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Subcommittee on Antitrust, Competition Policy and Consumer Rights

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"The AT&T/DirecTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond"

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Introduction

Chairman Klobuchar, Ranking Member Lee and members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Christopher Keyser; I am President of the Writers Guild of America, West, Inc. (WGAW) and a working television writer for the past 25 years.

WGAW is a labor organization that represents more than 8,000 professional writers of film, television and online video programming. Our members write feature films, dramas and comedies for broadcast, cable and pay TV networks, local news, documentary programs and the original series that are now available online through services such as Netflix, Amazon, Hulu and Crackle. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA").

The subject of today's hearing, the proposed merger of AT&T and DirecTV and the broader trend towards media consolidation currently underway, threatens the progress of our most vital communication platforms and will stifle the creativity, independence and innovation enabled by online video. The WGAW is opposed to this merger and the Comcast – Time Warner Cable merger, which are taking place against the backdrop of an already consolidated media environment where a handful of companies decide what content consumers can watch. The writers whom I represent have experienced two decades of consolidation, which has reduced a once vibrant market of independent producers to one in which seven companies control almost all of television.

The mergers between incumbent video and Internet service providers (ISPs) are happening at a time when new video competition is emerging online, giving consumers added choice and reintroducing independent programming to the landscape. At the same time, however, multichannel video programming distributors (MVPDs), which are also the largest ISPs, have an incentive to limit the growth of online video alternatives, because such services may pose a threat to existing television offerings. If this merger is approved by regulators, along with the Comcast – Time Warner Cable merger, two companies will control more than half of the nation's MVPD subscribers and half of the wired Internet access market.[1] The resulting companies would have unprecedented power as content gatekeepers. This consolidation of distributors will likely spur additional consolidation among content providers. In fact, the financial press reports that Univision, AMC Networks and Scripps Networks Interactive are potential acquisition targets.[2]

The merger between AT&T and DirecTV would combine the second and fifth largest MVPD. The result would be a company with 26 million MVPD customers and 11 million U-verse Internet subscribers, as well as 5.5 million non-U-verse Internet subscribers.[3] It would be second in size only to a merged Comcast – Time Warner Cable. A combined AT&T - DirecTV would have significant buyer power to reduce affiliate fees paid to content providers – like broadcast and cable networks - which is a stated goal of the merger.[4] Because DirecTV offers service nationally, the merger will reduce competition for MVPD service in areas where AT&T's

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[1] Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, http://www.leichtmanresearch.com/press/031714release.html, Subscriber information from company filings and SNL Kagan.
[2] Amol Sharma and Keach Hagey, "Entertainment Companies Scout for Mergers," *Wall Street Journal,* June 15, 2014, http://online.wsj.com/articles/entertainment-companies-scout-for-mergers-1402876065
[3] Includes DSL and non-U-verse Internet subscribers. Subscriber information from company filings.
[4] *Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses or Authorizations*, MB Docket No. 14-90, June 11. 2014. Hereinafter referred to as "Application".

U-verse television service is currently offered, which is approximately 25% of the country. Further, the merged entity's control over traditional and new content distribution platforms will give it both the incentive and the ability to stifle online video competition and limit consumer choice. The Satellite Home Viewer Act and the Telecommunications Act of 1996 embody a legislative intent to enhance competition, but this merger will have the opposite effect. While this combination may serve the corporate interests of AT&T and DirecTV, it does not serve the public interest and should not be approved.

The Current State of Video Competition

The proposed mergers of AT&T – DirecTV and Comcast – Time Warner Cable are unprecedented in their size and scope. On its own, each merger presents significant harm to content providers and consumers, and the effects are magnified because the market for delivery of video programming is already consolidated and lacks sufficient competition at all levels. Broadcast, cable and pay TV networks are owned by a handful of companies. A Government Accountability Office (GAO) report noted that seven companies control 95% of viewing hours on television.[5] Four companies control two-thirds of the MVPD market.[6] Cable prices continue to rise because of the lack of competition; the average monthly price of expanded basic cable increased by 4.8% to $61.63 in 2012, compared to a 2.9% increase in the Consumer Price Index (CPI).[7] Cable and telephone MVPDs provide wired Internet access, which puts them in control of the only platform that could add competition to the media marketplace. But the ISP market is

[5] United States Government Accountability Office, "Video Marketplace: Competition is Evolving, and Government Reporting Should be Reevaluated," GAO-13-576, June 25, 2013, p 6.
[6] SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," 12/13Q, http://www.snl.com.
[7] Federal Communications Commission, "Report on Cable Industry Prices," June 7, 2013, p. 3, Available from FCC website, MM Docket No. 92-266, http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0607/DA-13-1319A1.pdf.

also concentrated, with four companies controlling 68% of the Internet access market.[8] In addition, almost one in three Americans has only a single option for Internet service fast enough to stream videos.[9] Currently, wireless Internet plans feature low data caps that preclude wireless from being a viable Internet service substitute.

In this consolidated market, independent programming has been all but eliminated. According to WGAW analysis of the broadcast network schedules, only 10% of the 2013 fall primetime lineup was independently produced. This is down from 76% independently produced in 1989, when the Financial Interest and Syndication Rules (Fin-Syn) prohibited broadcast networks from owning the content they aired. In addition, most of the independent programs airing on broadcast television are reality series such as *Dancing with the Stars* and *American Idol*. These programs are typically viewed once and do not generate significant revenue from reruns, syndication and DVD sales in the way scripted programs do. As a result, the broadcast networks are less interested in owning this programming. The proliferation of cable channels has not increased competition; the five companies which own broadcast networks also own most of the major basic cable networks. When the WGAW examined the original comedies and dramas offered by basic cable networks, we found a similarly low and declining amount of independently produced series. Over the past five seasons, independently produced series have declined from 41% of basic cable dramas and comedies to only 22%.

The decline in independent programming has reduced the number of potential employers for writers. In 1989, 89% of TV writing jobs and 88% of TV writing compensation came from

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[8] Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, http://www.leichtmanresearch.com/press/031714release.html.
[9] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012,* December 2013, p 9.

outside the conglomerates. By 2013, those figures have declined to 25% and 14%, respectively.[10] The pivotal moment was the repeal of the Fin-Syn Rules in the 1990s. Despite the expansion of television outlets, both jobs and compensation have shifted from independent studios and production companies to vertically integrated media conglomerates.

The consolidation has caused considerable harm to the creative community. The market power possessed by these media conglomerates allows them to capture a majority of the economic value created by television production, to the detriment of actual content creators. Studios, now guaranteed distribution by virtue of having vertically integrated with networks, no longer compete for talent as a means of differentiation. The inordinate power held by these media conglomerates allows them to make increasing demands on the talent community. The result is that writers must do more work for less pay. For example, writers are now required to invest their time and bear the risk of developing new creative works, a function once compensated in a more competitive era.

Internet Distribution Enables New Video Competition

Online video offerings, which have become increasingly robust, have the potential to reverse the detrimental effects of media consolidation by increasing competition, reintroducing independent programming and expanding consumer choice. 2013 saw the debut of original television-length programming from outside the television ecosystem as Netflix and Amazon began offering original drama and comedy series directly to consumers. The Netflix original series *House of Cards* won three Emmy awards in 2013, the first online video series to win a

[10] These figures include all broadcast, cable and pay TV programming written by WGAW members, not just prime time.

television award.[11] Xbox and Playstation are set to become the next online providers to offer original programming.[12] That much of the original content produced for these new outlets comes from independent producers unaffiliated with a television network, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television, further enhances competition.

Internet distribution has not only brought about new programming choices, it has also addressed consumer concerns about pricing and flexibility. For instance, a Netflix or Hulu Plus subscription is available for only $7.99 a month and both offer thousands of on-demand video choices. While these services are not substitutes for an MVPD, because they must rely on a third-party ISP to reach consumers, they do provide additional competition to traditional television networks. Further, the ability to watch news online through a service such as Bloomberg Television and subscribe to online sports packages from Major League Baseball and The Tennis Channel begin to create the possibility for consumers to build their own, more flexible content bundles. Such a development reclaims some control for consumers who would otherwise have no alternative but to pay the ever-increasing cost of a bundled cable and Internet package.

Incumbent Response: Merger Mania

In February of this year Comcast – Time Warner Cable announced their planned union. In written testimony to the Senate Judiciary Committee, Comcast Executive Vice President David Cohen listed a host of companies, including AT&T and DirecTV, as rationale for the

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[11] T.C. Sottek, "Netflix challenges the TV establishment with Emmy wins for 'House of Cards', *The Verge,* September 22, 2013, http://www.theverge.com/2013/9/22/4759754/netflix-challenges-the-tv-establishment-with-emmy-wins-for-house-of.

[12] Nellie Andreeva, "XBox Develops Pro Skater Comedy Series," *Deadline Hollywood,* December 6, 2013, http://www.deadline.com/2013/12/xbox-develops-pro-skaters-comedy-series/, and Marc Graser, "Microsoft to Launch First Original Shows on Xbox in Early 2014," *Variety,* December 13, 2013 http://variety.com/2013/digital/news/microsoft-to-launch-first-original-shows-on-xbox-in-early-2014-1200953110/#, and Nellie Andreeva, "Xbox Developing 1990s Music Series Based on Rapper Nas' Life," *Deadline Hollywood,* February 11, 2014, http://www.deadline.com/2014/02/xbox-developing-1990s-comedy-series-based-on-rapper-nas-life/, and Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014, http://www.theverge.com/2014/3/19/5527878/sonys-first-original-tv-series-for-the-playstation-will-be-powers.

merger.[13] In May, AT&T and DirecTV announced their plans to merge. In their public interest statement filed with the FCC, AT&T and DirecTV claim the merger is necessary to compete with a merged Comcast - TWC.[14]

AT&T - DirecTV

The merger of AT&T and DirecTV would create the nation's second largest MVPD and ISP. With 26 million MVPD subscribers, the merged entity would control one-quarter of the market, giving it significant power over television networks. With control over such a sizeable share of the market, AT&T – DirecTV would be able to force television networks to agree to rates below market value. In fact, the companies have stated that lowering video costs is one of the key factors motivating the merger. By becoming the second largest MVPD, AT&T – DirecTV would have the power to cut content costs. The companies say they expect to reduce per subscriber content costs by 20%.[15]

The distributors' professed goal of cutting costs is a significant concern because affiliate fees paid by DirecTV, AT&T and other MVPDs to television networks have led to the rise of original dramatic programming across basic cable. This has led to new creative opportunities for WGA members and new content choices for consumers. At least two dozen cable networks are now developing and airing original comedies and dramas. Due in part to the investment in original programming, basic cable now accounts for 70% of adult primetime viewers.[16] AT&T – DirecTV's plans to significantly cut these costs will reduce the amount of revenue available to

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[13] *Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers, Before the U.S. Senate Committee on the Judiciary*, 113th Cong. 1 (April 9, 2014) (Joint statement of David L. Cohen, Executive Vice President, Comcast Corporation and Arthur T. Minson, Jr., Executive Vice President & Chief Financial Officer, Time Warner Cable).
[14] Application pp. 4, 23, 24.
[15] Application p. 36.
[16] Michael O'Connell, "Cable 2013 Ratings: Banner Year for AMC and A&E as History Drops," *The Hollywood Reporter,* December 12, 2013, http://www.hollywoodreporter.com/live-feed/cable-2013-ratings-banner-year-665133.

invest in programming, harming content creators and reducing choice for consumers. The enhanced buyer power can also harm competing MVPDs because programmers may attempt to raise prices for rival MVPDs to make up for revenue lost from AT&T – DirecTV.

The merging of DirecTV's MVPD service with AT&T's MVPD, wireline Internet and wireless services also would significantly increase the new company's incentive to stifle the development of competing online video services. With 26 million MVPD subscribers, the merged entity's strategic business priority will be to maintain existing subscriber levels. In addition, the recent formation of a $500 million venture with the Chernin Group, "to acquire, invest in and launch over-the-top (OTT) video services" will incentivize the company to prefer services it owns over unaffiliated offerings.[17] AT&T's share of the wired Internet market and its position as the largest wireless provider will enable it to steer the development of the online video market. It can do so by exerting bottleneck power to raise edge providers' cost of access to AT&T Internet subscribers and by instituting practices that favor affiliated content over outside competitors. For example, AT&T has already come out in favor of paid prioritization in the current debate over new Open Internet rules.[18]

AT&T also has a history of questionable practices regarding customer access to applications of their choice. In 2012, the company said it would block FaceTime for iPhone users unless they subscribed to a more expensive text-and-voice plan.[19] It backed away from the

[17] "The Chernin Group and AT&T Create New Venture to Acquire, Invest In and Launch Online Video Business," AT&T press release, April 22, 2014, AT&T website, http://about.att.com/story/the_chernin_group_and_att_create_new_venture_to_acquire_invest_in_and_launch_online_video_businesses.html, accessed June 18, 2014.

[18] Comments of AT&T Services, Inc., "In the Matter of Protecting and Promoting the Open Internet," GN Docket 14-28, p15.

[19] Ina Fried, "AT&T: We're Not Violating Net Neutrality by Limiting FaceTime over Cellular," *All Things Digital,* August 22, 2012, http://allthingsd.com/20120822/att-were-not-violating-net-neutrality-by-limiting-facetime-over-cellular/.

practice only after public outcry.[20] In 2013, AT&T also blocked mobile access to Google Hangouts unless the user had a shared data plan.[21] While these examples of discriminatory behavior occurred on wireless networks, where the FCC failed to apply all of the 2010 Open Internet rules, these examples demonstrate the kind of behavior AT&T would like to engage in.

AT&T is also the largest wireless service provider, with 35% of the mobile market. The company holds 39% of low-frequency spectrum and has said it plans to invest $9 billion to expand its spectrum holdings in the upcoming incentive auctions. To date, wireless has not been a viable platform for video, but as technology advances and additional spectrum is put into use, the wireless video market will develop. However, with AT&T as the dominant provider in a duopoly market that is not required to abide by all Open Internet rules, AT&T can act as a powerful content gatekeeper.

The conditions offered by AT&T – DirecTV provide little protection against the harms of this merger. The companies offer to provide standalone Internet service at a reasonable price for only three years. Moreover, the service offered--at least 6 Mbps downstream--is at the lower end of broadband speeds. The offer to expand Internet service to 15 million customer locations also deserves a fair amount of skepticism. An initial concern is that only 2 million locations will receive a fiber connection. The remaining 13 million will be connected through Wireless Local Loop (WLL).[22] AT&T has failed to follow through on Internet deployment commitments in the past. As a condition of the BellSouth merger, AT&T promised to offer broadband Internet to every customer in its territory by the end of 2007. This promise was not fulfilled, and even five

[20]Brendan Sasso, "AT&T backs down from FaceTime restrictions following net-neutrality complains," *The Hill*, November 8, 2012, http://thehill.com/policy/technology/266937-atat-backs-down-from-facetime-restriction-following-net-neutrality-complaints.
[21] William Neilson Jr, "AT&T reiterates they are for Net Neutrality, except for when they're not," *Android Authority,* June 9, 2014, http://www.androidauthority.com/att-reiterates-net-neutrality-except-theyre-390682/.
[22] Application p. 5.

years after the deadline some customers were still waiting for the service.[23] Finally, the offer to temporarily abide by the FCC's 2010 Open Internet Rules similarly provides little protection. Under these rules, ISPs such as Comcast have been able to institute discriminatory data caps and use bottleneck power to extract arbitrary interconnection tolls from Netflix. The rules simply do not go far enough to protect online video competition and do not extend to wireless services, a market AT&T dominates. Not only are the public benefits in this transaction minimal, but AT&T's recent history suggests that it may not follow through with public interest obligations once the merger is approved.

Conclusion

In conclusion, it is clear that we have reached a crossroads. The amount of consolidation that has taken place and is still underway is breathtaking. If both the Comcast – Time Warner Cable and AT&T – DirecTV mergers are approved, the two companies will control half of the MVPD and ISP markets. What's left of those markets is sure to be gobbled up in similar fashion. Where does that leave consumers, entrepreneurs and the creative community? This level of concentration among a few giant distributors makes inevitable tacit collusion on price, choice and service. These mergers cannot be managed with conditions that may be ineffective, insufficient or simply ignored. They are not in the public interest, they threaten to stifle competition and innovation, and they should not be approved.

[23] Gerry Smith, "Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise," *Huffington Post*, November 18, 2012, http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-lnternet_n_1914508.html.