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REDACTED – FOR PUBLIC INSPECTION

March 9, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: ***Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations*****, MB Docket No. 14-57**
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Comcast Corporation hereby submits a redacted, public version of the enclosed *ex parte* letter. The **{{ }}** symbols denote where Highly Confidential Information has been redacted. The Highly Confidential version of the letter has been submitted to the Office of the Secretary, and will be made available for inspection pursuant to the Second Amended Modified Joint Protective Order in this proceeding.[1]

Please contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

/s/ Francis M. Buono
Francis M. Buono
Counsel for Comcast Corporation

Enclosure

[1] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Second Amended Modified Joint Protective Order, 29 FCC Rcd. 13799 (2014) ("Second Amended Modified Joint Protective Order").

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445 12th Street, S.W.
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Re: ***Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations,*** **MB Docket No. 14-57**
HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO MODIFIED JOINT PROTECTIVE ORDER IN MB DOCKET NO. 14-57

Dear Ms. Dortch:

On January 30, 2015, in connection with the above-captioned proceeding, the Commission held an Economic Analysis Workshop (the "Workshop"), moderated by Commission economists and attended by Applicants' economists, including Drs. Dennis Carlton, Mark Israel, Gregory Rosston, and Michael Topper, and third-party economists, including Drs. David Evans, Joseph Farrell, and David Sappington.[1] This letter further responds to a question raised during the Workshop by Dr. Rogerson, namely:

> "Suppose the Commission does accept the [applicants'] arguments, that this merger is in the public interest, goes ahead and approves it, would the same sorts of arguments that we're hearing here . . . support further consolidation among

[1] *See* Letter from William Lake, Chief, Media Bureau, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 4, 2015) (*ex parte* notice for economist workshop).

> non-overlapping cable operators, and, if so, is that an issue we should think about today, when we're considering whether to approve this merger?"[2]

As described below:

(1) The limiting principle at work here is that each transaction has to be justified on the facts before it, so approving this transaction does not say anything about whether the facts in some later hypothetical deal would likewise merit approval. For example, and of particular relevance, this transaction is one where the combined company will serve less than 30% of all MVPD subscribers, a figure that the FCC itself, at its most conservative, found to be an acceptable level of cable consolidation. That says nothing about whether a combined firm in a hypothetical future merger with a much higher percentage, which might in fact present monopsony concerns, would also be approvable);

(2) Well-established precedent precludes the Commission or antitrust agencies from considering hypothetical future deals as part of their assessment of a current transaction; and

(3) *Opponents' argument* that the Commission should disapprove this transaction because "big is bad" is what lacks a limiting principle – as it would prohibit almost *any* conceivable version of this type of transaction – and should thus be rejected.

1. The Limiting Principle at Work Here

Opponents have claimed that, if the Commission allows two non-overlapping cable companies to merge in this transaction, what is to say that the resulting precedent could not be used to justify approval of a merger of the entire cable industry into just one cable provider? For example, at the Workshop, Dr. Evans asserted that Applicants claim "there are no limiting principles" and "so long as we're acquiring non-overlapping cable systems, so there is no competition that's being eliminated . . . no problem, no limitations on this argument."[3] But this assertion mischaracterizes Applicants' position. Applicants and their economists have never claimed that so long as a merger entails the combination of non-overlapping cable systems, there should be no basis for disapproving it. Rather, they have defended and demonstrated the justification *for this transaction* based on the full set of facts at issue here, *including* the lack of overlap as one key factor, but certainly have not suggested that approval is justified entirely, and solely, due to a lack of overlap.

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[2] Transcript of Economic Analysis Workshop, Federal Communications Commission, Proposed Comcast-Time Warner Cable-Charter Transaction, January 30, 2015 (hereinafter, "*FCC Workshop Transcript*"), at 374:18-22 – 375:1-5.

[3] *Id.* at 375:13-22 – 376:1.

For example, Applicants have demonstrated and quantified the specific benefits this deal offers (such as hundreds of millions of dollars in annual incremental value for TWC customers from accelerated deployment of faster broadband speeds,[4] almost **{{ }}** in cost savings for enterprise business service customers over 10 years,[5] expansion of low-cost broadband deployment to millions of additional low-income households through Comcast's *Internet Essentials* program,[6] among other things[7]). They have also analyzed the specific realities of the marketplace conditions that form the backdrop to this transaction, including in particular the exploding and already quite established OVD industry on a global and U.S.-specific basis (in large part due to Applicants' substantial broadband investments and significant licensing of content to OVDs); the availability and expansion of other high-speed broadband offerings; the existing and increasing competition, and the continued investment by multiple providers, in various video, data, voice, and other services; the porousness and robust interconnectivity and competitiveness of the backbone market; the existence of long-term interconnection agreements between Comcast and major OVDs **{{ }}**; the massive leverage programmers have in content licensing; and the lack of any evidence of bad conduct by Comcast to date, including the absence of any program access or program carriage harms as demonstrated by Drs. Rosston and Topper applying rigorous econometric analyses using the Commission's own methodologies and real-world data. All these marketplace factors and promised benefits support approval of *this* deal.[8] But the details regarding benefits and lack of harms may or may not be the same with respect to a potential future cable merger should one arise.

It is this focus on the specifics of the particular merger at hand, in total, that serves as the core limiting principle here and that readily defeats any argument that approval of this merger necessary means a future merger involving cable consolidation is likewise approvable. For example, as Dr. Carlton explained:

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[4] Israel Reply Decl. § VIII; Letter from Michael D. Hurwitz, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, Exhibit A (Feb. 26, 2015) (attaching "Analysis of Broadband Consumer Benefits Arising from the Transaction" prepared by Dr. Israel).

[5] *See* Letter from Francis M. Buono, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 1 (Feb. 24, 2015).

[6] Applications and Public Interest Statement of Comcast Corporation and Time Warner Cable Inc., MB Docket No. 14-57, at 62-66 (Apr. 8, 2014) ("Public Interest Statement").

[7] Moreover, these benefits are ones that the Commission has consistently recognized as satisfying its public interest standard under well-established precedent. *See* Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 25-36 (Sept. 23, 2014) ("Opposition and Response").

[8] Of course, the Commission and antitrust agencies should also consider that the video and broadband markets are highly dynamic, and that the additional investment, new innovations, and ever-expanding entry into these markets – including, notably, by mobile wireless broadband providers, wireline competitors like Google, and new OVDs – further diminish any concerns over alleged harms and further support approval of this transaction.

> [I]t goes without saying, every merger, you have to look at the specifics. I think what we find so far in the evidence is that these theories of harm just don't seem to be there. That doesn't mean they would never be there. We already talked about some possibilities, how they could be there, that . . . would fit in to where I would be concerned. Those might arise in the future, in future transactions . . . . We could calibrate what the benefit is in this merger. That doesn't mean it would extend to other mergers, because other mergers now would be on top of creating competition on what already exists. So . . . I think the answer is, it doesn't bind you. You should look at each merger separately.[9]

Dr. Topper similarly explained that the limiting principle at work here is that the analyses he and the other Applicants' economists have undertaken in support of the deal have been narrowly focused on the facts and marketplace evidence *of this transaction* and have not sought to account for, let alone attempt to justify, any potential future cable merger:

> [T]he absence of overlap in retail markets is certainly an important piece of our competitive analysis, but it's far from the only thing that we've done. . . . So, on the competition issues, there is definitely a limiting principle – we're accounting for not some [hypothetical] merger – of all non-overlapping cable, but this particular merger . . . . On the efficiency side, the efficiencies that we've been looking at, that Greg [Rosston] and I and Mark [Israel] have been talking about are also not just general about bigger scale, but specific things, if you think about where Comcast and TWC are today, and what they would be able to get to with the transaction, and the business services that we've just been talking about is a good example of that. So, our analysis that we've done really is focused on this transaction and in the future, I think one would have to look at what are the market facts? How has the whole competitive ecosystem of what's going on in these industries evolved. So, we're asking – our analysis is asking a narrower question, and there is definitely a limiting principle.[10]

One very specific example of this that highlights the limiting principle at work here is that post-transaction Comcast will be below the 30% threshold of MVPD subscribers that even the Commission, at its most conservative (and per the D.C. Circuit, *too* conservative) thought was an acceptable limit. While the D.C. Circuit said that level could be as high as 60% even back in 2001 when the market was much less competitive than it is now,[11] the fact is that this deal does not test that limit; it proposes approval of a transaction that is within the limiting principle established by the agency itself. In fact, Comcast has voluntarily agreed to divest

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9 *FCC Workshop Transcript* at 376:11-21 – 378:6-14.

10 *Id.* at 380:12 – 382:5.

11 *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

approximately 3.9 million subscribers to stay under this 30% threshold. So while it is possible that a hypothetical future transaction could cause the percentage of total MVPD subscribers to increase to a much higher level that might present a reasonable basis for Commission concern and possible rejection, there is no such reasonable argument or concern presented by this transaction, as Applicants' economic experts have thoroughly demonstrated. More generally, opponents' suggestion that approval of a horizontal merger is problematic because it could support approval of additional mergers essentially challenges whether the Commission could have permitted *any* amount of cable consolidation – even at levels below 30%. That is the limitless principle that *opponents* advance – as discussed in section 3 below – but one which the courts have roundly rejected, twice, as this Commission must here.

One significant marketplace factor that would be unique to any future hypothetical cable merger would be the existence of *this* transaction and the actual evidence of its impact on the marketplace since its consummation. To be sure, if this deal has – notwithstanding the hype and the theories – worked no harm upon the marketplace, that might be persuasive evidence that a future deal should be approvable.[12] But the reverse – leaving aside all other factors for the moment – could also be true. In short, this deal changes the backdrop for any follow-on deal, which by definition means that any future deal will be evaluated in a different context. As Dr. Israel explained this important point:

> I assume if there were another transaction like this, the single most important piece of evidence would be what you learned from this one, right? So, I think the limiting principle is, you evaluate what the facts are on the table about this transaction, that we've all laid out. You decide on balance, which way they go. Doesn't tie your hands any way in the future. You make the best prediction you can . . . . So, I think it's hard enough to do this one. We do what we can with this one, and the way science works, we would learn and just – and that would improve what we understood for any future ones.[13]

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[12] Those who predict that this transaction will cause marketplace upheaval will likely be sorely disappointed. As Applicants pointed out in their Opposition, these naysayers began their apocalyptic forewarnings ages ago – when most of us were connecting to the Internet at 14 or 28 *thousands* of bits per second, and a few had begun to use 56k modems. The sky, they claim, has been falling ever since. *See, e.g.*, Opposition and Response at 14-15 (citing Free Press et al.'s opposition to Adelphia-TWC-Comcast transaction in 2005, claiming, among other things, that "Comcast and Time Warner['s] . . . [i]ncreasing their national and regional concentration will permit them to block both voice over IP providers, such as Vonage, and potential video programming rivals, such as TiVo/Netflix"). Of course, what has actually happened in the wake of that approved merger is that Vonage and other VoIP providers have continued to thrive, TiVo has become an even more prominent player in the media device business – *and a strong supporter of this Comcast-TWC transaction* – and Netflix has catapulted to a global powerhouse sporting over 50 million subscribers worldwide – *over twice as many as Comcast.*

[13] *FCC Workshop Transcript* at 384:19 – 385:14.

Thus, Applicants and their economists have appropriately focused on the facts and dynamics of the current marketplace, as they impact whether the transaction creates or increases incentives and/or ability for harm. But none of this focus or analysis is predictive with respect to any other deals. In fact, in any future deal, many marketplace facts are likely to have changed. For example, in 2000, the DOJ ordered a divestiture of an interest in an Internet content portal business – Excite@Home – in connection with the *AT&T-MediaOne* merger, based on its concern regarding the combined company's large share and market power in this business.[14] However, this business model did not prove particularly compelling after all. By October 2001, Excite@Home filed for Chapter 11 bankruptcy protection, and the Internet content portal business no longer exists. Likewise, the merger of AOL and Time Warner was delayed in 2000 while the Commission considered consumer advocates' insistent pleas that a condition be adopted to prevent some anticipated harm with regard to "advanced [instant-messaging]-based applications."[15] More generally, opposition to that merger was rooted in concerns regarding the fact that at the time AOL was the world's largest ISP – five times its nearest competitor and with a global market share of 50% – as well as by far the leading instant message provider – several times larger than anyone else and larger than all others combined. Of course, less than two years after the merger was approved, the condition was abandoned, with nary a word from any of the consumer advocates who had deemed it so essential,[16] and the marketplace dramatically changed after this merger, with broadband Internet access services growing rapidly and surpassing the previous market-leading narrowband ISP offerings.

These cases, among many others, illustrate that quite often marketplace facts change – particularly in the highly dynamic communications, technology, and media marketplace – in ways that few had predicted or imagined. So there is no reason to think that the marketplace the Commission will have to examine in any future deal will look like the one we have today – which means that the current marketplace reality is the key limiting principle here: In sum, Applicants' analysis and advocacy and the decision the Commission is being asked to make is only that the lack of competitive overlap, the overall lack of harm, and the substantial public

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[14] Am. Compl. ¶ 25, *United States v. AT&T Corp.*, No. 1:00-cv-01176 (D.D.C. May 26, 2000).

[15] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd. 6547 ¶ 18 (2001); *see also Application of America Online, Inc. and Time Warner, Inc. for Transfer of Control*, Statement of Dr. Mark N. Cooper, Consumers Union, Consumer Federation of America, Media Access Project, and Center for Media Education before the *En Banc* Hearing, CS Docket No. 00-30, at 4 (July 27, 2000) (In 2000, Consumers Union, CFA, et al. opposed the AOL-Time Warner merger, claiming that these "huge communications corporations are more than willing to destroy [the Internet's] fundamental openness.").

[16] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, 18 FCC Rcd. 16835 ¶ 1 (2003).

interest benefits demonstrated in the record strongly support approval of *this transaction*, with no predictive effect on any hypothetical future merger.

2. Well-established Precedent Precludes Consideration of Hypothetical Future Deals

The foregoing responses to Dr. Rogerson's question by Applicants' economists not only provide a practical and economically defensible approach to analyzing this transaction, but they are also consistent with well-established precedent *requiring* the Commission to review and rule on the transaction before it, based on the evidence in the record.[17] Antitrust review likewise demands a fact-based inquiry and actual evidence of potential harms that may stem from the specific transaction in question.[18]

Consistent with this general standard, the Commission has long recognized – and courts have long affirmed – that the agency should not engage in or condone idle and unsupported speculation regarding hypothetical harms that may follow from a particular transaction. As the Commission has explained, "Mere possibilities are not of decisive significance in competitive analysis. 'The agency's responsibility is to deal with 'probabilities,' not 'ephemeral

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[17] *See, e.g.*, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 ¶ 72 (2006) (limiting analysis to "the facts and evidence presented in the record"); *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations; Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization*, Memorandum Opinion and Order, 29 FCC Rcd. 2735 ¶ 74 & n.259 (2014) (rejecting interoperability conditions where alleged harms were not transaction-specific); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 ¶¶ 96 n.214, 208 n.542 (2011) (same); *Applications of AT&T Inc. and Atlantic Tele-Network, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd. 13670 ¶ 90 (WTB/IB 2013) ("We note that the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes.").

[18] *See* Horizontal Merger Guidelines, U.S. Department of Justice & Federal Trade Commission, at 1 (Aug. 19, 2010) ("[M]erger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."); *see, e.g.*, Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, The Ticketmaster/Live Nation Merger Review And Consent Decree In Perspective, at 2 (Mar. 18, 2010), *available at* http://www.justice.gov/atr/public/speeches/263320.pdf ("[M]erger enforcement powers are limited to the transaction before us. We work in the context of market realities; we cannot try to change or unmake them. In a particular case, the question for us is whether the merger under consideration poses competitive concerns").

possibilities.'"[19] Such "ephemeral possibilities" include the speculative precedential impact of approval of the transaction on a hypothetical deal at some future time, against unspecified marketplace conditions:

- For instance, when opponents of the *AT&T-SBC* and *Verizon-MCI* mergers argued that those transactions would prompt other similar acquisitions that would raise even greater concerns, the Commission stated: "We reject as fundamentally speculative commenters' concerns that other BOCs will acquire the remaining independent facilities-based interexchange carriers. No such mergers are pending before the Commission and, in any event, the Commission could address any concerns arising from such mergers when, and if, they are presented to the Commission for approval."[20]

- More recently, the Commission rejected "general concerns" that a specific transaction would result in future spectrum aggregation, finding that the claim lacked specificity or any evidence of support.[21] And in the past, courts have rejected similar concerns.[22]

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[19] *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, Memorandum Opinion and Order, 12 FCC Rcd. 22280 ¶ 9 (1997) (quoting *United States v. Marine Bancorporation*, 418 U.S. 602, 623 (1974)); *see also United States v. FCC*, 652 F.2d 72, 99 (D.C. Cir. 1980) (en banc) (same); *SBC Commc'ns, Inc. v. FCC*, 56 F.3d 1484, 1494 (D.C. Cir. 1995) (same); Deborah L. Feinstein, Director, FTC, The Forward-Looking Nature of Merger Analysis, at 4 (2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf ("Hopefully, with requisite humility and open-mindedness, antitrust enforcers will instead continue to employ rigorous fact-finding and analysis to sift out likely outcomes from mere wishes or unfounded speculation when predicting what lies ahead.").

[20] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290 ¶ 149 n.435 (2005); *see also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433 ¶ 148 n.430 (2005) (same). *Cf.* 20 FCC Rcd. at 18573, Statement of Commissioner Kathleen Q. Abernathy ("It should not be standard operating procedure to craft company-specific merger conditions to address unknown and hypothetical competitive threats.").

[21] *Application of AT&T Mobility Spectrum LLC and Aloha Partners II, L.P.; For Consent to Assign Advanced Wireless Services A, B and C Block Licenses*, Order, 29 FCC Rcd. 8599 (WTB 2014); *see also Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 514 ¶ 38 (2007) (rejecting arguments about reduced employment from commenters "offering only speculative concerns, which we find are not supported by the record"); *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 583 ¶¶ 244-245 (2003) (finding that alleged harms that were "speculative and not transaction-specific" did not "provide a basis for either denying their Application or for imposing regulatory conditions").

[22] *See, e.g.*, *United States v. Nw. Indus., Inc.*, 301 F. Supp. 1066, 1094, 1096 (N.D. Ill. 1969) (rejecting plaintiff's argument in a Clayton Act Section 7 case that "[m]ergers involving very large firms tend to trigger other mergers of this type" and thus lead to anticompetitive effect).

Moreover, as discussed in Section 1, the notion that the Commission or DOJ would be bound in the future by their analysis in this case is not just speculative but counterfactual; both agencies are well versed in applying precedent to the specific facts at hand. As the Department of Justice has itself made clear: "enforcement decisions are made on a case by case basis and . . . the analysis and conclusions discussed in the [public statement issued upon closing of merger investigations] are not binding on the Department in future matters."[23]

In short, while opponents have raised an interesting thought problem, it is not a real world problem. The Commission not only *may not* consider future transactions as a basis to reject a current one, it also knows quite well how to limit the precedential value of its decisions with respect to any such hypothetical future consolidation – by stressing the degree to which the decision it reaches is dependent on the entirety of the unique factual record before it. Thus, an answer to how the Commission should or would deal with future transactions that may never come to pass and that (even if they do) will likely exhibit all sorts of features not present in this one is simply not necessary to resolving how the Commission should address *this* transaction.

3. It Is the Opponents' Own Arguments That Lack a Limiting Principle

As shown above, the limiting principle at work here (and required by precedent) is that each transaction has to be justified on the facts before it, so approving this transaction does not say anything about whether the facts in some later hypothetical deal would likewise merit approval. On the other hand, one could reasonably ask what is the "limiting principle" for *opponents' arguments*? On their face, many of these arguments would apply to *any* consolidation among cable companies.[24] For example, under their theories, any consolidation would increase the "bargaining power" of the combined company vis-a-vis programmers and edge providers. Indeed, the arguments opponents have submitted are in many cases precisely the same ones they made prior to this transaction even being introduced – e.g., Netflix's arguments about Comcast's supposed interconnection leverage predate any deal, as do the supposed risks of

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[23] U.S. Department of Justice, Antitrust Division, Issuance of Public Statements Upon Closing of Investigations, *available at* http://www.justice.gov/atr/public/guidelines/201888.htm. *See, e.g.*, U.S. Department of Justice, Office of Public Affairs, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010), *available at* http://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response ("[R]eaders should not draw overly broad conclusions regarding how the division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. Enforcement decisions are made on a case-by-case basis, and the analysis and conclusions discussed in this statement do not bind the division in any future enforcement actions."); U.S. Department of Justice, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Merger Of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/238849.htm (same).

[24] As noted above, many of the same parties objecting to this transaction also raised similar objections to multiple other transactions, including Comcast/AT&T Broadband and Time Warner Cable/Adelphia/Comcast, where their arguments were correctly rejected by the Commission and by the antitrust authorities.

harm for other types of OVD foreclosure whether through last mile Internet access service or through programming contracts. By this logic, Comcast would be prohibited from acquiring even one thousand more subscribers, or even 100 more subscribers.

And opponents have not come close to showing why there is something unique and problematic about Comcast's subscriber base growing from 22% to 29% of MVPD subscribers nationwide (through acquisitions from non-overlapping MVPDs) that would not apply equally if Comcast were growing to only, say, 24%. Surely opponents' claim cannot be that *no* deal could be approved; yet the same precedential concerns that animate opponents' limiting principle argument logically would apply in *any* cable merger scenario (including prior cable mergers that the Commission approved as in the public interest). For this reason as well, their unbounded, speculative claims should be rejected.[25]

* * *

The bottom line is that Applicants have demonstrated and quantified the substantial benefits that will result from this transaction, and opponents have presented no reasonable basis or evidence of harm. Their latest claim that the Commission should be concerned about this deal based on how it might impact *future* hypothetical cable transactions – that may never come to pass and that could present a whole new set of distinct issues – is precluded by the well-established Commission and antitrust precedent cited above.

The better and legally required course is for the Commission to continue to focus on the facts and evidence about this transaction before it in the record. These facts and evidence strongly support Commission approval of this transaction, which will unleash the substantial benefits Applicants have promised and demonstrated to millions of American consumers and businesses.

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[25] Opponents' calls for a rejection of this transaction because the combined company would be too big are particularly unjustified in light of the fact that post-transaction Comcast will manage systems serving approximately the same percentage of MVPD residential subscribers – about 29% – as it had after the AT&T Broadband and Adelphia transactions in 2002 and 2006, and that the D.C. Circuit has twice rejected a 30% ownership limit and noted that, under a programmer viability analysis, at least a 60% limit would have been justified in 2001 at a time when there was much less MVPD competition than there is today. *See Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001). In addition, opponents' concerns that approval of this deal will motivate Comcast to pursue a future cable merger to get even bigger ignore the fact that, as part of this application, Comcast has voluntarily agreed to divest approximately 3.9 million subscribers to remain under 30% of all MVPD subscribers.

Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Francis M. Buono
Francis M. Buono
Counsel for Comcast Corporation

cc: Hillary Burchuk
Bill Dever
Shane Greenstein
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