

**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 RCN TELECOM SERVICES, LLC  
AND GRANDE COMMUNICATIONS NETWORKS, LLC,  
("JOINT COMMENTERS")**

December 23, 2014

## SUMMARY

RCN Telecom Services, LLC (“RCN”) and Grande Communications Networks, LLC (“Grande”) provide bundles of video and broadband in competition with Applicants Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“TWC”). In many instances, RCN’s ability to compete with Comcast is hindered by Comcast’s anticompetitive practices. If the proposed combination with Time Warner Cable (“TWC”) is approved it is likely that Comcast will extend those practices to the TWC markets it retains post-merger. The proposed merger between Comcast and TWC will create a cable colossus that will pose myriad harms to competition from actual or potential MVPD competitors in numerous ways. The Applicants have opposed the Petition to Deny but their claims do not satisfactorily address the harms to competition that will arise if they are allowed to combine.

In their Petition to Deny, the Joint Commenters urged the Commission to examine competition in the market for a bundle of broadband and video. Based on Joint Commenters’ experience, this is how consumers purchase services. The Applicants ignore this reality and ask the Commission to adhere to outdated analysis of MVPD mergers. Applicants deny the meaning of a bundle when they inexplicably claim that consumers can create their own bundle by purchasing broadband from one provider and video from another. This, of course, is nonsensical as a bundle is widely understood to contain multiple services purchased from the same provider.

Nor have the Applicants adequately responded to concerns regarding their monopsony power in the purchasing of programming. Applicants ignore the reality that their increased size will allow them to extract even greater programming discounts and use those discounts to reduce competition.

Similarly, the Applicants argue there is no harm in the vertical market for programming controlled by Comcast, claiming that the transaction adds little new programming. But the

programming that TWC adds, particularly its RSN properties, is significant in the local markets where the Joint Commenters operate. Even apart from the increase in programming that TWC adds, in TWC markets, such as in New York and Texas, the combined entity will have new incentives, not present today, to impose anticompetitive conditions on the receipt of Comcast programming in order to favor their MVPD operations with whom the Joint Commenters compete for customers.

The Applicants also fail to minimize the harm to the market for spot cable advertising, despite the fact that Comcast excludes RCN and other entities that use third parties for representation in the interconnects Comcast controls for regional advertising. Similarly, the Applicants' Opposition does nothing to alleviate the concerns that the merged entity will have the ability and incentive to enter into exclusionary arrangements in the market for equipment used in delivering MVPD services. For these reasons, the Commission should deny the applications and if it does not should require the Applicants agree to conditions that:

- Extend Comcast/NBCU programming conditions from the Comcast/NBCU order to TWC properties, increase the length of conditions to ten years, modify the arbitration process to make it more effective, and allow programming cooperatives to represent MVPDs.
- Require Comcast/TWC to provide access to their major market advertising sales cooperatives on the same terms available to Comcast/TWC.
- Prohibit Comcast/TWC from entering exclusive contracts with equipment manufacturers and require access to emerging technology and equipment on reasonable rates, terms and conditions.

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**REPLY COMMENTS OF RCN TELECOM SERVICES, LLC  
AND GRANDE COMMUNICATIONS NETWORKS, LLC,  
PETITION TO DENY APPLICATIONS  
OR CONDITION CONSENT**

RCN Telecom Services, LLC (“RCN”) and Grande Communications Networks, LLC (“Grande”) (together, Joint Commenters), respectfully submit their reply comments to the Opposition<sup>1</sup> to the Joint Commenters’ petition to deny filed by the Applicants Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“TWC”). The Joint Commenters urge the Commission to deny the Applications,<sup>2</sup> on the ground that the Applicants have failed to meet their burden of showing that the proposed transfers will serve the public interest, convenience and necessity.<sup>3</sup> In the alternative, Joint Commenters respectfully urge the Commission to adopt

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<sup>1</sup> *Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement*, MB Docket No. 14-57, Comcast Corp. and Time Warner Cable Inc. Opposition to Petitions to Deny and Response to Comments (filed Sep. 23, 2014) (“Opposition”).

<sup>2</sup> *Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement*, MB Docket No. 14-57 (filed Apr. 8, 2014) (“Application”).

<sup>3</sup> 47 U.S.C. §§214, 310.

safeguarding conditions in connection with the proposed transfers to protect the public interest and preserve and promote competition in the market.

## **I. Introduction**

RCN, the nation's first and one of the largest cable overbuilders, provides customers with multichannel video programming, wired telephony, and wired high-speed Internet access services over fiber-based facilities, entirely owned and operated by RCN. RCN provides these services in the Chicago, Boston, New York City, Philadelphia, Lehigh Valley and Washington, D.C. markets. RCN competes head-to-head in the provision of one or more of those services with TWC in New York City and with Comcast in Chicago, Boston, Philadelphia, and Washington, D.C. RCN has approximately 440,000 customers.

Grande provides multichannel video programming, wired telephony, and wired high-speed Internet access services to Texas customers in North Dallas, San Antonio/San Marcus/Austin, Waco, Corpus Christi and Midland/Odessa. Grande competes with TWC in each of these markets except Midland/Odessa. Grande has approximately 150,000 customers. Both Grande and RCN compete with existing cable providers, principally in bundled service offerings, as opposed to stand-alone services.

In their Petition to Deny, the Joint Commenters presented significant concerns that the proposed combination of Comcast/NBCU and TWC threatens to reduce competition in the market for programming, the market for bundles of MVPD and broadband service and the market for spot-advertising. In their Opposition, Applicants distort these concerns to suggest that RCN is concerned about "how enhanced competition" might affect RCN. Joint Commenters struggle to understand how the proposed transaction enhances competition. For example, in the market for access to video programming that is not affiliated with Comcast, Comcast already has a substantial cost advantage over every other single competitor in the market. Its advantage is so

significant that a deep-pocketed company like AT&T has admitted defeat, claiming that it cannot compete with Comcast in the video market on its own. How then can the Commission credit the Applicants' claim that increasing the discounts the Applicants receive for programming enhances competition? It is simply not credible, and as explained below, the proposed combination reduces, rather than enhances, competition.

## **II. The Commission's Analysis of the Proposed Merger Must Consider the Separate Market for a Bundle of Broadband and Video**

In their Petition to Deny, the Joint Commenters explained that consumers have a strong preference for purchasing a bundle of services, consisting of at least video and wired broadband, from the same provider, and DBS providers do not provide effective competition in this market because they cannot offer a comparable bundle.<sup>4</sup> This is because DBS providers cannot offer a compelling broadband service that competes with wired broadband. Such bundles are typically marketed at a price that is less than the sum of the prices of the components, and the customer has the added convenience of receiving a single bill and dealing with a single provider.

Applicants do not attempt to rebut the data in the record that the vast majority of purchasers buy video and wired broadband from a single supplier.<sup>5</sup> Instead, they offer several arguments, each lacking in merit. First, Applicants rely on the Commission's 2006 *Adelphia Order* for the proposition that there is not a separate market for bundled service.<sup>6</sup> That order was adopted 8 years ago, and even then, the Commission did not independently examine whether a

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<sup>4</sup> *Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement*, MB Docket No. 14-57, \_\_\_ Petition to Deny (filed \_\_\_, 2014) at p. 7. ("Petition to Deny").

<sup>5</sup> *See Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, DA 14-1129, (filed June 11, 2014); Declaration of Patrick T. Doyle, at ¶ 16; Declaration of Lori M. Lee, at ¶ 22; Comments of Hawaiian Telecom, at 7.

<sup>6</sup> Opposition at 137-38.

market for bundled products exists. Rather, it stated that in past transaction reviews (which are even more remote in time than 2006), the Commission found that the relevant product market is all MVPD services.<sup>7</sup> The market has changed since 2006. Broadband is a much more important adjunct to video than it was in 2006. The explosive growth in streaming services such as Netflix alone demonstrates that fact. Indeed, in a speech earlier this month, Chairman Wheeler recognized the power of the broadband/video bundle, suggesting that “broadband becomes more economically viable” when it is “bundled with video services.”<sup>8</sup>

Second, Applicants assert that “DBS customers can create their own bundle using Comcast’s Internet and voice services and DBS video service.”<sup>2</sup> But that is not a bundle at all, and is surely not the type of bundle to which Chairman Wheeler was referring. The essence of a “bundle” is that the customer purchases two or more products from the same supplier and obtains a discounted price for the bundle, and the convenience of a single bill and dealing with a single supplier. What Applicants refer to simply is not a bundle and is not how the majority of consumers buy service.

The Dish Network website cited by Comcast itself quite candidly admits that its satellite broadband is not a viable substitute for TWC’s or Comcast’s broadband and therefore does not provide a competitive alternative for the consumer seeking a bundle of video and broadband.

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<sup>7</sup> *Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Commc’ns Corp. (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Commc’ns Corp., (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 ¶ 63 (2006) (“*Adelphia Order*”).

<sup>8</sup> Remarks of Chairman Wheeler at National Association of Telecommunications Officers and Advisors Annual Conference, October 1, 2014, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1001/DOC-329707A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1001/DOC-329707A1.pdf)

<sup>2</sup> *Id.*

Dish's website provide the following Q&A:

Q. The Internet provider at my current location is cable/fiber (FiOS, U-Verse, Comcast, Time Warner, Charter, Cox, AT&T or Verizon). Is DishNET Satellite a good solution for me?

A. NO, As a satellite-based service, dishNET Satellite Internet has monthly data allowance limits which are much lower than cable and fiber-based Internet providers. Additionally, with satellite-based systems signal latency (delay) occurs, which may negatively affect some activities such as realtime gaming and VoIP.<sup>10</sup>

Thus, there is ample support for the Commission considering a bundle of broadband and video service provided by Joint Commenters, TWC and Comcast as the critical product market for evaluating harms in the market resulting from the proposed merger.

### **III. The Proposed Merger Will Lead to Harm by Providing the Combined Comcast/TWC/NBCU with Increased Monopsony Power**

In their Petition to Deny, RCN and Grande demonstrated that the addition of TWC will afford Comcast with increased monopsony power resulting in harm to consumers.<sup>11</sup> Applicants' responses fail to undercut this argument. First, Applicants argue that Comcast is already so large that merging with TWC will not provide the merged entity the leverage to drive down the prices they pay for programming. Without support, they claim that discounts appear to be "flattening out with the industry moving to more standard pricing."<sup>12</sup> Joint Commenters seriously doubt that the evidence will support Applicants' claims. The Commission will have available data showing the shape of the curve that plots price against volume. It should examine such data carefully and draw its own conclusions, particularly as to whether increased purchasing power will enable Applicants to drive down programming costs in current TWC markets, given that

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<sup>10</sup> <http://www.dish.com/entertainment/internet-phone/> (last visited Sept. 26, 2014).

<sup>11</sup> Petition to Deny at 12-15.

<sup>12</sup> Opposition at 157-58.

their purchasing power will be more than tripling in those markets.

Applicants also argue that “it would not be advisable for a programmer to create too much differential between one MVPD’s prices and another’s in the same market, since that could drive subscribers to switch to the MVPD with lower wholesale pricing (and result in less revenue for the programmer), all else being equal.”<sup>13</sup> This assumes, without support, that the programmer will have the ability to hold the line on the discounts it provides to the merged Comcast/TWC. All data, and experience, shows that to the contrary, larger buyers can extract larger discounts. It is also most unlikely that having been forced to give an increased discount to the merged Comcast/TWC, programmers will then voluntarily increase their discounts to smaller customers such as RCN and Grande, so as to maintain the differential. Indeed, Applicants concede that “like good capitalists, programmers negotiate for the highest rates the market will bear from every MVPD.”<sup>14</sup>

But Applicants’ argument, flawed as it is, underscores the risk to competition and consumers when one participant in the market is so large that it wields disproportionate pricing power of wholesale inputs. Applicants admit that as they receive additional discounts for programming, they can lower rates, thereby motivating consumers to switch from higher-priced competitors. This weakens the competitors and their ability to compete. Applicants claim there is a consumer benefit if they pay less for programming and pass their savings on to consumers.<sup>15</sup> This focuses on the short run and, in fact, is not true in the marketplace today. In the longer run, Applicants can use their ability to reduce prices to drive out competition and then use monopoly power to gouge the consumer, should they elect.

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<sup>13</sup> *Id.* at 158.

<sup>14</sup> *Id.* at 164.

<sup>15</sup> Opposition at 164.

#### **IV. The Proposed Merger Will Lead to Harm Resulting from the Merged Company's Control of Programming**

In their initial comments, Joint Commenters stated that vertical harms would arise in the programming market because the addition of TWC “would enhance the ability of the merged Comcast/NBCU/TWC to ‘engage in potentially exclusionary conduct’ against rival MVPDs, including ‘frustrating or cutting off TWC’s video distributions rivals’ access to important Comcast-NBCU programming.”<sup>16</sup> Applicants argue that such harm is unlikely because its ownership of programming will only increase slightly.<sup>17</sup>

Applicants’ defense is no comfort because it is focusing on the wrong geographic market. Perhaps there is validity to the claim that nationally the merged entity’s ownership of programming will only marginally increase. But to evaluate the impact on MVPD competition, it is critical to examine the impact on local markets. Applicants do not dispute the need to use local markets to evaluate harms to competition in the MVPD market.<sup>18</sup> Thus it is important to analyze these vertical harms looking at the impact on competition in local markets, particularly TWC markets, not nationally.

For current TWC markets, such as New York City where RCN competes with TWC, and Dallas where Grande and TWC compete, the Applicants focus on the wrong metric. In those markets, in which TWC, not Comcast, is the MVPD with a monopoly market share, the relevant metric is whether TWC’s program ownership increases appreciably. If the proposed transaction is approved, TWC will effectively own all of the NBCUniversal programming networks. Based

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<sup>16</sup> Petition to Deny at 14 quoting Diana L. Moss, Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked, American Antitrust Institute, White Paper, at p. 11 (June 11, 2014) (“Moss White Paper”).

<sup>17</sup> Opposition at 240.

<sup>18</sup> Application at 131.

on Applicant's own data, TWC's current share of programming is 0.25%. Comcast's current share is close to 12% and includes critically important networks, including regional sports and broadcast channels, to customers in the marketplaces served by Joint Commenters.

Thus, TWC's market share of programming in New York City and Dallas (as well as other TWC markets) will increase significantly as a result of the merger. Post-merger, the merged company will continue to have an incentive to raise rivals' costs by forcing its programming to a very high level of video customers. That incentive did not exist prior to the merger, as Comcast would not benefit from raising Grande's costs in Dallas or raising RCN's costs in New York City.

**V. The Proposed Merger Creates A Substantial Risk to the market for Spot Cable Advertising**

In its Petition to Deny, the Joint Commenters argued that Comcast currently denies RCN access to the interconnect for selling spot advertising on a regional basis.<sup>19</sup> RCN, like many smaller operators and overbuilders, does not have its own affiliated advertising operations but relies on a third party firm, Viamedia, that specializes in the cable spot advertising market. Comcast, however, competes with Viamedia. Comcast would prefer that RCN use Comcast Spotlight and not Viamedia. As the Commission can understand, RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage.

Nonetheless, Comcast insists like "all other MVPDs, ...RCN [is] free to join the Comcast-managed interconnects at any time, and RCN's assertion that it is 'prohibited' by

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<sup>19</sup> Petition to Deny at 27.

Comcast from doing so is incorrect.”<sup>20</sup> This assertion ignores the plain fact that Comcast is not being truthful. Comcast will only allow RCN to join the interconnects if RCN employs Comcast spotlight instead of Viamedia. And Comcast plainly admits this in its Opposition, stating that “in its managed interconnects, Comcast does not typically contract with ‘middlemen’ media firms, such as Viamedia...”<sup>21</sup>

The Joint Commenters disagree with Comcast on the benefits of using intermediary firms. RCN does not have the luxury of building its own spot advertising business and must rely on third parties. Comcast is not concerned that Viamedia doesn't provide value; it wants the revenue that Viamedia generates to go to Comcast. And if Viamedia were ineffective to the detriment of RCN, that would appear to be to Comcast's benefit. Thus it is quite apparent that Comcast's only motivation here is to limit access to the interconnects to those firms that eschew the use of Viamedia and other third party representatives. Comcast's behavior is plainly anti-competitive and contrary to the public interest and should not be permitted. The Joint Commenters, as wire line competitors, should be allowed to join Comcast and TWC interconnects through chosen representatives and should not be denied such access for anticompetitive reasons.

#### **VI. The Commission Should Impose a New Program Access Arbitration Condition on this Merger**

In their Petition to Deny, the Joint Commenters argued that the presence of the NBCU Program Access arbitration condition was insufficient to alleviate the public interest harms arising from the addition of TWC's programming assets to the Comcast/NBCU assets.<sup>22</sup> The

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<sup>20</sup> Opposition at n. 876.

<sup>21</sup> *Id.*

<sup>22</sup> Petition at 32-33;

Joint Commenters did so because the Applicants championed the lack of use of the arbitration process as a reason to approve the merger despite the serious competitive concerns it raised.<sup>23</sup>

Comcast now says that the arbitration condition is irrelevant because “there is relatively little new programming accruing to Comcast as the result of this Transaction.”<sup>24</sup> But for Joint Commenters and other MVPDs in the local markets where TWC has significant programming assets, such as its RSNs, the impact is significant. Moreover, in the TWC markets, post-merger Comcast would have a new reason to use its control over programming to discriminate against competing MVPDs. Raising their costs will benefit TWC--a consideration that would be of no benefit to Comcast absent the merger.

It is impossible to measure the worth of the arbitration condition objectively since its terms made it impossible to use. The Commission should modify the condition to make it effective, rather than let Comcast dictate the terms that will again render it a nullity. Comcast claims that “no MVPD has found it necessary to invoke these arbitration conditions since the NBCUniversal transaction, there is simply no basis for extending their term here.”<sup>25</sup> But no MVPD has information regarding current terms and pricing available to similarly situated MVPDs. Thus, MVPDs lack the ability to negotiate effectively. The Joint Commenters and other MVPDs, or their legal representatives, must be provided with such information regarding current terms and pricing, including what Comcast pays NBCUniversal and other MVPDs. While the Commission could impose a condition making the disclosure of information about the market for programming more transparent, it should also prohibit Comcast’s anti-competitive and anti-consumer practices such as those addressed on page 32 of the Confidential version of

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<sup>23</sup> Petition at 32 citing Rosston-Topper Decl. ¶ 198.

<sup>24</sup> Opposition at p. 88.

<sup>25</sup> Opposition at p. 252.

the Petition to Deny.<sup>26</sup>

Comcast further argues that “the Commission already adopted provisions specially tailored to enable small MVPDs (with 1.5 million or fewer subscribers) to use a bargaining agent to negotiate on their behalf and, if necessary, pursue arbitration.”<sup>27</sup> This ignores the fact that the small MVPD’s best bargaining agent is the National Cable Television Cooperative (“NCTC”). But Comcast tilted the merger condition in its favor since the current rules explicitly prohibit NCTC from acting as the agent.<sup>28</sup> The Commission should therefore allow NCTC and its MVPD members to use the program access rules for Comcast/NBCU and TWC programming, without requiring NCTC to assume financial liability for its members.

## **VII. The Proposed Combination Will Harm The Market For Access To Emerging Technology And Equipment For Use In Providing MVPD Services**

The Joint Commenters’ Petition to Deny explained that if the proposed transaction is completed, the merged entity, due to its scale and scope, will have substantial power and incentive to impede small MVPDs’ access to emerging technology equipment, such as DOCSIS 3.1.<sup>29</sup> The merged firm could effectively “lock out” small MVPDs from the market for new technologies by negotiating exclusive arrangements for emerging technologies or equipment. Applicants respond by claiming that that there will be no harm in the equipment marketplace since the market for such equipment is global in scope. But even where markets are global, the market in the United States is one of the largest, if not the largest, market and the merged company will be an even larger influence on delivery of new technology in a lucrative market.

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<sup>26</sup> See Petition at. 32.

<sup>27</sup> Opposition at n. 852.

<sup>28</sup> See 47 C.F.R §76.1000(c)(1) (restricts program access rule eligibility to those entities that assume full financial liability for its members, which NCTC does not).

<sup>29</sup> Petition to Deny at p. 34.

Even where the market is global, Comcast retains outsized influence that needs to be checked rather than increased. And Comcast certainly does have an incentive to restrict smaller MVPDs from accessing this equipment as it reduces their effectiveness at competing with the new technology that Comcast, but not the smaller MVPDs, would be able to deliver. The Commission must therefore prohibit the combined entity from entering into exclusive contracts with contractors, vendors, equipment manufacturers, and product producers.

### **VIII. Conclusion**

For the reasons set forth herein, Joint Commenters respectfully submit that Commission must conclude that the proposed transaction will not serve the public interest, convenience, and necessity and deny the Applications. Should the Commission conclude, however, that the transaction can be approved, any such approval must include a set of conditions as discussed above to offset harms to competition and consumers.

Respectfully submitted,



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Jeffrey B. Kramp  
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RCN Telecom Services, LLC  
Grande Communications Networks, LLC

December 23, 2014