FREDERICK S. YOUNG (DC Bar No. 421285)
frederick.young@usdoj.gov
CORY BRADER (NY Bar No. 5118732)
cory.brader@usdoj.gov
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
450 5th Street N.W.
Washington, D.C. 20530
Telephone: 202-307-2869
Facsimile: 202-514-6381

Counsel for Plaintiff,
UNITED STATES OF AMERICA

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

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>DIRECTV GROUP HOLDINGS, LLC, et al.,<br><br>Defendants. | Case No. 2:16-cv-08150-MWF-E<br><br>**COMPETITIVE IMPACT STATEMENT**<br><br>Hon. Michael W. Fitzgerald |

Plaintiff United States of America ("United States"), pursuant to the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment against Defendants DIRECTV Group Holdings, LLC ("DIRECTV") and its corporate successor AT&T, Inc. ("AT&T") submitted for entry in this civil antitrust proceeding.

## I. NATURE AND PURPOSE OF THE PROCEEDING

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 2015 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").

Specifically, the Complaint alleges that DIRECTV and each of these competitors agreed to and did exchange non-public information about their companies' ongoing negotiations to telecast the Dodgers Channel, as well as their companies' 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 the company's 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 the companies' decisions 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 Defendants' negotiating position, strategy, or tactics concerning potential agreements for video programming distribution.

The Defendants filed a motion to dismiss the Complaint for failure to state a claim on January 10, 2017 (ECF No. 16), and the United States filed its corrected memorandum in opposition to that motion on February 8, 2017 (ECF No. 23). The Defendants filed their reply brief in support of their motion on February 21, 2017 (ECF No. 24), and the motion was due to be argued at a hearing set for March 13, 2017 (ECF No. 18). Prior to the hearing, the United States and the Defendants filed a stipulation seeking a two-week continuance of the motion hearing because the parties were engaged in productive settlement negotiations (ECF No. 27), and the Court granted the requested continuance (ECF No. 28).

The United States today filed a Stipulation and Order and proposed Final Judgment which would remedy the violation alleged in the Complaint by prohibiting Defendants from sharing or seeking to share competitively sensitive information with any MVPD. Such information includes without limitation non-public information relating to negotiating position, tactics or strategy, video programming carriage plans,

---

[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).

pricing or pricing strategies, costs, revenues, profits, margins, output, marketing, advertising, promotion, or research and development.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

### A. Defendants and the Parties to the Alleged Agreements

Defendant DIRECTV is a Delaware corporation with headquarters located in El Segundo, California, offering direct broadcast satellite television service nationwide. As of 2014, DIRECTV was the second largest MVPD in the United States, selling subscriptions to pay television services to approximately 20 million consumers. As of 2014, DIRECTV had approximately 1.25 million video subscribers in the Los Angeles area. In 2015, Defendant AT&T acquired DIRECTV in a transaction valued at approximately $49 billion. Following that acquisition, AT&T is now the largest pay television provider in the United States with more than 25 million video subscribers nationwide.

Cox Communications ("Cox") is a privately held Delaware corporation with its headquarters in Atlanta, Georgia. Cox is currently the third-largest cable provider in the United States. As of 2014, Cox was the fourth-largest cable provider in the United States and had approximately 500,000 subscribers in the Los Angeles area.

In 2014, Charter Communications ("Charter") was the third-largest cable company in the United States and had approximately 270,000 subscribers in the Los Angeles area. In 2016, Charter merged with Time Warner Cable ("TWC"), which owns the rights to the Dodgers Channel. As of 2014, TWC was the second-largest

cable company in the United States with approximately 1.3 million subscribers in the Los Angeles area.

AT&T, a Delaware corporation with headquarters located in Dallas, Texas, is a defendant in this action as the corporate successor to DIRECTV. AT&T is a multinational telecommunications company offering mobile telephone service, wireline Internet and television service, and satellite television service through its 2015 acquisition of DIRECTV. AT&T offers wireline television service through its U-verse video product, which distributes video content using AT&T's telecommunications infrastructure. As of 2014, AT&T had approximately 400,000 U-Verse video subscribers in the Los Angeles area.

In early 2013, TWC announced that it had partnered with the Los Angeles Dodgers to acquire the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. The Dodgers Channel was set to launch at the beginning of the 2014 baseball season. TWC approached MVPDs in Los Angeles – including DIRECTV, Cox, Charter and AT&T – and attempted to negotiate agreements for carriage of the Dodgers Channel. TWC failed to reach agreement with any other MVPD. Currently, apart from TWC itself (and Charter following its 2015 agreement to acquire TWC), no MVPD in the Los Angeles area carries the Dodgers Channel, leaving hundreds of thousands of area consumers without access to live telecasts of Dodgers games.

B. The Relevant Markets and Market Power

MVPDs acquire the rights to transmit content from video programmers and then distribute that content to subscribers who pay for the service. MVPDs compete with each other to attract and retain paying subscribers, both through the prices they charge and the programming content they offer. The Complaint alleges that the distribution of professional video programming services to residential or business customers is a relevant product market in which to evaluate the effects of the alleged antitrust violations.

MVPDs particularly depend on sports content as a way to distinguish themselves

from their competitors. For example, DIRECTV refers to itself as the "undisputed leader" for sports content and spends over $1 billion annually to obtain the exclusive rights to provide its Sunday Ticket package of live National Football League games. MVPDs also consider offering local, live sports content to be a crucial component of competition between them. Telecasts of local sports games are often available only through a regional sports network ("RSN"), like the Dodgers Channel. DIRECTV has publicly highlighted the popularity of RSNs and considers offering RSN content to be essential to its ability to compete. Similarly, MVPDs will purchase the right to telecast certain sports events and create an RSN to carry the telecasts, as TWC did with the Dodgers Channel. Residential and business consumers in the Los Angeles area can only watch Dodgers telecasts by subscribing to a video distribution service that carries the Dodgers Channel.

The Complaint alleges that Cox's and Charter's Los Angeles service areas are relevant geographic markets in which to evaluate the effects of the alleged antitrust violations. The availability of video distribution services is controlled by which MVPDs offer services to a given location. In the Los Angeles area in 2014, the market for purchasing video distribution services was highly concentrated and consumers could choose from only a handful of providers. Direct broadcast satellite providers, like DIRECTV, can serve customers almost anywhere in the United States. But wireline video distributors, including cable companies like Cox and Charter and telephone companies like AT&T, serve only geographic areas where they have installed infrastructure that reaches a consumer's home or business.

Consumers thus can purchase video distribution services only from those providers that offer services to their location. In 2014, only three cable companies – TWC, Charter, and Cox – offered video distribution services to a significant portion of

the Los Angeles area.[2] Their service areas did not overlap.

The Complaint alleges that the relevant market is represented by the competitive choices for video distribution services faced by a consumer at a given location. For ease of analysis, these markets can be aggregated to geographic areas where consumers face similar competitive choices. In the Cox and Charter areas, many consumers could access video programming services only from the cable provider (Cox or Charter) or one of the two satellite providers, DIRECTV and DISH Network. In some areas within these footprints, consumers could choose from four MVPD providers because they could also access video services from either AT&T or Verizon (but not both). The Complaint alleges that these markets are highly concentrated and that, by acting in concert, DIRECTV, Charter, Cox, and AT&T had market power in these geographic markets.

C. The Alleged Agreements to Share Information

As detailed in the Complaint, during the negotiations with TWC regarding carriage of the Dodgers Channel, DIRECTV orchestrated a series of agreements with Cox, Charter and AT&T to exchange competitively sensitive, forward-looking, strategic information about whether or not they would carry the Dodgers Channel. DIRECTV competes with every other MVPD in the Los Angeles area, making it the natural ringleader of these anticompetitive agreements. By contrast, cable companies serve discrete geographic areas and do not compete with each other for subscribers. Likewise, legacy telephone companies also serve limited territories and compete with the cable companies but not with each other. This meant that if DIRECTV did not carry the Dodgers Channel, it risked losing subscribers to any MVPD in the Los

[2] Mediacom and Suddenlink also operated small service areas in the LA area, although neither had more than 5,000 subscribers and neither was competitively significant. Champion Broadband reached a deal to carry the Dodgers Channel in 2014, but had only about 3,000 video subscribers in Arcadia and Monrovia, California, and has since gone out of business.

Angeles area that chose to carry the channel. If DIRECTV chose to carry the Dodgers Channel, it stood to gain subscribers from any MVPD that did not. Cox, Charter, and AT&T understood that if DIRECTV decided to carry the Dodgers Channel, competitive pressure could force them to carry it too. DIRECTV also recognized that it would lose leverage with TWC and risk losing subscribers each time any other MVPD chose to carry the channel.

In January 2013, TWC acquired the rights to telecast Dodgers games starting with the 2014 season. DIRECTV, Cox, Charter, and AT&T formed their strategies for the channel in fall 2013, and negotiations with TWC began in January 2014 and continued past the start of the 2014 Major League Baseball season in the Spring. Throughout this period, Dan York—DIRECTV's Chief Content Officer—exchanged strategic information about the Dodgers Channel with rival executives at Cox, Charter, and AT&T.[3] All told, during the period when each MVPD formed its strategy and negotiated for the Dodgers Channel, Mr. York and his rival executives had over 30 communications, some of which explicitly related to carriage plans and some of which coincided with key moments in each companies' negotiations.

For example, Mr. York agreed with his Cox rival to give each other a "heads-up" "before it was public knowledge" if either company was going to launch the channel. On another occasion, Mr. York offered to give Cox advance notice before DIRECTV signed a Dodgers Channel deal so that Cox could choose to sign first. Mr. York told his competitor this would help Cox "protect any MFN terms"—that is, it would enable Cox to sign a contract with a most favored nation term and thereby gain the benefit of any better bargain DIRECTV subsequently could extract from TWC due to its larger size. In making this offer, Mr. York was likely sacrificing the benefits of the better

---

[3] The Complaint alleges that Mr. York's agreements to exchange confidential information about content negotiations went further than just those about the Dodgers Channel, as Mr. York and his counterpart at Charter also agreed to exchange competitively sensitive information about non-sports programming deals.

deal he could negotiate because of DIRECTV's size and undercutting DIRECTV's claim to be the "undisputed leader" for sports content.

Mr. York and Charter's senior content executive also discussed their respective Dodgers Channel negotiations while they were ongoing. Charter's executive and Mr. York discussed "the high price" that TWC had paid for the Dodgers Channel and the "outrageous" price that TWC "was demanding for carriage." Charter's executive spoke to Mr. York the day before recommending to his CEO that Charter wait for DIRECTV to launch, and he relied on his knowledge of DIRECTV's plans, telling a colleague "I think Direct will not be there at launch." The Charter executive tried to speak with Mr. York again the day Charter set its content budget for the 2014 fiscal year. The two executives checked in after each company had received TWC's offer, and as negotiations continued, the Charter executive maintained to TWC that Charter would not carry the channel unless DIRECTV launched first.

Mr. York also agreed to exchange competitively sensitive Dodgers Channel information with the senior content executive at AT&T. Mr. York and the AT&T executive exchanged text messages that discussed the price of the Dodgers Channel. After the AT&T executive sent Mr. York a coded text message with Time Warner Cable's latest asking price, Mr. York responded by suggesting that he would not want AT&T to accept that offer. The AT&T executive tried to contact Mr. York the same day the AT&T executive recommended that AT&T adopt a Dodgers strategy that depended on DIRECTV. The AT&T executive continued to reach out, leaving Mr. York a voicemail asking to catch up on "three things . . . two sports and one news." The two connected over the phone the day before the AT&T executive met with AT&T's CEO and recommended that AT&T not carry the channel.

The Complaint alleges that Mr. York instigated and continued these information exchanges with his counterparts at rival MVPDs in order to benefit DIRECTV's own Dodgers Channel negotiations. In a two-hour span the day after DIRECTV received TWC's first Dodgers Channel offer, Mr. York spoke or attempted to speak with all

three of his co-conspirators, ultimately connecting with each of them. After those conversations, Mr. York informed DIRECTV's CEO that none of DIRECTV's competitors "appear[ed] in a rush to do a deal" with TWC for the Dodgers Channel, even though it was early in the negotiations and none of the distributors had made public statements about their plans. In April 2014, DIRECTV received an anonymous complaint that Mr. York had been speaking with competitors "about NOT carrying the Dodgers on DIRECTV." In May 2014, DIRECTV CEO Mike White told investors that distributors were "start[ing] to stand together, like most of us have been doing in Los Angeles for the first time ever, by the way, with the Dodgers on outrageous increases and excesses." With uncertainty reduced, the co-conspirators could comfortably resist TWC's offers to carry the Dodgers.

D. Anticompetitive Effects of the Alleged Information-Sharing Agreements

The Complaint alleges that DIRECTV's information-sharing agreements with its direct competitors at Cox, Charter, and AT&T harmed competition by making it less likely each competitor would carry the Dodgers Channel and by disrupting the competitive process. These agreements dampened the incentives of the companies to negotiate for and carry the Dodgers Channel, reduced their responsiveness to customer demand, and deprived Los Angeles area Dodgers fans of a competitive process that took into full account market demand for watching Dodgers games on television. The harm to competition and consumers stems from the basic principle that an MVPD need not worry about losing subscribers to a competitor over content if it has learned the competitor will not carry that content.

The sharing of competitively sensitive information among direct competitors made it less likely that any of the MVPDs would reach a deal for the Dodgers Channel because it increased their confidence that a decision to refrain from carriage would not result in subscribers switching to a competitor that offered the channel. The reduction of this uncertainty was valuable because each company identified a competitor's decision to telecast the Dodgers Channel as a significant development that could force

it to reach a deal with TWC. Indeed, the information shared between DIRECTV and its competitors was a material factor in their decisions not to launch the Dodgers Channel. These unlawful exchanges were intended to reduce – and did reduce – each rival's uncertainty about whether competitors would carry the Dodgers Channel, thereby providing DIRECTV and its competitors artificially enhanced bargaining leverage.

Because the information sharing agreements made it less likely that DIRECTV and its major MVPD competitors would carry the Dodgers Channel, those agreements had the tendency to reduce the quality of the co-conspirator video distribution services in the Los Angeles area and to reduce output by delaying the day when, if ever, the Dodgers Channel will be widely carried. These effects were ultimately felt throughout the Dodgers Channel broadcast territories where these companies offer service. DIRECTV's unlawful information exchanges harmed consumers by making it less likely that they would be able to watch Dodgers games on television, and this harm continues to be felt by consumers today. DIRECTV's unlawful information exchanges also harmed competition by corrupting the competitive process that should have resulted in each company making an independent decision on whether to carry the Dodgers Channel, subject to competitive pressures arising from independent decisions made by other, overlapping MVPDs.

DIRECTV's three bilateral agreements to share forward-looking strategic information concerning carriage of the Dodgers Channel lacked any countervailing procompetitive benefits and were not reasonably necessary to further any legitimate business purpose. The information directly and privately shared between high-level executives was disaggregated, company specific, forward-looking, confidential, and related to a core characteristic of competition between them.

## III. EXPLANATION 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 prompt, certain and effective remedies that will 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, 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 detailed below.

The proposed Final Judgment does not and 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 threatens to walk away, or even temporarily terminates the relationship (sometimes called a "blackout" or "going dark") 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 TWC, which owns rights to the Dodgers Channel, or any MVPD that is not the result of an unfettered negotiation in the marketplace. Rather, the Final Judgment is intended to prevent 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.

A. Prohibited Conduct

The proposed Final Judgment broadly prohibits Defendants from sharing strategic competitive information with direct competitors and thus protects the competitive process for negotiating video programming. Specifically, Section IV ensures 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 communication of such information

from any MVPD.

B. Permitted Conduct

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 where the information sharing appears unlikely to cause harm to competition.

Section IV(D) allows the communication of competitively sensitive information with rival MVPDs when counsel and the Antitrust Compliance Officer required by Section V of the proposed Final Judgment (see Paragraph IV.C., below) determine that such communication is reasonably related to a lawful purpose, such as a lawful joint venture, due diligence for a potential transaction, or enforcement of a most-favored-nation term.

Section IV(E) permits the communication of competitively sensitive information pursuant to negotiations with another MVPD to sell video programming to that MVPD, or to buy video programming from it.

Likewise, Section IV(F) permits Defendants to communicate competitively sensitive information with video programmers, including those affiliated with MVPDs, so long as the information pertains only to the potential or actual carriage of the programmer's content by Defendants.

Section IV(G) permits Defendants to respond to news media questions about programming distribution and carriage negotiations, provided Defendants' negotiating strategy is not disclosed.

Finally, Section IV(H) confirms that the proposed Final Judgment does not prohibit petitioning conduct protected by the Noerr-Pennington doctrine.

C. Antitrust Compliance Obligations

As outlined in Section V, Defendants must designate an Antitrust Compliance Officer, who is responsible for implementing training and antitrust compliance programs and achieving full compliance with the Final Judgment. Among other duties,

the Antitrust Compliance Officer will be required to distribute copies of the Final Judgment; ensure training related to the Final Judgment and the antitrust laws is provided to Defendants' directors, officers, and certain other executives; certify annual compliance with the Final Judgment; and maintain and submit periodically a log of all communications relating to competitively sensitive information between Defendants' covered executives and employees of other MVPDs. The Defendants are subject to these compliance obligations for the five-year term of the proposed Final Judgment. This compliance program is necessary considering the extensive communications among rival executives that facilitated Defendants' agreements.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

## V. PROCEDURES AVAILABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who

wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Scott A. Scheele, Chief
Telecommunications and Media Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking injunctive relief against Defendants' conduct through a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will terminate the anticompetitive conduct alleged in the Complaint and prevent its recurrence, preserving competition for the acquisition and carriage of video programming in the United States. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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
>
> (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." *United States v.*

*Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (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 mechanism to enforce the final judgment are clear and manageable").[4]

As the United States Court of Appeals for the District of Columbia Circuit has held, 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."

---

[4] 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).

*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).[5] 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

---

[5] *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'").

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); *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 the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual 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. As the United States District Court for the District of Columbia confirmed in *SBC Communications*, 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.[6]

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." 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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he

---

[6] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *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.").

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).

## VIII. DETERMINATIVE DOCUMENTS

No determinative documents or material within the meaning of the APPA were considered by the Department in formulating the proposed Final Judgment.

This document will also be made available on the Antitrust Division's website at https://www.justice.gov/atr/case/us-v-directv-group-holdings-llc-and-att-inc.

Dated: March 23, 2017

Respectfully submitted,
PLAINTIFF
UNITED STATES OF AMERICA

By: /s/ *FREDERICK S.YOUNG*

FREDERICK S. YOUNG
CORY BRADER
DYLAN M. CARSON
PATRICIA CORCORAN
MATTHEW JONES
DAVID LAWRENCE
LAWRENCE A. REICHER
ANNA SALLSTROM
SEAN SANDOLOSKI
CURTIS STRONG

Attorneys for the United States
U.S. Department of Justice
Antitrust Division
450 5th Street N.W.
Washington, D.C. 20530
Telephone: 202-307-2869
Facsimile: 202-514-6381
Email: frederick.young@usdoj.gov