Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the *Public Notice*[2] seeking comment on the applications of AT&T Inc. ("AT&T") and DIRECTV (collectively, the "Applicants") for consent to assign or transfer control of licenses and authorizations (the "Applications").[3] The Applications propose to

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

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

[3] Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations (filed June 11, 2014).

combine the assets and Federal Communications Commission ("FCC") licenses of the second and fifth largest multichannel video programming distributors ("MVPDs") in the United States, forming a new MVPD larger than any other provider now in existence. The merged company would have a nationwide footprint serving approximately 25.7 million video subscribers,[4] or approximately 25.6% of all MVPD households.[5] Following the merger, the new entity would have the potential to reach 30 million U.S. households with a terrestrial video service[6] – nearly a third of all MVPD households in the country – and face no limit on how many households it could potentially reach with Direct Broadcast Satellite ("DBS") service. Today, AT&T serves 11 million broadband subscribers,[7] but following the merger, the new entity's "high-speed fixed broadband networks will cover 70 million customer locations."[8] If approved, the proposed transaction also will significantly enhance the merged entity's share of several local and regional markets.

The Applicants contend that the transaction "combines parties whose most important products are complementary to one another."[9] However, this obfuscates AT&T's role as a video provider in approximately half of all U.S. television markets.[10] The merger will eliminate head-to-head competition and consumer choice between

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[4] *See Public Notice* at 1-2 (describing DIRECTV's 20 million subscribers and AT&T's 5.7 subscribers).

[5] Chris Young, *AT&T's Bid for DIRECTV Could Pave Way for Even More Industry Consolidation*, SNL Kagan (May 21, 2014) at 3.

[6] *See* Mark Rogowsky, *Hey AT&T, Try Building Something Instead Of Buying It*, Forbes (May 14, 2014), available at: http://www.forbes.com/sites/markrogowsky/2014/05/20/att-americas-troglodyte-telecom-again-seeks-salvation-via-merger/.

[7] Applications, Exhibit A, Public Interest Statement ("Public Interest Statement") at 3.

[8] Public Interest Statement at 39.

[9] Public Interest Statement at 54, citing Katz Decl. ¶¶ 3-5, 71.

[10] *See 2014 SNL Kagan Media Census Estimates,* First Quarter 2014.

DIRECTV and AT&T in these markets. It also will eliminate potential competition in other markets where U-verse might potentially have been offered in the future absent the merger. These are serious consequences that deserve careful scrutiny.

NAB urges the Commission to fully investigate the impact of the proposed transaction on MVPD concentration and competition in the video marketplace. Such an analysis is critical to making a public interest determination regarding consumers' access to a diverse array of programming. While NAB takes no current position on whether the proposed merger should ultimately be approved, the Commission must evaluate the potential impact on local viewers and its longstanding localism goals. Specifically, the Commission should consider conditions to promote localism, such as a requirement that DIRECTV offer consumers local broadcast stations in all 210 markets in which it operates.

I. The Proposed Merger Amplifies the Need for the Commission to Update Its Broadcast Ownership Rules

NAB has demonstrated the need to update the broadcast ownership rules in many pleadings.[11] A key reason for that need is the ever-changing media landscape—especially the growing concentration in pay TV markets. In particular, the regulatory imbalance that exists between the burdensome ownership rules applicable to local broadcast television stations and the nearly non-existent rules for multi-channel operators puts local broadcasters at a distinct disadvantage. That imbalance will be

[11] *See, e.g., See* NAB Reply Comments in MB Docket No. 14-50 (Sept. 8, 2014); NAB Comments in MB Docket No. 14-50 (Aug. 6, 2014); Comments of NAB in MB Docket No. 14-16 at 14-20 (Mar. 21, 2014); NAB Reply Comments in MB Docket No. 09-182 (April 17, 2012); NAB Comments in MB Docket No. 09-182 (Mar. 5, 2012).

skewed even further if the Commission moves forward on this proposed merger without revising the broadcast ownership rules.

The vast majority of broadcasters already are negotiating retransmission consent agreements with companies that are much larger in scale and scope, both in terms of their control of MVPD subscribers in local markets and at the national level in terms of both subscribership and revenue. Broadcasters also are competing head-to-head with MVPDs for viewers, advertising and programming. Grant of the Applications would only increase MVPDs' competitive position and bargaining strength vis-à-vis broadcasters. Allowing unfettered consolidation among MVPDs while broadcasters continue to operate under decades-old rules would be arbitrary and capricious.

The MVPD segment of the delivered video programming market is highly horizontally concentrated at the national, regional and local levels, and this concentration has been increasing over time.[12] For example, in 2002, the ten largest MVPDs controlled 67.4 percent of the MVPD market nationally (measured in terms of subscribers).[13] Today, the ten largest MVPDs control 91.7 percent of the nationwide MVPD market.[14] Indeed, the four largest MVPDs alone currently serve 67.7 percent of MVPD subscribers nationally, a dramatic increase from their collective 51.5 percent share of the market in 2002.[15] These figures will be even higher following the proposed

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[12] *See, e.g.,* Comments of NAB in MB Docket No. 14-16 at 14-20 (Mar. 21, 2014).

[13] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 6 (May 27, 2011) ("*Eisenach 2011 Declaration*") (citing SNL Kagan data), attached to NAB Comments in MB Docket No. 10-71 as Attachment A.

[14] *See 2013 SNL Kagan Media Census Estimates,* Third Quarter 2013.

[15] *2013 SNL Kagan Media Census Estimates,* Third Quarter 2013; *Eisenach 2011 Declaration* at 6.

transaction. In fact, if both the instant Applications and other pending transactions[16] are approved, the top two MVPDs will serve **55 percent** of all MVPD households,[17] and the top four MVPDs will serve **77.3 percent** of all MVPD households.[18]

Similarly, at the regional and local levels, markets are increasingly characterized by significant concentration, which reduces the number of MVPDs in each local market, and increases MVPDs' ability to compete with local television stations for local advertising revenues and their relative bargaining power against local television stations in retransmission consent negotiations.[19] Local markets are frequently dominated by a single MVPD—who can make or break a broadcasters' access to MVPD subscribers in that market.[20] In all, NAB counts 57 DMAs in which a single MVPD enjoys a share of 50 percent or more of the MVPD market as a whole, taking cable, DBS and other MVPD subscribers into account.[21] Courts have recently recognized the significance of these

[16] *Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo to Assign and Transfer Control of FCC Licenses and Other Authorizations,* Public Notice, DA 14-986 (rel. Jul. 10, 2014).

[17] Chris Young, *AT&T's Bid for DIRECTV Could Pave Way for Even More Industry Consolidation*, SNL Kagan (May 21, 2014).

[18] *Id.* at Table – "Top 10 U.S. Multichannel Video (Redrawn)."

[19] This is due in part to a history of cable system "clustering," but also will result from the instant proposed transaction. The Commission has described clustering as "an increase over time in the number of cable subscribers and homes passed by a single MSO in particular markets (accomplished via internal growth as well as by acquisitions)." *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, 3472 n.75 (2012). The number of clustered cable systems (cable systems under the same ownership serving the same local market area or region) serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers. *See Eisenach 2011 Declaration* at 8 (citing SNL Kagan, Broadband Cable Financial Databook (2009)). Unfortunately, SNL Kagan is no longer tracking regional clusters.

[20] For example, Time Warner Cable, Inc. ("TWC") enjoys a 60 percent or greater share of the entire MVPD market in nine DMAs, including Honolulu, HI (90.2 percent) and Rochester, NY (76.2 percent). *See 2013 SNL Kagan MediaCensus, Estimates—3rd Quarter 2013.*

[21] *See 2013 SNL Kagan MediaCensus, Estimates—3rd Quarter 2013.*

continuing high concentration levels.[22] Thus, although there has been some increase in the *types* of MVPDs serving each market, the number of MVPDs serving each local market has generally declined. Consequently, the video programming distribution market (both nationally and locally) continues to be dominated by a few large MVPDs.

The proposed transaction will increase the number of markets in which a single MVPD has gatekeeper control over access to large numbers of subscribers and reduce incentives to expand into additional markets, providing the merged entity with significant bargaining power in retransmission consent negotiations and other programming decisions. AT&T already serves 5.7 million subscribers in dozens of television markets,[23] including seven of the top ten television markets.[24] DIRECTV operates in every market nationwide. In some markets where each entity has a significant presence, the merged entity will serve 40 percent or more of the market's MVPD subscribers.[25] The merged entity will serve 25.7 million video subscribers in every market in the country. The scale and scope of the merged entity will allow it to realize efficiencies that broadcasters cannot achieve, affording it distinct competitive advantages over broadcast rivals.

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[22] *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 161-163 (D.C. Cir. 2013). The court found that "cable operators continue to hold more than 55% of the national MVPD market and to *enjoy still higher shares in a number of local MVPD markets*." *Id.* at 161 (emphasis added). The court could not "overlook record evidence that cable operators maintain a more than 60% market share in certain MVPD markets." *Id.* at 163.

[23] *See 2014 SNL Kagan Media Census Estimates,* First Quarter 2014.

[24] Public Interest Statement at 19, Notes 11-12 (listing several U-verse markets).

[25] *See 2014 SNL Kagan Media Census Estimates,* First Quarter 2014. This includes West Palm Beach-Ft. Pierce, FL; St. Louis, MO; Dallas-Ft. Worth, TX; Jackson, MS; Miami-Ft. Lauderdale, FL; Memphis, TN; Columbus-Tupelo-West Point-Houston, MS; and Houston, TX.

As NAB and other broadcasters have explained in other proceedings,[26] the FCC's rules should allow broadcasters greater flexibility in establishing ownership structures that permit them to achieve economies of scale and scope so that they can compete efficiently against the ever-consolidating pay television industry.[27] The Commission must complete its pending and long-delayed broadcast ownership proceeding to address this regulatory imbalance.

II. To Mitigate Potential Public Interest Harms, The Commission Should Adopt Conditions that Will Promote Localism

Despite its expansive national reach, DIRECTV still does not offer its subscribers local television broadcast stations as part of its packages in 13 of the 210 DMAs in which it operates.[28] The Applicants have announced a commitment to "expand and enhance high-speed broadband service to 15 million customer locations, mostly in underserved rural areas where AT&T does not today provide high-speed broadband service."[29] While fulfillment of this commitment will expand consumer access to information and entertainment available via the Internet, access to local television broadcast stations on the merged entity's DBS platform in these markets would

[26] *See* NAB Comments in MB Docket No. 14-50 (Aug. 6, 2014); NAB Reply Comments in MB Docket No. 09-182 (April 17, 2012); NAB Comments in MB Docket No. 09-182 (Mar. 5, 2012).

[27] *See* Jeffrey A. Eisenach & Kevin W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting 1 (2011), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) in NAB Reply Comments to Notice of Proposed Rulemaking in MB Docket No. 10-71, at Appendix A (filed June 27, 2011) (incorporated herein by reference). Scale economies arise because broadcast operations require large capital investment in equipment, production facilities, FCC licenses, and "first copy" intellectual property costs. *Id*. Economies of scope arise from the potential to use assets to create multiple products (e.g., a single transmitter can broadcast multiple digital programming streams). *Id*. Such economies "are associated with falling unit costs of production—that is, with the production of more output at lower average cost—and hence are *prima facie* welfare enhancing." *Id.* at 1.

[28] *See,* DIRECTV, *HD Locals*, available at: http://www.directv.com/DTVAPP/content/hd/hd_locals ("DIRECTV currently offers local broadcast channels in 197 markets").

[29] Public Interest Statement at 50.

contribute even more significantly to consumers' access to critical news, information and entertainment. Making available specific local news, weather, emergency information, and other programming tailored to community needs and interests via local television broadcast stations would clearly promote the FCC's longstanding localism goals and help counterbalance the potential harms to competition and diversity that will result from the elimination of one MVPD in dozens of markets. Thus, a commitment to expanding local-into-local service to all 210 markets, within the same timeframe as the broadband commitment, would be an ideal complement to the expanded broadband service offering for consumers.

III. Conclusion

The Applicants are required to demonstrate that the public interest benefits of the proposed transaction outweigh potential harms resulting from the transaction.[30] To make this public interest determination, the Commission should fully investigate the impact of the merged entity's size and its effect on competitors' ability to offer services that contribute to the Commission's goals of competition, diversity and localism. The public interest analysis must take into account the continuing disparate regulation of broadcast competitors that provide to viewers the type of local service the Commission has long endeavored to promote. Broadcasters must be allowed to enter into combinations that allow them the scale and scope that will make them viable

[30] *See, e.g., Applications of Comcast Corp., General Elec. & NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 ¶ 2 (2011).

competitors to MVPDs generally, especially in light of continuing mergers among MVPDs.

Respectfully submitted,

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