Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 or	)	
Transfer Control of	)	
Licenses and Authorizations	)	

REPLY OF SPORTS FANS COALITION TO COMCAST'S OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

Sports Fans Coalition, Inc. ("SFC" or the "Sports Fans Coalition"), by its attorneys, submits this Reply to Comcast Corp.'s Opposition To Petitions To Deny and Response To Comments.[1] The Comcast Response rehashes cursory arguments from its initial applications and fails to respond at all to the detailed, fact-based and economically substantiated evidence presented in SFC's Petition. The Commission therefore should reject the proposed change of control transaction or designate the Applications for hearing.

I. COMCAST FAILS TO REBUT ECONOMIC EVIDENCE AND COMPETITION ANALYSIS DEMONSTRATING SUBSTANTIAL HARM IN THE SPORTS PROGRAMMING MARKET RESULTING FROM THE PROPOSED TWC MERGER

The heart of the SFC Petition was its showing that regional sports programming is a relevant product market for purposes of merger review and that objective economic evidence

[1] Comcast Corp. Opposition To Petitions To Deny and Response To Comments, MB Docket No. 14-57 (filed Sept. 23, 2014) ("Comcast Response"); Petition To Deny and Comments In Opposition of the Sports Fans Coalition, MB Docket No. 14-57 (filed Aug. 25, 2014) ("SFC Petition").

shows that input foreclosure and regional sports network ("RSN") price increases are a direct consequence of both cable system vertical integration and horizontal market share.[2] SFC relied on publicly available, detailed econometric analysis demonstrating that in any given market (a) RSNs owned by cable operators tend to be less available to consumers than independently owned RSNs, and (b) the RSN-withholding problem gets worse the higher the market share of the vertically integrated cable operator.[3] Applying this compelling evidence, it is clear the proposed Comcast/Time Warner Cable ("TWC") acquisition would *prima facie* lessen sports fans' access to games and inevitably lead to higher prices, both for consumers and unaffiliated cable systems, post-merger.

Comcast fails to rebut this evidence or offer any analysis corroborating its odd claim that, like local cable systems, RSNs do not compete with each other. Regarding Los Angeles — where Time Warner Cable's ownership of L.A. Dodgers television rights, purchased for some $8 Billion in a deal that ousted Fox Sports from its former position, starkly illustrates the cable withholding problem[4] — Comcast blithely reassures fans that it "would hope to facilitate" wider distribution of Dodgers games post-merger.[5] It is a matter of historical record, however, that Comcast's behavior tells another story. From Philadelphia to Portland, Comcast's RSNs carrying exclusive regional sports content have failed to find distribution on competing MVPDs, denying fans without the ability or desire to subscribe to Comcast any access to their home team

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[2] *See* SFC Petition at 16-22.

[3] *Id.* at 20-22 (citing Caves, Holt and Singer study). "[W]hen an RSN is owned by a cable or satellite operator, the RSN charges rival distributors a significantly higher license fee. Most significantly for our purposes, the vertical integration premium increases significantly with the local downstream market share of the RSN's affiliated distributor." *Id.* at 20; Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REVIEW OF NETWORK ECON. 61, 66 (2013), *available at* http://ht.ly/ACZAm.

[4] SFC Petition at 29 ("[A]s the current Dodgers impasse evidences, even a temporary strategy of withholding RSN programming from rival MVPDs is profitable in the short run and increases the RSN's leverage to command ever-rising per-subscriber distribution prices.").

[5] Comcast Response at 174.

games. These multiple episodes are dismissed as "old chestnuts" by Comcast,[6] but they have generated widespread and heart-felt frustration from sports fans over many years and continue to this day.[7]

Sports fans in more than a dozen media markets have suffered for more than a decade as a result of the parallel and consistent anticompetitive behavior of both Comcast and TWC in (i) withholding competitively essential, and highly profitable, marquee RSN programming from rival MVPDs, (ii) substantially increasing RSN carriage rates to cable systems, thus raising basic cable rates and imposing a massive tax on sports fans, as well as cable subscribers who watch no sports at all, and (iii) blocking distribution of competing sports programming networks by their downstream cable systems. Yet tellingly, Comcast never addresses SFC's evidence that Comcast and TWC have in parallel "engaged in a consistent practice of withholding sports programming from rival MVPDs and refusing carriage of unaffiliated sports networks." SFC Petition at 9-14.

Moreover, Comcast tries to swat away SFC's concerns regarding the Dodgers by claiming that TWC offered to arbitrate disputes with competing carriers.[8] This pitch is low and outside. Fans do not care about corporate offers to arbitrate or what constitutes a reasonable or unreasonable offer in the rarified board rooms of multi-billion dollar companies. All sports fans know and care about is what they see right in front of them; one day, they can view their Dodgers games, the next day, they cannot. The Commission can and should make this quite

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[6] Comcast Response at 245.

[7] *See, e.g., I Can See the Stadium but I Can't See the Game*, Sportsfans.org (Dec. 7, 2009), *available at* http://ht.ly/GhUWa; *Comcast Screws Portland Fans for Third Straight Season*, Sportsfans.org (Dec. 31, 2009), *available at* http://ht.ly/GhUKG. "[A]rbitration is quixotic where the RSN's exclusive contracts for marquee professional sports teams result in a demand for carriage rates ***double prevailing market prices.*** The response to Chairman Wheeler's call for arbitration in order to resolve the L.A Dodgers impasse has been less than disheartening: his proposal has been met with silence. If, as it almost surely appears, arbitration cannot prevent SportsNet LA from denying distribution of Dodgers' games to rival MVPDs for what certainly will be a full, or at least almost full, MLB season, there is little objective reason to believe arbitration has any realistic chance to constrain the certain blocking of that and other key RSN channels in the future." SFC Petition at 29 (emphasis in original).

[8] Comcast Response at 244; SFC Petition at 26-29.

simple — no Dodgers, no merger. Suspend any final action in this docket unless and until all Dodgers fans in the L.A. market can see their team's home games.[9]

It is illustrative that at the end of this year's baseball regular season and in response to Dodgers fans' complaints, Time Warner Cable finally offered to televise six Dodgers playoff games on free over-the-air broadcast television.[10] This action spoke volumes about the problem — the fact that broadcast distribution was touted as a solution proves that when fans can only view sports on a pay-TV platform and the pay-TV provider takes a restrictive approach, consumers lose.

Comcast likewise fails to address how its increased market share from acquiring Charter cable systems in key markets, such as greater Los Angeles, could exacerbate the RSN with-holding problem.[11] As the unrefuted record shows, the higher the market concentration of a cable operator, the worse the withholding problem gets. In this case, as bad as the Dodgers situation was last season, it will only get worse post-merger as Comcast consolidates TWC and Charter systems in Southern California.

Finally, Comcast fails to address SFC's concern that by aggregating contiguous cable systems from North Carolina to Philadelphia, and from San Diego to San Francisco, the merged company would have the market power necessary to demand that leagues and teams change the "Regional" in "Regional Sports Network" to hew more closely to Comcast's post-merger footprint. A post-merger Comcast with significant MVPD market share in key regional geographic areas could work with sports leagues to create team or league territories that more

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[9] SFC Petition at 2, 30-31, 35-37.
[10] *See* Meg James, *Time Warner Cable to Televise Final Six Dodgers Games on Local TV*, Los Angeles Times, Sept. 15, 2014, *available at* http://ht.ly/GhVEY.
[11] *See, e.g.*, Comcast Response at 253 (asserting that Comcast would not gain "significant share through the Divestiture Transactions" despite acquiring roughly a quarter million Charter subscribers in Southern California).

closely overlap Comcast's regionally clustered, contiguous distribution footprint. Such a turn of events would extend the RSN withholding problem to more sports fans nationwide.

Comcast attempts to defuse this issue by asserting that "RSNs are generally distributed in a limited geographic area" and today "there is no geographic overlap" between Comcast's and Time Warner Cable's RSNs.[12] This analysis is wrong because RSNs are not legally or by contract constrained to specific geographic markets and compete aggressively, on a regional and national basis, for professional sports team and college sports rights. It also omits the forward-looking concerns raised by SFC and to which the Commission's public interest standard,[13] the FTC-DOJ Horizontal Merger Guidelines[14] and the Clayton Act's "incipiency" standard are all directed.[15] How might the aggregated, regional market power of a mammoth, contiguous cable system stretching across the most highly populated areas of the country impact leagues' and teams' territorial and licensing practices? Comcast is conspicuously silent on this point.

II. POST-MERGER COMCAST LIKELY WILL ABUSE ITS MARKET POWER TO HARM UNAFFILIATED PROGRAMMERS AND COMPETING ISPs AT THE EXPENSE OF UNDERSERVED NICHE SPORTS FANS

The proposed TWC transaction would increase Comcast's demonstrable incentive and ability to impose anticompetitive restrictions on sports fans' ability to watch their teams play. First, SFC has learned that Comcast may be planning to transfer distribution of some of its National Football League and other sports programming acquired through NBC Sports

[12] Comcast Response at 174.
[13] The Commission as a matter of law may only approve the transaction if it makes an affirmative finding "that the public interest, convenience, and necessity will be served" by approval, meaning that this merger must "enhance, not merely preserve, competition." 47 U.S.C. § 310(d); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 24 (rel. Jan. 20, 2011) ("Comcast/NBCU Order").
[14] FTC-DOJ Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.
[15] 15 U.S.C. § 18; *Brown Shoe Co. v. United States*, 370 U.S. 294, 317, 346 (1962).

exclusively on other NBCU-owned networks.[16] While this would not deprive fans of games in the near term (assuming that the NBCU networks in question are widely available on most MVPDs), it could result in reduced sports access if deployed in a way to reduce the competitiveness of independent sports or other niche networks.

First, fans of some sports, such as soccer, track-and-field or motocross, rely on smaller, independent programming networks for access to their favorite sporting events. Comcast today leverages its dominant market position in television distribution and content to relegate such niche networks to more expensive a-la-carte tiers, and to deprive consumers of online access to that content. Comcast also uses this tactic to deprive independent sports networks of advertising dollars so that they are less competitive when bidding for important rights with Comcast affiliated networks. With substantially higher post-merger penetration in key markets, Comcast could leverage its rights over must-have sports events to drive the independent niche programmers out of business, ultimately reducing fans' choices and access to games.

Second, where Comcast acquires exclusive television exhibition rights, such as to the Olympics, it has restricted the streaming availability of those sporting events — including Internet distribution even of its free NBC broadcast network programming — to pay cable subscribers and Comcast broadband customers only.[17] The increased nationwide market share in high-speed, residential broadband resulting from the proposed TWC acquisition would exacerbate this problem because Comcast's potential revenue losses from excluding non-Comcast broadband subscribers and rival wireless ISPs would be far lower post-merger.

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[16] *See* SFC Petition at 13 (recounting history of NFL-Comcast dispute arising from Comcast threats to move some NFL football games to pay cable distribution).
[17] *See, e.g.*, Joe Flint, *NBC to Live Stream Network Shows*, Wall Street J., Dec. 16, 2014, *available at* http://ht.ly/GiqRo.

These are anticompetitive consequences the Commission is empowered and obligated to avoid. Reducing the RSN market essentially to a two-firm duopoly between Comcast and Fox Sports[18] would be starkly inconsistent with the Commission's duty to ensure that transactions subject to its public interest review must "enhance, not merely preserve, competition." *Comcast/NBCU Order* ¶ 24. As renowned economist Franklin Fisher observes:[19]

> In the case of oligopoly…later attack [under the Sherman Act] is not likely to be possible, and merger policy is the only existing way to prevent a permanent noncompetitive structure from arising. Where a merger or a series of mergers will result in tight oligopoly structure, Section 7 with its present language permits enforcement agencies to prevent it. What is more, the move to a tight oligopoly structure can be halted at a time when the "inevitability" of that structure can be most easily examined by weighing the pro- and anticompetitive effects of the merger before it occurs. In the absence of any other structurally-oriented oligopoly policy, dealing with tight oligopolies "in their incipiency" may be the only way of dealing with them at all.

In the final analysis, Comcast's doctrinaire position that the TWC acquisition should be cleared merely because the firm's *local* cable systems are not directly competitive geographically is thus not only incorrect, and plainly inapplicable to *regional* RSN competition, but more importantly finds no support in the economics and jurisprudence of U.S. merger policy.

III. COMCAST FAILS TO OFFER ANY REMEDIES THAT WOULD MITIGATE THE TRANSACTION'S ANTICOMPETITIVE CONSEQUENCES FOR SPORTS AND RSN PROGRAMMING

Although SFC remains convinced that the proposed transaction should be rejected, had Comcast proposed structural or behavioral remedies for the merger-related harm to sports fans, SFC would have had to consider the potential benefits. For example, Comcast could have proposed:

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[18] SFC Petition at 6, 10, 23-24.

[19] Franklin M. Fisher, *Horizontal Mergers: Triage and Treatment*, 1 J. ECON. PERSPECTIVES 23, 25 (1987), *available at* https://www.aeaweb.org/atypon.php?return_to=/doi/pdfplus/10.1257/jep.1.2.23.

a. divestiture of some or all its vertically integrated RSNs;[20]
b. divestiture of vertically integrated RSNs in markets where the merged entity's local share increases through acquiring Charter subscribers, such as greater Los Angeles;
c. divestiture of vertically integrated RSNs in markets where the withholding problem already has been acute, such as Los Angeles, Philadelphia and Portland;
d. guaranteeing that a meaningful percentage (*e.g.*, 50%) of RSN-carried professional sports games, both regular- and post-season, will be made available on free over-the-air broadcast TV; or
e. restricting or eliminating sports exclusives for Comcast cable and broadband subscribers.

If Comcast proposed these or similar remedies, Sports Fans Coalition and the Commission would of course have to respond accordingly. Comcast's staunchly defensive line, however, requires an equally forceful offense on behalf of fans. Thus, SFC remains opposed to a Comcast-Time Warner merger and believes the Commission should reject the parties' proposal absent resolution of the L.A. Dodgers impasse and a structural solution to the deal's adverse consequences for RSN market concentration and sports fans nationwide.

CONCLUSION

For all these reasons, the Sports Fans Coalition opposes the proposed Comcast-TWC transaction and recommends that the Commission designate the Applications for hearing.

Respectfully submitted,

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[20] *See* SFC Petition at 2, 7, 31.