STOP MEGA COMCAST

March 25, 2015

EX PARTE PRESENTATION

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

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

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the Stop Mega Comcast Coalition submits this *ex parte* to provide additional evidence regarding Comcast's anti-competitive behavior with respect to rival services.

It appears from press reports that Comcast may be withholding its affiliated NBC Universal ("NBCU") content in an effort to thwart the entry of potential new video competitors. Apple reportedly is planning a Fall 2015 launch for an over-the-top ("OTT") bundle of TV channels.[1] The service will include, among other things, content from ABC, CBS, and FOX, but not NBCU content due to "a falling-out between Apple and NBCUniversal parent company Comcast Corp.[.]"[2] If true, this conduct is a potential violation of the condition adopted in the Comcast/NBCU merger designed to facilitate Online Video Distributor ("OVD") access to important NBCU content.[3]

If the reports are accurate about Apple, it would be consistent with Comcast's prior conduct in attempting to leverage affiliated content to thwart rival services, even when faced with merger conditions. For example, Project Concord was a nascent OVD service that sought to provide first-run movies and same-season television shows to viewers on an on-demand and subscription basis. After signing a deal to distribute content from a third party studio, Project

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[1] *See* Keach Hagey, Shalini Ramachandran and Daisuke Wakabayashi, *Apple Plans Web TV Service in Fall*, WALL STREET JOURNAL, Mar. 17, 2015, *available at* http://www.wsj.com/articles/apple-in-talks-to-launch-online-tv-service-1426555611.

[2] *Id.*

[3] 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*, MB Docket No. 10-56, 26 FCC Rcd. 4238, 4355, App. A (2011) ("Comcast-NBCU Order").

Concord sought to use its agreement with that studio to get Comcast/NBCU to sign a similar distribution deal with Project Concord pursuant to the benchmarking condition.[4] But Comcast/NBCU disagreed that Project Concord was a qualified OVD eligible to assert the benchmark condition and refused to engage in substantive commercial discussions with the OVD.[5] Project Concord was forced to request arbitration under the benchmarking condition, and Comcast/NBCU continued to dispute Project Concord's right to the programming.[6] Ultimately, eight months after Project Concord filed for arbitration, the arbitrator decided for Project Concord on every substantive issue.[7] Comcast/NBCU immediately sought *de novo* review of the arbitrator's decision with the Media Bureau.[8] Five months later, and a full 17 months after Project Concord sought to access NBCU programming, the Media Bureau issued its order on review and ruled in favor of Project Concord.[9] But by the time the Media Bureau's order was released, Project Concord had apparently ceased to exist as a going concern. Even when conditions ultimately prevail in promoting video competition, Comcast can delay relief until the potential rival is no longer a threat.

Stop Mega Comcast also attaches three relevant op/eds for inclusion in the Commission's record in this proceeding:

- Michael Copps, *Net neutrality doesn't neutralize the threat of 'Mega-Comcast,'* The Hill, March 18, 2015
- David Goodfriend, *Bad Sports: Why a Comcast/Time Warner Cable Merger Would Hurt Fans*, Huffington Post, March 18, 2015
- John Bergmayer and Shiva Stella, *It's Absurd That Comcast Can Block the HBO Go App on Your PS4*, Slate, March 13, 2015

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This additional evidence reinforces the already strong case that the proposed merger of Comcast and TWC threatens serious harms to competition and consumers and runs counter to

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[4] *See* Project Concord v. NBCUniversal Media, LLC, *Order on Review*, 27 FCC Rcd 15109, 15114 ¶ 8 (2012) ("Project Concord Order"). The benchmarking condition requires Comcast/NBCU to provide, among other things, "a Qualified OVD with Online Video Programming that is comparable to the Online Video Programming the OVD has received from a qualifying peer programmer." *Id.* ¶ 2.

[5] *See* Project Concord, Inc., Opposition to NBCUniversal Media Petition for De Novo Review, at 5-6 (filed Aug. 10, 2012), filed in Project Concord v. NBCUniversal Media, LLC, *Order on Review*, 27 FCC Rcd. 15109 (2012).

[6] Project Concord Order, 27 FCC Rcd. at 15114 ¶ 8.

[7] *Id*. at 15115-16 ¶¶ 10-11.

[8] *Id*. at 15117 ¶ 13.

[9] *Id*. at 15117-18 ¶¶ 14-15, 15120-21 ¶ 20.

our antitrust and communications laws. No set of conditions can alleviate these harms; therefore, the FCC must reject this merger.

Respectfully submitted,

/s/

Stop Mega Comcast Coalition

Attachments

THE HILL

March 18, 2015, 10:00 am

Net neutrality doesn't neutralize the threat of 'Mega-Comcast'

By Michael Copps

Few titans of American industry can compare to Comcast for sheer chutzpah.

To quell criticism of its proposed 2011 acquisition of NBC-Universal the company offered a handful of "voluntary concessions." Once the deal was approved, Comcast set about skirting a number of these conditions. Now, Comcast is back with another proposed mega-merger and is again suggesting that conditions – this time in the form of the Federal Communications Commission's (FCC) net neutrality rules - will be enough to protect the public interest.

Don't believe it. As important as strong Open Internet ("net neutrality") rules are for the country, they are not designed to fully reign in the potential abuses of a company of Comcast's scale. Indeed, they don't even touch upon the many non-Internet-related public interest concerns raised by this merger. Put simply, it is just as important for the FCC and Department of Justice (DOJ) to reject this merger today as it was the day before the FCC adopted its net neutrality rules.

To understand the depths of Comcast's mischief following its NBCU acquisition, it is worth looking at just a few examples. (Disclosure: I served at the FCC when the merger was reviewed and cast the sole dissenting vote against it.)

Comcast was forbidden from discriminating against rival news networks, but did everything it could to move the Bloomberg channel – a competitor to Comcast-owned CNBC – to a dark corner of its channel lineup. Comcast was forbidden from attempting to undermine online video distributors, but nevertheless managed to drive innovative online video outlet Project Concord out of business by blocking it from access to programming. The upstart could not keep up with Comcast's legal gamesmanship and folded. Comcast was forbidden from discriminating against competing over-the-top ("OTT") video providers, but began degrading Netflix transmissions on its broadband network until Netflix coughed up payments for improved delivery.

Now, Comcast wants DOJ and FCC approval to acquire Time Warner Cable and create "Mega-Comcast" – a company which would control more than 50 percent of the high-speed broadband market and one-third of the national pay television market, including the largest programming markets in the country, New York and Los Angeles. And once again, Comcast is saying that conditions – including FCC net neutrality rules – will prevent it from abusing the public interest. The argument doesn't hold up to even the most cursory scrutiny.

First, we don't yet know the future of the FCC's new rules. Certainly, the cable industry will litigate them for many years to come. The result could be the rules being affirmed, changed, or thrown out altogether. In any case, regulators need to rule on the TWC transaction long before anyone can know the ultimate fate of the Open Internet.

Second, even if the net neutrality rules the FCC has just passed withstand legal assault, the rules cannot account for the vastness and complexity of Mega-Comcast, or of the thousands of contracts between it and content providers, OTT providers, advertisers and other entities. Within the minutiae of those commercial deals, Mega-Comcast will certainly find ways to force unfavorable provisions onto competitors and do what net neutrality was meant to forbid. And while other smaller ISPs could try to do the same, Mega-Comcast's size and dominance of the broadband market would make it uniquely able to thwart competition and stifle innovation. Nobody in the American Internet eco-system would be able to survive if they couldn't fairly access Mega-Comcast's customers and content. And nobody rivals Comcast when it comes to unleashing lawyers and lobbyists to cower competitors into submission.

Third, the harms from this transaction go way beyond broadband. Net neutrality guarantees do nothing to stop Mega-Comcast from discriminating against diverse, independent programmers; do nothing to stop it from jacking up prices for small businesses seeking to advertise on its platform; do nothing to protect sports fans from being denied access to their home teams' games unless they subscribe to Comcast; do nothing to protect Hispanic viewers' access to Spanish-language channels other than Comcast-owned Telemundo and Mun2. And, of course, net neutrality does nothing to prevent Comcast from its relentless march toward ever higher prices and worse service. Even Comcast's top lobbyist offered no promise "that prices will go down or even increase less rapidly" post-transaction.

The bottom line is that this deal is a disaster for the American public. The passage of strong net neutrality protections was historic and, if upheld, will go a long way toward keeping the Internet free, open, and innovative. But the rules were never designed to mitigate the harms of this merger and nobody should be fooled into thinking they do. There is one and only one way to keep this transaction from wreaking havoc on the American telecommunications landscape: for our regulators to put the public interest first and just say "no." The transaction review teams at the DOJ and FCC have ample grounds to stop this madness; all that's needed is political will. Let's hope they find it.

Copps is a former commissioner of the Federal Communications Commission, and currently serves as the special adviser to the Media & Democracy Reform Initiative at Common Cause.

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David Goodfriend Become a fan

Chairman, Sports Fans Coalition; contributor, SiriusXM, MSNBC, CNBC, Al Jazeera America

Bad Sports: Why a Comcast/Time Warner Cable Merger Would Hurt Fans

Posted: 03/18/2015 12:35 pm EDT | Updated: 03/18/2015 12:59 pm EDT

The only thing worse than watching your team lose is not being able to watch it play at all, which happens all too frequently. From the sports fans' perspective, they support the team and pay the taxes to help build the stadium. Then when it matters most, they turn on the TV to find that the game is not available. Sorry fans, you lose.

Ask L.A. Dodgers fans, most of whom could not watch last year's regular season games because the local cable operator, Time Warner Cable, bought the Dodgers' TV rights and promptly made the games available only to their own subscribers. The result: a winning 2014 Dodgers season with roughly 70 percent of fans unable to watch the games on TV, simply because Time Warner Cable refused to make the games available on competing pay-TV platforms.

Ask Philadelphia fans, where the Phillies' Regional Sports Network and the local cable system are owned by Comcast which, until recently, relied on an arcane regulatory loophole to withhold the network from its competitors. Now, although the network is available to more consumers through competing cable and satellite providers, Comcast demands fees from its competitors that cause consumer bills to skyrocket. Just last year, Comcast raised its rates on competitors to help foot the bill for the $2.5 billion rights agreement it negotiated for Phillies games. Blue Ridge Communications, a local competing cable company, said of the deal, "it will have a direct impact" on customers' bills.

Time Warner Cable and Comcast have a long track record for acquiring sports rights and hoarding them, restricting the games to a subset of fans who subscribe to these companies' overpriced services or to another provider willing to pay their ransom and pass the costs on to unsuspecting customers. The greed and power of these two companies has made fans the perennial fumbled pigskin in the high-stakes sports media game.

Now Comcast and Time Warner Cable are asking federal, state, and city governments for permission to merge into a mega-cable conglomerate, serving 18 out of the 20 top sports markets. If Dodgers, Phillies, and other fans thought past seasons were bad, the proposed merger would only make matters worse.

A 2013 paper by three highly-respected economists (Kevin Caves, Chris Holt and Hal Singer) shows that when a cable company owns a regional sports network like the Dodgers or Phillies RSNs, the prices for that network go up and the availability to competitors goes down. The bigger the cable system, the worse the problem gets. In the case of the proposed merger, Comcast not only would acquire Time Warner Cable's L.A. subscribers, for example, it also would gain hundreds of thousands of Southern California Charter subscribers, exacerbating the incentive to withhold Dodgers games from competing cable and satellite companies and their subscribers.

As sports move to online "Over-the-Top" digital platforms, a combined Mega Comcast with over 50 percent market share in the high-speed residential broadband market would be an even more powerful gatekeeper in the online space. When Comcast's NBC Sports unit acquired the rights to televise the Olympics, it allowed only Comcast subscribers to watch certain exclusive online video coverage. After acquiring additional Time Warner broadband subscribers, Comcast will have an even greater incentive and ability to do likewise in other sports categories.

Comcast and Time Warner Cable want the American People's permission to merge. The only answer for federal, state and local governments and regulators is to make a goal-line stand for fans and say no. If our government officials care about fans' access to games, they should deny this merger and protect our nation's sports fans.

David Goodfriend is Chairman of Sports Fans Coalition and a former official of the Clinton White House and Federal Communications Commission. In his Washington, D.C. private practice, he represents tech companies like eBay and DISH Network, labor unions like the International Brotherhood of Teamsters, and independent programers like beIN SPORTS.

future tense Slate
THE CITIZEN'S GUIDE TO THE FUTURE
MARCH 13 2015 4:34 PM

It's Absurd That Comcast Can Block the HBO Go App on Your PS4

By John Bergmayer and Shiva Stella

Comcast has the power.

Photo by Joe Raedle/Getty Images

As a broadband or cable subscriber, you're probably thinking that you should be able to access online video content without your Internet service provider's—or cable provider's—permission. Yet this simple feat is proving ridiculously difficult for Comcast subscribers. Comcast is unique among large ISPs and cable companies because it can use its size and content ownership to undermine online video competition in creative, infuriating ways. And it's the dearth of protections supporting the online video market that allows Comcast to get away with it.

Strong net neutrality rules prevent Comcast the ISP from blocking or throttling online video competitors. But Comcast the cable company has multiple tricks up its sleeve to stifle online video competition.

Comcast's scope and power enable it to refuse to sell its own video programming to other online video providers, including Netflix. This is despite agreeing to an ineffective **NBC merger condition** designed to prevent this behavior. Comcast, as the largest distributor of video programming, can use its leverage in negotiations to put restrictions on the online availability of even someone else's programming. If that's not enough, Comcast also controls the largest base of broadband subscribers in the United States, giving it a negotiation advantage over Internet-backbone companies that want to connect to its networks. Indeed, the sheer size of Comcast means it can grow only by disadvantaging its competitors to maintain video dominance—and it's not afraid to do so.

Case in point: That HBO Go app that launched March 3 for the PlayStation 4? **Not happening** for Comcast Xfinity subscribers who pay for HBO. If you try to access HBO Go on a Comcast Internet connection using Verizon-provided credentials, you can. But if you try to access HBO Go on a Verizon Internet connection using Comcast-provided credentials, you can't.

One of the less understood ways that Comcast is able to direct the future of online video is through its control of "authentication." A lot of online video apps like HBO Go have traditionally been of little use to cord-cutters because they're tied to regular pay-TV subscriptions. To use these services, you need to log in with credentials obtained from your cable provider. This means that your cable company determines what online video app you can access on any particular device. Most pay-TV providers authenticate these apps as a matter of course—their customers are paying for service, and accessing these apps is part of the service they're paying for. But not Comcast.

Comcast prefers to refuse its customers access to particular apps on particular platforms. In March 2014, it was discovered that Comcast had previously blocked people with Rokus from accessing HBO Go and Showtime. There is no technical reason for this—Comcast customers with other devices could access those apps, and non-Comcast subscribers could access those apps on a Roku. Comcast just decided, for whatever reason, that they would rather their subscribers not use some apps on some devices. Given the scrutiny Comcast's practices are under during its **Time Warner Cable merger** review, it's not surprising that in November 2014, the company finally allowed its customers to use those apps. (Funnily enough, Comcast also**refuses authentication to Hulu**, too, even though it shares Hulu ownership.)

When we asked Comcast for comment, a representative sent us this statement:

Xfinity customers who subscribe to HBO currently have access to the full HBO library via their set to box, or via Xfinity TV Go platforms across devices. We also currently authenticate more than 90 networks across 18 devices (and we authenticate HBO specifically on many third-party devices including Apple TV and Roku) so there is no shortage in the number of ways for our customers to access their content across the devices and platforms of their choice.

Unless, of course, customers want to access HBO Go on a PlayStation 4. There's just no mention about why Comcast is blocking the app or word on when that might change. We can only speculate as to Comcast's motives based on previous behavior. It may be that Comcast is so much bigger than other cable companies that it's just slow-moving. It's much more likely that Comcast would prefer people watch traditional video and use Comcast-supplied set-top boxes instead of third-party equipment like PlayStation 4s. It might also be that either Comcast or HBO isn't willing to pay to access the other's customers. Whatever the reason, the effect is clear: Comcast customers are restricted in how they can watch video content in ways that customers of other companies are not.

There are several ways to solve this problem, but the best option is to **extend the competitive protections** some video providers already enjoy to online video providers. We can ensure that online video becomes a standalone alternative to the traditional cable bundle by dropping authentication through existing cable providers entirely. We can promote a competitive market for pay-TV set-top boxes to allow consumers to watch HBO Go and even pay-TV content on the device of their choosing. Another obvious solution is for the Federal Communications Commission and the U.S. Department of Justice to block Comcast's acquisition of Time Warner Cable, which would prevent this problem from spreading.

No one is saying that entering the online video market is impossible, but incumbent companies like Comcast have proven that they're willing to use every trick they can to preserve their dominance when faced with competition. These tricks can take many forms, from the big (consolidation via megamergers) to the subtle (denying the authentication process). Only more online video competition will solve this problem, but in the short term, Comcast's behavior around authentication is just another reason why it should not be permitted to expand its reach by buying Time Warner Cable. Things are already bad enough.

Future Tense *is a partnership of* ***Slate****,* ***New America****, and* ***Arizona State University****.*

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