Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| Applications of Comcast Corp., | ) | MB Docket No. 14-57 |
| Time Warner Cable Inc., | ) | |
| Charter Communications, Inc., | ) | |
| And SpinCo for Consent to Assign | ) | |
| And Transfer Control of FCC | ) | |
| Licenses and Other Authorizations | ) | |

# JOINT PETITION TO DENY OF CONSUMERS UNION AND COMMON CAUSE

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# PETITION TO DENY

## I. INTRODUCTION AND SUMMARY

Consumers Union, the public policy and advocacy division of Consumer Reports,[1] and Common Cause[2] respectfully submit this petition to deny the license transfers incident to the proposed merger of Comcast and Time Warner Cable ("TWC").[3] This merger would harm competition, impede innovation by online video distributors, threaten innovation in equipment and platforms, and reduce the diversity of information sources and services to the public, all to the detriment of consumers and contrary to the public interest.

To justify the merger, Comcast and TWC claim unconvincingly that they already face

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[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

[2] Common Cause is a nonpartisan, grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest, and accountable government that works for the public interest, and empowering ordinary people to make their voices heard.

[3] These comments were prepared with the assistance of Allen Grunes and Maurice Stucke. Both former attorneys in the Department of Justice's Antitrust Division, they are co-founders of the Washington, D.C. law firm, the Konkurrenz Group.

abundant and growing competition, and that they will continue to. Consumers rightly do not see it that way. Widespread consumer complaints of high prices, poor service, and no choices are unmistakable hallmarks of an *absence* of meaningful competition. Comcast and TWC already dominate television and broadband service in most of the key parts of the country, and this merger would only expand and strengthen and solidify that dominance.

Comcast and TWC claim that their merger would not harm competition because they currently serve subscribers in almost entirely distinct geographic areas – in other words, because consumers in a given area cannot choose between Comcast and TWC. This too is unconvincing. That is too narrow a view of how competition works and how it would be harmed. By the logic of that narrow view, Comcast should be free to acquire every cable and Internet company throughout the country in every market it does not already serve – amassing a nationwide monopoly. It also flies in the face of the concerns the Commission and the Department of Justice have repeatedly highlighted in reviewing the Comcast/NBCUniversal deal and other media and telecom mergers.

This merger would give a single company unprecedented control over key video programming, together with unprecedented control over the means by which video programming is distributed to American consumers, and create a national "gatekeeper" of the Internet. These harms cannot be prevented or fixed by isolated divestitures, or by imposing conditions that ask Comcast to refrain from taking advantage of its power to enrich itself by blocking competition from others. The only effective response to the application, the only response that will serve the public interest, is to deny the application.

Three years ago, in its review of Comcast/NBCUniversal, the Commission concluded that Comcast could, and had the incentive to, use its control over programs as a weapon to raise the costs of its competitors to make them less able to offer affordable products and services, even in local markets where Comcast did not compete. That not only remains true, but this merger would expand Comcast's power to every key market. The proposed merger would create a behemoth that controls access to more than 30 million consumers in 16 of the 20 largest U.S. markets for multichannel video programming distribution, and in 17 of the 20 largest U.S. markets for broadband Internet service.

The merger would also give Comcast greater power to blunt the emerging hope of competition from online video distributors in order to preserve its monopoly-level cable profits. Consumers are understandably tired of having to pay cable fees that outpace inflation, for packages of programs they neither watch nor want, and poor service. This is especially the case for Comcast and TWC, whose rates are higher, service is poorer, and value is less. Not surprisingly, a small but growing number of consumers have sought to "shave the cord" by buying smaller cable packages or to "cut the cord" altogether. Comcast recognizes that its high profits are at risk if consumers can turn to online video distributors as an alternative. And Comcast has shown it is able and willing to use its market power to undercut their ability to do so.

Not too long ago, Netflix made public that it had agreed to pay Comcast extra to reach the millions of subscribers controlled by Comcast's broadband network. Netflix described the deal as an add-on "toll" or "tax" that it was being forced to pay.

Comcast and TWC also claim that the merger would promote innovation in equipment such as set-top boxes. They point to the supposed superiority of Comcast's X1 platform over TWC's equipment. But they disregard how forcing subscribers to rent set-top boxes when they would rather use other equipment, and designing set-top boxes and other platforms to restrict access by other providers to the television set, actually threatens to hinder innovation in both equipment and services.

Diversity of programming would be another casualty of the merger. It would be harder for independent channels to get started or to be carried. Even if they were carried, Comcast would have an incentive to tilt the scales in favor of its own programs. The experience of Bloomberg shows that these concerns are well-founded. Comcast favored its own news programming on CNBC and MSNBC over Bloomberg by exiling Bloomberg to a more remote channel. Bloomberg was forced to spend years in litigation just to get Comcast to treat it fairly.

Nor have Comcast and TWC shown how their merger would otherwise serve the public interest, convenience, and necessity. Their public interest claims can be grouped into four categories: First, they claim that TWC subscribers would be "upgraded" to Comcast products and services through the merger. Second, they claim that Comcast needs to be even larger than it is today to gain economies of scale and scope and spread its fixed costs. Third, they claim that the two companies together would be able to offer consumers "the best of both" companies in products and services. And fourth, they claim that through the merger they would be able to take additional steps to help bridge the digital divide.

None of their claims, however, are adequately supported with credible evidence; nor have they shown how the purported public interest benefits are merger-specific, unachievable through other means.

Comcast and TWC cherry-pick arguments about how Comcast offers superior products and services in comparison with TWC. But in several important ways, TWC subscribers are likely to be worse off with the merger than without it.

Second, Comcast claims that it needs to be bigger so that it would be able to spread its fixed costs.  But Comcast is already a giant, any additional economies of scale would not be significant, and the benefits to consumers would be negligible and purely speculative.

Third, the companies claim that the merger would allow them to offer "the best of both," ignoring the fact that the two companies have incompatible technologies, and that the merger would result in substantial integration difficulties and costs.  These integration challenges, which are not discussed by the merging companies, are neither speculative nor trivial in this case.

Finally, as for Comcast's other promises to increase access for the underserved in exchange for approval of the merger, these benefits are not dependent on the merger and should not be held hostage to it.

Aware of the strong concerns their proposed merger would arouse, Comcast and TWC have offered to make a few targeted divestitures and swaps with Charter Communications and a new company they would create, SpinCo, and to extend the conditions Comcast agreed to three years ago when it acquired NBCUniversal, so they would apply to TWC as well.  But the proposed swaps with Charter actually make the problems worse.  And the Comcast/NBCU conditions have proven ineffective in protecting competition and consumers, and are no more likely to work now.

Like others, Consumers Union urged the Commission and the Department of Justice (DOJ) not to rely on behavioral conditions to solve the problems in Comcast/NBCU.  Like others, when the Commission and DOJ opted to rely on them, we expressed hope that they would work.  But they have not been effective in preventing all the harms.  We hope that now, informed by that experience, the Commission will recognize that denying the merger in its entirety is the only effective way to protect competition and consumers and serve the public interest.

Consumers have expressed strong concerns about this merger, and how it would leave them worse off – with fewer choices, higher prices, less innovation, and poorer service. And the risk of allowing this particular step toward even greater concentration is especially grave. High-speed residential broadband impacts all levels of our economy today. The Internet challenges multiple established industries, including the ways in which consumers access news, entertainment, and commerce. Given the importance of residential high-speed broadband, the stakes are too high to allow this merger to put so much power in this one company. By imposing gatekeeper "tolls" on the ability of online video distributors and other new emerging technologies to reach consumers, and thereby interfering with their expansion as viable alternatives, Comcast could continue to charge its subscribers inflated, monopoly-level prices.

Combining these two monopolies makes for a bigger, more powerful, more nationwide monopoly, with even greater incentive to restrict consumer choices, and even less incentive to improve customer service. Accordingly, we urge the Commission not to approve this merger. Conditions and divestitures will not be effective in preventing or overcoming the significant harm the merger would cause.

## II. Standard of Review

Under Section 310(d) of the Communications Act, the Commission must determine whether the proposed assignment and transfer of control of certain licenses and authorizations held and controlled by Comcast and TWC will serve "the public interest, convenience, and necessity."[4] Comcast and TWC bear the burden of proving this, and that the benefits that would flow from the merger outweigh any harm that would result. As the Commission has noted, the public interest standard is "a flexible one that encompasses the 'broad aims of the Communications Act.'"[5] These broad aims include, among other things:

[4] 47 U.S.C. § 310(d).
[5] In re Applications of Teleport Commc'ns Grp. Inc., Transferor, & AT&T Corp., Transferee, 13 F.C.C. Rcd.

- promoting the competition policies of the Sherman and Clayton Acts,
- enhancing "[a]ccess to advanced telecommunications and information services ... in all regions of the Nation,"
- promoting improvements in the quality of telecommunications services provided to consumers the provision of new or additional services to consumers,
- accelerating deployment of advanced services (including in particular high-speed broadband), and
- ensuring a diversity of information sources and services to the public.[6]

The Commission's public interest standard "includes an evaluation of the effect of the proposed transaction on competition ... and in the case of [multichannel video program distribution (MVPD)] services, a consideration of the impact on program and viewpoint diversity."[7]

## III. WIDESPREAD CONSUMER CONCERN

Surveys conducted by the Consumer Reports National Research Center show that consumers do not hold Comcast or TWC in high regard, believe they have few competitive options, and are concerned that the merger will make matters worse.

Among the key findings of a Consumer Reports online survey fielded April 22-29, 2014 to a nationally representative sample of 1,573 individual consumers:[8]

- 74 percent of American consumers believe the merger would result in higher Internet and cable prices for everyone.

15236 (1998).

[6] In re Applications of Teleport Commc'ns Grp. Inc., Transferor, & AT&T Corp., Transferee, 13 F.C.C. Rcd. 15236 (1998); Memorandum Opinion and Order in In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, at ¶ 23 (adopted January 18, 2011, released January 20, 2011), https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf [hereinafter Comcast/NBCU Order].

[7] In re FCC Declines to Approve Echostar-DirecTV Merger, 2002 WL 31268861 (F.C.C. Oct. 10, 2002).

[8] Consumers Union, *CR Poll: Most Consumers Oppose the Comcast/Time Warner Cable Merger*, June 19, 2014, http://consumersunion.org/news/cr-poll-most-consumers-oppose-the-comcast-time-warner-cable-merger.

- 74 percent believe consumers would have fewer choices for cable and Internet providers, because smaller companies will not have a fair chance to compete with the combined Comcast/TWC.

- Only 16 percent believe the merger would allow Comcast/TWC to operate more efficiently, lower its costs, and lower prices for consumers.

- Just one-third believe the merger would enable Comcast/TWC to better develop new innovative products and services for customers.

- 61 percent believe the merger would spur other large-scale mergers among TV/Internet companies trying to keep up.[9]

- 54 percent believe customer satisfaction would get even worse.

- 81 percent believed Comcast/TWC's increased market share will enable it to discriminate against its competitors' video programming in favor of its own.

For years, both Comcast and TWC have ranked at or near the bottom in terms of customer satisfaction for their telecom bundles, TV service, Internet service, and phone service. In Consumer Reports' 2013 Annual Questionnaire of its subscribers, Comcast and TWC ranked tenth and twelfth of the fourteen telecom bundles, and also ranked poorly for cable and Internet service.[10] In Consumer Reports' 2012,[11] 2011[12] and 2010[13] Annual Questionnaires of its subscribers, TWC and Comcast had similarly low ratings for customer satisfaction for bundled telecom, Internet, and cable services.

Similarly, the 2014 American Customer Satisfaction Index[14] notes that subscription TV is

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[9] The survey was conducted before AT&T and DirecTV announced their plans for a proposed merger.
[10] *Untangling the Bundle*, CONSUMER REPORTS, May 2014, at 22.
[11] *Bundle for Savings,* CONSUMER REPORTS, May 2013, at 24-25.
[12] *Cut Your Telecom Bill*, CONSUMER REPORTS, JUNE 2012, AT 20-21.
[13] *Cut Your Telecom Bills*, CONSUMER REPORTS, MAY 2011, AT 22-23.
[14] American Customer Satisfaction Index, ACSI Telecommunications and Information Report 2014 (May 20, 2014), http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2014/acsi-telecommunications-and-information-report-2014. The ACSI is an independent national measure of customer satisfaction with the quality of products and services available to household consumers in the United States. ACSI, Building the Cross-Industry Index, http://www.theacsi.org/about-acsi/building-the-cross-industry-index (last visited Aug. 7, 2014). The ACSI score for each company "is based on a sample of 250 customer interviews, with more than 70,000 interviews conducted annually." *Id*. The data serve as inputs to an econometric model that benchmarks customer satisfaction with more than 230 companies in 43 industries in 10 economic sectors.

"among the least satisfying industries measured in the American Customer Satisfaction Index. Only Internet service, which is provided by many of the same companies, scores lower ... ."[15]

Even the J.D. Power surveys on which Comcast and TWC rely show low customer satisfaction. In 2013, for example, Comcast's and TWC's customer satisfaction index rankings were at or near the bottom for television service in every region surveyed. They ranked at the bottom in the East region, sixth and eighth out of eight in the North Central region sixth and seventh out of nine in the West region, and eighth and tenth out of ten in the South region.[16] For Internet service, they were below average in three of the four surveyed regions. In the fourth, TWC was below average, and Comcast was one bare point above the average score of 675 – on a scale of 1000.[17]

Consumers are concerned that combining two of the worst-rated companies in the U.S. will not serve them or the public interest. In the rest of this petition, we explain why those concerns are well-founded.

## IV. ABSENCE OF COMPETITION TODAY IN LOCAL BROADBAND AND MVPD MARKETS

In their application, Comcast and TWC claim unconvincingly that the MVPD and

[15] 2014 ASCI Report, *supra* note 14. According to the latest ACSI results, Internet service providers dropped "3.1% to an ACSI score of 63 on a 100-point scale, while subscription TV falls 4.4% to 65. These industries, which include many of the same companies, are the worst performing among 43 tracked by the ACSI." ACSI Press Release, Subscription TV and ISPs Plummet, Cell Phone Satisfaction Climbs (May 20, 2014), http://www.theacsi.org/news-and-resources/press-releases/press-2014/press-release-telecommunications-and-information-2014.

[16] J.D. Power, Press Release: Loss of Signal Is the Most Frequently Mentioned Performance Issue When TV Customers Experience Problems with Service Interruptions: AT&T U-verse (North Central), DIRECTV (South), DISH Network (West) and Verizon FiOS (East) Rank Highest in Customer Satisfaction with Television Service Providers in Their Respective Regions (Sept. 26, 2013), http://www.jdpower.com/press-releases/2013-us-residential-television-service-provider-satisfaction-study.

[17] J.D. Power, Press Release, Customer Satisfaction Is High among Internet Customers Who Upgrade to Premium Speed Offerings To Boost Performance: Verizon Ranks Highest in Customer Satisfaction in the East, West and South Regions, while WOW! (Wide Open West) Ranks Highest in the North Central Region (Sept. 26, 2013), http://www.jdpower.com/press-releases/2013-us-residential-internet-service-provider-satisfaction-study.

residential broadband markets are highly competitive.[18] They claim that Internet service providers have no real gatekeeper power, as they simply "serve as a means of access for any and all of the Internet content their consumers want."[19] They claim that Netflix, Apple, and Amazon offer competing video, with other online competitors poised to enter, all creating a "dynamic and increasingly mobile and global marketplace marked by innovation and consumer choice."[20]

But what Comcast and TWC subscribers see is a continuing trend of poor service and high prices for cable and Internet. If consumers were truly in charge, as they should be, they could choose the specific programs they want, when they want, on a recording or storage device of their own choosing, through the video distributor or Internet service provider of their choice, at a competitive price, with high-quality service. Consumers would not be forced to pay ever-increasing prices that far outpace the rate of inflation for bundled programming that many of them do not watch or want. Consumers would not be dependent on an Internet provider that charges high prices for slow speeds and that discriminates against online video programming to give an unfair advantage to its own business. They would not be forced to rent an overpriced cable set-top box with outdated technology, and endure poor customer service when things go wrong. Indeed, given the importance of the Internet to the U.S. economy, one would expect competition to be bringing higher broadband penetration rates in the U.S. households, faster speeds, and lower pricing. Sadly, this is not the state of competition today.

For many U.S. households, there are often only one or two options for getting high-speed

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[18] Comcast Corp. & Time Warner Cable, Applications and Public Interest Statements, in *In re Application of Comcast and Time Warner Cable for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, at 4-6 (Apr. 8, 2014) [hereinafter Comcast/TWC FCC Filing] ("[t]his is no longer the media and communications industry of the 1992 Cable Act or the 1996 Telecommunications Act, or even the industry that the FCC and antitrust agencies analyzed in the Comcast-AT&T Broadband and Adelphia merger proceedings or in the Comcast-NBCUniversal transaction four years ago").

[19] *Id.* at 6.

[20] *Id.* at 5.

broadband access, and that appears unlikely to change in the foreseeable future.[21] In an effort to bolster the claim that there is meaningful competition among residential broadband providers, Comcast and TWC improperly rely on Commission data that the Commission itself cautioned "does not necessarily reflect the number of choices available to a particular household, and does not purport to measure competition."[22]

In many local geographic markets for broadband and cable services, Comcast and TWC already have significant market power.[23] The FCC and DOJ observed this in their review of Comcast/NBCU: As DOJ noted, "[o]ver the last decade, Comcast and other traditional video distributors benefited from an industry with limited competition and increasing prices, in part because successful entry into the traditional video programming distribution business is difficult

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[21] Reed Hastings, Netflix, Thursday, Internet Tolls and the Case for Strong Net Neutrality (March 20, 2014), http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html (last visited Aug. 2, 2014); *see also* Comcast/NBCU Order, *supra* note 6, at ¶ 102 (noting "the limited choice of broadband providers that many Americans have, particularly for higher speed connections," which would enable Comcast to hinder competition from DBS and OVD providers.).

[22] Comcast/TWC FCC Filing, *supra* note 18, at 42. As evidence of the "pervasive" competition, they rely, among other things, on a 2013 FCC report to state: "According to recent FCC data, approximately 97 percent of households are located in census tracts where at least two or more fixed broadband providers reported offering at least 3 Mbps downstream and 768 kbps upstream ... ." *Id*. at 44. But the FCC cautioned that the information "does not necessarily reflect the number of choices available to a particular household, and does not purport to measure competition." FCC, Internet Access Services: Status as of December 31, 2012 at 9 (2013). The FCC cautioned against using this data to measure competition because residential broadband providers can wire only parts of some communities. So although some households in an area might have a choice of two broadband providers, others may not. *Id*. Second, the FCC study is of advertised speeds, which are not necessarily the same as actual download speeds. *Id*. at 1 n.1 ("the reported connection speed is typically the advertised speed of the purchased service, and it is possible that the purchased service will not operate at its advertised speed at all times"). Third, the FCC data show that consumers have fewer choices of Internet service providers when they want faster download speeds. *Id*. at 9 (data showing only 34 percent of households in census tracks where three or more Internet service providers advertised download speeds of at least 6 Mbps).

[23] Complaint ¶ 33, filed in United States v. Verizon Communications Inc., Civ. Action No. 1:12-cv-001354 (D.D.C. dated August16, 2012) (noting that Comcast, TWC and the other cable defendants "are dominant in many local markets for both video and broadband services, with a reported national market share for incumbent cable companies of greater than 50% for both broadband and video services, although their shares may be higher or lower in any particular local market for any particular service" and that each "Cable Defendant has market power in numerous local geographic markets for both broadband and video services"); Complaint ¶ 45, filed in United States v. Comcast Corp., Civ. Action No. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.htm ("The incumbent cable companies often dominate any particular market with market shares within their franchise areas well above 50 percent. For example, Comcast has the market shares of 64 percent in Philadelphia, 62 percent in Chicago, 60 percent in Miami, and 58 percent in San Francisco (based on MVPD subscribers).").

and requires an enormous investment to create a distribution infrastructure such as building out wireline facilities or obtaining spectrum and launching satellites."[24]

The courts also have recently found that, despite the growth of satellite and telephone MVPDs, the entrenched cable companies still wield significant market power. As the U.S. Court of Appeals for the Second Circuit found in 2013:

> At the same time, however, we cannot overlook record evidence that cable operators maintain a more than 60% market share in certain MVPD markets; that [online video distributors], which are still in their infancy as a medium, do not currently pose a significant competitive threat to MVPDs; and that the video programming industry has a long history of economic dysfunction. Given these facts, even if cable operators with dominant MVPD market shares may not exercise market power in all cases, the FCC had a substantial evidentiary basis to conclude that some cable operators maintain the capacity to inhibit unaffiliated networks from competing fairly, supporting a program carriage regime for identifying anticompetitive conduct on a case-by-case basis.[25]

The D.C. Circuit in 2011 made essentially the same finding:

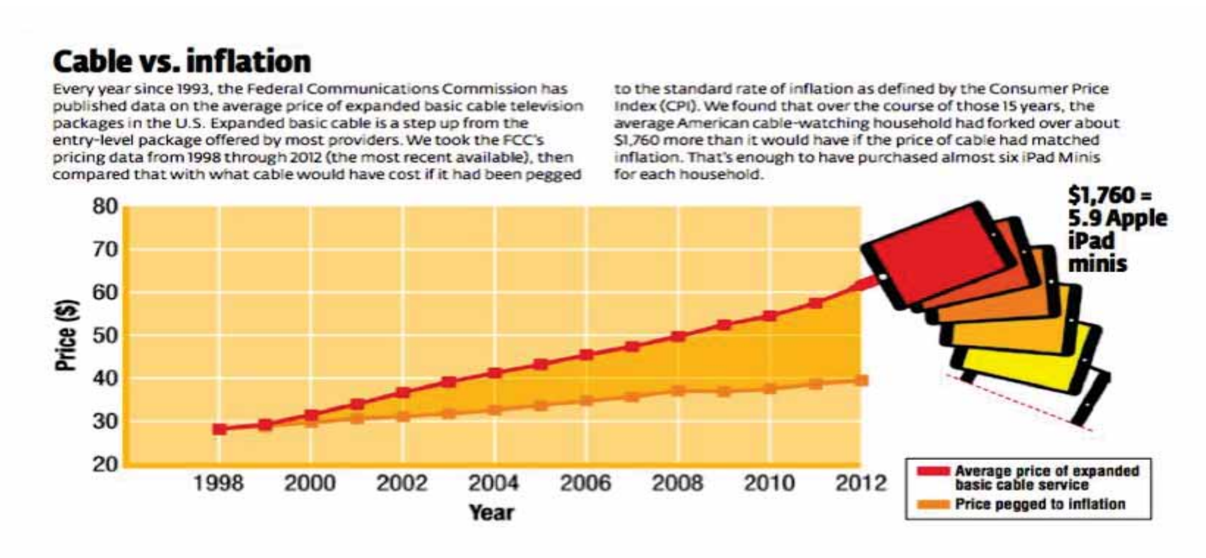
> As we observed in *Cablevision Systems Corp. v. FCC,* the transformation in the MVPD market, although significant, presents a "mixed picture" when considered as a whole. Relying on the record from the Commission's 2007 program access order extension for satellite programming, we observed that not only do cable operators still control some two-thirds of the market nationally, but also that they enjoy higher shares in several markets. We further recognized that clustering and consolidation in the industry bolsters the market power of cable operators because "a single geographic area can be highly susceptible to near-monopoly control by a cable company." On the programming side, we cited the Commission's finding that despite major gains in the amount and diversity of programming, as of 2007 "the four largest cable operators [were] still vertically integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks." In the order at issue here, the Commission reaffirmed these observations about the MVPD market, finding "no evidence . . . that market shares have changed materially since" 2007, and concluding that "cable operators still have a dominant share of MVPD subscribers," that "there is evidence that cable prices have risen in excess of

[24] Competitive Impact Statement at 28, filed in United States v. Comcast Corp., Civ. Action No. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.pdf, citing Report on Cable Industry Prices, *In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 24 F.C.C.R. 259, ¶ 2 & chart 1 (rel. Jan. 16, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-53A1.pdf (data showing price of expanded basic service increased more than three times the consumer price index between 1995 and 2008).

[25] Time Warner Cable Inc. v. F.C.C., 729 F.3d 137, 163 (2d Cir. 2013) (internal citations omitted).

inflation," and that "cable operators still own significant programming." Petitioners have given us no reason to question these findings.[26]

With meager competition come steep prices for cable and broadband service. Households on average spend more each year on home communications services ($1848) than they do on clothing, furniture, or electricity.[27] Consumer Reports compared the average price increase for expanded basic cable television packages (the next step up from the most stripped-down entry-level package offered by most providers) from 1998-2012 with the rate of inflation as defined by the Consumer Price Index. Consumer Reports found that "over the course of those 15 years, the average American cable-watching household had forked over about $1,760 more than it would have if the price of cable had matched inflation" – "enough to have purchased almost six iPad Minis for each household."[28]




And Comcast is the worst offender, raising cable and broadband rates faster than its rivals, as the following graph prepared by Free Press shows: [29]

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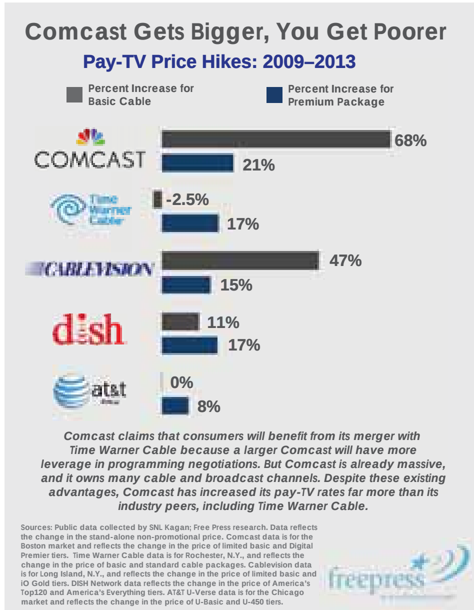
[26] Cablevision Sys. Corp. v. F.C.C., 649 F.3d 695, 712 (D.C. Cir. 2011) (internal citations omitted).
[27] *Untangling the Bundle*, CONSUMER REPORTS, May 2014, at 22.
[28] *Id*. at 25.
[29] Free Press, http://www.freepress.net/sites/default/files/resources/Free_%20Press_Comcast-TWC%20Infographic_Video_Price_Hikes_0.pdf (based on public data collected by SNL Kagan, supplemented by Free Press research).




Source: Free Press

Comcast and TWC are also practicing "drip pricing," advertising a lower price to consumers initially and then adding in additional charges. Consumers Union has heard from a number of consumers who have been on the receiving end of Comcast's drip pricing. Lynette S. of Franklin, Tennessee, for example, explained to us that her family tries to keep their bill at or around $150.00 but "it takes calling and fighting with them to keep [the bill] at the authorized service [and] takes several calls a month."[30] In her experience, it takes multiple phone calls, being on hold for long periods of time, and a great deal of haggling to get add-on packages removed that were never authorized in the first place.

Characteristic of drip pricing, Comcast and TWC are charging consumers a monthly fee for renting modems (which were once provided free of charge)[32] and set-top boxes.[33]

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[30] Consumers Union database of stories collected from consumers.

[32] *Bundle for Savings*, CONSUMER REPORTS, May 2013, at 23.

[33] S. DEREK TURNER, COMBATING THE CABLE CABAL: HOW TO FIX AMERICA'S BROKEN VIDEO MARKET 29 (Free Press May 2013) (noting that "the traditional cable providers saw their total video-segment revenues grow by 8 percent from 2008–2012 … primarily driven by growth in digital-tier, set-top box and DVR revenues, which increased by 14 percent, 227 percent and 93 percent respectively during this time").

Consumers cannot freely elect to forego Comcast's set-top box for a device of their own choosing. This forced rental, as explained below, is made possible by Comcast's and TWC's market power. And it effectively blocks affordable alternatives from freeing consumers from the inflated prices Comcast and TWC charge.

As Consumer Reports has emphasized, consumers benefit when they can effectively bargain with their residential broadband/cable system providers.[34] But to bargain effectively, they need the ability to take their business elsewhere. And in many areas of the country, there is already little or no opportunity to do that. They have no choice but to endure the repeated price hikes and lousy customer service because they lack meaningful options. For example, Sonny G. of Memphis, Tennessee tells us of price hikes averaging 14 percent per year for the last seven years in his town. As he puts it, he has no choice but to accept the price hikes because Comcast has a "virtual monopoly" in his area that leaves him "powerless."[35]

There are spurts of competition in the three cities where Google Fiber has entered – Kansas City, Provo, and Austin. For example, Time Warner Cable announced on April 24, 2014 that it had begun "deploying TWC WiFi™ in Austin Texas today – a citywide WiFi Hotspot network free to our customers with Standard Internet or above, as well as Business Class subscribers."[36] TWC noted that it had been rolling out free WiFi across its footprint "for some time now, as part of [its] larger strategy to offer significantly more value to [its] Internet subscribers." So what, if anything, accounted for TWC's decision "to deploy [its] network more aggressively now" in Austin? The appearance in Austin of Google Fiber. As TWC's digital

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[34] *See Untangling the Bundle*, CONSUMER REPORTS, May 2014, at 22.
[35] Consumers Union database of stories collected from consumers.
[36] Jeff Simmermon, Director, Digital Communications, Time Warner Cable, We Are Deploying Free Public WiFi For Customers in Austin, TX – Starting Today, Untangled Time Warner Cable Blog (Apr. 24, 2013), http://www.twcableuntangled.com/2013/04/atx-free-wifi/.

communications director, Jeff Simmermon, wrote, "we're ready to compete."[37] One wonders what Time Warner Cable was doing before Google Fiber announced it was coming to Austin.

Unfortunately, competitors offering faster broadband are not on the horizon for many U.S. communities. Google has picked 34 cities in nine metropolitan areas to target for the near-to-medium term. Its response to questions about its plans to expand Google Fiber any further is "Not for now. We have a lot of work to do with these 34 cities, in addition to bringing Fiber to customers in Kansas City, Austin and Provo."[38] And there is no assurance that Google will even enter all of those nine metropolitan areas.[39]

Fiber networks are exceedingly expensive to install and maintain, requiring operators to lay new fiber underground and link it to individual homes.[40] And as Chattanooga, Tennessee residents found when their city sought to offer them faster Internet, anyone who tries can expect a lawsuit from the entrenched broadband provider.[41]

So consumers already suffer from a lack of meaningful competition in television and broadband Internet service. And as discussed below, the proposed merger would only make matters worse.

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[37] *Id*.

[38] Google Fiber, Frequently Asked Questions, "Will you be expanding to other cities? When?," https://fiber.google.com/newcities/ (last visited Aug. 2, 2014).

[39] *Id*. ("We hope to bring Google Fiber to every city on this list, but there are a few circumstances that might make it tough and even impossible to build our Fiber network in a city. The city's checklist is the most important step towards making their community ready for the fiber-optic networks of the future. If a city doesn't want to proceed with us and chooses not to complete their checklist, we won't be able to bring them Google Fiber. There are also some physical characteristics of a city that might make it really complex for us to build Google Fiber.").

[40] James O'Toole, *Chattanooga's Super-fast Publicly Owned Internet*, CNNMoney, May 20, 2014: 5:53 PM ET, http://money.cnn.com/2014/05/20/technology/innovation/chattanooga-internet/ (noting that "[s]ince 1996, cable operators have invested $210 billion in broadband networks and other infrastructure, according to the National Cable and Telecommunications Association.").

[41] Lee Roop, *7 Things Chattanooga Says to Huntsville About Adding High-Speed Internet*, AL.Com, June 12, 2014, updated June 13, 2014, http://www.al.com/news/huntsville/index.ssf/2014/06/7_things_chattanooga_says_to_h.html (in advising other towns on whether to provide broadband, Colman Keane, epb's director of fiber optics said, don't fear a legal fight with Internet service providers like Comcast, AT&T and WOW. "Companies like these can be a challenge – they delayed Chattanooga's project two years in court – but Keane says flatly, 'If they (sue), they won't win.' He advises asking the big players to provide the service first. If they won't do it, he says, it's hard to claim the public utility has taken business from them.").

## V. THE COMCAST/TWC MERGER WOULD HARM COMPETITION

Comcast and TWC claim that their proposed merger does not raise any competition concerns. They claim that it would not increase their buyer power over programming or their market power in local television and broadband markets. They claim that courts rejected the "buyer power" concern as "not supported by the marketplace facts."[43] And they claim that courts have vacated the FCC's 30 percent cap on national subscriber market share because cable operators "no longer have the bottleneck power over programming that concerned the Congress in 1992."[44]

Comcast and TWC simply misstate the law. The Second Circuit just last year rejected the *very same argument* by the cable companies.[45] The court responded that the "relevant market in [the D.C. Circuit *Comcast* case on which Comcast and TWC rely in their filing] was the national MVPD market, not local MVPD markets. ... As the D.C. Circuit has pointed out in the subsequent cases ... cable operators retain market power in certain local MVPD markets."[46] Moreover, the Second Circuit found, despite the growth of satellite and telephone MVPDs, the entrenched cable companies still wield significant market power.[47] So too the D.C. Circuit found in 2011, in *Cablevision*, that the vertically-integrated cable companies possessed significant market power.[48] Here, given Comcast/TWC's dominance in many key local markets, Comcast would wield significant buyer power to harm competition and consumer choice even though its nationwide share of all subscribers might register at less than 30 percent.

Comcast's and TWC's claim that no current overlap in subscribers means no concern

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[43] Comcast/TWC FCC Filing, *supra* note 18, at 4.
[44] *Id*. at 4-5, quoting Comcast Corp. v. FCC, 579 F.3d 1, 8 (D.C. Cir. 2009).
[45] Time Warner Cable Inc., 729 F.3d at 162 n. 8.
[46] *Id.* at 162 n. 8.
[47] *Id.* at 163 (internal citations omitted).
[48] *Cablevision*, 649 F.3d at 712.

with the merger[49] is similarly off-base. That is too narrow a view of the ways the merger could and would harm competition. By the logic of that narrow view, Comcast should be free to acquire all the cable and Internet service providers throughout the country in every market it does not already serve – amassing a nationwide monopoly.

A cable and broadband merger can do significant harm to competition against the public interest even if the merging companies have not been competing for the same subscribers in the same geographic areas. Comcast and TWC may claim that "there is no credible theory of harm arising from the transaction."[50] But in Comcast/NBCU, the Commission identified several ways in which it was concerned that competition would be harmed. The Commission's concerns all apply here, only more so.

The merger would increase Comcast/TWC's power and incentive to discriminate against other video producers (such as Bloomberg), other multi-channel video program distributors (such as DISH and DirecTV), and other online video distributors (such as Netflix), all of which would restrict affordable consumer choices. The proposed merger would hamper competition from both existing and emerging rivals, raising their costs and making it more difficult for them to provide their products and services to consumers.

### *A. Harming Consumers by Hindering Rival MVPDs*

In Comcast/NBCU, the Commission was concerned that Comcast would withhold programming from other distributors (cable systems, telcos and satellite companies) or would raise the prices for such programming:

> The proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [Comcast-NBCU Joint Venture] would come to control or raise programming costs to its video distribution rivals.

[49] Comcast/TWC FCC Filing, *supra* note 18, at 138.
[50] *Id.* at 4.

> These exclusionary strategies could raise distribution competitors' costs or diminish the quality of the content available to them. As a result, Comcast could obtain or (to the extent it may already possess it) maintain market power in video distribution, and charge higher prices to its video distribution subscribers than those consumers would have paid absent the transaction.[51]

DOJ similarly found that Comcast, in gaining control over NBCU programming, would gain significant market power, and new incentives, for engaging in such discriminatory practices.[52] Comcast could use its power to harm both its competitors (other multi-channel video program distributors plus the emerging online video programming distributors) and consumers.[53]

One good example is regional sports network (RSN) programming, which continues to be a major draw for many cable subscribers, and therefore a "must-have" for MVPDs.[54] And because sports programming is must-have, a cable company can significantly hamper its rivals from serving their subscribers by charging them too much for that programming, or by withholding it altogether.[55] As the D.C. Circuit found in *Cablevision*:

> When a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate – like the games of a local team selling broadcast rights to a single sports network – competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company. To use a concrete example, we doubt that Philadelphia baseball fans would switch from cable to an alternative

[51] *Comcast/NBCU* Order, *supra* note 6, at ¶ 29.

[52] *Comcast-NBCU* Competitive Impact Statement, *supra* note 24; *see also* Complaint ¶ 51, filed in United States v. Comcast Corp., Civ. Action No. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.htm.

[53] *Id.* (expressing concern about Comcast's "ability to raise the fees for retransmission consent for the NBC [owned and operated television stations] or effectively deny this programming entirely to certain video programming distribution competitors" and Comcast's gaining "the right to negotiate on behalf of its broadcast network affiliate stations or the ability to influence the affiliates' negotiations with its distribution competitors.").

[54] *Cablevision*, 649 F.3d at 702; *see also* In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Sixth Annual Report, 15 FCC Rcd. 978, 986 ¶ 16 (2000) ("We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace.").

[55] *Cablevision*, 649 F.3d at 702 (crediting the Commission's 2006 regression analysis that found that the withholding of terrestrial RSNs substantially lowered the percentage of television households subscribing to DBS in two of three studied markets from what would have been expected without such withholding, and that the study found that "terrestrial programming withholding decreased a competitor MVPD's market share from 14.5% to 8.6% in Philadelphia and from 11.1 % to 7.4% in San Diego, although it found no statistically significant effect in Charlotte").

> MVPD if doing so would mean they could no longer watch Roy Halladay, Cliff Lee, Roy Oswalt, and Cole Hamels take the mound, even if they thought the alternative MVPD was otherwise superior in terms of price and quality. Facing such a structural disadvantage, a potential MVPD competitor might realistically conclude that expanding its presence in the Philadelphia market would be uneconomical, thus limiting its ability to provide video programming – and hence satellite video programming – to customers.[56]

Comcast was well aware of this anticompetitive opportunity, and the Commission found evidence that Comcast had in fact taken advantage of it using its own regional sports networks.[57]

This merger would only increase Comcast's power to hinder its competitors by denying them access to valuable NBCU programming, or by raising their licensing fees above what it would have made sense for a stand-alone NBCU to charge.[58]

Comcast owns interests in many RSNs:

- Comcast SportsNet Houston (22.5 percent),
- Comcast SportsNet Chicago (30 percent),
- Comcast SportsNet Bay Area (67 percent),
- Comcast SportsNet Philadelphia (75 percent),
- Comcast SportsNet New England (80 percent),
- Cable Sports Southeast (81 percent),
- Comcast Sports Southwest (100 percent),

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[56] *Id.* at 708 (D.C. Cir. 2011).

[57] Comcast/NBCU Order, *supra* note 6, at ¶ 37 (noting how "the record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPDs that compete with Comcast in video distribution" and how this conclusion is consistent with our previous finding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been.")

[58] *See, e.g.*, American Cable Association, Press Release, ACA to FCC: Finish Program Access Rules Update Before Reviewing New Comcast Merger (Feb. 13, 2014), http://www.americancable.org/node/4651 ("Comcast-NBCU's takeover of Time Warner Cable would vastly increase the number of cable homes served by an operator affiliated with NBCU's popular programming, creating new incentives for NBCU to demand unfair terms and conditions from TWC's pay-TV distribution rivals, including ACA Members.").

- Comcast SportsNet California (100 percent),
- Comcast SportsNet Mid-Atlantic (100 percent),
- Comcast SportsNet Northwest (100 percent),
- The Comcast Network (100 percent), and
- SportsNet New York (8.2 percent).[59]

In acquiring TWC, Comcast would increase the number of regional sports networks it would control, including key networks in New York and Los Angeles.[60] For example, TWC has a long-term agreement with the Los Angeles Lakers for rights to distribute all their locally available games.[61] TWC also manages 26 local news channels, including Time Warner Cable News NY1, 16 local sports channels, and ten local lifestyle channels; TWC also owns 26.8 percent of Sterling Entertainment Enterprises, LLC (which does business as SportsNet New York), a New York City-based regional sports network that carries the New York Mets' baseball games and other regional sports programming.[62] If allowed to acquire TWC, Comcast could make it more difficult or more costly for rival video program distributors to access this popular video and sports content – including companies seeking to build new fiber networks.

Studies have confirmed that price hikes for regional sports networks following vertical integration are bigger, the bigger the cable operator's downstream subscriber footprint.[63]

If Comcast chose to deny other MVPDs access to valuable NBCU and sports programming, consumers who want to watch it would have no choice but to subscribe to

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[59] Comcast/TWC FCC Filing, *supra* note 18, at 13.

[60] In October 2012, TWC launched the Los Angeles regional sports networks (one in English and one in Spanish) that carry the Los Angeles Lakers' basketball games and other regional sports programming. Time Warner Cable, Form 10-K for the fiscal year ended December 31, 2013, at 5, http://www.sec.gov/Archives/edgar/data/1377013/000119312514056642/d640670d10k.htm.

[61] *Id*.

[62] *Id*.

[63] Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REVIEW OF NETWORK ECONOMICS 61, 66 (2013).

Comcast. If Comcast chose instead to inflate the licensing fees it charged to other MVPDs, consumers would either pay more, if their MVPD pays the inflated fee, or would lose access, if their MVPD can't afford to pay it, or they would lose in other ways if their MVPD cuts corners and has less money to invest in innovation and expansion.

### *B. Harming Consumers by Hindering OVDs*

One exciting development for consumers that would likely be harmed by the merger is the delivery of programs over the Internet. The Internet could bring revolutionary benefits to consumers by enabling them to access the programs they want, when they want, for an affordable price, and without having to pay for a bundle of other programs they don't want. Frustration with ever-increasing cable rates, undesirable bundles, and poor service has led a small but growing number of consumers to "shave the cord" by buying smaller cable packages, or to "cut the cord" altogether.

Comcast knows all too well that the emerging growth of online video distributors (OVDs) could cut into its high video distribution profits.[64] Comcast and TWC in their FCC filing identify Netflix, Google's video websites, Apple's iTunes, and Amazon as competitors.[65] The Commission noted in Comcast/NBCU that the record was "replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it."[66]

This merger would give Comcast more power to hinder these innovative Internet platforms from becoming a viable route for consumers to "cut" or "shave" the cable cord. In

[64] *Comcast-NBCU* Competitive Impact Statement, *supra* note 24, at 19 ("Many internal documents reflect Comcast's assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution.").

[65] Comcast/TWC FCC Filing, *supra* note 18, at 5.

[66] *Comcast/NBCU* Order, *supra* note 6, at ¶¶ 85-86.

words that foreshadow Netflix's recent experience with Comcast, the Commission wrote in 2011:

> We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video.[67]

In this fashion, Comcast could use its market power in video programming to withhold its popular NBCU and sports programming from OVDs, or to license it at excessive fees. By controlling access to programming through the set-top box, it could also stifle development of innovative ways to bring programming to the television. It could also use its market power as an Internet service provider to discriminate against OVDs, who cannot access their subscribers' homes without fast Internet connections. Their "future competitive significance depends, in part, on robust broadband capacity."[68] And Comcast can control the households' experience of watching Netflix and other video programming from OVDS. And the merger would increase Comcast's power and incentive to do both.

Experience has shown that these concerns are well-founded. After the Comcast/NBCUniversal deal, Comcast successfully used its market power to charge Netflix, the biggest and most powerful online video distributor, higher fees to ensure smooth delivery of its programming.

Netflix publicly described how it "has seen firsthand how Comcast can leverage its existing market power to extract arbitrary tolls to reach consumers, particularly from Internet

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[67] *Id.* at ¶ 61

[68] *Comcast-NBCU* Competitive Impact Statement, *supra* note 24, at 17.

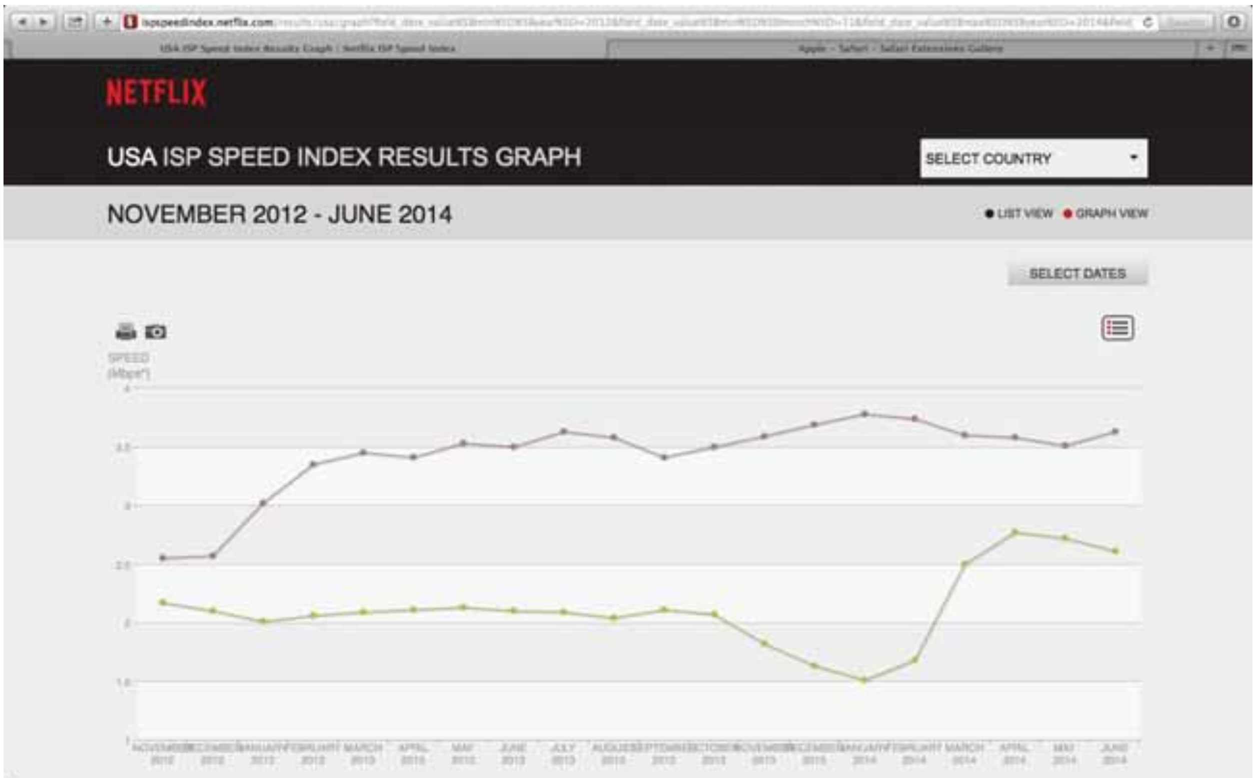
video companies like Netflix who pose a competitive threat to Comcast's own video services."[69] Around the time that Comcast announced its proposed merger with TWC, Netflix was agreeing to pay Comcast a premium "toll" to not degrade its members' video experience – according to Netflix, the first time it was ever forced to pay an Internet service provider for access to its subscribers.[70]

The graph below, comparing the average speed at which Netflix subscribers could stream movies on Comcast's and Google Fiber's broadband Internet service, reflects how Comcast's demand was an anticompetitive flexing of market power muscle, rather than any legitimate reflection of technological limitations.[71]

[69] Letter dated April 23, 2014 from Netflix to Sen. Al Franken, available at http://www.franken.senate.gov/files/letter/140424NetflixResponse.pdf.

[70] *Id.*

[71] Netflix's data "reflect the average performance of all Netflix streams on each [Internet service provider's] network from Nov. 2012 through Jun. 2014 and average performance during prime time starting in Oct. 2013." Netflix, USA ISP Speed Index Archives, http://ispspeedindex.netflix.com/results/usa/archives?field_date_value[value][year]=2014&field_date_value[value][month]=6 (last visited Aug. 1, 2014).




The purple, top line represents Google; the green, bottom line represents Comcast.
Source: Netflix

The graph shows how the average speeds for Comcast subscribers increased dramatically and almost immediately after Netflix paid Comcast's "toll." If the toll reflected genuine, inherent capacity constraints on Comcast's network, then we would not see such an abrupt and dramatic increase in the average speeds; they would increase gradually over time, as Comcast added capacity. And if this were an industry-wide capacity problem at the Internet's interconnection points, one would not see the stark disparity in Comcast's and Google's average Internet speeds. Both would be affected similarly. And if Netflix were truly causing the problem by overloading the Internet, Google would also be degrading its Internet service to

Netflix or complaining – but it is not.[72]

Netflix has described how Comcast was able to degrade its subscribers' broadband stream from Netflix to force Netflix to pay this toll:

> Comcast is limiting the capacity of connections between its network and other networks, unless the network agrees to pay Comcast for access. This congestion causes delays when traffic enters Comcast's network through the settlement-free connections. Consumers experience these delays as slow page loads, poor streaming quality, and frequent streaming pauses.
>
> Few Americans have a meaningful choice in broadband service providers: Comcast subscribers are largely stuck with Comcast. And the only way for content providers to reach the millions of broadband subscribers currently controlled by Comcast is to go through Comcast. By degrading consumers' experience, Comcast can demand that content providers pay them a toll to avoid congestion and reach their captive subscribers. If content providers cannot effectively reach Comcast subscribers, they cannot compete. So they have little alternative for an uncongested connection unless they agree to Comcast's terms. [73]

If a company like Netflix, which has more subscribers than Comcast does, can be forced to pay Comcast a toll, no one would stand a chance against a combined Comcast/TWC, with control over an even larger subscriber base covering 16 of the top 20 key markets in MVPD, and 17 of the top 20 key markets in broadband. Least of all smaller, more innovative OVDs, who could be forced out of business.[74]

So who would benefit from Comcast/TWC exacting these tolls?

Certainly not the OVD. Its costs would be increased.

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[72] Google Fiber – which offers 1 gigabit upload and download speeds where it operates – hosts "Netflix's servers free of charge at Fiber facilities, a practice of 'co-location' that promises better quality and speedier delivery of Netflix content." Chris Tribbey, *Google Fiber: We Won't Charge Netflix*, HOME MEDIA, 28 May 2014, http://www.homemediamagazine.com/streaming/google-fiber-we-won-t-charge-netflix-33293. Indeed, "Google Fiber gives companies like Netflix and Akamai free space and power in its facilities 'since people usually only stream one video at a time, video traffic doesn't bog down or change the way we manage our network in any meaningful way — so why not help enable it?'" *Id*.

[73] Letter from Netflix to Sen. Al Franken, dated April 23, 2014.

[74] *See, e.g.,* Netflix, US and Canada Blog, *Internet Tolls and the Case for Strong Net Neutrality*, March 20, 2014, http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html ("If this kind of leverage is effective against Netflix, which is pretty large, imagine the plight of smaller services today and in the future. Roughly the same arbitrary tax is demanded from the intermediaries such as Cogent and Level 3, who supply millions of websites with connectivity, leading to a poor consumer experience.").

Certainly not Comcast/TWC's broadband subscribers. They would pay more – either in higher monthly fees for the OVD's programs, if it pays the toll, or in slower speeds to stream or download the programs, if the OVD can't or won't pay.

Certainly not consumers generally, as the cascading harms from these gatekeeper tolls spill out beyond Comcast/TWC's geographic markets to everywhere that these OVDs serve.[75]

### *C. Harming Consumers by Hampering Innovation in Equipment and Platforms*

The merger also stands to substantially decrease technological innovation in the video distribution industry. Comcast is planning to upgrade its set-top boxes, for example, with more sophisticated electronic devices that perform the same functions as the boxes now in use – as the interface through which subscribers receive digital channels, access a channel guide, and order pay-per-view programming – but also much more. Box rentals have been an important revenue source in their own right,[76] but the box is also a mechanism for controlling access to the television set.

In 2003, the Commission attempted to open a pathway for other devices, by adopting standards for the CableCARD, a security shield that could be installed in devices made and sold independently of the cable companies, to prevent unauthorized access to the cable company's programming while allowing the devices to perform other useful functions. In 2007, the FCC imposed an additional "integration ban" to further separate the security function and protect those other functions. Despite the Commission's steps, the effort to create a competitive retail market for set-top boxes has been unsuccessful. Subscribers overwhelmingly are led to use the box rented out by their cable operator. (A notable exception is TiVo, one of the few

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[75] *Comcast/NBCU* Competitive Impact Statement, *supra* note 24, at 14.

[76] FCC, Report on Cable Industry Prices, MM Docket No. 92-266, at 12 (June 7, 2013) (reporting average price for leased equipment in January 2012 of $6.28 per month for basic service (a 22.9 percent increase from 2011), $7.29 for expanded basic, and $7.75 for the next most popular service).

manufacturers to build popular devices that incorporate CableCARD technology. But in general, the CableCARD did not accomplish its purpose.[77])

As the experience with CableCARD shows, it is not enough, in order for competition and innovation to take hold, that technology companies are designing devices that stream media from online video distributors like Netflix and Hulu and could become a substitute for the cable provider's set-top box. As it is, consumers have to purchase these devices in addition to, and not in lieu of, their rented set-top boxes. So if consumers want the cable programming, they are pretty much wedded to the set-top box. If they want streaming online media, they need to buy something on top of that. That adds further to the cost and complexity of moving between cable and over-the-top programming.

As Comcast upgrades its boxes and expands their array of functions, and as the interface between Comcast's cable and broadband technologies grows, the danger is that Comcast will have even more power to direct – and restrict – the course of innovation in both, thereby also restricting choices for consumers.

In 2013, TWC set out on a different, more open course. It entered into a deal with Roku, which allowed consumers to dispense with their set-top box and use an app on their Roku player to receive up to 300 live television channels as well as on-demand programming. TWC billed the availability of TWC television on an open platform as a "significant milestone" that gave consumers "more choice in entertainment than was ever possible before."[78] While the app was

[77] TiVo recently announced that it had entered into an agreement with Comcast to work on a future two-way non-CableCARD solution that would be supported in both Comcast and TiVo retail devices. Letter to Senators Jay Rockefeller and John Thune from TiVO CEO Thomas Rogers, dated July 22, 2014, *available at* http://blogs.rollcall.com/technocrat/wp-content/uploads/sites/17/2014/07/TIVOSenate-Letter-7-22pdf.pdf. It should be noted that (a) there is currently no such solution, so the agreement at most reflects a future possibility that may or may not happen; and (b) the agreement presents the additional risk that post-merger, the combined company would be able to use its additional market power to force others in the industry to go along with whatever solution, if any, it is willing to adopt.

[78] Time Warner Cable, Press Release, TWC TV Launching on Roku: Authenticated Cable Service Streams

imperfect, industry observers saw it as a big first step toward for greater choice and innovation, noting that TWC was "the first multichannel video program distributor to offer TV access to authenticated subscribers without the need of a cable set-top box."[82]

It does not take much imagination to see how the Comcast/TWC merger could put a quick stop to these sorts of maverick initiatives by TWC.

### *D. Harming Consumers by Harming Program Diversity*

Because media/telecommunications mergers affect not only consumers' wallets and purses, but also the marketplace of ideas, an important dimension of the public interest review is the merger's impact on program and viewpoint diversity.[83]

Comcast, by acquiring TWC, would increase its already massive cable subscriber base by approximately 38 percent (not including the 3.9 cable subscribers it plans to divest to Charter), and be much larger than any other multi-channel video program distributor, including the satellite companies DISH and DirecTV,[84] the telephone companies AT&T and Verizon,[85] and any overbuilder that uses a preexisting telecommunications operator's network (such as the cable networks) to offer customers an alternative.[86]

But the acquisition does more than simply increase Comcast's subscriber base. As DOJ found in Comcast/NBCU, Comcast already has large market shares in key metropolitan markets, such 64 percent in Philadelphia, 62 percent in Chicago, 60 percent in Miami, and 58 percent in

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Thousands of Live Programs to TV (Jan. 7, 2013), http://www.timewarnercable.com/en/about-us/press/twc_tv_launching_on_roku.html.

[82] Eric Gruenwedel, *Time Warner Cable Bows Roku Channel*, HOME MEDIA MAGAZINE, March 8, 2013, http://www.homemediamagazine.com/industry-news/time-warner-cable-bows-roku-channel-29845.

[83] *See* In Re FCC Declines to Approve Echostar-DirecTV Merger, 2002 WL 31268861 (F.C.C. Oct. 10, 2002).

[84] *Comcast-NBCU* Competitive Impact Statement, *supra* note 24 (finding that they collectively accounted at the time" for approximately 31 percent of video programming subscribers nationwide, although their shares vary and may be lower in any particular local market").

[85] *Id*. (finding that AT&T and Verizon, while enjoying success in the selected communities they have entered, "currently have limited expansion plans").

[86] *Id*. (finding that the "[o]verbuilders serve an even smaller portion of the United States").

San Francisco (based on MVPD subscribers).[87] Comcast, by acquiring TWC, would expand and increase its dominance, covering 16 of the country's 20 largest metropolitan regions for MVPD service.

Because Comcast would control almost every key metropolitan market, video programmers would need distribution carriage through Comcast. In effect, Comcast could dictate what programs get carried or not – not only in its markets but across America. A nightly business program, for example, would not get off the ground if it were carried only in rural markets. It would need access to cable subscribers in the New York City region, and thus Comcast's subscribers. Other video programmers that seek urban viewers would need access to Comcast, which would dominate most major urban centers. It would be impossible for many programmers to avoid the merged firm. Because video programmers would need to distribute their sports, entertainment, and news programs through Comcast, a combined Comcast/TWC could hinder both competition and programming diversity by deciding what programs to carry, where, and when.

So if an independent content provider wants to offer a sports-based package, perhaps NCAA athletics of universities currently under-represented, at a lower price point, Comcast could squelch the idea. It has the incentive and ability to refuse support for new programs like this that would compete against its own programming.[88]

And Comcast did just that, favoring its own news programming on CNBC over Bloomberg, by exiling Bloomberg to a more remote channel. Bloomberg was forced to spend years in litigation to get Comcast to treat it fairly. The merger would give Comcast even more

[87] *Id*.

[88] The FCC identified, and Second Circuit acknowledged, how Comcast's incentive and ability to harm unaffiliated networks would increase after acquiring NBCU. *Time Warner Cable*, 729 F.3d at 152 n.5 (quoting Comcast/NBCU Order, *supra* note 6, ¶ 116).

power to harm other video programmers and consumers who want to see these programs.

But more broadly, Comcast/TWC's sheer size would give it undue power to determine what programming is worth carrying, and at what cost to the program content provider. Programs with a smaller, specialty audience could well find it more difficult to affordably reach their viewers.

The Alliance for Community Media reports that Comcast has in recent years been reducing its support for the Public, Educational, and Government (PEG) access centers that the Alliance represents. These are anchor organizations that provide the public with training, facilities and channel time as part of the cable industry structure. According to the Alliance, PEG access centers that exclusively served the public have been shut down in 93 communities across the United States since 2005 – and 49 of those were in Comcast communities. The Alliance has called the proposed merger a "clear threat to media localism and diversity."[89]

The Writer's Guild of America, West has also raised concerns about the merger's impact on diversity.[90]

### *E. Harming Consumers by Creating a National Gatekeeper to the Internet*

The proposed merger would also result in a new type of harm: it would create a national "gatekeeper" to the Internet by combining the two largest residential broadband Internet service providers in the United States. Online video programmers and distributors would be dependent on Comcast's "last mile" network for access to millions of consumers. With control over that last mile in 17 of the top 20 local markets, Comcast would have the power to determine who could pass through, and on what terms.

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[89] Statement available at http://midpenmedia.org/about-us/resources/save-community-access/.

[90] Comments of The Writers Guild of America, West, Inc., filed in In re FCC's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16 (March 21, 2014), available at http://apps.fcc.gov/ecfs/document/view?id=7521094670.

Indeed, DOJ raised a similar concern in 2000 when the nation's two largest residential broadband providers at the time, AT&T and MediaOne, sought to merge.[91] Importantly, DOJ did not focus solely on the merger's impact in local markets (which Comcast and TWC urge here with their "no competitive overlap" story). Instead, the DOJ also considered how the merger would affect competition nationwide.[92]

DOJ was concerned that the merger would increase AT&T's power "to extract more favorable terms" from content providers to access its subscribers.[93] "By exploiting its 'gatekeeper' position in the residential broadband content market, AT&T could make it less profitable for disfavored content providers to invest in the creation of attractive broadband content, and reduce competition and restrict output in that market."[94] DOJ was concerned that AT&T's gatekeeper power, in controlling a little over two million broadband subscribers, threatened to hamper the development of the broadband industry,[95] and it required AT&T/MediaOne to divest their interest in Road Runner so it would be independent.

The same concern is present here, only more so. Comcast and TWC dominate high-speed residential broadband (connection download speeds at 10 Mbps and higher) with an estimated combined share of between 47 and 49 percent – not 2 million subscribers as in AT&T/MediaOne, but *30* million.[96] Even if you include all residential broadband, as in the chart

[91] Competitive Impact Statement, filed in United States v. AT&T Corp., Civ. Act. No. 1:00CV01176 (D.D.C. filed May 25, 2000). Excite@Home had the exclusive right to provide residential broadband service over the cable facilities of its three principal equity holders, AT&T, Cox Communications and Comcast. *Id*. at 4. MediaOne, along with then-Time Warner Entertainment and other entities, owned the second largest residential broadband provider, Road Runner. *Id*. at 4-5.

[92] *Id.* at 1 (defining the relevant antitrust market as the "nationwide market for the aggregation, promotion, and distribution of residential broadband content").

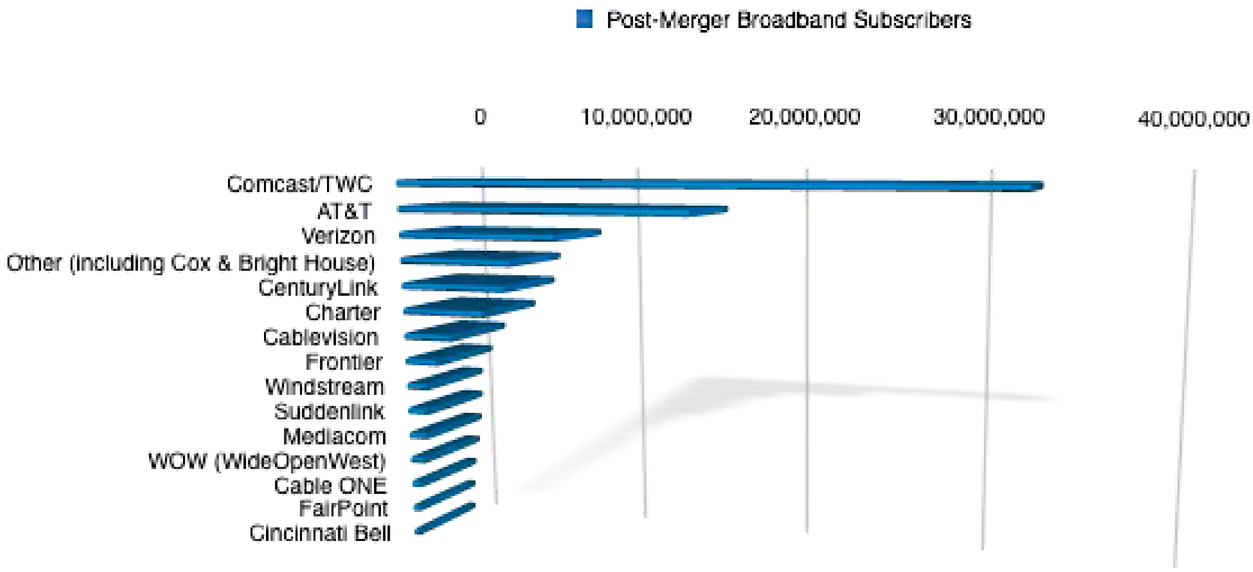
[93] *Id*. at 2.

[94] *Id*. at 2.

[95] *Id*. at 4.

[96] Mark Cooper, Director of Research, Consumer Federation of America, *Buyer And Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable"* 7 (April 8, 2014), http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf.

below, Comcast/TWC would still tower over all others.[97]




Source: Leichtman Research Group,

Although Comcast may not currently compete with TWC in specific local markets, the merger would consolidate Comcast's control over the local markets that are most important to online video distributors, content programmers, and advertisers. Comcast would extend its dominance in five key areas: New York State (including New York City), the Carolinas, the Midwest (including Ohio, Kentucky and Wisconsin), Southern California (including Los Angeles), and Texas. With a much larger overall national footprint, and locking up the key markets across the country, Comcast would become the de facto residential broadband gatekeeper, with the power to decide who can see what.

To hobble Netflix or another OVD who could offer consumers an alternative to Comcast,

[97] Leichtman Research Group, Inc., *Nearly 1.2 Million Add Broadband in the First Quarter of 2014* (May 20, 2014), http://www.leichtmanresearch.com/press/052014release.html. The graph does not reflect any divestitures of broadband subscribers. Comcast to date has only announced divestitures of approximately 3.9 million video customers. It is unclear, whether any, and if so how many, broadband subscribers would be divested. Even if approximately 3.9 million broadband subscribers were divested, Comcast would still tower over its rivals.

Comcast could slow the speeds at which over 30 million subscribers stream and download the OVD's content at any of several points: in the last mile "public Internet" channel to the consumer, or earlier at the interconnection point, or at any managed or specialized service channels. Or Comcast could exact add-on "tolls" from the OVD as the ransom for not degrading its customers' Internet speeds.

Not only would this augmented gatekeeper power enable Comcast to stave off competition from OVDs that would undercut its profits. More broadly, it would threaten program diversity. Special-audience or independent programs that don't generate enough revenue to pay Comcast's cable toll might find that an OVD is their only affordable route to reach viewers. And at that point, they would become dependent on the OVD being able to get favorable terms from Comcast.

Then-Commissioner Michael Copps noted this emerging danger in his dissent from the 2006 order allowing Comcast and TWC to acquire the assets of Adelphia:

> Concentrating so much clout in the Applicants gives them the ability to make or break cable programming across the country. If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television and of communities – especially minority communities – who struggle for basic access to programming they want and need. ... We need to support independent programmers and independent content production. I'll say it again: we just cannot afford to cede so much content control to so few media companies. It's bad because of the homogenized entertainment and information we are fed and it's bad for our democracy. And what happens if these two companies refuse to take political advertisements for issues they oppose? It's like giving them the keys to control what we watch, see and hear.
>
> . . .
>
> We are entering a world where big and concentrated broadband providers are searching for new business models and sometimes even suggesting that web sites may have to pay additional charges and new tolls for the traffic they generate. This could change the character of the Internet as we know it.[98]

[98] FCC Approves Adelphia, Time Warner, Comcast License Transfer, 2006 WL 1976221 (F.C.C. July 13, 2006)

Now, the reach is broader, the stakes are higher, and the harm that would result is even worse.

## VI. The Proposed Merger Would Not Serve The Public Interest in Other Respects

Comcast and TWC also fail to substantiate how their merger would serve the public interest, convenience, and necessity in other respects. They do not show how their merger is necessary for enhancing access to advanced telecommunications and information services throughout the country, for improving the quality of telecommunications services provided to consumers, for providing new or additional services to consumers, or for accelerating private-sector deployment of advanced services (including in particular high-speed broadband).[99]

Broadly speaking, Comcast and TWC make four public interest claims. First, they say Comcast offers consumers superior products and services to what TWC offers, so that TWC subscribers would be "upgraded." Second, they say Comcast needs to be even larger than it is today in order to gain economies of scale and scope and spread its fixed costs. Third, they say that the two companies together could offer consumers "the best of both" in terms of products and services. And fourth, they say they would be able to take additional steps to bridge the digital divide.

None of these claims holds up. First, the merging companies cherry-pick facts about how Comcast offers superior products and services to TWC. Consumers do not see Comcast as such a great company, and in several important ways TWC subscribers are likely to be worse off with the merger than without it. Second, Comcast and TWC are already so big that any additional economies of scale from the merger are likely to be negligible. Third, the claim that the merger

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(Comm'r Michael J. Copps, Dissenting)

[99] In Re Applications of Teleport Commc'ns Grp. Inc., Transferor, & AT&T Corp., Transferee, 13 F.C.C. Rcd. 15236 (1998); In Re FCC Declines to Approve Echostar-DirecTV Merger, 2002 WL 31268861 (F.C.C. Oct. 10, 2002).

would allow the companies to offer "the best of both" actually underscores the fact that the two companies have incompatible technologies and that the merger would result in substantial integration difficulties. Fourth, in terms of Comcast's other promises to do good things for consumers, underserved communities, or society, these benefits can be provided without the merger and should not be held hostage to it.

### *A. Comcast Overstates the Benefits to TWC Subscribers from an "Upgrade"*

Comcast touts the supposed superiority, as compared with TWC, of its broadband speeds, Wi-Fi options, X1 video platform and DVR, large Video On-Demand ("VOD") library, completed transition to "all digital," and focus on network reliability and customer service, among other things.[100]

But Comcast and TWC have cherry-picked what they choose to compare in order to cast Comcast in the better light. If the tables were reversed and TWC were seeking to acquire Comcast, TWC could make its own claims about its superiority over Comcast.[101] One important TWC service that is clearly superior to what Comcast offers, and that TWC subscribers would likely lose in the merger, is the ability to use Roku as an independent platform to access video programming. Another is the absence of data caps on home broadband use. Comcast has begun to impose caps in its standard plan; TWC's standard plan does not.

Second, at least some of Comcast's specific claims involve some sleight-of-hand. For

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[100] Comcast/TWC FCC Filing, *supra* note 18, at 28-66.

[101] Note, for example, TWC's description of its "TWC Maxx" initiative, announced in early 2014, that would include more reliable and better quality video at higher speeds, many more on-demand titles, a super DVR with 1 TB of storage and six different tuners, etc. *See* Time Warner Cable, Press Release, Time Warner Cable to Transform TV and Internet Experience in New York City and Los Angeles (Jan. 30, 2014), http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2014/Time-Warner-Cable-to-Transform-TV-and-Internet-Experience-in-New-York-City-and-Los-Angeles/default.aspx; Dante D'Orazio, *Time Warner Cable Promises Upgraded Internet, TV Service in Response to Rival Takeover Attempt: More Reliable Service, Faster Speeds, and More Will Come to NYC and LA under a New Brand*, The Verge, Jan. 31, 2014, http://www.theverge.com/2014/1/31/5365816/time-warner-cable-maxx-plans-broadband-cable-improvements-in-nyc-la.

example, Comcast says it "intends to extend its higher speeds and related consumer benefits to the TWC systems ... . The goal would be to bring the TWC services up to Comcast levels."[102] As one commentator has pointed out, however, TWC was already planning to speed up service in New York and Los Angeles to give its "standard" subscribers a full 50 Mbps download speed.[103] Comcast's promise to move TWC subscribers up from 15 Mbps to 25 Mbps is misleading. In fact, the merger would leave TWC subscribers worse off in this respect.

Similarly, Comcast may technically have more Wi-Fi hot spots than TWC, [104] but cable companies (including Comcast and TWC) have already pooled their resources to create a joint Wi-Fi network.[105] No merger was required.

As noted above, Comcast's current subscribers do not think highly of its products and services. TWC subscribers might not think of Comcast's products and services as much of an "upgrade."

It is also important to keep in mind that these upgrades often involve installation costs and price hikes for required equipment upgrades needed in order to enjoy the "upgraded" products and services. These costs and price hikes are not always initially obvious to the consumer. For example, Tom G. of Milwaukie, Oregon told Consumers Union that "Comcast recently terminated their local TV transmissions over QWAM channels. They now require an additional converter box to make my new 'digital, cable ready TV' work. Of course, this comes

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[102] Comcast/TWC FCC Filing, *supra* note 18, at 34.

[103] Adi Robertson, *Comcast Has Very Bad Reasons for Wanting to Buy Time Warner Cable: Defending the Massive Takeover to the FCC Requires Some Leaps of Logic*, The Verge, April 9, 2014 http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cable-takeover; see also D'Orazio, *supra* note 101; TWC Jan. 30, 2014 Press Release, supra note 101 ("Time Warner Cable customers in New York City and Los Angeles will be the first to benefit from major enhancements that will transform their service as they know it.").

[104] Comcast/TWC FCC Filing, *supra* note 18, at 38-41.

[105] http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cable-takeover; see also http://corporate.comcast.com/news-information/news-feed/cablewifi-alliance-offers-access-to-more-than-150000-wifi-hotspots-creates-largest-wifi-network-in-the-u-s-2.

with an additional $3.00 per month rental charge. Plus, I don't get all my channels with this box, I need another, more expensive one, to receive all the channels I pay for on all TVs in the home."[106]

### *B. Comcast Overstates the Scale and Scope Economies and Does Not Show How They Would Benefit Consumers*

In further broadening its scale and scope, Comcast would gain no benefit significant enough to outweigh the harm that would result from its increased market power. Comcast and TWC are already both giant companies. If the nation's largest cable and broadband providers are still not at an efficient scale, then what does that say about the viability of smaller cable and broadband providers? Comcast and TWC cannot credibly argue on the one hand that they need to get larger and have a broader geographic footprint in order to compete effectively, and then argue on the other hand that much smaller providers are significant competitive alternatives.

Under Comcast's logic, it should be allowed to keep buying cable companies and Internet service providers until it controls them all – because with each new acquisition, Comcast would spread its fixed costs over an even larger customer base. The prospect of possible cost savings never justifies a merger that increases an already dominant company's market power in a market that is already too concentrated.[108]

Comcast and TWC have not shown any significant cost-saving efficiencies that they need their merger in order to achieve, let alone how any such efficiencies would translate into savings to consumers.[109] Comcast has flatly stated that consumers should not expect prices to decline as a result of the merger.

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[106] Consumers Union database of stories collected from consumers.

[108] Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010), http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("antitrust laws give competition, not internal operational efficiency, primacy in protecting customers").

[109] *Id*. (merging companies must show that "cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market").

Comcast does not need to become an even more dominant nationwide platform to attract equipment manufacturers, app developers, and programmers.[110] And whatever benefit Comcast would gain in being able to take further advantage of so-called "network effects,"[111] by which the attractiveness of a product increases with the number of people using it, would come at the expense of increasing entry barriers and further entrenching Comcast's dominance.[112] In essence, Comcast desires to become the Great Barrier Reef on which all cable technology will develop. That might be beneficial to Comcast, but it would be bad for consumers. Comcast could maintain and reinforce its market power, and its ability to direct technological development to its own advantage, but at the cost of fewer competing platforms, fewer choices, higher prices, and potentially worse customer service.

***C. Getting "The Best of Both" Companies Would Come at Significant Cost***

Comcast and TWC claim, unconvincingly, that the merger would result in the whole being greater than the sum of the parts.[113] But they vastly understate the difficulties and costs involved in moving TWC subscribers onto the Comcast platform, and in taking the other steps necessary to integrate the two companies. Any benefits to TWC subscribers would likely be slow in coming, while significant disruptions, cost overruns, and diversions of resources would be almost certain.

Teena J. of Dallas, Texas, told us of her experience being caught in a small Time

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[110] Comcast/TWC FCC Filing, *supra* note 18, at 25 (internal footnote excluded).

[111] United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999*), aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

[112] Cf. Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 829 (6th Cir. 2011) (affirming the finding of Realcomp's substantial market power from MLS's market share, network effects, and barriers to entry); *Microsoft*, 84 F. Supp. 2d at 20 ("For just as Microsoft's large market share creates incentives for [independent software vendors] to develop applications first and foremost for Windows, the small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows.").

[113] Comcast/TWC FCC Filing, *supra* note 18, at 25 ("Each company brings proprietary technology and specialized knowledge about providing its unique mix of products and services.").

Warner/Comcast boundary re-alignment: "The transition was a nightmare for several years." She said it took years to work through all the transition problems – including three years to get the horrible exterior installation corrected on her home.[114]

As the Los Angeles Times reported in 2008, major integration problems resulted when Comcast and TWC acquired and divided up the assets of Adelphia:

> Time Warner became the dominant cable-TV provider in the Greater Los Angeles area in mid-2006, when it joined with Comcast to buy out bankrupt Adelphia Communications Corp. Then Time Warner swapped franchises with Comcast so each would have dominant markets in different parts of the U.S.
>
> The combination proved costly because Time Warner Cable had to revamp and upgrade Adelphia's and Comcast's old franchises and meld them with its own. Customers swamped call centers with complaints about Internet and e-mail outages, TV channel lineup changes and, especially, the hours they spent on hold to fix things.[115]

A Time Warner spokesperson at the time unequivocally blamed these problems on "integration issues we inherited from Adelphia and Comcast."[116]

Although Comcast and TWC acknowledge that "the contractual and operational integration issues are not trivial,"[117] they sidestep the questions of what those issues are, how much they would cost to remedy, and how long it would take.

### *D. Other Comcast Promises to Communities Do Not Depend On the Merger and Should Not Be Held Hostage to It*

In the Comcast/NBCU deal, Comcast promised to increase access in underserved communities, such as by providing computers to schools and making low-priced Internet and training available to help bridge the digital divide. In the current application, Comcast and TWC make the same kinds of promises.[118] They claim that the merger would allow Comcast to extend

[114] Consumers Union database of stories collected from consumers.
[115] *See* Alana Semuels, "A Murky High-def Picture," L.A. TIMES, May 27, 2008, available at http://www.latimes.com/la-fi-hdtv27-2008may27-story.html#page=1.
[116] *Id.*
[117] *See* Declaration of Michael J. Angelakis ¶ 29, http://apps.fcc.gov/ecfs/document/view?id=7521098031.
[118] Comcast/TWC FCC Filing, *supra* note18, at 59 ("One of the most pressing challenges facing this country is the significant broadband adoption gap—known as the 'digital divide.'").

its Internet Essentials program to TWC's territories, for example, and to provide other benefits. Without in any way minimizing Comcast's record of community service, it is important to note that none of these significant benefits depends on the merger, and for all their value, they cannot justify the harm the merger would cause – which would fall particularly hard on the less affluent and the underserved.[119]

Moreover, tying merger approval to a commitment to take socially beneficial actions creates the wrong incentives. It encourages companies to save such actions if they expect that one day they may have a merger under review – witness reports indicating that Comcast's *Internet Essentials* program was launched when it could be useful to secure approval of the Comcast/NBCUniversal deal,[120] and that Comcast has announced plans to augment the program as it looks to secure approval of the Comcast/TWC deal.[121]

Comcast's promise to do great things for society in wielding its increased power is no substitute for competition. Competition ensures that, in the words of Supreme Court Justice William Douglas, "the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed

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[119] *See, e.g.*, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); Lina Khan and Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASHINGTON POST, June 13, 2014, http://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html. In the 1980s, economist John M. Conner found that price effects were greater for low income households than upper income households due to the exercise of market power in almost all of the industries he examined. JOHN M CONNOR ET AL., THE FOOD MANUFACTURING INDUSTRIES: STRUCTURE, STRATEGIES, PERFORMANCE AND POLICIES (1985).

[120] *See, e.g.*, Cecilia Kang, "Comcast is trying to improve its image with a program for low-income consumers," Washington Post (May 9, 2014), http://www.washingtonpost.com/business/technology/comcast-is-trying-to-improve-its-image-with-a-program-for-low-income-consumers/2014/05/09/cab489cc-d231-11e3-937f-d3026234b51c_story.html ("Internet Essentials was conceived expressly to win goodwill in Washington. It began three years ago as part of an offering to the FCC as the agency considered another big and controversial merger by Comcast — this one to NBC Universal for $31 billion.").

[121] *See, e.g.*, Lily Hay Newman, Comcast's Internet Program for Low-Income Customers Is Getting a Makeover, SLATE, Aug. 5, 2014, http://www.slate.com/blogs/future_tense/2014/08/05/comcast_is_expanding_its_internet_essentials_program_for_poor_customers.html; Adi Robertson, Comcast Is Promoting its Low-Cost Internet Program by Forgiving Old Debts, THE VERGE, Aug. 4, 2014, http://www.theverge.com/2014/8/4/5967323/comcast-announces-debt-forgiveness-program-for-internet-essentials.Jon Fingas, "Comcast tries to clinch TWC merger by sweetening its low-income internet plan," http://www.engadget.com/2014/08/04/comcast-sweetens-internet-essentials/.

men. The fact that they are not vicious men but respectable and social minded is irrelevant."[122]

### VII. COMCAST'S PROPOSED DIVESTITURES AND BEHAVIORAL CONDITIONS WILL NOT BE EFFECTIVE IN PREVENTING HARM TO COMPETITION

Comcast proposes two steps to save its anticompetitive merger. First, to divest enough subscribers to Charter Communications to bring itself under the FCC's vacated subscriber limit of 30 percent for its video subscribers (though not for its broadband subscribers).[123] Second, to bring TWC under the terms of the behavioral conditions that Comcast agreed to in connection with Comcast/NBCU.

These proposed steps would not prevent the competitive harms. The divestitures actually strengthen Comcast's hold on key markets. And the behavioral conditions have already shown to be ineffective in restraining Comcast from taking advantage of the market power it already possesses.

#### *A. Swapping Subscribers with Charter Would Further Solidify Comcast's Market Power*

Comcast and TWC state that after the transaction and expected divestiture of systems to Charter Communications, Comcast "will manage systems serving fewer than 30 percent of total MVPD subscribers in the United States."[124] This bait-and-switch would not help mitigate the harm to competition; it would actually worsen it.[125] While the overall number of Comcast/TWC subscribers would be lower, concentration in key markets, including the crown jewels of New York and Los Angeles, would be higher, because the deal with Charter involves Charter

[122] United States v. Vandebrake, 771 F. Supp. 2d 961, 1001 (N.D. Iowa 2011) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)) *aff'd*, 679 F.3d 1030 (8th Cir. 2012).
[123] Comcast/TWC FCC Filing, *supra* note 18, at 4.
[124] *Id.* at 143-44.
[125] *See* Chris Morran, *Comcast Deal With Charter Isn't About Improving Competition; It's About Carving Up Marketplace*, Consumerist (April 28, 2014), http://consumerist.com/2014/04/28/comcast-deal-with-charter-isnt-about-improving-competition-its-about-carving-up-marketplace/.

swapping subscribers in those two markets to Comcast. Comcast will not be shedding any subscribers in the largest and most valuable markets. And Comcast's share of the residential broadband market would remain well over 30 percent nationwide, closer to 50 percent for high-speed residential broadband, with even higher shares in key local markets.

Especially with its dominance in so many key local markets, Comcast can enjoy buyer power even though its national share of MVPD subscribers is no more than 30 percent. With the merger increasing Comcast's geographic MVPD footprint to 16 of the top 20 markets, video programmers seeking cable subscribers in urban areas will need distribution through Comcast/TWC, and will have no choice but to agree to its terms.[126]

### *B. Behavioral Conditions Will Be Ineffective*

At the outset, there are strong reasons to doubt that behavioral conditions can take the place of competition in protecting consumers. They are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives."[127] Not surprising, this has proven impossible to achieve in practice, and exceedingly costly and burdensome to attempt. A major retrospective study by the economist John Kwoka indicates that behavioral conditions are spectacularly unsuccessful in preventing post-merger price increases.[128]

Behavioral conditions are difficult to craft, difficult to enforce, and often do not work as planned. For these reasons, the Justice Department and the FCC have maintained a strong

[126] The FTC and courts have found purchasers with a 20 percent national market share to wield significant buyer power over sellers. For example, in Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000), the retailer Toys "R" Us accounted for 20% of the national wholesale market and up to 49% of some local wholesale markets. The FTC found, and the circuit court affirmed, that Toys "R" Us had enough buyer power to coerce toy manufacturers to raise the prices they charged Toys "R" Us's rivals, the warehouse clubs.

[127] John E. Kwoka, Jr. & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* 5 (Nov. 2011), *available at* http://antitrustinstitute.org/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

[128] John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J 619 (2013).

preference for "structural" remedies – i.e., not letting a merger that would harm competition go forward – over behavioral conditions. DOJ's has explained that a behavioral condition "typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent" and could result in excessive "government entanglement" in the market.[129]

Many of the recognized problems with relying on behavioral conditions to address competitive problems in a merger[130] can be seen in the experience with using them in Comcast/NBCU.

***1.Difficulty in specifying the conduct in question***

The merged company has deeper knowledge about its own business than the agency. This puts the agency at a serious disadvantage in crafting effective behavioral conditions. It is exceedingly difficult to specify all aspects of a company's conduct, as to what is permissible and what forbidden. This is particularly difficult in dynamic markets, where technology and business relationships are changing. Behavioral condition remedies can fail both by being too general, and by trying to be too specific.

For example, DOJ and the Commission were aware at the time of Comcast/NBCU that Netflix and other over-the-top providers represented the "best hope" for increased competition to cable's dominance.[131] As a result, they imposed a number of conditions intended to prevent

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[129] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies 7-8 (2004), *available at* http://www.justice.gov/atr/public/guidelines/205108.pdf; *see also* Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at 30 n.52, filed in United States v. US Airways Group, Inc., Case No. 1:13-cv-01236-CKK (D.D.C. March 10, 2014), *available at* http://www.justice.gov/atr/cases/f304200/304233.pdf (refusing in connection with the consent decree entered in the airline merger to adopt route-specific behavioral conditions, stating that such conditions "would be exceedingly difficult to craft, entail a high degree of risk of unintended consequences, entangle the government and the Court in market operations, and raise practical problems such as the need for ongoing monitoring and enforcement").

[130] For a more detailed description of these and other problems with using behavioral conditions, see Kwoka & Moss, *supra* note 127.

[131] *See, e.g., Comcast-NBCU* Complaint, *supra* note 52, ¶ 9.

Comcast from engaging in conduct that would interfere with this developing source of competition. The DOJ and FCC orders spelled out multiple restrictions on Comcast's permitted behavior, including not discriminating against program content delivered over its own broadband network – adopting the FCC's "open Internet rules."

The conditions did not anticipate, however, that Comcast might decide not to continue to increase the number of ports into its network to keep pace with the increasing volume of traffic that content providers, and particularly Netflix, were delivering at the request of Comcast customers. The Comcast/NBCU conditions dealt with what happened when information was already *on* Comcast's network, not what happened at the point of contact *with* the network. Comcast assured the FCC and DOJ of net neutrality for its last mile. But Comcast found a loophole: it discriminated *before* the last mile, at the interconnection points. Ultimately, the behavioral conditions did not protect even the largest online video distributor, Netflix.

### *2. Difficulty in overcoming inherent profitmaking incentives*

Behavioral conditions can require or prohibit specific behavior, but they cannot abolish a company's incentive to maximize its profits. Telling a business not to favor its own interests over those of competing businesses gives rise to powerful incentives to test the limits of the conditions, and to find alternative routes of achieving the same anti-competitive objectives.

Thus, when the condition required Comcast to locate its rival Bloomberg News on a channel in a "news neighborhood" in close proximity to other news stations, the result was that Comcast fought the condition tooth and nail for more than two years.

Here, it seems clear that if Comcast did not own NBCU, its incentive would have been to give maximum exposure to Bloomberg News, to satisfy its subscribers who watch Bloomberg News. But its ownership of NBCU programming, in particular MSNBC and CNBC, fundamentally altered that incentive.

That the behavioral condition did not deter Comcast even when its discrimination against Bloomberg News was so highly visible to regulators suggests how much more difficult it is to require less visible good behavior when the company's incentives run in the other direction.

### *3. Difficulty in detecting noncompliance and in resolving complaints*

Those who are aware of, even being directly harmed by, a company's noncompliance may not want to come forward and complain because they have ongoing business relationships with the company. This can lead to under-reporting of violations. It is thus inherently difficult to devise a method for resolving complaints that is efficient enough to act as an effective check on the company.

Comcast says that it "keeps its promises and plays fair," and that since acquiring NBCU, it has "successfully negotiated dozens of agreements with MVPDs for carriage of NBCUniversal content without any withholding of content from consumers, and no arbitrations have been needed under the MVPD provisions of the NBCUniversal order."[133] No doubt content providers (like Bloomberg) and online video distributors (like Netflix) would disagree.

Nor has Comcast kept its promises elsewhere. As a condition for approving the NBCU transaction, for example, the Commission required Comcast to provide and promote a reasonably priced stand-alone broadband service. This was intended to keep a road open for customers who wanted to move from bundled to unbundled service, who maybe wanted even to cut out cable entirely and move to over-the-top programming. Comcast's sales force, however, continued to actively promote the bundle, and failed to promote the inexpensive stand-alone alternative.

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[133] U.S. House of Representatives, Judiciary Committee, Oversight Hearing on "Competition in the Video and Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable," May 8, 2014 (testimony of David L. Cohen), http://judiciary.house.gov/index.cfm/2014/5/hearing-oversight-hearing-on-competition-in-the-video-and-broadband-markets-the-proposed-merger-of-comcast-and-time-warner-cable.

Complaints mounted. Eventually, the Commission brought action and imposed an $800,000 penalty on Comcast for noncompliance.[134]

As for Comcast's claim that there have not been any arbitrations (there was one, Project Concord, discussed below) brought under the FCC order, silence does not signal approval, as companies may decide to stay quiet out of fear of retaliation. The American Cable Association's CEO has described the arbitration remedy as flawed because, among other reasons, it is "too expensive for small and medium-sized MVPDs to utilize on their own, and the manner in which bargaining agents appointed by individual MVPDs could potentially avail themselves of the arbitration conditions was poorly articulated and incompletely described."[135]

An apparently fruitless effort by Project Concord, a start-up online movie and TV streaming service, to seek arbitration under the FCC Order is a prime example of the remedy's shortcomings. In July 2011, Project Concord requested a license for NBCU programming that would include more recently released video-on-demand films and same-season TV shows, as well as other films and shows. Because the requested license was similar to one Project Concord had already obtained from another studio, the applicable behavioral condition should have entitled it to the license from NBCU on "economically equivalent terms." But NBCU disputed the scope of "comparable programming," and refused to give the license, so Project Concord requested arbitration.

In an expensive, year-long process, Project Concord won most of its claim before the arbitrator, but on appeal the Media Bureau, Comcast said licensing the programs to Project

[134] For a description of other reported claims of noncompliance, *see, e.g.*, Letter from Senator Al Franken to the Honorable Tom Wheeler, dated Feb. 27, 2014, http://www.franken.senate.gov/files/letter/140227FCCLetterComcastTWC.pdf.

[135] Statement of Matthew M. Polka, President and Chief Executive Officer, American Cable Association, Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law Committee on the Judiciary, United States House of Representatives, Oversight Hearing on "Competition In The Video And Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable" (May 8, 2014), http://americancable.org/node/4784.

Concord would violate licensing agreements NBCU or Comcast had negotiated with various third parties – though none of those third parties was complaining. The Media Bureau ruled that NBCU was not required to license films and TV programs to Project Concord if doing so would breach those licensing agreements Comcast had negotiated, as long as those agreements were "consistent with reasonable, common industry practice."[136] The matter apparently remains pending in the Commission.

And no one has sought arbitration under the DOJ settlement. The outcome of the DOJ arbitration process is unappealable, an aspect of the process that was of concern to the judge who had to consider whether the consent decree could be approved as in the public interest.[137]

## VIII. CONCLUSION

Comcast and Time Warner Cable have utterly failed to meet their burden of demonstrating that their merger would serve the public interest. As discussed above, the merger would significantly harm competition and consumers by enlarging and solidifying Comcast/TWC's market power in both multichannel video programming distribution and broadband Internet service, threatening to restrict choices, hamper innovation, and inflate costs and prices. The benefits Comcast and TWC claim would result are overstated, are elusive, or do not depend on the merger for their attainment. They are not nearly enough to outweigh the harm.

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[136] Order on Review, In re Project Concord, Inc., MB Docket No. 10-56 (FCC Nov. 13, 2012), http://www.fcc.gov/document/project-concord-inc-v-nbcuniversal-media-llc. As of 2014, according to Comcast, the applications "for review in the Project Concord arbitration remain pending, as does the application for review filed by several content companies challenging the Media Bureau's clarification that OVDs invoking the Benchmark Condition must disclose the terms of the comparable peer agreements to NBCUniversal's outside counsel and consultants to the extent necessary to enable NBCUniversal to carry out its obligations under the Condition." Comcast's Third Annual Report of Compliance with Transaction Conditions, at 4 (Feb. 28, 2014).

[137] Tom Schoenberg, *Comcast's NBC Universal Takeover Approved With Continuing Court Oversight*, BLOOMBERG, Sept. 2, 2011, http://www.bloomberg.com/news/2011-09-01/comcast-takeover-of-nbc-universal-merger-wins-approval-from-federal-judge.html.

Less than four years after Comcast/NBCUniversal, this is "like déjà vu all over again."[138] Comcast is once again promising not to take advantage of its newly strengthened market power, and dangling other good works it will do if only given the green light. The behavioral conditions crafted in an attempt to hold Comcast to those promises have proven to be costly, time-consuming, and ineffective. They should not be tried again now, when the stakes are so much higher.

As former Commissioner Copps warned when TWC and Comcast acquired Adelphia:

> The potential for harm here is in the sheer economic power of distribution and content that can, and likely will, ensue. While rescuing Adelphia from the perils of bankruptcy is laudable, the anti-competitive division of assets proposed by the Applicants is not. The swapping of media properties contemplated by these two giants has the clear potential, even the probability, of limiting competition in numerous media markets across the country. Nothing in this Order can rebut the simple truth that less competition equals higher prices. Indeed, when you step back and look at the totality of these proposed transactions, the direction here is unmistakable: this decision is about Big Media getting bigger, with consumers left holding the bag.[139]

The merger of Comcast and TWC would be an unprecedented, monumental step in the direction of further consolidation of Big Media.

For the forgoing reasons, we urge the Commission not to approve this merger. We do not believe conditions or divestitures would be effective in preventing or overcoming the significant harm this merger would cause.

Respectfully submitted,

Delara Derakhshani
Telecommunications Policy Counsel
Consumers Union

Todd O'Boyle
Program Associate
Common Cause

George P. Slover
Senior Policy Counsel
Consumers Union

[138] "Yogi Berra Quotes," Baseball Almanac, http://www.baseball-almanac.com/quotes/quoberra.shtml.
[139] FCC Approves Adelphia Time Warner Comcast License Transfer, 2006 WL 1976221 (F.C.C. July 13, 2006) (Commissioner Michael J. Copps, dissenting)

# APPENDIX A

**Declaration of Delara Derakhshani**

I serve as Policy Counsel at Consumers Union, the policy and advocacy arm of Consumer Reports.

This declaration is submitted in support of the *Petition to Deny* application in MB Docket No. 14-57.

Consumers Union's mission is to work for a fair, just, and safe marketplace. We represent the interests of consumers in the telecom and media marketplace and work to ensure that all consumers have access to affordable and accessible Internet services. The consumers we represent are customers of multichannel video programming distributors and Internet Service Providers and will be adversely affected if the pending applications in this docket are granted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 21, 2014

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# APPENDIX B

**Declaration of George P. Slover**

I am Senior Policy Counsel at Consumers Union, the policy and advocacy division of Consumer Reports.

This declaration is submitted in support of the *Petition to Deny* applications in MB Docket No. 14-57 that is being submitted by Consumers Union and to which this Declaration is attached.

I and other members and employees of Consumers Union and Consumer Reports are customers of the applicants, and of other multichannel video programming distributors, Internet service providers, online video distributors, and programming content providers who will be adversely affected if the pending applications in this docket are granted, and as their customers we also will be adversely affected if those applications are granted.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that
The foregoing is true and correct.

Executed on: August 21, 2014

George P. Slover

George P. Slover

# APPENDIX C

**Declaration of Todd O'Boyle**

I am Todd O'Boyle, Program Director of Common Cause's Media and Democracy Reform Initiative. This declaration is submitted in support of the *Petition to Deny* applications in FCC Docket Number MB 14-57.

Common Cause is the original citizens' lobby, founded in 1970 by John Gardner, and still battling for open, honest and accountable government in Washington, D.C. and in all 50 states.

We have 400,000 members and supporters, offices in 35 states and activists everywhere who believe that vibrant media is crucial to self-governance. Comcast's proposed transaction with Time Warner Cable will adversely impact the ability of our members to connect and communicate, and stay informed about current affairs.

The factual assertions in the *Petition to Deny* of which official notice may not be taken are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 20, 2014.

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Todd O'Boyle

## CERTIFICATE OF SERVICE

I certify that on August 21, 2014, I sent the foregoing "Petition to Deny" by e-mail to the following:

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