Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 14-57
Comcast Corp. and Time Warner Cable Inc.	)	
	)	
For Consent To Transfer Control of	)	
Licenses and Authorization	)	
	)	

COMMENTS OF CALIFORNIA BLACK MEDIA

October 14, 2014

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I. Introduction

Yes, there are more channels on television than in the past and there are certainly larger cable systems offering more cable programming than before. However, it would be a mistake to conflate the amount of services available, with the meaning that there is more diversity present than before. Many of the so-called current "diverse" channels present are offering the same kind of programming, showing the same types of shows, showing reruns of shows that have long left the air or are owned at least partially by Comcast. This is not true diversity as elaborated by the Federal Communications Commission (FCC). Diversity in cable television is not present, the goals of the FCC and Congress in creating several of the Communications Acts, specifically the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), have not been fulfilled, and Comcast has neglected to address the issue in anything more meaningful than a footnote in reply to parties presenting substantive and legitimate concerns, that should warrant serious consideration by the FCC.

Comcast's lack of response to communities that they claim to care about through touted statistics is telling. Media diversity is important, not simply for financial gains but for the good of the broader public interest. There are studies that show that the ways minorities are portrayed and treated on mainstream media is "scarce and shallow."[1] In contrast to what is offered by to mainstream media, the stations that are minority *owned and managed* bring about more minority-centered content that focus on the issues and concerns that are truly important to minority

[1] Why You Should Care About Media Diversity. The Leadership Conference. *Available at* http://www.civilrights.org/media/ownership/care.html.

communities in significant ways- not just entertainment.[2] This matters both in the home and in the communities that minorities reside..

II. Public Interest Harms Outweigh The Benefits Of The Transaction

In their response to opposition against the merger, Comcast correctly notes that the consideration the FCC is looking towards is whether the transaction "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the (Communications) Act or related statutes."[3] Comcast however neglects to note that the public interest standard followed by the FCC looks not only at the economic outcomes by the "broad aims of the Communications Act,"[4] but also areas that include "ensuring a diversity of information sources and services to the public."[5] It is not simply limited to how the transaction has worked in the past, but also how the current transaction will affect future services.[6] Comcast has sorely, and markedly, neglected to address this in their reply brief despite the numerous groups that have pointed this out. Opponents have pointed this out not as extortionists looking to strong arm Comcast for a hand out, nor as participants in the market who believe that this is going to have negative impact on their bottom line, but as believers in the basic freedoms underlying the Communications Act. To suggest economic self-interest as the primary motivating factor for opponents of this merger is both condescending and dismissive of legitimate concerns about the issues at hand, and is tantamount to character assassination and

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[2] *Id.*
[3] Comcast Response to Petition at Page 31.
[4] *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348,12364, ¶31 (2008).
[5] Jon Sallet. FCC Transaction Review: Competition and the Public Interest. FCC. *Available at* http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest.
[6] *Id.*

equivalent to bullying. One might suspect that Comcast's dismissive response to questions about its commitment to programming diversity reflects the kind of heavy-handed approach that could become even more severe with the kind of control and market power it is seeking in this merger. Can such a large communications and entertainment giant committed to limiting the information options of its customers be trusted to be a good corporate citizen or just another corporate profiteer without regard to the public interest. The opposition to this merger has raised its voice simply because as it currently stands, the prototype offered by Comcast is not only unsatisfactory for protected classes, it stands in the face of public interest and is itself, a blatant public harm.

To begin, Comcast asserted that the approval of the license doesn't effect a per se violation of the Act.[7] However, the Communication Act of 1934 is not the only act that the FCC takes into account. The Cable Act stands as law as well, and Comcast stands in violation of it - a fact that has been pointed out repeatedly. A violation of the Cable Act does not necessarily require that proponents take Comcast to court as Comcast asserts, although that it is an option, because the violation can be dealt with in this forum. The proposed merger of Comcast and TWC stands as the appropriate forum to address the violations of Comcast and assure that they do not continue in the future.

The Communications Act of 1934 charged the Commission with insuring that broadcasters "present those views and voices which are representative of [their] community and which would otherwise…be barred from the airwaves." The Cable Television Consumer Protection and Competition Act of 1992 amended Part II of Title VI of the Communications Act of 1934 to add a section for the Development of Competition and Diversity in Video Programming and Distribution. The amendment provides that cable operators "cannot engage in methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is

[7] Comcast Response to Petition at Page 23.

to hinder significantly or to prevent any multichannel video programming distributor from providing satellite programming…. to subscribers or consumers."[8] Comcast has committed a per se violations of this rule of which one such example is their violation of "neighborhooding", and further intends to commit others by merging with Time Warner Cable (TWC). Comcast has its own programming which it acquired in the NBCUniversal transaction. It proudly boasts that after this merger with TWC it will only own 1 out of every 7 channel present on its network.[9] What it neglected to note was that it was previously cited by the FCC for acting anti-competitively with one of the 6 out of 7 networks that it did not own.[10]

Additionally, Comcast chooses to also ignore its public interest harms and shows what it believes to be the public interest benefits. For two pages Comcast lists the benefits of the merger and simply ignores diversity as an important concept despite the FCC's commitment to progress in that area. Comcast spent nearly the same amount of pages, two and a half, addressing the concerns of the Latino community, yet providing only footnote addressing those of the African-American community despite receiving relevant comments from both groups. Both minority groups highlighted why the current merger is going to have a deleterious effect socially and economically on minority communities due to the inability to substitute the programming available on Comcast with other cable television. This is particularly so because the combined company will now have significant power over the television delivered into minority homes. The African American community should take note of the respect Comcast has shown to concerns about diversity in programming as they continue to enjoy reruns of shows that have not produced

[8] *Id.* at Section 628.
[9] Comcast Response to Petition at Page 98.
[10] Bloomberg TV filed a complaint with the FCC for Comcast not upholding its agreement created by the FCC on May 2, 2012. The agreement called for Bloomberg's new station to be put adjacent to channels in Comcast's "news neighborhoods." This was a condition to keep Comcast form favoring it's own news stations MSNBC and CNBC over independent stations.

new programming in decades an the lack of even a single news show reflecting that community's interest in the kind of public policy and news information available to virtually ever other minority community. Yes, even the followers of news programming produced by stations owners in the Great Britain and Middle East can depend on Comcast to meet their news information needs in a way Comcast has not considered important or relevant to the African-American community.

Comcast claims the benefits are "verifiable and non-speculative"[11] because they are similar to the ones that were delivered in the NBCUniversal transaction. Should that be true, then Comcast benefits are not benefits at all but merely a few show pieces dressed up and placed in front of the FCC for a pat on the back for their commitment to the status quo. Most notably, and that which requires deep investigation by the FCC, are the letters of support by minority groups submitted in support for Comcast. The FCC should be seeking interrogatories regarding the bias and influence behind Comcast's support. This is not to say that the "500" supportive comments are not all genuine, or that the groups do not believe that a larger Comcast cannot do some good, however every vote for support is not an genuine one. Apparently Comcast agrees, given their lambast suggesting economic incentive as the motivating factor on the part of objectors. One prime example is the OCA Asian Pacific American Advocates (OCA), an organization dedicated to advancing the social issues for Asian Pacific Americans, which was quoted extensively in Comcast's reply brief.[12] The OCA was the recipient of major Comcast funds through the Comcast Foundation.[13] OCA is not a lone example. The New York Times noted that from the

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[11] Comcast Response to the Petition Page 3.
[12] Comcast Response to the Petition Page 95-96.
[13] See The Comcast Foundation awards $25,000 to OCA for Internship Program, OCA National. May 13, 2013. *Available at* http://www.ocanational.org/news/125499/. *See also* OCA Receives New Internship Funding from the Comcast Foundation, St. Louis Chinese American Foundation. *Available at* http://www.scanews.com/2008/07/s932/93212/. Several other articles available ever year detailing Comcast's contribution to the OCA.

very beginning of the merger process, Comcast went on a lobbying rampage in order to get hundreds of letters of support for the deal from members of Congress, state officials, and leaders of nonprofit and minority-led groups.[14] This lobbying rampage included campaigns for distinct ethnic group support.[15] The same support now touted in Comcast's response.

One example of items that should be investigated by the FCC as well includes Meredith Attwell Baker who voted to approve the former Comcast-NBCUniversal merger and then left the FCC to work for Comcast.[16] Again, this is not to say that members of a government organization cannot leave to join a private organization. However, soon before the departure of Ms. Baker from the FCC - Comcast receives a merger approval with NBCUniversal, and soon after the departure of Ms. Baker form the FCC- Comcast begins immediately gearing up for it's next merger with TWC. While there is no assertion of impropriety, we believe that even the potential appearance of impropriety should be addressed and the position of the FCC as an objective arbiter of the facts protected.

Comcast also extensively lays out the support it has received from networks it carries about the diversity and opportunity for increased viewership by partnering with Comcast.[17] The opportunities that Comcast has provided, it notes, have helped to launch small independent programming to the tune of over 160 channels and many of these are diverse. Included in this line up are the channels from the Memoranda of Understanding Comcast (MOU) created for the NBCUniversal merger: Aspire and REVOLT. Again, lifting the veil that Comcast hides behind reveals several things about the support they are receiving. For one, Aspire, which promised new

[14] Eric Lipton. "Comcast's Web of Lobbying and Philanthropy". NY Times. February 20, 2014. *Available at* http://www.nytimes.com/2014/02/21/business/media/comcasts-web-of-lobbying-and-philanthropy.html?_r=0
[15] *Id.*
[16] *Id.*
[17] Comcast petition at page 96-103.

content, is showing reruns.[18] There is nothing innovative about that concept or pushing for the promoting of true diversity in television. In a place where the FCC, under the Communications Act of 1934, is charged with making sure the views and voices on TV are representative of the community, particularly those "which would otherwise.. be barred from the airwaves," it is important for new stations that are picked up by a colossus such as Comcast to reflect that communities they serve. In particular there is no African American news station to match those of Telemundo or Univision. TV One, a joint venture between African-American owned Radio One and Comcast has a news feature but has been shown to be Comcast controlled when it ultimately matters. There are reports that an article concerning how several civil rights groups with funding from Comcast wrote in support of this merger causing the elimination of net neutrality.[19] Several sites, including NewsOne[20], then syndicated the piece. Soon, that news article was deleted from NewsOne's site, allegedly based on pressure from Comcast. This is a clear example of media that cannot be trusted to represent the community that it is suppose to serve in a manner that goes beyond its own selfish corporate needs.

Other independent networks have noted that the Comcast-NBCUniversal merger did not provide more opportunities for minorities, instead it produced channels that were only bought and distributed by Comcast.[21] While there is some good being done by the carriage of such networks like BabyFirst America who otherwise would not have launched, Comcast downplays

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[18] Mandalit Del Barco. "Comcast Deal Puts New Minority-Run Channels In Play." NPR. *Available at* http://www.npr.org/2013/11/12/244558834/comcast-deal-puts-new-minority-run-channels-in-play. Writer Anita Wilson Pringle notes "He promised innovative, new fresh ideas, new fresh programming and it's not… It's crap, if you really want to know the truth." Pringle also notes that the managers of Aspire are reshuffled from the Gospel Music Channel, this too is not increasing diversity in television if there are the same controllers.

[19] Lee Fang. "Comcast Affiliated News Outlet Censored My Article About Net Neutrality Lobbying." Republic Report. August 1, 2014. *Available at* http://www.republicreport.org/2014/comcast-affiliated-newsite-censored-my-article-about-net-neutrality-lobbying.

[20] A company owned by RadioOne, which has a company, TVOne, in partnership with Comcast.

[21] Sam Thielman. Independent Cable Networks don't agree on the Comcast-TWC Merger: Is It Good for the Little Guy or Not?" Adweek. February 21, 2014. *Available at* http://www.adweek.com/news/television/independent-cable-networks-dont-agree-comcast-twc-merger-155852

the carriage questions that were asked of them by opponents. Where is the other diverse programming on its networks? New and innovative programming, particularly that for African-Americans that is African-American owned? Which of these networks were given the helping hand that Comcast gave to Telemundo's news networks? If Aspire and REVOLT, both of which Comcast claims to not have significantly helped, is the answer-then the silence is deafening. [22]

Another benefit that Comcast, and many of their supporters mention, is that this merger provides tangible benefits for many diverse communities through its job creation and support of small companies.[23] This was also mentioned in the MOU required in the Comcast-NBCUniversal merger. Again however, Comcast chooses to show only part of the truth and ignore the rest. It does not mention it's giant class action racial discrimination suit in Chicago[24], or the suit filed against it for racial discrimination in Pennsylvania[25] to name a few. As well, this obscures the real issue. The complaints launched against this merger are not about money infusion into communities however, but about minority network carriage. It is noted though, that as Comcast expands - diverse communities are hurt by Comcast's oversight of their real issues, both on the television and in real life.

What is most harrowing about Comcast's response to whether its public interest harms in this transaction outweigh the public benefits is the claim that Comcast has delivered or over-delivered on promises.[26] In the merger with NBCUniversal, Comcast was required to make some

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[22] Similarly, Comcast claims to not have an interest stake in either network, simply to have provided financial and other assistance in the creation of both networks. However, evidence indicates that contrary to Comcast's statements, minority networks seeking carriage with Comcast have claimed that Comcast requires a stake. Sheila Shayon. "Comcast Kicks Off Celeb-Back Minority Owned Networks, But Will Anyone Watch? " Brand Channel. March 9, 2012. *Available at* http://www.brandchannel.com/home/post/2012/03/09/Comcast-Minority-Networks-030912.aspx

[23] Comcast petition at page 93-4.

[24] Comcastdiscrimination.com

[25] Tim Kenneally, "Comcast Hit With Lawsuit Claiming Racial Discrimination." The Wrap. February 25, 2014. *Available at* http://www.thewrap.com/comcast-hit-lawsuit-claiming-racial-discrimination/.

[26] Comcast petition at page 30.

changes in a MOU with the FCC. Good portions of those changes were about fixing Comcast's sorely lacking history with diversity in all areas of its company. The promises committed to in the MOU may have been appropriate for the scale of the merger with NBCUniversal, but are no longer valid when a company as large as Comcast-NBCUniversal vertically is looking to expand horizontally into nearly every large and relevant market in the United States. New promises that reflect an understanding of the magnitude of this merger, the impact of this merger on diverse communities, and show that Comcast is truly committed to the public benefits they assure are forthcoming are necessary.

Taken in sum, what Comcast has touted are thinly supported arguments regarding public interest benefits. They are not answers to the questions posed to them by opponents in reply to their request to merge. They are simply a show pony trotted out in hopes that real issues will be hidden.

CBM has previously stated what the real issues are and Comcast largely ignored them. First, there are First Amendment concerns present in this merger. With only a few major cable television carriers in the market there are only a few companies making editorial judgment about what is shown in a majority of American households. This minutiae of editorial judgment is only lessened in the arena post merger and this creates more First Amendment suppression. This is because the diversity of views and ownership in the broadcast industry are being constrained unless minority ownership and programming are specifically promoted. For without the promotion of greater diversity in news programming and editorial judgment diversity, diversity can only come with greater minority station ownership.

The second issue was that Comcast, in its merger with NBCUniversal became anti-competitively vertically by being granted the ability to own programming to compete with the

independent channels it was purchasing. It is now asking the FCC to allow it become anti-competitive horizontally in merging with TWC by taking its system into areas it previously did not have control over. This is particularly true in the more relevant minority markets where Comcast has increased viewership in cities such as New York City and the California Bay Area. This increased viewership now provides incentive for Comcast to discriminate against independent programming because it now owns the content and conduit in more places than before. In particular- the impact of its incentive to discriminate harmfully will be felt most strongly against African-Americans who will be relying on the programming and carriage choices of Comcast to receive the entertainment and news choices important to their community. The free competition of ideas that are necessary to the diverse communities will be stifled. This merger is not a public interest benefit- it is a public interest harm.

III. Comcast's Real Issue with Minorities Is In It's Current and Future Program Carriage

a. The Issues

In relation to the programming concerns raised, Comcast has once again confused issues. Not only did Comcast interchange whether the opposition was talking about their own carriage with Comcast or with the state of diversity in media general in conjunction with Comcast's impact on this diversity with their merger proposal, but Comcast called those opposing the merger and voicing their concerns: "extortionists" and "rent-seekers."[27] They did this claiming that if they provided carriage to everyone there would be silence and all the "rent-seekers" would vanish. Comcast did this providing no evidence that the "extortionate, anti-consumer[s]" would walk

[27] Comcast petition at page 249-50.

away. No quotes, no paperwork, no documentation. Not only is this inflammatory language degrading but also it misconstrues the subject at hand. Rather than respond to the opposition, Comcast would rather name-call and obscure responses to legitimate concerns in a footnote. Instead, Comcast's ability to be harmful to the diversity that the FCC has repeatedly exclaimed to aid needs to be discussed. There are true public interest harms that cannot be swept away into a dark corner.

It is not that opponents are using the proceedings to get favored carriage and then fall away once Comcast grants it,[28] it is that programmers[29] who happen to represent minority interests are worried about what a larger Comcast, one that will engulf most competition, will do to programmers who are similarly situated. This is both diverse programmers who exist currently, and diverse programmers who will hopefully exist in the future. Programmers are concerned that Comcast is going to have the ability to use its leverage after the merger to withhold diverse programming from the air. A power it has previously used.[30] Even the Commission expressed during the Comcast-NBCUniversal merger that Comcast would have the "increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[31]

Comcast in its reply has called everyone self-interested but their response is narrowly focused on a few complainants and it uses the issues with those complainants to try and extend it to all of the opposition.[32] This is simply not the case. As Comcast itself notes- the same arguments have been repeated by complainants. This is because the same arguments are valid-

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[28] Comcast petition at 149-150.
[29] California Black Media does not seek carriage on Comcast. Rather, it seeks to promote the issues found within the African American community on behalf of the proposed merger.
[30] Bloomberg Lawsuit. *Supra ntoe* 11. Note that Comcast tried to recharacterize the suit.
[31] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, 4284, 116 (2011).
[32] Comcast petition at 149-50.

regardless of the messenger. Carriage of a few companies by Comcast does not mean that the problem ends and that the argument is moot. Just like carriage of Aspire and REVOLT does not mean diversity in media is satisfactory.

Nor does, as Comcast claims, the lack of tried and true economists in a brief make the message any less relevant.[33] In fact, Entravision Communications Corporation has provided the "level" of analysis that Comcast deems acceptable for it to respond to.[34] Professor John E. Kwoka studied the effect of the proposed merger on the Latino market. He came to the conclusion that the video programming market is not a single market but many markets of which Latino market is a separate one.[35] Thus, so is the African-American market.[36] He also noted that within the Latino market, Comcast-TWC will be the largest video-programming distributor in all but four of the top twenty Hispanic markets.[37] Several opponents to the merger have noted the same thing in the realm of African-American markets.[38] Most notably Kwoka remarked that due to the merger, Comcast becomes a monopsony.[39] A monopsony that has the ability to have leverage over programming in such a way to drive down what it pays for programming. Leading to less investment, and having the incentive to prefer it's own programming to unaffiliated

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[33] *Id*. at 150.
[34] "Summary of Prof. John E. Kwoka's Study: An Economic Analysis of The Effects of the Proposed Merger of Comcast Corporation and Time Warner Cable Inc. on Program Providers Serving the Latino Market." Entravision Communications Corporation. (Hereinafter referred to Kwoka)
[35] *Id.*
[36] Note from our original petition.
[37] Kwoka, *supra* note 6.
[38] Comcast new markets in New York, Los Angeles, Dallas-Ft. Worth, and Houston will add a potential 2,585,600 African-American homes to the current 3,193,810 homes Atlanta, Chicago, Washington D.C., Philadelphia, Detroit, and Miami. Comcast Corporate News on new cities being added via the merger. "Time Warner Cable To Merger With Comcast Corporation To Create A World-Class Technology and Media Company." *available at* http://corporate.comcast.com/news-information/news-feed/time-warner-cable-to-merge-with-comcast-corporation. Statistics on Top 10 Designated Market Areas and African-American TV Households. National Association of Journalist. "Broadcast Television and Radio in African-American Communities." *available at* http://nab.org/mpres/BroadcastTVandRAdio-AACommunities_NAB.pdf.
[39] Kwoka, *supra* note 6.

programming.[40] Comcast's monopsony in their merger with TWC allows it to demand deals from programmers that are more generous to Comcast than smaller cable companies could. Larger companies like Disney or Discovery Communications may not be injured majorly by this ability, but small and diverse networks who do not have the financial backings to keeping up with Comcast will be. Comcast believes that it is not a financially smart decision to be discriminatory because these diverse networks can go to other carriers but Comcast also knows this is not ture. Even programmers who support Comcast have noted "[i]t's going to be critical for any programmer—and probably essential—to have success to get a deal done with Comcast."[41] When suppliers of diverse content do not have a lot of enticing options for carriage they may decide to quit offering their content. The merging of competing buyers such as Comcast and TWC can lessen competition in a way that is harmful to the sellers of diverse content and diverse owners. This is the definition of harmful to the public interest. Being "…told you can't reach 30 percent of a potential market..."[42] is significant, even from the mouths of those who have carriage. That is harmful to the public interest.

There are several arguments Comcast makes to ensure the FCC that it is not leading away from diversity but rather enhancing it. The first is that it has editorial judgment in selecting which networks to carry. Opponents do not wish to take away Comcast's decisions as to what is appropriate for their channel, opponents simply ask that the FCC does what it has in previous cases where editorial control has been tightened - to see whether Comcast is "acting to ascertain

[40] *Id.*
[41] Sam Thielman. "Independent Cable Networks Don't Agree on Comcast TWC Merger. Is It Good For The Little Guy?" *Ad Week. Available at* www.adweek.com/news/television/independent-cable-networks-don't-agree-comcast-twc-merger-155852 . Quoting Brad Samuels of Ovation, currently distributed by Comcast.
[42] David Ingram. "Not a Typo, Monopsony in Spotlight in U.S. Cable Deal." Reuters. Febuary 21, 2014. *Available at http://www.reuters.com/article/2014/02/21/us-usa-comcast-monopsony-analysis-idUSBREA1K1VI20140221*.

issues of concern to its community and to respond to those issues."[43] In previous cases, Comcast has argued that "[a] lot of rules that allow the FCC to interfere with the editorial judgment of cable programmers were created in a world where the need to protect competition was the sole justification for regulation, and the principal basis on which these regulations were upheld."[44] These rules were created in a time when the FCC and Congress were afraid of the effects of consolidation on the market and for the effects of diversity on television. While previous competition has allowed a space for programmers and networks to have options to deliver their content, the increasing consolidation of cable companies changes the landscape with which the FCC should be looking at. This is especially pertinent in this merger that Comcast is seeking permission for, as this consolidation will increase Comcast's share of the market in cities with a significant diverse population.[45] The regime where the FCC needed to step in and regulate is back. Even if Comcast were to give away some of its customers to Charter to meet the 30% threshold to not be considered anti-competitive numerically, Comcast will engage in a strategy to get those customers back. As Comcast argued in *Comcast v. Tennis Company*[46], this is a financially driven transaction and a financially driven company. Good business means a better bottom line, which results in more customers and Comcast paying less for channels. Good business for Comcast means less diversity and more public harms.

This falls into Comcast's next argument that it cannot carry all networks.[47] This presents a problem. How does a diverse independent station get off the ground if it does not receive

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[43] http://www.broadcastlawblog.com/2014/08/articles/fcc-decisions-including-fox-tv-renewals-focus-on-fcc-limits-in-assessing-programming-claims-in-reviewing-license-renewals/ FCC v. Fox Television Stations, 132 S. Ct. 2307.
[44] Jeff Sistrunk. Appellate MVP: Gibson Dunn's Miguel Estrada. Gibson Dunn. December 02, 2013. *Available at* http://www.gibsondunn.com/publications/Documents/Estrada-AppellateMVP-2013.pdf.
[45] See footnote 38 regarding the increase in African-American market segments from the merger with TWC.
[46] Tennis Channel v. Comcast. FCC 12-78. Comcast carried the Tennis Channel as a premium channel and the FCC mandated it be made to carry it widely. It was competing against channels owned by Comcast such as the Golf Channel and NBC Sports Network.
[47] Comcast response petition page 251- 2.

carriage from Comcast, or if Comcast does not even consider the petitions for carriage before it by diverse channels? No petition against Comcast asks for carriage of every independent station that exists. Very few petitions ask for carriage of their stations. Comcast argues that independent programmers have other options such as carriage on Dish or AT&T but even companies with carriage on Comcast who support the company have noted that you need carriage with Comcast to be successful.[48] Comcast would argue discrimination is bad for their bottom line as consumers like diverse channels. However, carrying more diverse channels and investing the resources into independent diverse networks like it has previously done costs money. Why should Comcast invest in new networks when it has what it considers enough networks at this moment?[49] Why should Comcast seek diversity in its news and entertainment programming and minority station ownership, especially in the African American community, unless the Commission, as it has done in the past, directs it to do so? What is bad for business for Comcast is spending more money.

As Comcast has shown, what may cost them an FCC fee or two in the short run can be good for business in the long run. The ability of Comcast to remove the Tennis Channel from wider carriage by coupling it in the less expensive packages is an example of this.[50] Comcast selected the Tennis Channel to be included in a more expensive package while it favored it's own affiliated channels, the Golf Channel and Versus. In July 2012, the FCC gave Comcast a $375,000 fine and an order to put the channels on equal footing with their own. The D.C. Circuit Court ruled that not enough evidence was present to show that Comcast received a benefit from the move, but Comcast called the move financially driven. Unfortunately as history has

[48] Brad Samuels of Ovation, currently distributed by Comcast. Independent Cable Networks *supra* note
[49] See Comcast Response Brief page 99,
[50] Tennis Channel *supra note* 48.

progressed, Comcast's drive to be financially powerful has resulted in Comcast becoming discriminatory to public interests.[51]

b. Carriage

The main problem with Comcast's argument in its reply brief is that it confuses the argument of content with the argument of carriage.[52] The argument that is being raised in both the original opposition brief and in this brief is one of both content and ownership- not simply that there are not enough shows showing black faces on television. The problem with Comcast currently, and that which will be exacerbated by the merger is that Comcast does not carry African American owned channels. This is not in the public interest but rather in the business interest of Comcast. According to Comcast, the current amount of carriage is not a problem because there are other channels that have shows with African Americans on them and thus the opposition should be satisfied. In fact in their update on their MOU, Comcast details all the channels and shows that have African-American faces. As previously stated, African-American programming is not the same as African-American ownership when it pertains to diversity. Comcast in "blackface" is simply not enough.It does not have the same effect on diversity in real life and the same effect on the public interest. Simply because someone or some show is African-American does not mean that it represents a community as though it is a monolith. Examples such as Real Housewives of

[51] See claims from The NFL Network regarding placement of its unaffiliated channel in 2006. There was a settlement after Comcast made statements. "In April 2009, Comcast CEO Brian Roberts testified that Comcast was willing to move the channel from the Sports Entertainment Package to a lower priced base package if the subscriber fee was reduced to 25 cents per month. NFL Network charged 75¢ per month. He claimed Comcast saves $50 million a year in license fees by leaving the channel on its Sports Package."
[52] Comcast reply brief, pages 99, 101, 104, and 111.

Atlanta on Bravo[53] are not an accurate substitute for news channels or other substantive and diverse shows.

Comcast instead of discussing why it does not own more than two "completely" African-American owned networks other than Aspire and REVOLT, chooses instead to focus on content. It does not even focus on video programming exclusively- detailing their microsites as though they stand as an accurate and complete substitute for television, they do not. As Comcast itself notes in the reply brief, Internet is an essential in minority communities who often do not have access to it.[54] Yet, in a complete confusing moment, pages later Comcast touts the availability of individuals to have access to African-American programming, and thus diversity, available via the very Internet they often do not have access to. In economics, a substitute good is one that can replace another without a change in preference. Unfortunately with no way to access to the microsites there is no way to have options. No options- no substitutes.

Furthermore, the independent television stations are not enough. Studies have shown that Latinos and Blacks do not trust the media to portray them correctly.[55] People of color want news about their communities and are not happy with the news that they are seeing on mainstream shows on channels like CNN or FOX News, according the American Press Institute.[56] In fact, it has been noted that "[i]t matters who the owners are, it matters who the producers are… because that's often the agenda or the slant of the media and news coverage."[57] There are differences, significant differences even between Latinos and Blacks in perception. 75% of blacks believe

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[53] Cited in ComCast's MOU.
[54] Find Comcast reply brief at page 54.
[55] Associated Press. *Study: U.S. Latinos & Blacks Don't Trust How Mainstream Media Portrays Them.* SacObserver. *Available at* http://sacobserver.com/2014/09/study-u-s-latinos-blacks-dont-trust-how-mainstream-media-portrays-them/.
[56] *Id*.
[57] *Id*. citing Howard University Strategic, Legal and Management Communications professor Tia C.M. Tyree.

that the information on their communities is inaccurate while 66% of Hispanics do.[58] This is due to the access that each minority group has to their own media.[59] Comcast has had a great hand in this imbalance, as they have repeatedly pointed out, with the development of Telemundo and the new carriage of Univision. Similar carriage of African-American news powerhouses does not exist and Comcast makes no acknowledgement of it. Simply put, having Comcast refuse to face the facts of the consequences of the merger on the very people it claims to be helping and the push through of obscure trade-offs is an insult worse than being labeled extortionists.

c. Anti-Trust Claims

Finally, Comcast claims that objections to the merger are not transaction specific. Comcast confuses an industry-wide problem with Comcast's exacerbation of the situation. The harms identified: vertical harms, horizontal harms, harms to the public interest on behalf of diverse programming, are problems being created or exacerbated by Comcast merging with TWC. Yes some of these issues existed when Comcast merged with NBCUniversal but they should not be allowed to dog pile in this transaction.

Additionally, these are not arguments simply repeated from the NBCUniversal merger,[60] these are arguments based in a brand new landscape. Before Comcast was obtaining programming from NBCUniversal to use in the current markets that it owned and now Comcast is expanding out into new markets to have expanded control in new areas. This is no longer an issue of vertical anti-trust issues only, but also horizontal issues as well. As previously said, the FCC was worried when Comcast merged with NBCUniversal that it would use it's leverage in

[58] *Id.*
[59] *Id.*
[60] Page 195-6 and 239.

the market along with it's control over NBCUniversal programming to be discriminatory to other networks.[61] Due to that, the FCC applied conditions to the merger to protect diversity interests, and Comcast repeatedly broke the agreement to abide by those conditions. Comcast notes that there is very little additional programming added thus the foreclosure strategy cannot happen here because there is no "incentive or ability."[62] However Comcast fails to realize that old programming plus the new territory *is* the problem. Even if they shed customers, they will actively be working to gain new ones in their new areas- many of these areas are full of diverse candidates who are simply becoming sitting ducks awaiting harm by Comcast.

Comcast's hired economists downplay these effects by looking solely at the effects the transaction would have on whole, despite the fact that there are separate markets that commenters have noted. Consumers, Comcast's economists note, benefit by having "slower growth in subscription fees" because Comcast's new size and power allows them to negotiate more favorable terms in programming.[63] They argue that the increase in size for Comcast raises the stakes but does not show clear leverage for either side because Comcast and TWC did not previously compete in the same areas.[64] This is precisely why this is incorrect. Previously if a diverse network wanted carriage across the United States so that it could be recognized as a viable network and gain carriage with other cable networks, it had several options in different markets, in that TWC in one market and Comcast in other markets may pick it up. There were two different boards with two different modes of editorial control, which is key. What is occurring after the merger, what is important, is that Comcast is swallowing the option for more

[61] Application of Comcast, *supra* note 4.
[62] Comcast response to petition at 239.
[63] Comcast Response Petition. Exhibit 2. Page 20. Note that Comcast's own Mr. Cohen has said ""We're certainly not promising that customer bills are going to go down or even that they're going to increase less rapidly." Thus negating the Economist's conclusions.
[64] *Id.* and at page 38.

diverse networks to enter the market. Comcast is swallowing more points of entry and editorial control and replacing it for it's own.

Furthermore, the economists note that it is not important to show the use of market power by counting how many channels are on what tier[65] but this is incorrect. Comcast can, and has used its power in the market to delegate networks to tiers based upon a variety of factors including whether it competes with Comcast's programming. More importantly, diverse channels are often put into high price packages that are kept out of the range of individuals who are most likely to purchase basic packages, and are most likely to be lower income individuals and minorities.

The economists do respond directly to Professor Kwoka's argument regarding Hispanic programming. However, like Comcast in general, the response is limited and ignores the general scope of the problem. The problem is that networks need subscribers in order to be successful in the long run. In order to prove that they can be successful companies. As stated numerous times, due to Comcast's increasing size and expansion it is no longer the case that carriage anywhere will allow a network to be successful. This is not to suggest that every company needs or deserves carriage on Comcast, but rather Comcast is in denial of this fact and the obscuring of complaints reflecting the new role that Comcast is asking to take on. This not about publicity or public support[66]- this about the public interest benefits this transaction does not have and the extreme public harms that it does.

IV. Conclusion

Put simply, this transaction has few benefits. Those benefits do not outweigh the harms this transaction brings to many areas- particularly those to diverse communities. Diversity on

[65] *Id*. at page 24.
[66] Exhibit 2, Supra note 32 at page 37.

television requires diverse programming and diverse ownership. Not only does Comcast not recognize that in its carriage choices but also when pointed out to them, they resort to name-calling and finger pointing. Comcast only protects diverse viewpoints when forced to by the FCC thus the transaction should not be allowed unless there is protection for diverse viewpoints.

What has been asked is that a public mandate be attached should the FCC decide to move this merger forward. A public mandate is one that includes a requirement that Comcast and TWC carry more independently owned African-American television stations than the ones required in the MOU from the Comcast/NBCUniversal merger. These stations should include news channels, movie channels, children's programming and other programming from diversified communities.