



April 23, 2015

Via ECFS

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Filing of RCN Telecom Services, LLC and Grande Communications Networks, LLC, MB Docket No. 14-57, Applications of Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc. and SpinCo for Consent to Transfer Control of Licenses and Authorizations**

Dear Mr. Chairman:

I am writing on behalf of RCN Telecom Services, LLC (RCN) and Grande Communications Networks, LLC (Grande). These two local communications providers offer voice, video, and broadband Internet access service choices to approximately 1.9 million homes passed in competition to cable and telephone companies in many major markets. Of relevance for the proposed combination of Comcast Corporation (Comcast) and Time Warner Cable, Inc. (Time Warner Cable), RCN competes with Comcast in Chicago, Boston, Philadelphia, and Washington, D.C. and with Time Warner Cable in New York City. Grande competes with Time Warner Cable in Corpus Christi, North Dallas, San Antonio/San Marcos/Austin, and Waco. Both RCN and Grande also purchase "must have" programming from Comcast's affiliate, NBC Universal ("NBCU"), to distribute in all their markets. As a result, RCN and Grande understand how Comcast and Time Warner Cable as individual companies leverage their assets today to thwart competition and how, when they join, they can use their newfound leverage to inflict even greater damage in the market and to the public interest.

From the start of your tenure, you have sought to promote and protect competition: "Competition is a power unto itself that must be encouraged... We must protect competition where it exists. We must promote competition where it may not be fulsome."<sup>1</sup> You also have sought to ensure consumers can choose freely among a wide array of affordable services: "Consumers have long complained about how their cable service forces them to buy channels

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<sup>1</sup> See "Prepared Remarks of FCC Chairman Tom Wheeler," The Ohio State University, Dec. 2, 2013).

they never watch;”<sup>2</sup> and “Nothing has changed the laws of human nature or economics, and consumers must be protected from exploitation.”<sup>3</sup> RCN and Grande wholeheartedly endorse your objectives, and these bedrock goals should underlie the Commission’s review of the proposed combination of Comcast and Time Warner Cable. In brief, this transaction would cause material harms to consumers and competition, and the Commission cannot find the transaction is in the public interest without first ameliorating them. RCN and Grande have submitted extensive comments and other documentation to the Commission about these harms, and it has proposed a series of remedies to deal with them.<sup>4</sup> In this letter, I highlight three concerns we believe are most pressing.

**The Commission should address Comcast’s enhanced ability to unreasonably leverage NBC Universal to harm competing MVPDs by providing just, reasonable, and non-discriminatory access to NBCU programming.**

In the Comcast/NBCU merger, the Commission recognized that the vertical integration of NBCU’s programming assets and Comcast’s distribution assets would increase the likelihood that Comcast would withhold content from competing MVPDs or raise their programming prices.<sup>5</sup> Should Comcast/Time Warner Cable be permitted to combine, NBCU assets would be paired with Time Warner Cable distribution assets, resulting in new service territories where Comcast could harm rivals, including areas served by RCN and Grande.<sup>6</sup>

As part of the Commission’s approval of the Comcast/NBCU transaction, Comcast agreed to permit aggrieved MVPDs to seek “baseball-style” arbitration to obtain access to NBCU programming at fair market value.<sup>7</sup> A baseball player knows other player salaries when he decides whether and how to seek arbitration. However, the Comcast/NBC arbitration remedy, while seemingly usable, was critically flawed in a number of ways, including because competing MVPDs, unlike baseball players, could not obtain key information about rates charged by NBCU

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<sup>2</sup> See “Tech Transitions, Video, and the Future,” Tom Wheeler, FCC Chairman, FCC Blog Post (Oct. 28, 2014).

<sup>3</sup> See “Remarks of FCC Chairman Tom Wheeler,” National Association of Telecommunications Officers and Advisors Annual Conference (Oct. 1, 2014).

<sup>4</sup> See *e.g.* Notice of *Ex Parte* Presentation filed by Edward A. Yorkgitis, Jr., Counsel to RCN and Grande, MB Docket No. 14-57 (Feb. 17, 2015).

<sup>5</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, 4250 ¶ 28 (2011) (“Comcast/NBCU Order”).

<sup>6</sup> While Time Warner Cable has limited programming assets, these would be added to the suite of programming that NBCU would have available for use against rival MVPDs.

<sup>7</sup> See *Comcast/NBCU Order*, 26 FCC Rcd at 4355, Appendix A (“Appendix A Conditions”).

for its programming.<sup>8</sup> As a result, the Commission should not approve the Comcast/Time Warner Cable combination without fixing the arbitration remedy by:

- Requiring Comcast to provide data and information to the complainant enabling it to determine whether the rate offered by Comcast is at fair market value and to formulate a final offer in an arbitration;
- Requiring Comcast to submit the initial final offer and permit the complainant an opportunity to review offer before submitting its own;
- Enabling smaller cable operators to have the National Cable Television Cooperative represent them in an arbitration.

Finally, in light of the additional market power Comcast would have post-transaction, the arbitration condition should be in effect for at least nine years from the closing of the Comcast/Time Warner Cable transaction and should expire only after the Commission conducts a proceeding and affirmatively determines it is no longer warranted.

**The Commission should address Comcast's expanded usage of its anticompetitive Minimum Program Penetration Requirement by giving MVPDs the ability to exclude a "basic broadcast tier" from this requirement.**

NBCU mandates that an MVPD to obtain rights to carry its programming agree to minimum viewership levels (a so-called "Minimum Program Penetration Requirement"). This "off market" requirement effectively forces wireline providers that compete with Comcast, like RCN, to limit consumer choice, and it undermines the "promotion and protection" of competition. This problem will become even worse should the Commission permit Comcast to acquire Time Warner Cable. Let me explain in brief --

- The Minimum Program Penetration Requirement is already stifling competition.
  - Under the Comcast/NBCU minimum program penetration requirement, RCN, for instance, cannot offer an inexpensive broadcast basic package to those who want it since RCN already has the maximum number of their customer base subscribing to the broadcast basic tier.
  - Since Comcast has systems throughout the country, some that face wireline competition and many that do not, Comcast/NBCU uses this requirement to hurt its wireline competitors like RCN (and soon Grande should the transaction close). That is, in areas where RCN competes, Comcast offers an inexpensive broadcast basic tier while effectively denying RCN the opportunity to do the same. At the same time, in areas

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<sup>8</sup> See RCN Telecom Services, LLC *et al.* Petition to Deny Applications or Condition Consent, MB Docket No. 14-17 at 32 (Aug. 25, 2014).

without competition, Comcast often does not offer a low priced broadcast basic option.<sup>9</sup>

- The Minimum Program Penetration Requirement is already hurting consumers and is not in the public interest.
  - Customers who do not want an expensive video package with 100's of channels but just broadcasters and channels such as C-Span cannot buy it.
  - Lower income families and individuals are particularly hurt by this requirement because they cannot afford the higher priced packages.
  - Cord cutters – or those who just want to get a broadcast basic and the rest of their video programming online – are disadvantaged because they have fewer options.
- The Minimum Program Penetration Requirement is “off market;” other major programmers do not have this requirement.
- The Minimum Program Penetration Requirement is contrary to the public interest.
  - Congress recognized the importance of enabling consumers just to take a low priced broadcast basic tier. Comcast’s minimum program penetration requirement effectively prevents the sale of low cost broadcast basic by requiring MVPDs’ customers to take all their other programming.
- The proposed acquisition of Time Warner Cable by Comcast will exacerbate the harms from the Minimum Program Penetration Requirement --
  - The proposed transaction increases the number of markets where a Comcast distributor will compete with RCN, Grande, and other wireline competitors and thus Comcast has both an additional incentive and additional ability to harm competition.

The harm from the minimum program penetration requirement to consumers, competition, and the public interest is clear and substantial. Accordingly, Comcast/NBCU should be prohibited from imposing on any MVPD carrying its video programming mandatory minimum penetration percentages unless it allows for a full “basic broadcast tier” exclusion.<sup>10</sup>

**The Commission should prohibit any effort by Comcast to deny broadband subscribers of a rival MVPD access to NBCU online programming made freely available to subscribers of other Internet Service Providers.**

<sup>9</sup> Two such areas are Colorado Springs, CO and Mobile, AL.

<sup>10</sup> See Notice of *Ex Parte* Presentation filed by Edward A. Yorkgitis, Jr., Counsel to RCN and Grande, MB Docket No. 14-57 (Feb. 17, 2015).

Traditionally, when video program carriage disputes arose, programmers would cut off access to their programming by an MVPD's video subscribers. However, at least one programmer has employed an additional anticompetitive and anticonsumer weapon – blocking access to their online content, which is made freely available to an MVPD's customers subscribing to only a internet access service. On its face, this practice is blatantly discriminatory and runs counter to the Commission's open Internet policy. Today, Comcast/NBCU has the incentive and ability to engage in this practice in the future to harm MVPDs that compete with Comcast. Post-combination, Comcast/NBCU could engage in this harmful practice in areas currently served by Time Warner Cable. Accordingly, the Commission, as a condition to approving the proposed transaction, should prohibit any effort by Comcast to deny broadband subscribers of a rival MVPD access to NBCU online programming made freely available to subscribers of other Internet Service Providers.<sup>11</sup>

Thank you for your consideration of these issues and our proposed relief.

Sincerely,



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<sup>11</sup> As part of the *Comcast/NBCU Order*, Comcast/NBCU agreed that “no C-NBCU Programmer shall terminate or interfere with the Claimant’s customers’ online access to otherwise available programming in connection with a program access dispute, regardless of whether the programming is carried pursuant to an agreement.” *See Appendix A Conditions* (VII. A. 5.). This existing condition applies after a Claimant files a notice of intent to arbitrate. Patriot Media seeks as part of any approval of the Comcast/Time Warner Cable combination a requirement that Comcast be prevented from terminating or interfering with online access at any time, even if a request for arbitration is not filed.