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 Assign or Transfer Control of Licenses and Authorizations	))	

REPLY COMMENTS OF
BIG BEND TELEPHONE COMPANY;
CENTURYLINK COMMUNICATIONS, INC.;
CONSOLIDATED COMMUNICATIONS, INC.;
EATEL; EPIC TOUCH COMPANY;
FAIRPOINT COMMUNICATIONS, INC.; GVTC COMMUNICATIONS;
HAWAIIAN TELCOM, INC.; MONROE TELEPHONE COMPANY;
NORTH STATE COMMUNICATIONS;
PIONEER TELEPHONE COOPERATIVE, INC.;
AND SHENANDOAH TELECOMMUNICATIONS COMPANY

December 23, 2014

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Summary

The Commenters in this proceeding submit these joint comments to the Federal Communications Commission in this proceeding to express their shared concerns regarding the application of Comcast and Time Warner Cable seeking approval to transfer of control of the licenses and authorizations held by Time Warner Cable and its wholly-owned and controlled subsidiaries to Comcast.

The acquisition will establish a single corporate entity with substantial facilities based infrastructure and market share for the provision of voice, video and broadband services. This includes the merged entity's combined cable systems passing 84 million homes (75.4 million when the proposed divestiture of approximately 3.9 million customers is taken into account) representing more than 68 percent of households nationwide (62 percent post-divestiture). Post-divestiture, the combined company will provide fixed wireline broadband service to 35.5 percent of subscribers nationwide with speeds at or above 3 Mbps downstream and 768 Kbps upstream. The merged entity will have an embedded customer base of approximately 16.0 million residential voice customers, making it the second largest provider of residential voice services.

The combination of the Applicants' cable and broadcast programming assets under a single entity's control reinforces previous concerns raised by the Commission regarding the fundamental importance of reasonable and non-discriminatory access to programming to ensure vibrant video competition. If the Commission approves the proposed merger, it should ensure that competitors in the multichannel video programming distribution (MVPD) marketplace continue to have such access to the substantial programming content under the Applicants' control.

Similarly, MVPD competitors should have reasonable access to critical infrastructure necessary to video competition, particularly Comcast's Headend in the Sky (HITS) service. For many smaller and mid-size MVPDs, Comcast's HITS service is a crucial component that is essential to their ability to provide cost-effective video services to their customers, particularly in rural areas.

The Commission should also consider the implications of the proposed merger on the highly competitive voice marketplace. Specifically, the Commission should consider whether it still makes sense to allow the merged entity to require incumbent local exchange carriers (ILECs) to provide access to unbundled network elements (UNEs) at low, regulated Total Element Long-Range Incremental Cost (TELRIC) rates. A similar consideration should be given with respect to interconnection obligations under the Communications Act.

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The parties listed above (collectively, "the Commenters") provide these comments in the above referenced proceeding regarding the application of Comcast Corp. ("Comcast") and Time Warner Cable Inc. ("Time Warner Cable") seeking approval from the Federal Communications Commission ("Commission")[1] to transfer of control of the licenses and authorizations held by Time Warner Cable and its wholly-owned and controlled subsidiaries to Comcast.[2]

The acquisition will establish a single corporate entity with substantial facilities based

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[1] Public Notice, *Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations*, 25 FCC Rcd 2651 (2010). *See also*, Joint Application of Time Warner Cable, Inc. and Comcast Corporation, April 8, 2014 (*Application*) (available at: http://www.fcc.gov/transaction/comcast-twc) (visited December 17, 2014).

[2] Time Warner Cable and Comcast are referred to collectively in these comments as the "Applicants".

infrastructure and market share for the provision of voice, video and broadband services. In terms of broadband and voice infrastructure, the merged entity's combined cable systems will pass 84 million homes (75.4 million when the proposed divestiture of approximately 3.9 million customers is taken into account)[3] out of a total of 122,459,000 million households or more than 68 percent of the households nationwide (62 percent post-divestiture). Post-divestiture, the combined company will provide fixed wireline broadband service to 35.5 percent of subscribers nationwide with speeds at or above 3 Mbps downstream and 768 Kbps upstream. The merged entity will have an embedded customer base of approximately 16.0 million residential voice customers, making it the second largest provider of residential voice services.[4]

The combination of the Applicants' cable and broadcast programming assets under a single entity's control reinforces previous concerns raised by the Commission regarding the fundamental importance of reasonable and non-discriminatory access to programming to ensure vibrant video competition. If the Commission approves the proposed merger, it should ensure that competitors in the multichannel video programming distribution (MVPD) marketplace continue to have such access to the substantial programming content under the Applicants' control.

Similarly, MVPD competitors should have reasonable access to critical infrastructure

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[3] *See*, June 24, 2014 Ex Parte Letter of Katheryn A. Zachem, et al. to Marlene H. Dortch filed in MB Docket No. 14-57 at 2.

[4] *See*, Comcast Corporation, 2nd Quarter 2014 Results, July 22, 2014 (identifying approximately 11 million voice customers) (available at: http://www.cmcsk.com/releasedetail.cfm?ReleaseID=861091) (visited December 17); *see also*, Time Warner Cable, Press Release, *Time Warner Cable Reports 2014 Second-Quarter Results*, July 31, 2014, p. 5 (identifying approximately 4.9 million voice customers) (available at: http://ir.timewarnercable.com/files/2014%20Earnings/2Q14/Q2%202014%20TWC%20Earnings%20Release%20FINAL.pdf) (visited December 17, 2014).

necessary to video competition, particularly Comcast's Headend in the Sky (HITS) service.[5] For many smaller and mid-size MVPDs, Comcast's HITS service is a crucial component that is essential to their ability to provide cost-effective video services to their customers, particularly in rural areas.

The Commission should also consider the implications of the proposed merger on the highly competitive voice marketplace. Specifically, the Commission should consider whether it still makes sense to allow the merged entity to require incumbent local exchange carriers (ILECs) to provide access to unbundled network elements (UNEs) at low, regulated Total Element Long-Range Incremental Cost (TELRIC) rates. A similar consideration should be given with respect to interconnection obligations under the Communications Act.

I. ACCESS TO VIDEO PROGRAMMING CONTENT IS CRITICAL TO INCREASING VIDEO AND BROADBAND DEPLOYMENT AND COMPETITION.

Programming is the single biggest variable cost for MVPDs, and the Commission should carefully consider the access to programming issues that would arise from the proposed merger between Comcast and Time Warner Cable. If the merger is approved, Comcast would control even more programming than it did after the Comcast/NBC Universal (Comcast/NBCU) transaction.[6] The Applicants added scale post-merger would also widen the already substantial gap in programming costs between it and all other MVPD competitors.

As acknowledged by a broad range of commenters in this proceeding, the merged entity

[5] HITS is a digital content transmission technology that multiplexes multiple digital cable channels into a signal that is then sent to a satellite. The signal is then downlinked from the satellite to many MVPDs, which in turn forward the channels to their subscribers.

[6] Memorandum Opinion and Order, In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., 26 FCC Rcd 4238, FCC 11-4 (January 20, 2011) (*Comcast/NBCU Order*).

would control an unprecedented amount of popular video programming content.[7] Comcast already owns a comprehensive stable of multiple national cable networks that are considered "must have" programming, including Bravo, CNBC, E!, Golf Channel, MSNBC, NBC Sports Network, Oxygen, SyFy, and USA Network. Comcast also owns or partially owns eleven regional sports networks (RSNs) in major television markets such as Philadelphia, the San Francisco Bay area, New England, and the Pacific Northwest. In addition to its cable programming assets, Comcast owns two broadcast networks, NBC and Telemundo, and 26 broadcast stations. In addition, Universal Pictures, a movie studio that provides, acquires, markets, and distributes filmed entertainment worldwide is owned by Comcast.

Post-merger, Comcast would control not only its existing array of must-have programming, but also Time Warner Cable's significant programming assets that include multiple RSNs in major markets in California (including the recently-launched SportsNet LA), Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin. TWC also manages 26 local news channels, 16 local sports channels, and 10 "lifestyle" channels. If Comcast is allowed to buy Time Warner Cable, it would also acquire national programming services such as iN Demand and MLB Network.

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[7] *See e.g.*, Comments CenturyLink, Inc., MB Docket No. 14-57, p. 5 (submitted Aug. 25, 2014) (*CenturyLink Comments*) (noting that post-merger, Comcast would control "not only its existing array of desirable programming, but also TWC's significant programming assets, including national cable networks and regional sports networks ("RSNs") in California, Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin."); Comments of the American Cable Association, MB Docket No. 14-57, p. ii (submitted August 25, 2014) (noting that the proposed merger involves various categories of "must have" programming, "including NBC network broadcast programming aired on local owned and operated ("O&O") broadcast stations, Comcast and TWC regional sports networks ("RSNs"), and suites of NBCUniversal (NBCU) cable programming networks such as USA Network, CNBC, Golf Channel, Syfy, Bravo, E!, MSNBC, and other core programming.") (*ACA Comments*); *see also*, Comments of the National Telecommunications Cooperative Association, MB Docket No. 14-57, p. 3 (submitted August 25, 2014) (*NTCA Comments*).

The Commission has consistently emphasized how access to critical programming content will result in substantial consumer benefits including increased competition in the MVPD market, lower prices for consumers and increased broadband penetration.[8] Similarly, broadcast programming, such as that owned and controlled by Comcast, has previously been identified by the Commission as 'must-have' programming.[9]

Traditional phone companies of all sizes have been aggressively entering the MVPD market in geographic areas throughout the country. In many of these areas, they compete directly with Comcast and/or Time Warner Cable for customers for video, broadband and voice services. Local telephone company competitive video entry has greatly benefitted consumers by providing them an alternative to the incumbent cable operator which, as the Commission has previously found, has also led to lower consumer prices than in areas without a wireline cable competitor.[10] The Commission has also recognized that a successful video offering is directly

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[8] *See e.g.*, Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶17 (2007) (*MDU Order*) (concluding that access to programming results in a "significant increase" in MVPD competition, which "usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources."); *See also*, Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶50 (concluding that increased MVPD competition, "is necessary and appropriate to achieve increased video competition and broadband deployment.").

[9] Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473, ¶48 (discussing Congress' recognition of local television broadcast signals as "must-have programming."). NBC is included in the so-called 'Big Four' networks, in addition to ABC, CBS and FOX.

[10] *See e.g.*, Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 27 FCC Rcd. 2427, ¶5 (released March 9, 2012) (noting that average prices were 9.6 percent lower in markets with a second wireline MVPD competitor.); *see also*, See, Order, *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1595, 26 FCC Rcd. 13206, ¶29 (released

related to the ability of incumbent local exchange carriers (ILECs) to deploy robust broadband facilities.[11]

But as the Commission is well aware, the ability of ILEC video service providers to compete effectively is often dependent on access to essential programming that is owned by the very cable companies against which they are competing. In this context, many MVPDs have previously had a number of well-publicized and protracted disputes with Comcast and Time Warner Cable over access to programming under their respective control.[12]

As the Commission has noted on numerous occasions, broadband deployment and MVPD competition are "inextricably linked."[13] Denied access to must-have video programming

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September 22, 2011); see also, Order, *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1594, 26 FCC Rcd. 13145, ¶28 (released September 22, 2011) (both orders noted that wireline LEC entrants posed a greater competitive threat to cable operators, since DBS providers "do not constrain the price of cable service to the extent that wireline MVPDs do.").

[11] *See e.g.*, *Franchise Reform Order*, ¶51 (2006) (concluding that "broadband deployment and video entry are 'inextricably linked'") *Id.*, ¶62 (stating that, "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."); *MDU Order*, ¶20 (stating that "broadband deployment and entry into the MVPD business are 'inextricably linked.'"); First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that "a wireline firm's decision to deploy broadband is linked to its ability to offer video.") (*Program Access Order*).

[12] *See e.g.*, Todd Shields and David McLaughlin, Bloomberg News, *Dodgers TV Row Fuels Unease Over Comcast-Time Warner Deal*, August 20, 2014 (available at: http://www.bloomberg.com/news/2014-08-20/dodgers-tv-row-fuels-unease-over-comcast-time-warner-deal.html) (visited December 17, 2014) (discussing a dispute between Time Warner Cable and DIRECTV and AT&T regarding access to SportsNet LA); *see also*, Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, 72 FR 61559, FCC 07-169, pp. 34 – 36 (2007) (referencing instances where Comcast refused to make the terrestrially delivered Comcast SportsNet Philadelphia channel available to EchoStar and DIRECTV).

[13] *See e.g.*, *Franchise Reform Order* ¶51 (concluding that "broadband deployment and video entry are 'inextricably linked'"); *Id.*, ¶62 (stating that, "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked

content, whether in the broadcast or MVPD marketplace, could create a significant barrier to the provision of competitive video services. Because the deployment of broadband networks and the provision of video service are intrinsically linked, lack of access to critical programming makes entry into both the video and broadband markets more risky, thereby diminishing the incentive of wireline competitors to deploy advanced networks capable of transmitting video to consumers.

II. THE COMMISSION SHOULD CAREFULLY CONSIDER ISSUES RELATING TO VERTICALLY INTEGRATED MVPD PROGRAMMING ARISING FROM THE PROPOSED MERGER.

The Commenters agree with the numerous commenters in this proceeding that have encouraged the Commission to focus a great deal of its scrutiny on issues relating to ensuring the reasonable and non-discriminatory access to the vertically integrated programming that will be controlled by the merged entity.[14] If the merger is approved, the combined entity would control a sizable portion of the most valuable cable programming content, including numerous RSNs which are among the most valuable programming content.[15]

RSNs offer real-time, intensely viewed and competitively essential video content. The RSN content owned by Comcast has previously been described as the "crown jewels" of its

intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."); *MDU Order*, ¶20 (stating that "broadband deployment and entry into the MVPD business are 'inextricably linked.'"); *Program Access Order*, ¶36 (concluding that "a wireline firm's decision to deploy broadband is linked to its ability to offer video.").

[14] *See e.g.*, *ACA Comments*, pp. 11 – 20; *CenturyLink Comments*, pp. 6 – 21.

[15] Order, *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1594, 26 FCC Rcd. 13145, ¶ 3 (released September 22, 2011) (stating that the Commission has "recognized that some terrestrially delivered programming may be non-replicable and sufficiently valuable to consumers," and that "Regional Sports Networks ("RSNs") fall within this category.").

programming assets.[16] In addition to its RSNs, Time Warner Cable has ownership interests in national networks including MLB Network, MLS Direct Kick, NBA League Pass, NHL Center Ice, and Team HD.[17] The programming available on the RSNs owned by the Applicants includes teams from Major League Baseball, the National Basketball Association, Major League Soccer and the National Hockey League. Absent access to these RSNs, there is simply no substitute on television for local professional and college sports games. Access to such "must have" programming by competing MVPDs is a significant issue in this proceeding, which the Commission should carefully and thoroughly consider.

During the Comcast-NBCU proceeding, the Commission noted that "the vertical integration of certain video programming networks with a particular MVPD would harm competition and enhance the integrated MVPD's market power despite the Commission's [program access] rules."[18] The marquee and must-have programming identified by the Commission included "a broad portfolio of national cable programming in addition to RSN and local broadcast programming."[19] The Commission found that "such programming is important to Comcast's competitors and without good substitutes from other sources."[20] The Commission further noted that loss of access to the programming would likely cause other MVPDs to lose subscribers, and, most importantly, that "the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video

[16] *See*, Statement of William P. Rogerson, Professor of Economics, Northwestern University, FCC Media Bureau's Public Forum to Discuss the Proposed Comcast/NBCU/GE Joint Venture, July 13, 2010.

[17] Fifteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, FCC 13-99, ¶ 97 (released July 22, 2013).

[18] *Comcast/NBCU Order*, ¶ 35.

[19] *Comcast/NBCU Order*, ¶ 36.

[20] *Id*.

distribution rivals."[21] A failure by the Commission to adequately address these concerns will likely make it more difficult for competitive wireline MVPDs to build and operate broadband networks, especially in rural communities where offering competitively priced video services are essential in order to make a business case for broadband deployment.

III. THE COMMISSION SHOULD CLOSELY EXAMINE THE IMPACT OF THE MERGER ON THE RETRANSMISSION CONSENT REGIME.

In recent years, there have been increasing calls for the Commission to implement reforms to its retransmission consent rules.[22] The imbalance in the current retransmission consent regime is harming consumers by driving up rates for all MVPDs and their respective subscribers, as well as denying consumers' access to these signals at critical times.[23] Although consumers are not a party to retransmission negotiations, they are clearly impacted by the outcomes of those negotiations. Given the combination of the Applicants' already formidable content assets, the Commission should carefully consider concerns raised by various stakeholders in this proceeding as they relate to retransmission consent.

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[21] *Id.*, ¶¶ 36, 37.

[22] *Comcast/NBCU Order*, ¶ 137.

[23] For example, retransmission consent fees are projected to go from $3.3 billion in 2013 to $7.6 billion in 2019. See, Donohue, Steve, *Kagan: Retrans Fees to Hit $7.6B by 2019*, November 22, 2013 (available at: http://www.fiercecable.com/story/kagan-retrans-fees-hit-76b-2019/2013-11-22) (visited December 17, 2014). With respect to broadcaster blackouts, there were 12 blackouts in 2010, 51 in 2011, 91 in 2012, and a record-setting 127 broadcast blackouts in 2013. See, American Television Alliance website, *Astronomical increases in broadcaster blackouts* (available at: http://www.americantelevisionalliance.org/wp-content/uploads/2014/04/ATVA_Planets.pdf) (visited December 17, 2014). There has also been dramatic increase in the length of broadcaster blackouts. In 2010, the longest blackout lasted only 24 days, and in 2011, 16 of the 51 blackouts lasted over 24 days. By 2012, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days. And by 2013, there were 72 blackouts lasting over 24 days, four of which lasted more than 74 days, and one which continued for more than 190 days. *See*, American Television Alliance website, *Media Center, Blackout List 2010 – 2014* (available at: http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-2014.docx) (visited December 17, 2014).

For example, some parties have raised concerns regarding the acquisition by Comcast of Time Warner Cable's two RSNs in Los Angeles and New York – the two largest media markets and cities in the country.[24] There are concerns that by combining control of these broadcast and RSN assets, Comcast will have an increased incentive and ability to command higher prices for this programming, especially in markets where MVPDs distribute both a Comcast RSN and an NBC owned and operated (O&O) station.

In the Comcast/NBCU order, the Commission cited evidence that "when a single entity controlled the local broadcast rights to multiple broadcast networks that entity was able to secure a substantial bargaining advantage in retransmission consent negotiations with the local MVPD, leading to an increase in retransmission consent fees of at least 20 percent."[25] The Commission acted on this imbalance in its recent decision to prohibit the joint negotiation of retransmission consent agreements by broadcast stations in the same designated market area (DMA).[26] The combined ownership of key programming assets, such as RSNs and O&Os, may further increase Comcast's post-transaction bargaining power and allow it to charge even higher fees for such programming.

The Commission should therefore focus some of its analysis on whether and how such a bargaining imbalance in the retransmission consent marketplace could be exacerbated by approval of the proposed merger. To the extent the Commission identifies material competitive concerns it should consider implementing measured and reasonable mechanisms to address them.

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[24] *See e.g.*, Comments of the American Cable Association, pp. 20 – 23 (dated August 25, 2014).

[25] *Comcast/NBCU Order*, ¶ 137.

[26] Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, 3358, ¶ 13 (2014) (*Joint Negotiation Order*).

IV. THE COMMISSION SHOULD CONSIDER THE IMPLICATIONS OF THE MERGER WITH RESPECT TO THE ORDERING OF UNES OR INTERCONNECTION UNDER SECTION 251(C).

The Commission's interconnection and UNE rules were designed to enable competition by entrants that lacked the scale and scope to compete on a level playing field with incumbents.[27] They were not designed to give a further cost advantage to other established incumbents that have not only deployed their own network facilities, but also have substantial financial resources and one of the largest share of voice customers in today's marketplace.

If the merger is approved by the Commission, the merged entity would become one of the largest facilities based providers of voice, video and broadband services. The combination of Comcast and Time Warner Cable would also create a corporate entity with approximately $182 billion in market capitalization.[28] Overnight, the combined entity would be among one of the largest local telecommunications providers in the country, serving approximately 16 million

[27] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶679 (1996), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff 'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (stating that "As a result of the availability to competitors of the incumbent LEC's unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition. . . . We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including . . . small entities seeking to enter the local exchange markets . . . .").

[28] *See*, Google Finance Website: Comcast, (available at: https://www.google.com/finance?q=NASDAQ%3ACMCSA&ei=L8rWU_jPAoTLqAG3vYCQAQ (visited December 17); *see also*, Google Finance Website: Time Warner Cable Inc. (available at: https://www.google.com/finance?q=NYSE%3ATWC&ei=OM_WU5jID4ekqwGmooCYDA) (visited December 17, 2014).

residential voice customers.[29]

Given these realities, it makes little sense for Comcast and Time Warner Cable to continue to have access to UNEs at regulated TELRIC rates. Given the sheer scale of the combined companies' infrastructure and market capitalization, the post-merger entity would clearly have the scale and scope to invest in any facilities it needs without obtaining them from its competitors at regulated rates.

Indeed, the Applicants themselves repeatedly emphasize the alleged benefits of their increased scale by stating that "greater scale will lead to greater revenue without proportionally greater costs," which in turn will mean that "more investments can profitably be undertaken, increasing the firm's incentive to invest in innovative new services."[30] The Applicants further state that approval of their merger "will leave the merged company even better suited to offer an array of advanced voice services in competition with ILECs and other providers."[31] If the Commission accepts their premise, it makes little sense for their ILEC competitors to have to provide the merged entity access to UNEs at regulated TELRIC rates.

The Commission has previously recognized that permitting access to UNEs at TELRIC rates in circumstances where entities can and do compete without that access undermines sound policy. In that proceeding, the Commission concluded that, "unbundling can create disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities, and is an

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[29] *See*, Comcast Corporation, Form 10-Q, p. 28, filed April 22, 2014 (available at: http://www.sec.gov/Archives/edgar/data/902739/000119312514152328/d706957d10q.htm) (visited December 17, 2014); *see also*, Time Warner Cable Inc., Form 10-Q, p. 11, filed April 24, 2014) (available at: http://www.sec.gov/Archives/edgar/data/1377013/000119312514155814/d714931d10q.htm) (visited December 17, 2014).

[30] *Application*, p. 23.

[31] *Application*, p. 83.

especially intrusive form of economic regulation – one that is among the most difficult to administer."[32] Citing a Court of Appeals decision, the Commission noted that UNEs should not be made available for the provision of service in certain markets, observing that "where there is 'robust competition,' it is 'hard to see any need for the Commission to impose the costs of mandatory unbundling.'"[33] If the merger is approved, continuing to allow such UNE access at TELRIC rates would obviate further infrastructure investment by the merged entity, and undermine the policies of the Telecommunications Act of 1996.[34]

It likewise makes no sense to require ILECs to provide interconnection to Comcast under section 251(c) (as opposed to section 251(a)). As evidenced by the disclosures in their Application, the merged entity would have the necessary scale and leverage to negotiate reasonable terms for interconnection. There would simply be no need for the Commission to enforce the artificial regulatory constructs provided by regulated TELRIC rates. Moreover, it would make little sense for the Commission to maintain a lopsided framework under which the massive post-merger Comcast entity may demand interconnection "at any technically feasible point"[35] on an incumbent LEC's network, while smaller ILECs could make no similar demands of Comcast.

Absent UNE access or interconnection under section 251(c), the merged entity would clearly be able to compete in an already competitive voice market. Allowing such access after this transaction would only create the public-interest harms that the Commission has recognized

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[32] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 36 (2005), petitions for review denied, Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

[33] *Id.*, ¶ 32.

[34] *Id.*, ¶ 37.

[35] 47 U.S.C. § 251(c)(2)(B).

in other circumstances, including the disincentive to investment by both ILECs and competitive LECs, without providing any countervailing benefit.

V. THE COMMISSION SHOULD EXAMINE ISSUES REGARDING THE AVAILABILITY OF HITS TO COMPETITIVE MVPDS.

As noted by other commenters in this proceeding, many small and mid-sized MVPDs rely on Comcast's HITS service to deliver digital programming to their subscribers.[36] HITS is an integral component to the deployment of such services since it enables the provision of cost-effective digital cable to customers of smaller MVPD systems, particularly in more rural areas. There is currently no commercially reasonable alternative to HITS for aggregating and delivering digital content for these small systems.

Comcast's HITS service enables smaller and mid-sized MVPDs to provide access to a robust suite of digital programming, including HD and Video on Demand. Absent any reasonable access to HITS, many smaller and mid-sized video providers will face substantial difficulties to remain viable in today's highly competitive video marketplace. Given that some smaller MVPDs are already abandoning the video marketplace due to exorbitant programming costs,[37] it would simply be cost prohibitive for them to invest in facilities comparable to Comcast's HITS service. Indeed, the marketing materials provided by HITS to MVPDs notes that it is the "lowest cost option," that is "50% or less expense to implement," compared to other alternatives.[38]

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[36] *See e.g.*, Comments of CenturyLink, pp. 35 – 37 (dated August 25, 2014).

[37] *See*, Ramachandran, Shalini, Wall Street Journal, *More Cable Companies Take TV Off Menu*, p. B-1, October 1, 2014 (available at: http://online.wsj.com/articles/more-cable-companies-take-tv-off-menu-1412120310) (visited December 17, 2014).

[38] HITS website, *What's Next: Expand Services & Capture Bandwidth* (available at: https://www.hits.com/sites/default/files/Solutions%20Comparison.pdf) (visited December 17, 2014).

Despite the fact that in an earlier proceeding Comcast committed to continue to provide HITS services to small cable operators, the Applicants make no such commitment in this proceeding.[39] In a 2002 transaction also involving Comcast, it agreed that it would provide HITS to small cable providers for the foreseeable future, and honor all existing service agreements. Comcast also agreed to communicate in advance any substantial changes in the service relationship.[40]

Unlike that earlier proceeding where the Commission acknowledged "alternative sources of packaged digital programming," including "direct feed options from the programmers themselves,"[41] no such environment exists today. Continued access to HITS on fair and reasonable rates, terms, and conditions is crucial to the continued viability of smaller and mid-sized MVPDs in today's video marketplace.

VI. CONCLUSION.

The Commenters take this opportunity to voice their shared concerns that control over video programming not be allowed to prevent effective competition to the Applicants. The Commission must ensure that it has mechanisms in effect concerning access to programming – both cable and broadcast – that are sufficiently vibrant to respond to any anti-competitive conduct that might arise from the proposed consolidated programming ownership.

The Commission should also ensure that MVPD competitors have reasonable access to critical infrastructure necessary to video competition, particularly Comcast's HITS service.

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[39] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, FCC 02-310, ¶ 116 (2002). The Applicants make no such commitment in their current Application.

[40] *Id.*, ¶ 113.

[41] *Id.*, ¶ 116.

There is currently no commercially reasonable alternative to HITS for aggregating and delivering digital content, and it is an integral component to the deployment of such services since it enables the provision of cost-effective digital cable to customers of smaller MVPD systems, particularly in more rural areas.

Finally, the Commission should consider whether it still makes sense to allow the merged entity to require ILECs to provide access to UNEs at low, regulated TELRIC rates. A similar consideration should be given with respect to interconnection obligations under the Communications Act.

Respectfully submitted,

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