

**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***  
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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.<sup>1</sup>

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

Respectfully submitted,

/s/ Michael D. Hurwitz

Michael D. Hurwitz

*Counsel for Comcast Corporation*

Enclosure

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<sup>1</sup> *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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**VIA HAND DELIVERY**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th 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***  
**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO MODIFIED JOINT PROTECTIVE ORDER IN MB DOCKET NO. 14-57**

Dear Ms. Dortch:

This letter responds to two recent filings by Dish Network Corporation (“Dish”) citing to and quoting from a handful of internal Comcast business documents (the “February 10 Letter” and the “February 23 Letter”)<sup>1</sup> – letters which largely rehash prior arguments and rely on documents already discussed at length during the Commission’s January 30, 2015 Economic Analysis Workshop.<sup>2</sup>

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<sup>1</sup> Letter from Pantelis Michalopoulos, Counsel for Dish, to Marlene H. Dortch, Secretary, FCC (Feb. 10, 2015); Letter from Pantelis Michalopoulos, Counsel for Dish, to Marlene H. Dortch, Secretary, FCC (Feb. 23, 2015).

<sup>2</sup> 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 workshop). In particular, among Dish’s “new” evidence are a {{

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More than a month and a half after Dish filed its Reply,<sup>3</sup> Dish filed its February 10 Letter trumpeting “substantial new evidence” it had uncovered – namely internal documents that it claims “undermine” Applicants’ statements that (1) Comcast and Time Warner Cable (“TWC”) did not have plans to expand into each other’s territory via national over-the-top (“OTT”) services prior to their agreement to merge; and (2) Comcast does not have an incentive to foreclose OVDs that complement Comcast’s broadband service. Despite this extensive lead-time and significant build-up, Dish’s “evidence” does not live up to its billing. There is simply no evidence that Comcast and TWC were potential (or meaningful) OTT competitors, and there is no way in which the transaction reduces actual or theoretical competition in any market. And allegations that Comcast is poised to employ anticompetitive measures against OVDs are undermined by the very internal documents Dish highlights, which show nothing other than vigorous pro-competitive conduct to meet demand and benefit consumers.

In its subsequent February 23 Letter, Dish similarly mischaracterizes a handful of internal documents to make a number of fanciful – and already-well-refuted – claims about Comcast’s commercial dispute with Netflix in late 2013/early 2014, about failed efforts to broaden the appeal of Comcast’s Streampix subscription video-on-demand (“SVOD”) service, and about Comcast’s approach to customers and its compliance with the NBCUniversal Conditions. Upon even perfunctory inspection, these claims also founder on the rocks of logic and fact.

**I. No Evidence of OTT Offering or Negative Effect on Actual or Potential Competition**

*A. No Evidence That Comcast Planned To Enter the OTT Business*

In its February 10 Letter, Dish strains to find evidence of potential horizontal competition between Comcast and TWC in selective internal company business discussions that either are unrelated to an out-of-market OTT offering or that on their face reject such an offering as not feasible or realistic, which is precisely what Comcast has argued and represented.<sup>4</sup> In fact, Dish’s filing essentially confirms and verifies that, while Comcast has reviewed the prospects of offering an OTT product, Comcast has consistently rejected its business viability and has concluded not to offer such a product. Consequently, there is no actual or potential horizontal competition between Comcast and TWC.

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<sup>3</sup> Reply of Dish at 21 n.74 (Dec. 22, 2014). Dish asserted in its Reply that its filings in the formal pleading cycle “cannot be considered complete” because it had not yet plumbed the depths of all Applicants’ documents submitted in response to the Commission’s Information Request, and Dish reserved the right to “submit further views” to the Commission after it completed its review of these documents. *Id.*

<sup>4</sup> See February 10 Letter at 3-5.

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As a preliminary matter, Dish simply mischaracterizes {{  
}}, as an OTT service, and then wrongly  
claims that service is evidence of Comcast’s supposed plans to launch a standalone out-of-  
footprint OTT service. In fact the {{

}}.<sup>5</sup> As the Commission has recognized, the  
“definition of ‘cable service’ includes linear IP video service,”<sup>6</sup> and “merely using IP to deliver  
cable service does not alter the classification of a facility as a cable system or of an entity as a  
cable operator.”<sup>7</sup> The simple fact is that the service Dish points to as evidence of Comcast’s  
plans to offer an out-of-footprint OTT service is {{  
}}.

Dish next contends that documents show that Comcast has assessed a possible OTT  
service, seeming to suggest that this is compelling evidence of harm. But, importantly, Comcast  
has in no way stated that the company has *never considered* an OTT offering; instead, Comcast  
and its experts emphasized that Comcast had concluded that such entry would not be realistic or  
profitable.<sup>8</sup> And, indeed, there is no evidence that Comcast executives did anything other than  
weigh – and *reject* – this option. As Brian Roberts recently explained, “[o]n the OTT out of  
footprint [front], . . . we don’t have any new news today, which is our focus is *in footprint*  
investing in networks, having direct relationship with customers, having tens of thousands of  
people in the field who come to your home and service you and then add devices in your house  
and grow that relationship over the years.”<sup>9</sup> Similarly, another Comcast executive explained last

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<sup>5</sup> COMC-BUG-00000677 at 681-82. {{

}}. *Id.* at 681.

<sup>6</sup> *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd. 15995 ¶ 72 (2014) (“*MVPD Definition NPRM*”); *see also Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd. 9678 ¶ 5 (2012) (referring to “IP delivery of cable service”). Courts have also arrived at this same conclusion regarding IP delivery. *See Office of Consumer Counsel v. So. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, 276 (D. Conn. 2007) (“The statutory language itself appears to require the conclusion that [IP-based] video programming service does constitute a ‘cable service,’ as defined by the Cable Act.”), *vacated on other grounds*, 368 F. App’x 244 (2d Cir. 2010).

<sup>7</sup> *MVPD Definition NPRM* ¶ 71.

<sup>8</sup> *See* Comcast Corp., and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, at 176-78 (Sept. 23, 2014) (“Opposition and Response”); *id.*, Exhibit 1, Reply Declaration of Dr. Mark A. Israel, ¶ 127 (“Israel Reply Decl.”); *see also id.*, Exhibit 3, Declaration of Dr. Dennis W. Carlton, ¶ 11 (“Carlton Decl.”).

<sup>9</sup> Comcast Corp. Q4 2014 Earnings Call, Tr. at 16 (Feb. 24, 2015) (emphasis added).

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year that the company’s objective is to “maximize the value of what our customers pay us for” and that the focus is on creating a better “package and bundle of services within our footprint.”<sup>10</sup>

It is thus hardly surprising that there is no support for Dish’s claim that Comcast viewed an out-of-market OTT offering as having {{ }} Dish’s supposedly impactful find is nothing more than a few selective quotes from Comcast Cable employees engaged in an informal e-mail discussion about what all agree is an {{ }}<sup>12</sup> And, in fact, the broader company strategy was ultimately *not* supportive of that hypothetical approach – which is conclusive evidence that is not refuted anywhere in Dish’s filing. In the {{ }} that Dish and other opponents repeatedly have referenced as authoritative,<sup>13</sup> there is no endorsement of an out-of-footprint OTT offering as a competitive response – either in 2013 (before the TWC transaction) or in 2014.

As this absence of evidence suggests, there is also no support for Dish’s claim that Comcast would have been *more* likely to launch an OTT product out-of-footprint *but for* the TWC transaction. Dish cites to a single sentence in a 44-page “draft for discussion only” deck from May 2014 to assert, rather weakly, that the transaction “*may have* already changed Comcast’s decision making” on an OTT service and draws the inference that “absent the merger, Comcast is more likely to provide an out-of-footprint service.”<sup>14</sup> But the sentence in the cited document simply states: {{

}} It is hard to see how this could be read as smoking-gun evidence that, *without* a near-national footprint, Comcast was poised to offer an out-of-footprint OTT service – as even Dish’s tepid argument seems to recognize. A commenter’s observation that there is {{ }} is hardly evidence that, *absent* that factor, launching an OTT service was imminent or even plausible.<sup>15</sup> Again, and tellingly,

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<sup>10</sup> Peter Lauria, *Why Comcast May Soon Launch An Online-Only Subscription Service*, BuzzFeed, Oct. 1, 2014, <http://www.buzzfeed.com/peterlauria/why-comcast-may-be-next-to-launch-a-streaming-video-service#.ok46kv5rd> (quoting Matthew Strauss, Senior Vice President and General Manager, Video Services, Comcast Cable).

<sup>11</sup> COMC-GAM-00015613 at 15614-15 {{ }}.

<sup>12</sup> COMC-GAM-00015613 at 15614 {{ }}.

<sup>13</sup> *See* Comcast RFI Exhibit 101.1; COMC-ANM-00015642.

<sup>14</sup> February 10 Letter at 5 (emphasis added).

<sup>15</sup> In other words, the sentence reflects nothing more than {{

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Dish points to *no evidence* that Comcast ever determined that it made business sense, or had any plans, to launch an OTT service out-of-footprint – not before the transaction was considered nor after the merger agreement was executed. As Brian Roberts plainly stated in August 2011, “I don’t think there’s a business model outside of our footprint where we can make money”<sup>16</sup> – a conclusion, as noted above, he recently affirmed.

In short, all of Dish’s documentary “evidence” only underscores that Comcast is focused on offering appealing and innovative new programming packages to continue to attract new customers to its in-footprint service.

*B. No Plausible Evidence of an Adverse Effect on Competition*

The fact that Comcast neither had nor has plans to offer an out-of-footprint OTT service fully answers Dish’s claim that the transaction substantially lessens potential competition by making it less likely that Comcast would compete out-of-footprint with TWC and others. But even if there were some basis to conclude that Comcast was likely to offer an OTT service, it is hard to see why that would be particularly compelling evidence that the transaction would lead to diminished video competition.

First, the key factor needed to make such a showing is that entry by Comcast and/or TWC must be effective. But it certainly does not appear that either company believed this would be the case, not just about itself but about the other: It is telling that Dish has turned up no evidence that Comcast or TWC was *concerned* about the potential (supposedly impending) entry of the other as providing a significant source of competition. Notably, none of the Comcast {{ }} identifies a potential TWC OTT offering as a risk that even makes the list of pressing competitive concerns for the company. Second, given the proliferation of actual OVD competitors and potential OVDs, it is impossible to conclude that Comcast or TWC could be a uniquely important OTT competitor out of footprint. Finally, even if Comcast or TWC might have become an *effective* OTT competitor (however unlikely), it is hard to take seriously the notion that removing them from the OTT field would have any palpable or relevant impact on the overall competitiveness of the market. With growing competition among an expanding number of OVDs, including Dish’s own Sling TV, even if this transaction resulted in the loss of one such potential entrant, the effect would be trivial. Thus, Dish’s unsupported claims cannot form the basis for a credible argument of the loss of potential horizontal competition.

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<sup>16</sup> Ryan Lawler, *Comcast CEO: No Business Model for Over-the-Top Video*, Gigaom, Aug. 3, 2011, <https://gigaom.com/2011/08/03/comcast-not-down-with-ott/>.

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## II. No Evidence of Incentive To Harm OVDs

Dish's claims regarding Comcast's purported incentive to harm OVDs fare no better. Dish argues that Comcast has an incentive to harm OVDs precisely because Comcast is *still* poised to offer an out-of-footprint OTT service.<sup>17</sup> The argument seems to be that this putative planned entry into the national OTT market provides Comcast with the incentive to foreclose OVDs *in* footprint – and thus supposedly responds to Dr. Carlton's conclusion that there is no vertical foreclosure concern here.<sup>18</sup> But to begin with, as noted above, there is simply no factual evidence for the basic assumption at the heart of this argument – namely, that Comcast is seriously considering out-of-market OTT entry. Further, the inconsistency of Dish's theories – on the one hand, that the transaction has defeated OTT entry by Comcast, and, on the other, that the transaction is a concern because there is risk that Comcast *may* in fact enter the OTT market – should be reason enough to dismiss *both* arguments.

But even leaving that aside, Dish's argument evaporates because it fails to show how Comcast could plausibly use in-footprint foreclosure to generate substantial market power out of footprint, as Dr. Carlton's foreclosure analysis would require.<sup>19</sup> The notion would have to be that, by foreclosing OVD success within Comcast's footprint – notwithstanding that these same OVDs (like Netflix, Amazon, Hulu, Sling TV, and others) would continue to have access to *all* out-of-footprint broadband customers (as well as in-footprint customers of other ISPs) – those OVDs would somehow be so weakened *overall* as to leave Comcast better situated to obtain market power *outside* of Comcast's territory. The argument is implausible on its face. As Dr. Carlton concluded, “[I]f such a gain of new market power cannot occur given current marketplace or other constraints, then even if Comcast were to destroy Netflix (and all other OVDs), Comcast will not benefit: it would not obtain access to any customers over whom it does not already have ‘market power’ according to Commenters and, therefore, gain no additional power to harm consumers above what it already had absent the foreclosure.”<sup>20</sup>

The reality, of course, is that if Comcast were to enter the national OTT market it would face *fierce* competition, because it could not possibly dominate out-of-footprint OVD

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<sup>17</sup> February 10 Letter at 2.

<sup>18</sup> See Transcript of Economic Analysis Workshop, Federal Communications Commission, Proposed Comcast-Time Warner Cable-Charter Transaction, January 30, 2015 (hereinafter, “*FCC Workshop Transcript*”), at 168:2-173:14.

<sup>19</sup> See Carlton Decl. ¶ 11 (“[I]f by harming Netflix (and all other OVDs), Comcast could acquire additional market power to sell its competing video products to consumers who reside outside of Comcast's territory then, in such a situation, Comcast could theoretically have an incentive to harm Netflix (or other OVDs).”).

<sup>20</sup> *Id.*

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competition based on its in-footprint activities. The Comcast documents upon which Dish relies actually support this point. {{

}} – indicating that Comcast assumed at all times that OTT entry would involve substantial OVD competition, not that Comcast had some nefarious plan to eliminate that competition and thereby capture the out-of-footprint OVD market.<sup>21</sup> Indeed, the concluding observation in the cited e-mails plainly acknowledges {{

}}<sup>22</sup>

Reversing itself once more, Dish abandons its newly minted out-of-footprint foreclosure arguments and falls back on its amorphous theory that Comcast has an incentive to harm OVDs because of Comcast’s “ongoing reliance on its video distribution service.”<sup>23</sup> No commenter – least of all Dish and its experts – has effectively rebutted the clear record established by Drs. Israel and Carlton that this theory fails analytically and factually.<sup>24</sup> Dish’s latest efforts do not improve its argument.

Notably, the evidence that Dish has “uncovered” in this regard – based on two documents, a May 2014 “draft for discussion purposes” deck titled {{  
}} and the {{  
}} discussed at length during the Economic Analysis Workshop – amounts to nothing more than the recognition that {{  
}} and that certain OVD licensing models could {{  
}}. The key lesson to be drawn from the {{  
}} quoted above and discussed below, and the new documents that Dish cites, is that each of Comcast’s competitive responses to the challenges presented by OVDs and other disruptive technologies referenced in the cited documents, {{  
}}, is pro-competitive and designed to benefit consumers.<sup>25</sup> Such responses include, for

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<sup>21</sup> See, e.g., COMC-GAM-00015613 at 15613 {{  
}}; COMC-GAM-00034300 at 34310.

<sup>22</sup> See, e.g., COMC-GAM-00015613 {{  
}}.

<sup>23</sup> See February 10 Letter at 5-7.

<sup>24</sup> See Israel Reply Decl. ¶¶ 58-61, 122-123; Carlton Decl. ¶ 12.

<sup>25</sup> With respect to {{  
}}, Dish claims that Comcast has created its own {{

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example, {{

}}.<sup>26</sup>

The changing competitive landscape recognized by the cited documents is, of course, a story that is widely known across the industry,<sup>27</sup> and one that Applicants themselves have acknowledged in their public interest filings.<sup>28</sup> But mere acknowledgment of competition is by no means a basis to allege an intent to harm or foreclose competition. Likewise, the discussion in this same {{ }} of NBCUniversal's {{ }} to which Dish implausibly points as creating "a further incentive" to harm OVDs<sup>29</sup> merely demonstrates that NBCUniversal, like every other programmer, {{

}}. In any case, these issues and objectives are by no means unique to NBCUniversal or remotely linked to the transaction.<sup>30</sup> In

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}}. See COMC-GAM-00039040 at 39085-39087.

<sup>26</sup> Comcast RFI Exhibit 101.1 at 17 ({{ }}); *FCC Workshop Transcript* at 337:18-338:6 (Dr. Israel: {{

}}). Dr. Israel went on to conclude {{

}}. *FCC Workshop Transcript*  
at 338:7-18.

<sup>27</sup> See, e.g., Marguerite Reardon, *Netflix is Cable's 'Frenemy'*, CNET, May 23, 2012, <http://www.cnet.com/news/netflix-is-cables-frenemy/>; *Can Netflix Kill Cable TV If It's Part of It?*, Fortune, May 7, 2014, <http://fortune.com/2014/05/07/can-netflix-kill-cable-tv-if-its-part-of-it/>.

<sup>28</sup> See, e.g., Comcast-TWC Public Interest Statement at 20-22.

<sup>29</sup> February 10 Letter at 6.

<sup>30</sup> Like NBCUniversal, all major programmers are struggling with how to balance the revenue opportunities created by OTT models with the risks to their traditional businesses that are highly dependent on MVPD affiliation

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fact, they indisputably *pre-date* NBCUniversal's ownership by Comcast,<sup>31</sup> and there is no credible theory that this transaction involving Comcast's acquisition of cable systems has any negative (or positive) impact on how NBCUniversal will approach or navigate these issues.

In short, none of the documents Dish cites are the least bit surprising (much less evidence of an intent to harm OVDs).<sup>32</sup> It *would be* surprising if Comcast documents at various levels of the company were *not* actively grappling with how Comcast and NBCUniversal both benefit from and continue to be disrupted by the rapid growth and proliferation of OVDs.

What Dish has *not* uncovered is any intent or strategy on the part of Comcast or NBCUniversal to harm, let alone foreclose, OVDs. To the contrary, NBCUniversal has licensed significant content to OVDs over the past four years under Comcast's ownership.<sup>33</sup> As Dr. Israel

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fees and advertising revenues and have long been the foundation for creating high-quality programming. For an overview of how complicated these trade-offs can be. *See Video in 2014: Catching Fire*, Needham Insights, Jan. 10, 2014, [http://degonline.org/wp-content/uploads/2014/07/1\\_10\\_14-Catching-Fire.pdf](http://degonline.org/wp-content/uploads/2014/07/1_10_14-Catching-Fire.pdf).

<sup>31</sup> *See* Brian Stelter, *Serving up Television Without the TV Set*, N.Y. Times, Mar. 10, 2008, <http://www.nytimes.com/2008/03/10/technology/10online.html> (“‘Our challenge with all these [online] ventures is to effectively monetize them so that we do not end up trading analog dollars for digital pennies,’ [then-NBCU CEO Jeff] Zucker said, calling it the No. 1 challenge for the industry.”). In fact, Dish itself unwittingly reinforced this pre-transactional point in its own Reply Comments – again, by mischaracterizing a document beyond its plain meaning and intention. *See* Dish Reply at 84-86. In that case, as evidence supposedly of Comcast's inclination to harm OVDs, Dish cited a September 2010 e-mail from {{

}}. Notably, this was four months *before* Comcast actually acquired NBCUniversal, so Dish's insinuation that this was “Comcast” communicating with “another cable operator” is doubly wide of the mark. In any event, the discussion in that document is not evidence of some nefarious desire to harm OVDs, but is just expressing a view about the trade-offs involved in new licensing arrangements. Notably, {{

}} made essentially the same point to the FCC in a 2010 meeting contemporaneous with this e-mail. *See* Letter from Kenneth E. Satten, Wilkinson Barker Knauer LLP, Counsel for NBCUniversal, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (Aug. 20, 2010) (“Mr. Ahn explained that NBCU seeks to distribute its programming to as many viewers as possible in order to generate sufficient revenues from advertising and license fees to support the substantial investment it makes in high quality news and entertainment programming. Mr. Ahn emphasized that the dual revenue stream model has been critical to the success of NBCU's cable networks.”).

<sup>32</sup> As Dr. Israel explained at the Economic Workshop: “I think everyone here and everyone in the room would agree that the shift towards OVD video is the fundamental transformation of the industry and that any deck would be expected and I think all the Comcast decks see this as disruptive and the number one challenge to deal with and the number one thing to overcome.” *FCC Workshop Transcript* at 189:12-18.

<sup>33</sup> It is undisputed that NBCUniversal has licensed considerable content to OVDs – with total OVD revenues of nearly {{ }} in 2013 and nearly {{ }} in just the first three quarters of 2014. *See* Comcast RFI Exhibit 19.5(a); Comcast RFI Exhibit 98.1.

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observed at the Workshop in response to Dish and others’ repeated citation to the {{  
}}: {{

}}<sup>34</sup>

### III. Dish’s More Recent Claims Are Likewise Unsubstantiated

The series of “harms” set out in Dish’s subsequent February 23 Letter are not only largely unrelated to the transaction, but are also premised on incomplete, inaccurate, and/or misleading interpretations of the underlying Comcast documents. Dish’s allegations regarding the Netflix dispute, Comcast’s Streampix offering, its commitment to the consumer experience, and compliance with NBCUniversal Conditions, are not only unsupported by the documents Dish cites, but are decisively rebutted by the extensive record in this proceeding.

#### A. Comcast Accurately Described Netflix Performance Issues to Its Customers

Dish alleges that Comcast, in response to customer complaints, misled its customers about Netflix’s quality and performance issues in an effort to steer customers to Comcast’s video services.<sup>35</sup> Dish points to Comcast customer service talking points used during the Netflix incident as proof that Comcast has harmed OVDs.<sup>36</sup> However, contrary to Dish’s mischaracterization of them as “misleading,” Comcast’s talking points provide customers with accurate, factual information regarding the true cause of the Netflix incident, which Comcast has detailed for the Commission,<sup>37</sup> and direct them to the most appropriate point of contact to resolve such issues – Netflix. As the talking points conclude,{{

}} – an indisputably accurate (and measured) statement.<sup>38</sup> Dish’s entire argument here – i.e., that these talking points are in some way problematic – depends on its entirely incorrect view of the late 2013/early 2014 Netflix dispute – a view that Comcast has conclusively refuted on the record in this proceeding and elsewhere, and as to which Dish offers absolutely no counter-evidence whatsoever. Dish points to a single customer complaint to support its flimsy allegation that Comcast used the Netflix incident to bolster interest in the

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<sup>34</sup> FCC Workshop Transcript at 337:4-17.

<sup>35</sup> February 23 Letter at 3.

<sup>36</sup> See Comcast RFI Exhibit 103.1.

<sup>37</sup> See, e.g., Opposition and Response at 208-11; *id.*, Exhibit 4, Declaration of Kevin McElearney ¶¶ 21-42.

<sup>38</sup> See Comcast RFI Exhibit 103.1.

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Streampix SVOD service.<sup>39</sup> But there is no evidence that Comcast's desire to promote Streampix had anything to do with the root cause of the Netflix quality issues; even Netflix has not made that absurd allegation. And Dish ignores the key fact that the very customer service talking points that Dish cites as authoritative in no way direct representatives to promote Comcast video services in response to any reported Netflix performance issues.<sup>40</sup>

B. *No Evidence That Comcast and Other MSOs Plan to Self-Supply a National OTT Service*

Continuing its flip flop on whether the transaction will cause Comcast *not* to enter the OTT market or will permit Comcast to take actions to more effectively enter the OTT market, Dish's latest filing takes up yet another claim about Comcast's supposed master plan to enter the OTT marketplace and foreclose other OVDs: apparently, Comcast's attempt to {{  
}} to help fund Comcast's Streampix offering is smoking-gun evidence of such a plan.<sup>41</sup> Unfortunately for Dish's theory, however, Streampix never was and is not now a standalone national OTT service. It was a new SVOD *cable* service provided as an add-on to traditional cable service – which also included an OTT component so that cable subscribers could *also* access the service out of home (as well as on their in-home set top box). Comcast experimented on a very limited basis with providing the service to broadband-only subscribers in footprint, but then completely discontinued that offering, which was never successful.

But even if Comcast *had* tried to make Streampix become a quasi-national OTT service either through its own offering or {{  
}}, this would have *enhanced* competition by creating yet another option for consumers among the numerous online choices already available. As such, Dish's likening of Comcast's embryonic efforts with Streampix to the *Primestar* case is wildly inapt.<sup>42</sup> First, consumers are no longer limited to only one of three providers (i.e., cable or the DBS providers) for a single service – multichannel video programming – as they were in the 1990s when MSOs were attempting to acquire and launch the Primestar DBS service. With dozens of OVDs in the market (including Dish's own Sling TV), consumers can vote with their wallets and choose from a panoply of options to enjoy video programming. Second, and relatedly, multichannel video service is only one piece of the value equation today for cable operators; it is not a question of simply gaining an additional multichannel video subscriber for every subscriber that did not take a competing service. That

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<sup>39</sup> See COMC-COM-00053177 at 53178.

<sup>40</sup> See Comcast RFI Exhibit 103.1. In fact, the only video services referenced in the talking point are third-party OVDs.

<sup>41</sup> See February 23 Letter at 4-5.

<sup>42</sup> See *id.*

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is, since the demand for cable operators’ even-more-valuable broadband service and increased broadband speeds is highly dependent on complementary OVD content (from whatever source), Comcast and other cable operators would diminish the value of their broadband services if any efforts they undertook to add to the OVD marketplace reduced the attractiveness and value of OVD content. As Dr. Israel has explained, noting the scaling back of the Streampix service, “[c]hoosing to self-supply an OVD service – the most relevant alternative to third-party OVDs like Netflix – is both highly costly and risky to Comcast. . . . In the absence of viable self-supply options, a theory that Comcast would have an incentive to shift traffic away from third-party OVDs and toward a self-supply option is hypothetical and unrealistic.”<sup>43</sup>

C. *Comcast Is Committed to Delivering the Best Experience for Its Customers*

Dish also claims that Comcast plans to drive up fees in the acquired TWC markets and “sacrifice the consumer experience” for additional profits.<sup>44</sup> These claims are based on two documents – a {{

}} – that simply do not support Dish’s theory. There are at least two core reasons why Dish is wrong here: (1) there are no settled plans at this time for post-transaction service “rate increases,” nor could there be until the company can assess the market conditions that will actually be in play at such time; (2) in all events, Comcast will be *enhancing*, not “sacrificing,” the consumer experience – in the wake of the transaction, consumers, especially in the former TWC markets, will receive substantial added value with their existing services. And relatedly, Comcast’s exploration of the use of new platforms {{ }} to engage customers is clearly evidence of *proactive* thinking by Comcast, regardless of whether each idea ultimately bears fruit or has worked its way through the negotiation stage.

First, the {{ }} document Dish cites to support its allegation regarding fees reflects Comcast’s initial analyses, which are still under review and subject to change.<sup>45</sup> The specifics of any final plans will not become known until much closer to their actual implementation and will have to take into account the realities of the TWC and Comcast markets at issue at the time; the company does not decide its rate plans in a vacuum. Further, the documents merely reference the fairly generic goal of {{

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<sup>43</sup> Letter from Francis M. Buono, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57, ¶ 19 (Dec. 3, 2014) (attaching note prepared by Dr. Israel and Compass Lexecon).

<sup>44</sup> February 23 Letter at 2.

<sup>45</sup> See COMC-COM-00043296.

<sup>46</sup> See Response to Request 116.

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}}. Dish also ignores other price-related documents that are inconvenient to its claims, such as those that indicate Comcast's plans to {{

}}.<sup>48</sup>

Second, the idea that Comcast would sacrifice the customer experience in order to achieve these putative revenue synergies is ironic, given that any revenue synergies that may emerge from this transaction would be the result of the massive investment that Comcast will make in improving the "customer experience" once the transaction closes and Comcast can begin the process of upgrading TWC's systems, products, and services, offering TWC customers faster speeds, faster, Wi-Fi-enabled modems, more VOD and TV Everywhere, and the X1 guide and platform. As Dr. Israel explained when discussing the same presentation that Dish cites during the Commission's Workshop:

Normally, when we see revenue synergies, we think, "is that a reduction in competition, or is that an increase in quality?" Here, we only have one of those explanations, I believe. So, this is the Comcast side benefit from the quality improvement. . . . The plans on [behalf] of the firm are to make more revenue by delivering a higher quality product. I mean, pass through of quality is in savings and pass through of cost savings are quite similar, and in some cases, mathematically identical, and in both cases, we would expect if there is some improvement, there will be some increase in revenue or some reduction in price, and in then pass through to consumers. So, the company is going to make some

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<sup>47</sup> See {{

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<sup>48</sup> See {{

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more profit, some more revenue, and the firm is going to make – and the consumer is going to capture some of that increase in quality.<sup>49</sup>

It is precisely these plans to increase quality, which are driven by Comcast’s commitment to innovation and to delivering the best products and services and the best consumer experience for its customers, that constitute some of the core consumer benefits of this transaction.

Finally, Dish attempts to make much of a single out-of-context sentence from a single June 2014 e-mail discussing {{ }}. Dish seizes on language discussing the e-mail author’s view about how {{ }} to argue that Comcast does not care about offering consumers choices at attractive prices.<sup>50</sup> But what the document at issue in fact illustrates is that Comcast is exploring new and innovative ways to engage with and serve its customers – which is decidedly in the public interest. It is hard to see how Dish believes it can turn this inside out simply because Comcast {{ }} may have different views about the best way to do that. Indeed, the full e-mail chain, which Dish simply ignores, shows just the opposite of a company unconcerned with the customer experience. Notably, the discussion started when {{

}}<sup>51</sup> And the breadth and range of potential partnership {{ }}, show not only that Comcast is aggressively exploring new and innovative ways to engage customers, but also that these types of partnerships can take time and effort to pull off on both sides – {{ }}.

*D. No Evidence That Comcast Seeks To Evade NBCUniversal Conditions*

Finally, completing its scattershot attack based on unrelated and isolated documents, Dish asserts that Comcast has sought to evade its Open Internet commitments and the Specialized Service requirements in the NBCUniversal Conditions by exempting its own services from data caps, and breathlessly claims that Comcast’s documents “unspool” an elaborate plan to do so.<sup>52</sup> These extreme – and patently false – charges are based on nothing more than two single-page

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<sup>49</sup> *FCC Workshop Transcript* at 312:17-22; 317:5-21.

<sup>50</sup> *See* COMC-SCS-00081187, at 81188 {{ }}.

<sup>51</sup> *See id.*

<sup>52</sup> *See* February 23 Letter at 1, 5-6.

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charts that merely {{  
}} and make no reference to the  
NBCUniversal Conditions, much less any efforts to evade them.<sup>53</sup> In substance, Dish’s claim reduces to the same warmed-over argument that opponents have trotted out for years, contending that cable service delivered in IP must be treated as if it is an OTT service. As noted above, the Commission itself has recognized the distinction between cable delivered in IP and over-the-top content made available by a cable provider. As Comcast has previously explained (notably, in proceedings pre-dating and entirely unrelated to this transaction), Comcast’s Title VI cable services – whether delivered in legacy QAM or in IP – are entirely separate from Internet traffic, are not delivered over a customer’s Internet access service at all, and thus cannot and should not be subjected to usage plans that apply specifically to that customer’s use of *Internet access service*.<sup>54</sup>

As to content that *is* delivered over the Internet, Comcast treats all such traffic the same, and subjects it to any applicable data usage plans, regardless of whether it involves affiliated or unaffiliated content.<sup>55</sup> Comcast has consistently met, and in many cases over-delivered on, its obligations and commitments in the *NBCUniversal Order*, and the documents Dish cites by no means call into question Comcast’s track record of compliance.

\* \* \*

In sum, while Dish has highlighted a handful of internal Comcast documents that Dish claims support its self-interested opposition to the transaction, these documents only reinforce some of Applicants’ core public interest rationales for the transaction – to enable the combined company to compete even more effectively and innovatively in a robustly competitive and rapidly evolving broadband and video programming marketplace.

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<sup>53</sup> Classification as a Title VI cable service would by no means be an effective strategy to evade regulatory obligations. Indeed, as the Commission has recognized, IP-delivered cable services are subject to a litany of cable-specific regulations. *See MVPD Definition NPRM* ¶¶ 76-77.

<sup>54</sup> *See also* Opposition and Response at 236-37.

<sup>55</sup> *Id.*

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Please direct any questions to the undersigned.

Respectfully submitted,

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*Counsel for Comcast Corporation*

cc: Hillary Burchuk