DEPARTMENT OF JUSTICE

Antitrust Division

United States v. DIRECTV Group Holdings, LLC, et al.;

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States v. DIRECTV Group Holdings, LLC, et al.*, Case No. 2:16-cv-08150-MWF-E (C.D. Cal.), together with the Response of the United States to Public Comment.

Copies of the comment and the United States' Response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at https://www.justice.gov/atr/case/us-v-directv-group-holdings-llc-and-att-inc, and at the Office of the Clerk of the United States District Court for the Central District of California (Western Division), 312 N. Spring Street, Los Angeles, CA 90012. Copies of any of these materials may also be obtained upon request and payment of a copying fee.

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DIRECTV GROUP HOLDINGS, LLC, et al., Defendants.	Case No. 2:16-cv-08150-MWF-E **PLAINTIFF UNITED STATES' RESPONSE TO PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT** Judge: Hon. Michael W. Fitzgerald

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby files the single public comment received concerning the proposed Final Judgment in this case and the United States' response to the comment. After careful consideration of the submitted comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On November 2, 2016, the United States filed a civil antitrust Complaint alleging that DIRECTV acted as the ringleader of a series of unlawful information exchanges between DIRECTV and three of its competitors – Cox Communications, Inc., Charter Communications, Inc. and AT&T (prior to its acquisition of DIRECTV) – during the companies' parallel negotiations to carry SportsNet LA, which holds the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. The Complaint alleges that DIRECTV unlawfully exchanged competitively sensitive information with Cox, Charter and AT&T during the companies' negotiations for the right to telecast SportsNet LA (the "Dodgers Channel"). In 2015, Defendant AT&T acquired DIRECTV, and AT&T was included as a defendant in this action as DIRECTV's successor in interest.

The United States and Defendants subsequently reached a settlement and, on March 23, 2017, the United States filed a Stipulation and Order and proposed Final Judgment (ECF Nos. 31 and 31-1). The Court entered the Stipulation and Order on March 27, 2017 (ECF No. 35). The proposed Final Judgment, if entered by the Court, would remedy the violation alleged in the Complaint by prohibiting Defendants from sharing or seeking to share competitively sensitive information with competing video distributors. Such information includes without limitation "non-public information

relating to negotiating position, tactics or strategy, video programming carriage plans, pricing or pricing strategies, costs, revenues, profits, margins, output, marketing, advertising, promotion or research and development." Proposed Final Judgment at 3 (ECF 31-1). At the same time, the United States filed a Competitive Impact Statement ("CIS") (ECF No. 32), which explains how the proposed Final Judgment is designed to remedy the harm that resulted from Defendants' conduct.

As required by the Tunney Act, the United States published the proposed Final Judgment and CIS in the *Federal Register* on April 13, 2017. *See* 82 Fed. Reg. 17859. In addition, a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments, was published in both *The Los Angeles Times* and *The Washington Post* for seven days between April 6 and April 14, 2017. The 60-day period for public comment ended on June 13, 2016. The United States received one comment, which is described below and attached as Exhibit 1.

II. THE INVESTIGATION AND THE PROPOSED SETTLEMENT

The proposed Final Judgment is the culmination of almost two years of investigation and litigation by the Antitrust Division of the United States Department of Justice ("Department"). The Department conducted a comprehensive inquiry into the conduct of DIRECTV and the other companies involved to determine the facts of what occurred and the impact of that conduct on competition. The Department collected more than 100,000 business documents from DIRECTV and others, conducted numerous interviews of individuals and companies with potentially relevant information, obtained deposition testimony from a number of individuals, including those involved in the relevant communications, and required the Defendants to provide interrogatory responses explaining DIRECTV's conduct and any potential justifications for that conduct.

As a result of this detailed investigation, the United States alleged in the Complaint that DIRECTV was the ringleader of information-sharing agreements with three different rivals and that DIRECTV and these rivals agreed to and did exchange

non-public information about each company's ongoing negotiations to telecast the Dodgers Channel, as well as each company's future plans to carry – or not carry – the channel. The Complaint also alleges that each company engaged in this conduct in order to obtain bargaining leverage and reduce the risk that a rival would choose to carry the Dodgers Channel (while the company did not), resulting in a loss of subscribers to that rival. The Complaint further alleges that the information learned through these unlawful agreements was a material factor in each company's decision not to carry the Dodgers Channel, harming the competitive process for carriage of the Dodgers Channel and making it less likely that any of these companies would reach a deal because they no longer had to fear that a decision to refrain from carriage would result in subscribers switching to a competitor that offered the channel.

The Complaint alleges that these agreements amounted to a restraint of trade in violation of Section 1 of the Sherman Act, which outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Complaint seeks injunctive relief to prevent DIRECTV and AT&T from sharing non-public information with any other multichannel video programming distributor ("MVPD")[1] about a variety of competitively sensitive topics concerning potential video programming distribution agreements.

The proposed Final Judgment is designed to remedy the anticompetitive conduct identified in the Complaint. As explained in greater detail in the CIS, Section IV of the proposed Final Judgment provides that Defendants will not, directly or indirectly, communicate a broad array of competitively sensitive, non-public strategic information (such as negotiating strategy, carriage plans, or pricing) to any MVPD, will not request such information from any MVPD, and will not encourage or facilitate the

[1] MVPD is an industry acronym standing for multichannel video programming distributor, and it applies to a variety of providers of pay television services, including satellite companies (such as DIRECTV and DISH Network), cable companies (such as Cox and Charter), and telephone companies (such as AT&T and Verizon).

communication of such information from any MVPD. At the same time, Section IV makes clear that the proposed Final Judgment does not prohibit Defendants from sharing or receiving competitively sensitive strategic information in certain specified circumstances. The Final Judgment also requires Defendants to designate an Antitrust Compliance Officer, who is responsible for implementing training and antitrust compliance programs and achieving full compliance with the Final Judgment. This compliance program is necessary considering the extensive communications among rival executives that facilitated Defendants' agreements. The Defendants will be subject to these compliance obligations throughout the five-year term of the proposed Final Judgment.

The terms of the proposed Final Judgment closely track the relief sought in the Complaint and are intended to provide a prompt, certain and effective remedy to ensure that Defendants and their executives will not impede competition by sharing competitively sensitive information with their counterparts at rival MVPDs. The requirements and prohibitions provided for in the proposed Final Judgment will terminate Defendants' illegal conduct, prevent recurrence of the same or similar conduct in the future, and ensure that Defendants establish a robust antitrust compliance program. The proposed Final Judgment protects consumers by putting a stop to the anticompetitive information sharing alleged in the Complaint, while permitting certain potentially beneficial collaborations and transactions as described in detail in the CIS.

III. SUMMARY OF PUBLIC COMMENT AND RESPONSE OF THE UNITED STATES

During the 60-day public comment period, the United States received one comment, from Joe Macera. Mr. Macera stated that, in his opinion, the fact that this case was filed also shows that collusion has occurred between DIRECTV and the owner of the Dodgers Channel, Time Warner Cable. Mr. Macera called for a separate suit against Time Warner Cable for unfair business practices and stated that this

settlement should include additional relief in the form of either a fine against DIRECTV or a requirement that DIRECTV telecast live Dodgers games.

The United States appreciates receiving Mr. Macera's comment. The United States conducted a comprehensive investigation of the companies involved in the communications detailed in the Complaint. Based on that investigation, and as recounted in the Complaint, the United States concluded that DIRECTV had agreed with its rival MVPDs to share competitively sensitive information about their plans to carry the Dodgers Channel. The Complaint did not allege that Time Warner Cable was involved in the alleged illegal information sharing agreements, and the Complaint does not draw any conclusions about Time Warner Cable's conduct.

It is well-settled that comments that are unrelated to the concerns identified in the Complaint are beyond the scope of this Court's Tunney Act review. *See, e.g., United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 14 (D.D.C. 2007) (explaining that "a district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made'" (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995))); *see also United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) ("A court may not 'construct its own hypothetical case and then evaluate the decree against that case.'" (quoting *Microsoft*, 56 F.3d at 1459)). Accordingly, the portion of Mr. Macera's comment addressed to Time Warner Cable's conduct does not provide a basis for rejecting the proposed Final Judgment.

Mr. Macera also called for additional relief beyond that included in the proposed Final Judgment, such as a financial penalty or a requirement that DIRECTV carry Dodgers telecasts. The Sherman Act, however, does not provide for civil penalties or civil fines. The injunctive relief sought by the Complaint has been obtained in the proposed Final Judgment, which fulfills the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations. *See* 15 U.S.C. § 4 (investing district courts with equitable jurisdiction to "prevent and restrain" violations of the antitrust laws).

No additional relief is needed to prevent and restrain DIRECTV from entering into information-sharing agreements such as those alleged in the Complaint.

The United States' Complaint in this action also did not seek a requirement that any MVPD carry the Dodgers telecasts. Similarly, and as explained in the CIS, the proposed Final Judgment is not intended to compel any MVPD to reach an agreement to carry any particular video programming, including the Dodgers Channel. Negotiations between video programmers and MVPDs are often contentious, high-stakes undertakings where one or both sides threaten to walk away, or even temporarily terminate the relationship in order to secure a better deal. The proposed Final Judgment is not intended to address such negotiating tactics, or to impose any agreement upon Time Warner Cable or any MVPD that is not the result of an unfettered negotiation in the marketplace. Rather, the Final Judgment is intended to protect the competitive process for acquiring video programming from being corrupted by improper information sharing among rivals and to prevent harm to consumers when such collusion taints that competitive process and makes carriage on competitive terms less likely.

IV. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). "The APPA was enacted in 1974 to preserve the integrity of and public confidence in procedures relating to settlements via consent decree procedures." *United States v. BNS Inc.*, 858 F.2d 456, 459 (9th Cir. 1988) (noting that the APPA "mandates public notice of a proposed consent decree, a competitive impact statement by the government, a sixty-day period for written public comments, and published responses to the comments" (citations omitted)). In making that "public interest" determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *Microsoft*, 56 F.3d at 1461; *see generally SBC Commc'ns*, 489 F. Supp. 2d 1 (assessing public interest standard under the Tunney Act); *U.S. Airways*, 38 F. Supp. 3d at 75 (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").[2]

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62; *see also BNS*, 858 F.2d at 462-63 ("[T]he APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint."); *United States v. Nat'l Broad. Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal.1978) ("[I]n evaluating a proposed consent decree, one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief." (citation omitted)). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *BNS*, 858 F.2d at 462 (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1458-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. As the Ninth Circuit has explained:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. *See United States v. Nat'l Broad. Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978). The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (additional citations omitted).[3]

In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom*. *Maryland v. United States*, 460 U.S. 1001 (1983).[4] To meet this standard, the United States "need only provide a factual

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[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Nat'l Broad. Co.*, 449 F. Supp. at 1142 (under the APPA, "a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum, rather that minimum, judicial scrutiny, is a decidedly limited power" (citation omitted)); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

[4] *See also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that "room must be made for the government to grant concessions in the negotiation process for settlements" (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 1461) (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving consent decree even though the court would have imposed a greater remedy).

basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17 (citation omitted).

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself" and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.[5]

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."

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[5] *See also United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977 U.S. Dist. LEXIS 15858, at *22 (W.D. Mo. May 17, 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This is what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citation omitted).

CONCLUSION

After reviewing the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the *Federal Register*.

Dated: August 10, 2017

Respectfully submitted,

PLAINTIFF UNITED STATES OF AMERICA

By: /s/ *FREDERICK S.YOUNG*
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Exhibit 1

From: Joe Macera
To: ATR-Antitrust - Internet
Subject: AT&T and DirecTV Case Settlement
Date: Friday, March 24, 2017 12:10:45 PM

I am very disappointed with the DOJ decision to settle the AT&T and DirecTV case without affirmative action to end the blackout of Dodger games. In my opinion collusion has occurred between DirecTV and Time Warner Cable (TWC) which was apparent in the filing of this case. The sharing of inside, confidential information between the parties has put TWC in the position to control their monopoly for the broadcast of Dodger games by knowing where all the competitors stand, giving them an unfair advantage in their negotiations. A settlement in favor of the public would be punishment of the parties either through a fine or requirement to carry the broadcasts and a separate suit against TWC for unfair business practices.

Joe Macera
Email:
Work Cell:
Personal Cell:

[FR Doc. 2017-18091 Filed: 8/24/2017 8:45 am; Publication Date: 8/25/2017]