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By ECFS

January 12, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Notice of DISH Network Corporation, Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's rules,[1] and the *Modified Joint Protective Order* in the above-referenced proceeding,[2] this Ex Parte Notice is being submitted on behalf of DISH Network Corporation ("DISH"). On January 8, 2015, Jeffrey Blum and Hadass Kogan of DISH; William Zarakas, a principal with the Brattle Group; and the undersigned met with Phil Verveer of the Office of the Chairman; Jim Bird, Hillary Burchuck, Bill Freedman and Joel Rabinovitz of the Office of General Counsel; Paul LaFontaine, Katherine LoPiccalo (by phone), Bill Rogerson and David Waterman of the Office of Strategic Planning & Policy Analysis; Will Reed of the Enforcement Bureau; Bill Lake, Ty Bream, Jessica Campbell, Adam Copeland, Hillary DeNigro, Chad Guo, Shabnam Javid, Jamila Bess Johnson, Jeffrey Neumann, John Riefer, Jake Riehm, Julie Saulnier, Sarah Whitesell, Andrew Wise, Sean Yun and Alexis

[1] 47 C.F.R. § 1.1206(b)(2).

[2] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, *Second Amended Modified Joint Protective Order*, DA 14-1639 (Nov. 12, 2014) ("*Modified Joint Protective Order*").

Zayas of the Media Bureau; Eric Schmidt of the Public Safety and Homeland Security Bureau; Allen Barna, Daniel Meyerson (by phone) and Mitali Shah (by phone) of the Wireless Telecommunications Bureau; and John Adesalu, Ben Childers, Octavian Carare (by phone), Bill Dever, Lisa Gelb, Betsy McIntyre, Bakari Middleton, Eric Ralph and Matt Warner of the Wireline Competition Bureau. At that meeting, DISH discussed the anticompetitive effects of the proposed merger between Comcast and Time Warner Cable ("TWC"). Mr. Blum and Ms. Kogan were not in attendance for those portions of the meeting when Highly Confidential Information submitted by the Applicants under the *Modified Joint Protective Order* was discussed.

DISH specifically argued that:

- The national market for high-speed broadband access matters;
- Comcast-TWC would have a greater incentive to foreclose online video distributors ("OVDs") from high-speed broadband access to consumers; and
- Comcast-TWC would have a greater incentive to foreclose rival multichannel video programming distributors ("MVPDs") and OVDs from access to its programming.

The material illustrating these points is set forth in the attached Powerpoint presentation, which was distributed at the meeting.

Notably, the relevance of the national market was recently recognized by Comcast in yet another unguarded moment. On January 6, 2015, Comcast told institutional investors that the purpose for its acquisition of TWC was to become a player in a national market:

> There is clearly a state of – a change in the evolution of the market going on and that's one of the reasons we were very attracted to the Time Warner Cable acquisition. All our competitors are national Dish, DIRECT, AT&T, Verizon, Netflix, Hulu, Amazon, Apple, they are all national players and we felt that in order to compete long term and to bring the great products like X1 and higher speeds, business services into these markets that being a national player was important.[3]

And this is not the only significant admission on the part of the Chief Executive Officer of Comcast Cable. At the same presentation, he acknowledges the key dependency of OVDs on Comcast's broadband pipe, and the crushing handicap suffered by OVDs who cannot bundle their product with broadband access. Comcast appears to recognize that it can manipulate the pricing of its bundle to disadvantage competing OVDs. In Comcast's words:

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[3] Conference Call with Steve Amaro, Citi, Neil Smit, Comcast, and Tony Werner, Comcast, Transcript of CMCSA – Comcast Corp at Citi Global Internet, Media & Telecommunications Conference, at 2-3 (Jan. 6, 2015).

> Concerning the OTT players, it's interesting. I was reading about the Sling TV and I was comparing it to what an equivalent offer would be for us. And we offer a performance-based broadband product along with digital television selection, which includes ESPN and all the broadcast networks, for about a destination price of about $80. And if you were to compare that to the $20 of the Dish OTT plus our rack rate pricing of a performance broadband at about $67, we're actually a lower-priced offer all in offering broadcast, multiple streams, so a fundamentally, I think, better product. ***If you include the broadband, then you're going to need to deliver that service.***
>
> But I do think there's going to be more experimentation with packaging. We launched Internet Plus in Q4 of 2013, which was a light video product, basic video, performance broadband and HBO. And that went really well for us…[4]

At the meeting, DISH also pointed out that, because the combined Comcast-TWC would have much greater scale that any other pay-TV provider, it would possess the leverage and incentive to restrict the ability of third-party programmers to grant online rights to competing OTT services, like DISH's. A combined Comcast-TWC would have a number of contractual tools at its disposal to limit a competing OVD's ability to access programming, including:

- Require competing OVD programming to be distributed through Comcast-TWC's cable MVPD service at below-market rates;
- Impose contractual restrictions on third-party content providers to limit OVD access to content;
- Impose contractual restrictions that limit the ability of OVDs to gain preferential/equal "windowing" of content;
- Impose contractual restrictions on third-party content providers to limit OVD access to "must-have" or marquee programming; and
- Impose contractual channel/bundling restrictions on third-party content providers to require OVDs to carry more channels than they otherwise would be required to.

In fact, DISH already has experienced difficulties in obtaining certain OTT rights from third-party programmers, possibly because of restrictive contractual limitations imposed by Comcast on such programmers.

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[4] *Id.* (emphasis added).

The attached Powerpoint presentation, which was distributed at the meeting, contains Highly Confidential Information. DISH has denoted with "{{ }}" symbols information that it has deemed Highly Confidential Information pursuant to the *Modified Joint Protective Order*. A redacted version of DISH's presentation is attached. A Highly Confidential version of the presentation is simultaneously being filed with the Commission.

Please contact the undersigned if you have any questions.

Sincerely,

Pantelis Michalopoulos
Counsel for DISH Network Corporation

cc: Phil Verveer
Jim Bird
Hillary Burchuck
Bill Freedman
Joel Rabinovitz
Paul LaFontaine
Katherine LoPiccalo
Bill Rogerson
David Waterman
Will Reed
Bill Lake
Ty Bream
Jessica Campbell
Adam Copeland
Hillary DeNigro
Chad Guo
Shabnam Javid
Jamila Bess Johnson
Jeffrey Neumann
John Riefer
Jake Riehm
Julie Saulnier
Sarah Whitesell

Andrew Wise
Sean Yun
Alexis Zayas
Eric Schmidt
Allen Barna
Daniel Meyerson
Mitali Shah
John Adesalu
Ben Childers
Octavian Carare
Bill Dever
Lisa Gelb
Betsy McIntyre
Bakari Middleton
Eric Ralph
Matt Warner

DISH Network Corporation

Presentation on Some Competitive Effects of the Comcast-TWC Transaction

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Introduction

- The national market for high-speed broadband access matters.
- Comcast-TWC would have a greater incentive to foreclose online video distributors ("OVDs") from high-speed broadband access to consumers.
- Comcast-TWC would have a greater incentive to foreclose rival multichannel video programming distributors ("MVPDs") and OVDs from access to its programming.

The National Market for High-Speed Broadband Access Matters

Sling TV to Launch Live, Over-the-Top Service for $20 Per Month; Watch on TVs, Tablets, Computers, Smartphones, Game Consoles

- Sling TV to deliver the best of live TV including ESPN, ESPN2, TNT, TBS, Food Network, HGTV, Cartoon Network and Disney Channel
- Service to feature Video-On-Demand programming and the best of online video with long- and short-form content from Maker Studios
- Core package priced at $20 per month; no commitment, contract, credit check or hardware installation required
- Supported devices expected to include Amazon Fire TV, Amazon Fire TV Stick, Google's Nexus Player, select LG Smart TVs, Roku players, Roku TV models, select Samsung Smart TVs, Xbox One from Microsoft, iOS, Android, Mac, PC

Category: Products and Services

Monday, January 5, 2015 12:00 pm MST

The National Market for High-Speed Broadband Access Matters

- DISH has conducted a business case analysis based on its DISH World service and its recently launched Sling TV service.
- DISH will generally only pursue projects if net present value ("NPV") is positive over the first {{ }}.

The National Market for High-Speed Broadband Access Matters

- DISH forecasts that a new nationwide OTT service would reach profitability within {{ }}, assuming **uncompromised access** to the nation's high-speed broadband access subscribers.
  - {{ }} of operations, followed by positive and increasing pre-tax cash flows (profits).
  - NPV over {{ }} is {{ }}.

Table 1: Financial Projections with Uncompromised Access {{

}}

The National Market for High-Speed Broadband Access Matters

- The service would remain profitable notwithstanding the loss of access to standalone Comcast or TWC subscribers.
  - The {{ }} NPV of expected profit remains positive at }} if access to only **Comcast's** high-speed broadband subscribers is lost.
  - The {{ }} NPV of expected profit remains positive at {{ }} if access to only **TWC's** high-speed broadband subscribers is lost.

Table 2: Financial Projections without Access to (only) Comcast's Broadband Subscribers {{

}}

The National Market for High-Speed Broadband Access Matters

- The merger would make the service unprofitable.
- The {{ }} NPV is negative if DISH is unable to access both Comcast's and TWC's subscribers.
  - The combined Comcast and TWC would be able to block access to 50% of relevant broadband subscribers.
  - The service would incur substantial losses in each of the {{ }} years of its operation as a result.
  - These pronounced losses cause the {{ }} NPV of from the service to be an expected loss {{ }}.

Table 3: Financial Projections without Access to Comcast's *and* TWC's Broadband Subscribers {{

}}

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast is almost like the Hotel California of broadband.
- Almost nobody can leave Comcast today.
- Comcast cites its fear of departing broadband subscribers as a deterrent on foreclosure:
  - "[S]ignificant majorities of broadband subscribers likely would switch ISPs if their provider blocked or degraded access to edge provider content." Opposition at 203.
- The Netflix incident shows that Comcast need not fear.

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast claims that people easily switch from Comcast to other broadband providers, citing a {{ }} monthly churn rate.
- **BUT**: Comcast's own internal analysis shows that {{ }} of that churn is the result of involuntary or "force majeure" consumer behavior, including:
  - {{ }} and
  - {{ }}.
- Comcast's internal analysis can only identify only {{ }} of its churn as voluntary, putting its voluntary monthly churn rate at only {{ }}.
- DISH's voluntary churn rate in the more competitive MVPD market, by contrast, ranges from {{ }}—{{ }}.

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast's Hypothetical – the GSG Survey
  - The Survey concludes that 70% or more of an ISP's subscribers would likely switch if it blocked or degraded Internet content.
- A Real World Example of Blocking and Degradation – the Netflix Incident
  - Comcast's dispute with Netflix created similar factual circumstances to those posited in the GSG Survey
  - Consumers went from being able to access Netflix content at 720p to "nearly VHS" quality.
  - According to the GSG Survey, Comcast's churn should have increased as a result.

Table 4: Comcast's Average Monthly Churn—Oct. to Feb. (2012-2013 and 2013-2014)

{{

}}

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- The Netflix incident shows that few, {{ }}, switched.
  - A regression analysis found {{ }} in Comcast's churn during the relevant period.
  - In fact, Comcast's churn {{ }}.

{{

}}

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Dr. Mark A. Israel: "[U]nder a 25 Mbps definition, without accounting for mobile broadband, Comcast's share increases by only 0.7 percentage points following the transaction."
- Comcast's Reply to Responses: "[E]ven at the highest speed threshold—25 Mbps downstream—the combined company's broadband share would increase by only 1 percent . . . ."
- **BUT:**

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast fails to account for TWC's pre-existing plans to upgrade its network under its TWC Maxx initiative.
  - The figures Comcast cites are based on Form 477 and IAS Report data from June 2013 (for the 0.7% number) and Form 477 data from December 2013 (for the 1% number).
  - In 2014, TWC began aggressively rolling out TWC Maxx to significantly boost broadband access download speeds across its footprint—including in Austin, NYC, and LA.
  - TWC committed to providing minimum download speeds of 50 Mbps across 25% of its subscriber base by the end of 2014.
  - After executing its planned upgrades in seven new markets in 2015, TWC will have upgraded {{ }} more of its customers, for a total of nearly {{ }} of its subscriber base—all without Comcast.
  - TWC plans to complete the TWC Maxx upgrade for all customers by {{ }}.

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast is not constrained by its settlement-free interconnection agreements.

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- All interconnection with Comcast's network requires Comcast's consent.
- Comcast claims that its existing "40" settlement-free agreements discipline Comcast's ability to force content providers into paid relationships.
- BUT:

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast's agreements provide no protection
  - All but {{ }} of Comcast's interconnection agreements at the time of the Netflix dispute were based on a handshake, not a formal contract.
  - Only {{ }} to contain a restriction on Comcast's monitoring of the data passing through the interconnection points.
  - Only the ratios for {{ }} routes are set by contract, and those are exceedingly low ratios of {{ }}
  - Comcast's other settlement-free agreements {{ }} "general balance of inbound versus outbound traffic."
- Even Comcast's paid interconnection agreements generally provide little protection from pressure from Comcast:
  - {{ }}, making those contracts effectively "lame ducks," and
  - for many of those agreements—some {{ }} of the {{ }}—the initial periods have {{ }}

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- There are ***only 5 primary and 5 secondary competitors*** for high-speed data transit services that would support video services, not 40.
- Comcast asserts that it generally accepts up to a {{ }} ratio, ***BUT***:
  - it admits having imposed a lower {{ }} ratio on Level 3 during the Netflix dispute; and
  - a preliminary review of Comcast's internal communications has not revealed any instance in which the more generous {{ }} ratio was ever communicated to its peers, suggesting that Comcast is free to adopt any ratio advantageous to it under the circumstances.

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- All routes into Comcast's network were effectively unavailable during the Netflix incident.
- All but one routes were operating at above a {{ }} ratio.

{{

}}

Comcast-TWC Would Have a Greater Incentive to Foreclose OVDs

- Comcast sees the value of protecting its MVPD franchise from OVDs.
- Comcast's words make it easy to connect the dots.

Comcast Sees the Value of Protecting Its MVPD Franchise from OVDs

- {{ }} of the cable MVPD service is important to Comcast.
- {{
- }}

Comcast Sees the Value of Protecting Its MVPD Franchise from OVDs

- {{
  -
  -

}}

Comcast's Words Make It Easy to Connect the Dots

- {{ }}
- But the problem is that the proposed merger would turn the questionable into the unacceptable.
  - If the standalone Comcast was oscillating between yes and no in its cost/benefit analysis of a {{ }}, ***the merger would move the balance decisively towards foreclosure***: the benefit to NBCU from selling its programming would not increase with the merger; by contrast, the benefit of additional distribution revenue to Comcast-TWC from foreclosure would increase with the company's expanded footprint.
  - {{ }}

Comcast-TWC Would Have a Greater Incentive to Foreclose Rival MVPDs

- Foreclosure would become profitable for Comcast-TWC, both comparatively and in absolute terms.
- Comcast's use of a one-month timeframe seems result-oriented.
- Foreclosure would result in price increases for consumers.

Foreclosure Would Become Profitable for Comcast-TWC, Both Comparatively and in Absolute Terms

- Even Comcast admits that the merger would {{ }} the critical departure rate ("CDR") required for permanent foreclosure.
  - {{ }}
- Even a temporary one-month foreclosure strategy would become much more attractive.
  - {{ }}

Comcast's Use of a One-Month Timeframe Seems Result-Oriented

- The departure rate experienced by DISH in the Fisher incident was {{ }}.
- Multiplying Comcast's projected {{ }} actual departure rate by Fisher's six months yields a result of {{ }}—above the {{ }} Comcast indicates to be necessary for a successful foreclosure strategy.
- The actual departure number may be even higher: {{

}}

Comcast's Use of a One-Month Timeframe Seems Result-Oriented

- Comcast-TWC ***would not stop at one month*** if a six-month foreclosure is more profitable for it.
- Two recent foreclosures cited by Comcast as better precedent ***lasted longer than one month***—Media General-DISH (***46 days***) and CBS-TWC (***32 days***).
- The Fisher incident is as relevant today as in 2008-09.
  - NBC network programming currently ranked first in prime time.
  - Both the NBC network and Comcast-owned local NBC stations enjoying record profitability.

Foreclosure Would Result in Price Increases for Consumers

- Foreclosure would bring {{ }} price increases.
- {{ }}
- {{ }}
- {{ }}
- {{ }}

Appendix 1: Analysis of William P. Zarakas

REDACTED IN ITS ENTIRETY

Appendix 2: Supporting Comcast and TWC Documents

REDACTED IN ITS ENTIRETY