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BY ELECTRONIC MAIL

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Department of Justice
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Re: ACA Tunney Act Comments on *United States v. Walt Disney* Proposed Final Judgment

Dear Mr. Kendler:

The American Cable Association, which represents more than 700 small and medium-sized cable operators, hereby submits its Tunney Act comments regarding the proposed Final Judgment filed in *United States v. Walt Disney*.[1] The proposed Final Judgment solves one significant antitrust problem—the combination of Disney's ESPN with Fox's regional sports networks ("RSNs")—by requiring Disney to divest the Fox RSNs. Such divestiture, however, threatens to create a *new* and equally significant antitrust problem.[2]

More specifically, it would be contrary to the public interest to permit the divestiture of the Fox RSNs either to a same-market, big-four broadcaster or to a same-market multichannel video programming distributor ("MVPD"):

- Permitting such a broadcaster to purchase a Fox RSN would create the very problem the Antitrust Division identified here. It would allow a single firm to threaten to withhold two sets of must-have programming, thereby leading to increased MVPD licensing fees.

- Permitting such an MVPD to purchase an RSN would create the "vertical integration" problem the Division identified in blocking the AT&T-Time Warner merger. The

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[1] Antitrust Procedures and Penalties Act 15 U.S.C. § 16(b)-(h); *United States v. Walt Disney Co.*, Proposed Final Judgment and Competitive Impact Statement, 83 Fed. Reg. 40553 (rel. Aug. 15, 2018) ("*Proposed Final Judgment*").

[2] *See* Antitrust Division Policy Guide to Merger Remedies at 28 (describing as a "fundamental test[]" of divestiture approval that the "divestiture of the assets to the proposed purchaser [does] not itself cause competitive harm.").

> combined entity would have greater leverage to threaten to withhold RSN programming from rival MVPDs than would a stand-alone RSN owner, thereby leading to increased MVPD licensing fees.

The proposed Final Judgment already provides the Division with the "sole discretion"[3] to approve a divestiture party for Fox's RSNs. But the Final Judgment should make clear beforehand that the Division will not permit any divestiture to a same-market broadcaster or same-market MVPD. A settlement permitting any such divestiture would not be in the public interest.

I. The Division Should Not Permit Disney to Divest Fox's RSNs to a Same-Market Broadcaster.

The Competitive Impact Statement described the problem that an ACA member would face in negotiating with a newly combined ESPN-Fox RSN—losing both sets of programming simultaneously is far worse than losing each set of programming individually:

> Prior to the Transaction, an MVPD's failure to reach a licensing agreement with Disney would result in the blackout of Disney's networks, including ESPN, and threaten some subscriber loss for the MVPD, including those subscribers that value ESPN's content. But because the MVPD still would be able to offer its subscribers the local Fox RSN, many MVPD subscribers simply would watch the local RSN instead of cancelling their MVPD subscriptions. In the event of a Fox RSN blackout, many subscribers likely would switch to watching ESPN. After the Transaction, an MVPD negotiating with Disney would be faced with the prospect of a dual blackout of significant cable sports programming, a result more likely to cause the MVPD to lose incremental subscribers (that it would not have lost in a pre-transaction blackout of only ESPN or the Fox RSN) and therefore accede to Disney's demand for higher licensing fees. For these reasons, the loss of competition between ESPN and the Fox RSN in each DMA Market would likely lead to an increase in MVPD licensing fees in those markets. Some of these increased programming costs likely would be passed onto consumers, resulting in higher MVPD subscription fees for millions of U.S. households.[4]

An ACA member would face this exact problem in negotiating simultaneously with a Fox RSN and a same-market, big-four broadcaster, [5] which invariably controls sports rights at

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[3] *Proposed Final Judgment*, 83 Fed. Reg. at 40557 § IV.A (requiring Fox to divest its RSNs "in a manner consistent with this Final Judgment to one or more Acquirers acceptable to the United States, in its sole discretion").

[4] *Id.*, 83 Fed. Reg. at 40564 § B.2.

[5] By "same-market broadcaster," we refer to a television station located in a designated market area served by the RSN at issue. Thus, for example, WTTG-5 is in the Washington DC

least as important as those controlled by ESPN. Absent the combination, failure to reach an agreement with the RSN would result in some subscriber loss—but other subscribers would watch the broadcaster's programming instead. With the combination, the ACA member would be faced with the prospect of a dual blackout, making it more likely that it would lose incremental subscribers.[6] It would thus be more likely to accede to demands for higher fees. This may be because the broadcaster's sports programming constitutes a partial substitute for the RSN's programming—a conclusion not inconsistent with the Division's original conclusion that broadcast programming is not a *sufficiently strong* substitute to prevent harms from the Fox RSN-ESPN combination.[7] Or it may be true regardless of substitutability.[8] Regardless of the theory, the best empirical analysis, conducted by the FCC's economists, suggests that RSN-broadcast combinations lead to higher prices.[9] The Final Judgment should reflect that fact here.

DMA, which is also served by Comcast's NBC SportsNet Washington, an RSN. So WTTG would be a "same-market broadcaster" with respect to NBC SportsNet Washington. (Please note that RSNs often cover multiple markets. NBC SportsNet Washington, for example, covers both Washington and Baltimore. So WBFF-45 in Baltimore would be a "same market broadcaster" with respect to NBC SportsNet Washington as well.) By "big four" broadcaster, we refer to stations affiliated with the ABC, NBC, CBS, and FOX networks, each of which offers "must have" sports programming.

6 We note that Sinclair appears to have expressed interest in obtaining Fox's RSNs. Gerry Smith, *Sinclair Considers Tapping Private Equity to Buy Fox Sports Networks*, Bloomberg (Oct. 2, 2018), *available at* https://www.bloomberg.com/news/articles/2018-10-02/sinclair-mulls-tapping-private-equity-to-buy-fox-sports-networks. By our calculations, Sinclair's broadcast stations overlap Fox's RSNs to a greater extent than do Fox's own broadcast stations.

7 *Proposed Final Judgment*, 83 Fed. Reg. at 40563 § II.B.

8 For example, it may be that increased size permits a broadcaster to claim a larger share of the joint gains from agreement—what economists call "bargaining power" or "bargaining skill." Or it may be that MVPDs are risk averse, and their marginal disutility from lost income increases in the amount of income lost. Or, in certain circumstances, combining negotiations for two sets of "must-have" programming could make the demand for each type of programming less sensitive to price. *See*, *e.g.*, Comments of the American Cable Association at 26 *et seq.* and Attachment 1, FCC Docket No. 15-216 (filed Dec. 1, 2015) (containing submission by Michael H. Riordan, Professor of Economics at Columbia University).

9 *See Comcast Corporation, General Electric Company and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 137 (2011) (finding that "an analysis of the relevant data, presented in the Technical Appendix, suggests that joint ownership of an RSN and broadcast station in the same region may lead to substantially higher prices for the jointly owned programming relative to what would be observed if the networks were under separate ownership").

II. The Division Should Not Permit Disney to Divest Fox's RSNs to a Same-Market MVPD.

While divestiture of Fox's RSNs to a broadcaster would replicate the problem that the Division identified in *this* proceeding, divestiture to a same-market MVPD[10] would replicate the problem the Division identified in seeking to block the AT&T-Time Warner merger—a *vertical* combination of Fox's RSN programming and MVPD distribution will lead to price increases.[11] Here is how the government explained its concerns about vertical integration:

> Pre-merger, a blackout of Turner programming on Charter (for example) cost Time Warner license fees from Charter and advertising revenue from reduced viewership, and it cost Charter current and potential customers because its service is less attractive without the desirable Turner programming. Crucially, post-merger, that same blackout is less costly to AT&T than it had been to Time Warner alone because some Charter subscribers will switch to AT&T's DirecTV or UVerse. . . . It is precisely because of this diversion to DirecTV (which would have the competitively valuable Turner content) that the costs of blackouts to the merged entity would be lower than absent the merger. Because—solely as a result of the merger—the costs of not reaching a deal are reduced, Time Warner will have increased leverage to negotiate better terms with rival distributors. Exercising that leverage will result in increased programming fees for those rival distributors—lessening competition among DirecTV and its rivals—and ultimately increasing prices for millions of American consumers.[12]

So too if Fox RSNs are divested to a same-market MVPD.[13] Today, if Fox fails to reach agreement with an ACA member, it loses license fees and advertising revenue. If combined with an MVPD that competes with the ACA member, however, the calculus changes. The *RSN* loses license fees from the ACA member and advertising revenue. But the *competing MVPD* gains

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[10] By "same-market MVPD," we mean an MVPD offering service within the RSN's service area. Please note that AT&T and DISH both provide service nationwide, and would thus be "same-market MVPDs" with respect to all Fox RSNs.

[11] The Division has identified this concern previously. *See United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. 2011), § II.D.2.A. So too has the Federal Communications Commission. *See, e.g.*, *Adelphia Commc'n Corp., and Time Warner Cable*, 21 FCC Rcd. 8203, ¶¶ 122-65 (2006) ("*Adelphia Order*").

[12] Proof Brief of Appellant at 33-34, *United States v. AT&T Inc.*, No. 17- 2511 (D.C. Cir. 2018).

[13] *See* Mike Farrell, "It's Game On for Fox RSN Sell-Off," Multichannel News (Aug. 28, 2018) (listing as potential suitors John Malone; Liberty Media; Madison Square Garden's ruling Dolan family or Dolan-controlled entities such as MSG Networks; AT&T; Verizon; and Comcast), *available at* https://www.multichannel.com/news/its-game-on-for-fox-rsn-sell-off.

new fees from subscribers who switch to it from the ACA member in order to retain their RSN programming. There is, in other words, a "silver lining" for the combined RSN/MVPD if it fails to reach a deal. This gives the combined entity additional leverage—which means that prices will increase.[14]

Of course, as the *AT&T-Time Warner* litigation has made clear, a key factor in determining the magnitude of concern about vertical integration is the so-called "diversion rate"—that is, how many subscribers will switch providers in order to retain particular programming. This, in turn, depends on the importance of the programming itself. In this regard, we would note that the *AT&T-Time Warner* merger did not involve RSNs at all. And the Federal Communications Commission has considered RSNs paradigmatic "must have" programming—the kind of programming for which subscribers will switch providers—for at least fifteen years.[15] Vertical integration involving RSNs, in other words, should concern the Division at least as much as does any other type of vertical integration.

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Again, we very much appreciate the Division's efforts to address concerns related to the combination of Fox's RSN assets and Disney's ESPN.[16] But it would not be in the public interest to permit the divestiture of Fox's RSNs to a same-market, big-four broadcaster or to a same-market MVPD. Moreover, since the antitrust problems raised by these kind of divestitures are evident before the fact, the Division need not expend the resources to examine such divestitures individually or after the fact.

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[14] *See* Amicus Brief of William Rogerson and the American Cable Association at 11-12, *United States v. AT&T Inc.*, No. 17-2511 (D.C. Cir. 2018).

[15] *Gen. Motors Corp. & Hughes Elecs. Corp.*, 19 FCC Rcd. 473, ¶ 147 (2004); *News Corp., DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd 3265, ¶ 87 (2008); *Adelphia Order* ¶ 128.

[16] Press Release: "ACA Applauds DOJ For Requiring Disney To Divest 22 Fox Regional Sports Networks" (June 27, 2018), *available at* http://www.americancable.org/aca-applauds-doj-for-requiring-disney-to-divest-22-fox-regional-sports-networks/.

Respectfully submitted,

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