



March 26, 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 for why the merger of Comcast Corporation ("Comcast") and Time Warner Cable, Inc. ("TWC" and collectively, the "Applicants") threatens competition regardless of the implementation of open Internet rules.

I. Summary

In its letter¹ responding to Stop Mega Comcast's White Paper,² the Applicants urged the Commission to ignore significant evidence of its incentive to harm competitors, including online video distributors ("OVDs"), and to rely exclusively on the open Internet rules (either those adopted in 2010 or those adopted recently) to police any misalignment between Mega-Comcast's incentives and the public interest following the merger.

As Stop Mega Comcast explains below, the Applicants' arguments should be rejected because:

- **Beyond the Scope:** The Applicants have the incentive and ability to harm competition in a variety of ways, many of which are beyond the scope of both the FCC's 2010 open Internet rules and the new rules adopted this year.
- **OVD Foreclosure:** Neither the 2010 nor the 2014 open Internet rules address Comcast's core incentive to harm OVDs, and neither can adequately address the numerous ways in which Comcast can act on that incentive.

¹ Letter from Francis M. Buono, Counsel to Comcast Corp, to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 11, 2015) ("Comcast Letter").

² Letter from Stop Mega Comcast Coalition to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 2, 2015) ("SMC Letter").



- **Regulatory Constraints Fall Short:** If Comcast is constrained by regulatory conditions alone, it is incentivized to find ways to work around those conditions to the detriment of a healthy market. And Comcast has shown a propensity to skirt or litigate regulatory rules.
- **Too Many Options to Harm OVDs:** The merged entity would have any number of options that it can use in formulating a strategy that undermines competition from OVDs. It would be immensely difficult, if not impossible, to develop a regulatory structure that properly accounted for all of them.
- **Comcast's Reach Goes Beyond Broadband:** The 2010 and 2014 open Internet rules focus on broadband Internet access. But the concerns raised by the proposed merger extend beyond broadband, and the potential harms reach into any number of other areas, including programming, advertising, and consumer equipment.

II. The Merged Entity's Incentive and Ability to Harm Competition Goes Beyond the Scope of Open Internet Rules

In its letter³ responding to Stop Mega Comcast's White Paper,⁴ the Applicants urged the Commission to ignore significant evidence of its incentive to harm competitors, including online video distributors ("OVDs"), and to rely exclusively on the open Internet rules (either those adopted in 2010 or those adopted recently) to police any misalignment between Mega-Comcast's incentives and the public interest following the merger.

As Stop Mega Comcast explained in its White Paper, however, the scope of the merged entity's incentive and ability to harm competition and consumers extends well beyond the scope of the open Internet rules. Even for those harms that the open Internet rules are meant to address, Mega-Comcast will have the incentive to design around particular regulations, interpret them narrowly, and litigate them for years, as it has done in the past.⁵

Comcast would like the public to believe that the open Internet restrictions have the clarity of "thou shalt not steal," that Comcast will not steal, and that this will remedy all anti-competitive effects stemming from the merger. In fact, they are not even a partial remedy. Most fundamentally, if the Stop Mega Comcast Coalition is correct that the merger would significantly increase Comcast's incentive and ability to harm OVDs, conduct restrictions will not work. The idea is tantamount to letting the fox into the henhouse but prohibiting attacks on hens. For those

³ Letter from Francis M. Buono, Counsel to Comcast Corp, to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 11, 2015) ("Comcast Letter").

⁴ Letter from Stop Mega Comcast Coalition to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 2, 2015) ("SMC Letter").

⁵ For example, Comcast's decision to charge edge providers directly for interconnection was likely intended to engineer around the FCC's 2010 open Internet rules.



reasons, the Commission was right when it cautioned in the *Open Internet Order* that, notwithstanding the new rules, “it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and . . . take action against any anti-competitive mergers.”⁶

II. Comcast Has a Significant Motive to Foreclose OVDs, Which Would Be Significantly Increased by the Merger.

Despite Comcast’s continued assertions that it does not have the incentive to harm OVDs, the record in this proceeding clearly proves otherwise. While Comcast has asserted that OVDs are in fact beneficial to its broadband and programming services, its documents show that it considers OVDs as a threat. Parties in this proceeding also have identified a number of internal Comcast documents that demonstrate the company’s significant concern at every level of the organization about the risks from OVDs.⁷ As even the Applicants have admitted in the public record, “Comcast documents at various levels of the company [have been] actively grappling with how Comcast and NBCUniversal both benefit from and continue to be disrupted by the rapid growth and proliferation of OVDs.”⁸ Neither the Commission’s new open Internet protections nor its 2010 rules address Comcast’s core incentive to harm OVDs, and neither can adequately address the numerous ways in which Comcast can act on that incentive. The record shows that Comcast views over-the-top video distribution as a fundamental threat to its core MVPD business and would use its new scale and market power to ensure that threat is destroyed or crippled sufficiently to obviate Comcast’s concerns.

Comcast’s economists have also responded by claiming that Mega-Comcast would not seek to foreclose OVDs, but would instead force those OVDs to cover any loss to Comcast’s MVPD business.⁹ This is a difference without a distinction. Such anti-competitive rent seeking would make sense only if there were enough OVD profit to make Comcast whole—a proposition that is

⁶ Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, FCC 15-24, ¶ 203 (2015) (“*Open Internet Order*”).

⁷ See, e.g., Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene Dortch, FCC, MB Docket No. 14-57, at 5-6 (Feb. 10, 2015); David S. Evans, *Contrary to Professor Carlton’s Theory, Comcast has a Strong Incentive to Engage in Vertical Foreclosure*, MB Docket No. 14-57, at 12-17 (Mar. 18, 2015) (“*Evans Vertical Paper*”) (attached to Letter from Markham C. Erickson, Counsel for Netflix Inc., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 18, 2015)).

⁸ Letter from Michael Hurwitz, Counsel for Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 9 (Mar. 9, 2015).

⁹ Declaration of Dennis W. Carlton, MB Docket No. 14-57 (Sept. 22, 2014) (“*Carlton Decl.*”) (attached as Exhibit 3 to Comcast Corp., *Opposition to Petitions to Deny and Response to Comments*, MB Docket No. 14-57 (Sept. 23, 2014) (“*Opposition*”).



far from certain—and would certainly inhibit the ability of those OVDs to compete effectively with Comcast.¹⁰

III. Comcast Cannot Be Contained by Regulatory Constraints.

Comcast ridicules Stop Mega Comcast’s assertion that open Internet rules are inadequate to address the scope of harms that would result from the merger.¹¹ Yet, the White Paper’s argument—that such rules are neither a panacea nor even an effective partial cure for the anticompetitive effects of the merger—was just affirmed by the Commission itself in its recently adopted *Open Internet Order*. As the Commission explained:

Of course, this regulatory backstop is not a substitute for robust competition. The Commission’s regulatory and enforcement oversight, including over common carriers, is complementary to vigorous antitrust enforcement. Indeed, mobile voice services have long been subject to Title II’s just and reasonable standard and both the Commission and the Antitrust Division of the Department of Justice have repeatedly reviewed mergers in the wireless industry. Thus, it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and where appropriate, take action against any anti-competitive mergers, acquisitions, agreements or conduct, including where broadband Internet access services are concerned.¹²

The Commission’s reasoning is not only exactly right; it is non-controversial and has been long understood by policymakers. The Telecommunications Act itself states “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”¹³ The reasoning behind this public policy is simple. The market works best when a company’s incentives are aligned with pro-competitive behavior. A company constrained by regulatory conditions alone is instead incentivized to find ways to work around those conditions to the detriment of a healthy market.

¹⁰ Evans Vertical Paper at 6-11.

¹¹ Comcast asserts, “it should not go unnoticed by the Commission that the fundamental premise of SMC’s filing is the insulting position that the Commission will not – or will not be able to – enforce its own rules,” and “[s]urely, SMC cannot seriously be suggesting that the Commission is incapable of enforcing its rules – now or post-transaction.” Comcast Letter at 1, 4 (Mar. 11, 2015) (“Comcast SMC Letter”); *see also* Comcast Application at 108, 167-68 (“[T]he NBCUniversal Conditions . . . would fully mitigate” Comcast’s attempt to foreclose programming from competitors”); *id.* at 90 (“[T]he NBCUniversal condition allowing OVDs to demand, and, if necessary, arbitrate over access to NBCUniversal programming networks in certain circumstances remains in place.”).

¹² *Open Internet Order* ¶ 203.

¹³ 47 U.S.C. § 152, note (excepting certain inapplicable provisions).



Comcast’s letter itself shows the Commission is right to be cautious. As that letter explains, Comcast is “uniquely bound” by the 2010 open Internet rules, which prohibit Comcast from charging edge providers to deliver traffic over its customers’ broadband Internet access service.¹⁴ As an initial matter, those 2010 rules expire in a few years, while the harms from Mega Comcast would never expire. Moreover, Comcast notes that forcing Netflix to pay a fee did not violate the open Internet rules, but not because Comcast did not charge Netflix for access to Comcast’s broadband customers or because Comcast’s actions did not have the practical effect of throttling its customers’ access to Netflix service. Rather, Comcast proudly explains that its actions dodged the letter—though not the spirit—of the open Internet rules, because the throttling and the demand for payment took place upstream at the point of interconnection.¹⁵ Of course, that is not the only regulatory condition Comcast has managed to engineer around.¹⁶

Comcast further dismisses these concerns by arguing that anyone harmed would have legal redress under the new open Internet rules. Leaving aside that Comcast’s own industry association has promised to sue the Commission to block those rules,¹⁷ Comcast’s “see you in court” attitude is just another part of the problem. Complaining parties can be sure that Comcast will litigate every complaint to its fullest and seek every possible avenue of delay—straining the resources of the Commission and the complainant. In other words, Comcast will continue to earn its reputation as a determined pugilist, and in so doing, suppress the willingness of all but the bravest, well-funded companies to come forward.

IV. Comcast’s Menu of Options for Harming OVDs Is Limited Only by Its Imagination.

As an immense, vertically integrated media conglomerate, Comcast has significant bargaining power over, or control of, numerous parts of the video and broadband ecosystem. Post-transaction, that bargaining power and control would grow significantly. There are any number of ways that Comcast could use its bargaining power or influence to harm OVDs, but the White Paper offered an illustrative list of 53.

Comcast exclaims its innocence, of course, but its chief complaint about the list appears to be that it includes mutually exclusive options. There is no reason why Comcast’s treatment of two

¹⁴ Comcast Letter at 3.

¹⁵ *Id.* at 4.

¹⁶ See Letter from Pantelis Michalopoulos and Stephanie Roy, Counsel to DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 5-6 (Feb. 23, 2015); Michael Copps, *Net Neutrality Doesn’t Neutralize the Threat of ‘Mega-Comcast’*, The Hill (Mar. 18, 2015), available at <http://thehill.com/blogs/congress-blog/technology/235982-net-neutrality-doesnt-neutralize-the-threat-of-mega-comcast>.

¹⁷ *The Communicators*, C-SPAN (Feb. 12, 2014) (Statement of Michael Powell, President, National Cable & Telecommunications Association), <http://www.c-span.org/video/?324274-1/communicators-michael-powell> (indicating NCTA is likely to take the FCC to court over the open Internet rules).



different OVDs should be limited by anything other than Comcast's own internal strategies at the moment an opportunity arises. For example, Comcast could foreclose Netflix's access at the point of interconnection out of fear of its popularity, and then use the example it set with Netflix to force Vudu to become a "complementary" product by requiring it to distribute its programming through Comcast's video service at below market rates.¹⁸ Similarly, Comcast could charge Hulu a high fee for most-favored-nation access for Hulu's separate Hulu Plus offering on its set-top box ("STB"), but favor its own NBCU content on its STB over HBOGo, with which Comcast has a complicated relationship.¹⁹

Of course, that is the point. The merged entity would have any number of options that it can use in formulating a strategy that undermines competition from OVDs. It would be immensely difficult, if not impossible, to develop a regulatory structure that properly accounted for even the 53 options previously listed. Even then, the Commission could not ensure that the combined Comcast-TWC would not find some way to engineer, argue, or threaten its way around them—or simply use other options, previously unconsidered.

V. Comcast's Reach Goes Beyond Broadband.

The concerns raised by the proposed merger extend beyond broadband, and the potential harms reach into any number of other areas, including those regarding programming, advertising, and STBs. Comcast does not claim that the open Internet rules resolve these issues. Rather, Comcast merely assures the Commission that these anti-competitive effects are neither serious nor likely to arise, while offering little in the way of new substantive analysis. In fact, the harms threatened in each of these areas are well documented in the record, and significant enough in their own right to justify denial of this transaction:

- *Consumer Equipment.* Both COMPTTEL and Roku have raised concerns about Comcast's ability to interfere with the development and deployment of third-party streaming devices and the OVDs that rely on them, through its refusal to authenticate popular programming on all devices and the removal of TWC as the "maverick" cable system that has encouraged third-party development of navigation devices.²⁰ Comcast dismisses these claims as "absurd[.]" arguing that the transaction would not "result in Comcast's X1 becoming the default streaming platform, somehow displacing the myriad of interconnected device options for consumers that exist today."²¹

¹⁸ Comcast own economist, Dr. Carlton, appears to have suggested that this would be a reasonable course of action for the company. Carlton Decl. ¶ 12.

¹⁹ HBO continues to offer its content through cable services, including Comcast's, but recently announced that it would make that same content to consumers independently through a separate over-the-top offering.

²⁰ Roku, Inc., Comments, MB Docket No. 14-57, at 3, 8-12, 17 (Aug. 25, 2014) ("Roku Comments"); COMPTTEL Reply at iii, 19-24.

²¹ Comcast Letter at 8.



But the ability of Comcast to prevent popular content from being distributed over third-party devices has a significant and negative effect on the popularity of these devices, as well as a negative knock-on effect for the OVDs that rely on those devices for distribution of their own content.²² The fact that Comcast decided to ultimately agree to authenticate HBOGo on Roku does not, of course, guarantee that it will do so for other apps in the future, when other device-makers knock on its door. In fact, Comcast itself notes that it is under no regulatory obligation to authenticate these devices.²³ The merger's effect on Comcast's bargaining power with regard to the major programmers raises concerns that Comcast may affirmatively seek contractual rights to prevent authentication of those services over competing devices and platforms. This could lead to the X1 being the only viable, widely available streaming device available for many OVDs, forcing them to negotiate with Comcast for carriage of their competing services on the platform.

- *Programming Costs.* DISH, COMPTTEL, the Writers Guild of America, West, and the American Cable Association (“ACA”) have raised serious concerns regarding the effect of an increase in Comcast's bargaining power in the video programming market, post-transaction, the potential for Comcast to use its new market power to harm rival services, and the effect of Comcast's relative programming price advantage on competition from rival MVPD and broadband services.²⁴

Comcast urges the Commission to ignore these concerns and instead find that its post-merger 30% market share is *per se* permissible based on the Commission's “twice-rejected horizontal ownership rules” and its prior *AT&T Broadband* and *Adelphia* decisions.²⁵ The Commission, however, has an obligation to look at the facts of *this* merger in determining the potential for public interest harm, not past mergers or regulatory proceedings. This will require significant and probing econometric analysis of the combined entity's bargaining power in the programming market, and the potential for harm to Comcast's competitors as a result to ensure the issues are properly evaluated.

- *Program Access.* DISH and ACA have provided significant analysis in the record regarding the merged entity's increased incentive and ability to foreclose rival MVPDs and OVDs from access to Comcast-controlled programming, including its owned-and-

²² Roku Comments at 8-11.

²³ Comcast Letter at 9.

²⁴ DISH Network Corp., Petition to Deny, MB Docket No. 14-57, at 80-85 (Aug. 25, 2014) (“DISH Petition”); COMPTTEL, Reply, MB Docket No. 14-57, 25-29 (Dec. 23, 2014) (“COMPTTEL Reply”); Writers Guild of America, West, and Future of Music Coalition, Petition to Deny, MB Docket No. 14-57, at 21-40 (Aug. 25, 2014); American Cable Association, Reply Comments, MB Docket No. 14-57, at 17-25 (Dec. 23, 2014) (“ACA Reply”).

²⁵ Comcast Letter at 7.



operated broadcast stations.

Comcast dismisses these concerns as “not plausible” because it would “only harm NBCUniversal.”²⁶ DISH and ACA, however, have already provided analysis showing that the merger would make a foreclosure strategy profitable for the combined entity.²⁷ Even Comcast’s economists cannot help but concede that the proposed transaction would make NBCU foreclosure more plausible than when the Commission last conducted the analysis in 2010.²⁸ More recent analysis by DISH’s economist, William Zarakas, provides additional evidence that a foreclosure strategy would be made significantly more profitable as a result of this transaction, and raises significant questions about the analysis conducted by Comcast’s economists, Drs. Rosston and Topper.²⁹

- *Third-Party Content.* Mega-Comcast would have the ability to coerce third-party content owners and programmers to withhold online rights from competing OVDs, thereby stifling a crucial source of competition and innovation in the video industry. For example, Comcast/TWC could require third-party providers to submit to the following terms, among others: require restrictions on third-party content providers to limit OVD access to content; impose contractual restrictions that limit the ability of OVDs to gain preferential/equal “windowing” of content; command contractual restrictions on third-party content providers to limit OVD access to “must-have” or marquee programming; and impose contractual channel/bundling restrictions on third-party content providers to require OVDs to carry more channels than they otherwise would be required to.³⁰
- *Harm to Hispanic Consumers.* The expansion of Comcast’s footprint is particularly troubling for independent programmers that compete with Comcast’s own Telemundo offering. While Comcast claims that it “offers numerous programming options geared to the Latino community” and has “expanded the carriage of seven Hispanic programming services,” commenters, such as Liberman Broadcasting, Inc., have shown that Comcast

²⁶ Comcast Letter at 7.

²⁷ DISH Petition at 63-64; Professor David Sappington, *The Anticompetitive Effects of the Proposed Merger of Comcast and Time Warner Cable*, MB Docket No. 14-57 (Aug. 25, 2014) (attached as Exhibit B to DISH Petition); ACA Reply at 17-25.

²⁸ Gregory L. Rosston and Michael D. Topper, *An Economic Analysis of the Proposed Comcast Transactions with TWC and Charter in Response to Comments and Petitions*, MB Docket No. 14-57, at Table III.C. (Sept. 20, 2014) (attached as Exhibit 2 to Opposition).

²⁹ See William P. Zarakas, *Supplemental Declaration: Analysis of the FCC’s Vertical Foreclosure and Nash Bargaining Models Applied to the Proposed Comcast-Time Warner Cable Transaction*, MB Docket No. 14-57 (Mar. 25, 2015) (attached to Letter from Stephanie A. Roy, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 25, 2015)).

³⁰ See Letter from Jeffrey H. Blum, DISH Network Corp., to Marlene Dortch, FCC, MB Docket No. 14-57, at 2 (Jan. 29, 2015).



has an incentive to foreclose competing Hispanic-centered television stations from carriage on Mega-Comcast's system which will now spread to cover 91% of the Hispanic population.³¹

- *Advertising.* As DISH has previously noted, Comcast's ownership of FreeWheel—a service used for serving ads online and required by most of the major programmers—would provide Comcast with significant data about competing MVPDs' customers. The merger will increase Comcast's incentive to use this powerful tool. Comcast contends that the merger will merely “help accelerate” the development and deployment of this ad insertion technology “to the benefit of programmers and advertisers.”³² But as DISH has explained, Comcast's ownership of FreeWheel opens several avenues of mischief that will be more attractive to Mega-Comcast than they are to Comcast today, such as the ability of the combined company to interfere with an OVD's video advertising revenue, and the ability to steer programmers away from other OVDs and toward Comcast's services as a condition of preferential arrangements with FreeWheel.³³ The merger would also expand the footprint across which Comcast's interference would lead to diverting erstwhile OVD customers to its own services.

Viamedia, in turn, has warned of the significant implications of the merged entity's unfettered control over local spot advertising in 71% of U.S. cable households through Mega-Comcast's control over NCC Media and over “regional interconnects” in 72% of consumers in the top 25 markets.³⁴ Comcast argues that the transaction will have “no impact on local cable advertising competition or advertising options because the companies do not currently compete for local advertisers.”³⁵ But the merged entity's ability to aggregate these “local” spots together into a near-nationwide offering for large national advertisers threatens to significantly decrease the advertising time available to tens of thousands of local small businesses that rely on local cable advertising to promote their businesses, cutting off a critical avenue for reaching consumers or increasing the ad rates those businesses pay.³⁶ As for Comcast's argument that local advertisers have “multiple television and non-television options,”³⁷ it seems to be contradicted by the Applicants' own claim that TWC and NBC do not compete for advertising dollars in New

³¹ Letter from Lenard Liberman, Liberman Broadcasting, Inc., to Marlene Dortch, FCC, MB Docket No. 14-57 (Mar. 5, 2015).

³² Comcast Letter at 8 (emphasis in original removed)

³³ DISH Network Corp., Reply, MB Docket No. 14-57, at 76-78 (Dec. 22, 2014) (“DISH Reply”).

³⁴ Viamedia, Inc., Response to Applicants' Opposition to Petitions to Deny and Response to Comments, at 7-10 (Nov. 10, 2014) (“Viamedia Response”).

³⁵ Comcast Letter at 8.

³⁶ Viamedia Response at 12-13.

³⁷ Comcast Letter at 8.



York, because “most advertisers do not regard cable and broadcast advertising to be close substitutes.”³⁸

* * *

The inadequacy of open Internet rules to constrain Mega Comcast’s behavior reinforces the already strong case that the proposed merger of Comcast and TWC threatens serious harms to competition and consumers and runs counter to 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

³⁸ See Opposition at 274.