

Comments
of
David McCann

Comcast Corporation
and
Time Warner Cable, Inc.

at the

Federal Communications Commission
MB Docket No. 14-57

June 24, 2014

EDITORIAL NOTES:

1. These remarks have been presented in question-and-answer format, believed to expedite review of the topics addressed.
2. The term “Comcast” shall be used to refer to Comcast Corporation and, as the context may require, consolidated subsidiaries, including NBCUniversal Media, LLC (“NBC Universal”) and its respective consolidated subsidiaries.
3. For the sake of simplicity and convenience of reference, the term “Merger” shall be used to refer to the overall business transaction(s) effecting the joining of business purposes of Comcast and Time Warner Cable Inc. (“TWC”), for which approval is sought by Comcast.
4. Citations to regulatory proceedings and judicial orders are believed accurate though, in many instances, reliance has been placed upon the formal descriptions used by cross-referencing material.

Q. Please state your name and professional background.

A. My name is David McCann and, for more than 15 years, I served as a corporate vice president in several regulated utility holding company systems. Currently, I have been serving as an executive advisor to various small- to mid-sized businesses. A résumé highlighting professional work and background is provided as Attachment 1.

From 1998 to 2001, I served as Vice President – Restructuring at Conectiv. In that assignment, I had executive responsibility for guiding participation by Atlantic City Electric Company in deregulation and restructuring proceedings before the New Jersey Board of Public Utilities.

Q. What are the purposes of providing your remarks?

A. These remarks have been provided as comments to the Federal Communications Commission (the “Commission”) in MB Docket No. 14-57. Specifically, they relate to the application of Comcast for Commission approval of the transfer of control of the licenses and authorizations held by TWC and its wholly-owned and controlled subsidiaries.

Q. How would you characterize your expertise?

A. These remarks are being offered as the opinions and beliefs of an individual citizen, having a diverse background of business and regulatory experience.

As a layman, I rely upon a simple understanding of the Communications Act of 1934, as amended (the “1934 Act”), and the Telecommunications Act of 1996 (the “1996 Act”). These remarks are also based upon an understanding of certain issues noted by the United States Court of Appeals for the District of Columbia Circuit, Case No. 11-1355, decided January 14, 2014 (*Verizon, Appellant v. Federal Communications Commission, Appellee*) (hereinafter referred to as the “Verizon Appeal”).

Q. What is the primary recommendation of your remarks?

A. I respectfully recommend that review of the proposed Merger by the Commission be delayed at this time. Given this primary recommendation, additional recommendations with respect to procedural matters are more fully set forth below.

Q. Please explain your reasons for such a recommendation.

A. A delay in review of the proposed Merger would afford the Commission the opportunities to reconsider: applicable provisions of the 1934 Act and the 1996 Act; regulations and court decisions with respect to the scope of regulatory authority borne by the Commission; and, actions that it should take in discharge of its official duties.

It is believed that the review of regulatory matters affecting Comcast should be conducted prior to addressing the expected status and condition of a post-Merger entity. Such sequence of actions would prevent scale-up of a business model that is believed to be contrary to the public interest.

Q. Why should the Commission consider the provision of broadband services by Comcast, as it considers its request for approval of the Merger?

A. The provision of broadband services is a significant component of the overall business activity of Comcast. The substantial compliance of business in this area with applicable telecommunications law and regulations warrants regulatory review as part of the findings to be made by the Commission.

Attachment 2 has been prepared to present certain business segment information for Comcast in 2013. Approximately \$10.3 billion is revenue associated with high-speed Internet service. This is the second-largest component of revenue booked in 2013, second only to residential video services (\$20.5 billion).

Other dimensions of Comcast's business as a broadband services provider are also provided in Attachment 2. As indicated therein, Comcast passes approximately 38% of homes and businesses in the country.

Q. To what specific regulatory matters do your comments refer?

A. My comments will make particular reference to: (1) the application of Comcast for Commission approval of the Merger; (2) the import of Section 706 of the 1996 Act, insofar as the regulation of broadband services providers is concerned; (3) certain opinions expressed by judges of the United States Court of Appeals for the District of Columbia Circuit (the "Court") in the Verizon Appeal; (4) issues with respect to Title II of the 1934 Act; and, (5) the Commission's Notice of Proposed Rulemaking, *In the Matter of Protecting and Promoting the Open Internet GN Docket No. 14-28* (the "NPRM").

THE MERGER APPLICATION

- Q. Please comment on the application for approval of the Merger.
- A. Comcast and TWC requested “consent pursuant to section 214 of the Communications Act of 1934, as amended...” (Joint Application of Comcast and TWC, *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Subsidiaries of Time Warner Cable Inc.* Federal Communications MB Docket No. 14-57) (the “Merger Application”).

Actions based upon Section 214 would appear to relate to construction, extension, acquisition and/or operation of new line(s) and would be subject to receipt from the Commission of a “certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line...” (Section 214 of the 1934 Act).

Commission review with regard to a certificate approving the Merger is assumed to be comprehensive. It is not known, though, whether the Merger application is overly limiting by virtue of its specific requests. I believe that the Commission should make appropriate findings with respect to the substantial compliance of petitioner (Comcast) with the laws and regulations that are within the jurisdiction of the Commission. Such findings, in turn, depend upon a clear articulation of regulatory standards and authority, insofar as telecommunications law may be concerned.

SECTION 706 OF THE 1996 ACT

- Q. What are your opinions with respect to Section 706 of the 1996 Act (“Section 706”), insofar as this Merger may be concerned?
- A. It is believed that the basis of Commission authority over the Merger petitioner includes, but is not limited to, its authority over broadband services providers. It appears that the decisions of the Court in the Verizon Appeal reflect several perspectives:

“The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers’ treatment of Internet traffic, and its justification for the specific rules at issue here – that they will preserve and facilitate the ‘virtuous circle’ of innovation that has driven the explosive growth

of the Internet – is reasonable and supported by substantial evidence. That said, even though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates.” (Decision issued by the Court in the Verizon Appeal for Circuit Judges Rogers and Tatel, p. 4)

However, the third sitting judge of the Court stated:

“I also agree with the majority – and disagree with petitioners – that § 706 is a grant of positive regulatory authority, but it doesn’t come close to sanctioning the Commission’s regulation.” (Decision issued by the Court in the Verizon Appeal for Senior Circuit Judge Silberman, p. 1)

It appears to me that Section 706 provides a broad, but not exclusive, basis for the regulation of broadband services providers. Given the Court’s declarations cited here, I would infer that regulation of broadband providers solely on the basis of Section 706 authority may be subject to continuing debate by various stakeholder entities.

Since passage of the 1996 Act, there have been substantive developments with respect to telecommunications technologies, markets and user engagement, all of which could not have been fully comprehended or anticipated. However, it is believed that the Commission has sufficient authority to act in accordance with the comments and recommendations presented here.

Q. What is your understanding of the substantive import of Section 706?

A. For convenience of reference, I have transcribed a portion of Section 706 below:

“(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, *or* [emphasis provided] other

regulating methods that remove barriers to infrastructure investment.”

From this section of the 1996 Act, I would infer that: (1) the stated objective to be supported by Commission actions is the deployment of advanced telecommunications capability to all; (2) there are various tools available to the Commission, to help achieve the stated purpose; and, (3) the disjunctive ‘or’ would indicate that none of the tools mentioned are specifically mandated for use in achieving the stated objective, including the promotion of local competition. It is my further impression that regulatory standards of public interest, convenience, and necessity are to govern the procedures employed.

THE VERIZON APPEAL

Q. What do you infer from the decisions of the Verizon Appeal?

A. The decisions of the Verizon Appeal vacated the anti-blocking and anti-discrimination rules associated with a prior order (*In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010) (the “Open Internet Order”).

The Court appears to have found that

“Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.” (Decision issued by the Court in the Verizon Appeal for Circuit Judges Rogers and Tatel, p. 4).

Q. What do you consider to be the issue here, with regard to common carrier regulation?

A. It would appear that the controversy attending the issue of *per se* common carrier regulation (often referred to as “Title II regulation”) is one of the Commission’s own making. The Court so noted:

“Given the *Commission’s* [emphasis provided] still-binding decision to classify broadband providers not as providers of ‘telecommunications services’ but instead as providers of ‘information services’... such treatment would run afoul of [the definition of telecommunications carrier under the 1934 Act]: ‘A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.’”

(Decision issued by the Court in the Verizon Appeal for
Circuit Judges Rogers and Tatel, p. 45)

It appears that the Commission has viewed mutually exclusive classification of businesses as either information service providers or telecommunications service providers. By classifying broadband services providers as information service providers, the Commission, by its very actions, exempted certain businesses from Title II regulation. That exemption, in my opinion, gave rise to substantive findings and decisions in the Verizon Appeal.

It is my belief that such exemption is misinformed and adverse to public policy. It is my further belief that broadband services providers are, in fact, “telecommunications service providers” and not “information service providers”. As a result, it is my further belief that Title II regulation would apply to such services.

TITLE II REGULATION

- Q. Please explain the basis for your opinions regarding Title II.
- A. Formation of my opinion in this matter begins with a belief that certain definitions of the 1934 Act are internally inconsistent. The 1934 Act would exempt information service providers from common carrier regulation, by virtue of definitions contained in Section 3:

“(20) Information Service. - - The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a communications service...

“(43) Telecommunications. - - The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received...

“(44) Telecommunications carrier. - - The term ‘telecommunications carrier’ means any provider of telecommunications services (as defined in section 226). *A telecommunications carrier shall be treated as a common*

carrier under this Act [emphasis provided] only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage...

“...(46) Telecommunications service. - - The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used* [emphasis provided].”

To highlight my concern about inconsistencies, I would draw upon the example of a simple telephone call: It is my understanding that any form of telecommunications involves conversion of a message (or content) into intermediary form(s) to permit its being sent and received. For instance, the sounds sent by a user of telephone service are converted to electrical signals that may or may not be digitized, prior to transmission and conversion, at the receiver’s end, into information of a similar type. Therefore, the intermediary stages of processing, regardless of how many and of what type, do not change the substance of ‘what is received’, from ‘what has been sent’.

Such intermediation is a matter of transmission, and not specific content. The same can be said for the handling of packets of digitized information by broadband services providers’ facilities. Regardless of the number of packets, routers, compression devices, routes taken, etc., the fact of the matter remains that the “delivery” of content is separate from the “supply” (generation, storage, processing and control) of content.

If “information service” and “telecommunications service” are to be mutually exclusive concepts, then there should be no overlap in the scope of definition of these terms. However, overlap does exist. The definition of one classification should be *what the definition of the other category is not*.

According to the definitions, the substance of telecommunications service, i.e., telecommunications, involves “transmission...without change in the form of the information as sent and received.” (1934 Act, Sec. 3, definition of “Telecommunications”). While many people would argue that definition to apply to basic telephone calls, such calls are subject to the electromechanical conversion of sound waves. So, in fact, the processing of information is required in order for the very concept of telecommunications to exist.

The processing of information in order to facilitate telecommunications is an accepted phenomenon. As a result, the processing-related activities that are intended to have the received matter emulate the sent matter, should not be considered distinctive processing of the information service.

Q. How do you propose that this internal conflict be resolved?

A. It is not known whether this conflict can be resolved by the Commission on its own initiative, or whether additional actions may need to be taken in the legislative and/or judicial fields. I cannot prescribe the form of solution here; I can only highlight the perceived existence of the need for a solution.

OPEN INTERNET NPRM

Q. What effect does the Commission's NPRM regarding an "Open Internet" have upon the instant matter?

A. It is my understanding that the concept of "Open Internet" is generally considered synonymous with the concept of "Net Neutrality". A general sense of public policy associated with this terminology, is non-discriminatory access, or common carriage. As used, these terms may not be sufficiently robust for development of business models (regulated or otherwise).

I am led to infer that the basis of regulation, insofar as broadband services providers (including Comcast) are concerned, is not settled in the thinking of the Commission. The Notice of Proposed Rulemaking, in fact, states:

"Per the blueprint offered by the D. C. Circuit in its decision in *Verizon v. FCC*, the Commission proposes to rely on section 706 of the Telecommunications Act of 1996. At the same time, the Commission will seriously consider the use of Title II of the Communications Act as the basis for legal authority. This Notice seeks comment on the benefits of both section 706 and Title II, including the benefits of one approach over the other... We emphasize in this Notice that the Commission recognizes that both section 706 and Title II are viable solutions and seek comment on their potential use." (*NPRM*, Introduction, ¶ 4)

OTHER

Q. How would the Commission be able to revisit stated policies, such as characterization or classification of business activity as either information service or telecommunications service?

- A. It is my belief that the Commission receives substantial deference with regard to its actions. Even the Court, citing another proceeding, noted:

“But so long as an agency ‘adequately explains the reasons for a reversal of its policy,’ its new interpretation of a statute cannot be rejected simply because it is new. *Brand X*, 545 U.S. at 981.” (From Decision issued by the Court in the Verizon Appeal for Circuit Judges Rogers and Tatel, p. 20)

And it would appear that there is statutory support for the Commission revisiting regulatory matters:

“The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money”. (1934 Act, Section 403).

SUPPORTING RECOMMENDATIONS

- Q. Do you have other supporting recommendations?
- A. Yes. Listed below, they are consistent and sequentially appropriate, given the primary recommendation provided above.
1. The Commission should revisit its scope of authority vis-à-vis broadband services providers, giving effect to the 1934 Act, the 1996 Act and recent court decisions with respect to regulation by the Commission.
 2. Comcast should be directed to amend its application and defer to the broader jurisdiction of the Commission in the subject matter.
 3. The Commission should entertain Comcast’s Merger application, within the context of the broader authority that it may possess.

4. The Commission should direct that Comcast conduct an analysis of its unbundled costs of service. Such analysis should distinguish between services provided as a broadband services provider and services in other business capacities.
5. In its deliberations, the Commission should make findings with respect to the substantial compliance by Comcast with applicable rules and regulations associated with telecommunications matters.
6. The Commission should address other matters coming before it in a manner that is consistent with any resolution of regulatory ambiguity and/or uncertainty that may have been made.

Q. What would you offer as comments, given your own experience with regulated utility matters and deregulation?

A. With regard to electric and gas delivery services, it has been found to be in the public interest, that duplication of delivery facilities is generally not warranted. Regulation became a reasonable alternative, to encourage and protect prudent investment in infrastructure, afford reasonable access, and provide for just and reasonable charges for service.

I believe that such a model should inform the actions taken with respect to the regulation of broadband services providers.

Q. Does this conclude the presentation of your comments?

A. Yes.

DAVID MCCANN

SUMMARY OF PROFESSIONAL EXPERIENCE AND BACKGROUND

EXPERIENCE

STRATEGIC MANAGEMENT SERVICES, LTD. Millville, NJ

2001 – present

Principal

- Assisted with identification, qualification and selection of independent accounting firms for start-up technology firm
- Developed new marketing strategies to double market potential for division of a pharmaceutical supplier
- Facilitated organization of new \$18 million healthcare foundation to succeed multiple predecessors and provided support to governing boards with respect to transitional matters
- Coached executive clients with regard to strategic planning, leadership and organizational development
- Guided governing board of a nationally recognized watershed association with development of strategic, operational and succession plans
- Gathered data and developed analyses leading to recovery of ~\$300,000 for small steel fabrication enterprise
- Created a strategic marketing platform for newly established engineering college
- Provided expert leadership of strategic services offered to corporate clients by regional marketing communications firm

ALENCON ACQUISITION CO., LLC Hatboro, PA
Manager [Start-Up Administration]

2012

- Oversaw implementation of internal accounting and financial reporting practices
- Administered employee payroll and benefit matters
- Provided support for administration of DOE financial award for research and development
- Managed daily banking and transaction activities

SALEM COMMUNITY COLLEGE Carneys Point, NJ

2009

Dean of Administrative Services

- Designed framework for building organizational capacity with significantly limited resources
- Refined purchasing and contracting practices to enhance compliance and reduce risk with vendors
- Oversaw adoption of new enterprise applications for payroll and student accounts
- Provided direction for campus operations, safety and security

CONECTIV Wilmington, DE [ELECTRIC AND GAS UTILITY HOLDING COMPANY]

1998 – 2001

Vice President – Restructuring

- Provided strategic utility deregulation recommendations to executive management
- Strategized and directed deregulation proceedings on behalf of \$1 billion utility
- Developed and negotiated a deregulation and restructuring settlement with interveners and regulators
- Negotiated \$235 million restructuring and buyout of contracts with independent power projects

DAVID MCCANN

SUMMARY OF PROFESSIONAL EXPERIENCE AND BACKGROUND
(CONTINUED)

ATLANTIC ENERGY, INC. Egg Harbor Township, NJ [ELECTRIC UTILITY HOLDING COMPANY] **1985 – 1998**
Vice President (Atlantic City Electric Company)

Corporate Finance

- Developed and executed short- and long-term financing programs of up to \$150 million per year, issuing secured and unsecured debt, as well as senior and common equity
- Introduced savings with ‘first-time’ financings by utility in jurisdiction, including collared, reverse interest-rate swap; leasing of undivided interests in nuclear fuel; tender offers for high-coupon first mortgage bonds; and, tax-exempt bond insurance
- Managed short-term lines of credit of \$115 million with local, regional and international banks
- Developed an integrated investor and financial relations program to reduce expenses and improve shareholder communications
- Oversaw corporate disclosure mandated by Federal securities laws

Management and Planning

- Coordinated and prioritized annual construction programs amounting to \$100 million
- Introduced work management throughout organization to balance workforce requirements for operations and construction, manage costs and reduce overtime
- Oversaw the development of integrated resource plans for 2000 MW utility
- Provided executives with assessment and recommendations regarding deregulation strategies
- Led project with comprehensive recommendations for revision and improvement of electric tariff

Business Operations

- Developed and negotiated flexible rate power agreements with ~10 of the largest customers of utility
- Oversaw the management of relationships with the largest customers of the utility
- Administered and negotiated arrangements with independent power producers providing approximately one-quarter of utility’s power generation resources
- Provided executive leadership and direction for system operations and field forces

Treasurer & Secretary (ATE Investment & Atlantic Southern Properties, 1987 – 1991)

- Developed and executed initial business and financing plans for non-regulated subsidiaries
- Negotiated and closed major lease investments in \$230 million of assets during business start-up

EDUCATION

Master of Business Administration
Bachelor of Science, Electrical Engineering

University of Delaware, Newark, DE
University of Pennsylvania, Philadelphia, PA

Prepared Remarks of J. David McCann
For Submittal in Federal Communications Commission MB Docket No. 14-57

**Summary Information
Comcast Corporation^a**

According to the Comcast 10K^b: “Cable Communications: Consists of the operations of Comcast Cable, which is the nation’s largest provider of video, high-speed Internet and voice services (“cable services”) to residential customers under the XFINITY brand, and we also provide similar services to businesses and sell advertising.”

Homes and businesses passed, i.e., estimate of those that can be connected to Comcast’s distribution system without further extension of its transmission lines^c: **53.8 million**

High speed Internet customers^c: **20.7 million**

High-speed Internet penetration^c: **38.4% of homes and businesses passed**

Business Segment Information (dollar amounts in billions)^d:

Segment	Revenue
Cable Communications	\$ 41.8 ^e
Cable Networks	9.2
Broadcast Television	7.1
Filmed Entertainment	5.4
Theme Parks	2.2

NOTES:

^a Source: *The combined Annual Report on Form 10-K for the fiscal year ended December 31, 2013 as separately filed with the Securities and Exchange Commission (“SEC”) for both Comcast Corporation and NBCUniversal Media, LLC. (“Comcast 10K”). Unless stated otherwise, information is presented as of December 31, 2013. The definitions of terms herein are taken from the Comcast 10K.*

^b Comcast 10K, page 1

^c Comcast 10K, page 3.

^d Comcast 10K, pages 53, 57, 59, 61 and 63. Totals of business segments do not match total consolidated financial results. Elimination and consolidation adjustments are presented in Notes 19 and 21 (pages 117 and 120, respectively).

^e Includes: \$20.5 billion (residential video); \$10.3 billion (high-speed Internet); \$3.7 billion (voice); \$3.2 billion (business services); \$2.2 billion (advertising); and, \$1.9 billion (other).