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REDACTED—FOR PUBLIC INSPECTION

By ECFS

January 27, 2015

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

Re: Notice of *Ex Parte* Letter, 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 the *Second Amended Modified Joint Protective Order*[1] in the above-captioned proceeding, DISH Network Corporation ("DISH") submits a public, redacted version of the attached ex parte letter dated January 27, 2015. DISH has denoted with "[[ ]]" symbols information that it has deemed Confidential Information, with "{{ }}" symbols information that it has deemed Highly Confidential Information, and with "// //" symbols information that it has deemed Video Programming Confidential Information ("VPCI") pursuant to the *Modified JPO*. The versions of the letter containing Confidential Information, Highly Confidential Information, and VPCI are simultaneously being filed with the Commission and will be made available pursuant to the terms of the *Modified JPO*.

[1] 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 JPO*").

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STEPTOE & JOHNSON LLP

Please contact me with any questions.

Sincerely,

Stephanie A. Roy
Counsel to DISH Network Corporation

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445 12th Street, S.W.
Washington, DC 20554

Re: 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,

DISH Network Corporation ("DISH") submits this letter and accompanying Supplemental Reply Declaration ("Declaration") prepared by its expert economist, Professor David Sappington, to provide additional evidence regarding the substantial harms that would result from the proposed merger of Comcast and Time Warner Cable ("TWC"). This submission adds to the already overwhelming record evidence that the combination of the nation's largest and second largest cable companies is bad for competition, innovation, and consumers and must be rejected. DISH provides the following additional evidence to rebut new and continuing claims advanced by the Applicants in this proceeding:

First, Comcast's claim that is has no incentive to harm online video distributors ("OVDs")[1] is belied directly by //DISH VPCI Start//

[1] *See* Comcast Corporation and Time Warner Cable Inc., Reply to Responses, MB Docket No. 14-57, at 7-8 (Dec. 23, 2014) ("Reply to Responses").

//DISH VPCI End// in fact, programmers are usually willing to offer rate discounts for higher volume subscribership on cable and satellite systems. Comcast's incentive to sabotage OVDs is further confirmed by Highly Confidential documents submitted by Comcast. In one of them, Comcast expresses its concern about a {{

}}[2]

Second, with regard to market share, Comcast claims that the increase in the combined company's share of high-speed broadband (25 Mbps-plus) subscribers would be miniscule. Comcast essentially argues that it is dominant already, and that the competitive landscape cannot get much worse as a result of this proposed merger. Not so. Comcast's argument relies on numbers from December 2013, before TWC began its TWC Maxx roll-out across its footprint. In 2014, TWC made significant progress upgrading subscribers to speeds of 25 Mbps and higher, and TWC has concrete plans to continue upgrading its system. Based on this progress, Professor Sappington has calculated a realistic increase in market share as a result of the merger. This analysis is available in Professor Sappington's accompanying Declaration.

Third, Comcast has claimed that any bad behavior it could inflict against OVDs would be restrained because of Comcast's fear that it would lose broadband subscribers if it engaged in sabotage.[3] Comcast has no such fear. As DISH explained in its Reply, if anything, {{

}}.[4] Comcast has responded by restating another variant of what seems to be its general theory of this case. It essentially argues that ISPs behave badly enough already; thus, a future with a combined Comcast/TWC cannot be much more bleak. Comcast asks the Commission to shrug off its churn data, because other ISPs were also throttling Netflix, and therefore consumers had no other place to go. This argument fails for a

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[2] Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{

}}

[3] *See* Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 241 (Sept. 23, 2014) ("Opposition").

[4] *See* DISH Network Corp., Reply to Opposition, MB Docket No. 14-57, at 27-29 (Dec. 22, 2014) ("DISH Reply"); *see also* David Evans, Economic Analysis of the Impact of The Comcast/Time Warner Cable Transaction on Internet Access to Online Video Distributors: Response to Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, ¶¶ 233-239 (Dec. 23, 2014) (attached to Netflix, Inc., Reply to Opposition); COMPTEL, Reply to Opposition, MB Docket No. 14-57, at 15 n.49 (Dec. 23, 2014); Free Press, Reply to Opposition, MB Docket No. 14-57, at 34-35 (Dec. 23, 2014).

number of reasons, including the most basic principle: Comcast's subscribers most likely did not know that other ISPs may have engaged in similar behavior, even in the limited number of cases where they had a choice of high-speed ISPs.

Incentive to Harm OVDs

//DISH VPCI Start//

//DISH VPCI End//

The threat that competing OTT services pose to Comcast's core MVPD business also helps explain //DISH VPCI Start//

//DISH VPCI End//

//DISH VPCI Start//

//DISH VPCI End// One can only

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5 //DISH VPCI Start//
//DISH VPCI End//

6 //DISH VPCI Start// //DISH VPCI End//

7 //DISH VPCI Start// //DISH VPCI End//

imagine how much more blatant and anti-competitive Comcast's conduct will become if it is able to walk away from Washington, approvals in hand.

//DISH VPCI Start// //DISH VPCI End// is consistent with Comcast's acknowledgment back in 2010 that {{ }}[8] Indeed, other Comcast documents confirm that the rationale for the //DISH VPCI Start// //DISH VPCI End// was precisely that—fear that a vibrant OTT service would undercut Comcast's traditional MVPD service. In an {{ }}[12]

//DISH VPCI Start// //DISH VPCI End// and Comcast's internal documents are thus inconsistent with Comcast's self-serving assertions in this proceeding that it lacks an incentive to interfere with, foreclose, or otherwise harm OVDs. Actions speak louder than words.

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8 Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{ }}

9 Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{ }}

10 {{ }}

11 {{ }}

12 {{ }}

Effect of the Transaction on Market Share

To deflect scrutiny of its proposed merger, Comcast also argues that this deal will have only a minimal impact on the existing market structure, because Comcast already possesses an overwhelmingly dominant share of the nation's high-speed broadband (25 Mbps-plus) subscribers, while TWC only boasts a small number of such subscribers. Comcast argues that the increase in the combined company's share of high-speed subscribers would be miniscule—merely 0.7%, as claimed by Comcast in its Opposition;[13] or 1%, as Comcast claims in its Reply to Responses.[14] But the argument is an optical illusion based on seriously out-of-date numbers—June 2013 figures for the 0.7% claim, and December 2013 figures for the 1% claim. Both of these sets of figures reflect a time period before TWC began the TWC Maxx roll-out across its footprint. Since December 2013, TWC has rolled out TWC Maxx to approximately 25 percent of its subscribership. TWC will introduce TWC Maxx to an additional {{ }} of its customer base in 2015.[15] What is more, TWC already plans to complete the conversion to TWC Maxx service to all of its subscribers by the {{ }}.[16] As a result of the TWC Maxx program, TWC customers will be able to subscribe to broadband download speeds of up to 300 Mbps.[17] These numbers are especially significant because the completed upgrades of TWC's system should result in a wholesale upgrade of 15 Mbps customer plans to 50 Mbps plans: TWC is offering the upgrades at no additional charge.[18]

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[13] Mark A. Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters, MB Docket No. 14-57, ¶¶ 35 (Sept. 22, 2014) (attached as Exhibit 1 to Opposition) ("Israel Reply Declaration").

[14] Mark A. Israel, Comments on Federal Communications Commission's December 9, 2014 Memo Regarding Broadband Subscriber Data, MB Docket No. 14-57, ¶ 11 (Dec. 23, 2014) (attached as Exhibit B to Reply to Responses).

[15] *See* Time Warner Cable, Inc., Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Oct. 22, 2014) ("TWC Supplemental Responses"), {{

}}; *see also* Response of Time Warner Cable Inc. to the Commission's Information and Data Request, Response to Specification 61, at 107 (Sept. 11, 2014), {{
}}

[16] *See* TWC Supplemental Responses, {{ }}

[17] Press Release, Time Warner Cable, Time Warner Cable to Transform TV and Internet Experience in New York City and Los Angeles (Jan. 30, 2014), *available at* http://www.timewarnercable.com/en/about-us/press/twc-to-transform-tv-internet-in-nyc-la.html.

[18] *See, e.g.*, Press Release, Time Warner Cable, Time Warner Cable Launches Faster Internet Speeds for New Jersey Customers (Oct. 8, 2014), http://www.timewarnercable.com/en/about-us/press/twc-launches-faster-internet-new-jersey-customers.html ("[d]ownload speeds increase

Professor Sappington conducted an analysis to calculate a more realistic change in Comcast/TWC's post-transaction high-speed broadband market concentration. In doing so, Professor Sappington has taken into account TWC's progress in 2014, its plans through 2017, and its offer to upgrade 15 Mbps subscribers to 50 Mbps service for free.[19] The result? Even if the rest of the industry could upgrade broadband speeds at the same rate as TWC, Comcast would control a full {{ }} ***more*** of the market at the end of 2017 as a result of acquiring TWC.[20] In fact, Comcast's market share increase will likely be even steeper. As Professor Sappington explains, the rest of the industry is likely to grow more slowly than TWC for a number of reasons, including TWC's superior funding capability, its heavy concentration in urban areas, and the uncertain future of ADSL growth.[21] Assuming that the rest of the industry will upgrade its service speed at half the rate of TWC, the increase in share brought about by the transaction would be {{ }} percent, more than {{ }} times the paltry 1 percent claimed by Comcast.[22] Under those more realistic assumptions, the combined company would control {{ }} percent of the high-speed broadband market, despite the gains of competitors.

The Netflix Incident

Professor Israel opines that the Netflix incident's effect on Comcast's churn was limited, at least in part, by the fact that Netflix quality was degraded on "multiple ISPs at the same time."[23] But the foundation for this opinion is demonstrably infirm. First, the fact that other ISPs were also throttling Netflix could affect churn from Comcast only to the extent that Comcast's customers could churn to those ISPs. Of the implicated ISPs (TWC, AT&T, and Verizon), TWC has limited overlap with Comcast, and between them AT&T and Verizon's fiber

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up to six times faster at no additional charge"); Press Release, Time Warner Cable, Time Warner Cable Begins Major Internet Speed Increases in Austin and Surrounding Communities (May 21, 2014), http://www.timewarnercable.com/en/about-us/press/twc-begins-major-internet-speed-increase.html ("all six of the Internet plans offered by TWC will receive an increase in speeds at no additional cost"); Press Release, Time Warner Cable, Time Warner Cable Begins Major Internet Speed Increases in Los Angeles and New York City (Apr. 22, 2014), http://www.timewarnercable.com/en/about-us/press/twc-launches-faster-internet-new-jersey-customers.html (stating that customers will receive higher speeds "at no extra charge.").

[19] {{

}}

[20] {{ }}

[21] Sappington Supplemental Reply Declaration ¶ 10.

[22] {{ }}

[23] Israel Reply Declaration ¶ 56.

Internet access products (both FTTP and the various U-Verse products) overlap less than half of Comcast's footprint (with Verizon overlapping about [[ ]] percent and AT&T overlapping a bit more than [[ ]] percent).[24] Second, Professor Israel relies on a key assumption: knowledge by Comcast's customers both that the blame lay with Comcast (and not Netflix) and knowledge that other ISPs were also throttling Netflix's service. All indications are that customers had no such information. In fact, while Comcast's behavior was the subject of heavy press coverage at the time, the conduct of the other ISPs was not. As DISH and others have made clear, the type of consumer knowledge that Professor Israel presumes is far from assured and, in the common case, unlikely.[25] The publication cited by Professor Israel, Ars Technica, is a trade publication that does not have a wide lay readership.[26] Third, the Netflix performance issues on Comcast's network both started earlier and were more severe during the relevant time frame than the throttling experienced by customers on AT&T and Verizon's networks. *See* Figure 1. This chart illustrates vividly that Comcast was the most serious offender of all—downgrading Netflix service to speeds lower than any other ISP platform during the relevant time period. Moreover, the behavior of any one ISP never paralleled precisely that of any other ISP. For example, any degradation of Netflix's content in the hands of Verizon seems to have started more than a month after Comcast started its own pernicious behavior.

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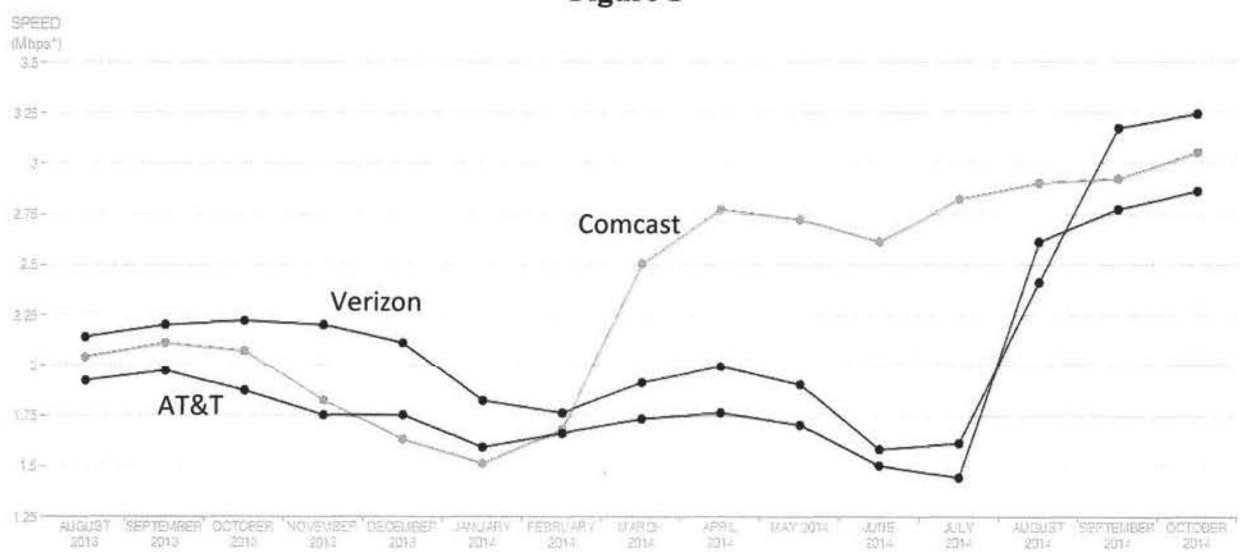
[24] Mark A. Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband, MB Docket No. 14-57, ¶¶ 50, 56 (April 8, 2014) (attached as Exhibit 6 to Applications of Comcast Corporation and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement).

[25] *See* DISH Reply at 22 (describing the risk for consumer confusion over who is to blame for degradation); Netflix, Inc., Reply, MB Docket No. 14-57, at 25-26 (Dec. 23, 2014) (identifying consumer confusion in survey commissioned by Comcast).

[26] *See* Israel Reply Declaration ¶ 86 (citing Jon Brodkin, *Netflix Slow on Verizon or Comcast? A VPN Might Speed Up that Video*, Ars Technica (Feb. 15, 2014), http://arstechnica.com/information-technology/2014/02/netflix-slow-on-verizon-or-comcast-a-vpn-might-speed-up-that-video/).

Figure 1



As DISH previously explained, Comcast's own, internal churn data show that Comcast is the Hotel California of broadband, with the Netflix incident having {{
}}.[27]

* * *

The additional evidence presented herein further reinforces the already strong case that this proposed merger will not serve the public interest. It should be rejected.

Sincerely,

Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corporation

Enclosure

[27] *See* DISH Reply at 27-29.

Supplemental Reply Declaration of Professor David Sappington on Relevant Market Shares and Incentives for OVD Sabotage

1. The purpose of this Supplemental Reply Declaration is two-fold. The first purpose is to provide a simple methodology for estimating the impact of the proposed merger of Comcast, Inc. ("Comcast") and Time Warner Cable, Inc. ("TWC") on industry concentration in the supply of high speed broadband service. The methodology reveals that the merger would substantially increase industry concentration. The second purpose is to explain why, despite Comcast's interest in licensing NBCUniversal ("NBCU") programming, the merger of Comcast and TWC would increase Comcast's incentive to sabotage the operations of online video distributors ("OVDs").

The Merger Would Substantially Increase Industry Concentration in the Supply of High Speed Broadband Service.

2. The Applicants suggest that their proposed merger would not substantially increase industry concentration in the supply of high speed broadband service.[1] This suggestion reflects a retrospective and dated view of the industry, because it begins and ends with data from 2013. An updated, judicious, prospective view is more appropriate and provides a very different conclusion.

3. One simple approach to constructing such a prospective view of the industry begins with the data the Commission has developed regarding the number of residential broadband subscribers served by major industry wireline suppliers as of December 2013.[2] The

[1] The Applicants state in their Opposition that "Comcast's share increases by only 0.7 percentage points," and Comcast notes in its Reply to Responses that the relevant increase would be 1 percent. *See* Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, Exhibit 1, Israel Reply Declaration ¶ 35 (September 23, 2014); Comcast Corp., Reply to Responses, MB Docket No. 14-57, Exhibit B, Israel Comments ¶ 11 (December 23, 2014).

[2] The data are provided in the Memorandum To: Marlene H. Dortch, Secretary, Federal Communications Commission From: William T. Lake, Chief, Media Bureau, Subject: Application of Comcast Corporation, Time Warner Cable Inc., Charter Communications Inc., and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 14-57 (December 9, 2014). Subscriber data for cable companies is included in Exhibit 1 – Residential Fixed Broadband Subscriber Counts by Provider and Speed (Nationwide). Subscriber data for non-cable companies (i.e.,

Commission's data distinguishes between what might be called "moderate speed subscribers" and "high speed subscribers." Moderate speed subscribers are those whose broadband service delivers download/upload speeds between 10/.768 megabits per second ("Mbps") and 25/3 Mbps. High speed subscribers are those whose broadband service delivers download/upload speeds of at least 25/3 Mbps. Table 1 summarizes the Commission's data. The table indicates that as of December 2013, Comcast served {{

}} of high speed subscribers.

4. Table 2 presents the Commission's estimate of the corresponding number of moderate speed and high speed subscribers that would prevail if Comcast merged with TWC and the Applicants' proposed divestiture of subscribers were implemented. The table indicates the merger would result in Comcast serving approximately {{ }} of December 2013 high speed subscribers. This small increase in the fraction of 2013 high speed subscribers that Comcast would serve reflects the {{ }} number of high speed subscribers that TWC served in December 2013.

FTTP, ADSL and Others) are included in Exhibit 4 – Residential Fixed Broadband Subscriber Counts by Technology and Speed. Subscriber counts are as of December 2013 and reflect data reported on FCC Form 477.

Supplier	Moderate Speed Subscribers[3]	High Speed Subscribers[4]
Comcast	{{	{{
Charter		
TWC		
Bright House		
Other Cable		
FTTP		
ADSL		
Other	}}	}}
Total	30,473,465	29,368,828

Table 1. Fixed, Residential Broadband Subscribers as of December 2013 if Comcast and TWC Do Not Merge.

3 Moderate speed subscribers are broadband subscribers of services that deliver download/upload speeds between 10/.768 Mbps and 25/3 Mbps.

4 High speed subscribers are broadband subscribers of services that deliver download/upload speeds of at least 25/3 Mbps.

Supplier	Moderate Speed Subscribers	High Speed Subscribers
Comcast/TWC	{{	{{
Charter		
Greatland		
Bright House		
Other Cable		
FTTP		
ADSL		
Other	}}	}}
Total	30,473,465	29,368,828

Table 2. Fixed, Residential Broadband Subscribers as of December 2013 if Comcast and TWC Merge.

5. Since December 2013, TWC has been engaged in an aggressive, ongoing program to upgrade its broadband network and significantly expand the number of high speed broadband subscribers it serves. To illustrate, the company's TWC Maxx program entails broadband service with download speeds as high as 300 Mbps. TWC has already made this service available to approximately 25% of its subscribers[5] and plans to make TWC Maxx available to {{ }} of its customer base by the end of 2015, and to all of its subscribers by {{ }}.[6]

[5] Ryan Kelly, "TWC Maxx Hits Austin Milestone: LA & NYC Upgrades Continue," *Time Warner Cable Untangled* (October 7, 2014), available at http://www.twcableuntangled.com/2014/10/twc-maxx-hits-austin-milestone-la-nyc-upgrades-continue/.

[6] *See* Time Warner Cable, Inc., "Responses to the Commission's Information and Data Request, MB Docket No. 14-57" (October 22, 2014), {{ }}.

6. Thus, the December 2013 data do not reflect accurately the number of high speed broadband subscribers TWC is likely to serve in the near future in the absence of the proposed merger. Consequently, use of the December 2013 data alone is unlikely to provide an accurate assessment of the impact of the merger on industry concentration in the supply of high speed broadband service. A more realistic assessment requires a reasonable estimate of the number of high speed broadband subscribers that TWC and other industry suppliers will serve in the near future in the absence of the proposed merger. One simple approach to formulating such an estimate is the following.

7. Suppose that all suppliers of broadband service can successfully transition their December 2013 moderate speed subscribers to high speed broadband service. Further suppose that each supplier also retains as high speed subscribers in the near future all of the high speed subscribers it served in December 2013. Under these conditions, the estimated number of high speed subscribers that each supplier serves in the near future is the number of subscribers to whom the supplier presently delivers broadband service with downstream/upstream speeds of at least 10/.768 Mbps.[7]

8. Table 3 provides the subscriber estimates in this simple setting, along with the corresponding fraction of total high speed subscribers that each supplier would serve if Comcast and TWC were not permitted to merge. Table 4 provides the corresponding data for the case in which Comcast and TWC merge their operations.

[7] For simplicity, this estimate abstracts from any growth in subscriber bases over time. The market share calculations reported below remain unchanged if all suppliers experience the same subscriber growth rates over time.

Supplier	**Future High Speed Subscribers**[8]	**Percent of Total Future High Speed Subscribers**
Comcast	{{	{{
Charter		
TWC		
Bright House		
Other Cable		
FTTP		
ADSL		
Other	}}	}}
Total	59,842,293	

Table 3. Estimated Number of Future Fixed, Residential High Speed Broadband Subscribers if Comcast and TWC Do Not Merge.

[8] The estimated number of future high speed subscribers is the sum of the number of December 2013 moderate speed subscribers and the number of December 2013 high speed subscribers.

Supplier	**Future High Speed Subscribers**	**Percent of Total Future High Speed Subscribers**
Comcast/TWC	{{	{{
Charter		
Greatland		
Bright House		
Other Cable		
FTTP		
ADSL		
Other	}}	}}
Total	59,842,293	

Table 4. Estimated Number of Future Fixed, Residential High Speed Broadband Subscribers if Comcast and TWC Merge.

9. Tables 3 and 4 indicate that if Comcast is permitted to merge with TWC, the estimated fraction of high speed subscribers that Comcast would serve would increase by {{ }}.

10. This {{ }} increase likely understates the increase in concentration the merger would actually produce. This is the case because the smaller cable companies and the suppliers of ADSL broadband service may not be as successful as TWC in delivering high speed broadband service to most of their subscribers in the near future. There are at least three reasons for this possibility. First, TWC typically has greater revenues than smaller cable companies, a

portion of which can be employed to finance network upgrades.[9] Second, TWC's footprint includes a relatively high proportion of densely populated regions, where the economics of network upgrading tend to be relatively favorable.[10] Third, the inherent limitations of the ADSL technology may well prevent ADSL suppliers from delivering high speed broadband service in the near future to all their December 2013 moderate speed subscribers.

11. It is straightforward to illustrate how the foregoing analysis could be altered to account for additional considerations like these. To do so, suppose that only the FTTP suppliers and the individual cable companies identified in Tables 3 and 4 successfully transition their December 2013 moderate speed subscribers to high speed subscribers (and continue to serve their present high speed subscribers) in the near future. In contrast, suppose the ADSL suppliers and the "Other Cable" companies represented in Tables 3 and 4 transition only, say, one-half of their December 2013 moderate speed subscribers to high speed subscribers (and continue to serve all of their December 2013 high speed subscribers) in the near future. In this event, Comcast would serve {{ }} of estimated future high speed subscribers if it did not merge with TWC, and {{ }} of these subscribers if it did merge with TWC. Consequently, the merger would increase {{ }} the fraction of estimated high speed subscribers that Comcast would serve.[11]

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[9] *Compare* Time Warner Cable, Press Release, Time Warner Cable Reports 2013 Fourth-Quarter and Full-Year Results, at 1 (Jan. 30, 2014), *available at* http://ir.timewarnercable.com/files/4Q13/Q4%202013%20TWC%20Earnings%20Release%20FINAL.pdf (reporting revenue of $22 billion for 2013), *and* Cox Enterprises, Revenues, http://www.coxenterprises.com/about-cox/annual-review/revenues.aspx#.VMZ3X_7F98G (last visited Jan. 26, 2015) (reporting revenue of $9.9 billion for 2013 for its Cox Communications company), *and* Charter Communications, Inc., 2013 Form 10-K (Feb. 21, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-SEC10K (reporting revenue of $8.2 billion for 2013).

[10] *See* Applications of Comcast Corporation and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57, at 128 (April 8, 2014) (providing map that illustrates TWC's service areas).

[11] The estimated {{ }} future high speed subscribers in this setting is the difference between: (i) 59,842,293, the estimated total number of high speed subscribers in the setting of Table 4; and (ii) $\frac{1}{2} \times$ {{ }}, one-half of the moderate speed subscribers of the ADSL and Other Cable companies reported in Table 2.

12. In summary, the Applicants' suggestion that the merger would only produce a small increase in concentration in the supply of high speed broadband service is an artifact of their dated, retrospective analysis. An updated, prospective analysis provides a more plausible estimate of the increase in market concentration the merger would engender. Even the foregoing simple prospective analysis, which may well be biased toward understating the impact of the merger on industry concentration, reveals that the merger would increase substantially (from an already high level) the fraction of high speed broadband subscribers that Comcast would serve.

The Merger is Likely to Increase, Not Reduce, Comcast's Incentive to Sabotage OVDs

13. The Applicants suggest they are unlikely to sabotage OVDs because doing so would reduce the revenue that Comcast-NBCU derives from licensing programming to OVDs. The Applicants further contend that the merger would reduce their incentives to sabotage OVDs. Specifically, the Applicants argue that:

> "OVDs have also become significant purchasers of NBCUniversal content. ... This creates a significant and growing *disincentive* for Comcast to harm or degrade the performance or viability of OVDs, which TWC does not have currently. Thus, to the extent the merger has an effect on incentives as they relate to OVDs, it only decreases the incentive to target them for harm" [footnote omitted].[12]

This argument is incomplete in at least three respects.

14. First, the argument fails to acknowledge the important manner in which the merger would *increase* the Applicants' incentive to sabotage OVDs. The increased incentive for sabotage arises because sabotage of an OVD by either Comcast or TWC would diminish the OVD's ability to compete effectively against the video services of both Comcast and TWC. If the merger were not permitted, Comcast would not benefit financially from an OVD's reduced ability to compete in TWC's operating territory. Similarly, TWC would not benefit from an OVD's reduced ability to compete in Comcast's territory. In contrast, if the merger were permitted, the combined Comcast/TWC would benefit financially from an OVD's diminished ability to compete both in

[12] Letter from Kathryn Zachem, Comcast Corporation, to Marlene Dortch, FCC, MB Docket No. 14-57, November 26, 2014, Response to Question 3 at 17.

the current TWC operating territory and in the current Comcast operating territory. The merger would thereby increase the incentives of Comcast and TWC to sabotage OVDs.

15. Comcast already has substantial incentive to sabotage OVDs. Comcast has recognized for some time the importance of protecting its core video business {{ }}.[13] One way to slow this growth is to diminish customer satisfaction with OTT services by slowing or disrupting the delivery of OTT services to broadband customers. This incentive to sabotage OVDs would be enhanced by the proposed merger, for the reason identified above.

16. Second, there is evidence to suggest that NBCU's incentive to license its programming to OVDs is limited by its incentive to {{ }}. Specifically, reacting to {{ }} recognizing that the licensing of prime content to an OVD like Netflix would harm MVPDs.

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[13] In an internal document, {{ }}. *See* Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{ }}

[14] Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (October 14, 2014) ("Comcast Supplemental Responses to Commission"), {{ }}

[15] Comcast Supplemental Responses to Commission, {{ }}

[16] {{ }}

17. This incentive for NBCU to limit the licensing of its programming to OVDs like Netflix undermines any suggestion that the Applicants might refrain from sabotaging OVDs because doing so would limit the revenues derived from licensing NBCU programming to OVDs. As is apparent {{ }}, NBCU's incentive to license programming to OVDs is limited by its desire to {{ }} for the MVPD franchise.

18. Third, Comcast has substantial ability to direct its sabotage at particularly effective OVD competitors while retaining the ability to license NBCU programming to other OVDs. Consequently, Comcast can sabotage an effective OVD competitor by withholding NBCU programming from that particular competitor while still securing substantial revenue from licensing the programming to other OVDs.

19. There is evidence to suggest that Comcast-NBCU engages in such targeting. In its //DISH VPCI Start//

//DISH VPCI End//

20. This //DISH VPCI Start//

//DISH VPCI End// undermines the Applicants' argument that the prospect of licensing NBCU programming to OVDs will effectively limit the Applicants' incentive to sabotage OVDs.

[17] //DISH VPCI Start//
//DISH VPCI End//

[18] //DISH VPCI Start// //DISH VPCI End//

Conclusion

21. In summary, the merger of Comcast and TWC would substantially increase industry concentration in the supply of high speed broadband service. Furthermore, the merger would increase Comcast's incentive to sabotage the operations of OVDs.

* * *

The foregoing comments were prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on January 26, 2015.

David Sappington
Eminent Scholar, Department of Economics
Director, Robert F. Lanzillotti Public Policy Research Center
University of Florida