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

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

PETITION TO IMPOSE CONDITIONS ON ASSIGNMENT AND TRANSFER OF LICENSES

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August 25, 2014

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To: The Commission

Introduction and Summary

Back9Network Inc. ("Back9" or "Back9Network") respectfully submits this Petition in connection with the Commission's consideration of Comcast Corporation's ("Comcast") proposed acquisition of Time Warner Cable, Inc. ("TWC"). Back9, an independent programming network, views this acquisition as vesting in Comcast final say on which new programming channels have a real opportunity to succeed. By combining the country's No. 1 and No. 2 cable distributors, the new company would control nearly 30 million subscribers in total and, more importantly, be the largest distributor in nine of the top 10 markets, including critically important New York and Los Angeles, as well as 16 of the top 20 markets.

Back9, based in Hartford, Connecticut, is an independent programming network formed in 2010 with a focus on golf-lifestyle programming. Back9's mission statement includes growing the game of golf by creating entertainment and lifestyle programming that appeals to an audience beyond the stereotypical golf community, with an emphasis on minorities and those socio-economic classes that have been ignored by traditional media outlets. This approach has led Back9's website to have the fastest-growing online audience in golf. The network has

developed original programming and signed up advertisers and investors. But, as a start-up network, Back9's biggest challenge is getting carriage on major distributors that serve the top markets — which is where advertisers want to be. In an era of distributor consolidation, few pay television outlets provide this access. Comcast and Time Warner Cable are the only two cable distributors with the power and reach for an independent network to launch successfully, and as explained in detail below, the nature of the MVPD ecosystem gives the leading cable distributors an outsized role in the content market. A combined Comcast-TWC would leave start-up networks with only one option for cable carriage in the markets most desirable for advertisers. And the combined company would have a vast horizontal footprint, giving it extraordinary power to block competing channels and to promote its own networks.

The biggest impact of the merger would be on programmers that compete directly with Comcast-affiliated networks. Back9, by focusing on the golf lifestyle — including golf personalities, as well as golf fashion, health, wellness, travel, and equipment — will compete directly with the Comcast-owned Golf Channel for audience, advertisers, and talent. Despite the conditions imposed in the Comcast-NBC Universal ("NBCU") merger not to discriminate against non-affiliated content, Comcast has so far rejected Back9's carriage proposals and not been willing to negotiate economically viable carriage. Time Warner Cable, by contrast, was engaging in substantive carriage discussions with Back9 — but those talks stalled when the merger with Comcast was announced. Two months ago, Back9 announced that it had reached a carriage deal with DirecTV, further demonstrating the attractiveness of its content. But without carriage by either Comcast or Time Warner Cable, which today control roughly 33 million subscribers, a programmer will not be profitable in the long-term. The Commission should be concerned that, in the absence of appropriate conditions, the merger will make it all but

impossible to launch a successful independent network that competes with a Comcast-affiliated network.

Back9 recognizes that no programmer has a right to be on the air. But every programmer deserves a fair hearing from the major distributors. The Commission's existing mechanism to make sure that happens and to deter affiliation-based discrimination — Section 616 — is insufficient for several reasons. The existing complaint process has proven to be expensive and time-consuming, and start-up networks do not have the time or money to wage protracted legal battles against powerful, resource-rich distributors like Comcast. Furthermore, Section 616 complaints only occur after the fact, when discrimination has already happened and could have snuffed out upstart channels before they launched. The Commission rightly recognized this risk in the Comcast-NBCU merger, and it imposed several conditions on Comcast as part of its approval of that merger.[1] The Commission's diagnosis of the problem was spot on; the remedy, however, turned out to be only partially effective. The conditions were designed to provide important safeguards against the anticompetitive effects of vertical integration, but the evidence of discrimination in favor of Comcast-affiliated content continues to build.

This horizontal merger, which combines the No. 1 and No. 4 MVPDs, must also be analyzed for the additional impact it will have on the unprecedented vertical merger approved just four years ago. The result would be a Comcast-TWC with a foreclosure power over the independent programming cable market that would be profound and should worry the Commission charged with protecting the public interest.

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[1] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238, Appendix A (2011) ("Comcast-NBCU Order").

This significant accumulation of power in the video content and distribution marketplace can be remedied through the imposition of strong and enforceable conditions that ensure the public interest is not disserved by a Comcast-TWC merger. Specifically—

- the Commission should require Comcast to launch 15 independent networks within the seven years following approval of the merger; and
- no fewer than two-thirds of those networks should be channels that compete directly with Comcast-affiliated networks.

The requirement for a total of 15 independent networks is consistent with the substantial increase in the subscriber base as a result of the proposed merger. The requirement that at least two-thirds of the networks compete with Comcast is designed to address the powerful incentive and ability Comcast has to discriminate profitably against unaffiliated content. This is especially important, since, as the Commission has found in other contexts, Comcast views its affiliated channels as "siblings."[2] Further, the independent networks must be truly independent, under criteria set forth by the Commission, and they must be carried on all Comcast systems that carry Comcast's competitive affiliated networks. Finally, the Commission should adopt a condition that establishes an expedited dispute resolution process to ensure that Comcast cannot run out the clock on start-up networks by engaging in lengthy Section 616 proceedings. These conditions will give independent networks a fair chance to prove they are worthy of carriage, and they will help mitigate the threat posed by a single company controlling so much of the distribution network and so many of the top markets.

[2] *In the Matter of Tennis Channel, Inc., v. Comcast Cable Commcn's, L.L.C.*, MB Docket No. 10-204, Memorandum Opinion and Order, ¶¶ 27, 47 (2012), *reversed sub nom. on other grounds*, Comcast Cable Commcn's, L.L.C. v. FCC, 717 F.3d 982 (D.C. Cir. 2013).

I. Back9Network History and Efforts to Achieve Carriage

Back9Network was formed in 2010 to provide original lifestyle and entertainment programming to golf-oriented consumers and advertisers. The golf lifestyle industry is a $177 billion market that includes spending on travel, equipment, apparel, real estate, and golf courses.[3] More Americans play golf than any sport other than bowling.[4] But golf has only one home on cable — the Golf Channel, owned by Comcast. The Golf Channel focuses on airing live professional golf tournaments, but largely ignores the golf lifestyle market and therefore misses a large segment of the potential audience and ad revenue. The Golf Channel's audience (total-day-viewership averaged 110,000 in 2013) does not even attract one-half of 1 percent (0.5%) of the more than 25 million active golfers in the United States.[5]

Back9 aims to fill that opening with character-driven and compelling original programming that covers all aspects of the golf world, including golf personalities, golf courses, fashion, health and wellness, and golf equipment and apparel. While competing with the Golf Channel for advertisers and viewers, Back9 will also present unique golf-related programming that cannot be found anywhere else — documentaries, scripted programming, character- and story-driven reality programming, and fresh profiles on pro tour players. In addition, Back9 sees

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[3] Per the most recent Golf Industry Report by SRI International and Bloomberg, only 1 percent of the $177 billion golf economy is spent on golf endorsements, tournaments, and associations. Approximately 99 percent is spent on the lifestyle activities (e.g., travel, course play, fashion, equipment) on which Back9 content will focus. Bloomberg has reported that the $69 billion core golf economy tops other professional spectator sports and is more than the revenues of baseball, basketball, football and hockey combined. *See* Nikhil Hutheesing, *The Real Economic Impact of Golf*, Bloomberg.com (July 26, 2013), *at* http://www.bloomberg.com/consumer-spending/2013-07-26/the-real-economic-impact-of-golf.html. The golf economy expands to $177 billion when one includes the spillover effect on industries such as tourism.

[4] Sporting Goods Manufacturing Association (SGMA), 2012 Sports Participation Report. These numbers exclude conditioning exercises and other activities such as fishing, camping, and hiking.

[5] Austin Karp, *ESPN Audience In '13 Lowest Since '08; MLB Net, NFL Net See Record Viewership*, Sports Business Daily, Jan. 9, 2014, *available at* http://www.sportsbusinessdaily.com/Daily/Issues/2014/01/09/Research-and-Ratings/cable-nets.aspx.

tremendous opportunity in targeting its programing to minority communities and socio-economic classes that have an interest in the sport, but have been overlooked by traditional golf programming and marketing.

Back9 has negotiated and continues to negotiate several co-production agreements with some of the top Hollywood production houses, many of which have created the highest-rated shows on cable television today. Back9 has signed up on-air talent and brand ambassadors including Padraig Harrington, Cheyenne Woods, and Ahmad Rashad. The network has created an online media site that features golf news, players profiles, information on golf travel destinations, reviews of golf courses and equipment, videos, and clips from its original programming. And Back9 has raised nearly $40 million from individual investors (including a loan from the State of Connecticut) who are committed to the game, and to the network's mission and its management team.

The challenge for Back9 is to gain sufficient carriage to generate the advertising necessary to support a new network. Major national advertisers want the programming and networks that they sponsor to be viewed in most of the top 25 markets (especially the top 10 markets). And the long-term profitability for a new programming network that relies on advertising revenue requires Nielsen ratings, which are only justified when an independent programmer achieves distribution on tiers that reach 40 million to 50 million subscribers nationwide.

It is difficult in the current environment for a truly independent programmer to reach this many subscribers. A successful initial launch must include distribution to over 10 million subscribers, without which there would be no follow-on effect from the other distributors needed to reach the threshold for long-term viability. Only four cable or satellite providers reach more

than 10 million subscribers: Comcast (22 million), DirecTV (20 million); DISH Network (14 million); and Time Warner Cable (11 million).[6] No other provider comes close.

There are approximately 100 million pay television subscribers nationwide.[7] As discussed above, an advertising-focused independent programmer needs distribution to 40 million to 50 million subscribers for long term-viability. Comcast and Time Warner Cable currently serve 33 million subscribers. If a programmer is precluded from meaningful distribution with Comcast and Time Warner Cable, therefore, it would need to gain carriage with distributors reaching 60 percent to 75 percent of the remaining audience to achieve a Nielsen-worthy audience pool. This difficulty is compounded by the business reality that smaller operators typically follow the largest operators. Indeed, as the Commission has found, it would be highly unlikely for a programming network to gain carriage on most or all of the small distributors *without* having carriage on either Comcast or Time Warner Cable.[8] (The major satellite providers, DISH and DirecTV, will occasionally make a deal to launch a channel, but because of bandwidth constraints inherent in satellite delivery, those deals are rarely on terms that would allow long-term profitability.[9]) As a result, Comcast and Time Warner Cable — traditional facilities-based cable systems that do not have the same bandwidth limitations as satellite providers — are effectively the gatekeepers of new, successful networks.

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[6] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, MB Docket No. 12-203, at ¶ 130, Table 7 (rel. July 22, 2013).

[7] *See id.*

[8] *See Tennis Channel, Inc.*, MB Docket No. 10-204, Memorandum Opinion & Order, at ¶ 73 (finding that smaller MVPDs follow Comcast's lead on launching and placing cable networks).

[9] Back9 recently entered into such an agreement with DirecTV for carriage despite these constraints, as discussed *infra*.

In 2012, Back9 initiated carriage negotiations with Comcast and then with Time Warner Cable in 2013. Comcast rejected Back9's offer in the fall of 2012, after Back9's initial approach. Back9 continued to approach Comcast in 2013 and 2014, but has not had any productive and substantive discussions leading toward carriage on economically viable terms.

Back9's discussions with Time Warner Cable, which does not own competing programming, were more encouraging. Back9 had several productive, high-level meetings with Time Warner Cable executives in 2013. These discussions suggested to the company that Time Warner Cable believed Back9's programming strategy and proposal to be unique and compelling. Over the course of these discussions, Back9 evolved its proposal's terms to ensure that Time Warner Cable possessed little-to-no financial risk in launching the network. Unfortunately, the discussions effectively halted with the announcement of the Comcast-TWC merger in February 2014, and, although Time Warner Cable has recently re-engaged in light discussions, it remains unclear whether substantive carriage negotiations will continue.

The attractiveness of Back9's programming and carriage offer, however, has been confirmed in the interim. Back9 recently built on the success and growth of its online viewership to obtain a carriage arrangement with DirecTV, and will launch on satellite September 29.[10]

The proposed Comcast-TWC merger would mean that independent networks are effectively left with one option: gain the favor of Comcast to achieve carriage in the markets most desired by advertisers. For an independent network that competes with a Comcast-

[10] While the DirecTV deal demonstrates the strength of Back9's programming and plan, sustainable agreements with cable distributors remains crucial for independent networks to succeed over the long term. As Back9 testified before the Senate Judiciary Committee, the market may someday get to a point where over-the-top services provide sufficient ad revenue to sustain a programming network, particularly in combination with satellite carriage, but that is not the market that exists today.

affiliated network, the merger would also mean relying on a powerful competitor for distribution, a competitor which has every incentive to discriminate and, without enforceable Commission conditions, no incentive to act fairly.

II. Comcast's Vertical and Horizontal Integration Will Give It the Incentive and Ability to Foreclose Programming Competition

For many years, Congress and the Commission have expressed concern about the power of media distribution gatekeepers to discriminate in favor of, or against, content developers on the basis of affiliation and financial interests. A key driver of the anti-discrimination provisions that were included in the 1992 Cable Act was concern about the inherent competition problem raised when cable and satellite operators own both cable programming networks and the distribution platforms for these channels (so-called "vertical integration").[11] The proposed merger of Comcast and Time Warner Cable magnifies these competition problems considerably.

A. Comcast Is a Vertically Integrated Powerhouse With a Track Record of Favoring Affiliated Programming Channels

Comcast has long been in the business of producing much of the content its distributes. It has a financial stake in 50 different national cable networks, including Bravo, CNBC, E! Entertainment TV, Golf Channel, MLB Network, MSNBC, NBC Sports Network, NHL Network, Oxygen Network, SyFy, The Style Network (now changed to Esquire Network due to Style Network's underperformance), The Weather Channel, and USA Network, as well as

[11] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, at § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable operators the incentive and ability to favor their affiliated programming services"); *see id*. ("For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee allege that some cable operators favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSOs and discriminating against rival programming services with regard to price, channel positioning, and promotion.").

numerous regional news and sports networks.[12] These cable network holdings are in addition to Comcast's ownership interest in two national broadcast networks, NBC Television Network and Telemundo Television Network, as well as a major movie studio, Universal Pictures, and additional studio and cable production interests. Its holdings also include 10 NBC owned-and-operated television stations and 15 Telemundo owned-and-operated stations.[13]

The acquisition of Time Warner Cable would further enhance Comcast's already robust content portfolio. Time Warner Cable has ownership interests in national cable networks such as MLS Direct Kick, NBA League Pass, NHL Center Ice, MLB Network, and Team HD, as well as 52 regional news, sports, and lifestyle networks, including two of the top regional sports networks in Los Angeles, which is the second largest U.S. television advertising market and a region where Comcast's presence is currently non-existent.

These programming and content interests would combine to provide Comcast and Time Warner Cable strong incentives to discriminate against unaffiliated content. As Congress anticipated in 1992, "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services."[14] In the Comcast-NBCU Order, the Commission found that by "foreclosing or disadvantaging rival programming networks," Comcast can increase the audience, the competitiveness for programming rights, and the advertising revenues of its affiliated networks.[15]

Indeed, the Commission's own competition expert as well as private parties have made

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[12] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, Appendix B, Table B-1 (2013).

[13] *Id.* at ¶ 96.

[14] S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158.

[15] *Comcast-NBCU Order* at 4287.

strong cases already of Comcast discriminating in favor of affiliated programming — and that is without the additional subscriber base, and corresponding foreclosure ability, this merger would provide. In connection with the Commission's review of the Comcast-NBCU merger, the FCC's chief economist found that Comcast had discriminated in program carriage in favor of affiliated networks for anticompetitive reasons.[16] In addition, both NFL Network and Tennis Channel established on a *prima facie* basis that Comcast discriminated against competing programmers in terms of carriage and in favor of its affiliated networks, including NBC Sports Network and Golf Channel, and both complaints were referred to an administrative law judge for a full hearing on the merits. More recently, Bloomberg filed a complaint against Comcast to enforce Commission-imposed conditions intended to address Comcast's ability to discriminate against unaffiliated news channels, such as Bloomberg, in favor of its affiliated news networks.[17]

Comcast clearly has the incentive to discriminate in favor of its vertically integrated content. That incentive alone is not concerning; what is problematic is that it has — and with Time Warner Cable will certainly have — not only the incentive but the ability to profit over the long term by thwarting competition in the programming market.

B. The Horizontal Integration That Would Result From a Combined Comcast-Time Warner Cable Would Foreclose Opportunities

The combination of Comcast and Time Warner Cable would consolidate under one entity 30 million cable subscriber homes, including homes in nearly all the major television markets. This unprecedented horizontal cable integration would provide the combined entity substantial power over competing programming channels by foreclosing their ability to reach key markets and the subscriber base needed for an ad-supported network. In the past, when it had a different

[16] *Id*. at 4285 & Technical Appendix.

[17] *See In the Matter of Bloomberg L.P.*, MB Docket No. 11-104.

objective in mind, in applying for Commission approval of its NBCU merger, Comcast even cited the Commission's view that "'vertical integration is less likely than horizontal integration to have anticompetitive effects.'"[18] Or, to put it another way, Comcast apparently acknowledges that the horizontal merger presented to the Commission in this transaction is *more likely* to have anticompetitive effects. We agree.

If the merger takes place, the combined entity would be the dominant pay TV provider in nine of the top 10 television markets, including New York and Los Angeles — markets which are disproportionately important to the ability of a cable network to attract advertisers and compete for programming rights — and 16 of the top 20 markets. In support of the merger, Comcast frequently cites the fact that it does not compete in the same coverage areas as Time Warner Cable. But that is simply beside the point when the issue is the impact of the merger on national cable programming. The more salient fact is that that today neither entity on its own has the ability to foreclose the entrance of national, independent programming channels from the video marketplace. Following the acquisition, the combined entity will be able to unilaterally foreclose an independent programmer from accessing nearly half of all cable subscribers in the country (and almost a third of all MVPD subscribers) and from reaching the cable subscribers most desired by advertisers in New York, Los Angeles, and most other major television media markets. By denying carriage to a new programmer, Comcast-TWC could then simply wait out the programmer's efforts to get sufficient carriage elsewhere, knowing it would almost certainly not get the distribution required to succeed. In other words, Comcast would effectively hold a blocking position over any new, national cable programmer.

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[18] *Applications and Public Interest Statement, Applications for Consent to the Transfer of Control of Licenses, General Electric Company to Comcast Corporation*, MB Docket No. 10-56, at 103 (2010) (quoting *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 360 (2004)).

If the combined Comcast-TWC is not prevented by a Commission condition from exercising such a foreclosure strategy, the result would plainly harm consumers and advertisers, as well as competing content holders and programmers. When Congress considered the need for anti-discrimination provisions in adopting the 1992 Cable Act, it understood that independent cable networks add diversity and competition to the video marketplace that benefit consumers.[19] That remains true today, although innovative new voices like Back9 will not have a chance of competing with Comcast's affiliated networks if Comcast is permitted to use its control over distribution platforms to disadvantage its competitors.

The prospect of this merger has raised bipartisan concern on Capitol Hill and elsewhere due to its potential anticompetitive effects and the harms it may pose for consumers and programmers. Both the House and Senate have held hearings on the merger, with Members urging a thorough governmental review of the proposal. After a hearing of the Senate Antitrust Subcommittee, Senators Klobuchar and Lee, the chair and ranking member of the subcommittee, respectively, sent a letter to the Commission and the Department of Justice. The letter, citing testimony from Back9 and others, stated: "Because this transaction will materially increase the buying power of the largest buyer in the market for programming, it is important for your agencies to carefully assess the impact of this transaction on the ability of viable content providers of all types to obtain distribution of their content."[20]

The Congressional Black Caucus, in a letter to Chairman Wheeler, noted that the American economy has seen a "troubling consolidation of ownership in many industries in

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[19] *See* H.R. Rep. No. 102-628 (1992), at 41 ("The Committee received testimony that vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.").

[20] *See* John Eggerton, *Sens. Raise Comcast/TWC Hearing Concerns with FCC, Justice*, Broadcasting & Cable (June 24, 2014), *at* http://www.broadcastingcable.com/news/washington/sens-raise-comcasttwc-hearing-concerns-fcc-justice/131977.

recent years" that has been "particularly significant in the telecommunications and internet industries."[21] Noting the underrepresentation of women and minorities in media ownership, the letter described "a media landscape in which diverse ownership is near extinction."[22] At the other end of the political spectrum, a *Weekly Standard* contributor and director of economic policy studies at the Washington-based Hudson Institute said the merger was "about as anticompetitive, and therefore as anticonsumer, as one can get."[23] He added that even with online viewing options now available, "[c]able's residual market power is sufficient to give it the power of life and death over new entrants that threaten to compete with its own programs."[24]

No doubt, the most well-established networks will be able to continue to secure carriage on Comcast systems. (Even with established networks owned by media conglomerates, however, there is a question about whether Comcast will be able to offer below-market rates for such carriage.) Truly independent programmers, however, simply will not be able to survive in the absence of a chance to compete. Comcast's affiliated networks will be able to foreclose competition for audience, programming, and advertising dollars, and consumers will have fewer choices available to them if the merger is approved without adequate conditions.

III. The Commission Needs to Improve Upon the Comcast-NBCU Merger Conditions, Which Have Been Shown to Be Inadequate

Finding that Comcast's acquisition of NBC Universal gave Comcast an "increased ability and incentive to harm competition in video programming," the Commission imposed several

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[21] Letter from the Congressional Black Caucus to Tom Wheeler, Chairman, Federal Communications Commission (Aug. 1, 2014), *available at* https://www.politicopro.com/f/?f=29009&inb.

[22] *Id.*

[23] Irwin M. Stelzer, *King Cable*, The Weekly Standard, March 17, 2014, *available at* http://www.weeklystandard.com/articles/king-cable_784286.html.

[24] *Id.*

conditions upon Comcast in its Order approving the Comcast-NBCU deal, including a non-discrimination requirement with a narrowly tailored neighborhooding requirement, and an obligation to add 10 new independent channels over eight years.[25] The concerns that prompted those conditions are magnified by the merger that Comcast now proposes.

In reviewing the Comcast-NBCU deal, the Commission found that "Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming."[26] The Commission noted Comcast's ability, as the largest MVPD, to limit access to viewers for any programming network it wished to disadvantage, either by denying that network carriage entirely or by placing the network on a less penetrated tier or in a less advantageous channel position.[27] As a result, the Commission determined, "Comcast can reduce the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits."[28]

The conditions set by the Commission to protect against these anticompetitive harms were well-intentioned but have been inadequate to the task. Comcast has been the subject of Section 616 complaints filed by Bloomberg L.P. and the Tennis Channel in recent years. Bloomberg argued that Comcast was violating the neighborhooding condition of the Commission's Comcast-NBCU Order by placing Bloomberg TV, a business news network, on a channel far away from other business and news channels, including the Comcast-owned MSNBC and CNBC. The Media Bureau found that Comcast was not carrying Bloomberg TV in a news

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[25] *Comcast-NBCU Order*, at 4284 & Appendix A.

[26] *Id*. at 4284-85.

[27] *Id*. at 4285.

[28] *Id*.

neighborhood on some of its systems, as required by the Commission's Comcast-NBCU Order, and ordered that Comcast carry Bloomberg in a news neighborhood where they existed.[29] The Commission affirmed.[30]

In 2012, the Commission found that Comcast had violated Section 616 by placing the Tennis Channel on a narrowly penetrated tier while carrying the similarly situated Comcast-affiliated networks Versus and the Golf Channel on highly penetrated tiers.[31] (The D.C. Circuit reversed the Commission on its legal conclusion but did not challenge the Commission's factual findings.[32]) In its Tennis Channel decision, the Commission found "significant" circumstantial evidence that "Comcast engaged in a general practice of favoring affiliates over nonaffiliates."[33] This evidence included statements from top Comcast executives that affiliated networks are "treated like siblings as opposed to like strangers," and that affiliates "get a different level of scrutiny" than unaffiliated networks.[34]

Close scrutiny indicates that Comcast has not fully lived up to the spirit of its pledge to add 10 new independent networks following approval of the NBCU acquisition. In 2012, Comcast announced the first four of the promised networks.[35] However, it appears that at least two of those networks, ASPiRE and Revolt TV, are not truly independent since they have ties to

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[29] *In the Matter of Bloomberg L.P. v. Comcast Cable Commcn's*, 27 FCC Rcd 4891, 4902 (MB 2012).

[30] *In the Matter of Bloomberg L.P. v. Comcast Cable Commcn's*, 28 FCC Rcd 14346, ¶ 7 (2013).

[31] *Tennis Channel, Inc.*, MB Docket No. 10-204, Memorandum Opinion and Order, ¶¶ 27, 47.

[32] *Comcast*, 717 F.3d at 987.

[33] *Tennis Channel, Inc.*, MB Docket No. 10-204, Memorandum Opinion and Order, at ¶ 45.

[34] *Id.* at ¶ 46. For instance, the Commission found Comcast gave broad distribution to the Outdoor Life Network (the predecessor to Versus) even though the head of Comcast's programming division referred to it as "a crappy network [that was] dead in the water." *Id.* at ¶ 48.

[35] *See* Press Release, Comcast, Comcast Announces Agreements with Four New Minority-Owned Independent Networks (Feb. 21, 2012) *at* http://corporate.comcast.com/news-information/news-feed/comcast-announces-agreements-with-four-new-minority-owned-independent-networks.

Comcast, which Comcast acknowledges. In a press release, Comcast announced that it developed ASPiRE "in partnership with" Magic Johnson to deliver "enlightening, entertaining, and positive programming to African American families."[36] Comcast described itself as a "partner" in the network.[37] Comcast has been reported to be a "production partner" in Revolt TV, a music network developed in part by Sean Combs.[38]

Comcast, of course, has no incentive to launch quality independent programming that would compete with Comcast-affiliated networks.[39] Comcast repeatedly states that it must provide quality programming because consumers demand it, and would go elsewhere otherwise. However, a combined Comcast-Time Warner Cable would have the ability to squash nascent cable channels from competing with its own content before those channels ever had a chance to succeed or find an audience. Refusing new channels carriage dooms their ability to build an audience base. Consumer cannot demand something they have not seen. The Commission needs to check this ability by conditioning approval of the merger on strict requirements for launching independent channels that are verifiably independent and that compete with Comcast-owned networks.

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[36] *See* Aspire Network Seeks to Inspire, Comcast NBCUniversal, http://corporate.comcast.com/csr2012/aspire-network-seeks-to-inspire.

[37] *Id.*

[38] Liz Elfman, *Revolt TV and Sean Combs: The Revolution Will Be Televised*, Huff. Post, Dec. 4, 2013, *at* http://www.huffingtonpost.com/fueled/revolt-tv-and-sean-combs-_b_4371800.html. While terms of the partnership have not been made public, Bloomberg Businessweek reported that Revolt TV "has backing from Comcast." Andy Fixmer & Alex Sherman, *Sean Combs Said to Bid $200 Million for Fuse TV Network*, Bloomberg Businessweek, Mar. 11, 2014, *at* http://www.businessweek.com/news/2014-03-10/sean-combs-said-to-bid-200-million-for-fuse-tv-network.

[39] Neither ASPiRE nor Revolt TV directly compete with any Comcast-affiliated networks.

IV. The Commission Should Require Comcast to Launch 15 Truly Independent Channels as a Condition of Merger Approval

The Commission has stated that the "broad aims of the Communications Act" include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets."[40] Just as the Commission found that the potential for substantial harm from the Comcast-NBCU merger necessitated a number of conditions to preserve competition,[41] so too should the Commission here require Comcast agree to conditions to avoid the likelihood of anticompetitive effects from the proposed merger and to protect the public interest. Indeed, the reasoning that led the Commission to impose non-discrimination requirements on Comcast as a condition of the NBCU deal applies with even greater force here, where a horizontal merger will create a cable company with inordinate market power.

Back9Network therefore proposes the Commission condition approval of a Comcast-TWC merger on the following requirements:

1. Comcast must launch a total of 15 independent networks, including the 10 required networks from the Comcast-NBCU Order, within seven years following merger approval. The networks must be truly independent, according to criteria set forth by the Commission. The additional five networks reflect the increase in subscriber base Comcast is seeking to acquire. The establishment of criteria by the Commission will ensure that Comcast does not simply create additional affiliated content.

2. No fewer than two-thirds of the independent networks must compete with Comcast's affiliated content, with at least two independent networks from each of the programming genres of Comcast's affiliated networks: entertainment, men's lifestyle, women's lifestyle, golf/sports, and children. This condition will address the concern that Comcast has an incentive to avoid launching independent networks that have content with which Comcast competes.

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[40] *Comcast-NBCU Order*, at 4248.

[41] *Id*. at 4250-4289 & Appendix A.

3. Independent networks that compete with Comcast-affiliated networks must be carried on all Comcast systems on which the affiliated network is carried, and distributed to the same subscribers to whom the affiliated network is distributed. Comcast should not be allowed to discriminate on carriage terms as a way to get around the other conditions that are intended to prevent anticompetitive conduct made possible by this merger.

4. Comcast must agree to participate in an expedited dispute resolution process for complaints arising under these conditions, separate from the Commission's current non-discrimination rules. A more efficient resolution process is needed to address Comcast's ability and incentive to discriminate against unaffiliated content based on the merger.

These conditions will ensure that a combined Comcast-Time Warner Cable, which would have extraordinary power in the video market, would not disadvantage or foreclose independent networks that will increasingly rely on Comcast-TWC to reach the markets that advertisers demand. The Commission has recognized that Comcast can increase subscribership and advertising revenue for its own programming content by foreclosing rival networks.[42] It must continue to guard against that possibility.

No programmer has a right to be on the air. But every programmer deserves a fair hearing. Back9 fears that, without meaningful, enforceable conditions, Comcast will act in its best interest, rather than the public interest, and favor its affiliated networks, making it nearly impossible for a new independent network to achieve the reach necessary to establish itself with viewers and advertisers. These conditions will help ensure that independent networks have an opportunity to compete fairly for carriage on the basis of their programming, their ideas, and their potential, not on the basis of their ownership.

[42] *Id*. at 4287.

V. Conclusion

Comcast's proposed acquisition of Time Warner Cable raises significant concerns about its impact on media diversity, on independent programmers, and on the public interest. The deal would give Comcast 50 percent more subscribers than its closest competitor, and more than three times as many subscribers as the second biggest cable distributor. These are not idle numbers; they are real threats to the independent programmers who must gain carriage in the top markets to be competitive. Comcast would have tremendous, unrivaled power to decide what gets on the air, and what does not.

If this merger is to be approved, the public interest requires the Commission impose substantive conditions to ensure that Comcast's history of discrimination is not its future. To combat the potential effects of a horizontal integration not seen since the breakup of AT&T, Back9Network respectfully submit that the Commission require Comcast to launch 15 new independent networks within seven years, two-thirds of them competitors to Comcast's own networks; that the networks be truly independent based on criteria set forth by the Commission; and that Comcast agree to an expedited dispute resolution process. These conditions will give independent voices like Back9 the one opportunity they are seeking: a chance to compete based on the merits of their programming.

Respectfully submitted,

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August 25, 2014