Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Docket No. 14-57
Time Warner Cable Inc.,	)	
Charter Communications, Inc.,	)	
and SpinCo	)	
	)	
For Consent to Assign Licenses or	)	
Transfer Control of Licenses	)	

To: The Commission

COMMENTS OF ENTRAVISION COMMUNICATIONS CORPORATION

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SUMMARY

The merger of Comcast Corporation and Time Warner Cable, the two largest cable providers in the United State, will disproportionately impact and harm the Latino community—including independent Latino-focused programmers and advertisers and, ultimately, Latino viewers. As detailed in a supporting economic analysis by antitrust expert, Professor John Kwoka, the merger will cause the predicable effects of being anti-competitive and harmful to interests of Latino-market program providers and Latino viewers.

First, the merger will increase Comcast's incentive and ability to discriminate against and exclude independent Latino-focused programming that provides a competitive check to its own Latino-oriented programming. Second, the merger will expand and cement Comcast's power as a buyer of Latino-focused programming and ultimately diminish the quantity, quality, and competitiveness of that market.

Professor Kwoka explains, in his analysis, that these two economic consequences will be detrimental to the distinct group of consumers that compromise the Latino-market segment, as well as independent program providers serving those consumers and the associated market for Latino-oriented television advertising.

Entravision asks that the Commission recognize the potential harm to the public interest and impose structural remedies consisting of a requirement that Comcast divest its Latino-focused programming networks and/or cable systems within areas of heavy Latino viewership.

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I. INTRODUCTION

Entravision Communications Corporation ("Entravision") respectfully submits these Comments in connection with the Federal Communications Commission's ("FCC" or "Commission") consideration of Comcast Corporation's ("Comcast") proposed acquisition of Time Warner Cable Inc. ("TWC") along with the associated divestiture transactions involving Comcast, TWC, Charter Communications, Inc., and SpinCo. Entravision is a diversified media company utilizing a combination of television, radio and digital operations to reach Latino audiences and communities across the United States. It provides both network-affiliated and unaffiliated program content that is Latino-focused and which seeks to meet the entertainment, educational, informational, and community engagement needs of its viewers. It is from this perspective that Entravision respectfully requests that the Commission fully consider and investigate the likely effects of the proposed merger of the two-largest cable television services in this nation upon Latino program providers, the Latino community, and the public interest in general.

The Commission repeatedly has expressed its commitment to diversity, competition, and localism in the provision of media to the public. When these goals are put at severe risk to an important and growing segment of the United States population, it is incumbent upon the FCC to analyze, searchingly and thoroughly, those risks, and where, as Entravision will show herein, the public interest can be expected not to be served, to impose remedies necessary to protect it.

As we explain below and in further detail in an attached White Paper, written by an esteemed antitrust expert who has published extensively on the subjects of market power and

concentration and vertical integration, Professor John E. Kwoka,[1] those risks for Latino program providers and the Latino community are very real and troubling.

The proposed transaction under Commission review will have a disproportionate impact on the Latino community, the diversity and quality of programming and information they can expect to receive, and, ultimately, harm their interest in and use of the media. Foremost, the proposed merger will combine TWC with Comcast's two existing Spanish-language programming networks, predictably distorting that combined company's incentives and induce it to prefer—or more fully prefer—its own Latino-focused programming to unaffiliated programming, including that offered by Entravision. This market distortion can be expected to reduce payments to independent, unaffiliated programmers and more generally diminish and perhaps even foreclose completely market opportunities for unaffiliated Latino-market programming. It will also make it harder for Latino program producers to reach a sufficient audience to operate efficiently. Of equal concern is the increase in Comcast's buyer power. The transaction will eliminate one important buyer of Latino-focused programming and substantially increase the total Hispanic viewership controlled by an already dominant company. As a result, the transaction will substantially increase Comcast's market power as a buyer of Latino-market programming, with the predictable effects of decreasing Latino-market program acquisition, decreasing the price paid to Latino-market program providers, and reducing its quality, quantity, and viewer interest. This increase in buyer-power over Latino programming also will, in turn, increase the dangers of foreclosure and discrimination.

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[1] In support of this Comment, we incorporate by reference the White Paper of Professor John Kwoka, ECONOMIC ANALYSIS OF THE EFFECTS OF THE PROPOSED MERGER OF COMCAST AND TIMES WARNER CABLE ON PROGRAM PROVIDERS SERVING THE LATINO MARKET (hereinafter LATINO MARKET ANALYSIS)—attached as Appendix 1.

As Professor Kwoka explains in detail, these economic consequences will be detrimental to the distinct group of consumers that comprise the Latino-market segment, as well as independent program providers serving those consumers and the associated market for Latino-oriented television advertising. In light of these predictable effects, Entravision contends that the Commission must impose structural or conduct remedies. As proposed by Professor Kwoka, structural remedies might include the divestiture of the combined entities' existing Latino-focused programming and/or cable systems in areas of heavy Latino viewership.

II. THE GROWING MARKET FOR LATINO-ORIENTED PROGRAMMING

Latinos are a unique population within the United States. Their diversity adds to the richness of overall America public expression, culture, intellectual debate and politics. Latinos are also a recognized and growing, distinct population. According to the U.S. Government Census Bureau data, Latinos are the largest minority group in the United States, compromising over 17% of the U.S. population, or approximately 54 million Latinos.[2] Their use of the Spanish language—some Latinos are bilingual and a substantial portion are Spanish-dominant—obviously sets Latinos apart. But language is only part of what makes Latinos a recognizable culture. Latinos have a unique history and current participation in American art, music, literature, entertainment, and viewpoints. This cultural identity is made manifest in the programming—in all formats—that is created for Latinos, whether broadcast in Spanish, English, or a bi-lingual combination. Latino news, sports, entertainment and public affairs programing are evidence that the Latino marketplace is distinct. On the other hand, evidence

[2] *See* http://quickfacts.census.gov/qfd/states/00000.html.

suggests that non-Latino viewers consume little or no Latino-focused content.[3] This distinctiveness not only defines the viewer needs and wants of the Latino community, but it necessarily also defines the markets for programming itself as well as local and national advertising.

Professor Kwoka further concludes that from an economic perspective these distinctive features and viewership, as well as the likely lack of substitutability between the Latino-market and other video programming, defines a distinct segment within the larger video programming market. Both the U.S. Department of Justice's Antitrust Division ("Antitrust Division") and the Commission itself have long recognized the concept of submarkets, especially for differentiated products—which video programming most certainly is. Latino-market television programming, Entravision submits, is such a submarket. As Professor Kwok contends:

> Although I have not conducted an independent empirical analysis of the Latino-oriented video programming market on either the subscriber or advertising sides, I believe that the answer to the key question of substitution is nonetheless clear. Evidence indicates that viewers of Latino-oriented programming are dedicated to that format for reasons of language, culture, and product, while viewers of general market programming are equally committed to their format. Given this bifurcation of viewers, advertisers seeking Latino consumers are not likely to switch to advertising on general market programs. Viewership of the latter captures a different demographic that is simply worth significantly less to Latino-oriented advertisers. I therefore conclude that the available evidence supports the proposition that Latino-focused video programming constitutes a distinct product market.[4]

The Antitrust Division has evidenced its agreement with Professor Kwoka's approach, having at least twice[5] found Spanish-language media compromises a distinct market in considering the

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[3] While television audience measurement services do not measure viewer language or ethnicity, radio audience measurements services do. Their information shows that the Los Angeles marketplace radio stations have only a 5.6% non-Latino audience, for example.

[4] John Kwoka, LATINO MARKET ANALYSIS, at 7-8.

[5] *See* Complaint, *United States v. Bain Capital, LLC* (2008), *available at*

antitrust impact of mergers.[6]

III. ENTRAVISION AND INDEPENDENT PROGRAM PROVIDERS AND THE DIVERSE CONTENT THEY CAN OFFER BENEFIT THE PUBLIC INTEREST

Independent program providers are an important sources of competition, innovation, quality, and format diversity. However, independent program providers, just like independent broadcasters,[7] have historically faced disadvantages in the communications marketplace, particularly those providers owned or controlled by minorities. Mainstream providers have consistently had advantageous channel placement and received better funding through licenses

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http://www.justice.gov/atr/cases/f230100/230167.htm; Complaint, *United Stations v. Univision Communications, Inc.* (2003), *available at* http://www.justice.gov/atr/cases/f200800/200878.htm.

[6] We recognize that these issues were vetted—to a limited degree—in an earlier but distinguishable matter reviewed by the Commission in 2003. In *Hispanic Broadcasting Corp.*, 18 FCC RCD 18834 (2003). First of all, the *Hispanic Broadcasting* analysis focused on the radio broadcasting industry, which predominately consists of the transmission of licensed musical compositions, not the demand for television programming. *Id.* at 18856. Second, the majority decision of the Commission, in the face or a blistering and meritorious dissent of two Commissioners, based its decision on the absence of record evidence that demonstrated "an identifiable Spanish-language media market that would be adversely affected by the proposed transaction." *Id.* at 18855. Most fundamentally, however, that decision failed to analyze the uniqueness of Latino culture and the related demand created for Latino-market programmers—instead, myopically focusing solely upon language and format differentiating factors. The dissenting Commissioners correctly complained that the Commission had failed to conduct a needed and careful analysis and required fact-finding. *Id.* at 18864. At very least, the transaction now before the Commission presents an opportunity to do so. Eleven years later, given the dramatic growth in the size of the Latino community, Latino-orientated media, and Latino-focused programing, the Commission should hold hearings, talk to experts, and gather the data the then majority of Commissioners refused to do in 2003, despite the urging of the two dissenting Commissioners.

[7] Entravision recalls all too well the history of MVPD carriage of specialty broadcasters in general and Latino-oriented broadcasters in particular. It was only the passage of the Cable Act of 1992 that enabled Latino-market broadcasters to secure carriage, on a must-carry basis, on MVPDs. Even then, MVPDs utilized any arguments they could come up with, most of which were frivolous, in order to delay the carriage of Latino-oriented stations. In the end, after innumerable battles, Latino-serving broadcasters such as Entravision, were able to secure carriage, thereby allowing Spanish-language broadcasting industry to develop to the vibrant level of today. However, while there is a vibrant Latino-oriented broadcasting industry, television viewing today is, for the most part, MVPD-delivered.

fees. Meanwhile, independent providers often struggle with channel lineup slots and licenses fees.

Entravision is a media company that strives to deliver unique and focused programming for the Latino media consumer. Its principal lines of business consist of the ownership of television stations, radio stations, digital media, and unaffiliated video programming. These ownership interests include 58 primary television stations, 49 owned and operated radio stations, digital media services, and a strategic partnership for the distribution of the LATV Latino-oriented program service. Entravision's broadcast properties operate in 19 of the top 50 Latino markets areas identified by The Nielsen Company, including markets in California, the Southwest, Texas and Florida—states that have some of the largest concentrations of Hispanics.

As a result of these operations, Entravision has developed extensive knowledge of the needs and interests of Latinos in entertainment, educational, and informational programming. Entravision has recognized the reliance of the Latino community on the media that serve them and has undertaken efforts to assist Hispanics in their civic engagement. These efforts include immigration advice, citizenship procedures, registration for and participation in voting, education resources for children and adults, and navigation advice under new health care laws. For the 2014 political cycle, Entravision has already scheduled debates on its stations in Colorado and New Mexico, which have substantial Latino communities, among candidates for public offices. These targeted efforts are absent in the general media and represent another reason for the strong attachment between Latinos and the media that make the effort to build bonds with the Latino community

There are unmet needs in Latino-market television programming that Entravision and other independent programmers are focused upon meeting. Entravision, for example, has developed its own Latino-focused news programs and a weekend public affairs service, Perspectiva Nacional. In nearly all of its stations, Entravision maintains news departments that concentrate their efforts on reporting not found on general media outlets, telling stories that resonate with Latinos. Perspectiva Nacional, produced at Entravision's studios in Washington, D.C., provide Latinos with a weekly report on issues, such as immigration, border control policy, and education, that are considered of significance in the Hispanic community. This programming has been so popular with the Latino community in Entravision's broadcast markets that it is now being expanded to the LATV network.

All of this experience has given Entravision an intimate knowledge of the uniqueness of the Latino population in this nation. Latinos, in particular, are not a monolithic group. They are young and old, native born, or of any number of generations, and new immigrations, with ancestral homes in Mexico, Central America, South America, or the Caribbean. Most speak or understand Spanish, many are as fluent in English as non-Latinos, and a good number are bi-lingual. Female Latinos are a key demographic and they have come into their own in the media, the arts, education, and scholarship, yet are unrepresented in many parts of the media serving Latinos.

Entravision believes that programming to Latinos can no longer be delivered in a one-size-fits-all package. Rather, Entravision submits that while the traditional Spanish-language networks and program services play a major role, there is a pressing need for new and novel programming. These include programming serving the needs of women, Latino youth, urban Latinos, and bilingual Latinos. Independent program producers, often from the very

backgrounds of the program services they produce, are the obvious parties to provide these valuable program services.

Entravision has responded to the growth and diversity of the Latino community through its strategic partnership involving the LATV network. One of the needs perceived by Entravision was that younger and bi-lingual Latinos do not have a program service that offers programming that appeals to their needs and interests, LATV contains a slate of programs that are bi-lingual and offer a unique perspective on entertainment and social issues, with a special emphasis on the viewing interests of Hispanic women. In an effort to promote the self-esteem of the Latino community, LATV has created programming that highlights the many accomplishment of American Latinos. Entravision and LATV are working on other programming initiatives that they expect to be well received by younger and bi-lingual Latinos.

However, these are not program offerings with obvious demographics attached to them. They are new and different and need to be given the opportunity to develop in the hothouse of the media world. But, no development is possible unless they are planted on channel lineups and are given a chance to thrive. This proceeding is critical to the future of independent Latino programming and whether there will be a closed programming world of a single programming gatekeeper or an open environment in which experimentation, such as that offered by LATV and Entravision, is permitted to take root and grow.

IV. THE MERGER AND COMCAST'S GATEKEEPER ROLE WILL FORECLOSE PROGRAM PROVIDERS AND HARM LATINO VIEWERS

The vertical aspects of the deal, including specifically the integration of Comcast's upstream programing assets with TWC, presents a substantial competitive threat to the Latino programing marketplace and its existing and future diversity. The danger for Latino-focused

programming providers is especially acute because Comcast is both already the single largest cable purchaser of Latino-oriented video programming and the owner of two Latino-focused television program networks: Telemundo and mun2. In effect, the deal replicates the combination of Comcast and NBC/Universal, but this time combining the first and second largest cable companies, thereby increasing the resulting firm's total share of Latino viewers.

Professor Kwoka's analysis shows that a vertically integrated buyer of programming has both the incentive and power to discriminate in favor of its own programming over those of independent, Latino-focused programing providers and harm Latino consumers.[8] As a result, the programming ultimately selected by Comcast will not be that with the largest net social value, but, rather, most benefits Comcast. Overall program quality suffers, and viewers, advertisers, and unaffiliated program suppliers are all harmed. Viewers do not get the best and most diverse Latino programming. Advertisers face higher prices because of fewer programming options. Unaffiliated program suppliers find their market opportunities limited, forcing down the prices they are paid, with resulting adverse effects on program quality, variety, and creativity. Moreover, even short of outright exclusion—a known as foreclosure—the disadvantaging of independent programming by tiering or channel placement, which blunts its competitive impact, also inflicts harm on unaffiliated sellers and on viewers. Professor Kwoka concludes that it is economically predictable that Comcast will act in its own interests to weaken its programming rivals and diminish their constraining effects on its own programming.

These issues are not new to the Commission. It has been almost 20 years since Congress, in the 1992 Cable Act, recognized the threat to independent programmers posed by cable

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[8] John Kwoka, LATINO MARKET ANALYSIS, at 8-12.

operators' incentives to favor programming in which they have an economic interest and directed the Commission to promulgate rules to proscribe such conduct. In the intervening years, the benefits of quality independent programming have only increased in the wake of growing industry consolidation. Indeed, the Commission itself insisted upon conditions in the Comcast/NBCUniversal merger, based upon evidenced, including a detailed economics study, that demonstrated that Comcast favored its affiliated programming and did so for anticompetitive reasons.

The proposed aggregation of programming assets, especially those aimed at the distinct market segment of Latinos, underscores the need for the Commission, in assessing the public interest implications of the pending application, to consider the impact on existing and new independent Latino-focused programmers and other independent program suppliers generally. Despite the Commission's program carriage rules, which provide a procedure through which aggrieved independent programmers can seek redress, evidence is cumulating that both the carriage rules and the additional constraints imposed in the context of the NBCUniversal merger do not suffice.

This proceeding offers an opportunity for the Commission to impose meaningful prospective conditions, consistent with the public interest, to ensure that a post-transaction Comcast does not use its augmented horizontal size and vertical integration to the detriment of independent Latino programmers and, ultimately, consumers.

IV. THE MERGER WILL INCREASE COMCAST'S BUYER MARKET POWER TO UNACCEPTABLE LEVELS IN MARKETS WITH SIGNIFICANT LATINO POPULATIONS

Latino viewers are uniquely situated in the footprints of the Comcast and TWC cable systems. That is, the Latino population is not uniformly spread throughout the United States, but instead clusters in major metropolitans areas and portions of the West, Southwest and Florida where the two companies often hold dominant market positions. Therefore, an analysis of the competitive overlap between Comcast and TWC in the general market for residential video subscribers is meaningful, but does not capture the actual level of concentration and resulting market power related to Latino programming that will be increased by the proposed transaction.

There is no question that the Comcast/TWC deal will increase Comcast's control over access to Latino viewers. According to an analysis undertaken by Professor Kwoka of the major Hispanic DMAs as developed by the Nielsen Company, just over two-thirds of all Latino viewing households are located within twenty DMAs. Those same DMAs, by comparison, only represent 38% of all general population households. In these areas, Comcast is already the largest cable provider and will become even more dominant after the deal. Comcast currently is the largest MVPD in 10 of those top 20 DMAs and TWC in another six. Moreover, post-transaction, Comcast will have a high level of subscribership in two of the other four DMAs, NewYork and Dallas, and the merged entity will be absent from only one of the top 20 Hispanic DMAs, Phoenix. Obviously the proposed Comcast-TWC merger will result in an increase in the number of Latino MVPD subscribers who are served by a single residential video services provider.

The likely detrimental effects of increased buyer power—indeed monopsony power—are well recognized. Such market power diminishes the dominant firm's need to pay competitive

prices and, in the short run, results in less overall output and, subsequently, less production of subsequent goods. Also, because there are less input goods purchased and those that are purchased receive a lower price, over time, the input market shrinks and there is less incentive for those manufacturers to produce, innovate, or invest.

Here, as Professor Kwoka explains, Comcast, as a stronger monopsony buyer of Latino-orientated programming, can be expected to purchase less such programming and at a lower price to program providers than in a competitive market.[9] Less programming adversely affects Latinos by offering less program choice and variety than under the competitive standard. The lower price to programmers diminishes the returns to those in that business, jeopardizing quality, improvements, and viability. For example, there will be less ability and incentives for independent programming providers to develop new and innovative programming, like LATV. The smaller quantity of Latino-market programming only drives up the price to advertisers seeking out such programming.

In addition, Comcast's control over a sizable number of Latino residential video subscribers will frustrate, impede, or even prevent independent Latino-focused program providers from gaining or retaining sufficient scale to meaningfully compete. According to Nielsen,here are approximately 14.7 million Hispanic television households in the United States.[10] At very least, the combined entities' control over a sizable portion of those viewers will present far greater challenges for Latino-oriented programming that seeks to by-pass Comcast as compared to programming for the general market. The control over access to so many Latino

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[9] John Kwoka, LATINO MARKET ANALYSIS, at 12-15.

[10] *See* http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_Hispanic_DMA_Ranks_2013-2014.pdf.

consumers will give Comcast additional leverage in negotiating with independent Latino-focused program providers.

VII. THE TRANSACTION SHOULD NOT BE ALLOWED TO PROCEED ABSENT SUFFICIENT REMEDIES THAT PROTECT ACCESS FOR DIVERSE PROGRAMMERS

Harms to the public interest, especially harms that fall disproportionately on an important class of citizens, must be remedied if the public interest is to be promoted. The public interest requires that both competition and diversity be protected. The problems of discrimination by vertically integrated cable networks and buyer power are not new problems. As Professor Kwoka examines in his White Paper, Commission precedent includes use of a number of structural and conduct remedies.[11] As he notes, the most direct and obvious here, short of prohibiting the transaction itself, would be: (1) the divestiture of Comcast's Latino-focused programming businesses; and/or (2) the divestiture of cable systems in top Latino market areas to ensure that the merged Comcast's Latino market share not exceed 30 percent of Latino subscribers, the level of subscribers Comcast has volunteered as a limit for its total number of subscribers. If the Latino-focused programming ecosystem is to be preserved, protecting and

[11] John Kwoka, LATINO MARKET ANALYSIS, at 15-21.

promoting diverse Latino programming, access, speech, political participation, and pocketbooks, the Commission must seriously and fully develop a factual record and impose these a remedies that will safeguard the public interest.

Respectfully submitted,

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APPENDIX 1

ECONOMIC ANALYSIS OF THE EFFECTS OF THE PROPOSED MERGER OF COMCAST AND TIME WARNER CABLE ON PROGRAM PROVIDERS SERVING THE LATINO MARKET

John Kwoka

Professor of Economics

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August 25, 2014

I. INTRODUCTION AND SUMMARY

The proposed merger of Comcast and Time Warner Cable would combine the two largest, cable distribution companies in the country and, in addition, provide further distribution opportunities for Comcast's program networks. It would affect the structure and operation of a number of markets. I have been asked by Entravision Communications Corporation to analyze and report on the effects that this merger would have on independently provided programming intended for Latino-oriented television viewers.[1]

In both its horizontal and vertical dimensions, the proposed merger raises competitive concerns for unaffiliated programming intended for Latino viewers. In its vertical dimension, this merger would increase Comcast's incentives, in its program acquisition decisions, to discriminate against and perhaps foreclose unaffiliated suppliers of Latino-market television programming. Comcast already has this incentive due to its ownership of two Latino-oriented programming networks, but its acquisition of TWC's distribution operations would significantly increase its ability to harm unaffiliated Latino-oriented programming by foreclosing, or at least disadvantaging, these program providers from TWC's current subscribership. This would shrink the market for unaffiliated Latino-oriented program providers, reducing their payments and eroding their competitive force against Comcast.

In its horizontal dimension, the proposed merger would eliminate the second largest cable operator as an independent buyer of Latino-oriented programming and substantially increase overall concentration of buyers of such programming. Comcast is not only the largest cable operator in the country, but even to a greater degree, it is the largest cable operator serving Hispanic viewers. Its acquisition of TWC would substantially increase its buyer

[1] A brief description of my biography is attached as Exhibit 1 and my full curriculum vitae is attached as Exhibit 2.

power over Latino-oriented video programming, decreasing demand for independent Latino market programming and thereby decreasing its price to providers, its quality, and its diversity. For these reasons, I conclude that the merger of Comcast with TWC poses a substantial threat to Latino-oriented program providers and the competitiveness of the market in which they operate.

II. THE PROPOSED TRANSACTION

Comcast is the largest cable operator in the country, currently having approximately 22 million residential video subscribers. It is also the largest broadband service provider and the owner of numerous cable channels, local broadcast TV stations, regional sports cable networks, the Telemundo and mun2 networks, the NBC network, television production operations, and Universal Pictures, among other assets. Time Warner Cable is the second largest cable operator in the country, with some 11 million current residential video subscribers. Both are far larger than the third and fourth ranked cable companies, Cox and Charter, which have 4.6 and 4.2 million residential video subscribers, respectively. Like Comcast, TWC is a also major provider of broadband service and voice services.

The proposed transaction between Comcast and TWC would involve the sale of cable systems and other assets of TWC to subsidiaries or affiliates of Comcast, effectively merging the two companies. The merger would raise both horizontal and vertical concerns. It would result in a cable operator with about 30 percent of national cable subscribers after certain exchange and divestiture agreements take effect.[2] In addition, it would extend to TWC's current subscribers Comcast's incentive to foreclose or otherwise disadvantage unaffiliated

[2] The parties have agreed to a series of divestitures, exchanges, and spin-offs, primarily involving Charter Communications, Inc., designed to address anticipated concerns regarding total residential video subscribers served by the merged company. I discuss the issue of strategic choices in voluntary divestitures later in this report.

programming as a result of Comcast's ownership of multiple video program networks. I will address the implications of both of these changes for Latino-oriented video programming in this report.

This transaction arises only three years after Comcast itself acquired NBCUniversal and a little more than three years before the expiration of the remedies imposed by the FCC as a condition of approval of that merger. It arises at a time when the results of careful economic studies of mergers have intensified concerns with respect to their competitive effects. I have recently completed a research project compiling and analyzing all the published and methodologically-careful studies of mergers in the United States over a 25 year period.[3] While that compilation focuses on horizontal mergers, it is instructive that most of these mergers—three-fourths, to be exact—resulted in price increases. After controlling for all other influences and in most cases after review by the antitrust enforcement agencies, those mergers have been found to result in price increases ranging as high as 28 percent and averaging nearly 10 percent. These findings suggest that recent antitrust policy has systematically erred on the side of undue tolerance of proposed mergers.

With these findings as a useful backdrop, I turn to the issue of the effects of this particular transaction on Latino-oriented video programming. I begin with an analysis of the Latino-oriented video programming market.

III. THE LATINO-ORIENTED VIDEO PROGRAMMING MARKET

Like all video programming, Latino-oriented video programming joins program providers on the supply side, with cable and other video distributors on the buying side. Those

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[3] J. Kwoka, "Does Merger Control Work? A Retrospective on U. S. Enforcement Actions and Merger Outcomes," *Antitrust Law Journal* (2013), 78, 619-650. J. Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective on U.S. Experience*, MIT Press, forthcoming.

distributors deliver video to---and derive their demand from---downstream viewers of various types of programming. Revenues originate from subscriber fees together with advertising fees. The latter are themselves based on viewership, in this example of a two-sided market.[4] The central question here is whether Latino-oriented video programming constitutes a market distinct from other video programming. My review of the evidence leads to the conclusion that such is the case. The bases for my conclusion lie both on the viewer and the advertiser sides of this market.

A. Latino-Oriented Programs and Viewers

As this Commission has recognized, video programs are neither perfect substitutes for each other nor are they generally entirely distinct. They are instead a "classic differentiated product"[5] wherein programs substitute for each other to varying degrees. Thus, some, but not all, viewers will switch between movie channels, or from movie channels to talk shows, or from shopping channels to reality shows.

This Commission has chosen, as a general matter, not to define numerous submarkets of program types, but it has nonetheless recognized that, at least for some purposes, certain programming should be viewed as a separate market.[6] It has made precisely this determination

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[4] A two-sided market is one in which there are two separate but interdependent demands. For example, a newspaper is demanded by both subscribers and advertisers. Moreover, advertiser demand is a function of readership, and readers demand advertisements for the information they contain. Both sets of demanders contribute revenue streams to the newspaper.

[5] *General Motors Corporation and Hughes Electronics Corporation*, 19 FCC Rcd 473, 504 (2004)

[6] The qualifier "at least for some purposes" reflects the fact that not all issues and proceedings may require such disaggregation of program types. As the Commission has said, "Nothing in the record suggests a need for us to define rigorously all the possible relevant markets for video programming networks." *Id.* But where correct analysis of the issues require drawing such distinctions, the Commission has made clear its willingness to do so.

with respect to regional sports programming and local broadcast news, each of which is said to be characterized by the "unique nature of its core component" and to lack any "readily acceptable close substitutes."[7] Thus, national news is not a substitute for local news, nor are out-of-market sporting events substitutes for home-town teams featured on regional sports networks.

Even to a greater degree than with those examples, Latino-market programming has unique features and lacks close substitutes. The distinctive features of Latino-market programming include, most obviously, language. While some fraction of Hispanics in the United States report they can speak English, a considerable majority are either Spanish-dominant or at most bilingual.[8] Television viewing by Hispanics follows much the same pattern: All of the top ten broadcast shows viewed by Latinos are Spanish in language and distinctive in orientation.[9] Moreover, Spanish-language programming has no crossover appeal or substitution capability for the vast majority of English-language viewers.

The reasons for distinguishing Latino-oriented programming go beyond language: various features of such programming, including program types (e.g., telenovelas) and cultural cues, resonate uniquely with persons of Hispanic background. Indeed, the major general market programming networks have had little success in gaining Hispanic viewership. A recent feature story reported that despite the presence of a Latino star in a top-ranked general market program, for example, Hispanic viewers made up only six percent of the audience. The top-ranked Latino-focused program that ran at the same time had seven times as many

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[7]. *Id.* at 535.

[8] "When Labels Don't Fit: Hispanics and Their Views of Identity," Pew Research Center, April 4, 2012, p. 26.

[9] *Id.* at 28. Nielsen, "Three Things You Thought You Knew About U.S. Hispanic's Engagement with Media."

viewers. This report concluded that Hispanic viewers "seem to want very little to do with American English-language television."[10]

Evidence demonstrates both program uniqueness and lack of viewer substitution for Latino-oriented video programming.

B. Latino-Oriented Programs and Advertisers

Advertisers play a direct role in programming markets as they pay for advertising time on video programming. But, of course, advertisers purchase advertising time selectively, targeting viewers whose characteristics make them likely potential purchasers of their products or services. For this reason advertiser choices of programming on which to purchase time reflects viewer distinctions that are relevant here. More specifically, to the degree that advertisers target Hispanic customers by developing distinctive advertising, by selling distinctive products, and by purchasing advertising time on Latino programming, that suggests distinct market segments.

And indeed, such is the case in this instance. Not only does Latino-focused programming appeal to advertisers with products oriented toward a Hispanic market, but the types of product and the methods of advertising are also distinctive. Nielsen reports that "[a] primetime English-language focused broadcast [advertisement] effectively leaves out Spanish-dominant Hispanics . Spanish-language advertising is generally more effective than English-language advertising for Hispanics."[11] Among the reasons for this distinction, according to that report, is the fact that "Spanish ads create a deeper personal connection to Hispanic

[10] "Networks Struggle to Appeal to Hispanics," *New York Times*, August 5, 2012, for example.

[11] Nielsen, p. 3

customers."[12]

Additional evidence of the distinctiveness of Latino-oriented advertising and, by implication, Latino-oriented programming, comes from an analysis by the Department of Justice in an antitrust case involving the merger of radio station groups. Advertising on Latino-oriented radio was a principal antitrust consideration. Applying its standard methodology for defining an antitrust market, the DOJ concluded as follows:[13]

> Many local and national advertisers . . . consider Spanish-language radio to be particularly effective or necessary to reach their desired customers, particularly Spanish-speaking consumers who listen predominantly or exclusively to Spanish-language radio. These advertisers consider Spanish-language radio, either alone or as a complement to other media, to be the most effective way to reach their target audience, and do not consider other media, including non-Spanish-language radio, to be a reasonable substitute. These advertisers would not turn to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio.

In short, having conducted an inquiry analogous to that necessary here, the Justice Department concluded that there was a distinct Spanish-language radio advertising market.

C. The Latino-Oriented Video Programming Market

Although I have not conducted an independent empirical analysis of the Latino-oriented video programming market on either the subscriber or advertising sides, I believe that the answer to the key question of substitution is nonetheless clear. Evidence indicates that viewers of Latino-oriented programming are dedicated to that format for reasons of language, culture, and product, while viewers of general market programming are equally committed to their format. Given this bifurcation of viewers, advertisers seeking Latino consumers are not

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[12] Ibid.

[13] United States of American v. Univision Communications, Inc., and Hispanic Broadcasting Corporation. C.A. No. 1:03CV00758 (United States District Court for the District of Columbia; Filed March 26, 2003), at p. 4-5.

likely to switch to advertising on general market programs. Viewership of the latter captures a different demographic that is simply worth significantly less to Latino-oriented advertisers. I therefore conclude that the available evidence supports the proposition that Latino-focused video programming constitutes a distinct product market. With this understanding of the market in question, I now turn to the task of evaluating the two anticompetitive effects of this merger upon Latino-oriented programming.

III. FORECLOSURE OF LATINO-ORIENTED PROGRAMMING

The first of these competitive concerns for Latino-oriented programming arises because Comcast is the single largest cable purchaser of Latino-oriented video programming. At the same time, Comcast owns Latino-oriented program assets that are in direct competition with unaffiliated Latino-oriented program providers. Comcast decides which of the alternatives to choose, and a longstanding concern with such arrangements has been that ownership of one alternative distorts that decision to the disadvantage of unaffiliated program providers. The disadvantage may involve poor channel placement, tiering, pricing, or outright foreclosure from carriage on the system. The incentive for such a strategy by the vertically integrated company is to weaken its rival and thereby to diminish its constraining effect on the integrated company's own programs. Any handicap, up to and including foreclosure, reduces the unaffiliated network's total viewership on all video distribution media, which will in turn have an adverse effect on its advertising revenues. Loss of subscribers and advertisers reduces the network's revenues, diminishing its ability to improve quality and develop new programming. Compounded by a likely increase in per-subscriber costs, the unaffiliated network may face a kind of death spiral of reduced quality, viewership, and advertising, leaving the vertically integrated firm's affiliated programming without a competitive constraint.

The competitive harms from this outcome are several. Clearly, unaffiliated video program providers are harmed by being disadvantaged or even excluded. Indeed, such exclusion will threaten the viability of Latino programing in general if a sufficient subscriber base does not remain. Comments filed in earlier proceedings of this Commission have suggested that, in order to attract sufficient advertising revenues, a national programming network needs to have a subscriber base of no less than 20 million viewers and, perhaps, considerably more.[14] In its Fourth Report and Order on cable ownership, this Commission estimated that a minimum viable scale for a cable network required a minimum viable scale of 19 million customers.[15] These numbers represent greater challenges for Latino-oriented programming that might seek to bypass Comcast than for programming oriented toward the general market.

In addition to harms to Latino-focused programmers, foreclosure will result in viewers being denied an alternative video option, and not because it offered inferior programming. Advertisers also lose an avenue through which to reach their intended audience, likely driving up the price of advertising time on the remaining network (owned by the vertically integrated firm).

The general scenario of foreclosure has long been viewed as likely, and both evidence and experience have established the very real basis for this concern. Starting with the Cable Act of 1992, Congress and this Commission recognized the threat of foreclosure and responded by mandating program access rules that sought to ensure nondiscriminatory access to cable distribution for unaffiliated networks. A number of economic studies undertaken

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[14] Adelphia Communications, 21 FCC Rcd 8203, 8250 (2006).

[15] Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92, 264, 23 FCC Rcd 2134, 2162 (2008).

around this time found that the integration by cable operators into various types of program ownership resulted in greater use of their own programming services and less carriage of independently owned and produced competing services, as very much predicted by theory.[16]

Discrimination and/or foreclosure have continued to be matters of major concern. Most recently, the FCC determined that foreclosure was a prospect directly raised by Comcast's acquisition of NBCUniversal. Having reviewed all of the evidence, the Commission concluded, "We agree that vertical integration of Comcast's distribution network with NCBU's programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming."[17] It came to this conclusion from a combination of documented experience and new economic evidence. Especially compelling to its determination was the study by Professor Austan Goolsbee that was discussed in detail and applied in that proceeding. In this Commission's own words at the time, that study showed that "Comcast currently favors its affiliated programming and that it does so for anticompetitive reasons."[18]

Notably, this conclusion was reached with respect to Comcast's behavior *prior to* its acquisition of NBCUniversal. Together with other evidence and allegations of discrimination, the FCC determined that the basic program carriage rules were not sufficient to prevent harms

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[16] See, for example, M. Salinger, "Vertical Mergers and Market Foreclosure," *Quarterly Journal of Economics*, 1988. D. Waterman and A. Weiss, "The Effects of Vertical Integration between Cable Television Systems and Pay Cable Networks," *Journal of Econometrics*, 1996. T. Chipty, "Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry," *American Economic Review*, 2001.

[17] Waterman and Weiss, op cit.

[18] FCC 11-4, p. 167. An important aspect of the Goolsbee study was its methodology for distinguishing efficiency vs. competitive harm as the reason for program selection by vertically integrated companies. It concluded that efficiency did not explain the observed pattern of Comcast's behavior. A. Goolsbee, "Vertical Integration and the Market for Broadcast and Cable Television Programming," FCC Working Paper, 2007.

to competition and, accordingly, it conditioned its approval of the merger on additional program carriage requirements.[19]

This pattern appears to be repeating itself. Even as Comcast and TWC propose to merge, evidence is cumulating that the current FCC remedies---the basic program carriage rules, plus the additional constraints imposed in the context of the NBCUniversal matter---do not suffice. A number of independent program providers report having difficulties securing carriage and/or reasonable channel placement from Comcast, where the latter owns what is arguably competing programming. These disputes have involved NFL Network, Tennis Channel, and Bloomberg. Most recently, RFD-TV has complained that following its merger with NBCUniversal, Comcast stopped further launches of its programming and dropped it in several important markets, raising concerns about what will ensue after a merger with TWC.[20] The Back9Network has publicly criticized Comcast for not honoring its commitments subsequent to its merger with NBCUniversal.[21] Back9Network's owner cites Comcast's Golf Channel as the reason it has had little success in securing carriage.

Such disputes will only multiply as Comcast becomes more thoroughly engaged in program supply and extends its distribution footprint as a result of this proposed merger. The reason is simply that TWC has no affiliated Latin-oriented programming, so its decision is presently undistorted by such ownership. But all of TWC's current viewers of competing Latino-oriented programs represent further opportunities for Comcast to replace such programming with its own Latino-oriented networks, or at least handicapping it, thereby

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[19] Comcast Corporation, supra, at 4287.

[20] Testimony of Patrick Gottsch, House Committee on the Judiciary, May 8, 2014. Also, "A Rural TV Channel Circles the Wagons," *Wall Street Journal*, August 12, 2014, B6. See also, *The New York Times*, August 24, 2014 at p. 1.

[21] Testimony of James Bosworth, April 6, 2014

eliminating or reducing a major competitive constraint that Telemundo and mun2 now face.

The increase in magnitude of Comcast's incentive to foreclose or disadvantage unaffiliated Latino-oriented programming can be approximated as follows. The value to a more dominant firm from the removal of a rival grows with its volume and share of the market. Put simply, if a 20 percent firm constrained by an aggressive rival loses one million dollars as a result of that constraint, then an otherwise equal 40 percent firm loses the opportunity for two million dollars. In light of that, the proposed merger of Comcast and TWC is clearly hazardous to competition in Latino-oriented video programming as well as in video programming generally. The proposed merger would enlarge Comcast's viewership base from approximately 22 million subscribers to approximately 30 million subscribers. The proposed merger would therefore increase by 36 percent Comcast's incentives to distort carriage decisions in favor of its own affiliated programming.

I therefore conclude that the merger will significantly strengthen Comcast's incentive and ability to foreclose or otherwise handicap unaffiliated providers of Latino-oriented video programming.

IV. MONOPSONY POWER OVER LATINO-ORIENTED PROGRAMMING

Apart from the distinct effect on unaffiliated Latino-oriented program supply, the proposed merger of Comcast and TWC will further concentrate the buying side of the Latino-oriented video program market as well the overall programming. This growth in buyer concentration creates a different but overlapping set of competitive harms. I shall first outline the relevant economic theory and then develop the factual basis for this concern in the context of this merger.

In a competitive input market, any one buyer purchases units up to the point where the unit's contribution to revenues ("marginal revenue product") equals the price charged. But if

there is only one buyer---a "monopsonist"---that buyer faces a rising schedule of offer prices for the input. As a result, any additional unit that is purchased costs the buyer a total of that unit's price *plus* the increase in the total costs of acquiring all preceding units at the now-higher price. The monopsonist maximizes its profit by purchasing units up to the point where marginal revenue product equals marginal acquisition cost. As the latter exceeds price, the buyer in fact purchases fewer units than would, collectively, a competitive buying sector.[22]

The result of this exercise of market power is that the acquiring firm uses fewer units of the input and produces correspondingly fewer units of output (which in turn sell at a higher final-product price to consumers). In addition, the fewer units of the input that are purchased transact at a lower price, since---for reasons just outlined---any unit's price is less than its marginal acquisition cost for the monopsonist. This shrinks the input supply sector in the short run and creates risks to its financial and technological viability in the longer term.

While neither the present Comcast nor the merged Comcast is a pure monopsonist, and while there is no precise number at which market power on the buyer side generally emerges, some relevant facts about the proposed merger are nonetheless clear. As previously noted, Comcast is already the largest cable system operator, serving 22 percent of residential video subscribers nationwide. TWC is the second largest wired cable operator, with 11 percent of total residential video subscribers.[23] After agreed upon divestitures, the merged Comcast will

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[22] The theory is set out in R. Blair and J. Harrison, *Monopsony in Law and Economics*. Cambridge, 2010, among other sources. I note that this model and the analysis that follows presumes a rising supply schedule of the input and the absence of price discrimination.

[23] I follow the Commission in excluding OTA broadcast and online video distribution from consideration as alternatives due to their technological and practical limitations. EchoStar-DirecTV para. 109-115. FCC, Comcast-NBCU, para. 40. Accordingly, my focus will be on residential video distribution. I also note that this Commission has concluded that DBS is an imperfect substitute for wired cable. FCC Docket 01-348, pp. 49-51. Other evidence of the primacy of wired cable exists. Comments filed in an earlier proceeding

control fully 30 percent of all residential video subscribers nationwide. As I previously noted, this represents a 36 percent increase in the buyer power of a company whose present market share already raises competitive concern for the operation of the market for video programming delivery.

I have also examined the extent of Comcast's control over the Latino-oriented viewing market and hence its control over acquisition of Latino-oriented video programming in particular. I identify the 20 DMAs with the largest number of Hispanic television households. This list, shown in Table 1, accounts for more than two-thirds of Hispanic television households in the country, but only 38 percent of all television households. I therefore conclude that, by examining these markets where Hispanic viewers are concentrated, I can gain insight into the extent to which Comcast has or will gain buyer power specifically over Latino-oriented video program acquisition.[24]

I find that Comcast's share of Latino-oriented viewing is large and will grow considerably larger as a result of this merger. In the top 20 Hispanic DMAs listed in Table 1, Comcast's weighted average share of subscribers is 26.4 percent.25 This share is somewhat greater than its 22 percent share of subscribers nationwide. More telling is the fact that as a result of acquiring TWC (including Bright House), the merged company will control fully 39.2 percent (on a weighted average basis) of subscribers in these DMAs that account for a large

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contend that, because of their scale, network carriage by both Comcast and (then) Time Warner Cable was required for a programming network's viability. Other MVPDs---including specifically DBS---were "reluctant to carry a network that is not already carried by Comcast and Time Warner." FCC 06-105, para 103.

[24] I do not have information at a more granular level; for example, the amount of Hispanic subscribership by franchise areas within DMAs.

[25] For purposes of this analysis, I have charged Bright House subscribers to TWC, thereby including the total number of Bright House subscribers in a DMA in the total number of subscribers I have used for TWC.

percentage of all Hispanic viewers throughout the country. This is well above the 30 percent cap to which Comcast has volunteered to adhere nationwide as its response to concerns over its buying power. That nationwide cap would not appear to suffice to ensure the same degree of protection against buyer power over Latino-oriented program supply. I also note that the merged company will become the largest single MVPD in sixteen of these top 20 Hispanic markets, combining the ten in which the present Comcast has the largest number of subscribers with six additional heavily Hispanic markets where TWC is largest.

The implications of this theory for the proposed Comcast-TWC merger are straightforward. Comcast, already in a leading position in Latino-oriented programming, will substantially increase its presence. Much as with a true monopsonist, the concern that must be considered is that Comcast will acquire less such programming, and at a lower price to program providers, than in a competitive market. Less programming adversely affects viewers by offering less program choice and variety than under the competitive standard. The lower price to programmers diminishes the returns to those in that business, jeopardizing quality, improvements, and even, perhaps, viability. And the smaller quantity of Latino-market programming drives up the price to advertisers seeking out such programming. Only the private interests of the program buyer---Comcast---are served.

I therefore conclude that the proposed merger of Comcast and TWC would result in a substantial increase in Comcast's buyer power with respect to Latino-oriented video programming.

IV. POLICY AND REMEDIES

These competitive harms to Latino-market programming from the proposed Comcast-TWC merger---foreclosure and monopsony power---are familiar issues before this Commission, since they have arisen in numerous other matters, some involving these very

companies. In this section I will first discuss the different types of policies and remedies for such concerns, and then analyze their likely effectiveness in addressing the competitive problems that will result specifically from the merger.

A. Evidence on Merger Remedies

For mergers that are neither cleared nor prohibited in their entirety, both structural and conduct remedies have been used extensively. Structural remedies usually involve divestitures, that is, the sale or spinoff of a division or plant that represents a significant overlap between the merging parties. Conduct remedies set rules of behavior for the merged firmBeither prohibiting certain behavior or requiring it in order to address deviations from competitive behavior. Neither technique is without its limitations and controversy.

An evaluation of actual divestiture remedies by the Federal Trade Commission found that a substantial fraction did not even result in a financially viable divested entity, much less one that restored market competition otherwise lost due to a merger.[26] That study identified several characteristics of more successful divestitures, characteristics that subsequently have found their way into divestiture policy at the antitrust agencies in the U.S. and elsewhere. These characteristics include the need to divest entire operating units rather individual plants, and the need to avoid sale to compromised bidders, such as might be preferred by the seller.

My own research, cited above, addressed the effectiveness of both types of remedies employed by both U.S. antitrust agencies.[27] This study found that divestiture remedies resulted in price increases of about the same magnitude as mergers that were cleared outright, indicating little incremental effect of that type of remedy. More striking was the fact that

[26] "A Study of the Commission=s Divestiture Process," FTC, 1999.

[27] J.Kwoka, 2013, op. cit. My data were focused on horizontal mergers, but the policy issues are similar.

conduct remedies were associated with price increases more than twice as large as either divestitures or cases of outright approval of mergers. There were several likely reasons for the ineffectiveness of conduct remedies. Such remedies do not alter the merged firm's incentives to engage in competitively problematic behavior, but rather seek to prevent the firm from pursuing its own interests. Whether they are successful depends crucially on a clear, comprehensive, and enforceable remedy that cannot be evaded over time. But parties have incentives to find loopholes. Changed circumstances present new opportunities for evasion. And conduct remedies require ex post oversight, more like a regulatory approach than that familiar to antitrust agencies.[28]

This last observation is relevant to the present question. While antitrust agencies may not be structured or equipped to enforce regulatory-like conduct remedies, by definition a regulatory body is better positioned to do so. The FCC is an expert agency with long experience in and deep understanding of the companies and industries it regulates. Its very mission, organization, and resources are oriented toward oversight. Hence, appropriately devised remedies imposed by this Commission may well be more effective than in an antitrust contextBbut the cautions about both structural and, especially, conduct remedies remain apropos.

B. Possible Remedies to the Comcast-TWC Merger

Past FCC policies dealing with the dual concerns of buyer power and discrimination in fact illustrate the two types of remediesBstructural and conduct. While not a divestiture per se, a cap on viewership share represents a structural approach and has the virtues associated with a

[28] D. Moss and I have developed the analogy between conduct remedies and conventional industry regulation. J. Kwoka and D. Moss, ABehavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement,@ *Antitrust Bulletin*, 2012.

structural solution. It is readily understood. Violations would be immediately evident. Subject to a cap, individual firm incentives are preserved. It is relatively easily enforced. For all these reasons, the viewership cap would seem to have served the FCC's purposes well. Indeed, in the proposed Comcast-TWC merger, the parties have voluntarily undertaken to ensure they continue to comply with this subscribership cap by arranging a series of divestitures and exchanges of subscribers said to be sufficient to remain beneath that cap. As the FTC Study cautioned, however, any divestitures proposed by parties to a merger should be evaluated critically, as the parties can be expected to offer those that are the least constraining to their behavior.

The other area of concern--enhanced incentives for discrimination and foreclosure--has in the past been addressed through use of conduct remedies designed to make the merged company mimic the competitive market outcome with respect to program acquisition. The basic remedy--Bprogram carriage rules--prohibit a cable operator from "engaging in conduct that unreasonably restrains >the ability of an unaffiliated programming vendor to compete fairly 'by discriminating against such a vendor >on the basis of affiliation or nonaffiliation'"[29] This statement sets forth a meritorious principle, but in practice it illustrates the difficulties of devising and implementing effective conduct remedies: For example, what is meantBindeed, what can be meant unambiguouslyBby such phrases as to "unreasonably restrain[]"? And does it follow that "reasonable restraint" (whatever that may be) is therefore acceptable? What is meant by the term to compete "fairly"? And so forth.

Moreover, enforcement of such a rule will likely depend in large part on complaints

[29] Comcast Corporation, supra, at 4282, citing Section 616. The Commission has gone beyond the basic program carriage rules in several cases, based on its determination that additional constraints are required to achieve the objectives and perhaps to ensure enforceability.

filed by disadvantaged programmers. But the latter parties have protested that making such an allegation triggers a costly and time-consuming process that favors large MVPDs. Moreover, some disadvantaged parties will understandably be reluctant to complain at all since at the end of the process they will still have to engage with the MVPD who may well be able to retaliate in subtle ways.[30]

These concerns are more than theoretical. The last section listed several unaffiliated program providers who have alleged discrimination against Comcast for violating the FCC decision approving its merger with NBCUniversal and the FCC's own program carriage rules. The record in those cases illustrates the difficulties of establishing violations of program carriage rules. In addition, Comcast has been faulted for its response to commitments it made in conjunction with its merger with NBCUniversal. In particular, it committed to launching several new independent channels with minority-focused programming. Some have viewed the resulting new programming as poorly chosen, unlikely to be as competitive as some alternatives, and in some cases not independent at all.[31] These are the types of problems that the FTC Divestiture Study predicted—that Comcast would favor weak bidders that would provide little or no competitive checks on its own competing businesses. Such are the inherent ambiguities and limitations of these remedies.

Given these inherent difficulties in designing and implementing conduct rules in the form of program carriage requirements, and the greater pressure on them as Comcast=s

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[30] This Commission's remedy in Comcast-NBCUniversal included such a provision, but its effectiveness has been questioned. Comcast Corporation, *supra* at 4283-4284. Bosworth testimony, s. For discussion of the inherent problems with anti-retaliation provisions, see Kwoka and Moss, *supra*. That source argues that such provisions are among the weakest parts of conduct remedies.

[31] Bosworth, *supra*.

distribution footprint and hence its incentives to discriminate and disadvantage rival Latino-market programming increases, I recommend an alternative, structural solution. If this proposed merger were otherwise to be allowed, competitive harm to unaffiliated Spanish-language program providers would be bestBperhaps onlyBensured by requiring Comcast to divest of its Telemundo and mun2, and be subject to a condition that it not acquire or develop for itself any new Latino market programming. At a stroke, a divestiture solution would guarantee a level playing field to all Latino-market program providers, while avoiding the need for trying to write and enforce a conduct solution.

V. CONCLUSION AND RECOMMENDATION

The proposed merger of Comcast and Time Warner Cable poses serious threats to Latino-market programming, a distinct segment of overall video programming. Along with other concerns about this merger, those threatsBforeclosure and monopsony powerBcan be addressed in the most thorough and straightforward manner by simply prohibiting the merger as anticompetitive and not in the public interest.[32]

If for any reason this merger were not to be prohibited in its entirety, based on all the evidence, I alternatively recommend the following combination of remedies:

> (1) Divestiture of Telemundo and mun2 and a prohibition on future entry into Latino market programming, in order to eliminate the merged company's greater incentive to discriminate against unaffiliated Latino-market program providers.

[32] As I noted before, I have been asked only to analyze the consequences of this merger for Spanish-language programming. I therefore do not address the larger questions about this merger.

(2) Further divestitures of Comcast and/or TWC distribution operations in top Hispanic market areas to ensure that the merged Comcast=s share of the top Hispanic areas not exceed 30 percent of subscribers in each such area.

EXHIBIT 1

Exhibit 1

Brief Biography of John E. Kwoka, Jr.

I am the Neal F. Finnegan Distinguished Professor of Economics at Northeastern University. Prior to joining Northeastern in 2001, I was Professor of Economics at George Washington University. I have also taught at the University of North Carolina at Chapel Hill, and held visiting positions at Northwestern University and Harvard University. In addition, I have served as President of the Industrial Organization Society, Vice President of the Southern Economic Association, and Editor of the Review of Industrial Organization. I have held non-academic positions at the Federal Communications Commission, the Federal Trade Commission, and the Antitrust Division of the Department of Justice.

I teach, conduct research, lecture, and consult regularly on topics in industrial organization, antitrust, and regulatory economics and policy. I have or will have published more than 75 articles and three books on these subjects. One of my books, now in its 6th edition, is a co-edited collection of case studies of the economics of recent antitrust proceedings. My latest book, due out in December of this year from MIT Press, is an extensive analysis of the effects of mergers and of the effectiveness of merger control policy in the U.S. I have in the past submitted statements and testified in many antitrust and regulatory proceedings, including before this body.

EXHIBIT 2

Curriculum Vitae

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Current Positions:

Neal F. Finnegan Distinguished Professor of Economics, Northeastern University, 2001
Senior Fellow and Advisory Board, American Antitrust Institute, since 2000
Board of Directors, Industrial Organization Society, since 2002
Editorial Board, Review of Industrial Organization, since 2004
Advisory Board, Journal of Industrial and Business Economics, 2015

Previous Academic Positions:

Professor of Economics, George Washington University, 1981-2001
Columbian Professor, 2001
Research Professor, 2001-2003
Faculty Associate in Public Policy, George Washington University, 1983-2001
Visiting Professor of Economics, Harvard University, 1994-95
Visiting Associate Professor of Economics, Northwestern University, 1980-81
Assistant Professor of Economics, University of North Carolina at Chapel Hill, 1972-75
Instructor, Lecturer in Economics, University of Pennsylvania, 1970-72

Previous Non-Academic Positions:

Member, Advisory Council to the Competition Commission of Mauritius, 2012
Guest Scholar, Amsterdam Center for Law and Economics, University of Amsterdam, Fall 2008
ENCORE Fellow, University of Amsterdam, 2003-09
Fellow, Center for Business and Government, Kennedy School, Harvard, Summer 2000
Founder and Co-Director, GWU Research Program on Industry Economics and Policy, 1996-2001
Guest Scholar, Brookings Institution, 1995
Special Assistant to the Chief, Common Carrier Bureau, Federal Communications Commission, 1987-88
Economist, Economic Policy Office, Department of Justice Antitrust Division, 1985
Economist, Bureau of Economics, Federal Trade Commission, 1975-81
Economic Policy Fellow, Brookings Institution, 1975-76

Previous Professional Positions:

General Editor, Review of Industrial Organization, 2001-04
Vice President, Southern Economic Association, 2000-02
Senior Research Scholar, American Antitrust Institute, 2000
Associate Editor, Journal of Industrial Economics, 1990-95, 1998-2001
Editorial Board, Review of Industrial Organization, 1983-2001
President, Industrial Organization Society, 1998-99
Board of Editors, Journal of Media Economics: 1987-96
Advisory Board, Antitrust Law and Economics Review: 1985-90

Education:

Ph.D. in Economics, University of Pennsylvania, 1972
A.B. in Economics, cum laude, Brown University, 1967
Rensselaer Polytechnic Institute, 1963 (transferred)

Books:

Mergers, Merger Control, and Remedies in the United States: A Retrospective Analysis, MIT Press, forthcoming

The Antitrust Revolution, co-edited with Lawrence J. White:
6th ed., Oxford University Press, 2014
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"The FTC and the Professions: A Quarter Century of Accomplishment and Some New Challenges," Antitrust Law Journal, 2005.

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"Freight Railroads," with L. J. White, in Network Access, Regulation, and Antitrust, Diana Moss, ed., Routledge, 2005.

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"Twenty-five Years of Deregulation: Lessons for Electric Power," Loyola University Chicago Law Journal, Summer 2002.

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Other:

Jerry S. Cohen Award for Antitrust Scholarship, 2014

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Distinguished Service Award, Industrial Organization Society, 2012

Principle organizer and Chair of Local Organizing Committee, International Industrial Organization Conferences, Northeastern University, 2003, 2006, 2009, 2011, 2013.

Award for Meritorious Service, Federal Trade Commission, 1980

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Membership in:

American Bar Association Antitrust Section
American Economic Association
European Association for Research in Industrial Economics
Industrial Organization Society
International Competition Network
Southern Economic Association

July 2014

TABLE 1

SHARES OF TOP 20 DMAs BY LATINO HOUSEHOLDS

Hispanic DMA Market Rank	Total Television Households	Hispanic Television Households	Comcast Percent of MVPD Subscribers	Time Warner Cable Percentage of MVPD Subscribers*	Post-Merger Comcast Percentage of MVPD Subscribers
1 Los Angeles	5,665,780	1,967,440	0.0%	31.0%	**31.0%**
2 New York	7,461,030	1,425,800	9.3%	16.5%	**25.9%**
3 Miami	1,663,290	735,740	47.0%	0.0%	**47.0%**
4 Houston	2,289,360	651,300	39.2%	0.1%	**39.3%**
5 Dallas	2,655,290	546,480	0.0%	16.5%	**16.5%**
6 Chicago	3,534,080	535,980	51.6%	0.0%	**51.6%**
7 San Francisco	2,518,900	441,590	56.9%	0.5%	**57.4%**
8 San Antonio	906,210	437,740	0.0%	45.6%	**45.6%**
9 Phoenix	1,855,310	379,850	0.1%	0.0%	**0.1%**
10 McAllen	369,240	315,690	0.0%	48.8%	**48.8%**
11 Sacramento	1,387,950	286,690	41.3%	0.0%	**41.3%**
12 San Diego	1,080,880	267,430	0.0%	12.7%	**12.7%**
13 Albuquerque	690,740	263,530	41.7%	0.0%	**41.7%**
14 Fresno	580,180	261,410	41.8%	0.2%	**42.0%**
15 Denver	1,574,610	246,160	55.0%	0.2%	**55.2%**
16 El Paso	344,480	243,000	13.4%	37.0%	**50.4%**
17 Orlando	1,490,380	240,510	7.6%	54.7%	**62.3%**
18 Philadelphia	2,963,500	238,130	58.2%	0.0%	**58.2%**
19 Washington, DC	2,412,250	225,870	36.2%	0.0%	**36.2%**
20 Tampa	1,827,510	219,500	6.4%	54.7%	**61.1%**
WEIGHTED AVERAGE			**26.4%**		**39.2%**

***Time Warner Cable Subscriber numbers include Bright House subscribers.**

Sources: Household data from The Neilsen Company. DMA® is a registered service mark of The Nielsen Company and is used pursuant to a license from The Nielsen Company, all rights reserved. The DMA boundaries and DMA data contained herein are owned solely and exclusively by, and are used herein pursuant to a license from, The Nielsen Company. Any use and/or reproduction of these materials without the express written consent of The Nielsen Company is strictly prohibited. The DMA boundaries and DMA data are effective for the period 200902013. Subscriber data from SNL Financial LC. Contains copyrighted and trade secret materials provided under license from SNL. For recipients' internal use only.