these promises, however, is a clear demonstration of the merged company's opportunities and incentives to undermine competition.

Condition: The FCC Should Bar AT&T/DirecTV From Entering Into Exclusive Programming Arrangements.

AT&T and DirecTV promise to exploit exclusive programming arrangements starting with DirecTV's current exclusive contract with the NFL for video distribution of out-of-market NFL games. The merged company plans continue exclusive satellite carriage and to expand distribution to include wireless devices and AT&T's wireline video customers. Yet, less than 24 months ago, AT&T sought to keep other video distributors from maintaining exclusive contracts for important sports programming like *NFL Sunday Ticket*, stating to the FCC that such agreements are "highly likely to be predominantly anti-competitive and a significant hindrance to competing MVPDs."[1] Now that AT&T seeks to become a dominant video provider with heretofore unseen scale and customer reach, it appears to have changed its opinion of exclusive sports programming agreements. But the FCC should recognize that AT&T's new position is self-serving and opportunistic. If AT&T/DirecTV is permitted to lock up fans of a major sports league (or other large niche market) simply because it is the only provider that can offer portions of that league's programming, then the combined company will have reduced incentives to offer competitive prices or improve customer service. The FCC should adopt a condition that prohibits the merged entity from entering into or continuing to enforce all exclusive programming agreements.

Condition: The FCC Should Prohibit AT&T/DirecTV From Entering Into Programming Contracts That Include Unfair Volume Discounts.

AT&T and DirecTV pledge to reduce their programming costs by 20 percent – nearly $1.6 billion – by extracting substantial volume discounts from programmers. Cox and other small to mid-sized operators then would be forced to pay for those discounts in the form of higher programming costs that often get passed down in part to consumers in the form of higher

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[1] *See* Comments of AT&T Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 20-22.

prices and reduced innovation in services. This has been a problem in the industry for several years, and the merger of AT&T and DirecTV into a programming buyer with unmatched distribution capacity will add an entirely new dimension to the problem, particularly as AT&T/DirecTV will be realizing substantial volume discounts as compared to their direct in-market competitors.

The FCC should adopt a condition that ensures customers of smaller distributers will not be forced to pay higher rates and endure reduced services simply so that AT&T and DirecTV can please their investors. The FCC should prohibit AT&T/DirecTV from entering into any programming contract that represents an unreasonable discount over the price paid by any other distributor and should establish a percentage differential that is presumptively unreasonable.

Condition: The FCC Should Confirm That AT&T/DirecTV Is Subject To The Program Access Rules.

To protect the wholesale video programming market from additional harm, the FCC should confirm that AT&T/DirecTV will 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 leave no doubt that the provision applies to the full range of video services offered by the merged company.

The Merger Threatens The Retail Consumer Market For Bundled Services.

AT&T/DirecTV will have substantial opportunities and incentives to disrupt competition in the retail market for bundled video, voice, and data services as a result of AT&T's bottleneck control over a 22-state wireline telephone network. If the merged company manages to shed its interconnection obligations or simply decides to cooperate less fully with competitors' interconnection needs, consumers will be deprived of competitive voice service as well as competitive bundled services that include a voice component. The merged company will also have the opportunity and incentive to weaken video competition due to regulatory advantages that were extended to the companies when they were viewed (rightly or wrongly) as competitors to traditional cable providers.

Condition: The FCC Should Require AT&T/DirecTV To Continue To Carry Out Its Interconnection Responsibilities Under The Communications Act.

AT&T's control over substantial portions of the old Bell Telephone System gives the merged company the ability to foreclose competition for wireline voice service, and AT&T/DirecTV's renewed focus on its ability to bundle services gives it the incentive to deprive consumers of competitive choices. As it shifts to IP, AT&T is asking the FCC and Congress to eliminate competitors' rights to interconnect with its network under Sections 251 and 252 of the Communications Act. If AT&T/DirecTV is successful in evading those regulatory obligations, competition in the consumer market for bundled services will suffer. AT&T has often sought to delay market entry to competitors and to raise their cost of providing service. Now that these incentives are even further aligned with AT&T/DirecTV's focus on bundled service offerings, the FCC must confirm that Section 251 and 252 will apply to the merged company during and after its transition to IP.

Condition: The FCC Should Require AT&T/DirecTV To Abide By The Basic Service Tier Requirements Of The Communications Act And The Commission's Rules.

The FCC should ensure that AT&T/DirecTV does not continue to reap competitive benefits from video regulations that were initially intended to foster competition. Now that AT&T/DirecTV will be a dominant player in the video market, the FCC should require them to abide by the same broadcast carriage and basic service tier rules that apply to cable operators. No justification exists for continuing to exempt a company that will start with 26 million video customers from obligations that all of its smaller competitors must follow.

The Merger Would Hinder Competitive Service To MDUs.

An AT&T/DirecTV combination poses special risks to competition in MDU buildings. Specifically, the merged company will have the incentive and opportunity to (1) leverage DirecTV's ability to enter into exclusive MDU service agreements to squeeze out competitors; and (2) manipulate the FCC's cable inside wiring rules to force competitors to subsidize their service in individual buildings. DirecTV engages in both of these anti-competitive behaviors today, and absent appropriate conditions, there is every reason to expect the same behavior from the merged company.

Condition: The FCC Should Adopt Conditions Prohibiting The Merged Company From Entering Into Exclusive MDU Service Agreements.

When the FCC adopted the prohibition on cable operators entering into MDU exclusive service agreements, it left satellite companies free of the prohibition. Permitting this exemption to continue in any form for AT&T/DirecTV following the merger would simply be inviting the merged company to use this regulatory advantage to remove competition for the 30 percent of Americans who live in MDU environments. The FCC should confirm that under Section 628(j), the MDU exclusivity ban applies to any video programming service offered by the combined AT&T/DirecTV entity.

Condition: The FCC Should Require AT&T/DirecTV To Compete Fairly For Broadband Customers In MDU Environments.

Today, DirecTV engages in various strategies that have the effect of physically disrupting Cox's broadband service to MDU buildings. In particular, DirecTV insists on using outdated diplexers on Cox's inside wiring when it acquires new video customers in MDU buildings Cox has wired. These diplexers are incompatible with data services offered using DOCSIS 3.0, effectively foreclosing Cox's customers from retaining Cox's broadband service when they switch to DirecTV video. The merger will give AT&T/DirecTV the incentive and opportunity to expand this behavior in MDU buildings. Now that the company will be able to offer its own video, voice, and data bundles, the company will have increased incentives to drive Cox and other operators out of buildings that they themselves have wired for service.

To ensure that customers that switch to AT&T/DirecTV video service in MDU buildings can retain stand-alone data service from the cable operator that wired the building, the FCC should require the merged entity to install its own inside wiring infrastructure in apartment buildings.

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Cox Communications, Inc. ("Cox"), by its attorneys, hereby urges the Commission to condition the merger of AT&T and DirecTV in the above-captioned proceeding.[2]

I. BACKGROUND AND INTRODUCTION

AT&T and DirecTV propose to create a video, voice, and data services enterprise with unprecedented scale and scope. 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 combine will include:

- More than 26 million video customers and the ability to serve video customers nationwide;[3]

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[2] *See* Commission Seeks Comment on Applications of AT&T Inc. and DirecTV To Transfer Control of FCC Licenses and Other Authorizations, *Public Notice*, MB Docket No. 14-90, DA 14-1129 (rel. Aug. 7, 2014).

[3] As of the end of the second quarter of 2014, AT&T reported 5,851,000 U-Verse video connections. *See* AT&T Investor Briefing No. 285, July 23, 2014, at 17, *available at* http://www.att.com/Investor/Earnings/2q14/ib_final_2q14.pdf ("AT&T 2Q 2014 Report"). For the same period, DirecTV reported 20,231,000 subscribers. *See* Press Release, *DirecTV Announces Second Quarter 2014 Results*, July 31, 2014, at 4, *available at* http://investor.directv.com/files/doc_news/earnings_releases/2014/Press%20Release%206.30.14%20-%20FINAL.pdf.

- 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;[4]

- More than 16 million wireline broadband connections, with the ability to expand broadband coverage to 70 million customer locations;[5] 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.[6]

This merger represents two nationwide service providers – each already a formidable competitor in its own right – merging into a single company of staggering size and customer reach. The combined company will be capable of offering video, voice, and data services across multiple platforms to nearly every home and business in the country.

In the past, Congress and the FCC have treated AT&T and DirecTV as emerging competitors in the video services market that needed competitive protection from traditional cable operators like Cox. Contrary to this dated portrayal of the marketplace, AT&T has always been a fierce and large competitor that uses every means at its disposal to challenge its smaller rivals and has been able to quickly grow its video subscriber base.[7] DirecTV has grown to become the second largest multichannel video programming distributor ("MVPD"), with a coverage area of over 99% of U.S. households. Consequently, this merger will decrease

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4 *See* AT&T 2Q 2014 Report at 17; Investor Briefing, *AT&T to Acquire DirectTV*, May 19, 2014, *available at* https://www.att.com/Investor /Financial/slides_directv.pdf ("May 19 Investor Briefing"); 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, at 10-11 ("AT&T Public Interest Statement").

5 *See* AT&T 2Q 2014 Report at 17; May 19 Investor Briefing at 6.

6 *See id.*

7 In only the most recent example of AT&T's tactics, AT&T recently sued Cox in Federal District Court for the District of Delaware alleging that Cox has infringed several of AT&T's patents related to Cox's IP video, voice, and data services. *See AT&T Intellectual Property I, L.P., et al. v. Cox Communications, Inc., et al.*, Case No. 1:99-mc-09999 (D. Del. Aug. 28, 2014). AT&T's lawsuit is meritless, but it will force Cox to expend considerable resources to defend – resources that could and should be going to continued innovation and improved service to Cox's customers.

competition, reduce consumer choice, and alter the video marketplace dramatically. Most consumers in AT&T's wireline markets will see their choice of video providers shrink from four to three and consumers nationwide will see their choice for stand-alone direct broadcast satellite ("DBS") service eventually shrink from two to one.[8] Thus, the marketplace will be trading two formidable challengers for one company of unprecedented size with the opportunity and the incentive to dominate the markets for video, voice, and data services for many years to come.

The merger will alter the video, voice and data markets, as well as the market for bundles of these services. The FCC should examine the competitive threats to each of these markets brought on by this merger, recognizing that a competitive threat to any one of the individual video, voice, or data markets also threatens the market for bundled services. With respect to the market for voice services, the FCC has a special responsibility in this case because the proposed merger involves AT&T, the largest incumbent local exchange carrier (an "incumbent LEC"), subject to specific market-opening regulations under the Telecommunications Act of 1996 ("1996 Act"). AT&T is heir to the name and many of the assets of a former telephone empire that was dismantled by the Courts, Congress, and the FCC. AT&T's history is important as AT&T and DirecTV are now seeking to put together an unparalleled set of wireline and wireless video, voice, and data distribution resources, which, when bundled together, will pose competitive threats beyond the video services market. The FCC must make certain that any permitted combination of these two companies serves the public interest by contributing to

[8] AT&T only commits to offering stand-alone DirecTV services for three years. AT&T Public Interest Statement at 9 (". . . AT&T will commit to offer, for three years after closing, standalone DIRECTV satellite video service at nationwide package prices that do not differ between customers in AT&T's wireline footprint and customers outside the footprint.").

competition and does not threaten to damage other providers' ability to serve customers or the public's right to realize the benefits of that competition.[9]

Cox has identified a number of transaction-specific harms that will flow from the proposed AT&T/DirecTV merger and the conditions necessary to address them. Each of the identified harms will distort the markets in which Cox competes and ultimately lead to higher prices and diminished service to the consumers that purchase video, voice, and data services. The FCC has the responsibility to adopt conditions on this merger that are necessary to address these transaction-specific harms.[10] The harms Cox has identified and the conditions necessary to address them include:

- Damage to the wholesale market for video programming that will be caused by AT&T/DirecTV's avowed intention to rely on exclusive programming and excessive programming discounts to make the merger profitable.
  - *Condition*: Prohibit AT&T/DirecTV from entering into or extending any exclusive programming agreements, particularly exclusive programming agreements for major sports programming.
  - *Condition*: Require AT&T/DirecTV to agree not to enter into programming contracts that include unfair volume discounts.
  - *Condition*: Require AT&T/DirecTV to concede that it is subject to the same program access and unfair competition restrictions that apply to its competitors under Section 628(b) of the Act and the associated FCC rules.
- Unfair advantages for AT&T/DirecTV in the retail (consumer) bundled services market resulting from its control and exploitation of the largest wireline telephone and data network in the country and legacy FCC rules designed for a time when AT&T and DirecTV were new entrants rather than potentially dominant market actors.

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[9] *See, e.g.*, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, *Hearing Designation Order*, 17 FCC Rcd 20559, 20574-76 ¶¶ 25-27 (2002); *see also* 47 U.S.C. §§ 214(a), 310(d).

[10] *See, e.g.*, Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd 10689, 10711 ¶ 30 (2012) (citations omitted).

- *Condition*: Require AT&T to commit to long-term compliance with all Section 251 and 252 interconnection obligations before and after it transitions to an all-IP network at some future date.

- *Condition*: Ensure regulatory parity between cable operators and the merged AT&T/DirecTV by requiring the merged company to agree to abide by the basic service tier requirements of the Act.

- Anti-competitive incentives and opportunities for AT&T/DirecTV to restrict competitors' access to multi-dwelling unit ("MDU") customers and practices that interfere with or degrade customers' broadband service.

  - *Condition*: Prohibit AT&T/DirecTV from entering into exclusive agreements to serve MDU buildings.

  - *Condition:* Require AT&T/DirecTV to install its own inside wiring infrastructure in apartment buildings, instead of relying upon internal MDU wiring deployed by Cox and other cable operators that is used to furnish broadband Internet service sought by residents of those buildings.

These narrow and carefully crafted prophylactic conditions are necessary to protect the video, voice, and data services markets from the anti-competitive effects of the proposed merger and to preserve the benefits of competition for customers throughout the country.

Cox has a strong interest in ensuring that the FCC thoroughly reviews this transaction because Cox competes against both AT&T and DirecTV today and would face competition from the merged entity in all of Cox's markets. Cox is a mid-sized broadband services company with more than 20,000 employees that provides wireline video, voice, and data service to more than six million residential and business customers in 22 states. Cox has a long history of innovation and pioneering service to customers and was one of the first cable companies to enter the competitive telephone business and to offer "triple play" video, voice, and data services. Cox competes head-to-head with DirecTV for video customers in all of the markets Cox serves, and it competes directly with AT&T for bundled video, voice, and data services in parts of California, Oklahoma, Louisiana, Kansas, Connecticut, and Arkansas. Cox also competes against AT&T

for wireline telephone customers in other areas of those states, as well as in Florida and Georgia, where AT&T's incumbent telephone network overlaps Cox's service footprint. Moreover, separate from its wireline services, AT&T's *wireless* voice and data services compete with Cox's wireline services in all of Cox's markets as consumers balance the costs and benefits of different broadband connections.

As consolidation in the video, voice, and data business accelerates, mid-sized service providers like Cox face mounting business challenges caused by the scale and scope of their competitors. The merger of AT&T and DirecTV will exacerbate those challenges. Cox has competed vigorously with both AT&T and DirecTV, and it would welcome the challenge of competing with the merged company – but only if the FCC takes the appropriate steps described below to ensure that future competition is fair and takes place on a level competitive playing field.

II. THE MERGER WILL HARM THE WHOLESALE VIDEO MARKET, LEADING TO HIGHER PRICES AND FEWER PROGRAMMING CHOICES FOR CONSUMERS.

The proposed transaction presents clear threats to the wholesale video programming market in which all MVPDs compete for reasonable prices, terms, and conditions for the carriage of video programming that has traditionally been the mainstay of MVPD service offerings. Maintaining a healthy wholesale video market is key to maintaining fair competition among MVPDs and to ensuring that mid-sized and smaller providers will not be forced into further consolidation due to higher programming costs. A fair and open wholesale programming market also is essential to consumer welfare because the higher programming prices paid by mid-sized and smaller distributors are likely to be passed on to customers in part, while the cost-savings realized by the very largest MVPDs are rarely passed through to their subscribers in the form of lower prices. The FCC should move decisively in this proceeding to impose conditions to address the harms threatened by this unprecedented merger as described below.

A. The FCC Should Adopt Conditions To Prevent AT&T/DirecTV From Maintaining Exclusive Programming Arrangements.

1. Transaction-Specific Harms

The proposed merger creates a new and heightened risk that AT&T/DirecTV will harm the wholesale video marketplace by securing exclusive contracts for programming content that will inhibit smaller MVPDs from competing fairly with the merged company. This problem is specific to this merger for two reasons. First, the FCC can be certain that the merged AT&T/DirecTV intends to pursue an exclusive programming strategy because continuation of DirecTV's *NFL Sunday Ticket* contract is a centerpiece of the merger, with AT&T retaining the right to walk away if the *NFL Sunday Ticket* contract is not renewed.[11] And, as AT&T's history of maintaining a long-term exclusive contract for distribution of the iPhone shows, AT&T is no stranger to leveraging exclusivity (rather than service or rate improvements) to drive market share expansion.[12] Second, AT&T's unprecedented nationwide, multi-platform reach will make it a uniquely attractive – perhaps indispensable – partner for programmers and give it the capability to outbid most if not all MVPDs for exclusive programming rights. The FCC must recognize and remedy the anti-competitive effects of permitting AT&T/DirecTV to maintain and create new exclusive programming agreements.

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[11] *See* Roger Cheng, *NFL Sunday Ticket: The Easiest Way to Derail the AT&T-DirecTV Deal*, C-NET, May 19, 2014, *available at* http://www.cnet.com/news/nfl-sunday-ticket-the-easiest-way-to-derail-the-at-t-directv-deal/.

[12] *See, e.g.*, Nilay Patel, *Confirmed: Apple and AT&T Signed Five-Year iPhone Exclusivity Deal – But Is It Still Valid?*, ENGADGET, May 10, 2010, *available at* http://www.engadget.com/2010/05/10/confirmed-apple-and-atandt-signed-five-year-iphone-exclusivity-de/

Less than two years ago, AT&T argued that exclusive video programming contracts should be considered presumptively unfair and anticompetitive.[13] 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 significant hindrance to competing MVPDs."[14] Today, however, AT&T appears to have reversed its position that exclusive control of national sports programming are "anti-competitive," as press reports indicate that continuation of DirecTV's exclusive agreement for *NFL Sunday Ticket* is a condition of completing the merger.[15]

The only thing that has changed since 2012 is that AT&T is seeking to use this merger to transform itself from a rapidly growing video competitor into a market-making juggernaut that can lock up must-have programming and use exclusive programming arrangements to keep others from competing. AT&T aims to parlay its exclusive access to *NFL Sunday Ticket* into distribution to its 116 million wireless customers – a wireless distribution channel that AT&T and Verizon alone among MVPDs can access.[16] There is no reason to think that AT&T's

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[13] *See* Comments of AT&T Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 20-22 ("AT&T Program Access Comments"). In addition, several years ago AT&T filed a program access complaint at the FCC to gain access to Cox's San Diego cable channel, Channel 4SD, due to that channel's airing of certain San Diego Padres games for which Cox held the distribution rights. AT&T Services Inc. and AT&T California v. CoxCom, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 2859 (MB 2009). While AT&T may argue that its 2012 position concerned only exclusive agreements between a cable operator and its affiliated national sports programming network, in the case of channels like *NFL Sunday Ticket*, that distinction is meaningless. Regardless of whether the MVPD owns the network itself, the competitive harm is caused by an MVPD's exclusive distribution of irreplaceable sports programming. Whether the MVPD owns the network is irrelevant to the competitive harm.

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

[15] *See, e.g.*, Joe Flint, *DirecTV Deal with AT&T Includes NFL Sunday Ticket Exit Clause*, L.A. TIMES, May 19, 2014, *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-directv-att-nfl-sunday-ticket-20140519-story.html.

[16] *See* Shalini Ramachandran and Thomas Gryta, *AT&T Raises Possibility of Offering NFL Sunday Ticket to Wireless Customers*, THE WALL STREET JOURNAL, June 6, 2014, *available at*

ambitions for exclusive programming will stop at *NFL Sunday Ticket*. More likely, the merged entity's exploitation of exclusivity for *NFL Sunday Ticket* will be a template for future exclusive programming deals.

There is no justification for allowing a company with the size and scope of a merged AT&T/DirecTV to monopolize access to major television programming. DirecTV's *NFL Sunday Ticket* package provides it with a significant competitive advantage over all other MVPDs by giving it exclusive access to out-of-market NFL games. NFL programming is some of the most valuable, sought-after programming on television.[17] While allowing DirecTV to control such a valuable asset on an exclusive basis might have made some sense when DirecTV was an upstart competitor to cable without the capability of offering bundled video, voice, and data services,[18] permitting a merged AT&T/DirecTV to maintain – and expand – exclusivity for *NFL Sunday Ticket* will give the merged entity unfair advantages that will damage competition.[19] If AT&T/DirecTV is permitted to offer all of its video and wireless customers access to this programming, the number of NFL fans that other MVPDs are blocked from pursuing will grow exponentially. Allowing AT&T/DirecTV to then repeat this pattern with other valuable

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http://online.wsj.com/articles/at-t-raises-possibility-of-offering-nfl-sunday-ticket-to-wireless-customers-1402089079.

[17] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 FCC Rcd 10496, 10667 ¶ 344 (2013) (citing Anthony J. DiClemente & Chris Merwin, *Who Bears the Burden of Higher Sports Rights Costs*, Barclays Capital, Jan. 27, 2012, at 1) ("*Fifteenth Annual Report*"); *see also* Chairman Tom Wheeler, *Updating Old Policies; Pioneering New Ones*, OFFICIAL FCC BLOG, Sept. 9, 2014, *available at* http://www.fcc.gov/blog/updating-old-policies-pioneering-new-ones (citing NFL dominance of television ratings).

[18] *See* News Corp. and the DirecTV Group, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3319-20 ¶¶ 117-18 (2008).

[19] As part of DirecTV's stand-alone satellite service, *NFL Sunday Ticket* has approximately two million subscribers. *See* John Ourand and Daniel Kaplan, *NFL, DirecTV on Verge of Sunday Ticket Deal*, SPORTS BUSINESS JOURNAL, Aug. 25-31, 2014, *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2014/08/25/Media/DirecTV.aspx.

programming assets would give the merged entity or unfair competitive advantage that would be nearly impossible for smaller rivals to overcome.

The FCC has never before considered the negative impact on consumers and competitors of permitting a huge multi-platform competitor like AT&T/DirecTV to hold exclusive control of such valuable programming because no such competitor has existed before. DirecTV has not been able to offer its customers bundled video, voice, and data services to wireline or wireless customers. The merged entity will have that capability, and, in fact, touts that as one of the key benefits of the merger.[20] AT&T/DirecTV will have the capacity to offer an even bigger bundle of services (including wireless phone and data) to more customers nationwide than any other MVPD, and that expansive service package already will give the merged entity significant competitive advantages. It certainly should not need the additional advantage of offering exclusive programming to compete effectively. Instead, it should compete based on the fundamentals of price and customer service.

Allowing AT&T/DirecTV exclusive access to programming will harm consumers in several ways. As AT&T has recognized, exclusive contracts are a "significant hindrance" to competitors. Exclusivity significantly lessens an MVPD's incentive to improve its prices or customer service because customers that want specific programming (like *NFL Sunday Ticket*) have no choice in service providers. Moreover, when MVPDs focus on programming acquisition rather than fair competition to drive subscribership gains, the inevitable result is higher prices or reduced service. The FCC is seeing that today in the debacle surrounding

[20] *See* AT&T Public Interest Statement, *passim* (*e.g.*, at 1-4).

SportNet LA's licensing of Los Angeles Dodgers baseball games.[21] Yet, permitting exclusive deals like *NFL Sunday Ticket* only encourages other MVPDs to attempt to create competing exclusive deals. As increasing amounts of desirable programming are locked up in such exclusive deals, competition suffers and consumers have less choice. Moreover, since the largest MVPDs will be likely targets for programmers to capture exorbitant rights fees for exclusive deals, customers of most MVPDs will face even further reduced programming and service provider choices.

2. <u>Proposed Condition</u>

To counteract AT&T/DirecTV's potentially overwhelming leverage in the wholesale video programming market and to protect consumers from the negative impact of exclusive arrangements, the FCC should adopt a condition prohibiting the merged entity from entering into or continuing any existing exclusive programming contracts.

AT&T/DirecTV's enormous scale – not just in the video industry, but in the wireline and wireless telephone business as well – justifies a condition banning exclusive programming agreements for the merged entity. While the FCC has relaxed some restrictions on exclusive programming contracts in the past few years,[22] none of its justifications for permitting exclusive deals in some contexts applies to the merged AT&T/DirecTV. The FCC has noted that

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[21] *See* Meg James, *L.A. Mayor Garcetti Seeks FCC Review of Dodgers Channel Impasse*, LOS ANGELES TIMES, Aug. 26, 2014, *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-comcast-dodgers-garcetti-20140826-story.html.

[22] Under the 1992 Cable Act, cable operators were generally prohibited from entering into exclusive contracts with affiliated programming networks. *See* 47 U.S.C. § 628(c)(2)(D). The FCC sunset this prohibition in 2012 but committed to prosecuting unfair or anti-competitive exclusive programming contracts in complaint proceedings under Section 628(b). *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, Order on Reconsideration in MB Docket No. 07-29*, 27 FCC Rcd 12605, 12639-40 ¶ 51 (2012) ("*Exclusivity Sunset Order*").

programmers sometimes argue that exclusive programming contracts can be a valuable "differentiator," allowing MVPDs to compete more effectively with incumbents.[23] But allowing AT&T/DirecTV's multiplatform distribution service to retain and expand its exclusive arrangements will not lead to more robust and fairer competition. Instead, exclusivity will lead to excluding other providers from competing for millions of customers and, ultimately, higher prices and less choice for individual consumers.

At the very least, the FCC should adopt a condition prohibiting AT&T/DirecTV from entering into exclusive contracts for local or national sports programming. The FCC has recognized that for certain categories of programming (like local news channels), exclusivity might be a desirable because it promotes production of local programming.[24] But the Commission also has consistently determined that for other types of programming (like regional sports networks) excluding competitors is a presumptively unfair practice because it creates unfair competitive advantages.[25] The same is true for major national sports programming. For that reason, there is no justification for allowing AT&T/DirecTV to maintain exclusivity for *NFL Sunday Ticket* and to potentially expand its exclusivity to its other customers and platforms, as the merged entity plans. There is only one NFL, and there is simply no basis for allowing a company of the size and scope of AT&T/DirecTV to exercise exclusive control over the distribution of such irreplaceable programming. The Commission should condition approval of the AT&T/DirecTV merger on the companies' agreement not to enter into exclusive

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[23] *See, e.g.*, The Regional Sports Network Marketplace, *Report*, 27 FCC Rcd 154, 159 ¶ 12 (2012).

[24] *See Exclusivity Sunset Order*, 27 FCC Rcd at 12640-41 ¶ 53.

[25] *See*, *e.g.*, Review of the Commission's Program Access Rules and Elimination of Programming Tying Arrangements, 25 FCC Rcd 746, 782-83 ¶ 52 (2010).

programming contracts, but, at the very least, it should require the companies to commit to refraining from entering into or continuing exclusive agreements for major sports programming.

B. The FCC Should Adopt Conditions That Prohibit AT&T/DirecTV From Entering Into Programming Agreements That Include Unfair Volume Discounts.

1. <u>Transaction-Specific Harms</u>

The scale and scope of AT&T/DirecTV's multi-platform distribution network will give the merged company both the incentive and the opportunity to further exacerbate the "volume discount" problem arising from massive disparities between the prices programmers charge to the largest and the smallest MVPDs.

For several years now, Cox has warned the FCC that the structure of the multichannel video marketplace has caused a severe imbalance between the prices paid for programming by the largest MVPDs and those paid by small and mid-sized companies like Cox.[26] The problem is that the largest MVPDs demand and receive substantial "volume discounts" that decrease their programming costs, while mid-sized and smaller MVPDs with less bargaining leverage are essentially forced to pay for these larger carriers' discounts through higher programming prices.[27] The result is that small and mid-sized providers end up paying unfair and

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[26] *See, e.g.*, Letter from Barry Ohlson, Vice President, Regulatory Affairs, Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-203, 05-192, 03-109, 15-5, filed June 13, 2013; Reply Comments of Cox Communications, Inc., MB Docket No. 12-68, filed Jan. 14, 2013 at 1-2 ("Cox Buying Group Reply Comments"); Comments of Cox Communications, Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 1-5 ("Cox Buying Group Comments"); Reply Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, filed July 23, 2012, at 3 ("Cox Program Access Reply Comments"); Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2012, at 3-7 ("Cox Program Access Comments").

[27] *See* Cox Buying Group Comments at 2-3; Cox Buying Group Comments at 1-2; Cox Program Access Reply Comments at 5-7; Cox Program Access Comments at 4-6.

discriminatory rates for cable programming.[28] The record before the FCC in rulemaking proceedings demonstrates that programmers charge smaller MVPDs upwards of 30 percent higher rates for the same programming than the rates charged for the largest MVPDs.[29]

The volume discount problem has real impacts on the market and consumers. Forcing smaller MVPDs to subsidize the lower prices paid by the largest MVPDs results in higher prices for the customers of smaller MVPDs and less opportunity for smaller MVPDs to invest in the kinds of innovation and service improvements that contribute to the consumer experience.[30] Rising programming input costs and the reality of volume discounts inevitably incentivize MVPDs to consolidate in order to achieve the scale necessary to reduce programming costs.

The FCC has considered some incremental reforms that, if properly implemented, could modestly improve this imbalance.[31] Cox has noted, however, that the problem is quickly

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28 The Communications Act and the FCC's rules prohibit discriminatory programming prices for cable-affiliated networks. *See* 47 U.S.C. § 548(c)(2)(B); 47 C.F.R § 76.1002(b). While this rule does not apply directly to non-affiliated programming networks, Cox has argued that when MVPDs enter into programming agreements that include volume discounts that cannot be justified based on the economic benefits of scale distribution, they violate the unfair competition provisions of Section 628(b). *See* Letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, MB Docket 07-29, filed Jan. 12, 2010; Letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, MB Docket 07-29, filed Jan. 14, 2010; Letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, MB Docket 07-29, filed Feb. 17, 2010.

29 *See*, *e.g.*, Cox Program Access Reply Comments at 2 (citing Comments of the American Cable Association, MB Docket No. 10-56, filed June 21, 2010, at 38-39).

30 *See* Letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. l2-68. 07-18. 05-192, 12-203, filed Sept. 21, 2012, attachment.

31 *See Exclusivity Sunset Order*, 27 FCC Rcd at 12658-68 (2012) (proposing rules to make it easier for smaller cable operators to for buying groups to obtain more equitable pricing); *see also* Letter from Jason E. Rademacher, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, MB Docket No, 12-68, filed May 30, 2014 (reiterating Cox's position that the proposed application of the rules only to cable operators with fewer than 3,000,000 subscribers will exacerbate rather than solve the volume discount problem); Letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, MB Docket No, 12-68, filed Aug. 8,

growing worse and that decisive FCC action is necessary to protect competition and consumers.[32] While Cox in the past has urged the FCC to initiate a rulemaking to compile a record on this issue,[33] the volume discount implications of this merger pose a clear, present, and specific danger to competition that requires immediate FCC action.

Indeed, the AT&T/DirecTV merger confirms the volume discount problem now is inhibiting competition by driving further market consolidation. One of AT&T's main public interest justifications for the merger is that the merger will help it reduce programming acquisition costs.[34] AT&T estimates that its programming costs for U-Verse today are approximately 60% of its subscriber video revenues.[35] AT&T further argues that industry observers widely agree that video content costs are largely a function of scale and that its U-Verse video service lacks, and cannot achieve, the scale necessary to negotiate programming agreements on par with larger MVPDs.[36] Once it achieves the scale anticipated by its merger with DirecTV, however, AT&T expects to improve its per-subscriber programming rates by at least 20%.[37] And AT&T has told investors that these cost savings will be the biggest part of the $1.6 billion in cost savings that AT&T anticipates realizing from the merger in the first 3 years.[38]

2013 (same); Cox Buying Group Comments at 7-11; Cox Buying Group Reply Comments at 1-6.

32 *See*, *e.g.*, Cox Buying Group Reply Comments at 1, 3.

33 *See* Comments of Cox Communications, Inc., MB Docket No. 12-203, filed Sept. 10, 2012 (citing Cox Program Access Reply Comments at 2-3, 7).

34 *See* AT&T Public Interest Statement at 33-38.

35 *See id.* at 22 (citing Declaration of Lori M. Lee, Senior Executive Vice President – Home Solutions, AT&T Inc. at ¶ 18 ("Lee Declaration"); Declaration of John T. Stankey, Group President and Chief Strategy Officer, AT&T Inc. at ¶ 15.

36 *See* AT&T Public Interest Statement at 21-23.

37 *See id.* at 36 (citing Declaration of Rick L. Moore, Senior Vice President, AT&T Inc. at ¶ 18).

38 *See* AT&T Inc., SEC Form 8-K, filed June 3, 2014, *available at* http://www.sec.gov/Archives/edgar/data/732717/000073271714000049/qa8k.htm.

While the volume discount problem is primarily a problem with the wholesale programming market, this merger also will magnify the retail-market effects of the problem. Both AT&T and DirecTV have roots as challengers to incumbent cable operators in every market they serve. That means they compete directly with small and mid-sized programmers across the country. When a large cable operator serving a distant market realizes a volume discount that reduces its programming costs compared to a smaller out-of-market operator, the competitive effect is minimal because those two operators do not compete for customers head-to-head. In contrast, AT&T/DirecTV will be realizing substantial volume discounts as compared with all of their small and mid-sized direct competitors in markets across the country. In other words, operators like Cox will be subsidizing direct competition from AT&T/DirecTV. That will not lead to healthy markets or consumer welfare.

Approving the merger while leaving AT&T and DirecTV to contribute further to the volume discount problem will just continue the vicious cycle that is harming customers and deforming the wholesale video programming market. The merger will leave fewer smaller MVPDs like Cox to finance AT&T/DirecTV's new lower programming rates. This will lead to another round of programming price hikes for mid-sized and smaller cable operators, increasing the disparity between the programming costs paid by the largest and the smallest MVPDs. The customers of smaller and mid-sized MVPDs will then face higher prices and distributors with less financial flexibility. And, following AT&T's own logic, that sequence will be followed by future mergers as smaller operators are forced to consolidate to afford key programming. The FCC should halt this process by adopting conditions to keep this merger from contributing to the existing volume discount problem.

2. **Proposed Condition**

To address AT&T/DirecTV's opportunities and incentives to further contribute to the growing volume discount problem, Cox proposes that the FCC adopt a condition that prohibits AT&T/DirecTV from entering into future programming agreements that result in the merged entity receiving an unreasonable discount for programming, on a per-subscriber basis, over the rates a programmer charges to any other MVPD. The FCC should establish a percentage discount that would be presumptively unreasonable under this condition, and the FCC should enforce this condition by requiring AT&T/DirecTV to include in its new programming contracts a provision in which both AT&T/DirecTV and each programmer certify compliance with the discount limitation.

The proposed limit on programming discounts still would leave AT&T/DirecTV free to secure programming deals at a reasonable discount compared to what mid-sized and smaller MVPDs are forced to pay. And the FCC can craft the discount limitation to ensure that it is in line with what could be economically justified. In any event, this "reasonableness" condition would at least limit the volume discount problem with respect to the merged entity while the FCC continues considering the substantial evidence that industry-wide rules are needed to combat this problem.[39]

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[39] *See, e.g.*, Comments of Cox Communications, Inc., MB Docket No. 12-203, filed Sept. 10, 2012; Cox Program Access Reply Comments at 2 (citing Comments of Mediacom Communications Corporation, MB Docket No. 12-68, filed June 22, 2012, at 9-17; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association, MB Docket No. 12-68, filed June 22, 2012, at 11-13; Comments of the Independent Telephone &Telecommunications Alliance, MB Docket No. 12-68, filed June 22, 2012, at 10-12; Joint Comments of Interstate Telecommunications, *et al.*, MB Docket No. 12-68, filed June 22, 2012, at 5-8; Comments of Blooston Rural Video Service Providers, MB Docket No. 12-68, filed June 22, 2012, at 3-4; Comments of American Cable Association, MB Docket No. 12-68, filed June 22, 2012, at 25-34).

C. The FCC Should Require AT&T To Concede That The Program Access And Unfair Competition Rules Will Apply In Full Force To All Of The Merged Company's Video Services.

1. <u>Transaction Specific Harms</u>

To further address the threats to the wholesale programming market that this transaction presents, the FCC should adopt an additional condition ensuring that MVPDs will be able to enforce specific claims of unfair competition or program access violations against the merged AT&T/DirecTV. The main statutory and regulatory vehicle for claims of unfair competition is Section 628 of the Communications Act and the FCC rules implementing that statute. It is essential to fair competition that the full panoply of Section 628 restrictions applies to the merged company's video operations.

2. <u>Proposed Condition</u>

As a condition of the merger, the FCC should require AT&T/DirecTV to concede the applicability of Section 628 to all of its video operations and to commit to obeying the statute. Congress enacted Section 628 as part of the Communications Act in 1992 to ensure that the market for MVPD programming remains open and fair.[40] Section 628(c) directed the FCC to establish rules designed to combat the issue that immediately faced the marketplace at that time, which was the increasing vertical integration of cable operators and cable programmers.[41] In particular, Section 628(c) requires regulations that (1) prohibit cable operators from inducing their vertically integrated programmers to refuse to sell programming to competing MVPDs; (2) prohibit vertically integrated programmers from discriminating against unaffiliated programmers in the prices, terms, and conditions of carriage; and (3) prohibit exclusive contracts

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[40] *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, 8 FCC Rcd 3359, 3360 ¶ 1 (1993) ("*Program Access Order*").

[41] *See id.* at 3361 ¶ 3; *See also* 47 U.S.C. §548(c).

between cable operators and their vertically integrated programming affiliates.[42] The FCC adopted rules to carry out Congress's directives in 1993.[43] In 2012, the FCC sunset the exclusivity ban, but the other program access rules remain in place, and the FCC continues to police exclusive programming contracts under Section 628(b).[44]

The FCC has held that Section 628(b) also provides the agency with a flexible tool for dealing with emerging problems in the wholesale video marketplace that Congress did not specifically identify in 1992.[45] Section 628(b) authorizes the FCC to punish specified MVPDs for unfair or anticompetitive conduct the purpose or effect of which is to prevent other MVPDs from competing fairly. The FCC has exercised its authority under Section 628(b) in recent years to prohibit cable operators from entering into exclusive contracts to serve multiple dwelling units ("MDUs") and to presumptively prohibit exclusive contracts for terrestrially-delivered regional sports networks ("RSNs").[46]

With this transaction, the FCC can confirm that the merged AT&T/DirecTV enterprise is subject to all of Section 628 of the Act. Pursuant to Section 628(j), these rules already apply to AT&T's U-Verse service by virtue of AT&T's status as a common carrier.[47] There has been

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42 *See* 47 U.S.C. §548(c).

43 *See Program Access Order*, 8 FCC Rcd at 3362-65 ¶¶ 9-20.

44 *See Exclusivity Sunset Order,* 27 FCC Rcd 12605.

45 *See* 47 U.S.C. § 548(b).

46 *See* Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Red 20235 (2007) (the "*MDU Order*"), *aff'd*, *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (banning MDU exclusivity agreements); Review of the Commission's Program Access Rules & Examination of Program Tying Arrangements, *First Report and Order*, 25 FCC Rcd 746 (2010), *aff'd*, *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (2011) (banning terrestrial regional sports network ("RSN") exclusivity agreements).

47 *See* 47 U.S.C. § 628(j).

unnecessary confusion, however, over the applicability of Section 628 to DirecTV.[48] Irrespective of any technical legal reading of the various provisions of Section 628, no justification exists for permitting a 26-million subscriber MVPD with an unprecedented scope and variety of video, voice, and data services to operate under a less restrictive set of competitive rules than its far smaller competitors. This is particularly the case given that AT&T anticipates expanding its video platform to encompass both DirecTV's nationwide satellite platform and AT&T's near-nationwide LTE wireless broadband platform. Under these circumstances, leaving any part of the merged entity free of Section 628 would encourage AT&T/DirecTV to behave in anti-competitive ways.

The FCC should require that as a condition of the merger, AT&T and DirecTV concede that Section 628 applies to all the video services offered by the merged entity, whether they are provided terrestrially, by satellite, or by wireless broadband. This condition would ensure that the FCC does not approve the creation of a massive MVPD with unmatched distribution platforms that operates with more favorable rules than its much smaller competitors. Section 628 of the Act was intended to ensure that potentially dominant MVPDs do not abuse their size and scope to undermine competition. In the context of this merger, that requires confirmation that the merged AT&T/DirecTV is subject to the full range of Section 628 restrictions and to

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[48] *Compare* Implementations of the Cable Television Consumer Protection & Competition Act of 1992: Development of Competition & Diversity in Video Programming Distribution & Carriage, *Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 9 FCC Red 3126, 3126-27 ¶¶ 40-41 (1994) (applying Section 628(b) to DBS providers) *with MDU Order*, 22 FCC Rcd at 20236 (asserting without analysis that at least some DBS providers "are not . . . subject to Section 628); *see also* Letter from David J. Wittenstein, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-29, 07-198, and 07-51, dated Feb. 17, 2010 (demonstrating that the plain language of Section 628(b) and the FCC's regulations apply to DirecTV); Letter from David J. Wittenstein, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-29, 07-198, and 07-51, dated Jan. 12, 2010 (same).

provide competing MVPDs with the ability to invoke all the procedures and remedies that Congress intended to protect competition in the video marketplace.

III. THE FCC SHOULD ADOPT CONDITIONS TO PROTECT THE COMPETITIVE MARKET FOR BUNDLED SERVICES.

A. The FCC Should Adopt Conditions To Ensure Fair Competition For The Wireline Voice Component Of Bundled Video, Voice, And Data Services.

1. Transaction-Specific Harms

The proposed merger poses unique risks to the competitive market for bundled services due to AT&T's control of the most geographically widespread collection of incumbent wireline telephone networks in the country. The ability of competitive voice service providers to compete fairly depends upon their ability to interconnect with incumbent LECs like AT&T. In other proceedings, AT&T is trying to convince the FCC and Congress to eliminate competitors' interconnection rights when they switch to internet protocol ("IP") networks.[49] But the transition to IP does not change that fact that competitors need interconnection with AT&T and other incumbent LECs to provide voice services. The merger would increase AT&T's incentives to use the transition to IP networks as a way to frustrate competitors' future efforts to offer voice service and, by extension bundled services with a voice component.

AT&T incorrectly claims IP interconnection is not subject to the statutory protections of Sections 251 and 252 of the Act[50] and has shown it will fight to prevent competitors from using

[49] *See* Comments of AT&T, GN Docket No. 13-353, filed Jan. 28, 2013, at 11-12 ("AT&T IP Transition Comments"); Comments of AT&T on Network Interconnection, House Committee on Science and Technology, filed Aug. 8, 2014, at 8-10 *available at* http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/WP4_Responses_1-22.pdf.

[50] AT&T IP Transition Comments at 11-12.

their rights to obtain IP Interconnection.[51] Both now and in the future, AT&T/DirecTV's interference with competitors' ability to offer comparable wireline voice service to that offered by AT&T/DirecTV would substantially inhibit companies like Cox from offering competitive bundled services. Without interconnection protections, AT&T will have the means to inhibit competitors' ability to offer wireline voice service as they transition to IP networks.

AT&T's public interest statement repeatedly emphasizes that one of the chief benefits it expects to realize from the merger is an improved ability to offer bundled video, voice, and data services throughout both companies' service areas.[52] As AT&T notes, customers are more likely to take service if it includes a full suite of video, voice, and data services, and customers are less likely to switch providers once they take all those services.[53] The FCC has recognized the benefits to consumers of receiving bundled services and research shows that many consumers want such services.[54] AT&T is undoubtedly correct that its ability to bundle its services with DirecTV's would enhance its ability to compete.[55] The unprecedented combination of wireline, wireless, and satellite assets, however, also creates powerful incentives for AT&T to seek to leverage its control over its vast wireline telecommunications infrastructure to keep competitors from offering comparable service bundles. The FCC must ensure that granting approval of the merger does not create unfair advantages for AT&T/DirecTV in the bundled services market.

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51 After Sprint asserted its interconnection rights, the Michigan Public Service Commission had to order AT&T to provide Sprint with IP Interconneciton. *In the Matter of Petition of Sprint Spectrum L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish Interconnection Agreements with Michigan Bell Telephone Company, d/b/a AT&T Michigan*, Order, MPSC Case No. U-17349 (Dec. 6, 2013). AT&T has appealed that decision in federal court. *See Michigan Bell Telephone Co., d/b/a AT&T Michigan v. John D. Quackenbush, et al.*, No. 1:14-cv-00416 (W.D. Mich. Apr. 15, 2014).

52 *See, e.g.*, AT&T Public Interest Statement at 20, 45, 56.

53 *See id.*, Lee Declaration at 7.

54 *See, e.g.*, *Fifteenth Annual Report*, 28 FCC Rcd at 10538 ¶ 93.

55 *See* AT&T Public Interest Statement at 45.

As the heir to much of the old Bell Telephone Company's infrastructure, AT&T is also the heir to that company's history of excluding competitors. Since the break-up of the Bell System in 1984 and the advent of the market-opening network sharing provisions of the 1996 Act,[56] AT&T efforts to undermine competition have been constrained by law and the FCC's rules. That has not, however, kept AT&T from attempting to narrowly construe its legal obligations to the detriment of competitors, causing years of wasteful litigation.[57] Despite these efforts, the 1996 Act's Section 251 and 252 interconnection requirements have been successful and have led to millions of consumers enjoying far less expensive and more advanced competitive telephone service than they did before Congress enacted these provisions. Cox has made use of these protections to introduce competitive telephone services in AT&T's footprint, offering those services as part of popular video, voice, and data bundles.

This competition will remain robust only as long as the FCC steadfastly preserves and promotes the interconnection requirements under Section 251 and 252 of the Act. As Cox has explained to the FCC, incumbent LECs like AT&T remain indispensable providers of wholesale interconnection that make it possible for competitors like Cox to reach all customers in a given market.[58] To preserve the telephone competition (and accompanying bundled services competition) that has grown since the 1996 Act, the FCC must adopt the conditions necessary to ensure that the merged AT&T/DirecTV entity does not interfere with its competitors' access to telephone customers in AT&T's service territories.

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[56] *See* 47 U.S.C. §§ 251, 252.

[57] *See, e.g.*, *SBC Communications, Inc.*, 17 FCC Rcd 19928 (2002) (finding AT&T predecessor SBC liable for failing to provide suitable quality transport service), *rev'd SBC Communications v. FCC*, 407 F.3d 1223 (2005) (accepting SBC's argument that the asserted regulations requiring provision of transport service were not sufficiently clear to support liability).

[58] *See, e.g.*, Comments of Cox Communications, Inc., GN Docket No. 12-353, filed Jan. 28, 2013, at 9-11.

This merger and AT&T's plans to transform its current telephone network from a TDM to an all-IP architecture require the FCC to take additional steps to ensure that AT&T cannot obstruct competition for the wireline telephone component of future competitive service bundles.[59] As Cox recently explained to members of Congress[60] and many other competitive providers have explained to the FCC, the transition of voice networks to all-IP technology does not alter the need for competitive providers to interconnect with the incumbent LEC or alter the incumbent LECs bottleneck control over wholesale access to transit service, interconnection with other carriers, and access to 911 resources.[61] The only way to ensure that a post-merger AT&T/DirecTV continues to play its essential role in allowing competitors to reach all customers and provide a competitive voice component to their bundled service offerings is for the FCC to ensure that the protections of Section 251 and 252 remain in place.

AT&T has claimed that such protection will be unnecessary after its transition to all-IP networks because it would continue to interconnect with its voice competitors on reasonable terms and conditions after completing the transition. But AT&T also has asserted that IP-based voice services "are appropriately classified as interstate information services" that would not be subject to Sections 251 and 252.[62] Indeed, AT&T has argued that "even the *prospect* of regulatory intervention" in IP interconnection, let alone actual regulation, would be harmful, and

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59 *See* Hank Hultquist, *Going All-IP in Alabama, Florida*, AT&T PUBLIC POLICY BLOG, Feb. 28, 2014, *available at* http://www.attpublicpolicy.com/wireless/going-all-ip-in-alabama-florida/.

60 *See* Comments of Cox Communications, Inc. in Response to the House Committee on Energy and Commerce White Paper on Network Interconnection, filed Aug. 8, 2014.

61 *See e.g.*, Comments of the Competitive Carriers Association, GN Docket No. 12-323, filed Jan. 28, 2013, at 3; Letter from Eric Einhorn, Windstream Communications, Inc., et al., to Jonathan Sallet, General Counsel, and Julie Veach, Chief, Wireline Bureau, FCC, GN Docket No. 13-5, *et al.* (filed Apr. 28, 2014).

62 Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, AT&T, Inc., GN Docket No. 12-353, filed Nov. 7, 2012, at 18.

that regulating IP interconnection would be unlawful.[63] Unfortunately, in the absence of a mandate from the Commission, AT&T/DirecTV would have no incentive to enter into reasonable agreements with bundled services competitors. AT&T's position on this issue strains credibility, given AT&T's history of obstructing competitive interconnection.

2. Proposed Condition

To protect the market for bundled services from potentially anti-competitive behavior by the merged AT&T/DirecTV, the FCC should require AT&T to commit to compliance with all Section 251 and 252 interconnection obligations both now and in the future. This condition should apply regardless of whether AT&T/DirecTV and the competitive provider continue to deliver telephone traffic over their existing TDM networks or over an all-IP network. These requirements are necessary to ensure that parties other than AT&T can continue to compete fairly for customers seeking bundled video, voice, and data services.

The FCC should insist that AT&T and DirecTV agree to permanently maintain interconnection under Sections 251 and 252, including both the substantive requirements and procedural obligations to engage in negotiation and arbitration. Under normal circumstances, the FCC might prefer to deal with these issues generally in the context of the IP transition. At this point, however, AT&T's goal to eliminate IP interconnection protections and its decision to go forward with this merger leaves the agency with little choice but to address these questions

[63] Reply Comments of AT&T, Inc., GN Docket 12-353, filed Feb. 25, 2013 at 18 (emphasis in original), *see also id.* at 32-38 (arguing that the Commission lacks legal authority to regulate IP interconnection). As Cox has described in its pleadings on these issues, the Commission has the authority to regulate IP interconnection whether voice over IP services are classified as information services or telecommunications services. *See, e.g.*, Reply Comments of Cox Communications, Inc., WC Docket No. 10-90, *et al.*, filed Mar. 30, 2012, at 9-14.

now.[64] If the FCC grants AT&T the authority to acquire the video piece it claims is necessary for it to compete effectively for bundled service customers, it should not simultaneously leave open the possibility that AT&T may leverage the IP transition to undermine the ability of competing providers to offer competing bundled services.

B. The FCC Should Adopt Conditions Requiring AT&T/DirecTV To Abide By The Same Basic Service Tier Requirements That Apply To Its Competitors.

1. Transaction Specific Harms

As described above, the merger of AT&T with DirecTV means that both providers will relinquish any façade that they are upstart competitors to cable operators. Together they will indisputably become one of the largest MVPDs with a suite of services that makes the merged company a formidable competitor in nearly every market nationwide. For that reason, regulatory advantages that Congress and the FCC have bestowed on AT&T and DirecTV separately no longer have any rational basis when applied to the merged entity. Fair competition for the video portion of AT&T/DirecTV and its competitors' bundled services requires a level regulatory playing field.

In particular, the cable basic service tier rules that apply to cable operators like Cox do not apply to DirecTV's satellite service, and AT&T has contested whether such "cable-operator" obligations apply to its U-Verse video service.[65] Under today's rules, cable operators are required to provide TV broadcast stations to all their customers, while DirecTV is permitted to

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[64] It would be reasonable for the FCC to reserve the right to revise this condition, if appropriate, as part of its consideration of issues arising from the IP transition. *See* Technology Transitions, *Order*, *Report and Order and Further Notice of Proposed Rulemaking*, *Report and Order*, *Order And Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative*, 29 FCC Rcd 1433 (2014).

[65] 47 U.S.C. §§ 534(b)(7), 543(b)(7); *see also, e.g.*, Comments of AT&T, MD Docket Nos. 13-140, 12-201, 08-65, filed June 19, 2013 ("AT&T's U-Verse TV service is an IP-based MVPD service, and not a 'cable service.'") (contesting regulatory classification as cable service for regulatory fee purposes).

sell those signals to customers separately or not at all, and presumably AT&T would argue that it has no basic tier obligations.

The basic tier requirements place costs on Cox and other cable operators and reduce the choices that Cox is permitted to offer its customers. Leaving AT&T/DirecTV free of these obligations gives them a cost, pricing, and packaging advantages for the video portion of their bundled services. Regardless of the wisdom of granting AT&T and DirecTV these advantages when they were viewed as providing nascent competition to incumbent cable operators, such advantages make no sense for a company that will have the massive scale and unprecedented scope of the merged AT&T/DirecTV. Indeed, allowing them to maintain these advantages will create an uneven playing field that offers unfair advantages to AT&T/DirecTV at the expense of mid-sized cable operators like Cox.

2. <u>Proposed Condition</u>

The FCC should use this merger proceeding to make certain that AT&T/DirecTV operates at regulatory parity with its smaller competitors when it comes to the video portion of their bundled service offerings. Accordingly, the FCC should require that the merged AT&T/DirecTV agrees to provide all TV broadcast stations to its video customers regardless of distribution platform. The FCC also should confirm that these obligations apply regardless of whether AT&T/DirecTV is distributing program via its IPTV platform, its satellite platform, or whatever wireless video platform the new company develops.

IV. THE FCC SHOULD ADOPT CONDITIONS DESIGNED TO ENSURE THAT THE TRANSACTION DOES NOT HARM BROADBAND SERVICES COMPETITION IN MULTIPLE DWELLING UNIT BUILDINGS.

A. The FCC Should Adopt Conditions Prohibiting The Merged Entity From Entering Into Exclusive Agreements To Serve MDU Buildings.

1. Transaction Specific Harms

The merger between AT&T and DirecTV creates a number of opportunities and incentives for the merged entity to act anti-competitively in the market for MDU customers. MDUs represent an important venue for competition for video, data and voice services. As the Commission has recognized, "[a]pproximately 30 percent of Americans live in MDUs, and their numbers are growing."[66] Under the Commission's rules, cable operators are expressly prohibited from entering into exclusive agreements to serve MDUs, but DBS providers are not.[67] A company the size of a merged AT&T/DirecTV, however, should be bound by the same MDU rules that govern much smaller cable operators irrespective of distribution platform.

The Commission previously has made clear that the prohibitions established in the *MDU Order* apply whenever a cable operator or a common carrier or its affiliate provides video programming service "by any means" to an MDU.[68] Thus, consistent with the intent of Section 628(j) of the Cable Act,[69] the Commission's MDU exclusivity ban is designed to apply to any video programming service offered by the combined entity, regardless of whether it is U-Verse or DirecTV's DBS service. Indeed, any contrary reading would undermine the competitive

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66 *See MDU Order*, 22 FCC Rcd. 20235, ¶ 1 (2007); *see also* ADTRAN White Paper, *Multi-Dwelling Units: The Pathway to a Successful FTTH Deployment*, at 2 (2014), *available at* https://www.adtran.com/web/fileDownload/doc/32208 (reporting that "there are over 32 million MDUs in the U.S. which is around 25 percent of all residential buildings").

67 *See* 47 C.F.R. § 76.2000.

68 *MDU Order at* ¶ 51.

69 47 U.S.C. § 548(j) ("Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers").

equity principle underlying Section 628(j) and the application of the MDU exclusivity ban to video programming services provided by a common carrier or its affiliate.

2. <u>Proposed Condition</u>

To ensure fair competition among video providers to MDUs, the Commission should confirm that post-merger, 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 Order*.

B. DirecTV Should Be Subject To Conditions That Proscribe Its Practices In MDUs That Impede Broadband Services Competition And Thwart The Deployment Of Advanced Capabilities To MDU Residents.

1. <u>Transaction Specific Harms</u>

The merged AT&T/DirecTV also will gain new opportunities and incentives to interfere in competitors' provision of broadband services to MDU customers by continuing and expanding unfair practices that DirecTV already is using to thwart MDU competition. Providing broadband communications services to MDUs can be more complicated than serving single-family homes due to the need to deploy distribution plant both to the building curb and within the MDU all the way to individual units. This added complexity should not – and need not – deprive MDU residents of the same benefits from broadband service competition enjoyed by residents of single-family homes. Toward this goal and in accordance with Commission policies that encourage the deployment of advanced broadband capabilities, Cox has been upgrading its cable plant serving both single-family homes and MDUs to 1 GHz and transitioning to DOCSIS 3.0, which operates in frequencies above 800 MHz.

Cox's ability to provide DOCSIS 3.0 to its subscribers, however, is being impeded by DirecTV's insistence on attaching diplexers to wiring in buildings where Cox provides broadband service and DirecTV provides video service to the same units. These diplexers cause harmful interference to Cox's DOCSIS 3.0 broadband signals transmitted above the 800 MHz frequency range and will likewise interfere with DOCSIS 3.1 signals planned for the future as the path to provide 1 GHz services. Cox has made substantial efforts to be reasonable and accommodating to DirecTV to attempt to co-exist in MDUs as the Commission intended, but DirecTV has rejected those efforts.

There is no specific FCC rule governing the treatment of cable operator-deployed MDU wiring in circumstances where an MDU resident opts to switch to DirecTV while continuing to receive Internet service from the cable operator. As a result, DirecTV is reflexively invoking the Commission's inside wiring rules for video service, thereby impairing the ability of MDU customers to obtain broadband Internet service from the provider of their choice. The manner in which DirecTV has chosen to provision its video service using existing MDU internal wiring interferes with the frequencies on which Cox is providing its DOCSIS 3.0 Internet offering. DirecTV, however, insists that if Cox wants to provide interference-free service to customers, it should install a second MDU wire to each customer's unit. As a result of DirecTV's unwillingness to accept or propose a reasonable solution to the interference problems caused by its diplexers on shared MDU internal wiring, Cox is forced to either decline to serve units interested in receiving (or continuing to receive) DOCSIS 3.0 cable modem service or to incur the costs of running a second wire to such units, which results in Cox wiring the building twice – both for itself and for its competitors.

Both of these outcomes conflict with key Commission policy objectives. The FCC has adopted a goal of ensuring universal access to broadband services and is encouraging cable operators to upgrade to DOCSIS 3.0.[70] However, the interference caused by DirecTV's diplexers either prevents that from taking place in many MDUs served by Cox or renders it untenable. Cox has been expending considerable capital to upgrade its network in order to provide all subscribers – including MDU residents – the opportunity to enjoy the benefits of DOCSIS 3.0 and 3.1, along with other advanced broadband capabilities. These investments are paving the way for Cox and other cable operators to offer broadband speeds of 1 Gbps and higher.[71] But MDU customers will not be able to enjoy these advanced capabilities – and the business case for the capital investment in MDUs becomes significantly riskier – if the additional spectrum made available by the upgrades to DOCSIS 3.0 and 3.1 cannot be used to provide broadband service to building residents who wish to retain Cox as their Internet service provider. MDU tenants should not be deprived of the broadband Internet service provider of their choice – and the advanced capabilities afforded by DOCSIS 3.0 and 3.1[72] – simply because DirecTV wishes to provide video service without having to deploy its own wiring in an MDU.

The problem described above is likely to be exacerbated by the proposed transaction because the merged AT&T/DirecTV plans to sell video, voice, and data plans in all MDUs in the combined entity's service area and will have every incentive to act unreasonably when obtaining

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70 *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Eighth Broadband Progress Report*, 27 FCC Rcd. 10342 ¶¶ 11, 21, 92 (2012) (noting that the high speeds associated with DOCSIS 3.0 are important because "greater bandwidth allows for greater utilization of higher data speeds by innovators at the edge of networks, which in turn drives greater demand and utility of broadband").

71 Jeff Baumgartner, *DOCSIS 3.1 Speeds Ahead*, MULTICHANNEL NEWS, Apr. 28, 2014 (Characterizing DOCSIS 3.0 as "a platform capable of getting cable operators within shouting distance of 1 Gigabit-per-second throughputs (at least downstream)" and noting that "the big initial driver for DOCSIS 3.1 will be enabling throughputs that extend beyond 1 Gbps").

72 *See id.* ("Even further down the road, DOCSIS 3.1 will usher in cable's broader all-IP transition, setting the stage for a platform capable of supporting capacities of 10 Gbps downstream and up to 2 Gbps upstream").

use of, through operation of the Commission's rules or otherwise, internal MDU wiring deployed by Cox or another MVPD. As a threshold matter, AT&T itself acknowledges that "a substantial number of standalone DIRECTV subscribers purchase broadband service from another MVPD."[73] AT&T correctly observes that these "are consumers who have already shown that they value both DIRECTV video service and broadband service," and there is little doubt that AT&T will be targeting those customers in an effort to win their broadband Internet service business (as well as AT&T's other bundled services). Yet, some MDU households in locations where AT&T offers Internet access service via DSL technology may prefer to retain cable broadband service, due to concerns regarding the limits and performance of DSL.[74] Thus, if anything, particularly given the focus on bundled services, the combined entity will have even less incentive than DirecTV has shown on a standalone basis to act reasonably with regard to use of shared wiring by MDU residents that wish to split video and broadband service providers.

Even apart from the customers that wish to split service, the transaction will give the combined entity a greater incentive to use DirecTV video service wins at MDUs as a means of assuming control over internal MDU wiring infrastructure deployed by Cox and other cable incumbents to individual building units in order to eliminate a potential source of competition to AT&T/DirecTV's bundled offerings. The potential impact of this incentive on competition in MDUs will be widespread since AT&T/DirecTV plans to compete for 75 percent of the nation's

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[73] AT&T Public Interest Statement at 69.

[74] *See*, *e.g.*, Edward Wyatt, *In Scrutiny of Cable Merger Internet Choice Will Be Crucial Battlefield*, NEW YORK TIMES, Apr. 8, 2014, *available at* http://www.nytimes.com/2014/04/08/business/in-scrutiny-of-cable-merger-internet-choice-will-be-crucial-battlefield.html?_r=0 ("But DSL service, which is delivered over traditional copper phone lines, does not measure up to the speeds of cable Internet service. The most recent FCC figures available, from mid-2012, show that only eight percent of DSL connections in the United States transmit at a speed of at least 10 megabits per second. Seventy percent of cable modem service travels that fast").

households by offering bundles that include DirecTV's video service.[75] The acquisition of DirecTV, therefore, provides AT&T with a mechanism in MDUs to commandeer the cable broadband wire – which in some cases may be upgraded to DOCSIS 3.0 or 3.1 and offers throughput capability that AT&T cannot itself match – and thereby reduce viable, often superior, broadband choices for MDU residents. Thus, in MDUs the transaction will provide AT&T/DirecTV with the incentive and ability to capture the internal distribution infrastructure that helps to provide Cox with the ability to offer those speed and reliability advantages to MDU residents.

Additionally, some observers have speculated that even in areas where U-Verse video is provided today, AT&T could use DirecTV's video distribution capabilities to free up more bandwidth for its broadband offerings.[76] This might be an especially attractive strategy in MDUs subject to the Commission's *Sheet Rock Order*, since the approach would not only free up bandwidth for AT&T's broadband offering but the takeover of cable-deployed wiring to MDU units switching to DirecTV's video service would remove a potential source of competitive broadband infrastructure to those units.

The adverse effects of these risks for consumers and competition are aggravated by the prospect that AT&T may claim that the Commission's inside wiring rules under Section 76.802

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75 *See* AT&T Public Interest Statement at 3.

76 *See, e.g.* Cecilia Kang, *AT&T, DirecTV Announce $49 Billion Merger*, *Washington Post*, May 18, 2014, http://www.washingtonpost.com/business/technology/atandt-directv-announce-48-billion-merger/2014/05/18/62ffc980-dec1-11e3-810f-764fe508b82d_story.html ("AT&T is expected to shift its U-Verse subscribers to satellite, freeing up space on its land-line network for improvements in high-speed Internet. 'The logic that AT&T could boost broadband speeds in U-Verse markets if it could take video off its network and send it via satellite is fine as far as it goes,' Craig Moffett, a senior analyst at Moffett Nathanson research, wrote in a recent note. 'But that is purely a defensive benefit. . . .'")

do not apply to any video services offered by the combined entity,[77] since DirecTV is a DBS provider and AT&T disclaims classification as a "cable operator." Thus, even if Cox eventually succeeded in winning back an MDU unit previously lost to AT&T/DirecTV, AT&T may take the position that it is under no obligation to cede back the inside wiring used to serve that unit. Such a circumstance would provide the combined entity with an artificial regulatory advantage in MDUs (*i.e.*, allowing the entity to enjoy the benefits of the FCC's inside wiring rules while being free of the burdens of those rules). It would also permit the combined entity to unjustifiably raise broadband rivals' costs in MDUs, with no offsetting benefits for MDU residents.

In order to prevent the adverse effects delineated above from occurring, the Commission should adopt conditions on the proposed transaction that ensure fair broadband service competition in MDUs. AT&T is one of the largest communications companies in the world, with an enterprise value in excess of $250 billion and has significant resources to invest in broadband infrastructure in MDUs.[78] Indeed, it is Cox's understanding that in most MDUs where U-Verse is offered, AT&T deploys its own internal MDU wiring to individual units. Because AT&T's size and access to resources will only become bigger as a result of this transaction, the Commission should require AT&T/DirecTV to invest in broadband infrastructure in MDUs in order to promote the deployment of advanced broadband capabilities and foster two-wire competition at MDUs.

2. <u>Proposed Conditions</u>

To counteract these harms and ensure fair competition in MDUs, the FCC should adopt the following conditions. In buildings where the combined entity intends to offer either U-Verse

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[77] *See* 47 C.F.R. § 76.802.

[78] *See* IAEResearch, *Is AT&T Undervalued?*, SEEKING ALPHA (May 15, 2014), *available at* http://seekingalpha.com/article/2219353-is-at-and-t-undervalued.

or DirecTV video and Internet service, the Commission should require AT&T/DirecTV to employ its own internal wiring infrastructure to any unit it serves. In buildings where AT&T/DirecTV has not installed wiring used to provide DBS video service, as long as an MDU resident seeks to take some service from the provider that did install the wiring, AT&T/DirecTV should be required to run its own wire to the customer's premises. Alternatively, and at a minimum, AT&T/DirecTV should be obligated to avoid taking any steps with regard to its use of internal MDU wiring deployed by another provider – both to, and within, any unit it serves – that may cause interference with broadband Internet access services furnished to units within that MDU by the provider that originally installed the wiring.

In buildings where AT&T/DirecTV uses MDU internal wiring installed by another service provider to furnish multichannel video programming service to any individual unit, it should be required, upon termination of its provision of such service to that unit, to surrender its use of that wiring to any MVPD that is subsequently authorized to provide video service to that unit. This reciprocal use obligation would effectively subject the combined entity to the basic tenets of the Commission's inside wiring rules. To encourage two-wire broadband competition in MDUs, this obligation need not be applied in any building in which AT&T/DirecTV relies solely on wiring that it has deployed itself to provide services to individual units.

Any disputes arising between AT&T/DirecTV and any service provider covered by these conditions should initially be presented to the Commission or its designee for mediation. If the parties are unable to resolve the dispute via mediation, either party should be permitted to seek review of the dispute by the Media Bureau, subject to procedures established by the Commission.

V. CONCLUSION

For the reasons stated above, Cox urges the Commission to adopt the conditions described herein before granting the proposed merger of AT&T and DirecTV.

Respectfully submitted,

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