

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of)	
)	
Comcast Corp. and)	MB Docket No. 14-57
Time Warner Cable Inc.)	
)	
For Consent to Transfer Control of)	
Licenses and Authorizations)	

**PETITION TO DENY AND COMMENTS IN
OPPOSITION OF THE SPORTS FANS COALITION**

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Dated: August 25, 2014

TABLE OF CONTENTS

INTRODUCTION 2

I. COMCAST AND TWC HAVE A DOCUMENTED AND CONSISTENT RECORD OF ANTICOMPETITIVE CONDUCT IN REGIONAL SPORTS PROGRAMMING 8

 A. Comcast and TWC Have For Years Both Engaged In a Consistent Practice of Withholding Sports Programming From Rival MVPDs And Refusing Carriage of Unaffiliated Sports Networks 9

 B. Comcast and TWC Have Both Used the Market Power Arising From Unique, Real-Time Regional Sports Programming to Increase Carriage and Licensing Prices Unreasonably 14

II. THE PROPOSED TRANSACTION WOULD SUBSTANTIALLY IMPAIR THE UNIQUE MARKET FOR SPORTS NETWORK PROGRAMMING, SEVERLY HARMING SPORTS FANS IN MANY REGIONS 16

 A. Regional Sports Network Programming Is a Separate Relevant Product Market With Many Distinctive Demand and Supply Characteristics 16

 B. Empirical Economic Evidence Demonstrates That MVPD Vertical Integration Into Regional Sports Network Programming Results In Anticompetitive Price Increases Harming Sports Fans As Consumers 20

 C. Substantially Increased RSN Concentration Arising From a Comcast-TWC Merger Would Create Even More Powerful Incentives for Price Escalation and Programming Foreclosure 22

 D. The Absence of Horizontal Competition In Local Cable Distribution Services Does Not Affect the Incentive or Ability of Post-Merger Comcast to Discriminate Against MVPD Rivals In Regional Sports Network Markets ... 23

III. THE COMCAST-NBCU CONDITIONS AND THE COMMISSION’S PROGRAM ACCESS RULES ARE INSUFFICIENT TO PREVENT ONGOING AND CERTAIN FUTURE FORECLOSURE IN RSN PROGRAMMING 26

 A. TWC Has Withheld L.A. Dodgers Programming From Almost All Other Los Angeles Cable and Satellite MVPDs Without Constraint From Program Access Regulation26

B.	With More Sports Programming Moving Online, a Comcast-TWC Merger To Form the Largest Nationwide Residential Broadband Provider Would Exacerbate the Current Regulatory Anomaly that Leaves Competing OVDs Unprotected	30
C.	The Commission’s Current Rules Do Nothing to Protect the Interests of Sports Fans, Especially Low-Income Consumers, In Maintaining Access to Sports Programming Without A Pay-TV Wall	31
D.	There Are No Offsetting Public Interest Benefits Relevant to Regional Sports Network Programming Distribution	34
IV.	NO ACTION ON THE APPLICATIONS IS APPROPRIATE UNLESS AND UNTIL TWC ELIMINATES ITS UNPRECEDENTED BOYCOTT OF OTHER MVPDs FOR L.A. DODGERS BASEBALL GAMES	35
	CONCLUSION	37

The Sports Fans Coalition (“SFC” or the “Coalition”), by its attorneys, hereby submits this petition to deny the above-captioned applications by which Comcast Corporation (“Comcast”) seeks authority to acquire control over Time Warner Cable Inc. (“Time Warner Cable”).¹ The Commission as a matter of law may only approve the transaction if it makes an affirmative finding “that the public interest, convenience, and necessity will be served” by approval,² meaning that a merger must “enhance, not merely preserve, competition.”³ ***But this proposed transaction would do neither.*** It would instead directly and substantially harm consumers and competition in regional sports network (“RSN”) programming, while offering absolutely no relevant countervailing procompetitive or public interest benefits.

Sports fans in more than a dozen media markets have suffered for years as a result of the parallel and consistent anticompetitive behavior of both Comcast and TWC in (a) withholding competitively essential, and highly profitable, marquee RSN programming from rival multi-channel video programming distributors (“MVPDs”), (b) substantially increasing RSN carriage rates to cable systems, thus raising basic cable rates and imposing a massive tax on sports fans, as well as cable subscribers who watch no sports at all, and (c) blocking distribution of competing sports programming networks by their downstream cable systems. Together, these three proven, exclusionary practices have already inflicted the very injuries on sports fans that opponents predict, on the basis of the vertically integrated parties’ post-merger incentives and abilities, will likely occur in the future in the broader markets for entertainment content and broadband.

¹ Comcast Corp. and Time Warner Cable, Inc., *Applications and Public Interest Statement (Redacted for Public Inspection)*, MB Docket No. 14-57 (filed April 8, 2014) (“Applications” and “Public Interest Statement”).

² 47 U.S.C. § 310(d).

³ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 24 (rel. Jan. 20, 2011) (“Comcast-NBCU Order”).

For the reasons demonstrated below, SFC requests that the Commission hold the Applications in abeyance, declining to act all in this docket, unless and until TWC makes the SportsNet LA channel, and its exclusive Los Angeles Dodgers baseball content, available to all competing MVPDs at “fair market value and on non-discriminatory prices, terms and conditions,”⁴ and on the merits either (a) deny the Comcast-TWC request for transfer-of-control in its entirety,⁵ or (b) require the divestiture of all of Comcast’s RSN properties — sufficient for an independent competitor to operate the channels on profitable, going concern basis — as a condition to approving the acquisition of TWC.

INTRODUCTION

The proposed acquisition of Time Warner Cable by Comcast Corporation presents this Commission with its most significant merger proceeding in years, and with that the opportunity to fashion a regulatory decision which will decisively shape media law and the competitive landscape in cable television literally for decades to come. The parties labor mightily in their *Public Interest Statement* to paint a picture of benign market effects, scale economies and enhanced infrastructure investment, and of two firms with a purported track record of consumer service and corporate philanthropy. The reality, in sharp contrast, is that a combination of Comcast and TWC would have devastating competitive consequences — with immediate, substantial adverse impact on consumers — in a unique and captive market completely ignored by

⁴ *Comcast-NBCU Order* ¶ 72.

⁵ SFC is a “party in interest” for purposes of section 310(d) of the Act and the Commission’s procedural rules (47 C.F.R. § 73.3584) in that its board, staff and members are all viewers of Comcast and TWC regional sports network programming, and thus have a direct stake in the outcome of this proceeding.

the voluminous arguments and economic analyses the parties have submitted: regional sports programming.⁶

Concentration in RSN markets has already produced very substantial competitive and consumer harms. Indeed, the anticompetitive effects of vertical integration by cable systems have now reached *crisis proportions* with the ongoing refusal — already more than five months old and with no end in sight — of TWC to license Los Angeles Dodgers baseball games for cable or satellite distribution, or local broadcast, on any network other than its own SportsNet LA cable programming channel. The reason, based on apparently accurate press reports, is a demand by TWC for licensing rates that are *double the prevailing market prices for RSN content*, an unprecedented \$4-\$5 per subscriber. As Chairman Wheeler emphatically noted in July,⁷ the result is that millions of L.A. area sports fans, especially low-income, predominantly minority consumers for whom basic cable and over-the-air television remain crucial, have been and are still being unfairly denied TV access to the classic American summer pastime. The appropriate and necessary remedy for the unparalleled boycott by TWC of all broadcast and MVPD rivals for distribution of L.A. Dodgers baseball in the Los Angeles regional market is for this Commission to hold the Applications in abeyance — and decline to act in this docket — unless and until TWC makes the SportsNet LA channel, and its L.A. Dodgers baseball content, available to

⁶ Counsel for the Sports Fans Coalition (“SFC”) authored this Petition to Deny and comments in their entirety. Except for the provision of *pro bono* legal representation by Troutman Sanders LLP, neither counsel for SFC nor any third party made a direct or indirect monetary contribution to fund the preparation or submission of this pleading.

⁷ The Chairman expressed his “strong concern about how [TWC’s] actions appear to have created the inability of consumers in the Los Angeles area to watch televised games of the Los Angeles Dodgers” and “the negative impact that [TWC’s] apparent actions are having on consumers and the overall video marketplace.” Letter from Tom Wheeler, Chairman, FCC, to Robert Marcus, Chairman & Chief Executive Officer, Time Warner Cable, Inc., July 29, 2014, at 1 (“Wheeler-TWC Letter”). See *FCC Chairman ‘Troubled’ by Time Warner Cable’s L.A. Antics*, Wall Street J., July 29, 2014, available at <http://on.wsj.com/1n0IcwM>; *Dodgers TV Row Fuels Unease Over Comcast-Time Warner Deal*, Bloomberg News, Aug. 20, 2014, available at <http://buswk.co/1tnijMz>.

all competing MVPDs at “fair market value and on non-discriminatory prices, terms and conditions.”⁸

While the Coalition shares the concerns of many that the proposed merger would create an unprecedented degree of concentration and resulting market power in content acquisition, entertainment programming distribution and broadband Internet access,⁹ SFC believes these serious consequences are qualitatively different from those related to regional sports programming. Unlike previous transactions involving vertical integration by cable multiple system operators (“MSOs”), especially the 2011 Comcast-NBC Universal merger,¹⁰ with respect to sports the Commission here does not have to predict, project or rely on economic theory to know what the post-transaction conduct of these parties would be if their merger were approved. The plain fact is that Comcast and TWC — each of which is already integrated into regional sports programming and which together control a near-dominant share of distribution rights to regional sports programming nationwide — have a documented and consistent record of foreclosure and related anticompetitive conduct in the regional sports programming market. Both Comcast and TWC have for years engaged in a blatant practice, virtually unconstrained by the Commission’s program access rules, of withholding regional sports network content from rival MVPDs,

⁸ *Comcast-NBCU Order* ¶ 72.

⁹ *See, e.g.*, Testimony of Gene Kimmelman, President and CEO, Public Knowledge, Before the Senate Judiciary Committee (April 9, 2014) (“By expanding its customer base to control almost one-third of all subscription TV households in the country and almost one-half of all the high speed broadband customers in the U.S., Comcast would position itself to dictate how much consumers must pay, determine what packages of services customers must buy, and influence what devices people can use to receive the type of video content they want.”)

¹⁰ In the *Comcast-NBCU Order*, the Commission concluded that “Comcast-NBCU would have both greater incentive and greater ability to raise prices for its popular video programming to disadvantage Comcast’s rival multichannel distributors (such as telephone companies and direct broadcast satellite (‘DBS’) providers). It would also have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast’s cable television business.” *Comcast-NBCU Order* ¶ 3.

increasing licensing and subscription rates for their RSN channels, and refusing cable carriage of unaffiliated sports networks.

That triple-whammy is not only *certain* to recur, it is going on right now with the standoff in Los Angeles over Time Warner’s SportsNet LA and Dodgers baseball. Comcast’s utter silence on the highly controversial matter of regional sports programming — astonishingly not even identifying RSNs as a relevant market for purpose of competition analysis — is illuminating. The company’s self-proclaimed public interest benefits (largely assertions that increased scale should support greater infrastructure investment)¹¹ are totally unrelated to, and can thus have no positive impact on, the availability or pricing of sports programming and the competitive structure of the regional sports network marketplace. Sports fans in more than a dozen media markets have suffered for years as a result of the parallel conduct of both Comcast and TWC in (a) withholding competitively essential, and highly profitable, marquee RSN programming from rival MVPDs, (b) substantially increasing RSN carriage rates to cable systems, thus raising basic cable rates and imposing a massive tax on sports fans, as well as cable subscribers who watch no sports at all, to fund a content bidding war and resulting trend of integration by RSNs into sports franchise ownership, and (c) blocking distribution of competing sports programming networks by their downstream cable systems. Together, these three proven, exclusionary practices have already inflicted the very injuries on sports fans that opponents

¹¹ “Together, Comcast and TWC will bring millions of households and businesses of all sizes the next generation of broadband Internet, video, voice, and related technologies and services, and will compete more effectively against communications, media, and technology providers with national and global scale.” Applications at 1. However, “[p]oor consumer satisfaction rankings stand oddly in contrast to Comcast-TWC’s claims in its FCC application that Comcast is the leading innovator in cable TV and broadband.” Diana L. Moss, *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked*, American Antitrust Institute White Paper, at 7-8 (June 11, 2014) (citations omitted), available at <http://ht.ly/ACpTk>.

predict, on the basis of the vertically integrated parties' post-merger incentives and abilities, will likely occur in the future in the broader markets for entertainment content and broadband.

Televised sports are not just for fun, they represents the key pillar of the “blocks of programming” bundled today in retail television distribution.¹² Regardless of the Commission’s overall determination of the consistency of the Applications with the Communication Act’s public interest test,¹³ there is no basis in law or regulatory policy to the exacerbate the parties’ woeful history of anticompetitive and consumer-unfriendly conduct in regional sports programming by approving their proposed merger. The transaction would not merely “create[] the possibility that [the post-merger firm], either temporarily or permanently, will block Comcast’s video distribution rivals from access to video programming content,”¹⁴ it would ensure that certain future conduct by rewarding licensees who have repeatedly blocked and continue to block their rival MPVDs from access to regional sports programming and have steadily increased prices for RSN content well above the inflation rate or economically reasonable pricing levels.

As to a long-term remedy, eliminating TWC as a substantial RSN competitor would essentially result in a two-firm nationwide duopoly between Comcast and Fox Sports in regional sports network programming.¹⁵ (Indeed, TWC already owns or controls three major sports networks in Los Angeles alone: Time Warner Cable SportsNet, Time Warner Cable Deportes

¹² *Comcast-NBCU Order* ¶ 36 n.88.

¹³ 47 U.S.C. § 310(d). “[T]he Commission reviews such transactions to ensure that they are in the public interest, convenience, and necessity.” *Comcast-NBCU Order* ¶ 2.

¹⁴ *Comcast-NBCU Order* ¶ 29.

¹⁵ “The two biggest players in regional sports coverage are Comcast, through its various Comcast SportsNet offerings, and FOX, which operates a large number of local sports channels. In markets with multiple sports teams, these regional channels often carry the majority of games for everything except the NFL, which is usually available through a local broadcast TV station.” *Regional Sports Channels Highlight Problem With Comcast/TWC Merger*, Consumerist, April 24, 2014, available at <http://wp.me/p2L7Ik-GDy1>.

and SportsNet LA). That result is one this Commission has repeatedly concluded is neither consistent with the antitrust laws nor within the scope of the public interest. Indeed, the Commission has held that to meet the competition criteria of the public interest test, a proposed transfer-of-control must “enhance, not merely preserve, competition.”¹⁶ ***This merger would do neither.***

At a time when ticket prices for sports events are at historic highs and chronically high unemployment rates continue to persist throughout America, making it difficult for many consumers to afford attending local sports events, Applicants’ practice of accelerating price increases for RSN programming is unreasonable, unconscionable and unacceptable. It must be stopped. Like the now-abandoned attempts of AT&T (in 2012) and Sprint (in 2014) to acquire T-Mobile, there is no justification to allow the extraordinary concentration the proposed deal would produce in the RSN market. Therefore, the Commission should reject this proposed merger and deny the Applications in their entirety. Alternatively, if Comcast persists in pursuing its planned merger, the Commission should impose structural relief in view of the established inefficacy of its program access regulations and similar “behavioral” remedies by requiring the divestiture of all of Comcast’s RSN properties — sufficient for an independent competitor to operate the channels on profitable, going concern basis — as a condition to approving the acquisition of TWC.

¹⁶ *Comcast-NBCU Order* ¶ 24; *United States v. FCC*, 652 F.2d 72, 87 (D.C. Cir. 1980) (en banc) (“[T]he agency is required to consider anticompetitive consequences as one part of its public interest calculus. [No] authority we have found makes the antitrust component of that calculus conclusive.”). *See generally* Jonathan A. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, *Antitrust*, Vol. 25, No. 2 (Spring 2011), available at http://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf.

I. COMCAST AND TWC HAVE A DOCUMENTED AND CONSISTENT RECORD OF ANTICOMPETITIVE CONDUCT IN REGIONAL SPORTS PROGRAMMING

Comcast blithely asserts that because its local cable systems do not compete directly with TWC cable systems in any specific geographic markets, the proposed merger cannot possibly have any anticompetitive impact.¹⁷ That is absurd and in some ways altogether irrelevant. In addition to the obvious, namely their status as the number one and two cable MSOs in the country, Comcast and TWC are also the largest current providers of live local sports programming and together the near-dominant nationwide RSN operators.¹⁸ It is in this market, for sports and regional sports network programming, that the proposed transaction will have its most immediate, direct and visible adverse impact on consumers. The conclusion that a combination of Comcast and TWC would certainly and negatively impact sports programming and regional sports network distribution is analytically sound, empirically validated and, most significantly, corroborated by a long and sordid history of real-world experience.

¹⁷ *E.g.*, Applications at 4, 127.

¹⁸ Comcast holds interests in a variety of regional and local programming networks and in numerous RSNs. Comcast owns or partially owns 11 regional sports networks, principally through its NBC Universal subsidiary, including Comcast SportsNet Houston, Comcast SportsNet Chicago, Comcast SportsNet Bay Area, Comcast SportsNet Philadelphia, Comcast SportsNet New England, Cable Sports Southeast, Comcast Sports Southwest, Comcast SportsNet California, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Northwest and The Comcast Network. In addition, NBC Universal controls an 8.2% minority interest in SportsNet New York and recently launched the NBCSN, the NBC Sports Network. On a national basis, Comcast also holds owns or holds interests in Golf Channel, NHL Network and MLB Network.

TWC owns and manages numerous local news channels, local and regional sports channels and local lifestyle channels. TWC owns Time Warner Cable SportsNet and Time Warner Cable Deporte, both principally serving Los Angeles, and two RSNs that carry Los Angeles Lakers basketball games, as well as other regional sports programming. Launched on February 25, 2014 as the result of a 25-year deal between TWC and the Los Angeles Dodgers baseball club, TWC also controls SportsNet LA, which succeeded Fox Sports West as exclusive regional rights holder for the team. Some of TWC's local channels also include qualifying RSN content, including two that carry professional sports programming in Spanish and 12 others that carry local or regional college sports programming. Additionally, TWC has a 26.8% interest in SportsNet New York and provides affiliate sales, ad sales and certain other production and technical services to SportsNet LA. Altogether, TWC owns or operates 16 local and regional sports channels.

A. Comcast and TWC Have for Years Both Engaged In a Consistent Practice of Withholding Sports Programming from Rival MVPDs and Refusing Carriage of Unaffiliated Sports Networks

As the Commission and the Department of Justice explained in their parallel analyses of the earlier Comcast-NBCU transaction, vertical integration by a bottleneck local cable monopolist creates the incentive and ability to foreclose competition and discriminate against rivals at both the programming and local distribution levels.¹⁹ “Input foreclosure” results from upstream programming affiliates refusing to sell to rival downstream MSO competitors or raising those competitors’ costs for crucial programming inputs.²⁰ “Customer foreclosure” occurs when the downstream local cable systems of an integrated media company exclude rival programming suppliers from access to a sufficient customer base by refusing to carry a competing network.²¹ The proposed merger of Comcast and TWC would enhance the documented incentive for the combined firm to do both: foreclose rival MVPDs, such as DirecTV and Dish Network, online video distributors (“OVDs”) and local broadcast stations, from access to Comcast-TWC’s RSN programming, as well as block upstream sports programming competitors from local cable distribution.²²

¹⁹ *United States v. Comcast Corp.*, No. 11-cv-00106, Compl. ¶ 54 (D.D.C. Jan 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266164.htm> (“Comcast’s incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution.”).

²⁰ See Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 528–29 (1995), available at <http://ht.ly/AE9os>.

²¹ *Id.* See also Hal J. Singer, Presentation to the FCC on Vertical Integration in Cable Networks: A Study of Regional Sports Networks, at 2 (May 21, 2013), available at <http://ht.ly/ABGT1> (“Caves-Holt-Singer Presentation”).

²² See Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 LOY. CONSUMER L. REV. 56, 58–59, 66 (2008), available at <http://ht.ly/AAuS0>.

As the Commission’s former chief economist explained, the *Comcast-NBCU Order* “sets forth a detailed legal roadmap for analyzing exclusionary harm from vertical mergers.”²³ Yet there is one highly significant difference between this proposed transaction and the earlier Comcast-NBCU acquisition. There, the overlap between Comcast’s RSN content and NBC’s broader suite of entertainment content — combining “the national sports presence of NBC Sports with Comcast’s dominance of regional sports programming”²⁴ — was far more attenuated. This required the Commission to use its expert predictive judgment to project whether Comcast “could use exclusionary program access strategies to reduce competition” after integrating upstream into “a broad portfolio of national cable programming in addition to RSN and local broadcast programming.”²⁵ Here, the proposed merger would substantially increase already high existing concentration in RSN programming, a market in which Comcast and TWC are currently the 2nd and 3rd largest providers, leaving Comcast and Fox Sports as the principal remaining players in an effective two-firm nationwide duopoly. (Between them, a combined Comcast and TWC alone would control 27 of the 61 largest RSNs, representing a 44.3% market share.²⁶).

More importantly, the consistent practice of both Comcast and TWC of withholding sports programming from rival MVPDs and refusing carriage of unaffiliated sports networks means that in this case the Commission need not project whether Comcast “could use” exclusionary program access strategies in sports programming. It has already done so, as has

²³ Jonathan A. Baker, *supra* note 16, at 37.

²⁴ Comcast-NBCU Order ¶¶ 133 & n.324.

²⁵ *Comcast-NBCU Order* ¶¶ 36, 39 (emphasis supplied). Prior to acquiring NBC Universal, Comcast did not own a broadcast network, so that transaction did not directly reduce competition among broadcast networks, and NBCU did not own any RSNs, so there was no reduction in competition among RSNs. *Id.* ¶ 134.

²⁶ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, MB Docket No. 12-203, Appendix D (rel. July 22, 2013) (counting Spanish-speaking, high-definition and traditional versions of a channel as one channel) (“15th Video Competition Report”).

TWC, repeatedly and with little or no regulatory constraint. “The history of RSNs has been marked by notable episodes of both customer and input foreclosure.”²⁷ There are many examples of both Comcast and TWC acquiring sports rights and then making sure that only their own subscribers can watch the games.²⁸ There are other examples of Comcast and TWC refusing to provide their own customers with sports content distributed by independent sports networks and discriminating in carriage terms and channel placement against unaffiliated networks.

This understandably has upset sports fans around the country, particularly where the stadium or arena was built with taxpayer money, upset. It should upset this Commission too. For example:

- **Comcast in Philadelphia:** Comcast historically refused to sell its affiliated RSN, Comcast SportsNet Philadelphia, to its main competitors, satellite TV providers DIRECTV and DISH Network, depriving sports fans who did not subscribe to Comcast cable, including many rural Pennsylvanians who could only get satellite, of local Phillies (MLB), Flyers (NHL) and 76ers (NBA) games. The Commission found that Comcast’s behavior reduced satellite TV penetration in Philadelphia by 40%, harming competition.²⁹

²⁷ Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REVIEW OF NETWORK ECONOMICS 61, at 67 (2013), available at <http://ht.ly/ACZAm>.

²⁸ See Tim Wu, *The Real Problem With the Comcast Merger*, The New Yorker, Feb. 14, 2014, available at <http://ht.ly/AFCip> (“[A] key strategy, which Comcast has already used to great effect, is to either use ownership or exclusive contracts of important channels to freeze out rivals or increase their costs. In its takeover of the Philadelphia market in the early aughts, Comcast relied on local demand for Phillies, Flyers and 76ers games to depress satellite competition and thereby maintain high prices. Comcast has repeated the regional-sports strategy across the country; if it gains unfettered control over Time Warner, Comcast can simply reuse the strategy in its new territories.”).

²⁹ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“Adelphia Order”).

- **Comcast in DC/Virginia/Maryland:** Comcast wanted exclusive rights to Washington Nationals games, but when Major League Baseball granted those rights to the Mid-Atlantic Sports Network (MASN) Comcast refused to carry MASN, depriving fans of Nats games, particularly in the Tri-Cities region of southwestern Virginia, Roanoke and Lynchburg, and various small communities in the region.
- **Comcast in Portland:** Comcast’s RSN acquired the exclusive rights to Portland Trailblazers games and, against the wishes of the team, only distributed the games to Comcast subscribers, depriving fans in small, rural communities access to their NBA team’s home games.
- **TWC in North Carolina:** Time Warner Cable refused to carry MASN on the most widely available, basic analog channel tier where TWC carried its own regional sports network, depriving baseball fans in North Carolina of additional games and coverage of the Nationals, Washington, D.C.’s then-new baseball team.
- **Comcast/Tennis Channel:** Comcast positioned Tennis Channel, with which Comcast is not affiliated, on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while carrying its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to all basic cable subscribers at no additional charge.³⁰
- **TWC in North Carolina and South Carolina:** Time Warner Cable refused to carry Carolinas Sports Entertainment Television (C-SET), an independent RSN that featured the NBA’s Charlotte Bobcats, on its most widely available, basic analog channel tier.

³⁰ *Tennis Channel, Inc. v. Comcast Cable Communications, Inc.*, MB Docket No. 10-204, Memorandum Opinion and Order, 27 FCC Rcd. 8508, 8519, 8543, ¶¶ 27, 92 (2012) (“Tennis Channel Order”)

This deprived about one million TWC subscribers of the Bobcats' inaugural season. After forcing C-SET into bankruptcy, TWC acquired licensing rights to the Bobcats' games and placed them on its own network, News 14 Carolina, which it positioned on its basic cable tier. TWC refused to distribute Bobcats games to its satellite TV competitors, depriving hundreds of thousands of fans, particularly in rural areas dependent on satellite, of local professional basketball games.

- **Comcast and NFL Network:** In 2008, Comcast retaliated against the just-launched NFL Network, after the National Football League decided not to sell an annual package of eight regular-season games to a Comcast-owned sports network (in part because Comcast insisted on an unacceptable condition in the deal that would have violated the NFL's long-standing policy of free over-the-air television coverage of games in the cities of the two competing teams), by relegating NFL Network to a sports tier for which subscribers must pay substantial additional fees while uniformly carrying Comcast-owned sports networks on a widely-distributed basic tier.

By far the most prominent and serious case of withholding sports programming from rival MVPDs is the current impasse among TWC and all other MVPDs with respect to Los Angeles Dodgers baseball on SportsNet LA, a TWC affiliate in which it has invested more than \$8 billion for license fees alone. Chairman Wheeler and the Commission are thoroughly familiar with this debacle, summarized in the Introduction and addressed in detail in Section III.A below. Commission staff also should now be in possession of confidential, internal TWC documents addressing the company's cost structure, business rationale and specific carriage fee demands, which according to press reports and industry analyst estimates are more than double that of any other RSN in the nation.

The result of this extraordinary act of foreclosure — despite the Commission’s *sua sponte* intervention — is that TWC’s boycott of all other satellite and cable MVPDs is almost certain to persist throughout the entire 2014 MLB season, depriving 70% of L.A. baseball fans television access to the Dodgers during one of their best seasons in recent memory. It is difficult to conceive of more compelling evidence that, in light of their documented, consistent pattern of foreclosing rivals from marquee sports programming, a merged Comcast-TWC would certainly continue the parties’ more than decade-long practice of anticompetitive discrimination against MVPD rivals.

B. Comcast and TWC Have Both Used the Market Power Arising From Unique, Real-Time Regional Sports Programming to Increase Carriage and Licensing Prices Unreasonably

Broadcast and cable networks are paying increasingly large amounts to sports teams for television rights.³¹ “Sports networks are a key source of the runaway growth in consumers’ monthly [cable] bills.”³² As TCI founder and Liberty Media CEO John Malone has observed, sports programming fees have become a “tax” that everyone pays.³³

³¹ *15th Video Competition Report* ¶ 34. Cable networks typically derive roughly one half of their revenues from licensing fees paid by video programming distributors and the other half from advertising fees. Generally, a distributor pays an owner of cable networks a monthly per-subscriber fee that may vary based upon the number of subscribers served by the distributor, the programming packages in which the program is included, the percentage of the distributor's subscribers receiving the programming, and other factors. Typically, the popularity or ratings of a network's programming affects the ability of a content owner to negotiate higher license fees. *United States v. Comcast Corp.*, No. 11-cv-00106, Competitive Impact Statement at 9 (D.D.C. Jan 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

³² S. Derek Turner, *Combating the Cable Cabal: How to Fix America’s Broken Video Market*, at 4, Free Press, May 2013, available at <http://ht.ly/AFDRi> (“Turner/Free Press”).

³³ See, e.g., *Cable Pioneer John Malone Says Sports Costs are Out of Control*, Los Angeles Times, Nov. 9, 2012, available at <http://ht.ly/AFBbD> (“We’ve got runaway sports rights, runaway sports salaries and what is essentially a high tax on a lot of households that don’t have a lot of interest in sports. The consumer is really getting squeezed, as is the cable operator.... The only way it is going to change in the short run is for government to intervene.”).

The website <http://www.whatyoupayforsports.com/> offers an illuminating interactive service that calculates what a cable subscriber pays for the sports channels available from his or her local cable company. The results are eye-opening. Today we are experiencing what some observers have termed a “sports cable bubble.” That is:

a value balloon that keeps going up, up, up, launched and inflated by America's collective cable and satellite bill, a perfectly legal shell game built on high-stakes deal-making, entrenched corporate interests and overlapping near-monopolies. It's the reason why investors paid \$2 billion for the Los Angeles Dodgers; why schools have taken to conference realignment like swingers at a 1970s key party; why ESPN is the golden goose of the Disney empire; why Fox Sports 2 is basically a foregone conclusion even before Fox Sports 1 launches; why Solomon was so ridiculously ticked; and why so much of what happens in sports *happens*.”

The Sports Cable Bubble, SportsOnEarth, July 12, 2013, available at <http://ht.ly/AFBIv>.

Comcast and TWC are two of the major, perhaps the worst, cable MSOs in terms of sports programming rate increases.³⁴ In 1995, sports networks accounted for 17 percent of the license fees paid to cable programmers. Today that figure stands at 38 percent. In some markets with a large number of RSNs, sports channels account for more than 50 percent of a subscriber's monthly cable bill.³⁵ And the pleas of Comcast and TWC that they “must” increase rates to cover sports licensing fees ring hollow because, as Derek Turner's financial analysis demonstrates, while “[s]ports channels are forking over record amounts of cash to secure broadcasting rights from sports leagues,...the increased revenues brought in from advertising and the licensing

³⁴ See, e.g., *Sticker Shock for Time Warner Customers: A Review of Comcast's Rates & Packages*, Stop the Cap!, Feb. 17, 2014, available at <http://ht.ly/AFBYJ> (“Time Warner customers can expect significant channel losses with Comcast's nearest equivalent basic cable service. If you enjoy a lot of sports or old movies, Comcast will make you spend nearly \$20 more on a higher-cost tier to get back the networks that Time Warner used to bundle as part of their basic cable service.”). Even at present, Comcast SportsNet Philadelphia, already one of the nation's priciest RSNs, “is seeking a subscriber surcharge on behalf of the wallet-busting, 25-year, \$2.5 billion TV rights deal it negotiated with the Phillies in January. As part of the deal, at least 33 Phillies games will relocate from over-the-air [broadcast] to the cable sports network.” *Blackout Warning As Comcast Sports Network Pitches a Surcharge*, Philly.com, March 27, 2014, available at <http://ht.ly/AGSbe>.

³⁵ Turner/Free Press, *supra* note 32, at 4.

fees cable subscribers pay more than cover programmers' increased production costs."³⁶ At a time when ticket prices for sports events are at historic highs and high unemployment rates persist throughout America, making it difficult for many consumers to afford attending local sports events,³⁷ this trend of accelerating price increases for RSN programming is unreasonable, unconscionable and unacceptable. It must be stopped.

II. THE PROPOSED TRANSACTION WOULD SUBSTANTIALLY IMPAIR THE UNIQUE MARKET FOR SPORTS NETWORK PROGRAMMING, SEVERLY HARMING SPORTS FANS IN MANY REGIONS

A. Regional Sports Network Programming Is a Separate Relevant Product Market with Many Distinctive Demand and Supply Characteristics

Despite the unwillingness of Comcast in its competitive analysis to identify sports programming and regional sports networks as a relevant product market, or series of local geographic markets (*see Public Interest Statement* at 127-38), sports programming is plainly different than any other kind of television programming because it is (a) publicly subsidized, (b) by far the most highly rated, (c) necessarily real-time, and (d) therefore critical to robust competition in the video market. As the Commission has so powerfully observed, sports content represents "marquee programming" that is properly considered apart from other entertainment content:³⁸

Sports programming continues to be a distinct form of programming in comparison to movies and other types of television programming.... [First,] sports programming is the least time-shifted genre of television programming.... [M]ajor sporting events are typically viewed as "premium" programming. This has led broadcast and cable networks to pay increasingly large amounts to sports teams for television rights. Second, sporting events tend to have little value beyond their initial telecast because there is very little

³⁶ Turner/Free Press, *supra note* 32, at 18-19.

³⁷ *See Sports Blackout Rules*, Notice of Proposed Rulemaking, MB Docket No. 12-3, ¶ 13 (rel. Dec. 18, 2013).

³⁸ *Comcast-NBCU Order* ¶ 36; *15th Video Competition Report* ¶ 343.

interest in an event once the results are known. Ancillary markets for sports programming are thus limited.

15th Video Competition Report ¶ 343.

What the Commission aptly describes as “the unique characteristics of RSN programming”³⁹ exhibit significant supply constraints as well. The inputs for regional sports networks are limited, especially for the highest-demanded professional sports league and major college sports games. It has been recognized by federal antitrust enforcers for nearly two decades that there exist “formidable entry barriers into programming” and that entry into “‘marquee’ content like sports ‘has proven slow and costly.’”⁴⁰ That means sports programmers can charge far higher fees (to cable systems for carriage and to advertisers) than any other type of television content. Indeed, as noted above, rising sports channel fees and surcharges have become, even according to cable magnate and pioneer John Malone, a tax everybody pays.⁴¹

“RSNs are non-replicable and, in many cases, critically important to consumers.”⁴² And lest anyone think that regional sports network viewers are confined to sports fanatics only, according to Nielsen the games of 12 Major League Baseball teams ranked as the *top programming in primetime across all of American television*, including broadcast, in their DMAs from

³⁹ *Report And Order In MB Docket Nos. 12-68, 07-18, 05-192*, FCC 12-123, ¶ 2 (rel. Oct. 5, 2012) (“Exclusive Contact Sunset Order”).

⁴⁰ *In re Time Warner Inc.*, 123 F.T.C. 171, 207 (1997) (statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney). Especially in sports programming, the economics of entry make substitution to alternative content uneconomic because “new entrants face significant entry costs, while entrenched competitors benefit from the low marginal costs associated with the distribution of existing content.” Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH J. 631, 647 (2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269124.

⁴¹ See Section II.B, *supra*.

⁴² *Exclusive Contact Sunset Order* ¶ 55; *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (“[T]he Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.”); *id.* at 718 (“Given record evidence demonstrating the significant impact of RSN programming withholding, the Commission’s presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming.”).

the start of the 2014 baseball season through July 24, a week after the All-Star break ended.⁴³ That is a formidable illustration that sports content is conclusively a separate relevant product market for competition analysis and meritorious of consideration in this docket totally independent of the Commission’s assessment of competitive effects in the broadband, OVD and national entertainment programming markets.

The Commission has emphasized that for competition analysis purposes, it is imperative to consider the “specific programming networks offered by the parties to the transaction,” the “popularity of the particular programming that is withheld and how the inability of competing MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.”⁴⁴ Regional sports programming *is the poster child of this inquiry*. RSNs offer real-time, intensely viewed and competitively essential video content. There is no substitute on television for local professional and college sports games. Without that unique sports content, as the Commission has repeatedly found from experience — for example in 2006, when Comcast’s withholding of Comcast SportsNet Philadelphia from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been⁴⁵ — effective competition in MVPD services is all but impossible. “Sports programming is one of the few types of ‘must-have’ programming” in today’s television industry.⁴⁶ Sports are thus the most important component of the “marquee programming for which subscribers would switch to a different

⁴³ *MLB RSN Telecasts Lead Primetime in a Dozen DMAs, Multichannel News*, July 30, 2014, available at <http://ht.ly/AAuhS>.

⁴⁴ *Terrestrial Loophole Order*, 25 FCC Rcd. at 768, ¶ 32; *Comcast-NBCU Order* ¶ 45 n.109.

⁴⁵ See *Comcast-NBCU Order* ¶ 37.

⁴⁶ Hal Singer, *Program Access Reform at the FCC: Are Exclusive Programming Deals a Good Thing?*, *Forbes*, Oct. 7, 2012, available at <http://ht.ly/AB3TU>.

MVPD in order to regain access.”⁴⁷ In short, video sports content is not just for fun, it represents the key pillar of the “blocks of programming” bundled today in retail television distribution.⁴⁸

As the policy voice of sports fans, SFC also believes it is imperative to recognize that the “distinct form of programming” represented by sports television is different not only from an antitrust economics standpoint, but also from a cultural, diversity and community engagement perspective. Sports are an arena where ethnicity, income and education are all but irrelevant. Sports fans share passions across many of the cultural divides separating Americans.⁴⁹ Televised sporting events enhance community by providing a common experience and a source of local and regional pride.⁵⁰ They are a mainstream bastion of entertainment for casual fans and a lifestyle for committed sports junkies. These are considerations that follow inherently from the Commission’s settled media policies of diversity and localism, and represent important non-economic reasons to classify sports programming a separate product market when assessing the competitive and public interest consequences of the proposed Comcast-TWC acquisition.

⁴⁷ *Comcast-NBCU Order* ¶ 52.

⁴⁸ *Comcast-NBCU Order* ¶ 36 n.88.

⁴⁹ See, e.g., Beth Jacobson, *The Social Psychology of the Creation of a Sports Fan Identity: A Theoretical Review of the Literature*, 5 *Online J. of Sports Psychology* 1 (2003), available at <http://ht.ly/ACeAM> (“A fan identity, as with any group identity, is beneficial to the individual in that it may provide a sense of community.... [F]andom offers such social benefits as feeling of camaraderie, community and solidarity, as well as enhanced social prestige and self-esteem. Sports fandom further affects individual personal development by helping people learn to cope with emotions and feelings of disappointment.”) (citations omitted).

⁵⁰ See generally Garry Whannel, *FIELDS IN VISION: TELEVISION SPORT AND CULTURAL TRANSFORMATION* (1992), available at <http://ht.ly/ACich/>; Lawrence A. Weiner, *MEDIA, SPORTS AND SOCIETY* (1989), available at <http://ht.ly/ACizW>.

B. Empirical Economic Evidence Demonstrates That MVPD Vertical Integration Into Regional Sports Network Programming Results In Anticompetitive Price Increases Harming Sports Fans As Consumers

Empirical research shows clearly that vertical integration between cable systems and RSNs produces higher licensing and subscription fees that are passed onto customers.⁵¹ This increase in rival MVPD costs is largely a result of the lack of substitute inputs. If local cable and MVPD distribution rivals could easily switch to other programming suppliers, then those competitors would not be harmed.⁵² However, there are no substitutes for RSN content because, as explained above, sports programming constitutes a distinct product market.⁵³ Therefore, if an MVPD wants to air a Washington Capitals hockey game in Washington, D.C., for instance, there is simply no alternative to Comcast SportsNet Mid-Atlantic — the only RSN with rights to Washington Capitals games.

Recent cutting-edge research by three highly-respected economists (Kevin Caves, Chris Holt and Hal Singer) shows that when a cable company owns an RSN, the prices for that network go up and the availability to competitors goes down. Their research also found that the problem only gets worse as the cable company gets larger. “[W]hen an RSN is owned by a cable or satellite operator, the RSN charges rival distributors a significantly higher license fee. Most significantly for our purposes, the vertical integration premium increases significantly with the local downstream market share of the RSN’s affiliated distributor.” Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of*

⁵¹ See *Caves-Holt-Singer Presentation* at 9-11. More generally, the Commission’s economic studies of Comcast-NBCU “confirmed that vertical transactions between MVPDs and content providers tend to lead to higher programming prices to rival MVPDs through an empirical analysis of the change in affiliate fees following the vertical integration of Fox programming with the DIRECTV direct broadcast satellite video distribution system in the wake of the 2004 News Corp./Hughes transaction.” Jonathan A. Baker, *supra* note 16, at 40.

⁵² Riordan & Salop, *supra* note 20, at 531.

⁵³ See Section II.A, *supra*; *USFL v. NFL*, 842 F.2d 1335 (1988).

Regional Sports Networks, 12 REVIEW OF NETWORK ECON. 61, 66 (2013), available at <http://ht.ly/ACZAm>.

This “vertical integration premium” is anticompetitive, because it raises input costs to MVPD rivals, and harms consumers by increasing rates for basic cable tiers.⁵⁴ As many media observers and providers have noted, sports licensing costs are typically assessed on a per-subscriber basis, and thus put severe upward pressure on cable rates for viewers — more than four times the rate of inflation — whether or not they actually watch regional sports programming.⁵⁵ Cablevision, RCN and numerous other MVPDs have responded by imposing a “sports programming surcharge” on all basic tier subscribers.⁵⁶ In Los Angeles alone, for instance, at current rates demanded by TWC for SportsNet LA, every cable subscriber would pay a huge

⁵⁴ One prolific conservative antitrust scholar dismisses this pricing evidence as “only minimal[]... (4-7 percent of the mean license fee per subscriber per month).” Geoffrey Manne, *Beneficence Is Beside the Point: The Antitrust Realities of the Comcast/Time Warner Cable Merger*, CPI Antitrust Chronicle (April 2104), available at <http://papers.ssrn.com/sol3/papers.cfm>. To the contrary, such a small but significant, and profitable, price increase is the accepted test for market definition under the DOJ/FTC HORIZONTAL MERGER GUIDELINES; and when a typical cable bill averages \$100, the “minimal” price increase he describes amounts to some \$100 per year even for the lowest-spending cable consumers. That is the market price for a mid-level wireless smartphone. Moreover, as discussed above, the unique and non-replicable nature of RSN sports programming, and the business economics of tiering, makes such price increases unavoidable for both sports fans and non-sports cable viewers alike.

⁵⁵ See, e.g., *Sports Fans: Get Ready to Spend More Money to Watch Your Favorite Teams*, Variety, Aug. 13, 2013, available at <http://ht.ly/ABKf6> (“The price of TV broadcast rights for sports in the age of time-shifted viewing has soared. After all, it’s high-demand content that viewers don’t DVR. And unlike other video entertainment, it’s not available from Netflix or other Internet services.”). As one FCC staff study concluded, moreover, “Looking at decisions of cable systems regarding what channels to carry shows that carriage rates for vertically integrated channels are higher on systems that own the given network but only in places where there is not much competition from DBS. This suggests, potentially, a problem for an efficiency based explanation for the behavior.” Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, FCC Media Ownership Study, at 2 (April 2007), available at <http://ht.ly/AD0wr>.

⁵⁶ Cablevision states that “programming costs, including the cost to carry sporting events, have been continually increasing and now represent more than a third of Cablevision’s total programming costs.” The company has thus implemented a “sports programming surcharge” for its basic cable subscribers. See Cablevision, Optimum Customer Service, at http://optimum.custhelp.com/app/answers/detail/a_id/3633. RCN also assesses a sports surcharge because sports distribution fees “are growing at four times the rate of inflation.” RCN FAQs — Sports Surcharge, at <http://ht.ly/ABJQt>. See *That New \$2, \$3 Fee on Cable Bill? Sports the Culprit*, USAToday, Feb. 28, 2013, available at <http://usat.ly/151xOcx>; *Rising TV Fees Mean All Viewers Pay to Keep Sports Fans Happy*, New York Times, Jan. 25, 2013, available at <http://nyti.ms/14fp9ce>.

“vertical integration premium” of some \$312 per year as a consequence of the cost-escalating effect of RSN vertical integration.⁵⁷

C. Substantially Increased RSN Concentration Arising From a Comcast-TWC Merger Would Create Even More Powerful Incentives For Price Escalation and Programming Foreclosure

“Sports is one of the largest cudgels Comcast has, and they just use it every way they can,” observes Susan Crawford, whose book *Captive Audience* uses Comcast’s purchase of NBCU as a lens to examine the telecommunications market. “And now with the [TWC] merger they’re going to be able to do that on a larger scale.”⁵⁸

The regional sports and news networks that Comcast and Time Warner control would enhance the market power of the post-merger firm both as a bottleneck (withholding access to marquee content) and a buyer (reaching high-value regional sports audiences).⁵⁹ Comcast and TWC currently choose as a business matter or negotiation tactic to withhold RSN content from their rivals, thereby contradicting any contention that, for whatever theoretical reason, a merged company would experience a miraculous epiphany and not do so again in the future. “For example, Comcast’s refusal to provide the Philadelphia RSN is not due to a dispute about price or terms, but rather is merely Comcast’s ‘long-standing business policy.’”⁶⁰

⁵⁷ *The LA 'Sports Tax': \$312 a Year, Whether You Ever Watch a Game or Not*, Southern California Public Radio, July 31, 2014, available at <http://ht.ly/AAsQM>.

⁵⁸ *Dodgers TV Row Fuels Unease Over Comcast-Time Warner Deal*, Bloomberg BusinessWeek, Aug. 20, 2014., available at <http://bloom.bg/1oPKAgm>.

⁵⁹ Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger “Unapprovable,”* Consumer Federation of America, at 6 (Apr. 2014), available at <http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf>.

⁶⁰ *Comcast-NBCU Order* ¶ 71 & n.155 (quoting Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet, to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C. (Jul. 23, 2010)).

The substantial increase in national RSN concentration would only exacerbate these effects. First, an effective duopoly between Comcast and Fox Sports would increase the already powerful economic incentives for RSNs to bid up distribution fees paid to professional and major college sports teams.⁶¹ In other words, the Los Angeles experience of TWC paying more than \$8 billion for Dodgers baseball licensing rights, while today perhaps slightly anomalous, will likely become the norm industry wide. Second, smaller cable systems and those without RSNs will be pressured to impose and increase sports programming surcharges, which have become common over the past several years. Third, unaffiliated sports programming networks will find it more difficult to obtain carriage arrangements even on non-vertically integrated cable systems, because the soaring per-subscriber costs associated with RSNs and national sports networks such as ESPN and NBC Sports Network will limit their ability to carry other sports programming content.

D. The Absence of Horizontal Competition In Local Cable Distribution Services Does Not Affect the Incentive or Ability of Post-Merger Comcast to Discriminate Against MVPD Rivals In Regional Sports Network Markets

In the context of vertical mergers, firms can substantially lessen competition or increase barriers to entry in a market in three principal ways: (1) raising rivals' costs by foreclosing competitors of the purchasing firm from access to a potential source of supply or from access on competitive terms, called "input foreclosure;" (2) raising rivals' costs by foreclosing competitors of the selling firm from access to the market or a substantial portion of it, called "customer foreclosure;" or (3) forcing actual or potential competitors to enter or continue in the market only

⁶¹ "Despite claims of cost efficiencies, consumer benefits and enhanced investment and innovation, the ability of merged companies to prove up the claimed benefits is increasingly viewed with skepticism. Moreover, there is the real risk that 'mergers-to-tighter-oligopoly' facilitate market structures that are conducive to tacit coordination that drives up price, restricts output, eliminates choice, and stifles innovation." Diana L. Moss, *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked*, American Antitrust Institute White Paper, at 5 (June 11, 2014) (citations omitted), available at <http://ht.ly/ACpTk> ("AAI White Paper").

on a vertically-integrated basis because of advantages unrelated to economies solely attributable to integration.⁶²

As Consumer Federation of America's Mark Cooper has cogently demonstrated, "inter-modal competition and a cozy duopoly is not enough to discipline the abuse of market power in [the video distribution] sector. Every traditional measure of market structure — concentration ratios, the Lerner index, Tobin's q ratios — indicates the existence of market power in the cable industry."⁶³

The withholding of vital geographically specific marquee programming [*i.e.*, sports] from alternative distribution platforms is one of the elements in a tightly woven web of business practices that have dampened competition in the sector. The incessant reduction in number of cable operators and their increasing size has led to the aggregation of cable systems into large regional clusters. Market power at the point of sale to the public and monopsony power at the point of purchase from programmers combine to undermine competition. Large MSOs have come to dominate specific regions of the country. They have moved into regionally specific sports programming that is itself a monopoly. They embed this programming in huge bundles, forcing consumers to pay for it all. They then deny access to this programming to competing distributors or make it available on anticompetitive and unfriendly terms and conditions.

The parties' argument that the transaction is competitively neutral because their cable systems operate in different geographic markets, and thus do not compete horizontally, is irrelevant to the certainty that a post-merger Comcast would discriminate against MVPD rivals in the sports programming market. Even on a horizontal competition basis, that explanation is

⁶² *Yankees Entertainment and Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp.2d 657, 673 (S.D.N.Y. 2002) (citing *Freuhaf Corp. v. FTC*, 604 F.2d 345 (2d Cir. 1979), and *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949)). See *Brown Shoe Co. v. United States*, 370 U.S. 294, 323–34 (1962) ("The primary vice of a vertical merger . . . is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition' which 'deprive(s) . . . rivals of a fair opportunity to compete.'") (quoting *Standard Oil Co. of California*, 337 U.S. at 314). "The term "foreclosure" is broadly understood to include price-raising strategies as well as complete exclusion." Jonathan A. Baker, *supra* note 16, at 37.

⁶³ Statement of Mark Cooper, Research Director, Consumer Federation of America, Before the Senate Judiciary Comm., Dec. 7, 2006, available at <http://ht.ly/AAxkS>.

plainly wrong. As illustrated by the maps below, regional sports networks compete in wider, sometimes multistate (*e.g.*, NY/NJ/CT, MA/NH/ME/VT, MD/VA/DC, etc.), markets that cover a very large number of cable system franchise areas. The post-merger market share in the key RSN markets affected by the merger, especially combined with the additional Charter subscribers Comcast will acquire in several of those markets if the Commission approves the related Comcast-Carter clustering spinoff proposal,⁶⁴ will exacerbate that concentration. These harmful effects are most pronounced in the Los Angeles and Dallas regions, but there are numerous others as well. When the relevant geographic market for RSN programming is properly defined on a regional basis, it appears that post-merger market shares are almost universally well over 50%.⁶⁵



⁶⁴ See Public Interest Statement of Comcast Corporation and Charter Communications, Inc., *Charter-to-Comcast Exchange Transaction*, MB Docket No. 14-57 (June 4, 2014).

⁶⁵ Opponents of the proposed merger have already demonstrated that a combination of Comcast and TWC would greatly increase cable system concentration in many major metropolitan regions. See, *e.g.*, Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger “Unapprovable,”* Consumer Federation of America, at 6 (Apr. 2014), available at <http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf>. Regional sports networks compete geographic markets that span multiple cable system franchise areas. On information and belief, Sports Fans Coalition understands that the Comcast and Time Warner Cable RSNs’ distribution territories are far larger than either cable operator’s geographic footprint in markets where one or the other company controls the RSN and where both companies’ local systems would be combined post-merger (*e.g.*, Los Angeles). Moreover, SFC is unaware of limiting factors that would prevent a post-merger Comcast or Time Warner RSN from negotiating with sports leagues to expand the RSN’s post-merger territory to include additional cable service areas — as the Comcast cable service area grows in any given region, such as the northeast, its affiliated RSN distribution rights could grow accordingly. Thus, SFC believes that the level of concentration of cable households served by the same company that owns the RSN will increase dramatically as a result of the merger and, therefore, exacerbate the precise anticompetitive (and anti-fan) behavior described by Singer, *et al.*

Having disposed of Comcast's horizontal competition charade, economic analysis of the transaction then goes on to assess vertical impacts and benefits. As addressed in the next section, the Applicants offer no answer (other than the FCC's program access rules, which the Commission itself has dismissed as insufficient to eliminate input foreclosure) to the assessment of vertical competition effects in cable television and regional sports network programming. Nor are there any public interest benefits associated with the proposed transaction that have relevance to sports programming, RSN operations or national sports licensing rights competition, let alone the public interest in maintaining affordable, ubiquitous availability of televised sports programming.

III. THE COMCAST-NBCU CONDITIONS AND THE COMMISSION'S PROGRAM ACCESS RULES ARE INSUFFICIENT TO PREVENT ONGOING AND CERTAIN FUTURE FORECLOSURE IN RSN PROGRAMMING

"In an industry where there is limited competition at most levels, ongoing changes in control that create or enforce vertically-integrated content/distribution platforms should trigger a rigorous level of scrutiny by antitrust and regulatory agencies."⁶⁶ In the context of Comcast-TWC, the parties argue that vertical foreclosure and anticompetitive conduct post-merger are all but impossible in light of the Commission's program access rules and the *Comcast-NBCU Order* conditions.⁶⁷ That is demonstrably incorrect.

A. TWC Has Withheld L.A. Dodgers Programming From Almost All Other Los Angeles Cable and Satellite MVPDs Without Constraint From Program Access Regulation

Since the opening of the Major League Baseball season in March, Time Warner Cable has been in a standoff involving SportsNet LA ("SNLA"), the exclusive local TV home for Los

⁶⁶ Moss, *supra* note 11.

⁶⁷ Applications at 156-69.

Angeles Dodgers games for the next 25 years. TWC, which gained control of the channel in an \$8.3 billion deal for distribution rights with the Dodgers, wants top dollar from any other pay TV operator looking to carry it. Burdened by its huge Dodgers license fee investment, TWC is reportedly demanding \$4-\$5 per subscriber per month for SNLA. So far, all other MVPDs serving the Los Angeles market have refused that asking price, which would stand as the highest carriage fee for any American regional sports network, even though most [RSNs] broadcast multiple teams' games instead of just one.⁶⁸ The result: no Dodgers channel for L.A. baseball fans whose residences are not served by Time Warner, about 70% of the Los Angeles market.

It is generally accepted among antitrust experts and courts that structural remedies — the “surer, cleaner remedy” of divestiture, are far preferable to behavioral remedies like program access regulation and complaint-based pricing arbitration because “behavioral remedies are fraught with difficulties [and] fall short both in theory and in practice.”⁶⁹ Moreover, the Act’s program access provisions, written in 1992, have not kept pace with today’s technology and market structure. Cable operators can control exclusive rights to programming delivered over their headends by fiber as opposed to satellite. This is called the “terrestrial loophole” and is why a DBS subscriber in Philadelphia cannot receive Comcast Sports Network with Flyers, Phillies and ‘76ers games. It is why a DBS subscriber in San Diego cannot receive Cox’s sports

⁶⁸ According to analysis by SNL Kagan, Time Warner Cable is charging other TV providers nearly twice as much for the Dodgers network as what other regional sports networks charge. *Dodgers Dispute Is Not Helping Comcast-TWC Merger Case*, National J., Aug. 21, 2014, available at <http://ht.ly/AAs0u>.

⁶⁹ AAI White Paper at 18; *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961); *United States v. AT&T Co.*, 552 F. Supp. 131, 165 (D.D.C. 1982). Indeed, with respect specifically to the OVD behavioral conditions of the Comcast-NBCU antitrust consent decree, the Justice Department candidly admitted to the presiding district court “[w]e can’t enforce this decree.” *United States v. Comcast Corp.*, No. 11-106 (RJL), slip op. (D.D.C. Sept. 1, 2011). More recently, DOJ explained that structural relief for the American Airlines/U.S. Airways merger was required because behavioral remedies are “exceedingly difficult to craft, entail a high degree of risk of unintended consequences, entangle the government and the Court in market operations, and raise practical problems such as the need for ongoing government monitoring and enforcement.” *United States v. U.S. Airways Group, Inc.*, No. 13-cv-01236 (CKK), Response of the United States to Public Comments On the Proposed Final Judgment, at 30 n.52 (D.D.C. March 10, 2014) (“US Airways CIS”), available at <http://ht.ly/ACSHw>.

network for Padres games. The Commission has looked at this issue several times and concluded it lacks the legal authority to deal directly with terrestrially delivered content unless there are changes to the current Communications Act.⁷⁰

In fact, Commission precedent established unequivocally that the present program access regulations are insufficient to constrain anticompetitive blocking of access to sports and other marquee programming. In its *Terrestrial Loophole Order* (25 FCC Rcd. at 761-75, ¶¶ 25-40), the Commission found that despite Section 628 of the Act, cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market. And as the *Comcast-NBCU Order* explains, “a strategy of uniform price increases for video programming would not necessarily violate [the] current rules because the price increases would not involve discriminatory conduct. To facilitate the combined entity’s exercise of a uniform-price-increase strategy, Comcast could pay the same fees as its MVPD rivals or could choose to pay the highest fee that NBCU charges a competing MVPD.”⁷¹ Additionally, the existing program carriage rules are insufficient, in terms of both substance and process, to provide a meaningful remedy because the complaint process is slow and costly, and thus favors companies with greater financial resources, such as Comcast, over independent networks. Therefore, the Commission’s program access rules, “which address discriminatory pricing, inadequately address the potential harms presented by the increased ability and incentive of [Comcast-TWC] to uniformly raise Comcast’s rivals’ costs.”⁷²

⁷⁰ E.g., *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd. 746, 770, ¶ 34 & n.133 (2010) (“*Terrestrial Loophole Order*”).

⁷¹ *Comcast-NBCU Order* ¶ 49.

⁷² *Comcast-NBCU Order* ¶ 49.

Nor is arbitration (the hallmark of the *Comcast-NCU Order* remedies) sufficient relief. First, as the current Dodgers impasse evidences, even a temporary strategy of withholding RSN programming from rival MVPDs is profitable in the short run and increases the RSN's leverage to command ever-rising per-subscriber distribution prices. Second, whether TWC's rival MVPDs refuse to purchase SportsNet LA programming or agree to pay the higher fees, TWC either way benefits from weakening its competitors by raising their costs and diminishing their subscriber counts.⁷³ Third, and also illustrated by the Dodgers dispute, arbitration is quixotic where the RSN's exclusive contracts for marquee professional sports teams result in a demand for carriage rates double prevailing market prices. The response to Chairman Wheeler's call for arbitration in order to resolve the L.A Dodgers impasse has been less than disheartening: his proposal has been met with silence. If, as it almost surely appears, arbitration cannot prevent SportsNet LA from denying distribution of Dodgers' games to rival MVPDs for what certainly will be a full, or at least almost full, MLB season, there is little objective reason to believe arbitration has any realistic chance to constrain the certain blocking of that and other key RSN channels in the future.⁷⁴

⁷³ *United States v. Comcast Corp.*, No. 11-cv-00106, Competitive Impact Statement at 23-26 (D.D.C. Jan 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

⁷⁴ Some of this is the consequence of the Commission's 2012 decision to sunset its prohibition of vertical cable programming exclusivity under Section 628(c)(5) of the Act. *Report And Order In MB Docket Nos. 12-68, 07-18, 05-192*, FCC 12-123 (rel. Oct. 5, 2012). Without exclusive programming deals between major league professional sports teams and RSNs, almost none of which are satellite-delivered, the "terrestrial loophole" would be far less significant because local broadcast and free over-the-air distribution of sports programming would remain profitable and competitively sustainable. See, e.g., *Baseball's Biggest Cable Deals*, Forbes, March 21, 2012, available at <http://ht.ly/AFAR2> (noting that the San Diego Padres, playing in the fifth smallest market with neither commercial success (their television ratings last season dropped 41% from 2010) nor on the field success (in the last five years), nonetheless struck a \$1.4 billion with Fox Sports San Diego which pays the team an average \$50 million annual rights fees, four times their previous deal, and include a 20% equity stake in the network).

B. With More Sports Programming Moving Online, a Comcast-TWC Merger to Form the Largest Nationwide Residential Broadband Provider Would Exacerbate the Current Regulatory Anomaly that Leaves Competing OVDs Unprotected

If the Comcast-TWC merger is approved, the combined companies would control more than 47 percent of all the residential high-speed broadband connections in America, and would pass more than 60 percent of homes in America. This has serious potential consequences generally for MVPD and OVD-distributed programming,⁷⁵ but poses especially harmful risks to sports television programming.

It is obvious to any observer of current media and technology trends that the ubiquity of digital devices (tablets, smartphones, Internet-enabled TVs and accessories, etc.) and the associated “TV Anywhere” phenomenon has fueled rapidly growing demand for IP distribution of television video programming, and shows no signs of abetting. Sports is one of the leading areas of this current trend. While there remain contractual barriers to universal Internet streaming of sporting events, the supply of live and time-shifted sports programming on the Web is increasing exponentially.

The risk that as vertically integrated RSNs, a merged Comcast-TWC would extend the companies’ historic pattern of MVPD foreclosure to OVD competitors is therefore at its greatest where regional sports programming is concerned. Imagine the difference that unfettered Internet availability of L.A. Dodgers baseball would have on the current TWC impasse over SportsNet LA if there were numerous independent Internet sources for real-time viewing of that content.

⁷⁵ DISH Network’s general counsel has cogently pointed out that Comcast/TWC will have at least three “choke points” in the broadband pipe where it can harm competing video services: the last mile “public Internet” channel to the consumer; the interconnection point; and any managed or specialized service channels, which can act as high speed lanes and squeeze the capacity of the public Internet portion of the pipe. Each choke point provides the ability for the combined company to foreclose the online video offerings of its competitors. *E.g.*, DISH Network ex parte notice, MB Docket No. 14-57, July 2014 (Letter from Jeffrey H. Blum Senior Vice President & Deputy General Counsel, DIS Network, to FCC Secretary), at 3.

The result would clearly be a substantial diminution of the hold-hostage power TWC is now unilaterally exercising over baseball in Los Angeles.

Without rejection of this transaction, or as SFC proposes the mandatory divestiture of all Comcast RSN entities (*see* Section V *infra*), the Commission has few if any tools to facilitate a different and pro-consumer result. First, OVDs do not even qualify for protection under the Act and current FCC rules. The issue of whether an OVD is properly considered an MVPD for purposes of the Commission’s program access regulations has been raised in complaint proceedings and a pending NPRM, but remains unresolved.⁷⁶ Second, the huge imbalance of resources and bargaining power between smaller, largely start-up OVDs and the behemoth of a combined Comcast-TWC would be extraordinary, making resort to — let alone commercially timely resolution of and success in — Commission-supervised complaint or arbitration proceedings effectively impossible as a remedy. This is why DOJ has opposed such “behavioral” remedies in vertical merger cases and, likewise, why the SFC proposal for divestiture of the Comcast RSNs as a condition of approving the Applications is consistent with the courts’ and Commission’s historic preference for the ““surer, cleaner” approach of structural relief.⁷⁷

C. The Commission’s Current Rules Do Nothing to Protect the Interests of Sports Fans, Especially Low-Income Consumers, In Maintaining Access to Sports Programming Without A Pay-TV Wall

Because sports are one of the few shows that viewers still watch live — providing advertisers with a captive audience — their value has soared. Rising TV revenues have in turn

⁷⁶ *See, e.g., VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); and *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, CSR-8605-P (Mar. 24, 2010).

⁷⁷ *See supra* at 27 & n.69. DOJ believes, with significant historical support from its experiences in the *AT&T* and *Microsoft* antitrust cases, that behavioral remedies in vertical cases are “exceedingly difficult” to fashion, entail a “high degree of risk of unintended consequences,” and “entangle the government ... in market operations,” among other unwarranted consequences. *US Airways CIS, supra* note 27, at 30 n.52.

driven up team sale prices: in May Steve Ballmer, the former head of Microsoft, agreed to pay \$2 billion for the Los Angeles Clippers basketball club. DirecTV CEO Mike White has reportedly said that the company's million-plus L.A. subscribers would be paying \$312 a year to watch their hometown teams if they all demanded terms as rich as the Lakers and the Dodgers, which both started their own RSNs operated by Time Warner Cable.

This [the Dodgers fee dispute] and the Lakers deal that Time Warner Cable did creates stratospheric pricing in the Los Angeles market that if you did it for all the sports team that L.A. subscribers have to pay for, you would be at \$26 dollars per subscriber per month in the bill, and that's a huge tax, particularly on the many households that don't watch sports.

The LA 'Sports Tax': \$312 a Year, Whether You Ever Watch a Game or Not, Southern California Public Radio, July 31, 2014, *available at* <http://ht.ly/AAsQM>.

As the Commission found in analyzing the Comcast-NBCU acquisition, “the public interest could be harmed if the Applicants move NBCU broadcast content currently available online for free to restricted online platforms that require a subscription or payment. Moving free NBCU online content behind a pay wall would reduce consumer choice and access to information and entertainment that consumers benefit from pre-transaction.”⁷⁸ The same is true in spades for broadcast and basic cable access to RSN content. With the accelerating increase in distribution prices for RSN programming, however, the traditional inclusion of sports programming in the non-pay portion of cable system bundles is today in serious jeopardy.

Indeed, the concern is especially pointed where Comcast is involved. When Comcast acquired an equity stake in the NHL Network, it moved the channel from its Sports Tier (a higher-cost pay TV tier) to the more widely penetrated “Digital Preferred Tier.” Similarly, Comcast changed its plans to locate MLB Network on the Sports Tier after obtaining an equity

⁷⁸ *Comcast-NBCU Order* ¶ 108.

stake, and placed it instead on the lower-cost Digital Preferred Tier, and in 2009 likewise relocated NBA TV, in which Comcast obtained an indirect ownership interest, from the Sports Tier to the Digital Preferred Tier.⁷⁹ It earlier attempted to craft a deal with NFL Network that would have given exclusive distribution rights to an affiliated cable sports network on a premium subscription tier, violating the NFL's consumer-friendly practice of ensuring free over-the-air television coverage of games in the cities of the two competing teams.⁸⁰

Given Comcast's size and established leadership in the cable industry, the "ripple effect" identified by the Commission in its *Tennis Channel Order* (whereby one MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution) means such tiering and pricing decisions will likely be mirrored nationwide by other cable systems.⁸¹ Nonetheless, nothing in the Commission's current program access rules or the *Comcast-NBCU* conditions prevents any RSN, including a merged Comcast-TWC, from implementing a tiering strategy that relocates regional sports programming to a higher, pay TV tier.

This is a particularly important issue in the context of diversity. The predominant composition of most non-pay tier cable subscribers, apart from more trendy "cord-cutters" who obtain television programming principally from Internet sources,⁸² consists of low-income

⁷⁹ See, e.g., *Tennis Channel Order* ¶¶ 48, 57.

⁸⁰ On a complaint by NFL Network, the Commission determined that "the NFL has presented sufficient evidence to make a prima facie showing that Comcast indirectly and improperly demanded a financial interest in the NFL's programming in exchange for carriage." *NFL Enterprises LLC v. Comcast Cable Communications LLC*, File No. CSR-7876-P, Memorandum Opinion and Hearing Designation Order, ¶ 89 (rel. Oct. 10, 2008).

⁸¹ *Tennis Channel Order* ¶ 73. "[T]he nature of the ripple effect is such that the larger the MVPD, the greater the effect." *Id.*

⁸² Cord cutters and other OVD subscribers cannot watch local professional sport games because the licensing agreements for MLB Network and the like restrict Internet distribution of league events to out-of-market franchises in order to protect the financial interests of RSNs with exclusive regional distribution rights. Indeed, one federal district court recently rejected an effort by several major professional sports leagues and RSNs to dismiss an

consumers and households. Perhaps even more low-income consumers rely solely on broadcast television for their television programming.⁸³ Especially given the continuing sluggish economy and weak jobs market, the Commission must remain mindful that the availability of free local sports television programming is in serious jeopardy. The time may come when the economics of professional sports requires cable systems to begin putting RSNs or some sports programming behind a pay wall. That time, however, is not 2014 and should be delayed by the Commission as a consumer protection objective for as long as economically sustainable.

D. There Are No Offsetting Public Interest Benefits Relevant to Regional Sports Network Programming Distribution

Assured access to content, particularly regional sports programming, is essential to the development of high-capacity networks that provide not only video but broadband competition.⁸⁴ Without such a guarantee, all of the miscellaneous (and highly speculative) purported public interest benefits articulated in the Applications are irrelevant to the Commission's consideration of the proposed transaction's impact on regional sports programming. Comcast makes no effort at all to connect its promises of enhanced broadband and video services to the RSN market for obvious reasons: there is no relationship between them.

antitrust lawsuit challenging the current restrictions on out of market ("OOM") broadcasts and the uniform requirement that an OOM subscriber purchase all teams' OOM games as a single package. *Lauman v. National Hockey League, et al.*, No. 12-cv-1817 (SAS) (S.D.N.Y. Aug. 8, 2014).

⁸³ Unfortunately, that is now more and more a rare luxury. See *Baseball Games on "Free" TV are Increasingly Rare*, CBS MoneyWatch, March 28, 2014, available at <http://ht.ly/AFClj> ("Comcast, which signed a 25-year, \$2.5 billion broadcast rights deal with the Philadelphia Phillies, plans to offer at least 33 more games over Comcast SportsNet Philadelphia, its regional sports network.... According to a recent *Philadelphia Inquirer* story, Comcast has asked other pay TV providers to pay an additional surcharge for the additional games, and has threatened to black out the broadcasts for companies that don't pay."). "It would seem inevitable that all regular season [MLB] games will be on pay TV in the not-too-distant future." *Id.*, quoting David Carter, Executive Director of the USC Marshall Sports Business Institute and a principal of the Sports Business Group. See also *Threat of Phillies Blackout as Comcast Sports Network Demands New Surcharge*, Lehigh Valley The Morning Call, March 27, 2014, available at <http://ht.ly/AFDaw>.

⁸⁴ See Statement of John Goodman, President, Coalition for Competitive Access to Content, Before the Senate Judiciary Comm., Dec. 7, 2006, available at <http://ht.ly/AAxkS>.

To the contrary, if critics of the merger with respect to the broader video distribution, entertainment programming and broadband Internet markets are correct, the only effect of a combined Comcast-TWC on RSN pricing, distribution and content would be to increase Comcast's already formidable profitability. This would exacerbate the upward spiral of sports licensing and subscription prices that already threatens the affordability of regional sports programming and the availability of professional sports games on free over-the-air broadcast television. In balancing anticompetitive harms against procompetitive effects, in the sports programming market there simply are none of the latter.

IV. NO ACTION ON OF THE APPLICATIONS IS APPROPRIATE UNLESS AND UNTIL TWC ELIMINATES ITS UNPRECEDENTED BOYCOTT OF OTHER MVPDS FOR L.A. DODGERS BASEBALL GAMES

The current and ongoing impasse between TWC and the rest of the video industry over SportsNet LA and Los Angeles Dodgers baseball amply illustrates that the combination of rights fees, franchise investment, exclusive contracts and lax regulatory enforcement is a witches' brew taxing the 90-95% of Americans who subscribe to cable television — whether or not they are sports fans or watch RSNs. Despite the Commission's efforts and good offices, no relief is reasonably possible this year, wiping out the entire 2014 season on television for most of the Los Angeles market. Heated carriage and pricing disputes like the very significant one between Comcast and Tennis Channel several years ago seem tame in comparison, certainly affecting a far smaller number of consumers.

Since TWC is holding Los Angeles hostage, the Commission should use all its powers to fully resolve that situation before acting on the Applications. This would not so much be holding the parties hostage as employing the lawful tools of administrative procedure to enforce the law

(specifically sections 628(b) and 628(c)(2)(B) of the Act)⁸⁵ by compelling licensees seeking discretionary Commission relief to demonstrate compliance with their regulatory obligations before action is taken in a non-mandatory administrative proceeding. But “what’s sauce for the goose is sauce for the gander,” so Applicants have no legitimate legal or policy grounds to complain if the Commission effectively holds their deal hostage as a counterweight to the unprecedented TWC boycott of all other MVPDs — and 70% of Los Angeles television consumers — for L.A. Dodgers baseball. Indeed, this is precisely the “intervene[ment] as appropriate necessary to bring relief to consumers” promised by Chairman Wheeler in his July 29, 2014 correspondence.⁸⁶

In addition, even after restoring televised baseball to Los Angeles, the Commission as a matter of reality and policy needs to address the efficacy of merger “conditions” that seek to constrain the anticompetitive incentives which the power of vertical integration enables Comcast and TWC to wield against consumers and competitors. Where the likelihood of future anticompetitive conduct is uncertain or difficult to gauge, such behavioral conditions may represent a good regulatory option in vertical cases. But where exclusionary and welfare-reducing vertical practices, as in regional sports programming, are certain, the resource imbalance, opportunities for evasion and very slow wheels of administrative enforcement make conditions either unenforceable, a regulatory pipe dream or both.

If the Commission does not deny the Applications, it should choose a structural solution over regulatory conditions to remedy the anticompetitive history and certain future foreclosure of Comcast and TWC in regional sports programming. In an even bigger case 30 years ago

⁸⁵ 47 U.S.C. §§ 548(b), 548(c)(2)(B).

⁸⁶ Wheeler-TWC Letter, *supra* note 7.

affecting more consumers (indeed everyone in the country), U.S. District Judge Harold Greene ordered divestiture as structural relief against AT&T because he recognized that divestiture is a quick, definite and, if needed, permanent solution to a long history of anticompetitive practices, one that makes the extreme difficulty of regulatory supervision and enforcement immaterial.⁸⁷ The Commission should take the same sort of bold, decisive step here — mandating a remedy that will eliminate the regional sport programming problem at its source — by requiring the divestiture of all of Comcast’s RSN properties (sufficient for an independent, unaffiliated competitor to operate the channels on profitable, going concern basis) as a condition to approving the acquisition of TWC.

CONCLUSION

For all the foregoing reasons, SFC requests that the Commission hold the Applications in abeyance, declining to act all in this docket, unless and until TWC makes the SportsNet LA channel, and its exclusive Los Angeles Dodgers baseball content, available to all competing MVPDs at fair market value and on non-discriminatory prices, terms and conditions, and on the merits either (a) deny the Comcast-TWC request for transfer-of-control in its entirety, or

⁸⁷ *United States v. AT&T Co.*, 552 F. Supp. 131, 165 (D.D.C. 1982) (“[T]he assumption that structural reorganization will make it impossible, or at least unprofitable, for AT&T to engage in anticompetitive practices... is fully consistent with the public interest in the enforcement of the antitrust laws. The soundness of this remedy becomes even more apparent when it is compared with other relief alternatives.”).

(b) require the divestiture of all of Comcast's RSN properties as a condition to approving the acquisition of TWC

Respectfully submitted,

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Dated: August 25, 2014

DECLARATION

David Goodfriend, Founder and Chairman of the Sports Fans Coalition, declares under penalty of perjury pursuant to 28 U.S.C. § 1746 and 47 C.F.R. §78.22 that he has personal knowledge of the matters addressed in the foregoing Petition to Deny and that the allegations of fact set forth therein are true and correct to the best of his knowledge, information and belief.

Executed in Washington, D.C. this 25th day of August, 2014.

/s/ David Goodfriend
David Goodfriend

CERTIFICATE OF SERVICE

I hereby certify that in compliance with the Commission's rules, a copy of the foregoing Petition to Deny and Comments In Opposition of the Sports Fans Coalition was filed via ECFS and in addition served on the parties to the Applications by email transmission to outside counsel for each of Comcast Corp. and Time Warner Cable, Inc. on this 25th day of August, 2014:

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