

**Before the
Federal Communications Commission
Washington, DC 20554**

In the matter of

Applications of Comcast Corp.,
Time Warner Cable Inc.,
Charter Communications, Inc.,
and SpinCo for Consent to Assign
and Transfer Control of FCC
Licenses and Other Authorizations

MB Docket No. 14-57

**PETITION TO DENY OF PUBLIC KNOWLEDGE
AND OPEN TECHNOLOGY INSTITUTE**

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Summary

The FCC should block this merger. If the country's largest cable company buys the second-largest, the results for consumers would be disastrous. TV viewers and Internet users depend on choice, competition, and diversity. This merger would threaten all of that, giving Comcast the power to impose its will and extract rents at vital chokepoints. Comcast's business interests would determine what Internet services, programming, and devices people can access and use nationwide. The competitive state of the broadband and cable markets even without this merger is hardly rosy. But the state of competition after it would be dire.

Comcast today has a commanding lead in the marketplace. This merger would increase that lead yet further—giving it a 50% share of the truly high-speed broadband distribution market. This merger would give make-or-break power over much of the video programming and Internet content marketplace. Its decisions would reverberate throughout the industry, reaching far beyond its own customers. As the primary distributor of video programming—and a large creator of video programming itself—it would be able to control the terms under which content is distributed nationwide. To prevent these manifold harms, the FCC must stop this transaction.

Petitioners will demonstrate how this merger would give Comcast unprecedented gatekeeper power in the nationwide market for broadband distribution. Petitioners will also show how Comcast's size gives it the power to shape the pay TV, video device, and online video markets. Because Comcast has failed to demonstrate that, despite these competitive harms, its merger would nevertheless benefit the public interest, the FCC must block it.

Introduction

This is not just a cable TV merger. It is not just a broadband merger. It is a proposed combination of two of the largest media companies in the country, one that would create an entity with the ability to control what millions of subscribers watch on TV and access on the Internet. Public Knowledge and Open Technology Institute, New America Foundation, nonprofit public-interest organizations dedicating to protecting consumers and promoting competition, file this Petition urging the FCC to block this transaction. By blocking this transaction, the FCC will ensure that the interests of consumers come first. Otherwise, TV viewers, Internet users, programming creators, rival platforms, and online content and services all stand to lose.

Comcast and Time Warner Cable consistently rank at or near the bottom of customer satisfaction rankings. This is not just the result of bad management, but of bad incentives. Large cable operators face little pressure to make customers happy, and operate in a business culture devoted to charging more each year for the same products. Their business incentive is to trap customers, not make them want to stay.

While people love TV, many hate their cable companies. That's because the cable industry delivers the content that people want in a way they don't want it. People are willing to pay for cable, but their bills consistently rise at a rate that is higher than inflation, and are filled with mysterious fees. For every channel people want to watch, they need to subscribe to a dozen more. People love the functionality of DVRs, but they're forced into using inferior rented devices, instead of choosing between competing devices the way they do with laptops, TV sets, and smartphones. They increasingly want to watch video online, and on mobile devices, but the cable industry contrives to keep content off of online platforms, or funneled through the "authentication" approach that allows current incumbents to maintain their control of video

distribution. Finally, when despite all these obstacles some online video services do become popular, they find they have to pay cable broadband ISPs to ensure continued quality of service. Secret deals that customers have no knowledge of or influence over control the quality of their Internet connections, and whether their TV line-up will have the channels they want to watch.

The pay TV marketplace in the United States has shown that it is different than other media markets. While the newspaper, music, and publishing industries are struggling to cope with the effects of the digital revolution, the cable TV industry has found it fairly straightforward to avoid “disruption.” New entrants to the video marketplace all have to face a startling fact—in this marketplace, unlike most others, the incumbents hold all the cards. Cable operators control the broadband connections into people’s homes, which online video providers need to access if they’re to reach any customers. They also control the content online services need to carry—either directly (as in Comcast’s control of NBCU content) or through leveraging their position as a dominant distributor. As one industry analyst put it, “Apple didn’t need Nokia’s consent to disrupt the phone business... In TV it needs consent from the people it disrupts.”¹

There is still, however, only so much incumbent cable operators can do to hold back the tide. Technology and viewer demand is inexorably moving video online. Online providers are beginning to create their own content, and even the slowest-moving incumbents have to give people more options and control over how they watch video.

Content creators and distributors alike have the potential to benefit from a changing market. Even some large pay TV providers, like DISH and Verizon, have or plan to launch video services available purely online, without the need to also subscribe to a traditional TV package. Smaller cable operators would benefit from the opportunity to expand beyond their service areas,

¹ Tweet from Benedict Evans, July 30, 2014, <https://twitter.com/BenedictEvans/status/494594950630092800>.

and content creators would benefit from increased distribution outlets. New competitors can enter the market with new approaches no incumbent has even thought of.

But while the video industry is in transition, it is not certain who will control its future. That's where this merger comes in. Comcast does well the way things are today. To Comcast, new technologies are not new possibilities, but platforms for possible competitors. Its reaction to these new technologies has been right out of the old monopolist's playbook: Embrace, extend, and extinguish.²

This explains many of the actions they've taken—from restricting the availability of content online, to limiting the bandwidth available to online video services, to fighting municipal broadband projects. It also explains why these two companies want to merge—united, they will better be able to control the future direction of the video industry. With a nationwide scale, a post-merger Comcast will have no need to expand beyond its footprint. Its footprint would already encompass most of the country's important markets. Comcast's strategy is not to go “over the top”—it's to own the wires and control the content. If the FCC allows it, this could be a successful strategy to ensure that today's distribution incumbents maintain their place.

The actions of the largest cable companies also explain why the industry has seen so many false starts. Some of the largest technology companies—for example, Apple, Intel, and Amazon—have been trying to launch online video services that more directly compete with cable for some time. Thus far, they've hit insurmountable obstacles.³ No matter how much

² Embrace, extend, and extinguish, Wikipedia, http://en.wikipedia.org/wiki/Embrace,_extend_and_extinguish.

³ See, e.g., Amol Sharma, Shalini Ramachandran & Don Clark, *Amazon Considering Online Pay-TV Service*, Wall Street Journal, Jan. 21 2014, <http://online.wsj.com/news/articles/SB10001424052702304757004579334981130200324> (“Those companies seeking to launch new services have struggled to negotiate licensing terms that would allow them to price their services competitively.”); Ina Fried, *Brian Krzanich on Why*

money, technology, and talent a company has, it can't sell a video product if programmers won't sell to them, and programmers won't sell to them if their current largest customers won't let them.⁴ Large cable companies are using their power over content, over the broadband pipe, and over the viewer's TV screen to make sure that any new services that viewers start using are ones they control. Even popular online services like Netflix face a cloudy future where, in order to reach viewers, they first have to pay off cable companies with local monopolies and nationwide monopsonist power.

Comcast in particular is invested in the current way of doing things. After it was allowed to purchase NBC Universal, it became vertically-integrated to a degree no cable company has been before. It now owns a movie studio, many cable channels, TV stations, and the nation's oldest broadcast network. Not only is it able to use its buying power to squeeze programmers, but it also has the incentive and ability to favor its own content over that of its rivals, while limiting the ability of other distribution platforms to access its own content. By buying Time Warner Cable, and increasing its distribution footprint as well as adding to its programming holdings, it would increase its incentive and ability to engage in these sorts of anticompetitive activities.

Comcast was only permitted to purchase NBC Universal under the terms of a consent decree with the Department of Justice, and was subject to enforceable merger conditions by the Federal Communications Commission. But simply extending that decree and those conditions to this merger and to Time Warner Cable's footprint would not be enough to alleviate the specific harms this merger would cause. First, years have passed since the NBC Universal merger, and

He Pulled the Plug on Intel's TV Dreams, re/code, Jan. 2 2014, <http://recode.net/2014/01/02/brian-krzanich-on-why-he-pulled-the-plug-on-intels-tv-dreams>.

⁴ That's not to say that a few of the largest programmers don't see benefits from the current constrained distribution model, which raises prices by inhibiting supply.

policymakers should take this opportunity to evaluate how effective their remedies were. In a number of respects Comcast has been able to subvert them, at times violating their letter, and frequently violating their spirit. But more fundamentally, those merger remedies were addressed toward only some of the same kinds of harms that would be present in this merger—issues of content favoritism and discrimination that can come about when a large distributor buys a large programmer. A Comcast/Time Warner Cable merger could cause many of the same harms—both in how it amplifies existing threats by increasing Comcast’s footprint, and because Time Warner Cable controls several important programming properties in its own right. But it would cause gatekeeper harms of a whole new character, that result from the merged companies’ unprecedented scale as a broadband and video distributor.

This transaction represents a retrenchment of the established way of doing things. By joining forces, Comcast and Time Warner Cable will be better able to defend their turf and their current business practices. They will increase their control over content and over distribution and leverage these to ensure they control the future of video distribution just as they control the present. Instead of video distribution moving in the competitive direction the Internet has shown is possible, the Internet might start to look increasingly like the pay TV world Comcast is so familiar with. To protect the video and broadband future, the FCC must block it.

ARGUMENT

I. The Most Relevant Market in this Transaction is the Nationwide Market for Truly High-Speed Broadband Distribution, Though Many Other Markets Would Be Harmed As Well

The Commission should ensure it uses market definitions that accurately reflect the market power that a post-merger Comcast would have now and in the foreseeable future. In the pay TV space, the Commission and the DoJ have already done the necessary work. The agencies have recognized that online video is only a partial substitute for traditional pay TV service. It is a complementary product, and a potential competitor, but should not be included in the product market.⁵

Similarly, the Commission's market analysis of broadband should only include wireline providers. Consumer behavior, carrier pricing, and the underlying capabilities of the technology all serve to demonstrate that wireless service complements wireline service rather than substituting for it. Ample demonstration of this fact is already before the Commission.⁶ For these purposes, the Commission could trust Time Warner Cable executive Mike Roudi, who stated that "The way we think about it is, wireline and wireless networks are going to coexist.... It would be hard for somebody to rationalize getting rid of their home connection and moving all of that traffic to a wireless rate plan."⁷ As The Consumerist noted, it would cost between \$1200 and \$2200 to watch the complete run of *Breaking Bad* on a mobile wireless connection in one

⁵ Competitive Impact Statement of the Department of Justice 11-30, *United States v. Comcast Corp.*, 1:11-cv-00106 (D.D.C. Jan. 18, 2011) ("Comcast/NBCU Competitive Impact Statement").

⁶ *See, e.g.*, Comments of Public Knowledge et al., in *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (filed July 15, 2014) at 18, *available at* <https://www.publicknowledge.org/documents/official-comments-for-fcc-net-neutrality-proceeding>.

⁷ Anton Troianovski, *Cord-Cutters Lop Off Internet Service More Than TV*, *Wall Street Journal*, May 29, 2013, <http://online.wsj.com/news/articles/SB10001424127887324682204578513262440196772>.

month⁸—a modest level of data consumption that would not even trigger Comcast’s monthly usage cap.⁹

The Commission speed cutoff for what constitutes “broadband” has evolved over the years, to reflect market realities, technological progress, and policy goals. In this proceeding, the Commission should adopt a forward-looking market definition that sets a minimum downstream speed for broadband of 25 Mbps. This is a speed threshold that ensures that average households have adequate capacity for online video and other applications.

The average HD video stream requires 5 Mbps of capacity, and the average American home has three television sets. A 25 Mbps threshold ensures that viewers can use watch television while still having sufficient leftover capacity for mobile devices, online backup services, and other applications. The Commission has already founds that speeds in excess of 15 Mbps are necessary for “[b]asic functions plus more than one high demand application running at the same time”¹⁰—25 Mbps for three high-demand applications plus basic functions is a reasonable extrapolation of this metric. (The Commission may also consider whether it should include other metrics necessary for this level of usage, such as usage caps and latency, in its market definition.)

⁸ Kate Cox, *Comcast Says Mobile Data Is Competitive, But It Costs \$2k To Stream Breaking Bad Over LTE*, Consumerist, August 18, 2014, <http://consumerist.com/2014/08/18/comcast-says-mobile-data-is-competitive-but-it-costs-2k-to-stream-breaking-bad-over-lte>.

⁹ Comcast XFINITY Support, *What are the new data usage plans being trialed?*, <http://customer.comcast.com/help-and-support/internet/data-usage-trials-what-are-the-different-plans-launching>.

¹⁰ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Tenth Broadband Progress Notice of Inquiry*, FCC 14-113, rel. August 5, 2014, Table One.

The Commission has an obligation to “review and reset”¹¹ its broadband standards periodically. It has set itself a goal of “continuing to evolve the speeds and quality of service at which broadband access is commonly available to the American public,”¹² and is required by statute to continue to improve its measurement and analysis of broadband.¹³ Indeed, one of the Commission’s primary obligations to promote universal access to communications technology, which includes access to “advanced telecommunications and information services,”¹⁴ and which requires the FCC to define “an evolving level of telecommunications services . . . taking into account advances in telecommunications and information technologies and services.”¹⁵

The Commission’s past practices are in line with its policy goals and statutory duties. In the Commission’s First Broadband Deployment Report, it adopted a minimum broadband speed threshold of 200 kbps downstream¹⁶—essentially, an “as long as it’s faster than dial-up” threshold. In the Sixth Report, the Commission took “the overdue step of raising the minimum speed threshold for broadband”¹⁷ to 4 Mbps downstream (a metric which is still higher than Comcast’s preferred 3 Mbps cutoff). This month, the Commission signalled that it is likely to adopt a yet-higher minimum standard of 10 Mbps downstream.¹⁸ Yet for the purpose of this merger, this is still not enough. If Comcast purchased Time Warner Cable, the effects will be felt for decades—not just the narrow timeframe when the Commission’s upcoming broadband

¹¹ Connecting America: The National Broadband Plan (2010), at 135.

¹² Measuring Broadband America, Fixed Broadband Report (2014) at 4, <http://www.fcc.gov/reports/measuring-broadband-america-2014>.

¹³ Broadband Data Improvement Act, S.1492 (110th Congress).

¹⁴ 47 U.S.C. § 254(b)(2).

¹⁵ 47 USC § 254(c)(1).

¹⁶ *First Broadband Deployment Report*, 14 FCC Rcd at 2406, ¶ 20 (1999).

¹⁷ *Sixth Broadband Deployment Report*, 25 FCC Rcd 9556, ¶ 4 (2010).

¹⁸ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Tenth Broadband Progress Notice of Inquiry*, FCC 14-113, ¶¶ 14-15 (rel. August 5, 2014).

redefinition is in place. The Commission therefore has good reason to adopt a higher standard for broadband here, one that makes sure that the Commission’s analysis takes into account the broadband needs of today and the near future—and, in particular, one that recognizes that only cable and fiber provide the residential broadband performance that users increasingly need. This standard will help “ensure that [the Commission] remain[s] forward thinking and [is] prepared to satisfy future needs as well as immediate demands.”¹⁹

A 25 Mbps standard will itself not be permanent—the longer term, American’s broadband needs will likely demand the gigabit capacity that only fiber and upgraded cable networks can provide. But for today and the next few years, a 25 Mbps threshold is sufficient to ensure adequate capacity for online video. Given the competitive concerns surrounding Comcast’s incentive and means to degrade online video, a broadband metric that reflects the needs of online video is apt—and is likely to provide sufficient capacity for other services, as well, such as online education, telemedicine, cloud storage, gaming, high-definition VoIP, and other forms of real-time communication.

The Commission should also recognize that the proper market definition for this merger is nationwide, not local. As the Department of Justice has found, the market for the “aggregation, promotion, and distribution of residential broadband content”²⁰ is nationwide. This the market most threatened by this merger—most of the consumer harms that this merger would cause would arise as a result of Comcast’s power in the distribution market. While Comcast’s power in the residential access market is real—and directly increases its ability to exercise its power as a distribution gatekeeper—the gatekeeper harms would be the most immediate. Comcast itself

¹⁹ *Eighth Broadband Progress Report*, 27 FCC Rcd. 10342, ¶ 21 (2012).

²⁰ Competitive Impact Statement, *United States v. AT&T*, No. 1:00-cv-01176 (D.D.C. 2000).

adopted this perspective when it was trying to defend its purchase of NBCU. Then, Comcast CEO Brian Roberts argued before Congress that the nationwide distribution market for video was “very well defined” with “robust distributors,” such as Time Warner Cable.²¹ (While those remarks were about the MVPD marketplace the same reasoning applies to broadband.)

Other providers also recognize that the national market for distribution is the future competitive battleground in the broadband industry. For example, AT&T has recently argued that purchasing DirecTV would strengthen it as an “integrated broadband, wireless, and video provider capable of delivering content on a national scale, across multiple screens and innovative platforms,” pointing to “broader distribution”²² as a particular goal of that transaction, and singling out Comcast and Time Warner Cable as “its principal competitors.”²³

II. If It Buys Time Warner Cable, Comcast Would Have Overwhelming Market Power in the Most Relevant Market, Nationwide Broadband Distribution

There are two ways to arrive at a post-merger Comcast’s share of the appropriate broadband market: Based on post-merger Comcast’s share of the market of providers who are capable of providing truly high-speed broadband, and based on Comcast’s share of providers who currently provide truly high-speed broadband.

²¹ Jon Brodtkin, Franken: Comcast Called Time Warner Cable a Competitor Until They Wanted to Merge, Ars Technica, April 9 2014, <http://arstechnica.com/tech-policy/2014/04/franken-comcast-called-time-warner-cable-a-competitor-until-they-wanted-to-merge>.

²² Declaration of John T. Stankey in AT&T/DirecTV, MB 14-90, at page 10.

²³ AT&T/DirecTV Public Interest Statement, MB 14-90, at page 3.

A. *Post-Merger, Comcast's Share of the Market of Providers Who Are Capable of Offering Truly High-Speed Connections Would Be Near 50%*

Post-merger Comcast's share of the market of providers that are capable of offering truly high-speed broadband would give it monopsony power that would allow it to influence the entire Internet ecosystem.

Cable and fiber are the technology platforms that are capable of offering broadband at the speed tier and with the characteristics necessary to qualify as truly high-speed broadband. There are two primary reasons to think this. First, as a matter of engineering and economics, only cable and fiber are realistically capable of offering truly high-speed broadband. Policymakers should not base their decisions on predictions of future inventions, or claims about possible upgrades to existing networks (e.g. the copper telephone network) that make little economic sense. Nor should they ignore both the physics of radio transmission and the overwhelming evidence about the complementary nature of wireless service in an effort to create a market definition where Comcast is merely extremely dominant, instead of a near-monopolist. For the foreseeable future, cable and fiber are the technologies most likely to serve America's residential broadband needs, and a market definition that includes only those technologies is appropriate.

Second, just looking at what is subscribed to today, cable and fiber-the-premises (FTTP) together comprise nearly 99% of the 25 Mbps and above wireline broadband market.²⁴ This is strong empirical evidence that cable and FTTP together are the technologies best able to meet America's broadband needs. Nevertheless, for these purposes, Petitioners are assuming that all cable, fiber-to-the-node (FTTN), and FTTP providers can offer truly high-speed broadband, an

²⁴ See attached worksheets. This may understate Comcast's dominance, as these figures count FTTN as well as FTTP connections, even though very few FTTN subscribers have 25 Mbps or higher connections.

assumption that likely favors Comcast. Some smaller providers may require substantial upgrades before they are capable of providing service at the appropriate speed tiers.

With this understanding, and using publicly-available information from the Leichtman Research Group, a merger of Comcast and Time Warner Cable would create a broadband provider with more than 49% of this market (44% after a divestiture of 3.9 million subscribers).²⁵ These numbers alone provide a grounds for the FCC to block this merger on both antitrust and public interest grounds.

B. Post-Merger, Comcast's Share of the Market of Providers Who Currently Provide Truly High-Speed Connections Would Be 50%

Post-merger Comcast's share of the market of providers that are currently offering truly high-speed broadband (25 Mbps and up) also show that the company would have monopsony power that would allow it to influence the entire Internet ecosystem. Looking only at providers that actually offer broadband at the appropriate speed tiers today allows one to sidestep some of the questions that would need to be answered under an analysis that looks to capability. This analysis therefore includes all wireline providers, not just cable and fiber—yet the conclusions of this analysis are similar to that of the analysis above.

There is no single, publicly-available information source that breaks down the current subscribership by speed tier of the major cable and broadband providers. However, Comcast has provided post-transaction broadband subscribership numbers, and the FCC compiles a report that breaks down the number of subscribers by speed tier, by technology (though not by provider). It is possible to use these two data sources in conjunction to estimate that Comcast's share of the market of providers who currently offer truly high-speed broadband would be 56%, or 50% post-divestiture. The assumptions and analysis that underlie this conclusion are detailed in the

²⁵ See attached worksheets.

attached worksheet.²⁶ But it is notable that both the Leichtman numbers and this analysis both arrive at a share for Comcast in the range of 50% of the relevant market.

Comcast has spent some energy attacking this 50% number.²⁷ The gulf between Comcast's claim that it would control "only" 35.5% of the market and PK's figures is largely explained by Comcast's use of an outdated 3 Mbps broadband cutoff. Using the same current subscriber methodology as above but with a 3 Mbps cutoff, PK arrives at a post-merger, post-divestiture marketshare for Comcast of 35.13%, in line with Comcast's own figures. While the Commission and Comcast may have access to data sets with more fine-grained detail than the publicly-available numbers used in this Petition, it is unlikely that applying the same assumptions used in this Petition would lead to very different results. (In any event, Petitioners recommend that the Commission ask Comcast to provide its own analysis of what its post-merger marketshare would be at different speed tier cutoffs.) The Commission has a choice—does it want to analyze this merger using yesterday's assumptions for what constitutes adequate broadband, or today's and tomorrow's?

Of course, market share is only relevant inasmuch as it enables a company to exercise market power. Taken together with the evidence that Comcast today, pre-merger, already exercises significant market power against independent video programmers and Internet content providers, there should be little doubt that this merger would significantly enhance Comcast's ability to behave anti-competitively as a content distribution monopsonist.

²⁶ See attached worksheets.

²⁷ Letter from Comcast in MB 14-57, at page 2 (August 13, 2014).

III. The Commission Has Many Sources of Legal Authority It Can Use to Block This Merger

Comcast must prove that removing Time Warner Cable from the marketplace serves “the public interest, convenience, and necessity.”²⁸ The Commission’s public interest analysis embodies a “deeply rooted preference for preserving and enhancing competition in relevant markets...and ensuring a diversity of information sources and services to the public.”²⁹ While “[t]he FCC’s actions should be informed by competition principles,” its “public interest” standard is not limited to purely economic outcomes.³⁰ Comcast must show that its transaction would not harm the public, frustrate the goals of the Communications Act, harm competition, or otherwise break the law, and it must demonstrate that its transaction would result in positive public interest benefits, not merely attempt to rebut claims of harms to the public interest.

Comcast has not met its burden. This merger would harm consumers and competition to such a degree that it should be blocked on both competition law and public interest grounds.

A. Competition Law Provides Grounds to Block This Merger

This merger violates antitrust law. Under the Clayton Act, transactions that substantially lessen competition, or tend to create a monopoly in any line of commerce, are illegal.³¹ As this Petition will show, among other harms, this merger would substantially lessen competition in the nationwide market for the delivery of broadband content.

²⁸ 47 U.S.C. § 310(d).

²⁹ Applications of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, 26 FCC Rcd 4238, ¶ 23 (2011).

³⁰ Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC Blog, August 12, 2014, <http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest>.

³¹ 15 U.S.C. § 18.

“In order to find that a merger is in the public interest,” the Commission must “be convinced that it will enhance competition.”³² This merger violates this test: it decreases competition in relevant broadband and pay TV markets, could choke off innovation in the video device market, and could limit incipient competition from online video distributors. The Commission must block it.

B. The Commission Should Block This Merger Because It is Contrary to the Public Interest and Would Frustrate the Goals of the Communications Act

The Commission must determine whether this merger “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”³³ But Comcast’s burden is not merely to show a lack of public interest harms. It must demonstrate specific public interest benefits that would directly flow from this transaction. It has not done so. On the contrary, the record shows that this merger would frustrate the goals of the Communications Act and harm the public interest by limiting American’s access to affordable communications services and content from a diversity of sources.

The Commission is charged with providing access to advanced telecommunications and information services across the country and encouraging deployment to all Americans;³⁴ ensuring quality services...available at just, reasonable, and affordable rates;³⁵ promoting the development of the Internet and preserving the competitive free market for its provision;³⁶ encouraging the development of technologies which maximize user control over what

³² Applications of NYNEX and Bell Atlantic for Consent to Transfer Control, *Memorandum Opinion & Order*, 12 FCC Rcd 19985, ¶ 2 (1997).

³³ XM Satellite Radio Holdings, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd 12348, ¶ 30 (2008).

³⁴ 47 U.S.C. §§ 254(b)(2), 1302(a).

³⁵ 47 U.S.C. §§ 254(b)(1), 201(b), 151.

³⁶ 47 U.S.C. §§ 230(b)(1), 230(b)(2).

information is received by individuals, families, and schools who use the Internet;³⁷ and preventing unjust or unreasonable discrimination by carriers.³⁸ This Petition shows that the merger would frustrate all of these goals, because of its effects on the pay TV, broadband, programming, online video, and telecommunications markets.

The Commission is also directed by Congress to

promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.³⁹

This provision grants the FCC “broad and sweeping” powers to promote video competition.⁴⁰

Unless the Commission blocks this merger, its ability to carry out this provision, and other provisions that direct the Commission to “promote competition in cable communication” and “assure that cable systems are responsive to the needs and interests of the local community,”⁴¹ would be frustrated.

The Commission is also required to maintain “standards by which cable operators may fulfill their customer service requirements,” which

include, at a minimum, requirements governing—
(1) cable system office hours and telephone availability;
(2) installations, outages, and service calls; and
(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).⁴²

As this Petition demonstrates, Comcast, which has been called the “worst company in America,”⁴³ has a poor customer service record falls short of any reasonable customer service

³⁷ 47 U.S.C. § 230(b)(3).

³⁸ 47 U.S.C. § 202(a).

³⁹ 47 U.S.C. § 548.

⁴⁰ *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (DC Cir. 2009).

⁴¹ 47 U.S.C. § 521.

⁴² 47 U.S.C. § 552.

metric. If it allows this merger to go through, the FCC’s ability to implement its statutory requirement to promote adequate customer service would be frustrated.

Finally, the third element in Comcast’s triple play—telephone service—should not be overlooked. The public interest goals that would be harmed by this merger apply with equal force to the broadband, video, and telephony markets. Because Time Warner Cable operates regulated telecommunications services in several states,⁴⁴ Comcast may not “acquire or operate” such services unless it can show that “the present or future public convenience and necessity require or will require” it to do so.⁴⁵ Because this merger will not serve the public interest, Comcast cannot make that showing. This provides independent grounds for the Commission to deny this transaction.⁴⁶

IV. This Merger Would Give Comcast Significant Gatekeeper Power as a Distributor of Broadband and Video Content

If you listen to Comcast, this merger can’t be dangerous because Comcast and Time Warner Cable do not overlap in territory. It is true that cable companies, with limited exceptions, have chosen not to compete with each other for residential subscribers. Sometimes there are unavoidable economic reasons for this: last-mile communications networks, like the electric grid, water system, and other public utilities have a tendency toward natural monopoly (and should be regulated accordingly). In many areas, it is simply not economic to build competitive infrastructure.

⁴³ Adrienne Jeffries, *The Worst Company in America*, The Verge, August 19, 2014, <http://www.theverge.com/2014/8/19/6004131/comcast-the-worst-company-in-america>.

⁴⁴ Time Warner Cable, Regulatory & Carrier Relations, http://help.twcable.com/twc_regulatory.html.

⁴⁵ 47 U.S.C. § 214.

⁴⁶ Comcast has requires that it requires Section 214 authorizations to complete this transaction. Comcast/Time Warner Cable Joint Applications and Public Interest Statement, in MB 14-57, at 173 (“Public Interest Statement”).

But it is also clear that some providers have made a conscious choice not to expand into territories covered by other providers, and to grow through mergers, instead. Some high-density markets do support multiple facilities-based pay TV and broadband competition. For example, Verizon’s FiOS broadband and TV service overlaps with cable in most of the territory it covers. Niche cable overbuilders also have built a business. It is unlikely that these providers have exhausted all the possibilities that exist for facilities-based competition, and that economic forces alone explain why large cable providers do not expand into each others’ territory. Major cable providers like Comcast and Time Warner Cable should be foreclosed from using the cable industry’s uncompetitive state as an argument in favor of further mergers.

But while mergers of head-to-head competitors are one kind of anticompetitive merger, they are not the only kind. Mergers that create a powerful gatekeeper—to use the technical term, mergers that create a monopsony, as opposed to a monopoly—are bad for consumers, as well. A monopoly exists when a single seller of a good or services has market power, which means it can raise prices at will without being afraid of losing business to competitors. A monopsony, on the other hand, exists when a single buyer has the ability to demand that it pays less for goods or services, or is able to extract other kinds of onerous terms, leaving sellers with nowhere else to go. Monopsonies, like monopolies, can violate antitrust law. As the Department of Justice explains,

Enhancement of market power by buyers, sometimes called “monopsony power,” has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.⁴⁷

⁴⁷ DoJ Horizontal Merger Guidelines 2 (2010).

While there's nothing wrong with driving a hard bargain, a seller who is not satisfied with a buyer's terms should be able to walk away, and sell to someone else, instead. When a single buyer is so important that this is not a realistic option—especially when that buyer puts not just a single seller, but an entire industry in that position—it has monopsony power. If regulators allow this merger to proceed, they will create the most powerful communications monopsonist the country has ever seen, and a communications company with more market power than the country has faced since the breakup of the Bell System.

A. Comcast Would Have Increased Ability to Leverage Network Interconnection Points to Extract Rents and Disadvantage Rivals, Particularly OVDs

For an Internet service to reach Comcast's customers, at some point either its data network or a third-party network must interconnect with Comcast's network. These interconnections are unregulated, and can take many forms. Two networks may interconnect with each other for free, each bearing its own costs, in so-called "settlement-free" peering. Or one network might pay to deliver traffic to, or accept traffic from, another network. A "content delivery network" (CDN) might install specialized equipment on another network's premises, sometimes paying, sometimes not. The exact business relationships between the different networks vary, and depend on the relative advantage each network gets out of the interconnection.

Most parts of the Internet (e.g., the "transit" market of networks that carry data from place to place) are competitive, and there are often multiple ways to route traffic. Even if two networks can't reach a deal, Internet traffic can usually still reach its destination. If an Internet content provider can't reach a deal with an individual transit provider or a CDN, there are other transit providers and CDNs who can perform the same function. Large Internet content

providers, such as Facebook, Google, and Netflix, can even find it beneficial to build out their own transit and CDN networks, internalizing some costs and connecting directly to end-user networks.

However, end-user networks themselves are an area of special interest. That's because there is no other way to reach end-users than through their ISPs. Comcast makes the bizarre claim that "edge providers have multiple avenues for reaching Comcast's broadband subscribers,"⁴⁸ but this is misleading. While it is well-understood that there are fewer competitive concerns "[i]f competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution,"⁴⁹ the fact that there are multiple ways to reach Comcast's *network* does not mean there are alternative ways to reach its *customers*. No matter how competitive the transit, CDN, and Internet backbone markets are, there is no way to reach Comcast's customers except through Comcast. Comcast might argue that an edge provider has the option of paying Comcast directly, or paying some third party to pay Comcast. But the common feature in all of these agreements is that Comcast gets paid. Comcast's argument is analogous to the operator of the only toll bridge into a community arguing that the bridge market is competitive, because there are multiple roads that lead to the bridge.

Comcast's position is nothing more than a fact of network topology. Every residential ISP stands in the same position with respect to its subscribers, and broadband subscribers don't need to simultaneously connect to multiple broadband networks to ensure that edge providers have multiple paths to reach the same user. But the privileged position of smaller residential ISPs is less of a concern because they have less ability to abuse it. Consider a smaller ISP making an

⁴⁸ Public Interest Statement at 159.

⁴⁹ *Omega Env'tl v. Gilbarco*, 127 F.3d 1157, 1163 (9th Cir. 1997).

unreasonable demand for interconnection fees from an edge provider: It would not have the leverage to get its way. An edge provider might prefer to connect with that network on reasonable terms and provide high-quality service to its users. But if it cannot, the edge provider can walk away. A smaller ISP's user base is not large enough where if an edge provider fails to reach an interconnection deal with it, the edge provider would be cut off from a large part of its customer base.

By contrast, large ISPs such as Comcast, with tens of millions of customers, can pose an existential threat to Internet edge providers if they provide no means for their residential subscribers to access the edge providers' services. Comcast already controls a large portion of the residential ISP market and is able to leverage its subscriber base in negotiations against edge providers. By purchasing Time Warner Cable, its leverage would increase even more, increasing its ability to put pressure on the networks it connects with.

In the past few years, this issue has come to the forefront of tech policy, as Comcast has started to flex its muscles and demand new kinds of payments from Internet backbone and content providers. Comcast first started requiring that Internet backbone providers, with whom it had long had settlement-free relationships, begin paying Comcast for interconnection⁵⁰ on the spurious grounds of traffic balance—a largely-irrelevant metric⁵¹ that, because Comcast's user base is largely residential subscribers with asymmetrical connections, will always favor Comcast. It has since been reported that other major edge providers pay Comcast, as well. There is reason to conclude, even though the exact contract terms are confidential, that edge providers

⁵⁰ Matthew Lasar, *Peers or Not? Comcast and Level 3 Slug it Out at FCC's Doorstep*, Ars Technica, Feb. 25, 2011, <http://arstechnica.com/tech-policy/2011/02/peers-or-not-comcast-and-level-3-slug-it-out-at-fccs-doorstep>.

⁵¹ Dr. Peering, *The Folly of Traffic Ratios*, <http://drpeering.net/white-papers/The-Folly-Of-Peering-Ratios.html>.

are not paying just for the cost of an interconnection—which may be fair—but some amount in excess of that, calculated to cover Comcast’s general business expenses and network maintenance. In short, users pay Comcast to reach the Internet, and the rest of the Internet has to pay Comcast to reach users. Comcast is in the catbird seat.

When interconnection issues arise, most customers don’t know who to blame.⁵² All they can see is that certain applications no longer perform well. But even if users were able to understand the cause of their degraded online experience, it is usually easier for a user to switch from one Internet service to another, than to switch from one ISP to another. Even if a fully-informed customer knew that Comcast was behaving anticompetitively in degrading her access to an online video site, the easiest and most effective way to fix the problem is usually going to be to find a new online video site—not a new ISP.⁵³ That assumes she can even switch if she wanted to. Comcast’s ability to exploit its interconnection relationships is made worse by that fact that most of Comcast’s customers do not have sufficient competitive alternatives. It’s bad enough that Comcast can use its customers as leverage in negotiations with other networks. But many of these customers are held hostage, with nowhere else to go.

⁵² Nicholas Economides, *Why Imposing New Tolls on Third-party Content and Applications Threatens Innovation and Will Not Improve Broadband Providers’ Investment, in Net Neutrality: Contributions to the Debate* 87, 96 (2010), available at http://www.stern.nyu.edu/networks/Economides_Imposing_New_Tolls.pdf.

⁵³ The effects of these kinds of actions can extend beyond Comcast’s footprint. Most obviously, an Internet service that has to pay significant fees to a last-mile ISP will have less money to invest in its own service, and if it’s a pay service, it may have to raise its rates to customers nationwide. But it may also be compelled to seek payments of its own from other networks that it interconnects with, if it has bargaining power over them. Petitioners do not deny that it is possible that a large edge provider would have the same leverage over a smaller ISP that a large ISP has over most edge providers. In general, edge markets are more competitive and have fewer barriers to entry than access markets but this is not always the case.

Comcast's executives reject the idea that, in this case, "big is bad."⁵⁴ But it is Comcast's size, and its size alone, that gives it the means to exploit interconnection deals for its own ends. If regulators permit it to purchase Time Warner Cable, its power to do this will only increase, and the harms to the Internet economy will be exacerbated. Comcast's bigness is already bad. It should not get bigger.

This problem is particularly acute when it comes to online video. Online video providers face the same challenges as other networks when it comes to interconnection. As the Department of Justice found, online video providers "are dependent upon ISPs' access networks to deliver video content to their subscribers[.]" However, online video services, unlike many other Internet services, compete with cable providers such as Comcast in the market for video. As the DoJ further observed, there is a danger that Comcast could "adversely affect[] the quality of [online] services that that compete with Comcast's own" video services.⁵⁵ Unfortunately, none of the conditions the DoJ imposed on Comcast for its NBCU merger apply to these interconnection issues.

Problems with last-mile interconnection area may soon merit a regulatory response. But the best thing regulators can do in the short term is to prevent any one last-mile ISP from further increasing the bargaining power it has over Internet service providers through mergers.

B. Comcast's Incentive and Ability to Interfere With the Open Internet Would Increase

The ways that large ISPs like Comcast can exploit their position in the interconnection space, and with regard to net neutrality violations, are very similar. By exploiting interconnection

⁵⁴ Ted Johnson, *Comcast's David Cohen: Merger With Time Warner Cable 'Not a Very Scary Story'*, Variety, March 27, 2014, <http://variety.com/2014/biz/news/comcasts-david-cohen-merger-with-time-warner-cable-not-a-very-scary-story-1201149315>.

⁵⁵ Comcast/NBCU Competitive Impact Statement at 37.

agreements, large end-user ISPs can manipulate the market, demand anticompetitive payments, and push users to their own affiliated services. Net neutrality violations cause many of the same problems, but through different means: Instead of exploiting physical network connections, large ISPs such as Comcast can exploit their control over physical infrastructure to give differential treatment to Internet applications and services that have already entered their network through an interconnection point. For example, Comcast might not choose to interfere with an interconnection with a particular Internet backbone provider that may be carrying hundreds of Internet applications and services, but it may want to slow down just a handful of those services to its users, or demand direct payments from one of the edge providers. Like with interconnection problems, only large ISPs have the market power to fully exploit their position. By purchasing Time Warner Cable, Comcast's existing ability to interfere with the marketplace by violating the principles of the Open Internet would be enhanced.

Comcast's offer to extend its existing net neutrality commitments (imposed on it as a condition of its purchase of NBC Universal) do not alter this analysis. Comcast is proposing to change the structure of the residential broadband market in a way that could have effects for decades to come. Time-limited conditions do little to change this, and as discussed below, there are particular reasons to be skeptical that conditions can alleviate the harms this merger could cause.

C. The Merger Would Increase Comcast's Incentives and Ability to Discriminate Against Online Services, Especially Video, and Otherwise Take Actions that Detriment its Customers

If it buys Time Warner Cable, Comcast's incentives to make its products worse, not better, would increase. Already, Comcast's business interests can work at cross-purposes to the interests of its users. While users want access to video programming and Internet content with

has few barriers as possible, Comcast has the incentive to push its users towards its own content and services, instead—or to those third-party programmers and service providers that pay for special treatment. By exercising this strategy, Comcast can extract multiple revenue streams from the same subscribers. Not only do Comcast’s subscribers pay it directly for broadband and pay TV access—they watch Comcast content on devices rented from Comcast, where they are served Comcast ads. Even those independent online services they use wind up paying Comcast one way or the other. Comcast’s ability to extract revenue at multiple points would increase post-merger. It is able to do this not only because of its sheer size, but because most of its subscribers do not have adequate competitive alternatives.

Arguing against this idea, Comcast’s expert Dr. Israel writes that “[a]ny strategy that reduces the availability or attractiveness of edge services would reduce demand for the combined firm’s broadband services, potentially causing customers to switch to rival broadband providers ... or to reduce their overall consumption of broadband services, either of which would harm the combined firm’s profits.”⁵⁶

But this assumes (1) That customers can easily switch to rival broadband providers, and (2) That customers would consume less broadband overall if fewer services were available. Both of these assumptions are questionable.

It is accepted that competition usually ensures that businesses provide the services their customers actually want. But in most markets, Comcast faces little competition. To inflate its claims about competition, Comcast must rely on an FCC chart that carries the disclaimer that it “does not necessarily reflect the number of choices available to a particular household, and does

⁵⁶ Public Interest Statement, Declaration of Dr. Israel, at ¶ 204.

not purport to measure competition,”⁵⁷ and that lumps wireless and wireline providers together. The real numbers tell a different story.

Only fiber can provide a service comparable to cable—after all, cable and fiber together account for 99% of current 25 Mbps broadband subscribers. But only a small number of cable customers could switch to fiber-to-the-premises (FTTP) technology. Verizon’s FiOS service, far and away the most popular residential fiber network, overlaps well under 20% of both Comcast’s and Time Warner Cable’s footprint.⁵⁸ To make the threat of fiber seem more pronounced, Comcast relies on press releases, announcements, and pilot projects.⁵⁹

Fiber-to-the node (FTTN) networks are essentially upgraded DSL—they have limitations that neither fiber nor cable have (e.g., the bandwidth available for video service) but can offer speeds comparable to mid-tier cable broadband. The FCC currently counts FTTN networks as varieties of DSL, but its current subscribership figures show a very small number of “DSL” customers with downstream speeds of 25 Mbps or greater. This demonstrates that customers do not see FTTN as an option for truly high-speed broadband. Even if this were to change, FTTN, like FTTP, overlaps only a small portion of Comcast’s and Time Warner Cable’s footprint.⁶⁰ In the words of *The Consumerist*, AT&T’s U-Verse, the leading FTTN service, is “still a complete

⁵⁷ Wireline Competition Bureau, Industry Analysis and Technology Division, Internet Access Services: Status as of June 30, 2013, at page 9.

⁵⁸ Joan Engebretson, *Moffett: FiOS Will be an Ongoing Cable Threat*, TeleCompetitor, August 14, 2013, <http://www.telecompetitor.com/moffett-fios-will-be-an-ongoing-cable-threat>. Comcast has redacted its own FiOS overlap number but provides a 13% FiOS overlap figure for Time Warner Cable, which is lower than the Moffett Research estimate. Public Interest Statement, Declaration of Dr. Israel, at ¶ 50.

⁵⁹ Public Interest Statement, Declaration of Dr. Israel, at ¶¶ 53-54.

⁶⁰ Public Interest Statement, Declaration of Dr. Israel, at ¶ 56.

non-factor for millions of broadband consumers in tons of cities and states, including the densely populated urban corridors of both the northeast and the West Coast.”⁶¹

For most cable subscribers, the only wireline alternative to cable is standard DSL—and even a degraded Internet experience on cable might be better than the DSL alternatives. As Comcast CEO Brian Roberts recognized as early as 2008, “DSL is the new dialup.”⁶² DSL is a legacy technology that does not offer truly high-speed broadband service, and customer and pricing data confirm that it is not a true competitor to broadband. Because for most customers that have an Internet access choice, DSL is their next-best alternative, Comcast’s only incentive is to keep its service marginally better than DSL: not much of a hurdle.⁶³

Additionally, Comcast is likely overstating the degree to which its actions might reduce demand for broadband and therefore be counterproductive. Broadband is an essential service for most users, and Comcast has wide latitude to take actions adverse to its users before they simply flee. Comcast’s strategy would not be to stop people from using high-bandwidth Internet services entirely—just to steer them to the ones it controls (e.g. its own broadband video-on-demand services, and TV Everywhere programming), or finding ways to monetize (e.g., through interconnection fees) popular third-party services it does not. However, even if Comcast’s strategy, by making higher broadband tiers less attractive, causes it to lose some revenue, this is likely swamped by the rents it collects elsewhere.

⁶¹ Kate Cox, *Comcast Officially Files for TWC Merger, Claims Broadband Competition Is Fine Because You Have A Smartphone*, Consumerist, April 8, 2014, <http://consumerist.com/2014/04/08/comcast-officially-files-for-twc-merger-claims-broadband-competition-is-fine-because-you-have-a-smartphone>.

⁶² Transcript, CMCSA - Comcast Corporation at Bear, Stearns 20th Annual Media Conference, at page 4, <http://files.shareholder.com/downloads/CMCSA/0x0x299559/4ba532f8-5fa5-4654-aa4b-f38d1c76e248/030607.pdf>.

⁶³ Additionally, in highly concentrated markets competitors tend to engage in parallel behavior, meaning that a customer’s “alternative” provider might be just as bad, making switching pointless.

But even for those customers who do have alternatives to Comcast, the ability of competition to discipline any anticompetitive action by Comcast is also limited by switching costs, which are endemic to residential broadband service. As a recent report notes, the “economic literature sets out a wide range of switching costs that may exist in a market. In practice, virtually all are present in broadband, particularly for those consumers (more than 80%) who purchase broadband as part of a bundle.”⁶⁴ Comcast’s customers face at least five major categories of switching costs: search costs for finding and researching new service, uncertainty costs relating to the potential quality of new service, compatibility costs of owned equipment that may be rendered obsolete, contractual costs, and transaction costs (the direct costs of making the transition).⁶⁵ The Commission has noted similar switching fees incurred by residential ISP customers, including early termination fees (a contractual cost); the inconvenience of ordering, installation, and equipment setup (transaction costs); temporary interruption of service (a transaction cost); problems learning a new service (a learning cost), and the potential loss of a personal website or email address (a transaction cost).⁶⁶ This significantly reduces the overall ability of Comcast’s subscribers to switch broadband providers even when faced with objectionable behavior.

Furthermore, many of Comcast’s subscribers purchase bundles of service, comprised of broadband, pay TV, and often telephone service. This intensifies many of these costs, and adds at least two more broad categories of switching costs for consumers—shopping costs associated

⁶⁴ Robert Kenny & Aileen Dennis, *Consumer Lock-in for Fixed Broadband*, Computers & Comm. Industry Ass’n Report, 4 (Sept. 5, 2013), <http://www.cciainet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf>. See also Patrick Xavier & Dimitri Ypsilanti, *Switching Costs and Consumer Behavior: Implications for Telecommunications Regulation*, 10(4) Info 13 (2008).

⁶⁵ Kenny & Dennis, at 10.

⁶⁶ Preserving the Open Internet, Report & Order, 25 FCC Rcd. 17,905, ¶ 34. The categorization of costs is based on descriptions given in Kenny & Dennis, *supra* note 36, at 8-10.

with buying three new services at once and learning costs associated with becoming familiar with multiple new types of equipment.⁶⁷ As with the more general categories of switching costs, bundling reduces firm-specific elasticity of demand and thereby lowers overall subscriber churn.⁶⁸ Research suggests, in fact, that cable companies and other firms in recurrent service industries explicitly use bundled offerings as a means to reduce customer churn by increasing customer switching costs.⁶⁹

Switching providers incurs uncertainty costs because it is very difficult for consumers to assess the quality of a new service in advance. However, allowing paid prioritization and other blocking systems can create additional sources of uncertainty that magnify access networks' market power. In particular, customers may not be able to ascertain the sources of internet access problems, and therefore may attribute quality of service issues to edge providers instead of network operators. Regardless of what party might be responsible for the situation, "[t]he fact that the quality of the network services is opaque to consumers under discrimination, confers additional market power to access networks."⁷⁰

Finally, while Comcast does not face sufficient competition to discipline its behavior and ensure that it provides the best possible service to consumers, the little competition it does face, along with other factors, demonstrates why the "single monopoly profit" argument, frequently

⁶⁷ Kenny & Dennis, at 10.

⁶⁸ Economides, at 87, 96.

⁶⁹ See Jeffrey Prince, *The Dynamic Effects of Triple Play Bundling in Telecommunications*, Time Warner Cable Research Program on Digital Commc'ns: Winter 2012 Report, 15, http://www.twcresearchprogram.com/pdf/TWC_PrinceReport.pdf ("[W]e present a novel explanation for firms to bundle that is particularly pertinent in recurrent service industries—reduction of churn.")

⁷⁰ Economides at 96. See also Open Internet Order ¶ 27.

advanced to justify anticompetitive conduct,⁷¹ is not available. Under this theory, if Comcast wants to maximize its profits the easiest thing it can do is charge its users more, and efforts to control adjacent markets or demand high payments from edge services would be, at best, revenue neutral. However, this argument, to the extent it is valid at all,⁷² is only available in in “unusual and extreme circumstances”⁷³ which rarely occur in the real world. The limited, imperfect competition that Comcast faces in some markets means the argument does not apply. Indeed, that competition is typically based on top-line prices and speeds, since few people choose their broadband provider based on interconnection policies and network management practices. Furthermore, Comcast is subject to political, regulatory, and other constraints that limit its ability to raise rates indiscriminately. Thus, Comcast’s profit-maximizing strategy is to seek revenue streams from third parties such as edge providers, to extend its control into markets adjacent to broadband (such as online video), and to maintain its points of control (such as the set-top box). Only large providers, such as Comcast today, are able to employ these tactics, and the larger Comcast is, the more effectively it can employ them. This merger would increase Comcast’s incentive, and ability, to extract new revenue and degrade the quality of its offerings by imposing harsh terms on programmers and Internet services, and to try to control adjacent markets. In other words, ““The potential for competitive harm from exclusionary conduct by a dominant firm cannot be ruled out by appeal to economic theory.”⁷⁴

⁷¹ Jonathan B. Baker, Taking the Error Out of ‘Error Cost’ Analysis: What’s Wrong with Antitrust’s Right, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333736 (2014) 18-20.

⁷² Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harvard Law Review 399 (2009)

⁷³ Baker at 19.

⁷⁴ Baker at 20.

D. Comcast's Poor Customer Service Record, High Prices, and Negotiations with Content Suppliers Show That Its Interests Are Not Aligned With the Public Interest and the Interests of Its Subscribers; The Merger Would Worsen This

This simplest way to demonstrate that Comcast, as a business, does not put its users' interests first is to review its behavior today. To the extent that these issues are caused by Comcast's current scale (and its pattern of acquisitions) there is good reason to believe that by purchasing Time Warner Cable, they would get worse.

Time Warner Cable is notorious for poor customer service itself. But there is one company it beats: Comcast. Comcast ranks dead last in the American Customer Satisfaction Index, and its score keeps dropping.⁷⁵ If Comcast buys Time Warner Cable, millions of customers would get even worse customer service than they do today.

Comcast's customer service levels are so astonishingly poor that customers have taken to recording their interactions with Comcast representatives and sharing them online.⁷⁶ This sort of evidence is necessary, because otherwise Comcast's customer service techniques are so poor as to be unbelievable. Investigative reports show that the blame for this has at least two sources. First, Comcast trains and incentivizes its employees to prioritize upselling over satisfying

⁷⁵ Press Release, ACSI: 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>.

⁷⁶ See, e.g., Elsie Hu, *Comcast 'Embarrassed' By The Service Call Making Internet Rounds*, NPR, July 15, 2014, <http://www.npr.org/blogs/alltechconsidered/2014/07/15/331681041/comcast-embarrassed-by-the-service-call-making-internet-rounds>; Adrienne Jeffries, *Now everyone is recording their nightmare Comcast calls*, The Verge, August 11, 2014, <http://www.theverge.com/2014/8/11/5991525/now-everyone-is-recording-their-nightmare-comcast-calls>; Brad Reed, *Comcast Keeps Customer on Hold Until It Closes to Avoid Canceling His Service*, Yahoo! Tech, August 13, 2014, <https://www.yahoo.com/tech/comcast-keeps-customer-on-hold-until-it-closes-to-avoid-94637033299.html>; Jon Brodtkin, *Comcast incompetence inspires more painful tales from customers*, Ars Technica, August 21, 2014, <http://arstechnica.com/business/2014/08/comcast-incompetence-inspires-more-painful-tales-from-customers>.

customer requests.⁷⁷ Second, Comcast is a poorly-organized, unmanageable company.⁷⁸ It has grown too large too quickly, largely through acquisitions, and its structure and lines of accountability have not kept up.⁷⁹ If it purchases Time Warner Cable, these problems would get worse. This would fly in the face both of the FCC's public interest analysis, as well as its separate statutory obligation to ensure adequate customer service levels in the cable TV marketplace.

Comcast's prices, bundles, and tiers are designed to extract as much money from its subscribers as possible, not to give them the choices they want.⁸⁰ Cable prices have been getting higher and higher for many years, recently increasing in price at a rate more than four times the rate of inflation.⁸¹ Comcast's bills are a confusing mess riddled with unadvertised, below-the-line

⁷⁷ Adrienne Jeffries, *Employee metrics show how Comcast pushes customer service reps to make sales*, The Verge, August 19, 2014, <http://www.theverge.com/2014/8/19/6028059/training-materials-show-how-comcast-pushes-customer-service-reps-to>.

⁷⁸ Harold Feld, *Is Comcast's Awful Service Grounds For Blocking The TWC Deal? Yes, Actually.*, Wet Machine, August 21, 2014, <http://www.wetmachine.com/tales-of-the-sausage-factory/is-comcasts-awful-service-grounds-for-blocking-the-twc-deal-yes-actually>.

⁷⁹ Adrienne Jeffries, *Comcast Confessions: Growing Pains of a Goliath*, August 11, 2014, <http://www.theverge.com/2014/8/11/5978481/comcast-confessions-there-is-no-one-comcast>.

⁸⁰ Warren S. Grimes, *The Cable Television Case: Troublesome Indicia for the Making of Antitrust Law?*, http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/protected/grimes_march_2013.pdf ("The consumer surplus captured through the forced bundles is likely to very substantial. According to an analysis published in the Los Angeles Times, the average household pays approximately \$90 a month for cable programming, and almost half of this goes to pay for sports channels which only 15 to 20% of consumers regularly watch." (citing Joe Flint & Meg James, *Sports Cost, Even If You Don't Watch*, Los Angeles Times, A1 (Dec. 2, 2012)).

⁸¹ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Report on Cable Industry Prices, MM 92-266; Chris Morran, *FCC: Basic Cable Prices Increased At Four Times Rate of Inflation*, Consumerist, May 19, 2014, <http://consumerist.com/2014/05/19/fcc-basic-cable-prices-increased-at-four-times-rate-of-inflation>.

fees⁸² and (oftentimes misleading) equipment rental charges.⁸³ This is due to many factors, but among them is the fact that most cable customers, particularly if they buy a bundle of pay TV and broadband service, have nowhere else to go. While Comcast claims that this merger will help it achieve efficiencies, by its own admission this merger will not lower, or slow down the rate of increase, of its subscriber's bills. In the words of Comcast Executive Vice President David Cohen, with this merger, Comcast is "certainly not promising that customer bills are going to go down or even that they're going to increase less rapidly."⁸⁴

Comcast's policies with regard to data caps—policies that sell Internet users broadband access but then limit what they can do with it—are worse than Time Warner Cable's. While Time Warner Cable tries to provide customers with a choice of whether they want a cap, in many markets, Comcast requires it.⁸⁵ Comcast's data cap policies would be a setback for current Time Warner Cable customers, and could decrease demand for high-bandwidth online services to the detriment of Internet users nationwide. But Comcast's policies with respect to data caps are even worse than they first appear—it has a practice of exempting its own broadband traffic from the usage caps, an anticompetitive practice that encourages users to use its online video services instead of those of its competitors.

⁸² Karl Bode, *Comcast Only Latest to Bury Retrans Hikes in Below the Line Fees*, DSL Reports, November 25, 2013, <http://www.dslreports.com/shownews/Comcast-Only-Latest-to-Bury-Retrans-Hikes-in-Below-the-Line-Fees-126803>.

⁸³ Libor Jany, *FCC Sides with Local Cable Commissions against Comcast*, StarTribune, April 5, 2014, <http://www.startribune.com/local/east/254058681.html>.

⁸⁴ Edward Wyatt, *As Services Expand, Cable Bills Keep Rising*, New York Times, Feb. 14, 2014, <http://www.nytimes.com/2014/02/15/business/media/as-services-expand-cable-bills-keep-rising.html>.

⁸⁵ Geoff Herbert, *Comcast, Soon to Own Time Warner Cable, Plans to Cap Data Usage for Customers*, May 15, 2014, Syracuse.com, http://www.syracuse.com/news/index.ssf/2014/05/comcast_cap_data_usage_limit_time_warner_cable.html.

In addition to violating net neutrality through the manipulation of data caps, it is notable that Comcast's discriminatory actions lay at the heart of the net neutrality debate. While some time has passed since the FCC found that Comcast violated the principles of the Open Internet by surreptitiously degrading BitTorrent traffic,⁸⁶ there is little evidence that the company culture that gave rise to this violation has changed. As Comcast executive David Cohen recently stated about Internet "fast lanes," "Whatever it is, we are allowed to do it."⁸⁷ Comcast fundamentally does not accept the public interest and legal obligations that should accompany its status as a dominant broadband provider. The Commission should not permit a company with this track record to further expand its reach in the broadband marketplace.

Finally, there is ample evidence that Comcast already abuses its monopsony power, and therefore reason to conclude that with even more leverage, this behavior would get worse. Comcast's behavior in the broadband interconnection space has been documented above. Its tactics are similar in the pay TV space. Though the use of most-favored-nation clauses in its programming contracts, Comcast is able to starve online video services of popular content while depriving independent programmers of marginal revenue. Comcast has a history of steering viewers to its own programming rather than that of its rivals, and has been involved in high-profile carriage disputes, that frequently include allegations of discrimination by Comcast, with

⁸⁶ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion & Order, 23 FCC Rcd 13,028 (2008).

⁸⁷ Todd Spangler, *Comcast's Cohen: Whatever an Internet 'Fast Lane' Is, We're Allowed to Do It*, May 14, 2014, Variety, <http://variety.com/2014/biz/news/comcasts-cohen-whatever-an-internet-fast-lane-is-were-allowed-to-do-it-1201180653>.

Bloomberg, Player's Network, Wealth TV, TCS Sports Broadcasting,⁸⁸ NFL Network,⁸⁹ Mid-Atlantic Sports Network, Tennis Channel, and others.

E. Comcast is Able to Leverage its Control of Video Devices and Apps to Extract Rents and Control Adjacent Markets; Its Incentive and Ability to Do This Would Increase Post-Merger

Comcast's gatekeeper power is not limited to its control of the last-mile broadband network and TV lineup. It also controls the device that most people use to access video content—the cable set-top box.

Cable providers have long seen their control over the TV set-top box as an important way to control what services customers can access. Despite Section 629 of the 1996 Telecommunications Act,⁹⁰ which directs the FCC to promote a competitive market in set-top devices (making them more similar to telephone and computer equipment, which is not leased from the network provider), cable providers have managed to hold on to their control of the TV screen through their control of this key device—which they lease to users for a monthly fee. (This is similar to pre-Carterfone telephone systems, where people rented AT&T-supplied telephones instead of just buying their own.) While standards exist that would allow any game console, TV set, or Blu-Ray player to access cable content directly, the cable industry has contrived to block that more open, interoperable possibility. Because most users don't attach devices to their TV set other than their cable-supplied set-top box and a DVD/Blu-Ray player (or perhaps a game console), devices such as the Roku, Apple TV, and Chromecast service an enthusiastic, but limited market. Taken together with the control of "authentication" of online

⁸⁸ TCR Sports Broadcasting Holding v. Comcast, Corp., *Memorandum Order and Hearing Designation Order*, 21 FCC Rcd. 8989 (2006).

⁸⁹ In the Matter of NFL Enterprises LLC v. Comcast Cable Comm., LLC, No. CSR-7876-P, *Memorandum Opinion and Designation Hearing Order* (Oct. 10, 2008).

⁹⁰ 47 U.S.C. § 549.

video applications, discussed below, Comcast is able to (1) ensure that the majority of its customers use the device it controls instead of a competitive or more open device, and (2) ensure that those customers that do use an alternate device are not able to access the full range of online content. By buying Time Warner Cable, Comcast would increase its incentives to limit the development of competitive online video apps and services in this way.

Some pay TV providers have attempted to leverage their control of the existing pay TV market to the Internet through an approach called “TV Everywhere.” Under this model, programming is put online, but is only made available to users who can “authenticate” that they have traditional cable or satellite subscriptions.⁹¹ This approach serves a dual purpose. First, it ensures that the most valuable video programming is only available online to MVPD subscribers, a forced bundling that requires that TV viewers who want increased online access to video to first pay for an expensive pay TV subscription. This makes sure online video remains a complement to pay TV, rather than a substitute, and limits the ability of viewers to “cut the cord” and access programming exclusively online.

But the “authentication” model is about more than heading off competition from purely-online providers. It is structured in a way that ensures that incumbent providers are able to maintain control of the way that viewers access video. Pay TV subscribers don’t just provide a mechanism where their customers can log in to various authenticated apps to access video. They must specifically authorize each app, on each device, before their subscribers can use it. Different MVPDs authorize or fail to authorize different apps on different devices, with no clear pattern. One trend is clear, however: Comcast has consistently kept its subscribers from accessing popular video content on the device of their choice. While PK has not located a single

⁹¹ For a more in-depth description of authentication, *see* Comments of Roku in GN 14-28 (July 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=752148133>.

central source of information on what apps and devices are authenticated with what cable providers, based on Internet research and discussions with industry experts, it appears that Comcast is uniquely reluctant to authenticate apps and devices—for instance, some devices are fully-functional with every major cable provider but Comcast.

HBO Go, a popular app that uses the “authentication” model, is a good example of this. Comcast subscribers who have Roku devices or Playstation 3s cannot use their devices to watch HBO Go.⁹² But Comcast does allow its subscribers who have certain other devices to watch HBO Go—using one of its lesser-understood points of control to pick winners and losers in the video device market.⁹³ There is no plausible technological justification for this behavior by Comcast—streaming video from the same source has the same network impact when viewed on one device as on another, and would not affect Comcast’s network any differently. (Indeed, DBS subscribers with Comcast broadband connections can use their log-ins to access these apps without difficulty.)

This behavior stands in stark contrast to Time Warner Cable. Time Warner Cable allows its customers to access HBO Go on all of those devices. Prior to the announcement of this merger, Time Warner Cable was even reported to be in talks with Apple concerning a next-

⁹² Karl Bode, *Comcast Still Blocking HBO Go On Roku (And Now Playstation 3), Incapable Of Explaining Why*, TechDirt, March 7, 2014, <https://www.techdirt.com/articles/20140305/14254626446/comcast-still-blocking-hbo-go-roku-now-playstation-3-incapable-explaining-why.shtml>.

⁹³ Chris Welch, *Comcast Isn’t Letting Customers Watch HBO Go on PlayStation 3*, The Verge, March 5, 2014, <http://www.theverge.com/2014/3/5/5474850/comcast-isnt-letting-customers-watch-hbo-go-on-ps3> (“And there’s no clear rhyme or reason to how Comcast decides which devices can use HBO Go. If you own an Apple TV or Xbox 360, you can stream shows and movies without issue. (Xbox 360 support was also delayed initially, but for only a short time.) The company even supports HBO Go on Samsung Smart TVs. But Roku — and for now the PlayStation 3 — aren’t so lucky.”)

generation video device.⁹⁴ Soon after the merger plans were announced, however, industry observers predicted those talks would stall. James McQuivey of Forrester Research stated that “[Y]ou can bet that Comcast is going to slow down the Apple deal.”⁹⁵ His prediction was accurate. A few months later, “Apple employees ... cited cable companies ‘dragging their heels’ and the pending Comcast-Time Warner Cable merger as reasons the device and accompanying TV service haven’t launched.”⁹⁶ If it allows Comcast to purchase Time Warner Cable, not only will Time Warner Cable now be subject to Comcast’s capricious blocking of certain video devices, it will enhance Comcast’s ability to control the future direction of the video device market.

Comcast’s hostility to customer choice in video devices is easily explained: It has a rival platform it wants its own customers, and TV viewers across the country, to use instead. It develops and licenses⁹⁷ a software platform called “RDK,”⁹⁸ which is the basis for its own X1 devices.⁹⁹ It stands to benefit in several ways if its technology becomes more widely adopted than competing technologies—it would maintain direct control of the user interface its own

⁹⁴ Jason Abbruzzese, *Report: New Apple TV by Christmas, Could Access Time Warner Cable*, Mashable, Feb. 12, 2014, <http://mashable.com/2014/02/12/apple-tv-time-warner-cable>.

⁹⁵ Seth Fiegerman, *Comcast, Time Warner Merger Could Be Bad News for Apple TV*, Mashable, Feb. 13, 2014, <http://mashable.com/2014/02/13/comcast-time-warner-apple-tv>.

⁹⁶ Jessica E. Lessin and Amir Efrati, *Apple’s TV Push Stalls as Partners Hesitate*, July 30, 2014, The Information, <https://www.theinformation.com/Apple-s-TV-Push-Stalls-as-Partners-Hesitate>.

⁹⁷ See various reports of licensing deals at <http://www.btreport.net/articles/2012/10/intel-licenses-comcast-rdk.html>; <http://www.tvtechnology.com/article/motorola-mobility-licenses-comcast-rdk-/215089>; <http://www.v-net.tv/s3-group-licenses-sheds-light-on-comcast-rdk/>; <http://www.cedmagazine.com/news/2012/09/tata-elxsi-licenses-comcast-rdk/>; <http://www.btreport.net/articles/2012/05/itaas-licenses-comcast-rdk.html>; <http://www.fiercecable.com/press-releases/comcast-and-pace-sign-license-agreement-reference-development-kit-rdk-curre>.

⁹⁸ RDK Central, <http://rdkcentral.com>.

⁹⁹ Mike Robuk, *Built for speed: Comcast RDK*, CED, July 5, 2012, <http://www.cedmagazine.com/articles/2012/07/built-for-speed-comcast-rdk>.

customers use (which provides it advertising and cross-selling opportunities, and the ability to exclude apps and services it would like to steer its users away from), and through licensing revenue from the remainder of the industry. The Commission should also examine whether the terms under which Comcast and its partners license the RDK, which are confidential, allow it to further suppress innovation and customer choice in the video device market.

Comcast's behavior with respect to video devices provides a clear demonstration of how Comcast takes actions that are directly contrary to its customers' interests, and how it uses its scale and gatekeeper control over its customers as a means to gain control of adjacent markets. If it buys Time Warner Cable, its ability and incentive to continue these behaviors would increase. This provides more grounds for the FCC to block this merger.

F. Comcast's Monopsonist Power Would Harm the Video Programming Industry

Comcast is already the nation's largest video distributor. Time Warner Cable is the nation's second largest cable provider. If they merge, the result will be a company that will not just threaten programmers, but reduce choice and raise costs for all TV viewers, not just their own subscribers. Because of its vast scale, it will be able to negotiate to pay less on a per-subscriber basis to carry programming, while facing little competitive pressure to pass those savings on to customers. Not only could it starve the programming industry of revenue, decreasing the quality and choice of programming that Americans have come to enjoy and threatening "TV's Golden Age." Its actions could also raise costs for TV viewers around the country, as programmers find themselves compelled to make up for lost revenue by charging more to other pay TV distributors, ones with less negotiating leverage since they do not control access to so many households.

The danger that Comcast could pose as a monopsonist as a video distributor has been recognized by Comcast itself. When it was arguing that it should be allowed to buy NBC Universal, it argued that “market power as a content buyer” was “an essential prerequisite for a successful foreclosure strategy.”¹⁰⁰ At the time, it argued that “no MVPD is or can be a ‘gatekeeper’”,¹⁰¹ because the merger it was then attempting to justify was a vertical acquisition that had fewer effects on Comcast’s gatekeeper power (though not on its incentive to exercise its existing power in favor of NBC content). But this proposed merger is primarily horizontal in character, and contributes directly to Comcast’s market power as a buyer. These statements from Comcast’s past demonstrate that the basic case against this merger, that at some point gatekeeper power becomes anticompetitive, is not at all controversial. It should likewise be uncontroversial that a single provider with about 50% control of the high-speed broadband distribution market and about 30% of the pay TV distribution market meets any reasonable threshold for the dangerous concentration of gatekeeper power.

To picture the danger that a merged Comcast/Time Warner Cable poses to the video programming industry, just put yourself in the shoes of a video programmer. A programmer that can’t get carried by an independent Time Warner Cable might have serious problems. Any programmer that cannot get carried by Comcast/Time Warner Cable might find itself without a business model.

When Comcast does carry a video programmer, the terms it demands can also be restrictive. Comcast can require that a programmer sign a “most-favored nation” (MFN) agreement, limiting the ability of a programmer or a rival distributor to come to novel or differentiated agreements. With an MFN in place, any deal that a programmer strikes with

¹⁰⁰ Comcast/NBC Public Interest Statement, in MB 10-56, at page 107.

¹⁰¹ Comcast/NBC Public Interest Statement, in MB 10-56, at page iii.

another distributor, Comcast would be able to claim for itself. A programmer might want to extend special terms to a competitive MVPD to preserve competition in the video industry. An MFN would prevent it from doing so. An MFN might also apply to conditions beyond price—for instance, if an online video distributor strikes a deal for non-linear, on-demand access to programming, the programmer might be required to extend the same terms to Comcast. This limits the ability of the programming industry to foster new forms of video distribution outside of Comcast’s control.

However bad an MFN is, it might still be better than an “alternative distribution method” (ADM) agreement. An ADM would prevent a programmer from selling its content to a new distributor on any terms. While an ADM might be illegal with respect to distribution by rival MVPDs (despite the Commission’s program access rules having recently been substantially weakened),¹⁰² the Commission has thus far not used its statutory authority to protect video programming distribution to ensure that online video distributors can access programming.

These are not hypothetical concerns—this docket already has direct evidence on Comcast’s detrimental effects on video diversity, through testimony from viewers and programmers themselves. Unfortunately, many smaller programmers—some of which Petitioners have spoken to—fear going public with their concerns, rationally worried about retaliation from Comcast. The Commission should assume that each programmer, each network, and each creator it hears from speak from many more who can’t risk their livelihoods to participate in the Commission’s proceedings.

¹⁰² See Revision of the Commission’s Program Access Rules and Sunset of the Exclusive Contract Prohibition, Small Entity Compliance Guide (2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1082A1.pdf, for a summary of this issue.

The presence of DBS (a full substitute) and OVDs (a partial substitute) means that, considered only as a pay TV provider, Comcast faces slightly more competition than it does as a broadband provider. This is why Comcast pushes its customers to buy bundles of broadband, pay TV, and often telephone service together—it is able to leverage its dominance in broadband to gain or maintain control of related markets. In fact, if the FCC were to look at the nationwide market for double and triple play bundled services it would find that Comcast is even more dominant in that market than in the nationwide market for broadband content distribution.

Unfortunately, one way companies on the content side might try to adapt to a market with such a dominant distributor is to consolidate themselves.¹⁰³ The same goes for the remaining smaller pay TV distributors.¹⁰⁴ If the Commission approves this merger it may set off a wave of consolidation that leaves the remaining independent players, and consumers, gasping.

V. Comcast's Vertical Integration Would Enable it to Harm Rival Programming Distributors as Well as Rival Programmers

If it buys Time Warner Cable, Comcast would become even more of a vertically-integrated powerhouse. Comcast owns eight regional sports networks outright and is part owner of two more. It owns Universal Pictures, one of the major film studios. It owns well-known cable networks like USA, Syfy, Oxygen, E!, MSNBC, CNBC, Golf Channel, and Bravo. It owns two broadcast networks, Telemundo and NBC, and 27 broadcast stations. The Department of Justice has already recognized the value of Comcast's content businesses and the competitive dangers of this vertical integration between Comcast's distribution and programming businesses.¹⁰⁵ Not

¹⁰³ Amol Sharma, Dana Cimilluca, & Martin Peers, *Media Squeeze Fuels Fox Bid for Time Warner*, Wall Street Journal, July 16, 2014, <http://online.wsj.com/articles/21st-century-fox-offered-to-buy-time-warner-1405511112>. This bid, though rejected, is unlikely to be the last word in media consolidation.

¹⁰⁴ *E.g.*, AT&T/DirecTV Transaction, <http://www.fcc.gov/transaction/att-directv>.

¹⁰⁵ Comcast/NBCU Competitive Impact Statement at 20-22.

only would a merger between Time Warner Cable and Comcast would increase these dangers (giving the company the increased incentive and ability to favor its own programming on its own distribution networks and withhold it from rivals), but it would add to them—Time Warner Cable is a vertically-integrated company itself. Time Warner Cable controls three major sports networks in Los Angeles alone (Time Warner Cable SportsNet, Time Warner Cable Deportes, and SportsNet LA), manages 26 local news channels, 16 local sports channels, and 10 “lifestyle” channels. If Comcast buys Time Warner Cable, these new properties will add to its ability to use its power in both distribution and programming markets to harm rivals and suppliers, drive up costs for consumers, and impede the development of new competition.

Comcast is already subject to a consent decree due to the anticompetitive potential of its vertical integration.¹⁰⁶ The DoJ recognized that combining the programming assets of NBC Universal and the distribution assets of Comcast’s cable television and broadband businesses gave the company the motivation and the means to behave anticompetitively, giving it the ability to foreclose or squeeze competitors, increase barriers to entry, and prevent new competition (particularly from new online video rivals). A merger between Comcast and Time Warner Cable would add both to the company’s horizontal scale and vertical integration, limiting the effectiveness of the existing consent decree remedies while creating new harms.

As mentioned above, Time Warner Cable is a vertically-integrated content company itself. While it has fewer content properties overall than Comcast, they are disproportionately “must have” sports programming. The degree to which video programming is substitutable varies. A cable channel that primarily shows reruns or low-budget reality shows is probably not “must have” programming because viewers may be perfectly happy watching something else.

¹⁰⁶ Comcast/NBCU Competitive Impact Statement at 20-22.

But when someone is a fan of a particular team, not other sport, and no other team will do. That programming is “must have” because viewers will accept no substitutes. Controlling such programming is a significant advantage, and in some markets, such as Los Angeles, Time Warner Cable is a leader in this must-have programming. The degree to which Time Warner Cable is using its market power in this category and withholding programming from distribution rivals is “threatening to undermine the merger of the nation’s two largest cable-television companies,”¹⁰⁷ because it is likely that a merger would allow Comcast to continue this foreclosure strategy, with its own and with Time Warner Cable’s programming. The FCC should therefore consider the many ways this merger would worsen the harms that can come from vertical integration.

By even without considering the harms that would arise if Comcast controlled Time Warner Cable’s programming lineup, simply by increasing Comcast’s broadband and cable TV footprint, this merger would increase its ability to use its programming assets to benefit its distribution businesses. For instance, a standalone programming business might be willing to sell programming to any willing buyer to maximize its profit. But a programming business that is part of a vertically-integrated company might decide not to sell to a willing buyer at a reasonable price, if that buyer is a rival to the company’s distribution businesses. The vertically-integrated company has the incentive and ability to take actions that are contrary to its interests as a programming company if those actions benefit the overall business by foreclosing rivals or potential rivals. The FCC has already found that Comcast has “the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions

¹⁰⁷ Todd Shields and David McLaughlin, *Dodgers TV Row Fuels Unease Over Comcast-Time Warner Deal*, Bloomberg News, August 20, 2014, <http://www.bloomberg.com/news/2014-08-20/dodgers-tv-row-fuels-unease-over-comcast-time-warner-deal.html>.

against OVDs.”¹⁰⁸ It has also noted that “vertical integration or exclusivity arrangements between content producers/owners and cable networks, broadcast networks, or MVPDs may impede unaffiliated OVDs. OVD content acquisition also can be difficult when content owners are vertically integrated with, or enjoy exclusive relationships with, other OVDs.”¹⁰⁹ By increasing the size of Comcast’s distribution businesses relative to its programming businesses, and increasing the degree of its vertical integration, this merger would increase Comcast’s incentive to act in these ways.

But Comcast’s content business is not just a tool it can use to bolster its cable TV and broadband interests. Comcast can also benefit its content businesses, by favoring its own content over that of rival content producers on its own cable TV and broadband systems. For instance, it can decline to carry certain cable TV programming or give it a disadvantageous channel placement, or apply discriminatory treatment to rival video content on its broadband system. Comcast’s numerous disputes with programmers provide reason to think that its practices would continue—but with worse effects—were it to buy Time Warner Cable.

Other ways that Comcast might favor its own video content over that of rivals is by counting rival video programming against data usage caps, but not its own, or by demanding excessive interconnection payments for the delivery of rival video programming to its customers. By favoring its own content over that of rivals on its distribution platforms, Comcast would, be making choices having to do with content based not on customer demand but its own interests, and it may make better programming and content less accessible, making things worse for users and viewers. But the distribution business has a trump card: even if it gets worse in noticeable

¹⁰⁸ Comcast/NBCU Order at ¶ 78.

¹⁰⁹ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report, MB 12-203, 28 FCC Rcd 10496, ¶ 253 (2013).

ways, customers have nowhere to go. Most Comcast subscribers do not have effective broadband alternatives, and even if they do, the switching costs can be high. This gives Comcast room to behave strategically, using both its control of content and its control of distribution in ways designed to disadvantage rivals on either front and benefit its overall business. All of these harms are already present to some degree with Comcast today—but the addition of Time Warner Cable’s distribution and programming assets would give Comcast such additional power at so many points in the creation and distribution of video and broadband content that the FCC must block the transaction.

VI. This Merger Would Reduce Broadband Buildout and Degrade Network Quality

By removing Time Warner Cable from the market Comcast and “rationalizing” its holdings by swapping markets with Charter, Comcast would reduce its incentive to engage in further broadband deployment, and to invest in network quality. A broadband provider’s incentive to provide new service to an unserved area is greatest when there are multiple competitors, each of whom is capable of serving the area. In such a circumstance, the provider knows that if it does not try to serve those customers, another provider might. Because Time Warner Cable is the only cable company that approaches Comcast in scale and resources, removing it from the marketplace removes that marginal incentive to deployment.

Additionally, smaller providers are more likely to fill in the gaps in their coverage area. A large provider will always find it makes more sense to invest in higher-density, wealthier, urban and suburban areas first, before getting to lower-income and rural areas. Comcast’s focus on larger media markets (which is most clear in its swaps with Charter) show that this transaction is about consolidating existing networks, not new buildout. Its incentives will keep it from investing in those communities that need it the most, and it would be odd to claim that this

transaction will suddenly give Comcast new incentives to start investing in the communities it has thus far ignored. By contrast, smaller providers, who can be more focused on serving local markets, don't face the same tradeoffs. They are more likely to invest in the communities they serve. If Comcast gets bigger, its marginal incentive to invest in underserved communities will decrease.

Comcast's scale also means it could drive up other pay TV and broadband providers costs, making it more difficult for them to deploy service. If Comcast squeezes content and edge providers, those providers may be forced to try to make up the difference from providers that lack Comcast's scale. Even though these providers are least able to afford it, they could end up paying the price for Comcast's scale, and their own service could suffer in turn.

Finally, consumers, even when they lack direct broadband or pay TV alternatives, can benefit from "benchmark" competition.¹¹⁰ If another provider in the town next door offers better service at a lower price, a customer might rightly demand that her provider matches those terms. It is difficult for a provider to pretend that its prices are fair when there is direct evidence to the contrary. By reducing the level of competition in the marketplace and by geographically consolidating its holdings, Comcast reduces even this indirect form of market discipline.

VII. This Transaction Could Harm Consumer Privacy

If Comcast bought Time Warner Cable, it would be able to expand its information collection and targeted advertising programs, raising significant consumer privacy concerns. Comcast already has the ability to collect an enormous amount of information about consumers

¹¹⁰ Applications for Consent to the Assignment and/or Transfer of Control of Licenses from

¹¹⁰Adelphia Communications to Time Warner Cable, *Memorandum Opinion & Order*, 21 FCC Rcd 8203, ¶¶ 78, 83 ("adjacent service areas can provide a useful benchmark for consumers to compare price and service.").

and to conduct highly targeted advertising. It has cited increasing its advertising activity as one of this transaction's key motivations,¹¹¹ and through "interconnects" already coordinates with some of its cable competitors in the advertising space. These factors, when considered with Comcast's record of troubling privacy practices, provide another reason why this transaction would not serve the public interest.

Comcast boasts a database of consumer information that is both broad and deep. For example, the website for Comcast Spotlight, the advertising sales division of Comcast Cable, describes the type of local research it can offer on advertising targets in the Chicago area:

Before you can properly sell to your audience, you must understand what makes them tick: their needs, their viewing habits, their purchase behaviors, etc. . . . Here's just a small sample of what kinds of research we can provide.

- Target audience identification/confirmation
- Purchase behaviors of your target
- Lifestyle activities of your target
- Viewing habits of your target by geographic region
- Advertising activity of your competitors¹¹²

Comcast leverages the wealth of information it collects to deliver highly targeted advertisements across platforms. For example, according to Tracy Lewis, Senior Director, Sales Strategy and Development, "We can hit a certain person in a specific market, a specific zone, a specific demographic, we can daypart, we can hit at the user by what device they're on—so we can get pretty granular."¹¹³ Were Comcast, already the nation's largest broadband and pay TV provider to get yet larger, the amount of data it would be able to compile and cross-reference about the Internet and video habits of its users would put it in a class of its own.

¹¹¹ Public Interest Statement at 100-105.

¹¹² Comcast Spotlight, Local Research, <http://www.comcastspotlight.com/markets/chicago/395/local-research>

¹¹³ Comcast Spotlight, Targeting Consumers with Video Across Multiple Screens, <https://www.youtube.com/watch?v=K31itXTz7ho> at 3:08.

Not only do the collection of consumer information and use of it to conduct advertising raise privacy concerns, but these concerns are intensified by Comcast's flawed track record in data protection practices. For example:

Because of an admitted error by Comcast, over 74,000 Comcast residential subscribers had their confidential information made public through different directories, i.e., directory assistance services, phone books, and/or the Internet. This confidential customer information was erroneously published for 27 months, from July 2010 through December 2012, before detection by Comcast.¹¹⁴

Comcast's data collection, targeted advertising, and data security protection practices already raise privacy-related concerns. If Comcast were permitted to expand even further by buying Time Warner, these concerns would be augmented as well.

VIII. This Merger Could Harm the Public Interest in Voice Telecommunications and Complicate the IP Transition

The public outcry against this merger has thus far focused mostly on the merger's impact on video and internet access service, but the merger would also cause significant harms in the market for traditional phone services. The Commission noted that the parties filed applications under section 214(a) in addition to section 310(d),¹¹⁵ but Comcast fails to show that its proposed acquisition of Time Warner Cable's telecommunications lines would serve the public convenience and necessity.¹¹⁶ To the contrary, especially with continuing regulatory uncertainty

¹¹⁴ California Public Utilities Commission, Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, Order Instituting Investigation into the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers by Comcast, I.13-10-003 at 1-2 (Oct. 3, 2013), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M078/K432/78432340.PDF>.

¹¹⁵ See Applications of Comcast Corporation and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Applications, MB Docket No. 14-57, *Public Notice* (rel. July 10, 2014).

¹¹⁶ See 47 U.S.C. § 214(a).

for interconnected VoIP in the phone network transition, the proposed merger would give a combined Comcast-TWC the incentive and ability to leverage its voice customers against other providers in interconnection agreements. This would have particularly devastating effects when the service in question is not just video or internet access, but basic voice service.

The Commission has acknowledged that “[i]nterconnection benefits customers directly and drives telecommunications competition.”¹¹⁷ Indeed, interconnection and other competition policies lie at the heart of the development of a robust and competitive phone service environment.¹¹⁸ However, the Commission has thus far declined to classify interconnected VoIP as either a Title I information service or a Title II telecommunications service, leaving the interconnection obligations of interconnected VoIP providers in doubt.¹¹⁹ As a result, a combined Comcast-TWC would have even more incentive and ability to leverage its customer base against the providers it interconnects with, without interconnection rules providing a regulatory backstop to ensure interconnection agreements are reasonable and encourage competition.

¹¹⁷ Technology Transitions, GN Docket No. 13-5, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353, Connect America Fund, WC Docket No. 10-90, Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123, Numbering Policies for Modern Communications, WC Docket No. 13-97, *Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative* ¶ 62 (rel. Jan. 31, 2014).

¹¹⁸ See Jodie Griffin and Harold Feld, *Five Fundamentals for the Phone Network Transition*, PKThinks, 11-12 (July 2013), <https://www.publicknowledge.org/news-blog/blogs/five-fundamentals-for-the-phone-network-transition>.

¹¹⁹ *Id.* at 7. The Commission has used other sources of authority, including significant reliance on ancillary authority, to apply certain limited obligations on interconnected VoIP providers, *id.* at 8, but the Commission’s ability to make basic voice services act like the phone network without actually classifying them as telecommunications services was called into question by the *Verizon v. FCC* decision. See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

This is not just idle speculation. We have already seen concerns arise in the context of Comcast's interconnection agreements with other content providers and ISPs.¹²⁰ Just as this merger would give Comcast more leverage in peering disputes for data and content, it would give Comcast more leverage in voice interconnection agreements. If customers relying on basic voice service get swept up into more interconnection disputes as a result of this merger, that could set the stage for a communications disaster. Many customers could very likely not even be aware of the regulatory distinctions between interconnected managed VoIP and traditional TDM-based voice service, and yet find themselves unable to contact loved ones, conduct business, or call for emergency services if Comcast's newly acquired market power leads to a new peering dispute that either explicitly includes VoIP traffic or indirectly impacts voice calls because ports are not upgraded as a bargaining tactic against a content provider.

A Comcast-TWC merger could also exacerbate problems that have already arisen in the phone network's transition to IP-based technology. For example, the Commission has recently had to begin addressing problems in rural call completion that arose as providers used new technologies to try to lower their costs.¹²¹ The rural call completion problem is a stark reminder of how the phone network can begin unraveling at the edges without a backstop that guarantees that carriers will seamlessly interconnect, and authorities can step in to protect consumers if something does go wrong. However, if a provider like Comcast acquires yet more voice customers, while evading the interconnection regime that applies to other basic voice providers simply by virtue of the technology it uses to deliver voice service, such a merger would only

¹²⁰ See *supra* Section IV.A.

¹²¹ Rural Call Completion, WC Docket No. 13-39, *Report and Order and Further Notice of Proposed Rulemaking* (rel. Nov. 8, 2013).

increase the risk of customers experiencing call completion problems without an applicable regulatory structure to protect consumers and competition.

The proposed Comcast-TWC merger would give Comcast even more leverage as a provider of interconnected VoIP service, risking that customers will be unable to contact others or will experience degraded service quality as a result of peering disputes between Comcast and other providers. Especially considering the regulatory uncertainty that still surrounds interconnected VoIP, the Commission must protect voice customers from falling victim to increased interconnection disputes and deny Comcast's and Time Warner Cable's application.

IX. Behavioral Conditions Would Not Be Sufficient to Remedy the Harms That This Merger Would Cause

No remedies are enough to save this merger. It must be blocked, not “fixed.”

There are limited ways to try to alleviate the competitive and public interest harms that can result from a merger. The remedies used by the antitrust authorities as well as the FCC “take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms.”¹²² But both structural and conduct remedies would be unable to fix the numerous harms to many markets this merger would cause—much less assure that the merger “provide[s] affirmative public benefits,”¹²³ as all transactions approved by the FCC must.

Structural remedies are effective only when they eliminate the incentive of a merged company to behave in anticompetitive ways. But the only way to eliminate the competition harms in this merger is to block the merger entirely. Any remedy that is short of this will likewise fall short of protecting the public interest. While “[n]o policy can guarantee innovation

¹²² Department of Justice, Antitrust Division Policy Guide to Merger Remedies 7 (2004).

¹²³ Applications of Ameritech Corp., Transferor, and SBC Communications, Transferee, 14 FCC Rcd. 14,712, 14,737-38 (1999).

... higher quality and lower prices.... structural approaches are more effective than looking over the shoulders of giant corporations and nagging them; they should be a trusted tool of government rather than a last resort.”¹²⁴ According to the Department of Justice,

Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.

The DOJ continues,

Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm’s activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy’s “spirit” while not violating its letter....Third, a conduct remedy may restrain potentially procompetitive behavior....Fourth, even where “effective,” efforts to regulate a firm’s future conduct may prevent it from responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.¹²⁵

Conduct remedies treat the symptoms of a sick marketplace rather than the disease—and address themselves only to one actor. But policymakers should affirmatively promote competition rather than continuing to cope with what happens when it’s missing. And to the extent that consumer protections are necessary, they should apply them industry-wide rather than targeting just Comcast.

Despite these drawbacks, the FCC has often relied on conduct remedies to attempt to preserve the public interest in mergers. This strategy cannot work here. The multi-market harms that need to be remedied are so wide-ranging, and the merged company would be so large, that any attempted conduct remedies would likely be ineffective. In order to ensure that the new

¹²⁴ Tim Harford, *Monopoly is a Bureaucrat’s Friend but a Democrat’s Foe*, The Undercover Economist, August 16, 2014, <http://timharford.com/2014/08/monopoly-is-a-bureaucrats-friend-but-a-democrats-foe>.

¹²⁵ Department of Justice, Antitrust Division Policy Guide to Merger Remedies 8 (2004).

entity did not abuse its power in the many markets in which it would be dominant, the FCC and Department of Justice would require more resources, time, and legal tools than it has now—or will ever have. Competitors, fearful of retaliation, should not be burdened with policing the merged company’s behavior—and average citizens will have an even harder time fighting a company that spends millions on lobbying alone. Put simply, conduct rules applied to Comcast cannot re-create the features and benefits of a competitive market.

An illustration of the drawbacks of conduct remedies can be found in the recent past. In the Comcast/NBCU merger proceeding, the DoJ and the FCC required that Comcast abide by certain behavioral remedies that were intended to limit the competitive harms that merger caused. However, those conditions did not have the pro-competitive effects that policymakers may have hoped. As Senator Franken has observed, “[t]o the extent that Comcast has a history of breaching its legal obligations to consumers, such history should be taken into account when evaluating Comcast’s proposal for future market expansion.”¹²⁶

Comcast points to its proposed extension of the Comcast/NBCU Open Internet condition as a public interest benefit of this transaction. But Comcast’s view of the open Internet would give little comfort to those edge providers and users who depend on the free flow of information. Comcast has already discriminated in favor of its own online video service by exempting it from its usage caps.¹²⁷ Public Knowledge has filed a complaint against Comcast for this behavior, but the Commission has taken no action. Comcast also claims it has free reign to construct Internet

¹²⁶ Sen. Franken: Comcast’s Track Record Should Raise Concerns over Proposed Time Warner Cable Deal, February 27, 2014, https://www.franken.senate.gov/?p=press_release&id=2724.

¹²⁷ Kyle Orland, Comcast: Xbox 360 On Demand Streams Won’t Count Against Data Caps, March 26, 2012, Ars Technica, <http://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demand-streams-wont-count-against-data-caps>.

fast lanes and charge edge providers for priority access.¹²⁸ It should not be in charge of deciding what constitutes an open Internet.

Comcast's history of non-compliance with merger conditions is a matter of public record. For example, it was fined \$800,000 by the FCC for failing to comply with its obligation to provide standalone broadband service, a condition of the Comcast/NBC merger.¹²⁹ It engaged in a long-running dispute with Bloomberg News about discriminatory channel placement—which it lost¹³⁰—yet denies it failed to comply with a merger condition designed to prevent it from doing just that, choosing to characterize its non-compliance as “an interpretive issue.”¹³¹

This latter issue points to the biggest shortcoming with conditions as applied to Comcast. It is a smart company, and its usual practice is to violate the spirit and intent of a merger condition, not its letter. Or it minimally complies with them, or bogs them down in legal proceedings rather than ignoring them. Such is the case with the “peer programming” condition, which was intended to ensure that Comcast-NBCU offered its video programming to online video providers on terms comparable to those of its non-vertically-integrated programming peers. Comcast was able to undermine that condition by arguing that in order to comply with it,

¹²⁸ Todd Spangler, Comcast's Cohen: Whatever an Internet 'Fast Lane' Is, We're Allowed to Do It, May 14, 2014, Variety, <http://variety.com/2014/biz/news/comcasts-cohen-whatever-an-internet-fast-lane-is-were-allowed-to-do-it-1201180653>.

¹²⁹ Press Release, FCC Resolves Investigation of Comcast-NBCU Broadband-Related Merger Conditions; Ensures Consumer Access To Reasonably Priced Broadband Internet Service, July 27, 2012, https://apps.fcc.gov/edocs_public/attachmatch/DOC-314879A1.pdf.

¹³⁰ *Bloomberg v. Comcast Cable*, *Memorandum Opinion & Order*, MB 11-104, 28 FCC Rcd. 14346 (2013).

¹³¹ Jon Brodtkin, *Franken: Comcast Called Time Warner Cable a Competitor Until They Wanted to Merge*, April 9, 2014, Ars Technica, <http://arstechnica.com/tech-policy/2014/04/franken-comcast-called-time-warner-cable-a-competitor-until-they-wanted-to-merge>.

it would have to review its competitors' confidential programming contracts.¹³² Its competitors naturally balked at this, and the peer programming condition did not successfully ensure that third-party online video providers had full access to NBC programming.¹³³

Comcast has also pointed to the success of its Internet Essentials program as a justification that this merger is in the public interest.¹³⁴ Arising out of a merger condition in the Comcast-NBCUniversal transaction, the program has faced significant criticism for being both underutilized and overly restrictive in its eligibility rules.¹³⁵ While Comcast has worked to improve the program in recent years, it has not been widely perceived as a successful condition in the wake of the merger.

It is worth noting that Comcast has made additional efforts this year to expand and improve the Internet Essentials program, apparently taking earlier criticisms to heart. Although the program was set to expire three years after the NBCUniversal transaction was approved in 2011, Comcast announced in March that it would extend the program "indefinitely."¹³⁶ Earlier

¹³² Arbitration between Project Concord, Inc. v. NBCUniversal Media, LLC, MB Docket No. 10-56, Project Concord, Inc. Application for Review (filed Dec. 13, 2012); NBCUniversal Media LLC's Application for Review (filed Dec. 13, 2012).

¹³³ Comcast Second Annual Report of Compliance in MB 10-56 at 5 (citing various OVD deals but reporting that "[n]o new benchmark requests were received during the Reporting Period."); Comcast Third Annual Report of Compliance in MB 10-56 at 3-4 (mentioning deals but citing benchmark condition only in the context of the Project Concord activity).

¹³⁴ Comcast Corporation and Time Warner Cable Inc., Application and Public Interest Statement, MB Docket No. 14-57 (April 8, 2014) at 59.

¹³⁵ Amy Chozik, "Mixed Response to Comcast in Expanding Net Access, New York Times" (Jan. 20, 2013) *available at* http://www.nytimes.com/2013/01/21/business/media/comcast-internet-essentials-brings-access-to-low-income-homes.html?pagewanted=all&_r=4&; Cecilia Kang, "Comcast is Trying to Improve its Image with a Program for Low-Income Consumers," Washington Post (May 9, 2014) *available at* 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.

¹³⁶ Brian Fung, "It shouldn't take a merger for low-income Americans to get cheap broadband," Washington Post's The Switch Blog (March 5, 2014) *available at*

this month, Comcast announced additional changes to the program, including “up to six months of complimentary service for any new family that has not yet applied for Internet Essentials” as well as an amnesty program for certain families that meet all other specific requirements and are able to pay their outstanding balances in full¹³⁷

These improvements are not insignificant, but they do not mitigate the anticompetitive effects of the merger at hand. Internet Essentials is a valuable program for the households that are able to use it. It is not, however, a merger-specific condition that will address the fundamental challenges relating to broadband affordability and availability, nor does it address this merger’s gatekeeper harms. Competition and smart regulatory interventions are the only ways to address those challenges in a systematic, long-term way.

Conclusion

For the above reasons, the Commission should find that this transaction is contrary to the public interest, and block it.

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

August 25, 2014

<http://www.washingtonpost.com/blogs/the-switch/wp/2014/03/05/it-shouldnt-take-a-merger-for-low-income-americans-to-get-cheap-broadband/>.

¹³⁷ David L. Cohen, “Comcast to Offer Six Months of Free Internet Essentials Service and Announces Amnesty Plan for Back-Due Balances,” ComcastVoices Blog (Aug. 14, 2014) *available at* <http://corporate.comcast.com/comcast-voices/comcast-to-offer-six-months-of-free-internet-essentials-service-and-announces-debt-forgiveness-plan>

Worksheet One.

The market data in this worksheet is taken from Leichtman Research Group Research Notes, available at http://leichtmanresearch.com/research/notes06_2014.pdf. See also Press Release, <http://leichtmanresearch.com/press/081514release.html>.

Cable

Number of broadband subscribers for each major cable provider.

Comcast = 21271000
Time Warner = 11965000
Charter = 4850000
Cablevision = 2779000
Suddenlink = 1103300
Mediacom = 987000
WOW = 769600
Cable ONE = 482725
Other Cable = 6475000

TotalCable = Comcast + Time Warner + Charter + Cablevision
+ Suddenlink + Mediacom + WOW + Cable ONE + Other Cable =>
50,682,625

Telephone

Number of broadband subscribers for each major telephone provider.

ATT = 16448000
Verizon = 9077000
CenturyLink = 6055000
Frontier = 1900500
FairPoint = 333421
Cincinnati Bell = 270300

TotalTelephone = ATT + Verizon + CenturyLink + Frontier +
FairPoint + Cincinnati Bell => 34,084,221

Totals

This the the total of cable + all telco broadband:

TotalBBAll = TotalCable + TotalTelephone => 84,766,846

According to Leichtman, "U-verse and FiOS broadband subscribers now

account for 49% of Telco broadband subscribers." Assuming that that FiOS and U-Verse comprise by far the majority of current FTTx subscriptions, then it should be possible to arrive at an accurate approximation of the total FTTx market based just on that. This worksheet will assume that the relevant market is cable + FTTx, an assumption that favors Comcast, because the FCC's data show that about 99% of current 25 Mbps and up wired broadband subscribers are on cable or FTTP connections.

$$\text{TotalFTTx} = 34084221 * .49 \Rightarrow 16,701,268.29$$

This is the total of cable + FTTx:

$$\text{TotalBB} = \text{TotalCable} + \text{TotalFTTx} \Rightarrow 67,383,893.29$$

This is the total for Comcast and Time Warner Cable based on Leichtman's numbers:

$$\text{PostMergerCTWC} = \text{Comcast} + \text{Time Warner} \Rightarrow 33,236,000$$

Comcast's Share

Combined percentages of relevant market:

$$\text{PostMergerCTWC} / \text{TotalBB} \Rightarrow 0.4932$$

Combined percentage of total market after 3.9 million sub divestitures:

$$(\text{PostMergerCTWC} - 3900000) \Rightarrow \text{Total BB} \Rightarrow 0.4354$$

Note that this calculation likely understates Comcast's share of the "25 Mbps or greater" market, because Comcast likely has a greater-than-average number of customers on high speed tiers.

Worksheet Two.

This information is taken from Industry Analysis and Technology Division, Wireline Competition Bureau, Table 11, https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf.

Many of the numbers for sDSL are redacted, so this calculation assumes they are all at the highest speed tier, to favor Comcast.

Cable's percentage of all Market

```
sDSLall = 8 + 19 + 3 + 0 + 0 + 0 + 0 + 13 => 43
aDSLall = 397,000 + 2,679,000 + 3,312,000 + 7,949,000 +
5,560,000+ 7,049,000 + 157,000 + 0 => 27,103,000
OtherWirelineall = 0 + 1,000 + 2,000 + 4,000 + 3,000 +
15,000 + 2,000 + 2,000 => 29,000
Cableall = 119,000 + 985,000 + 3,204,000 + 3,834,000 +
1,125,000 + 21,162,000 + 18,924,000 + 140,000 => 49,493,000
FTTPall = 10,000 + 82,000 + 76,000 + 238,000 + 180,000 +
3,851,000 + 2,262,000 + 44,000 => 6,743,000
```

```
TotalBroadbandAll = sDSLall + aDSLall + OtherWirelineall +
Cableall + FTTPall => 83,368,043
```

```
Cableall / TotalBroadbandAll => 0.5937
```

3 Mbps Market

```
sDSL3 = 0 + 0 + 0 + 0 + 13 => 13
aDSL3 = 7,949,000 + 5,560,000+ 7,049,000 + 157,000 + 0 =>
20,715,000
OtherWireline3 = 4,000 + 3,000 + 15,000 + 2,000 + 2,000 =>
26,000
Cable3 = 3,834,000 + 1,125,000 + 21,162,000 + 18,924,000 +
140,000 => 45,185,000
FTTP3 = 238,000 + 180,000 + 3,851,000 + 2,262,000 + 44,000
=> 6,575,000
```

```
TotalBroadband3 = sDSL3 + aDSL3 + OtherWireline3 + Cable3 +
FTTP3 => 72,501,013
```

```
Cable3 / TotalBroadband3 => 0.6232
```

10 MBPs Market

```
sDSL10 = 0 + 0 + 13 => 13
aDSL10 = 7,049,000 + 157,000 + 0 => 7,206,000
```

OtherWireline10 = 15,000 + 2,000 + 2,000 => 19,000
Cable10 = 21,162,000 + 18,924,000 + 140,000 => 40,226,000
FTTP10 = 3,851,000 + 2,262,000 + 44,000 => 6,157,000

TotalBroadband10 = sDSL10 + aDSL10 + OtherWireline10 +
Cable10 + FTTP10 => 53,608,013

TotalTelco10 = aDSL10 + OtherWireline10 + FTTP10 =>
13,382,000

Cable10 + FTTP10 => 46,383,000
46,383,000 / TotalBroadband10 => 0.8652

Cable10 / TotalBroadband10 => 0.7504

25 MBPs Market

sDSL25 = 0 + 13 => 13
aDSL25 = 157,000 + 0 => 157,000
OtherWireline25 = 2,000 + 2,000 => 4,000
Cable25 = 18,924,000 + 140,000 => 19,064,000
FTTP25 = 2,262,000 + 44,000 => 2,306,000

TotalBroadband25 = sDSL25 + aDSL25 + OtherWireline25 +
Cable25 + FTTP25 => 21,531,013

TotalTelco25 = sDSL25 + aDSL25 + OtherWireline25 + FTTP25
=> 2,467,013

Cable and fiber percentage of 25 Mbps and up market:

Cable25 + FTTP25 => 21,370,000
21370000 / TotalBroadband25 => 0.9925

Cable25 / TotalBroadband25 => 0.8854

Comcast's share

Comcast numbers from
<http://apps.fcc.gov/ecfs/document/view?id=7521351426>

ComcastPostDivestiture = 27,900,000
Comcast = 31,100,000

All

Comcast's percentage of all connections that are tracked in Table 11:
ComcastPostDivestiture / TotalBroadbandAll => 0.3347

3 Mbps

First, reduce Comcast by the same amount Cable3 is reduced from Cableall. This assumes that if x% of cable is at or above a speed tier, so is Comcast. This assumption may favor Comcast, which likely has a greater percentage of users at higher speed tiers than cable as a whole.

$$\text{Cable3} / \text{Cableall} \Rightarrow 0.913$$

$$\begin{aligned} \text{ComcastPostDivestiture} * 0.913 &\Rightarrow 25,472,700 \\ 25,472,700 / \text{TotalBroadband3} &\Rightarrow 0.3513 \end{aligned}$$

$$\begin{aligned} \text{Comcast} * 0.913 &\Rightarrow 28,394,300 \\ 28,394,300 / \text{TotalBroadband3} &\Rightarrow 0.3916 \end{aligned}$$

10 Mbps

First, reduce Comcast by the same amount Cable10 is reduced from Cableall. This assumes that if x% of cable is at or above a speed tier, so is Comcast. This assumption may favor Comcast, which likely has a greater percentage of users at higher speed tiers than cable as a whole.

$$\text{Cable10} / \text{Cableall} \Rightarrow 0.8128$$

$$\begin{aligned} \text{ComcastPostDivestiture} * 0.8128 &\Rightarrow 22,677,120 \\ 22,677,120 / \text{TotalBroadband10} &\Rightarrow 0.423 \end{aligned}$$

$$\begin{aligned} \text{Comcast} * 0.8128 &\Rightarrow 25,278,080 \\ 25,278,080 / \text{TotalBroadband10} &\Rightarrow 0.4715 \end{aligned}$$

25 Mbps

Reduce Comcast by same amount Cable25 is reduced from Cableall. This assumes that if x% of cable is at or above a speed tier, so is Comcast. This assumption may favor Comcast, which likely has a greater percentage of users at higher speed tiers than cable as a whole.

$$\text{Cable25} / \text{Cableall} \Rightarrow 0.3852$$

$$\begin{aligned} \text{ComcastPostDivestiture} * 0.3852 &\Rightarrow 10,747,080 \\ 10,747,080 / \text{TotalBroadband25} &\Rightarrow 0.4991 \end{aligned}$$

$$\begin{aligned} \text{Comcast} * 0.3852 &\Rightarrow 11,979,720 \\ 11,979,720 / \text{TotalBroadband25} &\Rightarrow 0.5564 \end{aligned}$$

DECLARATION OF JOHN BERGMAYER

I, John Bergmayer, declare under penalty of perjury that:

1. I have read the foregoing “Petition to Deny of Public Knowledge and Open Technology Institute.”
2. I am a Senior Staff Attorney at Public Knowledge (PK), an advocacy organization with members, including Comcast and Time Warner Cable subscribers, who, in my best knowledge and belief, will be adversely affected if the Commission approves the merger.
3. PK members subscribe to Comcast and Time Warner Cable broadband, cable TV, and telephone services. PK is a Comcast subscriber. They use these services to access online video and other edge services. PK and some of its members are also video content creators.
4. In my best knowledge and belief, PK and its members will be directly and adversely affected if the Commission allows the proposed merger of Comcast and Time Warner Cable to proceed. They will face higher prices and reduced choice for broadband and video content.
5. The allegations of fact contained in the Petition are true to the best of my personal knowledge and belief.

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

August 25, 2014

CERTIFICATE OF SERVICE

I, John Bergmayer, certify that today, August 25th, 2014, I have served copies of this Petition to Deny on the following parties and staff via email:

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