

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of Comcast Corp.,)	MB Docket No. 14-57
Time Warner Cable Inc., Charter)	
Communications, Inc., and)	
Spinco)	
)	
For Consent To Assign and)	
Transfer Control of)	
Licenses and Authorizations)	

**RESPONSE OF CONSUMERS UNION AND COMMON CAUSE
TO APPLICANTS' OPPOSITION TO PETITIONS TO DENY**

December 17, 2014

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I. Introduction

Consumers Union (CU) and Common Cause hereby submit this reply to the opposition of Comcast Corp. in reference to the above-captioned application. Applicants have not met their burden of proving that the proposed transaction is in the public interest. Nothing in their opposition further substantiates any of their claimed benefits or refutes the concerns raised by Consumers Union and Common Cause. Despite Comcast's assertions to the contrary, the merger will harm competition and impact consumer choice all across the nation, regardless of whether the two companies are competing directly head to head for the same subscribers. Applicants have not made a convincing case that significant economic efficiencies would result or would be passed along to consumers. The merger will not result in lower prices for consumers, and any technological advancements or improvements in service are tenuous and not dependent on the merger. As Comcast expands its reach and market power into the broadband market and into adjacent markets, it will find new ways to favor its own content and exert even more control over every aspect of the viewing experience, to the detriment of current and future competitive options for consumers. The Application should be denied.

II. Comcast Presents a Distorted View of Competition in the Marketplace

Comcast continues to make the same tired argument that because there is no geographic overlap in the areas where the Applicants serve subscribers, the transaction poses no threat to competition. As explained at length in our initial filing, this merger would give a single company unprecedented control over key video programming, together with unprecedented control over the means by which video programming is distributed to American consumers, and would create a 'national gatekeeper' of the Internet. The merger will have harmful effects for consumers far beyond the areas in which the two companies might compete directly head-to-head for

subscribers, resulting in higher prices, fewer choices, and less incentive to respond to consumers' needs.

A. Comcast Improperly Considers DSL and Wireless as Part of the Relevant Broadband Product Market

In an effort to understate its market power, Comcast claims that post-merger it would control only 35.5% of the broadband market. However, its claim to this low figure is based on broadband speeds as low as 3 Mbps and includes DSL and wireless in the relevant broadband product market.¹ A speed threshold of 25 Mbps is more relevant to the broadband market definition in the context of this proceeding, since broadband at that speed is what is necessary for online video to fully replace an average household's current cable video consumption. Recent remarks by Chairman Wheeler provide further support for considering that speed as the threshold for adequate broadband today, and for rejecting Comcast's claims that DSL and mobile broadband options are part of the same product market.² Comcast already dominates the market for all broadband services, and particularly for these advanced broadband services at speeds of 25 Mbps and above. The merger would give Comcast control of nearly half of these broadband subscribers at these speed tiers.

Consumers do not consider DSL as a true substitute for the high-speed broadband services at issue in the merger. Not only do DSL's slower download speeds fail to meet the Commission's current definition of broadband, but the Commission itself has stated that they are

¹ Opposition of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign Or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, at 21 (Sep. 23, 2014) (arguing that "customers who have opted for higher speeds would see DSL and wireless as a serious alternative if their current broadband provider were to degrade their service by blocking or slowing an edge provider's service").

² Prepared Remarks of Tom Wheeler, Chairman, FCC, "The Facts and Future of Broadband Competition," (Sep. 4, 2014) (referring to the Commission's current definition of broadband as "yesterday's broadband"), *available at* <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition>.

inadequate to meet consumers' evolving needs.³ As the Commission recently recognized in its *Measuring Broadband Report*, consumers continue to migrate to higher speed tiers,⁴ and DSL cannot sustain what consumers need and expect for their broadband needs.

Nor do consumers see streaming mobile services as substitutes for the traditional offerings they receive in the home. Streaming services require a certain threshold level of quality and speed to function, but a number of factors make it difficult – if not practically impossible – for consumers to treat mobile options as real substitutes to traditional fixed broadband.⁵ For example, wireless carriers' throttling practices, which Consumers Union has spoken out against,⁶ restrict consumers' ability to use data, limit consumer choice, and add to the ever-increasing costs of Internet access for consumers. Throttling – a practice which each of the major wireless carriers has in place – allows the carrier to slow down user speeds under certain circumstances. Carriers claim that they engage in these practices solely to deal with congestion, but the end result for consumers is that they can be throttled down to network speeds that cannot even support streaming video. Even when consumers are not throttled, it is far too cost-prohibitive to stream video on mobile devices in the way one would in the home. As *The Consumerist*, a publication of our organization, concluded, it would cost about twenty times more to stream programming over a mobile network rather than over Wi-Fi into the home.⁷

³ See Federal Communications Commission, *2014 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the U.S.* (June 18, 2014) (“2014 Measuring Broadband Report”), available at <http://www.fcc.gov/reports/measuring-broadband-america-2014>.

⁴ 2014 *Measuring Broadband Report* at 12.

⁵ See also John B. Horrigan, PhD, *Smartphones and Broadband: Tech Users See Them As Complements And Very Few Would Give Up Their Home Broadband Subscription In Favor Of Their Smartphone*, November 2014, available at https://www.publicknowledge.org/assets/uploads/blog/Smartphones_and_Broadband.pdf.

⁶ Glenn Derene, *FTC Sues AT&T Over Cellular Throttling*, ConsumerReports.Org (Oct. 28, 2014) available at <http://www.consumerreports.org/cro/news/2014/10/ftc-sues-at-t-over-cellular-throttling/index.htm>.

⁷ See Kate Cox, *Comcast Says Mobile Data Is Competitive, But It Costs \$2K To Stream Breaking Bad Over LTE*, (Aug. 18, 2014) (concluding that IT COULD cost a consumer nearly \$2000 to stream an entire season of a TV series on a mobile phone) available at <http://consumerist.com/2014/08/18/comcast-says-mobile-data-is-competitive-but-it-costs-2k-to-stream-breaking-bad-over-lte>.

Comcast takes a Consumer Reports finding out of context in an effort to support its argument that consumers are willing to give up their broadband connections for alternatives such as DSL and wireless.⁸ While our survey found that consumers would attempt to switch to a competing service if a provider blocked, slowed down, or otherwise degraded popular streaming services such as Netflix, the survey did *not* conclude that consumers are willing to switch to give up broadband for DSL or wireless. Rather, as we recounted in our petition to deny, consumers often have no competitive alternatives and find themselves with no meaningful options because of the way the cable market is carved up into monopolized geographical clusters.

B. In an Effort to Downplay its Market Power, Comcast Overstates the Competitive Threat it Faces from Over-the-Top (OTT) Providers

Comcast has also sought to downplay the harmful impact of the merger by claiming that it faces meaningful competition from OTT providers. However, Comcast is in a unique position as a vertically integrated operator. Online offerings are at a distinct disadvantage relative to Comcast because they must rely on Comcast to reach most of the nation's video programming customers. Online video has the potential to be an attractive alternative to expensive traditional packages, but its continued existence and sustainability depends on its ability to reach consumers.

Comcast seeks to convince the public and regulators that any concerns about its vertical integration with content providers were already addressed in the 2011 transaction between Comcast and NBCU Universal and therefore that they are irrelevant to the transaction at hand. But a number of examples in the record indicate that Comcast has interpreted many of its commitments in a way that continues to allow it to disadvantage its competitors. Both the Commission and Department of Justice have recognized that as a vertically integrated company

⁸ Comcast Opposition at 22.

with control over both the content and the means by which that content reaches consumers, Comcast is in a particularly powerful position to engage in anti-competitive practices and raise costs for consumers. The proposed merger would significantly increase that power.

Comcast argues that "in situations where Comcast and an edge provider are in competition for customers, Comcast has an incentive to reach a mutually beneficial vertical arrangement" with that edge provider.⁹ Furthermore, it argues that it has no incentive to engage in anticompetitive behavior because if consumers were to learn of this behavior they would not stand for it. However, Comcast is able to utilize its market power to harm competition in a variety of subtle ways, such as by putting in place data caps and exempting its own services from such caps, refusing to make investments that are necessary to ensure the smooth delivery of programming to consumers, or striking deals that raise costs for OTT providers and ultimately result in higher prices for consumers.

Comcast has experimented with data caps, suspending caps in some markets while testing tiered approaches in other markets.¹⁰ In the past, Comcast has applied these caps to competitor services like Netflix or Amazon, while exempting its own streaming services.¹¹ While Time Warner Cable (TWC) has stated an intention not to subject its consumers to data caps, a larger, more powerful Comcast will have a strong incentive to use data caps to favor its own content, especially as more consumers are cutting the cord and turning to broadband for video content. As

⁹ Comcast Opposition at 206.

¹⁰ Comcast Blog, Comcast to Replace Usage Cap With Improved Data Usage Management Approaches (May 2012), <http://corporate.comcast.com/comcast-voices/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches>.

¹¹ See Kate Cox, Comcast-TWC Merger Could Bring Broadband Data Caps To Pretty Much Everyone, The Consumerist (Apr. 14, 2014), <http://consumerist.com/2014/04/14/comcast-twc-merger-could-bring-broadband-data-caps-to-pretty-much-everyone/>.

others have reported and a recent Government Accountability Office report concluded,¹² consumers are more likely to be at risk for such anticompetitive behaviors in any area in which there is little competition among broadband providers. This and other restrictive behavior threatens an open Internet and limits the content available to the consumer, because consumers are pushed to watch content pre-approved by Comcast and ultimately only services that are affiliated with Comcast are the ones to thrive or reach consumers. In this way, the proposed merger would put Comcast in an even more powerful position to determine which programming succeeds and which fails.

III. Comcast Overstates the Benefits of the Proposed Transaction

Comcast attempts to frame the proposed merger as a means to close the digital divide, expand broadband access, and provide new technologies to consumers, but it overstates the benefits that will actually accrue to consumers.

A. Comcast Overstates The Extent to Which Communities Will Benefit from the Merger

Comcast frames the proposed merger as a means to close the digital divide, but it overstates the benefits that will actually accrue to underserved communities. Although its Internet Essentials program provides some benefits to consumers, it does not significantly close the gap between those who can afford access to broadband and those who cannot. By including speeds as low as 3, 4, and 5 Mbps in its definition of broadband, Comcast is able to claim that it has expanded broadband access to serve new communities. But as discussed above, this definition of broadband is outdated and inadequate to serve consumers' needs. Furthermore, Comcast's definition of broadband can actually harm minority and rural communities because it

¹² See Jon Brodtkin, Data Caps, Limited Competition a Recipe for Trouble in Home Internet Service, *Ars Technica* (Dec. 2, 2014) available at <http://arstechnica.com/business/2014/12/data-caps-limited-competition-a-recipe-for-trouble-in-home-internet-service/>.

allows Comcast to claim that it has implemented programs to serve these communities with broadband, when in reality communities in underserved areas are left with limited options and slower speeds.

Comcast has made a number of promises about how the proposed merger will allow it to expand its unique products and services into new territories. Every community—rich or poor, rural or urban—deserves the benefits of new technology and competition, but there is a real risk that Comcast will have an incentive to improve service only through selective areas of its service territory where it is most lucrative to do so. The merger would allow Comcast to cherry-pick the most profitable and densely populated areas in the state without requiring those companies to serve all consumers over a reasonable period of time.¹³ The end result will be that only the most lucrative, densely populated areas in Comcast’s service territory will be able to benefit from any new technologies or improved service, while less prosperous urban and rural areas will be left either without access or unable to afford the newer technologies or higher speeds. The unintended consequence would be to further exacerbate the digital divide.

B. The Merger Will Not Protect the Open Internet

In its public outreach, Comcast has focused on the fact that it the only company that is legally bound by the Commission’s net neutrality rules. Comcast claims that it is a proponent of net neutrality, but its version of net neutrality differs significantly from the proposal backed by Consumers Union, the Administration, and the nearly 4 million consumers who wrote in to the Commission to express concern about the ability of the largest ISPs to engage in practices that favor the companies with the deepest pockets.

¹³ In its documents to the Commission, Comcast has stated that it may not make new services available to all consumers across a footprint at the same time, and has even noted that some of its new technologies require one-time fixed costs but result in significant revenue opportunities for the company.

Comcast has been reluctant to accept a legal framework that prevents it from limiting the ability of new entrants to reach consumers or extracting additional tolls from other businesses that use its broadband facilities to reach consumers. Comcast has argued to the Commission that these deals should be permitted unless parties are able to show harm. But Comcast has shown that it is able to fundamentally change the nature of competition online, in ways that may not be immediately apparent to the consumer or the Commission but that ultimately limit the availability of options to the consumer.

Comcast argues that it would be to its detriment to block or degrade Internet applications or content, as consumers would not stand for this behavior. Comcast argues that if it “degraded access to Internet content, broadband subscribers likely would switch to Comcast’s competitors.”¹⁴ Setting aside the fact that many consumers have no alternative option, the fact is that Comcast can act anti-competitively in a number of ways *indirectly* and which may not even be apparent to the consumer, but that have a profound impact on both competition and the consumer’s viewing experience.

C. Comcast Has Not Made a Convincing Case that the Merger’s Claimed Benefits Will Flow Through to Consumers

Under the Commission’s standard, a claimed benefit must “flow through to consumers, and not inure solely to the benefit of” the merging companies.¹⁵ The merged company will experience some cost savings as a result of eliminating redundant costs, but it has not made a convincing case that any significant efficiencies will pass along to consumers. Other merger opponents have wondered, rightly so, whether Comcast is more likely to find ways to cut costs and benefit itself at the expense of consumers, and whether the merger is a way for the company

¹⁴ Comcast Opposition at 204.

¹⁵ *Application of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100, ¶ 132 (2005).

to amass subscribership without having to make corresponding improvements in service or price. Similarly, the experience of consumers tends to suggest that Comcast is more likely to find ways to cut its costs to benefit itself and not its customers.

The deployment of advanced services and new technologies is one of the factors the Commission must look to in its determination of whether a merger is in the public interest. For this reason, it is clever for Comcast to describe at length all of the advanced functionality and enhanced services made possible only by Comcast's systems. But the fact remains that Comcast is overstating the benefits of this merger to consumers and that the merger gives Comcast an ability to expand technology that ultimately benefits itself.

D. Comcast's Deployment of Its Set-Top Boxes Is Another Way For It to Control Competition

In its initial petition to deny, Consumers Union expressed concern that Comcast avoided any discussion of the higher prices that could result for customers who, as a result of the merger, would have to transition from TWC to Comcast technologies. Comcast responded to CU's concern by noting that it has the option of leaving in place current TWC technologies if migrating to Comcast technologies would prove too expensive.¹⁶ While Comcast certainly has the option of leaving technologies in place, it has an incentive to replace that technology with its own. Comcast executives have acknowledged that expanding the sale of the technology is one reason for the merger.¹⁷ This is technology that will generate more revenue, allow Comcast to strengthen its hold on the market, more quickly amass subscribers, and keep out future competitors.

¹⁶ Comcast Opposition at 83.

¹⁷ See Brian X. Chen, Comcast Reiterates Net Neutrality Position at Showcase For New Product (Nov. 12, 2014) (noting that Comcast CEO Brian Roberts recently went so far as to call its expensive X1 platform as "one of the reasons why [Comcast] wanted to buy Time Warner Cable"), *available at* http://bits.blogs.nytimes.com/2014/11/12/comcast-reiterates-net-neutrality-position-at-showcase-for-new-product/?_r=0.

Set top box revenues continue to provide a significant revenue stream for Comcast – as do the equipment fees, installation fees, and upgrade fees associated with it. The set-top box also serves as yet another point of control over the consumers’ viewing experience. Cable companies have considerable power to restrict access to competing content on its boxes or to decide which technologies are compatible with it. Because cable companies rent out set-top boxes, they can control the software on those set-top boxes, dictate standards for those boxes, and readily influence the consumer adoption of particular online programming.

When Consumers Union expressed concern about this ability in its petition to deny, Comcast responded that it will not “force any other operator to use Comcast’s chosen solution” and that “if operators want to pursue a different path, they are free to do so.”¹⁸ However, because Comcast is in a position to dictate standards and set rates, it can readily influence consumers’ adoption of new online competitive options. The result is that the merger would make it more difficult for all but perhaps the largest players to get their technologies or applications incorporated into the set-top boxes of MVPDs, stifling the innovative features and developments of smaller players that could provide additional choice to consumers.

As the merger expands Comcast’s reach and market power, Comcast would find new ways to favor its own content to the detriment of current and future competitive options. Cable content is increasingly moving into the cloud, and Comcast’s new set top box provides it with yet another competitive advantage that allows it to attract and retain subscribership without making corresponding improvements in customer service.

¹⁸ Comcast Opposition at 188.

IV. The Merger Will Harm the Public Interest

The proposed transaction would significantly harm the public interest. Despite Comcast's claims to the contrary, customer service and higher prices are both merger-specific harms and would negatively impact consumers.

A. The Merger Would Result in Worse Customer Service

Comcast is incorrect to suggest that concerns about customer service are irrelevant to the Commission's merger analysis.¹⁹ Considerations of customer satisfaction clearly fall under the Commission's broad analysis of whether a merger will be in the public interest.²⁰ Comcast itself has specifically and repeatedly cited improved customer service as a claimed benefit of the proposed merger.²¹ In a truly competitive market, competing providers would work to keep customers happy or risk losing them to competitors.²² The fact that customers of both Comcast and TWC are highly dissatisfied with the services they receive is a strong indication of a lack of competition in the market, and is certainly relevant to the Commission's analysis.

This merger will have a direct impact on the level and quality of customer service Comcast provides to its customers and that any existing problems are likely to be further exacerbated. As set forth by Consumers Union and others at length previously, survey after survey continues to rate these companies poorly. In Consumer Reports' annual survey of readers' experiences with television and Internet service in 2013, both Comcast and Time Warner Cable received low customer satisfaction scores.²³

¹⁹ Comcast Opposition at 282-283.

²⁰ 47 U.S.C. § 552.

²¹ See, e.g., Comcast Opposition at 28.

²² See, e.g., Comments of the National Cable & Telecommunications Association at 6, MB Docket No. 14-16, (filed Mar. 21, 2014), Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming (arguing that "[i]n a competitive video market, retaining customers requires much more than offering a high quality service.").

²³ Comcast ranked 15th among 17 television service providers, earning particularly low marks for value and customer support. Time Warner Cable ranked 16th overall for television service with particularly low ratings for

Comcast executives have openly acknowledged these problems in various public settings. They have promised changes, pointing to Comcast's cloud-based set-top boxes as proof that the consumer experience will improve. But advanced features and technological upgrades are not the same as improved customer service – nor should improved customer service be accompanied with a higher price tag. Providing an acceptable level of customer service should be an expectation, and consumers should not have to rely on a merger or an expensive upgrade in technology in order to get a satisfactory consumer experience.

Comcast attempts to reduce Consumers Union's concerns to little more than an unfounded "big is bad" argument. Our point is not that greater size automatically leads to poorer service, as Comcast wrongly suggests.²⁴ There are a number of large companies with consumer-friendly practices. Rather, we are concerned that Comcast's treatment of consumers is a strong indication of a problem in the market and that the merger will only make that problem worse. To this end, Consumers Union has heard from thousands of consumers writing with complaints of equipment installation, service problems and improper charges beyond what the consumer actually authorized. A merged entity with an even larger national presence and greater market dominance will have even less of an incentive to address the needs of consumers – especially when that entity knows that consumers have nowhere to turn for alternatives.

B. The Merger Will Result in Higher Prices

Cable and broadband rates continue to rise for consumers at a pace faster than inflation. Comcast has already stated that the merger will not result in lower rates to residential customers. This merger will raise prices not only for the millions of consumers who switch from TWC to

value, reliability, and customer support. Both companies rated mediocre on overall satisfaction with Internet service. See James K. Willcox, Consumers Still Don't Like Cable TV Companies (Mar. 26, 2014), <http://www.consumerreports.org/cro/news/2014/03/consumers-still-don-t-like-cable-tv-companies/index.htm>.

²⁴ Comcast Opposition at 283.

Comcast, but for consumers across the nation. Most of Comcast's revenue comes from pay TV, yet most of its growth is in broadband. Comcast therefore has the incentive to embrace online video – but only in ways that it controls. This strategy allows it to embrace and co-opt the growth in online video while protecting its legacy business and primary revenue stream.

Comcast claims that cable rates have risen only modestly, and that costs are actually coming down for consumers on a per-channel basis.²⁵ However, Comcast's price-per-channel analysis is not an accurate measure of the rising cable costs that consumers must bear or the benefits they receive. That measure – which divides the number of channels by the price consumers pay – assumes that there is full value for every channel added; it fails to account for the fact customers must purchase larger and larger packages of channels in order to gain access to the handful of channels with the content they actually want. For this reason, the full price of the monthly bill is a more accurate measure of the price that consumers will be forced to bear. Most consumers continue to watch the same relatively few channels, yet they are forced to pay for all of them. To this end, a recent Nielsen study has also found that although the number of channels has increased, viewership has remained the same.²⁶

Comcast criticizes various price surveys in its opposition and argues that they do not portray an accurate picture of pricing, noting that “nearly 50 percent of Comcast's customers take advantage of promotional or multi-product discounts, neither of which are factored into price surveys.”²⁷ However, the price surveys also do not capture the widespread consumer frustration, reflected in the many consumer stories Consumers Union has received, of price hikes

²⁵ Comcast Opposition at 293.

²⁶ Victor Luckerson, Pay TV: You're Not Watching More Channels, But You're Definitely Paying For Them, Time.Com (May 6, 2014) (noting a new Nielsen study that finds that although the number of channels has increased, viewership has remained the same), <http://time.com/89813/nielsen-data-shows-people-watch-same-number-of-tv-channels/>.

²⁷ Comcast Opposition at 291.

with no explanation, efforts to upsell expensive products, instances of overbilling, and other questionable practices that lead to excessive and unexpected charges. Many consumers continue to write in with stories of being improperly double-billed for bundled services, or charged rent on equipment that they actually own. We are concerned that millions more would be at risk for such behaviors after the merger.

V. Conclusion

A merged Comcast-Time Warner Cable will result in anticompetitive harms that no conditions can remedy. Comcast overstates the proposed benefits from the merger and fails to address the public interest harms that will result. The net effect of the transaction will be higher prices for consumers, fewer choices, and less incentive for the combined company to respond to consumers' needs. For the foregoing reasons, the Commission should reject Comcast's Opposition and deny the Application.

Respectfully submitted,

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