



February 25, 2015

Via Electronic Filing

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Via U.S. Mail

The Honorable Eric Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: AT&T Inc. and DIRECTV Merger (MB Docket No. 14-90)

Dear Chairman Wheeler and Attorney General Holder:

AT&T's proposed \$49 billion purchase of DIRECTV offers no substantial benefits to American consumers, and will lead to higher prices, less competition and an expansion of the notorious anti-consumer practices that DIRECTV currently imposes on its customers. Consumer Watchdog¹ believes that AT&T has failed to demonstrate that the merger is in the public interest. If, however, the Commission is contemplating approval of the proposal, any such action must be made contingent on AT&T's agreement to discontinue DIRECTV's improper practices, and to maintain its current rates – without equipment upgrade requirements or charges – for a period of at least five years.

I. The Proposed Merger Will Subject Consumers to Anti-Consumer and Anti-Competitive Practices.

DIRECTV and AT&T employ two highly anti-consumer and anti-competitive practices. First, the companies levy an "Early Termination Fee" on customers who no longer wish to do business with them. Second, the companies employ an "arbitration clause" to prevent dissatisfied customers from holding the company accountable in court for over-billing, excessive fees or other unlawful practices.

¹ Consumer Watchdog is a non-profit, non-partisan consumer research and advocacy organization founded in 1985.

AT&T charges a pro-rated Early Termination Fee (ETF) for a smart phone of up to \$325. Consumers who have a dispute with AT&T over charges, service problems or any other matter cannot simply take their business elsewhere: to do so, they must first pay the onerous ETF penalty, which is designed to keep AT&T's customers captive. Nor can they challenge improper conduct by AT&T in court: its arbitration clause bars access to the judicial branch. When its customers sued AT&T for excessive charges and other unlawful practices in connection with its Cingular merger in 2004, discussed in detail below, AT&T asserted that its customers' class action lawsuit, brought by lawyers for Consumer Watchdog and other firms, was precluded by an arbitration clause that also barred customers from joining together to adjudicate the dispute in an arbitration. The case, *Coneff v. AT&T Corp., et al.*, No. C06-0944 (W.D. Wash), was dismissed after the U.S. Supreme Court upheld such restrictive arbitration clauses in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), overturning decisions to the contrary in California and other states.

DIRECTV's consumer practices in this regard are particularly egregious. DIRECTV imposes a mandatory service term of eighteen to twenty four months; few customers are aware of this condition prior to signing up. The company routinely extends this "contractual obligation" by another year or two if malfunctioning equipment needs to be replaced, or the customer decides to make a change to programming or other services. Customers who terminate service are charged an "early cancellation fee" of up to \$480, regardless of the reason, plus a "deactivation fee." Customers are forced to pay these penalties even if their equipment could not be installed, they moved and DIRECTV service isn't available in the new location, or the equipment stopped working.

Worse, DIRECTV often charges these cancellation fees directly to their customers' credit cards, or even takes the funds out of their checking accounts, without the knowledge or approval of the customer. Many customers who were victimized by this practice incurred substantial additional bank fees as a result.

These policies were not properly disclosed to purchasers beforehand.

Unfortunately, DIRECTV customers who have challenged these practices in court are confronted with the company's arbitration clause. In response to complaints from DIRECTV customers, Consumer Watchdog lawyers filed a class action lawsuit in California in 2008 challenging these practices on their behalf. (*Imburgia and Greiner v. DIRECTV*, Los Angeles Superior Court No. BC 398295). DIRECTV's customer contract, which many consumers do not receive until after they sign up, contains an arbitration provision barring such class action lawsuits, unless such a provision is invalid under the laws of a consumer's state. Initially, DIRECTV acknowledged that California's consumer protection laws invalidated arbitration clauses barring class actions. However, after the United States Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, DIRECTV sought to retroactively resuscitate its arbitration clause. The California Court of Appeal rejected DIRECTV's argument, holding that the company's arbitration clause stated that it was subject to California's consumer protection laws, and the

California Supreme Court denied review.² DIRECTV's petition for writ of certiorari is pending before the U.S. Supreme Court.³ DIRECTV has since changed its arbitration clause to eliminate the exemption for conflicting state law.

Early Termination Fees are inherently anti-competitive: by imposing a massive financial penalty, they prevent customers from entering the marketplace in search of better prices or improved services. Mandatory arbitration clauses foreclose customers from another avenue of redressing abuse that would discourage corporate wrongdoing: access to the judicial branch. Together, these two practices substantially undermine the rights of DIRECTV's and AT&T's customers, limit competition and incentivize corporate wrongdoing.

Not surprisingly, the terms of the proposed merger do not mention, much less address, these practices. The Commission, however, can and should consider them when determining whether the merger is in the "public interest." If the Commission is inclined to ignore the anti-competitive impact of the proposed merger on the marketplace, it should condition its approval on an enforceable, permanent agreement by AT&T that DIRECTV will eliminate these practices.

II. The Proposed AT&T/DIRECTV Merger Will Lead to Reduced Competition and Higher Prices.

The Commission's recent announcement that it will consider treating high speed Internet as a public utility in order to protect consumer access is a recognition that the traditional distinctions between cable, telecom and content creation are rapidly disappearing. Consolidation among the component companies has been intense. Two decades of mergers among cable companies have reduced the number from 41 to 4.⁴ Where once there were 22 mobile phone companies, now there are 4 major carriers.⁵ It is estimated that the merger of AT&T and DIRECTV will reduce pay TV choices "in about 25% of the United States."⁶ This stark statistic makes clear that the merger of AT&T and DIRECTV would continue the long-running trend of consolidation and reduced competition, at a time when once-separate industries are collapsing into a single behemoth media super-industry. The inevitable result of reduced competition is higher rates and diminished service. The threat to consumers is particularly profound when a small number of firms exercise oligopoly power in the marketplace.

² *Imburgia v. DIRECTV* (2014) 225 Cal.App.4th 338, rev. denied Jul. 23, 2014.

³ *DIRECTV, Inc. v. Imburgia*, petition for cert. filed, Oct. 21, 2014, U.S. Sup. Ct. No. 14-462.

⁴ Rani Molla, *Two Decades of Cable-TV Consolidation*, Wall Street Journal, February 20, 2014 (<http://blogs.wsj.com/corporate-intelligence/2014/02/13/chart-two-decades-of-cable-tv-consolidation/tab/print/>).

⁵ Thomas Caton and Spencer Ante, *U.S. Sues to Stop AT&T Deal*, Wall Street Journal, September 1, 2011 (<http://www.wsj.com/articles/SB10001424053111904716604576542373831069388>).

⁶ Ryan Knutson, Thomas Gryta and Brent Kendall, *Brewing Telecom Deals Bring Long-Promised Future Into View*, Wall Street Journal, May 5, 2014 (<http://www.wsj.com/articles/SB10001424052702303417104579541700749492482>).

III. AT&T's Self-Serving Claims Should Be Ignored.

Eleven years ago, AT&T Inc.'s wholly owned subsidiary, AT&T Mobility LLC (then known as Cingular Wireless Corporation) requested permission to buy AT&T's wireless network (then known as AT&T Wireless Services, Inc.) for \$41 billion. At that time, AT&T and Cingular had the first and second largest share, respectively, of wireless providers in the U.S. In order to get the merger approved, AT&T and an army of executives, lobbyists and consultants assured regulators and consumers that the deal was in the public interest by making a plethora of vague, unsubstantiated predictions and promises — the very same ones that we're hearing from AT&T today (boldface emphasis added):

2004 AT&T – Cingular promises

- “In addition to improvements in network coverage and service quality, and greater availability of enhanced service offerings, the transaction will result in **a number of synergies** which will **benefit consumers**...”⁷
- The merger will “accommodat[e] the **growth of existing voice and data services** for several years.”¹⁰

2015 AT&T – DIRECTV promises

- “The transaction, moreover, will generate substantial cost savings and other **synergies**. As a result, the combined company will be able to deliver more value to consumers and provide stronger competition to cable bundles.”⁸
- “[T]his transaction will enable the combined AT&T and DIRECTV to meet the challenges of this new competitive marketplace with improved services and bundles, foster increased competition in broadband and video, and **give consumers better choices** than are possible today from either company on a standalone basis.”⁹
- “This transaction will deliver enormous **consumer benefits** that could not and would not have been available without the

⁷ Application for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0001656065, Exhibit 1, at 22 (Mar. 18, 2004) (“2004 AT&T Application”) *available at* <https://wireless2.fcc.gov/ULsEntry/attachments/attachmentView.jsp?attachmentKey=17917140&affn=0179171404013300694756609>.

⁸ Application of AT&T, Inc. and DIRECTV for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 14-90, Public Interest Statement, Exhibit A, at 29. (“Exhibit A”) *available at* <http://www.fcc.gov/transaction/att-directv>, under application documents.

⁹ Exhibit A, Public Interest Statement, at 9.

¹⁰ 2004 AT&T Application, *supra* note 1, Exhibit 1, at 22.

2004 AT&T – Cingular promises

- “[T]he transaction **increases network capacity** and provides the spectrum and compatible network resources to fill in the coverage holes of both companies...”¹²
- “[C]onsumers will enjoy significant **near-term improvements in service quality**.”¹⁴
- “[T]he merger will **alleviate spectrum capacity constraints that currently hinder the growth of Cingular and AWS**...”¹⁶

2015 AT&T – DIRECTV promises

transaction, including **enhanced broadband/video competition, broader deployment of broadband infrastructure, and enhanced development of OTT services.**¹¹

- “[T]he savings and synergies made possible by this transaction will fundamentally and permanently increase the incentives of the combined company to **expand and enhance its broadband networks.**”¹³
- “The proposed merger will provide exactly the kind of **near-term**, verifiable, transaction-specific public interest benefits that the Commission has credited in approving previous transactions.”¹⁵
- “The transaction will benefit millions of these customers by making it economically attractive for AT&T to expand its deployment of an LTE-based fixed WLL broadband product . . . Fixed WLL is **expected to utilize 20 MHz of dedicated spectrum.**”¹⁷

¹¹ Exhibit A, attachment, Declaration of John TY. Stankey, Group President and CSO of AT&T Inc., at 27.

¹² Application, *supra* note 1, Exhibit 1, at 9.

¹³ Exhibit A, Public Interest Statement, at 5.

¹⁴ Application, *supra* note 1, Exhibit 1, at 9.

¹⁵ Exhibit A, Public Interest Statement, at 4.

¹⁶ Application, *supra* note 1, Exhibit 1, at 9.

¹⁷ Exhibit A, Public Interest Statement, at 43.

2004 AT&T – Cingular promises

- “The **public interest benefits** of the transaction are straightforward and compelling. The **combined company will be able to deliver the ... benefits faster and more broadly than either company could on a stand alone basis...**”¹⁸
- “The **complementary** nature of the overlapping service areas ... is a **particular benefit in rural areas...**”²⁰

2015 AT&T – DIRECTV promises

- “The integration of AT&T and DIRECTV will allow the **combined company to offer more advanced video capabilities** and better bundles of services **than either company could offer absent the transaction.**”¹⁹
- “[T]his deployment will provide expanded and enhanced broadband service to approximately 15 million customer locations in **primarily rural areas...**”²¹
- “At a minimum, AT&T expects to bring new or enhanced high-speed broadband to at least 15 million customer locations, the majority of which are in **rural areas** with no or limited broadband service choices.”²²

¹⁸ Application, *supra* note 1, Exhibit 1, at 9.

¹⁹ Exhibit A, attachment, Declaration of John T. Stankey, Group President and CSO of AT&T Inc., at 5.

²⁰ Application, *supra* note 1, Exhibit 1, at 58.

²¹ Exhibit A, Public Interest Statement, at 66-67.

²² Exhibit A, Public Interest Statement, at 5.

2004 AT&T – Cingular promises

- “The combination of AWS and Cingular will allow the availability of these services on a **seamless, nationwide basis** far more promptly than can otherwise be achieved, if they could be achieved at all, by the companies individually.”²³
- AT&T is “working to make this **transition as seamless as possible** for customers of AT&T Wireless.”²⁴
- “[C]ustomers of both companies will **continue to enjoy the benefits of their current** phones, rate plans, and features, without any service interruptions.”²⁷
- AT&T Wireless customers were assured that they would be able to “**continue using their existing phones and rate plans but now have access to the largest digital voice and data network in the country.**”²⁹
- “By acquiring **both spectrum and infrastructure**, the company can **provide expanded coverage** to consumers in the near term.”³¹

2015 AT&T – DIRECTV promises

- “AT&T plans to consolidate the two companies’ installation and service operations, thereby reducing costs while also providing customers with better and more **seamless** installation and repair services.”²⁵
- “The transaction also will allow the consolidation of installation and service operations, thereby reducing costs while providing customers with improved and more **seamless** services.”²⁶
- “As an initial matter, both AT&T and DIRECTV video services will remain available on a standalone basis, so the merger **will not eliminate any existing options.**”²⁸
- “Existing DIRECTV **customers will be able to keep their video service and add on a competitive high-speed broadband and mobile service** provided by the same company.”³⁰
- “The combined company also will provide millions of current DIRECTV customers faster and more efficient services, such as video-on-demand. It will do so by using AT&T’s Internet backbone and state-of-

²³ Application, *supra* note 1, Exhibit 1, at 15.

²⁴ Second Amended Consolidated Complaint and Demand for Jury Trial at ¶32, *Coneff v. AT&T Corp.*, No. 06-944 (W.D.Wash 2006).

²⁵ Exhibit A, attachment, Declaration of Rick L. Moore Senior Vice President, AT&T Inc. at 11.

²⁶ Exhibit A, Public Interest Statement, at 38.

²⁷ *Id.*

²⁸ Exhibit A, Public Interest Statement, at 72.

²⁹ Second Amended Consolidated Complaint and Demand for Jury Trial, *supra* note 2x.

³⁰ Exhibit A, Public Interest Statement, at 33.

³¹ Application, *supra* note 1, Exhibit 1, at p. 22.

2004 AT&T – Cingular promises

- “Wireless telephony markets are and will remain **robustly competitive** [after the merger]”³³

2015 AT&T – DIRECTV promises

the- art broadband **infrastructure** to provide higher-quality service at a reduced cost, through measures such as more efficient use of caching to store content closer to the customer.”³²

- “By combining two nationwide services, this transaction will create more **robust competition** to cable for most Americans.”³⁴

What happened after the AT&T - Cingular merger? Once the Commission approved the deal, the newly merged company – which later renamed itself AT&T Mobility LLC – betrayed its promises. It deliberately degraded the quality of its legacy technology in order to force AT&T customers to migrate to a new network, pay an upgrade fee of \$18, buy new equipment and agree to new and more expensive monthly plans. These anti-consumer actions were enforced by an anti-competitive “early termination fee” of anywhere between \$175 and \$400, which prevented customers of AT&T from choosing to move to another carrier to avoid AT&T’s costly new requirements. In short, AT&T customers were railroaded into spending hundreds of dollars more in order to maintain their service.

Having successfully hoodwinked the Commission and the public in 2004, AT&T tried it again seven years later, when it sought permission to buy one of its three competitors in the mobile phone business, T-Mobile. Deploying the same promises and platitudes it proffered in 2004,³⁵ AT&T insisted to the Commission and state regulators that its purchase of T-Mobile would herald a new era of efficiency, quality and competition. Thankfully, the Commission engaged in far greater scrutiny of the 2011 proposal, and after thorough consideration, determined that AT&T’s purchase of T-Mobile was not in the public interest.

Nothing in the present merger application – including its vague, loophole ridden “assurances” – provides any concrete, objective, measurable and *citizen-enforceable* assurances that the combined company will not raise prices or utilize some version of the tactics it employed after the merger with Cingular in order to impose additional, unnecessary and improper charges on DIRECTV customers. Were the Commission to contemplate approving the proposed merger, AT&T must agree that DIRECTV (or any successor company) will:

³² Exhibit A, Public Interest Statement, at 30-31.

³³ Application, *supra* note 1, Exhibit 1, at 25.

³⁴ Exhibit A, Public Interest Statement, at 33.

³⁵ A point this organization highlighted in a August 9, 2011 letter to the Commission opposing the AT&T/T-Mobile merger. See http://www.consumerwatchdog.org/resources/cwd_att_merger_letter_final.pdf (PDF).

- (1) Discontinue the imposition of Early Termination Fees or similar charges;
- (2) Cease debiting customers' bank or credit card accounts for non-recurring charges or fees;
- (3) Eliminate and cease enforcement of arbitration clauses;
- (4) Maintain the rate structure currently in place for programming for a period of at least five years, unless the Commission expressly authorizes a change;
- (5) Maintain consumer access to programming with existing technology, without any charges for equipment or other upgrades – or provide any required equipment upgrades to customers at no charge – for a period of five years.

Conclusion

These mega-mergers rarely benefit anyone other than the executives of the companies involved, the corporate-funded academics and experts who provide cover for the glib promises and projections that perennially accompany such applications, and the Wall Street firms that will reap hundreds of millions in fees for doing the paperwork. In rejecting the merger of AT&T and T-Mobile in 2011, the Commission signaled a new commitment to preserving competition in the marketplace and protecting consumers against oligopolies in the telecommunications marketplace. As it did then, the Commission should ignore the lofty pronouncements of those who have a direct financial interest in the proposed merger and focus instead on the practical impact upon the companies' customers and the average American family.

Sincerely,

A handwritten signature in cursive script that reads "Harvey Rosenfield". The signature is written in black ink and is positioned below the word "Sincerely,".

Harvey Rosenfield
Founder, Consumer Watchdog