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REDACTED – FOR PUBLIC INSPECTION

March 23, 2015

By ECFS

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

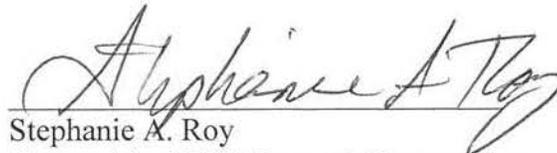
Re: Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57

Dear Ms. Dortch:

Pursuant to the *Second Amended Modified Joint Protective Order*,¹ DISH Network Corporation (“DISH”) submits the attached redacted version of its Video Programming Information (“VPCI”) and Highly Confidential Information (“HCI”) *ex parte* letters. DISH has denoted with “// //” symbols information that it has deemed VPCI and with “{ { } }” symbols information that it has deemed HCI pursuant to the *Modified Joint Protective Order*. Unredacted versions of the letters have been filed with the Commission and will be made available pursuant to the terms of the *Modified Joint Protective Order*.

Please contact me with any questions.

Respectfully submitted,



Stephanie A. Roy
Counsel for DISH Network Corporation

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 ¶ 14 (Nov. 12, 2014) (“*Modified Joint Protective Order*”).

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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 to respond to Comcast Corporation’s (“Comcast”) recent *ex parte* submissions¹ purporting to rebut evidence submitted by DISH in this proceeding.² The Applicants have made numerous rebuttal filings over the last few weeks.³ All of these filings reflect three unifying themes: (i) retreat from the Applicants’

¹ Letter from Michael Hurwitz, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Mar. 9, 2015) (“Comcast March 9 Ex Parte”); Letter from Francis Buono, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Mar. 12, 2015) (“Comcast March 12 Ex Parte”), and attached Comcast-Time Warner Cable Presentation to the Federal Communications Commission (Mar. 10, 2012).

² Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 10, 2015); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 23, 2015).

³ *See, e.g.*, Letter from Francis Buono, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 20, 2015); Letter from Francis Buono, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 23, 2015); Letter from

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original positions; (ii) failure to respond to a number of contentions made by DISH and others; and (iii) pleas that the Commission discount incriminating documents.

First, Comcast has retreated from its original positions on several issues critical to the Commission’s public interest analysis:

- *Before*, the Applicants portrayed online video distributors (“OVDs”) as a benefit to Comcast’s broadband and programming businesses. *Now*, the Applicants acknowledge OVDs are a threat, but assure us that Comcast will only engage in pro-competitive actions to counter it.
- *Before*, the Applicants protested that engaging in out-of-footprint over-the-top (“OTT”) competition is out of the question for each company. *Now*, against the glare of documentary evidence, they effectively acknowledge that Comcast had given repeated consideration to an OTT offering outside its footprint. The Applicants’ new line of defense—that Comcast “consistently” rejected it—has no firm support in the evidence, particularly because an out-of-footprint OTT service was considered as {{
}}⁴
- *Before*, the Applicants had dismissed any notion that they would restrict the availability of OTT rights to their own or third parties’ programming on the ground that an OTT condition prevented them from doing so. *Now*, they carefully phrase their denials, stopping short of averring they have not done it and pointing instead to the lack of evidence that they have. DISH has in fact proffered such evidence: //DISH VPCI Start//

//DISH VPCI End//

- *Before*, the Applicants said that they cannot guarantee the merger will prevent prices from continuing to go up. *Now*, they have to explain away plans for an {{
}} rate increase, saying that they are not “settled,” {{
}}

For the reader’s ease of reference, DISH has prepared the attached chart illustrating Comcast’s “before” and “now” statements, as well as relevant statements from Comcast

Michael Hurwitz, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 26, 2015); Comcast March 9 Ex Parte; Comcast March 12 Ex Parte.

⁴ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

}}

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documents.

Second, Comcast either avoids entirely or sidesteps many of DISH's central positions. Consider the following examples:

- DISH's careful analysis of Comcast's churn numbers during the Netflix degradation incident has gone largely un rebutted. In response, the Applicants effectively admit that {{ }} left Comcast despite the degradation of Netflix's service, and confine themselves to coming up with reasons why there was not a mass departure.
- The Applicants sidestep the main issues on Comcast's evasion of conditions. The point is not that Comcast will overtly violate the law, but that Comcast can and will exploit any lack of clarity, complexity in the facts, and the likely frequent inability of either the Commission or possible victims to detect the relevant conduct. The documents indicate it has done so before. The lengths to which Comcast has gone to develop that argument illustrate Comcast's propensity to interpret narrowly the conditions to which it became subject as a result of the NBCUniversal acquisition.

Third, the Applicants repeatedly resort to the curious argument that the incriminating statements from their own documents are somehow cancelled out by the absence of the same statements in other documents; or that these statements should be ignored because the documents containing them do not include additional incriminating admissions. Thus:

- The Commission is asked to dismiss the statements portraying OVDs as {{ }} essentially because the same document did not say that Comcast will try to destroy Netflix or *Sling TV*.
- The statement that out-of-footprint OTT competition {{ }} should be dismissed because other documents—{{ }}—did not contain the same statements.
- The plans for {{ }} should be overlooked because they could not be found in documents other than the one in which they were found.
- A customer complaint about Comcast's conduct during the Netflix incident should be discounted as isolated, as if the absence of additional formal complaints in Comcast's records is evidence that all other Comcast broadband subscribers and Netflix members were happy with Comcast's conduct.
- The Commission should discount the embarrassing {{ }} email showing Comcast's *modus operandi* towards customers because no other documents contain the same statement. That document's author stated that {{

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}} No one seems to have reprimanded the employee making that statement, or even to have disagreed with it. And the absence from Comcast's production of other documents displaying the same candor is no absolution to Comcast.

The Applicants Now Retreat from their "Before" Positions

The OTT Threat. Before, the Applicants portrayed OVD offerings as a benefit for Comcast, as they help attract subscribers to its broadband business and buy programming from NBCUniversal. In the Applicants' words (and the words of their experts): "Comcast does not have an incentive to foreclose OVDs";⁶ "attempting to harm OTT edge providers . . . would harm Comcast's broadband business";⁷ "OVDs are complementary to Comcast's (and TWC's) high-margin broadband business and Comcast's programming business";⁸ and "OVDs are obviously complementary to Comcast's broadband business."⁹

Now, Comcast admits—for the first time—that OTT services are a competitive threat to its video business and avers that "[i]t would be surprising if Comcast . . . [was] *not* actively grappling with how Comcast and NBCUniversal both benefit and continue to be disrupted by the rapid growth and proliferation of OVDs."¹⁰ It is not, of course, an admission that the Applicants

⁵ Comcast Corp., Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
}}.

⁶ Comcast March 9 Ex Parte at 2.

⁷ 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 158 (Apr. 8, 2014) ("Application").

⁸ Letter from Kathryn Zachem, Comcast Corp., to Marlene Dortch, FCC, MB Docket No. 14-57, Response to Question 1 at 2 (Nov. 26, 2014).

⁹ See, e.g., Mark A. Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters, MB Docket No. 14-57, ¶¶ 122-25 (Sept. 22, 2014) ("Israel Reply Declaration") (attached as Exhibit 1 to Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014) ("Opposition")).

¹⁰ Comcast March 9 Ex Parte at 9. Comcast goes on to say that "NBCUniversal, like any other programmer, {{

}} *Id.* at 8.

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make enthusiastically; rather, it is forced on the Applicants by statements from Comcast documents such as: {{

}};¹¹ and {{

}}¹² Comcast goes further to misrepresent the company's perspective on the OTT threat, alleging that the referenced documents show only that {{ }}¹³ This is wrong. Comcast documents do not cast OVDs as merely {{

}}¹⁴

To offset its admission, Comcast now juxtaposes two points, both unavailing. First, Comcast argues that the threat is counterbalanced by the benefits of selling NBCUniversal programming to OVDs.¹⁵ But internal documents pointedly state that {{

}};¹⁶ and {{

}}¹⁷

¹¹ Comcast Corp., Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{

}}

¹² Comcast Corp., Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Jan. 27, 2015), {{

}}

¹³ Comcast March 9 Ex Parte at 7 (emphasis added).

¹⁴ DISH Feb. 10 Ex Parte at 5, {{

}}.

¹⁵ Comcast March 12 Ex Parte, Presentation at 5 ("The growth of OVDs benefits Comcast's broadband business and provides another outlet for NBCUniversal programming.").

¹⁶ {{

}}

¹⁷ {{ }} The Applicants protest that "NBCUniversal has licensed significant content to OVDs over the past four years under Comcast's ownership." Comcast March 9 Ex Parte at 9. Not to DISH. //DISH VPCI Start//

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Second, Comcast says that its documents only show plans to counter the threat with pro-competitive responses,¹⁸ and avers that “mere acknowledgement of competition is by no means a basis to allege an intent to harm or foreclose competition,”¹⁹ claiming that “these issues and objectives are by no means unique to NBCUniversal or remotely linked to the transaction.”²⁰ This changes the topic and sets up a straw man. The question is whether Comcast has an incentive to hurt OVDs. The threat is what provides the incentive. As to the alleged absence of documents that feature an explicit Comcast vow to illicitly destroy Netflix and *Sling TV*, this can hardly be described as either a tribute to Comcast’s civic-mindedness or an assurance for the future.²¹

An OTT Offering. Before, the Applicants argued that an out-of-footprint OTT offering was out of the question for either company. In their words: “[t]here is no evidence that Comcast and TWC have any plans to compete with one another either in the traditional MVPD or OVD space and thus no basis for a concern about potential competition”;²² “Comcast has no plans to offer online video offerings outside its footprint”;²³ and “the notion that Comcast and TWC might have launched competing nationwide OVD services—or that even one would—is entirely speculative.”²⁴

//DISH VPCI End//

¹⁸ Comcast March 9 Ex Parte at 2, 7-8.

¹⁹ Comcast March 9 Ex Parte at 8.

²⁰ *Id.*

²¹ The Applicants also try to narrow the argument about Comcast’s incentive to harm OVDs by casting it as dependent on its launch of an out-of-footprint service. Comcast March 9 Ex Parte at 6. Not so. OVDs threaten Comcast’s video distribution business in all its forms—linear and on-demand, both in- and out-of-footprint. Whether or not Comcast enters the out-of-footprint OTT market, Comcast has an incentive to foreclose OVDs within its own footprint because they compete with its traditional cable offerings, its remote access features (*e.g.*, “TV Everywhere”), and subscription video-on-demand. Comcast’s reading of the argument is an unsuccessful attempt to cabin it and is inconsistent with the arguments put forth by DISH and others in this proceeding.

²² Israel Reply Declaration ¶ 14.

²³ *Id.* ¶ 127.

²⁴ Opposition at 177.

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Now, faced with internal documents that indicate otherwise, they effectively admit, as they must, that they repeatedly considered such an offering.²⁵ Their modified position is that it is natural for Comcast to consider all scenarios, no matter how unrealistic or outlandish; and that, Comcast rejected an out-of-footprint OTT offering every time it was considered. In their words: Comcast “has reviewed the prospects of offering an OTT product, [] has consistently rejected its business viability,” and, as a result, “there is no actual or potential horizontal competition between Comcast and TWC.”²⁶

The problem, however, is that the Applicants point to no firm evidence that the plan has been “consistently rejected,” other than the fact that it has not been implemented ... yet.²⁷ The Applicants quote Comcast’s Chief Executive Officer as saying, on February 24, 2015: “we don’t have any new news today, which is our focus is in footprint investing in networks”²⁸ This is not a rejection. It means what it says—that there was no “new news today,” February 24, 2015. In fact, this may have changed just a few days after Mr. Roberts’ statement. On March 3, 2015, NBCUniversal confirmed that it will offer a streaming product comprised of its comedy content, apparently both to in-footprint *and* out-of-footprint consumers.²⁹ And press reports indicate that NBCUniversal is considering other genre-specific offerings.³⁰

²⁵ Comcast’s expert has previously conceded in passing {{

}} Israel Reply Declaration ¶ 127.

²⁶ Comcast March 9 Ex Parte at 2.

²⁷ The Applicants also challenge the comparison between the *Primestar* case and the attempt of Comcast to pool the cable industry’s resources so as to promote the online Streampix service as an add-on to linear cable service. But in fact, this is precisely what the Primestar consortium set out to do—pool the cable operators’ resources to create a satellite operator that would promote Direct Broadcast Satellite service as a complement to, rather than a substitute for, cable television. As the Department of Justice recognized: “The five cable companies that control Primestar serve approximately 60% of all cable subscribers in the United States. Those cable companies have no economic incentive to use this valuable DBS satellite capacity to steal their own cable subscribers and thus cannot be expected to do so.” Complaint, *United States v. Primestar, Inc.*, No. 1:98-cv-01193, 7 ¶ 13 (D.D.C. Mar. 12, 1998).

²⁸ Comcast Corp., Transcript of Q4 2014 Earnings Call, at 16 (Feb. 24, 2015), *available at* http://files.shareholder.com/downloads/CMCSA/4065182414x0x811519/663727C3-1EDF-43AC-83FA-FD4F4269BA5F/Comcast_4Q14_Earnings_Transcript.pdf.

²⁹ Shalini Ramachandran and Amol Sharma, *NBCU Plans Subscription Comedy Video Service*, Wall Street Journal (Mar. 3, 2015), <http://www.wsj.com/articles/nbcu-plans-subscription-comedy-video-service-1425411837>; Jon Lafayette, *NBCU Plans Comedy OTT Video Service*,

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And why would the plan be rejected, if, in the eyes of a Comcast executive, {{
}}³¹ That statement can hardly be said to “reject such
an offering as not feasible or realistic.”³² The Applicants still offer no explanation other than to
dismiss the statement as a {{
}}³³ In fact, Comcast has done more than
merely consider such services. As DISH pointed out, {{

}}.³⁴ Indeed, this very work may have led
to the recent NBCUniversal announcement.

As for the chilling effect that the merger would have on out-of-footprint OTT
competition, the Applicants appear to directly contradict for the public record the statement
pointed out by DISH from Comcast’s own documents. Here is what the Applicants say in
public: “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”³⁵ And
here is what the Highly Confidential document states: {{

Broadcasting & Cable (Mar. 3, 2015), <http://www.broadcastingcable.com/news/technology/nbcu-plans-comedy-ott-video-service/138463>.

³⁰ Billy Steele, *NBC is Working on a Streaming Service for Comedy Fans*, Engadget (Mar. 3, 2015), <http://www.engadget.com/2015/03/03/nbc-comedy-streaming-service/>. It is true that, in August 2011, Mr. Roberts opined that there was no “business model outside of our footprint.” 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/>. That was almost four years ago, when the threat from OTT offerings was still in its baby cradle. The Applicants are wrong that Mr. Roberts’ “no new news” 2015 statement “affirms” the 2011 opinion.

³¹ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

}}

³² Comcast March 9 Ex Parte at 2.

³³ *Id.* at 7.

³⁴ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{

}}

³⁵ Comcast March 9 Ex Parte at 4.

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}}³⁶ In other words, the Highly Confidential document says what the Applicants state in public it does not say. The document links the near national footprint {{

}}³⁷ Similarly, Comcast says: “[a] commenter’s observation that there is {{ }} is hardly evidence that, *absent* that factor, launching an OTT service was imminent or even plausible.”³⁸ That argument makes sense only when the reader of the Applicants’ public filing does not have the benefit of the Highly Confidential statement. Because {{ }} means that {{ }}.

Nor does DISH’s failure to produce evidence of Comcast’s or TWC’s concern with the other’s potential entrance into the out-of-footprint OTT market mean that neither company would have been an effective competitor in such market.³⁹ Given Comcast’s decades of experience as a creator, licensee, and distributor of linear and on-demand video programming, there is no reason to believe it would not have been able to attempt to enter the OTT market.

Finally, the Applicants point to this sentence from the document cited by DISH: {{ }}⁴⁰ But this conclusion would appear to change when there is one less cable operator.

Programming for OVDs. Before, the Applicants alleged that the Comcast-NBCU conditions precluded them from disadvantaging OVDs.⁴¹ In their words, the “NBCUniversal

³⁶ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

}}

³⁷ Comcast March 9 Ex Parte at 4.

³⁸ *Id.*

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 7.

⁴¹ Comcast Application at 108, 167-68; *see also* Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4273-74 ¶¶ 87-89 (2011) (creating conditions “to ensure that OVDs retain non-discriminatory access to Comcast-NBCU video programming”) (“*Comcast-NBCU*”).

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condition allowing OVDs to demand, and, if necessary, arbitrate over access to NBCUniversal programming networks in certain circumstances remains in place.”⁴²

Now, when asked for greater detail, their position becomes remarkably circumspect. All five references to Comcast’s conduct are carefully phrased to stop short of averring that Comcast does not engage in practices restricting the availability of OTT rights. Thus, the Applicants state that “there is *no evidence* that Comcast has engaged in any strategy to disadvantage OVDs”;⁴³ that “Comcast is *not aware of any evidence* that its contractual provisions are limiting programmers from licensing to OVDs”;⁴⁴ that “*there is no evidence that* Comcast is engaging in an ‘OVD foreclosure’ strategy”;⁴⁵ that they are “*aware of no evidence that* content MFNs have limited programmers from licensing to OVDs”;⁴⁶ and that they are “*aware of no evidence*” that Comcast’s programming agreements limit content available to MVPDs.⁴⁷

In fact, whatever the reason for this special care in the phrasing, DISH has submitted such evidence to the Commission for its review.⁴⁸ The limitations on access to Video Programming Confidential Information (“VPCI”) in this proceeding have prevented the Applicants and other parties from reviewing that (and other) evidence on this point. //DISH VPCI Start//

⁴² Opposition at 90; *see also* Comcast Application at 15 n.38 (stating that the “NBCUniversal Conditions, which will apply to the acquired systems, provide . . . OVDs the right to seek arbitration”).

⁴³ Comcast March 12 Ex Parte, Presentation at 5 (emphasis added).

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at 12 (emphasis added).

⁴⁶ *Id.* at 15 (emphasis added).

⁴⁷ *Id.* (emphasis added).

⁴⁸ Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57, at 3-4 (Jan. 27, 2015).

⁴⁹ //DISH VPCI Start//
//DISH VPCI End//

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//DISH VPCI End//

The Applicants themselves rely on VPCI.⁵¹ That portion of the Applicants' rebuttal is still unavailable to the parties' outside counsel in this proceeding, and so is the universe of the Applicants' programming agreements, which are key to evaluating these questions. DISH reserves the right to submit a fuller response when this information becomes available.

TWC Rate Increase. *Before*, the Applicants had warned that they could not promise that the merger would lower rates or even result in a slower rate of increase. In the words of Comcast's own executive, Mr. David Cohen: "We're certainly not promising that consumer bills will go down or increase less rapidly"⁵² post-merger.

Now, faced with multiple internal documents, the Applicants are forced to discuss plans for a post-merger rate increase. They seek to demote and qualify such planning as unsettled, not {{ }} and not {{ }} In their most recent words: "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" at the time the deal concludes;⁵³ Comcast "does not decide its rate plans in a vacuum";⁵⁴ {{

}}⁵⁵ But the documents in question do not suggest anything is unsettled. They clearly show a {{

}}.⁵⁶ Comcast attempts to underplay further these allegedly unsettled plans by

⁵⁰ Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57, at 3-4 (Jan 27, 2015).

⁵¹ *See, e.g.*, Comcast March 10 Presentation at 10, 12, 14, 15, 16, 17.

⁵² Jon Brodtkin, *Comcast: No Promise that Prices "Will Go Down or Even Increase Less Rapidly,"* Ars Technica (Feb. 13, 2014), <http://arstechnica.com/tech-policy/2014/02/comcast-no-promise-that-prices-will-go-down-or-even-increase-less-rapidly/>; *see also* Edward Wyatt, *As Services Expand, Cable Bills Keep Rising*, New York Times (Feb. 14, 2014), <http://www.nytimes.com/2014/02/15/business/media/as-services-expand-cable-bills-keep-rising.html>.

⁵³ Comcast March 9 Ex Parte at 12 (emphasis added).

⁵⁴ *Id.*

⁵⁵ *Id.* at 13.

⁵⁶ Comcast Corp., Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

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claiming that they “merely reference the fairly generic goal of {{ }}”⁵⁷ But again, the euphemism is not convincing. What the Applicants are calling an {{ }} is described more candidly as a {{ }} in the 2014 documents.⁵⁸ And if {{ }} were the true objective, {{ }} as the table below shows.

Table 1: {{ }}⁵⁹
{{

}}
{{

}} But even if, under the glare of the spotlight, the Applicants decide to disavow such plans and pledge not to {{ }} the plans’ existence speaks volumes about what is likely to happen after the merger is removed from regulatory scrutiny and the front page headlines.

The Applicants Fail to Respond to DISH’s Arguments

The second theme characterizing the Applicants’ rebuttals is how little they attempt to rebut DISH’s contentions and how much they sidestep. Take the following examples:

⁵⁷ Comcast March 9 Ex Parte at 12.

⁵⁸ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{ }}
}}

⁵⁹ Comcast March 9 Ex Parte at 12-13; *see also* Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

}}

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No Answer on Churn. Comcast has still failed to rebut the evidence on churn. DISH has shown that {{{
}}}⁶⁰ But instead of engaging on this directly, Comcast insists that it “has not degraded OVD access to its network”⁶¹ and that “there has been no degradation by Comcast that would produce relevant voluntary churn.”⁶² In support of this proposition, Comcast alleges once again that degradation was occurring on multiple broadband networks at the same time.⁶³ But DISH has rebutted this line of reasoning by showing that there was limited overlap with the other networks, that Comcast cannot assume that consumers understood that Comcast was the source of the slowdown, and that the problems on Comcast’s network both started earlier and were more severe than the issues on the other networks.⁶⁴ To these showings, Comcast has no response. Instead, Comcast repeats its argument that the Global Strategy Group survey is the better source for evidence of whether OVD degradation on Comcast’s network would result in the diversion of customers to other Internet service providers.⁶⁵ DISH and others have shown that this hypothetical questionnaire is riddled with errors.⁶⁶ All evidence in this proceeding points to the fact that Comcast is the Hotel California of broadband. Neither the Commission nor the public can count on any fear of broadband customer diversion to restrain Comcast’s conduct.

Netflix Degradation. Comcast continues to obfuscate the cause of the Netflix degradation, a tactic that it has employed in its previous attempts to degrade Internet traffic on its network.⁶⁷ Comcast proclaims that it “has conclusively refuted on the record”⁶⁸ the cause of the

⁶⁰ DISH Network Corp., Reply, MB Docket No. 14-57, at 29-30 (Dec. 22, 2014) (“DISH Reply”).

⁶¹ Comcast February 23 Ex Parte, Appendix A at 4.

⁶² *Id.* at 7.

⁶³ *Id.* at 4.

⁶⁴ DISH January 27 Ex Parte at 7.

⁶⁵ *Id.*

⁶⁶ DISH Network Corp., Reply to Opposition, MB Docket No. 14-57, at 25-29 (Dec. 22, 2014) (“DISH Reply”).

⁶⁷ See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 FCC Rcd. 13028, 13028 ¶ 1 (2008) (“[W]e conclude that the company’s discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management. Moreover, *Comcast’s failure to disclose the company’s practice to its customers has compounded the harm.*”) (emphasis added).

⁶⁸ Comcast March 9 Ex Parte at 10.

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degradation, but much remains unanswered. DISH has already provided customer service examples that show beyond the shadow of a doubt Comcast's efforts to shirk its responsibility for the degradation incident by {{

}}⁶⁹ Resorting again to the absence of the same incriminating statement in documents other than the one where it was found, the Applicants say: "DISH points to a single customer complaint to support its flimsy allegation that Comcast used the Netflix incident to bolster interest in the Streampix SVOD service."⁷⁰ But the existence of one complaint would appear to suggest strongly that this happened to other customers, too. DISH has also

{{

}} a claim that Comcast

conveniently neglects to answer.⁷¹

Evasion of Conditions. The best predictor of future behavior is past behavior. And Comcast has repeatedly sought to evade the conditions that the Commission imposed in the *Comcast-NBCU Order*.⁷² Comcast's response avoids the central premise of DISH's argument—that it can easily evade any conditions. DISH has already detailed the conditions Comcast has sought to evade long before the proposed merger was a gleam in Comcast's eye, as evidenced by Comcast's actions against Project Concord and Bloomberg, among others.⁷³ If Comcast is permitted to merge with TWC, the combined company's resources will allow it to easily evade any conditions the Commission imposes, and for far longer.

Comcast's response that IP-delivered cable services face a "litany of cable-specific regulations" is yet another effort to divert the Commission's focus.⁷⁴ DISH has never claimed that Comcast's IP-delivered services are not subject to any regulations. Instead, DISH argues that Comcast's {{

}} is an attempt to interpret narrowly and avoid application of the Comcast-NBCU conditions, even if Comcast is still subject to other

⁶⁹ DISH February 23 Ex Parte at 3-4; *see also* Comcast Corp., Responses to the Commission's Second Information and Data Request, MB Docket No. 14-57 (Feb. 5, 2015), {{
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⁷⁰ Comcast March 9 Ex Parte at 10.

⁷¹ Comcast Corp., Responses to the Commission's Second Information and Data Request, MB Docket No. 14-57 (Oct. 22, 2014), {{
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⁷² *Comcast-NBCU*, Appendix A.

⁷³ DISH Reply, at 118-21.

⁷⁴ Comcast March 9 Ex Parte at 15 n.53.

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regulations. The Commission has recently recognized that particular attributes of a cable service might characterize it as a non-broadband Internet access provider service or a Title VI IP-based cable service depending on the circumstances, and has reserved the authority to act if a specialized service is providing the “functional equivalent” of broadband Internet access service or is being used to evade its Open Internet rules.⁷⁵

Comcast’s conjuring act includes trumpeting the seemingly clear distinction between its Title VI and non-Title VI services. But {{

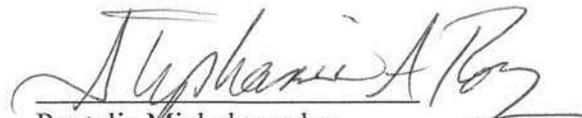
{{
public protestations.

}} Once more, Comcast’s
}} undercut its

* * *

DISH has made a compelling case that the proposed merger will increase Comcast’s incentive to act in an anti-competitive manner, and harm consumers and the public interest. It has supported its case with evidence from Comcast’s admissions on the record and its internal documents. For these reasons, among many others, the proposed merger should be rejected.

Sincerely,


Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corporation

⁷⁵ Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, ¶ 212 & n.546 (Mar. 12, 2015).

⁷⁶ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

⁷⁷ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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EXHIBIT 1: COMCAST’S STATEMENTS

Statements <i>Before</i>	Statements <i>Now</i>	Internal Documents
<p>OTT services are complementary to Comcast’s business, and do not pose a competitive threat:</p> <ul style="list-style-type: none"> • “Comcast does not have an incentive to foreclose OVDs.”¹ • “[A]ttempting to harm OTT edge providers . . . would harm Comcast’s broadband business”² • “OVDs are complementary to Comcast’s (and TWC’s) high-margin broadband business and Comcast’s programming business.”³ • “OVDs are obviously complementary to Comcast’s broadband business.”⁴ 	<p>OTT services are a competitive threat, but Comcast will only engage in pro-competition actions to counter it:</p> <ul style="list-style-type: none"> • “It would be surprising if Comcast . . . [was] <i>not</i> actively grappling with how Comcast and NBCUniversal both benefit and continue to be disrupted by the rapid growth and proliferation of OVDs.”⁵ • “[M]ere acknowledgement of competition is by no means a basis to allege an intent to harm or foreclose competition.”⁶ 	<p>Comcast documents reveal {{</p> <p style="text-align: right;">}}:</p> <ul style="list-style-type: none"> • {{ <p style="text-align: right;">}}’</p> <ul style="list-style-type: none"> • {{ <p style="text-align: right;">}}⁸</p> <ul style="list-style-type: none"> • {{ <p style="text-align: right;">}}⁹</p> <ul style="list-style-type: none"> • Comcast is worried that {{ <p style="text-align: right;">}}¹⁰</p> <ul style="list-style-type: none"> • {{

		<p style="text-align: right;">}}¹¹</p>
<p>Comcast has not considered launching OTT services and that such considerations are out of the question for each company:</p> <ul style="list-style-type: none"> • “There is no evidence that Comcast and TWC have any plans to compete with one another either in the traditional MVPD or OVD space and thus no basis for a concern about potential competition.”¹² • “Comcast has no plans to offer online video offerings outside its footprint.”¹³ • “[T]he notion that Comcast and TWC might have launched competing nationwide OVD services – or that even one would – is entirely speculative.”¹⁴ 	<p>Comcast had considered OTT service offerings, but dismissed the idea due to several factors:</p> <ul style="list-style-type: none"> • Comcast “has reviewed the prospects of offering an OTT product, [] has consistently rejected its business viability,” and, as a result, “there is no actual or potential horizontal competition between Comcast and TWC.”¹⁵ 	<p>Comcast documents indicate {{</p> <p style="text-align: right;">}}:</p> <ul style="list-style-type: none"> • NBCU recently announced that it will offer a streaming product comprised of its comedy content, apparently both to in footprint <i>and</i> out-of-footprint consumers.¹⁶ • {{ • Comcast {{ • Comcast executives believe an {{ • {{

		<p style="text-align: right;">}}²⁰</p> <ul style="list-style-type: none"> • {{ <p style="text-align: right;">}}²¹</p> <ul style="list-style-type: none"> • {{ <p style="text-align: right;">}}²²</p>
<p>Comcast has cited the Comcast-NBCU conditions as evidence against its ability to disadvantage OVDs:</p> <ul style="list-style-type: none"> • “[T]he NBCUniversal condition allowing OVDs to demand, and, if necessary, arbitrate over access to NBCUniversal programming networks in certain circumstances remains in place.”²³ 	<p>Comcast’s references to its conduct with regard to OVDs have become remarkably circumspect:</p> <ul style="list-style-type: none"> • “[T]here is <i>no evidence</i> that Comcast has engaged in any strategy to disadvantage OVDs.”²⁴ • “Comcast is <i>not aware of any evidence</i> that its contractual provisions are limiting programmers from licensing to OVDs.”²⁵ • “[T]here is <i>no evidence that</i> Comcast is engaging in an ‘OVD foreclosure’ strategy.”²⁶ • Comcast is “<i>aware of no evidence</i> that content MFNs have limited programmers from licensing to OVDs.”²⁷ 	<p>Many of the Applicants’ documents that may provide evidence on this issue are still unavailable to the parties’ outside counsel in this proceeding, and so are the universe of the Applicants’ programming agreements, which are key to evaluating these questions.</p>
<p>Comcast has stated that prices will not decrease or even slow their rate of growth:</p> <ul style="list-style-type: none"> • “We’re certainly not promising that consumer bills will go down or 	<p>Comcast argues that the merger will not make consumers worse off:</p> <ul style="list-style-type: none"> • “[T]here are no <i>settled</i> plans at this time for post-transaction service ‘rate- 	<p>Consumers will {{ }}:</p> <ul style="list-style-type: none"> • Comcast planned a {{

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<p>increase less rapidly.”²⁸</p>	<p>increases,²⁹ nor could there be until the company can assess the market conditions” at the time the deal concludes.”²⁹</p> <ul style="list-style-type: none"> • {{ <p style="text-align: center;">}}³⁰</p> <ul style="list-style-type: none"> • Documents cited by opponents “merely reference the fairly generic goal of {{ <p style="text-align: center;">}}³¹</p>	<p style="text-align: center;">}}³²</p> <ul style="list-style-type: none"> • Comcast has contemplated a {{ <p style="text-align: center;">}}³³</p>
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¹ Letter from Michael Hurwitz, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57, at 2 (Mar. 9, 2015) (“Comcast March 9 Ex Parte”).

² Comcast Corp. and Time Warner Cable, Inc., Application and Public Interest Statement, MB Docket No. 14-57, at 158 (Apr. 8, 2014) (“Comcast Application”).

³ Letter from Kathryn Zachem, Comcast Corporation, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57, Response to Question 1 at 2 (Nov. 26, 2014)

⁴ Mark A. Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters, MB Docket No. 14-57, ¶¶ 122-125 (Sept. 22, 2014) (“Israel Reply Declaration”) (attached as Exhibit 1 to Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014) (“Opposition”).

⁵ Comcast March 9 Ex Parte at 9.

⁶ *Id.* at 8.

⁷ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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⁸ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{
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⁹ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Jan. 27, 2015), {{
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¹² Israel Reply Declaration ¶ 14.

¹³ Israel Reply Declaration ¶ 127.

¹⁴ Opposition at 177.

¹⁵ Comcast March 9 Ex Parte at 2.

¹⁶ Billy Steele, *NBC is Working on a Streaming Service for Comedy Fans*, Engadget (Mar. 3, 2015), <http://www.engadget.com/2015/03/03/nbc-comedy-streaming-service/>.

¹⁷ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Sept. 16, 2014), {{
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¹⁸ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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¹⁹ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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²⁰ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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²¹ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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²² Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Feb. 12, 2015), {{
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²³ Opposition at 90.

²⁴ Comcast-Time Warner Cable Presentation to the Federal Communications Commission, at 5 (Mar. 10, 2012) (attached to Letter from Francis Buono, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57 (Mar. 12, 2015)).

²⁵ *Id.*

²⁶ *Id.* at 12.

²⁷ *Id.* at 15.

²⁸ Jon Brodtkin, *Comcast: No Promise That Prices “Will Go Down or Even Increase Less Rapidly,”* Ars Technica (Feb. 13, 2014), <http://arstechnica.com/tech-policy/2014/02/comcast-no-promise-that-prices-will-go-down-or-even-increase-less-rapidly/>.

²⁹ Comcast March 9 Ex Parte at 12 (emphasis added).

³⁰ *Id.* at 13 (emphasis added).

³¹ *Id.*

³² Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{
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³³ *Id.*, {{
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