Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are filed in response to the Commission's request for comments concerning the agency's review of the transfer of control of licenses in connection with the proposed acquisition of DIRECTV by AT&T Inc. These comments do not endorse or oppose the proposed merger. Rather, their purpose is to set out baseline principles by which the Commission should evaluate this as well as other mergers and to provide a summary analysis of AT&T/DIRECTV in light of those principles.

Mergers and acquisitions are competitive entrepreneurial activities. In free market economies, mergers are acts of calculated risk-taking by entities seeking to generate efficiencies and improve their competitive standing. Bureaucratic decisionmaking risks unnecessary displacement of marketplace business judgments by competitors possessing critical knowledge about market opportunities and consumer preferences. Commission-imposed regulatory

[*] These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

conditions that freeze specific pricing options, programming content or lineup decisions, offerings of various features and functions, or other business judgments into place limit marketplace freedom to innovate in new products and services.

In light of those considerations, the Commission's substitution of its judgment for that of market actors can be justified only if there are specifically identified harms demonstrated by compelling evidence. The Commission must target narrowly any remedies designed to address such harms. Demanding clear evidence of harm safeguards against market competitors seeking to opportunistically manipulate or unduly influence the merger review process.

The presence of competitive choices in the broadband marketplace, including cross-platform facilities-based alternatives, makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

The dynamism that characterizes the advanced telecommunications and information services marketplace – that is, the market for digital, IP-enabled, cross-platform services such as wireline and wireless broadband Internet access services as well as multichannel video program distributor (MVPD) services – must inform the Commission's analysis of AT&T/DIRECTV's likely competitive effects.

The market's dynamism can be seen easily by contrasting the video consumer experience of two decades ago with today's experience. The typical video consumer experience in the early 1990s included a lone cable operator supplying limited lineup of one-way analog cable channels. The video consumer experience today is characterized by ongoing transition to digital, rapid expansion of high-definition video – with ultra-HD on the horizon, digital video recorder (DVR) options, video-on-demand functions, as well as TV-Everywhere and other mobility capabilities.

Following competitive entry in the video services market by DBS providers and so-called "telco" MVPDs, consumers now have choices among MVPDs. Data cited in the *Fifteenth Video Competition Report* (2013) indicates that at year's end 2011, 98.6% of subscribers had access to at least three MVPDs and 35.3% of subscribers had access to at least four MVPDs.

Broadband Internet access services are another case in point. The small number of consumers with Internet access in 1994 relied principally on 14 kbps or 28 kbps dial-up modems. But according to NTIA's report *U.S. Broadband Availability: June 2010- June 2012* (May, 2013), by 2012, almost 93% of Americans had access to advertised wireline broadband download speeds of at least 6 Mbps, 91% had access at 10 Mbps, and 78% had access at 25 Mbps. The broadband revolution has enabled breakthroughs in Internet delivery of video content by online video distributors (OVDs) and other distribution outlets. Subscription services include HuluPlus, Amazon Prime, and Netflix. *A la carte* video content options are available through iTunes, Amazon.com, Google's Play store, and more. Widely available "smart TVs" and a growing number of devices are capable of downloading video content directly from the Internet.

Further, wireless services have seen radical technological innovation and rapid consumer adoption since the early 1990s. Wireless voice subscribers numbered just 13 million in June 1993 but exceeded 322 million in June 2011. And by the end of 2008 subscriptions to wireless broadband services – that had emerged only a handful of years earlier – reached 26 million. According to the *Sixteenth Wireless Competition Report* (2013), as of October 2012, approximately 99.5% of the U.S. population lived in areas with coverage by at least one mobile broadband provider. As of October 2012, 97.8% of the population was served by 2 or more wireless broadband providers, 91.6% by 3 or more, and 82% by 4 or more wireless broadband providers. Significantly, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitive alternative – indeed, in many instances a potential substitute for – wireline broadband. For most major wireless broadband providers, average LTE speeds range between 30 and 40 MBps, enabling a wide range of video viewing functionalities.

A forward-looking analysis that takes stock of these dynamic conditions in the advanced telecommunications market indicates that an AT&T/DIRECTV combination presents potential benefits to consumers. Importantly, the proposed merger likely will result in significant expansion of consumer choice for bundled broadband and MVPD-related services. Consumers located outside of U-Verse's geographic footprint would be able to purchase DIRECTV's video services bundled with broadband Internet access. That is, consumers would have another genuine bundled service alternative to bundled services offered by cable operators. Likely competitive effects of that additional choice include increased pressure on market rivals to keep prices lower and/or to enhance the value of existing offerings.

The cross-platform rivalry of digital, IP-enabled services that has emerged over the last two decades – due to DBS entry into the video market, cable operator entry into the voice services and broadband market, telephone company entry into the video and broadband markets, and wireless entry into the voice, video, and broadband markets – has made the bundling of services a critical competitive front in the market. "Double play" or "triple play" packages have attracted large numbers of consumers of voice, video, and data services. As the Commission recognized in the *CenturyLink/Qwest Order* (2011), "an increased ability to provide voice, data, and video packages is likely to make the merged company a stronger company overall, and a stronger competitor in the multichannel video service market." The AT&T/DIRECTV merger will likely enhance competition in this respect.

AT&T/DIRECTV will also potentially result in lower prices and increased value options for consumers of MVPD services or bundled MVPD and broadband Internet services on account of video programming cost savings produced by the combination. Video programming content is perhaps the most significant cost of doing business for MVPDs. The increased scale of the combined entity will likely be better positioned to negotiate rights to video programming content at discounted rates or for increased content choices.

In addition, AT&T/DIRECTV likely will accelerate investment and deployment in next-generation broadband services. Bundled services offer providers greater return on investment potential – through increased per-subscriber revenues – than stand-alone MVPD or broadband services. AT&T and DIRECTV indicate that the merger will make it feasible to expand fiber-to-the-premises wireline broadband investment and deployment to 2 million additional households and deployment wireless broadband infrastructure to 13 million additional households.

Finally, AT&T/DIRECTV will potentially benefit consumers through the combined entity's enhanced ability to innovate, including its pursuit of a seamless cross-platform consumer interface for viewing video content, accessing data, and using other functionalities. The combined entity will enable an integrated offering for current and future DBS subscribers and DBS-bundled subscribers that relies on AT&T's broadband infrastructure to provide two-way interactive functions, including on-demand video selections, and complementary Internet-delivered video options. AT&T/ DIRECTV will likewise have the potential to provide innovative new forms of video services through the integration of satellite and wireless technological capabilities and service offerings.

Importantly, AT&T/DIRECTV does not appear to pose any overt risk of harm to consumers. Careful economic analysis is necessary for confirmation. But at the outset it should be recognized this is primarily a *non*-horizontal merger of complementary services. That is, in AT&T's non-U-Verse territories, the merger involves the integration of AT&T's wireline and wireless networks with DIRECTV's multichannel video services. No consumer of wireline or wireless broadband Internet services would lose a choice of providers as a result of the proposed merger.

The proposed merger is a horizontal integration only with respect to MVPD services and only then in certain territories – where consumers currently have access to both U-Verse and DIRECTV video services. Such integrations only pose market power and anticompetitive conduct concerns where the market in question is or will become concentrated or offers consumers limited choices. The potential harm to consumer welfare resulting from horizontal integrations is also significantly diminished where the market is characterized by rapidly changing technologies, service offerings, and consumer habits. Potential harm is also offset to the extent of potential public benefits resulting from horizontal integrations.

As for market power, the *Fifteenth Video Competition Report*, at the end of 2011, listed DIRECTV and AT&T as the second and eighth largest MVPDs, respectively. The combined entity's post-merger share will remain below a 30% nationwide market share for MVPD subscribers. The D.C. Circuit has twice struck down, as arbitrary and capricious, Commission-imposed 30% nationwide MVPD subscribership caps.

Vertical integration aspects of AT&T/ DIRECTV are minor. Those aspects are extremely unlikely to harm consumer welfare. DIRECTV, for instance, only has ownership interests in three regional sports networks (RSNs) and the Game Show Network. Those networks are a miniscule fraction of the market for video programming content. FCC program access regulations exist to mitigate even the remotest concerns about foreclosure related to the proposed merger. In any event, the Commission precedents recognize that the economic efficiencies that result from vertical integration typically benefit consumers.

Finally, there is little reason to suspect that AT&T/DIRECTV would pose any realistic threat of creating a buyer-side market problem as a wholesale buyer of video programming. Monopsony is a rare scenario in which the distributer or retailer is the only outlet for wholesale goods. Here, the post-merger existence of other MVPDs providing direct competition includes cable MVPDs, another nationwide DBS provider (DISH), other telco MVPDs (Verizon, CenturyLink, Frontier), and nascent broadband service providers (Google Fiber). The existence of an increasing number of Internet-based alternatives for delivery of video programming by OVDs and other Internet outlets makes monopsony power concerns less likely still.

Whatever ultimate decision the Commission reaches in its review of the proposed AT&T/DIRECTV merger, its analysis should adhere to rigorous economic analysis. The proposed merger's potential effects on consumer welfare should remain the focus of the Commission's review.

II. <u>The Innovative and Competitive Conditions in the Advanced Telecommunications Marketplace Should Calibrate Commission's Merger Analysis</u>

A dynamic market analysis involves a forward-looking evaluation of the market's underlying competitive conditions and processes for delivering new generations of products and services. It emphasizes the critical role of those market conditions most conducive to continuing investment and innovation rather than static considerations such as market share estimates. The dynamism that characterizes the advanced telecommunications marketplace – that is, the market for digital, IP-enabled, cross-platform services such as wireline and wireless broadband Internet access services and as well as MVPD services – should inform the Commission's analysis of AT&T/DIRECTV's likely competitive effects.

Over the last two decades, entrepreneurial investment, technological innovation, and market competition has reshaped the landscape for voice, video, and data services in myriad ways. Although these comments can only touch briefly on some highlights of those forces of change, the highlights supply the critical analytical backdrop for reviewing the proposed merger.

First and foremost, the early 1990s bottleneck assumptions regarding cable services have passed into oblivion. The typical video consumer experience in the early 1990s included a lone cable operator supplying a limited lineup of one-way analog cable channels. But the video consumer viewing experience is drastically different today.

Heavy entrepreneurial investment, innovative breakthroughs in transmission and viewing technologies, new market entrants relying on rival service platforms, disruptive business models, and changing consumer habits have ushered in a myriad of new product and service options for consumers.

Today's video market is characterized by the replacement of analog systems with digital, rapid expansion of high-definition video – with ultra-HD on the horizon, multi-casting, digital video recorder (DVR) options, video-on-demand functions, as well as TV-Everywhere and other mobility capabilities. This includes across-the-board increases in deployment, functionality, and adoption of such advanced video technologies. For instance, according to data collected in the Commission's *Fifteenth Video Competition Report* (2013), as of 2012, more than 74% of households have sets capable of receiving digital signals, including HD signals.[1] Nearly 44% of

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[1] *Fifteenth Report*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 12-203, at 5, ¶ 7 (released July 22, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.

households have DVRs.[2] More than 5% of MVPD subscribers qualifying for TV-Everywhere access used it to view content in the month of September 2012.[3] By year's end 2012, more than half the geographic footprints of the top eight cable operators had transitioned to all-digital video.[4]

Meanwhile, innovative new platforms for consumer access to video services have emerged, including Internet delivery of video content by online video distributors (OVDs) and other distribution outlets. Subscription services are available through OVDs such as Hulu, Amazon Prime, and Netflix. *A la carte* video content options are readily available through Apple's iTunes, Amazon.com, Google's Play store, and more. Widely available "smart TVs" are capable of downloading video content directly from the Internet. And the video marketplace now offers consumers a wide range of devices to access video content, such as IP-connected MVPD-provided set-top boxes, multi-room DVR and home networking solutions, Wi-Fi connected tablet devices, gaming consoles, Internet-connected smart phones and table computers, and home monitoring systems that act as extensions of cable MVPD networks. Roku, Boxee, and Apple TV offer content delivery services through their respective new devices. Broadband-connected video game consoles such as Sony PlayStation 4 and Xbox One are also increasingly popular devices for viewing video programming.

Competitive entry in the video services market in the 1990s by two DBS providers offered consumers new competitive choices. DBS presaged additional competitive and technological advancements that have enhanced consumer welfare. According to data cited in the *Fifteenth Report*, by the end of 2013, cable providers held just 55.7% of MVPD subscribers.[5]

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[2] *Id.* at ¶ 7.
[3] *Id.* at ¶ 4.
[4] *Id.* at ¶ 5.
[5] *Id.* at ¶ 3.

DBS providers claimed about 33.6% of MVPD subscribers. And so-called “telco MVPD” entrants and DBS providers claimed about 8.4%.[6] At year’s end 2011, 98.6% of subscribers or 130.7 million households had access to at least three MVPDs.[7] And 35.3% of subscribers or 46.8 million households had access to at least four MVPDs.[8]

By the time DBS was entering the video services market, what we now know as broadband was a rarity. According to the Commission’s Omnibus Broadband Initiative (OBI), “[i]n 1994, few consumers had Internet access at home, and if they did have access it was likely via a 14 kbps or 28 kbps dial-up modem.”[9] Data cited by OBI indicates that in 2003 broadband was deployed to only 15%-20% of Americans. According to data cited in a report by NTIA,[10] as of two years ago the nation's broadband deployment picture looked as follows:

> ***Basic Availability:*** 98% of Americans had access to wired or wireless broadband at combined advertised download speeds of 3 Mbps or greater and upload speeds of 768 kbps or greater.
>
> ***Wireline:*** Just over 93% of Americans had access to advertised wireline broadband at speeds of at least 3/768, and almost 93% of Americans have access to at least 6 Mbps. 91% had access at 10 Mbps and 78% had access at 25 Mbps.
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> ***Wireless:*** Approximately 81% of Americans could access mobile wireless download speeds of 6 Mbps or greater. Nearly 26% of the population could access fixed wireless download speeds at 6 Mbps.

These availability and speed numbers have surely improved in the last two years. In that time, wireline broadband deployment by AT&T, CenturyLink, and other providers has continued. Also, cable broadband Internet service providers have continued with DOCSIS 3.1 system upgrades. And next-generation wireless broadband deployment has been aggressively pursued.

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[6] *Id.* at ¶ 27.
[7] *Id.* at ¶ 36.
[8] *Id.* at ¶ 36.
[9] FCC – Omnibus Broadband Initiative, “Broadband Performance,” *Technical Paper No. 4*, at 11, available at: http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-broadband-performance.pdf.
[10] *See* NTIA, *U.S. Broadband Availability: June 2010- June 2012* (May, 2013), available at: http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

Indeed, wireless services have seen radical technological innovation and rapid consumer adoption since the early 1990s. Wireless voice subscribers numbered just 13 million in June 1993.[11] That number exceeded 322 million in June 2011.[12] And by the end of 2008 subscriptions to wireless broadband services – that had only emerged only a handful of years earlier – reached 26 million.[13]According to data cited in the Commission's *Sixteenth Wireless Competition Report* (2013), as of October 2012, approximately 311 million people, or 99.5 percent of the U.S. population, lived in areas with coverage by at least one mobile broadband provider.[14] Further, as of October 2012, 97.8% of the population is served by 2 or more wireless broadband providers, 91.6% by 3 or more, and 82% by 4 or more.[15]

Significantly, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitive alternative – indeed, even a potential substitute for – wireline broadband. For most major wireless broadband providers, average LTE speeds range between 30 and 40 MBps,[16] enabling a wide range of video viewing functionalities. With regard to video, it is estimated that half of all broadband consumers access mobile TV apps each month, 17% use mobile TV apps weekly, and 16% use mobile TV apps daily.[17] These numbers are certain to increase, as wireless broadband providers are unveiling new technologies that will enhance wireless video viewing capabilities. For example,

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[11] *See* CTIA, *CTIA Semi-Annual 2011 Top-Line Survey Results*, at 5 (2011).
[12] *See id.*
[13] *Fifteenth Report*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Services, Including Commercial Mobile Services, at WT Docket No. 10-133 ¶161 (2011), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.
[14] *Sixteenth Report*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Services, Including Commercial Mobile Services, WT Docket No. 11-186, at ¶ 48 (released March 21, 2013), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.
[15] *See id.*
[16] *See, e.g.*, Lynn La, "4G LTE Showdown: How Fast is Your Carrier?" *CNet* (August 5, 2014), available at: http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/.
[17] TGD, Press Release: "Half of Adult Broadband Users Now Engage Mobile Video Apps at Least Once a Month" (July 23, 2014), available at: http://tdgresearch.com/tdg-half-of-adult-broadband-users-now-engage-mobile-video-apps-at-least-once-a-month/.

Verizon is launching LTE multicast video service in the near future. "LTE Multicast" can deliver live TV signals wirelessly to mobile devices more efficiently than unicast delivery because multiple users can watch the same multicast stream being delivered from a cell site. Sprint is deploying its enhanced LTE service, with peak download speeds of 60 MBps.[18]

The cross-platform rivalry of digital, IP-enabled services that has emerged over the last two decades – due to DBS entry into the video market, cable operator entry into the voice services and broadband market, telephone carrier entry into the video and broadband markets, and wireless entry into the voice and broadband markets – has made the bundling of services a critical competitive front in the market. "Double play" or "triple play" packages have attracted large numbers of consumers of voice, video, and data services. As the Commission summed up the MVPDs' offering of bundled services:

> MVPDs continue to compete through attempts to differentiate their services from their competitors' services. Some MVPDs differentiate their services by highlighting bundles of video, Internet access, and telephone services while other MVPDs focus on video packages. The major cable and telephone MVPDs focus their marketing on bundles. Their emphasis usually is that bundles offer better prices for consumers, relative to individual service offerings. In contrast, the two DBS MVPDs focus their marketing on video services, in part, because the satellite technology they use for delivering video programming limits their ability to provide non-video (*i.e.*, Internet access and telephone) services.[19]

The rapid emergence and advancement of cross-platform rivalry converging on digital, IP-enabled voice, video, and data services should be matched by a merger review analysis that is forward-looking and emphasizes the continuing disruptions and breakthroughs that will drive the market for advanced telecommunications services forward.

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[18] Sprint, Press Release: "Sprint Spark" (June 24, 2014), available at: http://newsroom.sprint.com/presskits/sprint-spark.htm.

[19] *Fifteenth Report*, at ¶ 93. *See also id*. at ¶ 103.

III. **Policy Considerations Should Lead the Commission to Base Any Regulatory Intervention Respecting the Proposed Merger on Compelling Evidence of Likely Market Power and Consumer Harm**

For important public policy reasons, the Commission should find compelling evidence of potential market power and consumer harm before it prohibits or imposes any restrictive conditions on proposed mergers such as AT&T/DIRECTV.

First, mergers and acquisitions are competitive entrepreneurial activities. In free market economies, mergers are acts of calculated risk-taking. They are undertaken by acquiring entities in a market process in which they seek to improve their competitive position. Efficiency-creating mergers typically are proposed in efforts to seize unrealized (or at least hoped-for) market opportunities. Profits resulting from such mergers are thereby won through competition. Government intrusion into this facet of competition therefore requires compelling justification. Otherwise, freedom to pursue entrepreneurial opportunities through mergers becomes too easily undermined.

Second, when the Commission withholds its approval of a proposed merger or imposes conditions on that approval it means a government institution is substituting its own judgment for the judgment of market actors. Bureaucratic decisionmaking lacking clear evidence of market power or potential consumer harm risks unnecessary displacement of marketplace business judgments by competitors possessing critical knowledge about market opportunities and consumer preferences. The Commission’s substitution of its judgment for that of market actors can be justified only if there are specifically identified harms demonstrated by compelling evidence. And, in that instance, the Commission must target narrowly any remedies designed to address such harms.

Third, according to former Federal Trade Commission Chairman Christine Varney, "the vast majority of mergers are either pro-competitive and enhance consumer welfare or are competitively benign."[20] Accordingly, the production of compelling evidence is necessary to support any Commission finding that the proposed merger would produce a contrary outcome. Of course, the Commission's own precedents also recognize that "efficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products."[21] The Commission has previously recognized that "an increased ability to provide voice, data, and video packages is likely to make the merged company a stronger company overall, and a stronger competitor in the multichannel video service market."[22] In addition, the Commission's precedents acknowledge a number of potential public interest benefits that result from mergers involving MVPD providers with vertical integration aspects.[23] The Commission's precedents also conclude there are public benefits in facilitating broadband

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[20] Christine A. Varney, "Merger Guideline Workshops," Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.pdf.

[21] *Memorandum Opinion and Order* ("*Adelphia Order*"), In the Matter of Applications of For Adelphia Communications Corporation, Time Warner Cable Inc. and Comcast Corporation, For Consent to Assignment and/or Transfer of Control of Licenses, MB Docket No. 05-19, at 107, ¶ 243 (released July 21, 2006), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-105A1.pdf.

[22] Memorandum Opinion and Order ("*CenturyLink/Qwest Order*"), In the Matter of Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control, WC Docket No. 10-110, at ¶ 39 (released March 18, 2011), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-47A1.pdf. *See also, e.g*., Memorandum Opinion and Order ("*Time Warner Cable/Insight Order*"), In the Matter of Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc., WC Docket No. 11-148, at ¶ 23 (released January 31, 2012)(Media Bureau), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-12-113A1.pdf.

[23] Among the "efficiencies and other benefits that might be gained through increased ownership or control," the Commission has recognized: (1) reduction of "barriers and friction that exist when unaffiliated content providers and distributors negotiate to reach agreements"; (2) "the 'elimination of double marginalization' through vertical integration encourages lower downstream prices and increased output than would otherwise be achieved";[19] and (3) "synergies and economies of scale and scope in the areas of programming, advertising, and cross-promotion." *Memorandum Opinion and Order* (*"Comcast/NBCU Order"*), In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, at 96, ¶ 231, ¶ 237, ¶ 242 (January 20, 2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

goals by spurring "greater broadband demand, deployment and adoption."[24] And the Commission has recognized that combinations can increase deployment of next-generation technologies and can make other products and services upgrades more readily and widely available.[25]

Given the rapidly changing landscape of the markets for wireline and wireless broadband services and for video services, the Commission must not freeze specific pricing options, programming content or lineup decisions, offerings of various features and functions, or other business judgments into place through regulatory conditions imposed on proposed mergers. And the Commission should not brush aside the likely consumer welfare-enhancing benefits of mergers as non-transaction specific simply because competitors or new entrants conceivably could benefit from additional infrastructure. The Commission cannot cavalierly disregard the economic benefits of mergers proposed by parties that actually bear the risks of failure. Nor do hypotheticals in which competitors or new entrants are conceived to be able to offer possibly superior outcomes provide basis for finding likely anticompetitive harm.

Fourth, where a proposed merger will take place within the context of a marketplace characterized by ongoing competition, the less likely it is that a proposed merger will undermine consumer welfare. As indicated in Section II, the markets for wireline and wireless broadband Internet services as well as for video services are dynamic and vibrant. The presence of competitive choices, including cross-platform facilities-based alternatives, makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

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[24] *See, e.g.*, *Comcast-NBCU Order*, at ¶ 233; *CenturyLink/Qwest*, at ¶ 37.

[25] *See, e.g.*, *Memorandum Opinion and Order* ("*T-Mobile/MetroPCS Order*") In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc., For Consent To Transfer of Control of Licenses and Authorizations, WT Docket No. 12-301, at ¶ 74, available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-13-384A1.pdf.

Fifth, requiring compelling evidence of actual or likely consumer harm resulting from market power and anticompetitive conduct ensures a more disciplined analytical and policy approach to competition. Demanding clear evidence of harm provides a safeguard against market competitors seeking to opportunistically manipulate or unduly influence the merger review process. In the name of defending competition, market rivals may seek to use the merger process to gain competitive advantage by urging the Commission to saddle merging parties with regulatory constraints. A rigorous economic analysis based on actual evidence from the market offers a crucial check-and-balance against protectionism.

IV. The Proposed Merger Presents Potential Consumer Welfare-Enhancing Benefits

AT&T/DIRECTV presents a number of potential benefits to consumers. *First*, the proposed merger would significantly expand consumer choice for bundled broadband and MVPD-related services. In particular, consumers located outside of U-Verse's geographic footprint would be able to purchase DIRECTV's video services bundled with broadband Internet access. That is, consumers would have another genuine bundled service alternative to bundled services offered by cable operators. Likewise, consumers in 21 U-Verse states in locations where U-Verse is not offered would gain an additional choice for genuine bundled services.

As indicated above, consumers of MVPD services typically prefer bundling those services with broadband Internet access for discount prices and for simplicity. Cable MVPDs typically provide bundled video and broadband services, for instance. A likely competitive effect of that additional choice is increased pressure on market rivals to keep prices lower. A related competitive effect is increased pressure on market rivals to enhance the value to consumers of their bundled service offerings – whether through additional video channels, viewing functionalities, data usage options, or the like.

DIRECTV currently offers its nationwide potential subscriber audience “synthetic” bundled service options. However, bundled offerings by an integrated provider enjoy greater cost efficiencies, enabling integrated providers to offer more competitive pricing. Accordingly, by eliminating double marginalization and double moral hazard costs through integration – that is, by eliminating the costs of both entities conducting business at arms-length – AT&T/DIRECTV offers more than three-quarters of TV households the potential for more affordable bundled MVPD and broadband Internet services options.

Second, AT&T/DIRECTV will potentially result in lower price and increased value options for consumers of MVPD services or bundled MVPD and broadband Internet services on account of video programming cost savings produced by the combination. Video programming content is perhaps the most significant cost of doing business for MVPDs. The increased scale of the combined entity and its increased MVPD and bundled services subscriber base will likely enable it to negotiate rights to video programming content at better bulk discount rates or to negotiate for better value in video programming content through increased choices. Post-merger potential cost savings from purchasing video programming content – as well as from the integration of both entities’ operations and the elimination of redundancies – would therefore likely result in cost of business savings that could enable the combined entity to offer consumers more competitive pricing and value options.

Third, AT&T/DIRECTV will potentially accelerate investment and deployment in next-generation broadband services. Bundled services offer providers greater return on investment potential – through increased per-subscriber revenues – than stand-alone MVPD or broadband services. The improved return on investment outlook of bundled services may therefore make a strong business case for broadband infrastructure investment and deployment in areas where no business case might otherwise exist.

The proposed merger enhances the combined entity's ability to offer bundled services and thereby expands its opportunities for investing and deploying broadband to new geographic areas. This likely gives AT&T/DIRECTV a business case – or stronger business case – for deploying next-generation broadband infrastructure to new geographic markets. AT&T and DIRECTV indicate that merger-related improvements in incentives for broadband deployment make it feasible for the combined entity to expand its fiber-to-the-premises wireline broadband investment and deployment to 2 million additional households.[26] The parties similarly indicate that the merger creates a business case for deployment wireless broadband infrastructure to 13 million additional households, mostly in rural areas unserved by high-speed wireless broadband services.[27] In fact, the merging parties have committed to making those deployments within four years of the merger's closing and to being bound to that commitment as a condition of the merger's approval by the Commission.[28] The expanded availability of those bundled services options – and the expanded availability of wireless broadband services – potentially enabled by AT&T/ DIRECTV would benefit consumers by giving them access those advanced services.

Fourth, AT&T/ DIRECTV also potentially benefits consumers through the combined entity's enhanced innovative abilities, including its pursuit of a seamless cross-platform consumer interface for viewing video content, accessing data, and using other functionalities. As indicated in Section II, the future competitiveness of MVPD services depends upon providers being able to offer consumers two-way, interactive functions as well as complementary features

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[26] *See* AT&T and DIRECTV, Description of Transaction, Public Interest Showing, and Related Demonstrations ("Public Interest Statement"), Docket No. MB 14-90, at ¶ 41 (May 18, 2014), available at: http://licensing.fcc.gov/myibfs/download.do?attachment_key=1050160.
[27] *See id*. at ¶ 45.
[28] *See id*. at ¶ 41, ¶ 45.

such as mobility and multi-screening. Currently, DIRECTV's DBS service does not offer two-way interactivity. But the combined entity will enable current and future DBS subscribers and DBS-bundled subscribers an integrated offering that relies on AT&T's broadband infrastructure to provide those kinds of interactive functions, including on-demand video selections. AT&T's wireless broadband capabilities offer the potential for a variety of new complimentary applications for video services.

More particularly, post-merger the combined entity will be better positioned to provide or otherwise offer consumers a pathway for Internet-delivered video services. Growing numbers of consumers – as it was pointed out in Section II – are adopting Internet-delivered services, including OVD services such as Netflix, AmazonPrime, and HuluPlus. Evidence indicates these types of innovative video services have both complimentary and close substitute potential for consumers of MVPD and bundled services. DIRECTV lacks the ability to expand its existing platform into this space and enhance its competitiveness through Internet-delivered video services that the combined entity would almost surely possess.

AT&T/ DIRECTV will potentially be able to further leverage and build upon DIRECTV's innovative video navigation device capabilities, including its DVR recording and multi-screening playback functionalities. AT&T's nascent U-Verse video services will potentially benefit the most from DIRECTV's technological insight and experience involving video navigation devices. AT&T/ DIRECTV will also have the potential to provide innovative new forms of video services through the integration of satellite and wireless technological capabilities and service offerings.

V. Conditions in the Broadband Internet and Video Services Markets Reduce the Likelihood of Consumer Harms From AT&T/DIRECTV

AT&T/DIRECTV does not appear to pose any overt risk of harm to consumers. In light of the dynamic and competitive forces prevalent in the video and broadband Internet services market as well as the particulars of the proposed merger, the probability seems low that AT&T/ DIRECTV would create any problematic market power scenario or cause likely consumer harm.

AT&T/DIRECTV is primarily a *non*-horizontal merger of complementary services. That is, in non-U-Verse territories, the merger involves the integration of AT&T's wireline and wireless networks with DIRECTV's DBS services. Accordingly, the proposed merger is not a non-horizontal integration with respect to wireless and wireline broadband services. No consumer of wireline or wireless broadband Internet services would lose a choice of providers as a result of the proposed merger. As Commission precedents recognize, static market concentration measures do not apply to such integrations.[29]

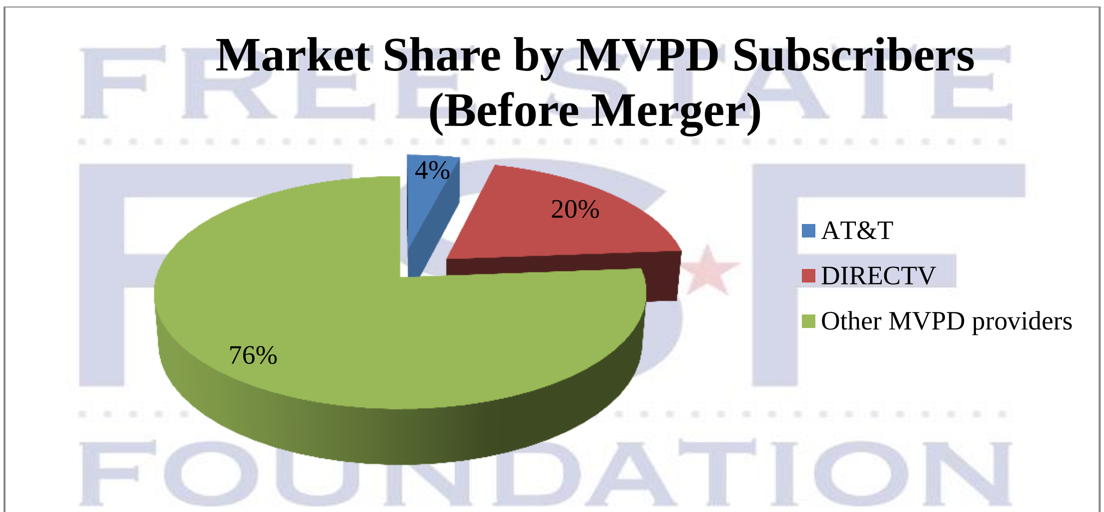
AT&T/DIRECTV is only a horizontal merger in AT&T's U-Verse territories – reaching some 33 million households in 21 states in the next few years.[30] That is, the proposed merger is a horizontal integration only with respect to MVPD services and only then in certain territories – where consumers currently have access to both U-Verse and DIRECTV video services.

Horizontal integrations necessarily result in the elimination of one choice for products or services in the market. But such integrations only pose market power and anticompetitive conduct concerns where the market in question is or will become concentrated or offers consumers limited choices. Importantly, the potential harm to consumer welfare resulting from

[29] *See, e.g., Adelphia Order*, MB Docket No. 05-19, at 40, ¶ 80 ("An important prerequisite for HHI analysis, as described in the Horizontal Merger Guidelines, is that the sellers compete for customers' business in the same product and geographic market.")
[30] *See Public Interest Statement*, at 3.

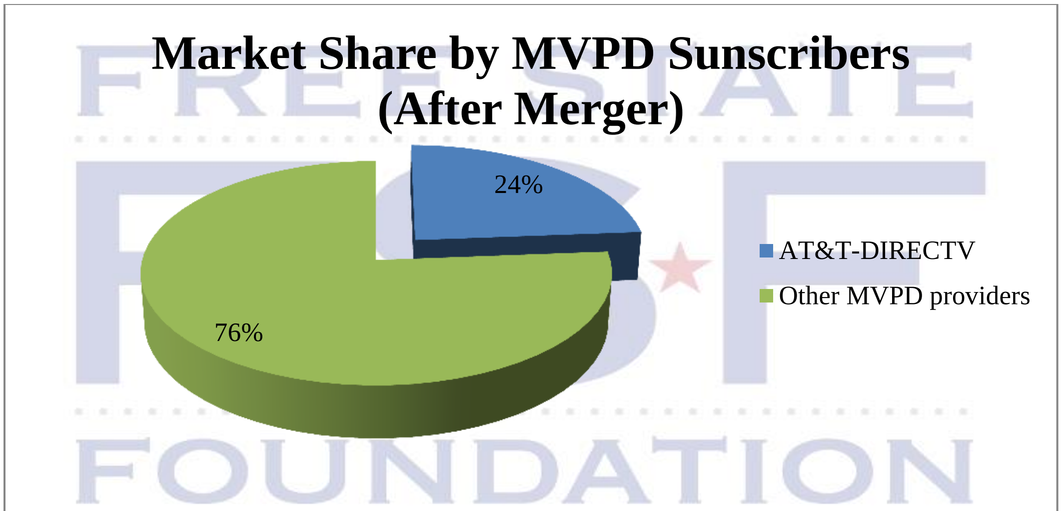
horizontal integrations is also significantly diminished where the market in question is characterized by rapidly changing technologies, service offerings, and consumer habits. As mentioned, potential harm is also diminished or offset to the extent of potential public benefits resulting from horizontal integrations.

Here, the relative MVPD market shares of DIRECTV and AT&T's U-Verse would not likely pose significant market power or consumer harm concerns. According to the Commission's *Fifteenth Video Competition Report*, at the end of 2011, DIRECTV and AT&T were the second and eighth largest MVPDs, respectively.[31] As the following charts depict, the market share of MVPD subscribers for AT&T (4%) and DIRECTV (20%) together is 24% before the merger and remains 24% after the merger for the combined entity.



Source: FCC 15th Report on Video Competition

[31] *Fifteenth Report*, at ¶ 110, ¶ 118.



Source: FCC 15th Report on Video Competition

The combined entity's post-merger share will still fall well below 30% of the nationwide market share for MVPD subscribers.[32]

Vibrant and competitive conditions in the advanced telecommunications communications also reduce the likelihood of market power or consumer harm resulting from AT&T/ DIRECTV. Those aspects of the market are more fully described in Section II and their implications for the Commission's analysis described in Section III.

Further, the "vertical" integration aspects of AT&T/ DIRECTV are extremely minor – and in any event are unlikely in the extreme to pose any threat to consumer welfare. DIRECTV, for instance, only has ownership interests in three regional sports networks (RSNs) and Game Show Network.[33] AT&T has no such interests.[34] So the vertical integration would result to the extent that U-Verse also offers to MVPD consumers the content of those networks. By itself, this amounts to a miniscule fraction of the market for video programming content. FCC program

[32] *See Comcast Corp. v. FCC*, 579 F.3d 1, 6-8 (D.C. Cir. 2009) and *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001), wherein the D.C. Circuit twice invalidated as arbitrary and capricious the Commission's horizontal ownership cap set at 30%.
[33] *Fifteenth Report*, at ¶ 110.
[34] *Id*. at ¶ 118.

access regulations also exist to mitigate even the remotest concerns about foreclosure that could arguably be related to the proposed merger.

For that matter, the Commission precedents recognize that the efficiencies that result from vertical integration typically benefit consumers. Given the generally consumer-welfare enhancing effects of vertical integrations, clear and convincing evidence would have to be produced to suggest that the tangential vertical integration aspects of AT&T/DIRECTV would pose any potential harm to consumers.[35]

There is also little reason to suspect that AT&T/DIRECTV would pose any realistic threat of creating a monopsony power scenario. That is, it appears unlikely that the combined entity would somehow trigger a buyer-side market problem as a wholesale buyer of video programming.

Monopsony is rare scenario in which the distributer or retailer is the only outlet for wholesale goods. Here, post-merger existence of other MVPDs providing direct competition includes cable MVPDs, another nationwide DBS provider (DISH), other telco MVPDs (Verizon, CenturyLink, Frontier), nascent broadband service providers (Google Fiber).

The existence of an increasing number of Internet-based alternatives for delivery of video programming by OVDs and other Internet outlets makes monopsony power concerns less likely still. That includes wireless broadband providers as an alternative outlet for video programming content delivery (Verizon, Sprint, T-Mobile, as well as regional or local wireless carriers).

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[35] *See, e.g.*, *Adelphia Order*, at ¶ 71:

> [A]ntitrust law and economic analysis have viewed vertical transactions more favorably than horizontal transactions in part because vertical transactions, standing alone, do not directly reduce the number of competitors in either the upstream or downstream markets. In addition, vertical transactions may generate significant efficiencies.

Given post-merger market share numbers as well as the existence of platform and cross-platform alternatives for video programming content distribution, it's unlikely that AT&T/DIRECTV could somehow decrease market-wide output of video programming by artificially decreasing its demand to drive down their costs as wholesale inputs. If anything, negotiating lower input costs can benefit consumer welfare. And an MVPD's decision not to purchase and make certain content available to its subscribers would not prohibit other distributors from making the same content available. Rather, rival MVPDs could potentially gain by differentiating their services by offering added video programming content choices.

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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