ICLE International Center for Law & Economics

In the Matter of
Applications of Comcast Corp. and Time Warner Cable, Inc.
For Consent to Assign or Transfer
Control of Licenses and Authorizations

MB Docket No. 14-57

Comments of
International Center for Law & Economics

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These comments are filed in response to the Commission's request for comments concerning Comcast Corporation's proposed acquisition of Time Warner Cable, Inc. In its review of the license transfers, the FCC should assess the transaction's likely competitive effects using the modern economic models employed by antitrust regulators.

The consumer welfare standard of antitrust law has established a number of things:

1. Increased concentration is not, in itself, evidence of anticompetitive effect.
2. Product markets should include all the reasonable substitutes.
3. Generally, mergers, like this one, that combine to meet only a 30% threshold (or less, if the market is properly defined) cannot be presumed to enable enough foreclosure to result in consumer harm.
4. Mergers, like this one, offer many efficiencies, from increasing shared know how among vertical steps in the production chain and increasing bargaining power against inputs that hold market power, to improving governance, reducing transaction costs, and increasing economies of scale that can lead to benefits for consumers.

Below, we very briefly support these points and apply them to the merger. We expand on these points in greater detail in our previous work on this merger, attached to this comment:

- Geoffrey A. Manne, *Beneficence Is Beside the Point: The Antitrust Realities of the Comcast/Time Warner Cable Merger*, CPI Antitrust Chronicle, Apr. 2014(1).[1]
- Geoffrey Manne, *Why the Antitrust Realities Support the Comcast-Time Warner Cable Merger*, Truth on the Market (Apr. 14, 2014).[2]
- Geoffrey Manne, *Actually, the Comcast-Time Warner Merger Doesn't Hurt Netflix*, Wired (May 9, 2014).[3]

Increased Concentration ≠ Anticompetitive Effect

The bulk of many critics' analysis of the proposed merger is that it will result in an increase in market share for the new combined Comcast-Time Warner entity. While it hardly merits repeating that increasing concentration isn't the same thing as anticompetitive effect, we must note it anyway as a corrective to the persistent assumption that "big is bad." As the Horizontal Merger Guidelines state:

> "The *measurement of market shares and market concentration is not an end in itself*, but is useful to the extent it illuminates the merger's likely competitive effects.... *Even a highly concentrated market can be very competitive* if market shares fluctuate

[1] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424917.
[2] *Available at* http://truthonthemarket.com/2014/04/14/why-the-antitrust-realities-support-the-comcast-time-warner-cable-merger/.
[3] *Available at* http://www.wired.com/2014/05/actually-the-comcast-time-warner-merger-doesnt-hurt-netflix/.

substantially over short periods of time in response to changes in competitive offerings."[4]

As noted below, Comcast-Time Warner will still be subject to considerable competition in both the MVPD and broadband markets, and Comcast's market share has indeed fluctuated with the advent of new technology. In fact, a proper definition of those marketplaces will show the combined firm would lack even the level of concentration assumed by critics.

Fiber, Wireless, Satellite, and DSL are All Reasonable Substitutes for Cable Broadband

Under the current FCC benchmark of 4 mbps down and 1 mbps up, wireless, satellite, DSL, cable, and fiber all contribute competitive offerings to the vast majority of American consumers. According to FCC data, 92% of American households have access to at least 3 offerings in the 6 mbps down and 1.5 mbps up speed range and 98% have at least 2.[5] In other words, FCC data suggests there is strong competition in the marketplace for broadband.

In fact, even under the proposed standard of 10 mbps down and 1 mbps down,[6] consumers still face a competitive marketplace. Again, the FCC Wireline Competition Bureau's Internet Access Services Report notes that 92% of American households have access to 2 or more fixed broadband ISPs with speeds of 10 mbps down and 1.5 mbps up.[7] If wireless is included, 91% of American households have access to 3 or more service providers that can provide 10 mbps down and 1.5 mbps up and 98% have access to at least 2.[8]

Part of the reason there is increasing competition is that innovations have made wireless and DSL into more effective competitors. DSL, in particular, has seen dramatic improvements in recent years. The deployment of VDSL2 (the newest DSL technology) by AT&T's U-verse and other providers like CenturyLink has enabled DSL-based broadband connections to grow at significantly higher rates than cable-based broadband connections. For instance, between December 2008 and December 2012, DSL-based broadband

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[4] HORIZONTAL MERGER GUIDELINES 7, 18 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[5] FCC Wirelines Competition Bureau, *Internet Access Services: Status as of June 30, 2013*, at 11 *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf.

[6] *See* Tenth Broadband Progress Notice of Inquiry, FCC 14-113, Aug. 5, 2014, at ¶¶ 14-16 *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0805/FCC-14-113A1.pdf.

[7] *Internet Access Services 2013*, *supra* note 5, at 10.

[8] *Id.* at 11.

connections grew at an average annual rate of 25% compared to only 18% for cable broadband.[9]

The deployment of VDSL has also played a significant role in increasing the options that consumers have at higher speeds. The growth in availability indicated in the table below is largely attributable to VDSL:[10]

Time Period	Households With Access to Two or More Broadband Providers		
	3 Mbps/768 kbps	6 Mbps/1.5 Mbps	10 Mbps/1.5 Mbps
As of December 31, 2012	97%	71%	70%
As of June 30, 2013	99%	92%	92%

Finally, it is important to note that Netflix, one of the most bandwidth-intensive services on the Internet, recommends only 3 mbps for SD quality and 5 mbps for HD quality.[11] Even over fiber, the fastest service technology available, Netflix usually streams at about 5 mbps or less.[12] Competition to provide the necessary speeds to do most of what consumers want on the Internet reasonably includes all the services noted above, dramatically decreasing the risk of harm from increased concentration from this merger.

The Combined Entity will not have Market Power or Incentive to Foreclose Competition

On a horizontal basis, national measures of post-merger market shares are irrelevant: Consumers have never had the ability to choose between Comcast and TWC (largely

[9] FCC Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, at 23, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1224/DOC-324884A1.pdf.

[10] *Cf. Internet Access Services 2012*, *supra* note 9, at 9, and *Internet Access Services 2013*, *supra* note 5, at 9.

[11] *See Internet Speed Recommendations*, NETFLIX (last accessed Aug. 24, 2014), https://help.netflix.com/en/node/306.

[12] *See* David Talbot, *Not So Fast: A Google Fiber One-Gigabit Mystery*, MIT TECH. REV. (Sept. 20, 2013), http://www.technologyreview.com/view/519466/not-so-fast-a-google-fiber-1-gigabit-mystery/ (noting “3.8 megabits per second… that’s the measure of the performance of Netflix streams on the network, not of what your home link is capable of doing” and that this “serves as a reminder that you only need five-megabit speeds to get high-definition Netflix”).

because of local and state franchise regulations[13]) and the merger doesn't change that, whatever the resulting market shares.

Vertically, the merger changes little overall. Comcast currently has no ownership interest in the vast majority of programming it distributes — and yet it eagerly distributes it. And it makes its own content widely available for distribution by competitors. Nothing about the proposed merger will change any of that. What the merger *does* do is to combine TWC's distribution networks with Comcast's NBCUniversal content. While the merger doesn't appreciably increase Comcast's content holdings and thus doesn't appreciably increase vertical concentration, it should be noted that it does bring the benefits of a more vertical structure to more subscribers.

After divesting customers to SpinCo as part of the merger, the new Comcast-Time Warner entity will have less than 30% of the national MVPD market and less than 40% (considerably less if, as is appropriate, wireless and other technologies are included) of the national broadband market. Certainly, the FCC should not presume the new entity will be harmful just because of its size. If anything, the presumption should be that this merger will *not* have anticompetitive effects.

The MVPD marketplace is more competitive than ever. There should be no concern that Comcast will be a "bottleneck" for video programming because programmers will have ample ways to access subscribers in the top markets. In fact, as the FCC found in 2011, 98.6% of homes have access to at least three MVPDs, and 35.3% had access to at least four. First, DirecTV and Dish are available in all DMAs, so programmers have at least two other robust and well-established alternatives to access in *all* of the top DMAs. Second, the major telco providers (AT&T U-Verse and Verizon FiOS) have a particularly significant presence in top markets, as do other overbuilders (e.g., RCN), providing programmers with additional ways to access subscribers. Third, programmers also have access to other cable providers in many of these DMAs. And OVDs like Netflix, Amazon and iTunes — to say nothing of traditional forms of distribution like DVDs and over-the-air broadcasting — present a significant (and, in the case of OVDs, growing) platform for national programmers in *all* of the top DMAs (and everywhere else).

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[13] Kate Cox, *Why Starting A Competitor To Comcast Is Basically Impossible*, CONSUMERIST (May 10, 2014), http://consumerist.com/2014/05/10/why-starting-a-competitor-to-comcast-is-basically-impossible/ ("Companies' reach stopped at the town line because that's where their franchise agreement stopped" and "There's also a large secondary cost to building out any kind of infrastructure project anywhere, and it's not measured in dollars… It's political clout"). *See also* Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 1 (2007), *available at* http://www.vjolt.net/vol12/issue1/v12i1_a2-Hazlett.pdf.

Finally, not only will Comcast's share of the broadband market post-merger be relatively small, as noted, it has no incentive, as many critics allege, to foreclose programmers' access to consumers via broadband in order to benefit its cable offerings. The company is not a monolith, and, at minimum, these different divisions within Comcast have clearly divergent incentives. Moreover, broadband and OVD services offered via broadband are rapidly growing, while cable video distribution is somewhat in decline. There is no reason to expect the merged company to have any greater incentive or ability to foreclose broadband competition for the sake of cable than it has today — and every reason to expect its incentive to facilitate the provision of broadband content to increase.

The Efficiencies from the Merger Could be Substantial and Will Promote Consumer Welfare

There are many potential benefits to competition that could result from this merger, and the FCC should consider them in its analysis:

- Reductions in transaction costs and increased "know-how" from increased vertical integration between distribution and content once TWC is merged with Comcast/NBCU. These benefits are likely to be passed on in the form of higher quality and more content;
- Elimination of double marginalization of Comcast/NBCU content to Time Warner customers, which could lead to lower prices;
- Better offerings for businesses on broadband;
- Increased efficiency due to economies of scale; and
- Increased bargaining power in disputes with content providers. It is indisputable that video programmers have significant bargaining power of their own, as evidenced by recent carriage disputes. Programming costs have outstripped both inflation and cable rate increases over the last decade. Increased bargaining power could reduce these, with lower prices passed on to consumers.

We urge the FCC to consider these and the other issues raised in our attached documents. Opposition to the merger has rested largely on the unsubstantiated belief that "big is bad," and the highly politicized and emotional belief that the government should "do something about Comcast." Neither of these has any grounding in fact or in rigorous competition analysis, and we urge the Commission to reject them as grounds for stopping or conditioning this merger.