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

In the Matter of	)	
	)	
Applications of	)	
	)	
Comcast Corp.	)	MB Docket No. 14-57
Time Warner Cable Inc., *et al.*	)	
	)	
To Assign and Transfer Control of	)	
FCC Licenses and Other Authorizations	)	

COMMENTS OF CENTURYLINK, INC.

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INTRODUCTION AND EXECUTIVE SUMMARY

Absent aggressive action by this Commission, the merger between Comcast Corporation ("Comcast") and Time Warner Cable, Inc. ("TWC") presents a grave threat to the development of facilities-based video competition throughout the country. Diminished facilities-based competition, in turn, would be a substantial harm to consumers and the public interest. As the Commission has explained, "Congress and the Commission have repeatedly found . . . that entry by [local exchange carriers ("LECs")] and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers," including "lower prices, more channels, and a greater diversity of information and entertainment from more sources."[1]

CenturyLink is uniquely well-positioned to understand and combat these threats. Although CenturyLink is the third largest telecommunications provider in the United States, it is a small facilities-based video provider. CenturyLink offers video primarily over a fiber-optic IPTV platform branded as PrismTV. CenturyLink has entered 12 markets with this service and is actively exploring new ones. PrismTV has approximately 215,000 customers in its existing markets. Where it is available, PrismTV creates a significant competitive alternative to cable providers. Indeed, in those areas, it is generally the only facilities-based alternative to incumbent cable operators for the bundles of video, broadband, and voice that consumers increasingly demand.

[1] Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 17 (2007) ("*MDU Exclusivity Prohibition*"), *petitions for review denied*, *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009); *see also id.* ¶¶ 40-55 (examining the Communications Act of 1934 ("1934 Act") and concluding that "a primary concern . . . was fostering competition among cable operators and enhancing consumer choice").

CenturyLink's ability to offer competitive video choices to new customers and in new markets – and to offer a viable product to consumers in its existing markets – depends fundamentally on the existence of a fair (if not level) competitive playing field. This transaction threatens to tilt the playing field decisively against small providers such as CenturyLink in a number of significant ways, and thus to limit or prevent competitive facilities-based entry, much to the detriment of consumers.

First, the transaction creates a significant risk that the gap in programming costs between the largest cable providers and smaller multichannel video programming distribution ("MVPDs") will grow even wider. Post-merger, Comcast would control not only its existing array of desirable programming, but also TWC's significant programming assets, including national cable networks and regional sports networks ("RSNs") in California, Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin. And Comcast would have 7 million more subscribers, including subscribers in New York and Los Angeles. Altogether, Comcast would be the leading MVPD in 23 of the 30 largest metropolitan statistical areas ("MSAs").

In short, Comcast would control even more programming than it did after the Comcast/NBC Universal ("Comcast/NBCU") transaction and would have even greater incentives to use that control to raise costs for, or deny access to, marquee content. And, even aside from that, Comcast's added scale post-merger would widen the gap in programming costs between it and smaller entrants such as CenturyLink. Given that programming is the single biggest variable cost for MVPDs, that disparity would impede competition and, in the long-run, increase costs for consumers, contrary to the public interest.

Second, contrary to Comcast's facile rhetoric, Comcast and TWC do compete directly with each other, and other MVPDs, in the market for spot cable advertising. The combined post-merger entity would dominate that market and be able to use that dominance to deprive smaller MVPD competitors of revenue and to increase their costs.

Third, as CenturyLink demonstrates below, Comcast has repeatedly used local franchising proceedings to slow or discourage facilities-based competitive entry into new markets. By contrast, CenturyLink has not generally experienced such dilatory tactics from other incumbent providers. As a direct result of this merger, therefore, Comcast would have the ability to delay (or even prevent) entry in new geographic areas and to raise its competitors' costs, to the detriment of competition and consumers.

Fourth, in addition to its PrismTV service, CenturyLink provides traditional cable service to several thousand customers in small communities in Wisconsin and Iowa. Like many other small cable providers, CenturyLink relies on Comcast's "Headend in the Sky" ("HITS") service to deliver digital programming to those consumers. CenturyLink has no realistic alternative to HITS to provide robust digital content in these areas. Comcast, however, has made no commitment in this proceeding to continue to offer HITS after this transaction to some or all of the small cable providers (or overbuilders) that currently use it. This is particularly a concern where TWC, which is not now under common control with HITS, offers service in areas that are contiguous or overlapping with small cable providers, and thus may wish to deny cable companies this needed input in order to expand its operations into those areas.

Fifth, the post-merger Comcast/TWC not only would be many times CenturyLink's size as a company, but also would be larger than CenturyLink and all but two other incumbent LECs *as a local telecommunications provider*. In such circumstances, a post-merger Comcast plainly has the scale and resources to provide its own network facilities. Requiring CenturyLink to continue providing unbundled network elements ("UNEs") and interconnection to Comcast at

Total Element Long-Run Incremental Cost ("TELRIC") rates would thus cause the public-interest harms (chiefly, disincentives to investment in new facilities) that the Commission has acknowledged are associated with overbroad regulatory rights, without providing any countervailing benefit.

These multiple, transaction-specific problems pose a substantial threat to competition and the public interest. Moreover, they are not remotely outweighed by any public-interest benefits. For that reason, the Commission would be amply justified in declining to approve this transaction. If the Commission does not do that, however, it must ensure that there are commitments and conditions that at least mitigate these fundamental competitive harms. At a minimum, to address the issues identified above (and discussed in more detail below), those should include the following:

To help preserve competition in MVPD markets around the country, the Commission should (1) require Comcast to disclose the prices, terms, and conditions for Comcast-controlled programming under new agreements reached with the largest MVPDs; (2) extend the Comcast-NBCU Conditions to all post-merger Comcast-owned and -affiliated content, including online video programming; (3) require Comcast to disclose the prices it pays third parties for cable and broadcast content under any new agreements Comcast signs post-merger; and (4) mandate that Comcast allow competing providers to use letters of agency ("LOAs") to disconnect a customer's Comcast cable service (and, where obtained with cable, broadband service) without the customer having to make a separate call to Comcast.

To address the significant effects of this transaction on the market for spot cable advertising, the Commission should not approve this transaction unless Comcast and TWC (1) divest their interests in Comcast Spotlight and TWC Media Sales, their affiliated spot representation firms; (2) adopt auditable non-discrimination obligations for all interconnects controlled by the combined entity; and (3) implement auditable non-discrimination safeguards applicable to NCC Media. At a minimum, the Commission must impose a comprehensive non-discrimination regime to ensure that competing MVPDs are not disadvantaged in the market for spot cable advertising.

To prevent the public-interest harms imposed by Comcast-caused delays in local franchising – and consistent with Comcast's repeated assurances that this merger "will not harm competition or reduce consumers' choice *in any way*"[2] – the Commission should not approve this transaction unless Comcast agrees not to oppose any effort by a competitive franchise applicant to obtain a local franchise. At the least, Comcast must agree (1) not to oppose any competitive franchise applicant's request to expedite a local franchising proceeding and (2) to make available at a single location on a publicly available website, in a manner consistent with this Commission's ex parte rules, information reflecting all written and oral communications with local franchising authorities by Comcast representatives as to competitors' or potential competitors' local franchise applications.

To address the concern that a post-merger Comcast will stop offering HITS service, the Commission should require the post-merger entity to continue to provide HITS at current rates (adjusted as necessary for inflation) for seven years. Alternatively, and at the very least, the Commission should require Comcast to renew the commitment it made to the Commission in the context of a 2002 transaction to (1) provide HITS to small cable providers for the foreseeable future; (2) honor all existing service agreements; and (3) communicate in advance any substantial changes in the service relationship.

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[2] Comcast Corp., Comcast and Time Warner Cable Transaction Fact Sheet, http://corporate.comcast.com/images/Transaction-Fact-Sheet-2-13-14.pdf.

To avoid the public-interest harms of overbroad and asymmetrical UNE and interconnection rights, the Commission should approve this transaction only if Comcast agrees not to seek access to UNEs or interconnection at TELRIC rates under existing or new interconnection agreements.

I. Absent Action By This Commission, The Merger Would Further Enhance Comcast's Unfair Competitive Advantages With Respect To Programming

A. The Transaction Would Increase Comcast's Incentive And Ability To Use Its Control Over Affiliated Programming To Harm Competitors

Three years ago, the Commission recognized that Comcast's merger with NBC Universal created "the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [joint venture ("JV")] would come to control or raise programming costs to its video distribution rivals."[3] The Commission understood that "Comcast-NBCU has the ability to exclude all of Comcast's rivals from the JV's programming, whether by withholding the programming or raising its price, thereby harming competition in MVPD services in each of Comcast's franchise areas," and that "successful exclusion (whether involving complete foreclosure or cost-raising strategies) of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."[4]

Recognizing that its existing program access rules were insufficient to guard against what it called Comcast's "anticompetitive exclusionary program access strategy," the Commission adopted a set of merger conditions, including a modified commercial arbitration remedy, "to maintain the pre-integration balance of bargaining power between vertically integrated

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[3] Memorandum Opinion and Order, *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, ¶ 29 (2011) ("*Comcast/NBCU Order*").

[4] *Id.* ¶¶ 39, 43.

programming networks and rival MVPDs."[5] For the first time, the Commission extended the arbitration and standstill remedies beyond Comcast's RSNs to include *all* Comcast-NBCU affiliated programming, concluding that certain national cable programming networks constituted "marquee programming" for which subscribers would switch to a different MVPD if that programming became unavailable or too expensive.[6]

The Comcast/NBCU merger did not appreciably alter Comcast's geographic footprint. The number of MSAs in which Comcast provided video services was not affected by its merger with NBCU – it continued to provide video services in 17 of the 30 largest MSAs in the United States. As the Commission explained, "[i]n light of the fact that NBCU does not own any MVPD properties and Comcast does not hold an interest in any broadcast television stations, the transaction will neither increase concentration in the MVPD services in any geographic market nor increase concentration in the 9.5 percent of homes that rely solely on over-the-air delivery of broadcast signals in any region."[7] Yet, notwithstanding the fact that Comcast did not expand its footprint as a result of its merger with NBCU, the Commission found that Comcast's existing footprint gave it both the incentive and ability to harm competition by withholding programming.

In contrast to the Comcast/NBCU merger, the proposed merger between Comcast and TWC significantly expands Comcast's footprint. With the purchase of TWC's video services, Comcast would provide video services in 23 of the 30 largest MSAs, including the two largest in the country – New York-Newark and Los Angeles-Long Beach. The markets in which TWC currently is the dominant video distributor would soon become ones in which Comcast has the

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[5] *Id*. ¶¶ 44, 50.

[6] *Id.* ¶ 52.

[7] *Id.* ¶ 129 (citing Nielsen, 2009-2010 Universe Estimates – Media Related TV Households and Penetrations by DMA (July 2010)).

same power and incentive to withhold its video programming that the Commission found troubling at the time of the Comcast/NBCU merger.

As with the Comcast/NBCU merger, moreover, this merger substantially increases the marquee programming that Comcast would control. Comcast creates content through its NBC and Telemundo broadcast television networks. It also owns multiple national cable networks such as Bravo, CNBC, MSNBC, NBC Sports Network, and USA Network. It owns or controls several RSNs such as Comcast SportsNet Bay Area (carrying the Giants, Warriors, and various college athletic conferences); Comcast SportsNet California (carrying the A's, Kings, Sharks, Earthquakes, California Golden Bears); Comcast SportsNet Philadelphia (carrying the Phillies, Flyers, 76ers); Comcast SportsNet New England (carrying the Celtics and Revolution); and Comcast SportsNet Northwest (carrying the Trail Blazers, Canucks, Oregon Ducks). It also owns the movie studio Universal Pictures, which produces, acquires, markets, and distributes filmed entertainment worldwide.

Through this proposed transaction, Comcast would substantially enhance that already-substantial portfolio of programming that is of significant value to consumers. TWC's interests include not only national programming services such as iN Demand and MLB Network, but also regional sports programming in California, Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin.[8] In 2011, TWC signed a 20-year agreement with the Los Angeles Lakers and a 10-year deal with the Los Angeles Galaxy to carry all games that are not televised on a national network.[9] In 2013, TWC reached a deal with the Los Angeles Dodgers to create a

[8] *See* Applications and Public Interest Statement, Exh. 8, MB Docket No. 14-57 (FCC filed Apr. 8, 2014) ("Comcast/TWC Public Interest Statement") (listing TWC's programming interests).

[9] *See* Joe Flint, *Time Warner Cable, Lakers Strike 20-Year TV Deal*, L.A. Times (Feb. 14, 2011), http://articles.latimes.com/2011/feb/14/sports/la-sp-0215-lakers-time-warner-20110215; *LA Galaxy and Time Warner Cable Sports Reach 10-Year Agreement To Televise Galaxy Games*

new RSN – SportsNet LA – which became the exclusive local carrier of the Dodgers' games starting in 2014.[10]

The proposed merger between Comcast and TWC therefore raises many of the same anticompetitive concerns with respect to video programming that the Commission sought to remedy three years ago, only this time the magnitude of the problem is even greater. Comcast currently has 22.5 million video subscribers,[11] and this number would rise to approximately 30 million after completing the acquisition of TWC.[12] Indeed, in acquiring TWC, Comcast extends its footprint to five major geographic areas: New York State (including New York City), the Carolinas, the Midwest (including Ohio, Kentucky, and Wisconsin), Southern California (including Los Angeles), and Texas. The merger thus increases significantly the markets where Comcast would benefit by denying or raising the costs of programming to rival MVPDs. And, as described above, the combined company would also own or control a substantial amount of video programming content that consumers value highly. If this transaction is approved, in order to compete successfully with Comcast's cable systems, unaffiliated MVPDs would need to obtain access to an even greater amount of Comcast-controlled content.[13]

(Nov. 18, 2011), http://www.lagalaxy.com/news/2011/11/la-galaxy-and-time-warner-cable-sports-reach-10-year-agreement-televise-galaxy-games.

[10] *See* Joe Flint, *Dodgers Near TV Rights Deal with Time Warner Cable*, L.A. Times (Jan. 23, 2013), http://articles.latimes.com/2013/jan/23/business/la-fi-ct-dodgers-tv-20130123.

[11] *See* Comcast Corp., Quarterly Report (Form 10-Q) ¶ 33 (July 24, 2014).

[12] *See* Comcast/TWC Public Interest Statement ¶ 25. According to its latest quarterly report, TWC currently has approximately 11 million video subscribers, *see* Time Warner Cable, Quarterly Report (Form 10-Q) ¶ 12 (July 31, 2014). The 30 million post-acquisition subscriber number takes into account planned divestitures to Charter that will grow Charter's subscriber base to more than 8 million. *See* Press Release, *Comcast, Comcast and Charter Reach Agreement on Divestitures* (Apr. 28, 2014), http://corporate.comcast.com/news-information/news-feed/comcast-and-charter-reach-agreement-on-divestitures.

[13] The important point for program-access purposes is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable

The Commission has extensive experience in analyzing vertical combinations in recent media mergers. For instance, in the *Adelphia Order*,[14] the Commission, in setting forth the economic theory of harm from the increased vertical integration, stated:

> [W]here a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.[15]

The Commission then concluded that these vertical effects were likely to result in public-interest harm and adopted conditions to mitigate the harm.

In the *Comcast/NBCU Order*, the Commission concluded that it could not "rely on Comcast's assurances that it will not use its control of NBCU content anticompetitively."[16] It cited as an example of Comcast's anticompetitive conduct its outright refusal to provide the Philadelphia RSN to MVPD competitors.[17] And, within the past few months, TWC has been in

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operators. As the Commission has recognized, "the relevant issue is the popularity of the particular programming that is withheld and how the inability of competing MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service." *Comcast/NBCU Order* ¶ 45 n.109 (citing First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 34 (2010) ("*Terrestrial Loophole Order*"), *petitions for review denied in part and granted in part*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011)).

[14] Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees*, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*").

[15] *Id.* ¶ 117.

[16] *Comcast/NBCU Order* ¶ 71.

[17] *Id.*; *see also id.* ¶ 67 ("Commenters also note that Comcast has a history of withholding programming from its rivals. For example, Comcast withholds its RSN in Philadelphia from both DISH and DIRECTV. Similarly, WOW!, which is a mid-sized MVPD, claims that it has had difficulty obtaining Comcast's online programming."). The Commission found that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in

a major dispute with DirecTV over terms for access to SportsNet LA, the exclusive local broadcaster of Los Angeles Dodgers games. According to the Los Angeles Times, "[t]he price being charged is so high that neither Cox, Verizon FiOS, or DISH is able to carry the network either."[18] Indeed, TWC has been apparently "using this standoff to woo DirecTV subscribers."[19] The Commission itself recently became involved when Chairman Wheeler sent a letter to TWC's Chairman and CEO, recognizing that this dispute has the potential " 'to set a precedent for vertically integrated companies to hold the consumer hostage to assert unfair market dominance.' In addition to the aforementioned impact on consumers and the impact on broadband deployment referenced below, the matter of such vertical integration in a manner that affects consumers and the marketplace is of timely concern to the FCC."[20] Both Comcast and TWC have a history,

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Philadelphia to be 40% lower than what it otherwise would have been. *See Terrestrial Loophole Order* ¶ 32.

[18] Joe Flint, *Time Warner Cable Says Yes to Arbitration To End Dodgers TV Standoff*, L.A. Times (July 28, 2014), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dodgers-time-warner-cable-arbitration-20140728-story.html; *see also* Joe Flint, *Standoff over Dodgers Games Could Be Defining Moment in Sports TV*, L.A. Times (July 17, 2014) (explaining that MVPDs contend that TWC's price for the sports channel is too high; "Only subscribers to Time Warner Cable, which has about 30% of the Los Angeles pay-TV market, are seeing games regularly.") ("Time Warner Cable wants SportsNet LA to be mandatory for all pay-TV subscribers, which is how regional sports networks have been traditionally sold including those owned by DirecTV. By being in every home, a network has a greater opportunity for higher ratings and ad revenue than when it is in limited distribution."), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dodgers-tv-standoff-20140718-story.html#page=1.

[19] Joe Flint, *Time Warner Cable Steps Up Efforts To Woo Dodger Fans To Switch*, L.A. Times (Apr. 25, 2014) ("Although the 'Switch today and never miss a game' ad does not mention satellite broadcaster DirecTV, that's the company whose subscribers TWC is aiming at. Subscribers to Charter and Cox can't switch to TWC. But DirecTV subscribers in TWC service areas can change providers."), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-dodgers-gift-20140425-story.html.

[20] Letter from Chairman Wheeler to Robert D. Marcus, Chairman & CEO, Time Warner Cable, Inc. (July 29, 2014) (quoting from a letter sent by eight members of Congress from the Los Angeles area, expressing concern about the ongoing stalemate), *reproduced at* http://www.deadline.com/2014/07/fcc-time-warner-cable-dodgers-tom-wheeler/.

therefore, of using their market power over valuable video programming to impose unreasonable costs on their MVPD competitors, with the intention of raising their rivals' costs or withholding the supply of valuable programming.

The concerns about foreclosing access to video content are not limited to traditional linear carriage; they extend to the provision of video programming online. The Commission recognized in the *Comcast/NBCU Order* that "[o]nline viewing is indisputably becoming an important service demanded by consumers – one that every major MVPD is offering its subscribers" – and that, "[w]ithout access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers."[21] As a condition of its approval of that merger, the Commission required Comcast to provide to all other MVPDs, "at fair market value and non-discriminatory prices, terms and conditions, any affiliated content that it makes available online to Comcast's own subscribers or to other MVPD subscribers."[22] The Commission also generally prohibited Comcast from entering into restrictive agreements with third-party content providers regarding online rights and from impeding access to its own content by entering into overly restrictive agreements for online rights to that content.[23] And the Commission extended its commercial arbitration remedy to disputes over access to online content, further underscoring the fact that the growth of video programming online as a complement to existing offerings would make access to online broadcast and cable video programming essential for competing MVPDs.[24] Because, after this transaction, Comcast would control not only the programming at issue in

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[21] *Comcast/NBCU Order* ¶ 70.

[22] *Id.* ¶ 72.

[23] *Id.* ¶ 73.

[24] *Id.* ¶¶ 4367-68, Attach. A – Conditions, § VII.C.

Comcast/NBCU, but also the additional TWC programming, the post-merger Comcast would have even greater incentive and ability to use its market power to either withhold content from competitors or impose higher fees or other unreasonable conditions for online rights.

B. The Merger Would Further Enhance Comcast And TWC's Scale Advantage Over Rivals In The Acquisition Of Content

Even aside from the issues raised by affiliated programming, by significantly increasing the size of Comcast's subscriber base – *already* the largest of any MVPD – the merger would give Comcast further advantages over rivals in the acquisition of content. Comcast would obtain unprecedented negotiating power with content providers, which would enable it to obtain per-subscriber rates lower than those charged to other MVPDs, and in particular to smaller competitors like CenturyLink. Although these cost savings may provide Comcast's consumers lower prices in the short run, they would further increase Comcast's advantages over rivals in the long run, ultimately stifling competition from new market entrants to the detriment of all consumers.

Congress,[25] the Commission,[26] and the courts[27] have long recognized that MVPDs with large numbers of subscribers may gain advantages in the acquisition of programming content.

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[25] *See* 47 U.S.C. § 533(f)(1)(A), (2)(A) ("In order to enhance effective competition, the Commission shall . . . prescribe rules and regulations establishing reasonable limits on the number of cable subscribers" in order to "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer").

[26] *See* Third Report and Order, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits*, 14 FCC Rcd 19098, ¶ 11 (1999) ("large cable [multiple system operators] might exercise excessive market power in the purchase of video programming").

[27] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("[W]e concluded that Congress had drawn 'reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable

The Commission has explained, for example, that "[e]conomies of scale appear to produce cost advantages, especially with respect to the cost of acquiring programming and customer premise equipment, and thus may play a major role in profitability and the willingness to enter the MVPD industry."[28] It has further acknowledged that "[c]able operators sometimes can reduce their per-unit programming costs by increasing their subscriber reach."[29] Industry data confirm that this is not merely hypothetical, but that greater scale enables MVPDs to achieve lower programming costs in the marketplace. According to SNL Kagan, for example, Comcast already has lower programming costs than other large cable operators.[30]

Other MVPDs likewise confirm that greater scale yields lower content costs, which creates a competitive advantage. In its Public Interest Statement regarding the acquisition of DirectTV, AT&T explained that the transaction would "lower content costs" because it would "create a combined entity with a much larger subscriber base than AT&T currently has and thus offer much more value to programmers."[31] AT&T "conservatively project[ed]" that "the transaction will reduce AT&T's expected per-subscriber content costs as a standalone company

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industry.' ") (quoting *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1319-20 (D.C. Cir. 2000).

[28] Fifteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, ¶ 68 (2013) ("*Fifteenth Video Competition Report*") (footnote omitted); *see* Fourteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd 8610, ¶ 74 (2012).

[29] Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 21 FCC Rcd 15087, ¶ 21 (2006).

[30] Robin Flynn, *U.S. Multichannel Subscriber Update and Programming Cost Analysis*, SNL Kagan, ¶ 3 & Table (June 2013), *available at* http://go.snl.com/rs/snlfinanciallc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf.

[31] Description of Transaction, Public Interest Showing, and Related Demonstrations ¶ 35. *Applications of AT&T Inc. and DirecTV To Transfer Control of FCC Licenses and Other Authorizations*, MB Docket No. 14-90 (FCC filed June 11, 2014).

by at least 20 percent."[32] AT&T further explained that "[c]ost savings of this magnitude will significantly enhance the combined company's competitiveness in video services."[33]

Conspicuously, Comcast's Public Interest Statement makes no mention of the merger's potential effects on the combined company's scale advantages in content acquisition, and it does not contend that those reduced costs are a public-interest benefit. Responding to questions from Members of Congress, Comcast Executive Vice President David Cohen testified, without explanation, that there would not be "dramatic shifts in programming costs . . . as a result of this transaction"[34] and that Comcast "won't gain undue power over programmers."[35]

Comcast's attempt to deny further scale-related programming cost savings is a transparent effort to avoid scrutiny of the anticompetitive advantage the merger would give Comcast over rivals. Comcast's own prior statements – as well as those of TWC – recognize that increased scale yields programming-cost advantages.[36] For example, Comcast's CFO has told analysts that, "with our scale, that's one major benefit, we know we're pretty much the

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[32] *Id.* ¶ 35-36.

[33] *Id.* ¶ 36.

[34] Testimony of David L. Cohen, Executive Vice President, Comcast Corp., *Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 14 (Apr. 9, 2014) ("Apr. 2014 Senate Hr'g") (available on LexisNexis).

[35] *Id.* ¶ 7.

[36] *See* Comments of Time Warner Cable ¶ 19 n.24, *The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules*, MM Docket No. 92-264 (FCC filed Jan. 4, 2002) ("Large MVPDs can reduce video-programming services' risk to a much greater extent than small MVPDs: a long-term contract with a large MVPD helps guarantee that a video-programming service will recover its sunk costs. Naturally, an MVPD able to reduce a video-programming service's risk in this way is entitled to a lower rate – just as a firm agreeing to buy a factory's entire output over a period of years receives a lower per-unit price than a firm committing to buy only a few units.").

low-cost provider, given our scale."[37] Comcast's CEO, Brian Roberts, has likewise stated that "[o]ur scale, our programming discounts – you add it all together, a little bit here, a little bit there, it makes a big difference."[38] Comcast provides no reasonable basis to deviate from its own prior statements, prior Commission decisions, and the recent statements of other MVPDs, and conclude that the merger would bring Comcast even greater programming cost advantages over rivals.

Because Comcast does not address the issue, it is difficult to quantify the additional programming cost advantages the merger would yield for Comcast. Following the merger, Comcast/TWC would serve approximately 30 million subscribers (as well as potentially 2.1 million Bright House subscribers for which TWC currently acquires content[39]), whereas the next largest MVPD, DirecTV, has approximately 20 million subscribers, and combined with AT&T would serve 26 million subscribers; CenturyLink serves only 215,000 video subscribers. Thus, Comcast would have a 15% scale advantage over its nearest rival, a combined AT&T and DirectTV, and scale advantage of approximately 1,400% over CenturyLink. Taken together with the substantial cost advantages that Comcast already enjoys as the largest MVPD, further cost reductions would give Comcast a significant, if not insurmountable, advantage over rivals, particularly smaller providers like CenturyLink.

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[37] *Comcast Corp at Barclays Capital Global Communications, Media, and Technology Conference – Final*, Fair Disclosure Wire, Transcript 052411a4055044.744, ¶ 5 (May 24, 2011) (Statement by Comcast Corp. CFO Michael Angelakis).

[38] *Q3 2006 Comcast Corporation Earnings Conference Call – Final*, Fair Disclosure Wire, Transcript 102606az.723, ¶ 8 (Oct. 26, 2006) (Statement by Comcast Corp. CEO Bryan Roberts).

[39] *See* Shalini Ramachandran, *TWC's Arrangement Adds Wrinkle to Comcast Merger Plan: Bright House Agreement Will Expand Power to Buy Programs*, Wall St. J. (Aug. 17, 2014), *available at* http://online.wsj.com/articles/twc-arrangement-adds-wrinkle-to-comcast-deal-1408316427.

In sum, the merger would exacerbate an already harsh competitive environment for new market entrants, including fiber-based providers like CenturyLink that are the best opportunity to provide meaningful competition against incumbent cable companies. Those new market entrants already face enormous fixed costs to build state-of-the-art networks to deliver video programming. Comcast's market power in purchasing content allows it to reduce its content costs – the single largest variable cost incurred by MVPDs – below those available to its smaller rivals, including and especially these new market entrants. That advantage in variable costs compounds the disparity in fixed costs and therefore threatens dramatically to reduce the ability of smaller entrants like CenturyLink to enter new markets to challenge incumbents. This result undermines the competition that Congress and the Commission have recognized as essential to the functioning of the market in the delivery of video programming to consumers.

C. If The Commission Does Not Reject the Proposed Transaction, It Should Impose Conditions To Mitigate These Anticompetitive Merger Effects

As discussed above, in light of the significant anticompetitive harms to the market for video programming distribution that this merger is likely to cause (and the other harms discussed below), the Commission could reasonably conclude that it should not approve this transaction. If, however, the Commission does not reach that conclusion, the following conditions are the minimum necessary to mitigate substantial public-interest harm:

1. For A Period of Seven Years, The Commission Should Require Comcast To Disclose The Prices, Terms, And Conditions of Contracts for Programming Reached With The Largest MVPDs

Comcast has an enormous advantage when both negotiating and arbitrating commercial carriage agreements, because it alone knows precisely what the "fair market value" of its video programming actually is. Smaller MVPDs such as CenturyLink need greater transparency into the prices, terms, and conditions offered to the larger MVPDs, including, of course, Comcast itself, in order to ensure that they are getting a fair deal. CenturyLink is not suggesting that it is necessarily entitled to precisely the same contractual terms of the largest MVPDs; it may well be reasonable for a supplier to offer some kind of volume-based pricing under appropriate circumstances. However, the absence of any visibility into even the "standard" rate places smaller MVPDs at an enormous disadvantage.

Even with the ability to arbitrate the terms of access to video programming, the absence of pricing transparency imposes substantial hardship on smaller MVPDs. Smaller buyers of Comcast programming lack the critical information even to make a credible "final offer" under the Commission's baseball-style arbitration rules. This creates an enormous disincentive to arbitrate, particularly given the risks and high costs of losing.[40] As Comcast and TWC have noted, the arbitration rights that the Commission established when approving the Comcast-NBCU merger have never been invoked as to traditional cable television programming.[41] While the arbitration remedy is an essential backstop (and deterrent) to bring Comcast to the table and ensure that Comcast cannot refuse to allow carriage of its programming by unaffiliated MVPDs, it has not proven to be a sufficient remedy to ensure that smaller MVPDs have a fair opportunity to reach a commercially reasonable carriage agreement.

Because the potential risk of losing customers as a result of a video-programming blackout is so great, smaller MVPDs are more likely to agree to pay substantially more than the fair market value for this programming. If Comcast were required to disclose the price, terms, and conditions of its major agreements *before arbitration*, it would allow smaller MVPDs to

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[40] *See Comcast/NBCU Order* ¶ 53 (recognizing the high "costs and burdens that the aggrieved MVPD must incur in order to use the arbitration and standstill remedies").

[41] *See* Comcast/TWC Public Interest Statement ¶ 155.

determine what the fair market price (on a per-subscriber basis) for the programming might be. Such information may be shared in discovery as part of the arbitration process, but by then it is too late for the MVPD to make an offer that is fairly informed by the available data. It is the structural imbalance in information that has proven particularly harmful in negotiating fair agreements, and this condition is designed to rectify that. Any concerns regarding the non-disclosure of such information can be taken into account by limiting access to a small number of individuals and applying this condition only to new agreements signed after the merger (so that no party can claim to be surprised that limited disclosure obligations exist as to the agreement).

2. For A Period of Seven Years, The Commission Should Extend the Comcast-NBCU Conditions To All Comcast-Owned And Affiliated Content, Including Online Video Programming

While it is true that the arbitration remedy from the Comcast-NBCU merger has never been invoked as to cable television programming, as noted above, it has nevertheless had a substantial and beneficial impact on the negotiation process. Even though the arbitration remedy is imperfect and expensive – something that the first condition discussed above would help remedy – it has nevertheless proven to be of paramount importance in ensuring that Comcast comes to the negotiating table at all. As its incentives to withhold programming grow with the combination of TWC's assets, the continued availability of this remedy is absolutely essential.

Moreover, it is critical that the remedy continue to apply not only to the traditional carriage of all Comcast-controlled programming, but also to video programming that any Comcast programmer licenses to any affiliated or non-affiliated MVPD for online display. The Commission should continue to require Comcast to provide to all other MVPDs, at fair market value and non-discriminatory prices, terms, and conditions, any affiliated content that it makes available online to Comcast's own subscribers or other MVPD subscribers. The Commission should also continue generally to prohibit Comcast from entering into restrictive agreements with third-party content providers regarding online rights. In case a dispute arises over any of these conditions regarding online video programming, the arbitration and standstill remedies should continue to be available.

3. For A Period of Seven Years, The Commission Should Require Comcast To Disclose The Prices It Pays To Third-Party Broadcast Stations And Cable Programmers For Content

In order to help mitigate the merger's damaging effects on price transparency in the market for video programming, the Commission should, at a minimum, require Comcast to disclose publicly the rates that both it and TWC currently pay for content under agreements signed after the transaction is completed, and for Comcast to provide annual updates of its content costs going forward. Knowing the rates, terms, and conditions that Comcast has recently reached with unaffiliated broadcast stations and cable channels would provide smaller MVPDs with essential data regarding the fair market value of the programming. As explained above, the information imbalance that currently characterizes negotiations with Comcast has forced smaller MVPDs to reach carriage arrangements with both broadcasters and cable channels that are economically unjustified and potentially anticompetitive. By providing greater transparency into the terms Comcast is receiving from programmers, this condition will help narrow the information gap facing smaller MVPDs and assist them in negotiating fairer terms.

Because Comcast would almost certainly pay lower rates than any other MVPD, the disclosure of those rates would serve as a useful benchmark that facilitates other market participants' ability to negotiate for lower rates.

4. For A Period of Seven Years, The Commission Should Require Comcast To Allow Competing Providers To Discontinue Comcast Video And Broadband Through An LOA Process

In the voice context, to support competition, the Commission's rules permit a competing provider to obtain an LOA from a customer in order to effectuate a change in service providers.[42] To provide some balance to the competitive playing field, if the Commission allows this transaction to go forward, it should insist that Comcast make it easier for customers who wish to change cable service (and broadband service, where obtained with the cable service) to do so by allowing disconnections through a similar LOA process. That will allow customers to avoid the potential hassles and delays associated with making a separate call to Comcast to disconnect and avoid a disincentive to changing providers. Although it is by no means a complete solution to the competitive imbalances created by this transaction, a workable regime for disconnection from Comcast that does not require a customer call would provide at least some competitive counterweight to the deleterious effects of this transaction.

II. The Proposed Transaction Would Increase The Combined Entity's Incentive And Ability To Harm Competition And Competitors In The Market For Spot Cable Advertising

The proposed combination of Comcast and TWC would increase the ability of the combined entity to raise prices and suppress output in a market where the companies currently compete: the market for spot cable advertising – the broadcast time that MVPDs themselves (as opposed to the networks that they carry) sell to national, regional, and local advertisers. The transaction would give the combined entity greatly enhanced control over two key points of

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[42] *See* 47 C.F.R. § 64.1130; Fourth Report and Order, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 23 FCC Rcd 493, ¶ 2 & Appendix A (2008).

distribution of advertising: "interconnects," which provide access to multiple MVPDs within a DMA; and spot representation firms, the agencies that represent MVPDs in their transactions with advertisers and advertising agencies. Moreover, the transaction would give Comcast greater control over NCC Media, the sole entity capable of selling spot cable advertising on a national basis.

As explained below, this control over the transaction pathways linking advertisers and MVPDs would allow the combined entity to extract a greater fee for every spot cable sold. That would reduce the revenues available to competing MVPDs and hamper their ability to compete in the MVPD market. Furthermore, by steering advertisers, and limiting their dealings with competing spot representation firms, the combined entity would have the ability to consolidate its control over the spot cable market still further.

A. The Proposed Transaction Would Give Comcast A Stranglehold Over All Segments Of The Spot Cable Advertising Market

The proposed transaction would give the combined entity a dominant position with respect to every relevant segment of the spot cable advertising market – local, regional, and national. Spot cable advertising refers to buying commercial time controlled by the MVPD, as opposed to the cable network. Spot cable advertising is a distinct market from other forms of cable advertising because it allows advertisers to reach a geographically targeted audience more effectively.[43] MVPDs are provided with local advertising availabilities ("avails") by

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[43] *See* Statement of Allen P. Grunes ¶ 17, *Competition in the Video and Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable*, Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. (May 8, 2014) ("Grunes Testimony") ("The spot cable advertising market allows national, regional, and local advertisers to cost-effectively geo-target (advertise in specific areas) during the two to three minutes reserved each hour for MVPDs as part of a carriage agreement with cable programmers."), *available at* http://judiciary.house.gov/_cache/files/665684a1-49d4-4aca-9bc1-79ae9ad387b9/grunes-testimony.pdf.

cable programming networks as part of carriage agreements – usually MVPDs are given four 30-second spots per hour to sell – and the MVPDs in turn can sell those spots to national, regional, or local advertisers.[44] The FCC has recognized that "[a]dvertising revenue has become an increasingly important source of revenue for the cable industry."[45] Spot cable advertising is currently a $5.4 billion dollar market.[46] The combined entity would control approximately $4.5 billion of that $5.4 billion in revenue, equivalent to 83% market share.[47]

The market for spot cable advertising is composed of three segments – local, regional, and national – each of which involves distinct sales mechanisms. Spot advertising sold on a local basis is typically purchased by advertisers directly from the MVPD, or through the MVPD's representative.[48] The two largest representatives – Comcast Spotlight and TWC Media Sales – are affiliated with Comcast and TWC, respectively.[49] These entities sell advertisements for Comcast and TWC; they also represent other MVPDs in the sale of advertising to local advertisers. The combined entity will control spot cable advertising into 49 million of the 69 million cable households in the United States, either through direct advertising or through

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[44] *See id.*; *see also* Letter from Viamedia to Hon. Kathleen H. Burgess, New York Public Service Commission ¶ 3, Case 14-M-0183, *Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control* (Aug. 8, 2014) ("Viamedia NYPSC Comments").

[45] First Report, *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, ¶ 23 (1994).

[46] *See* Viamedia NYPSC Comments ¶ 2 ("Spot Cable Advertising is a $5.4 billion national market"); *see also* Steven Perlberg, *Here's Why A Comcast Deal Could Be Bad For Small Advertisers* (Apr. 9, 2014), http://blogs.wsj.com/cmo/2014/04/09/comcast-twc-cable-ads.

[47] *See* Viamedia NYPSC Comments ¶ 2.

[48] *See* Grunes Testimony ¶ 17.

[49] *See id.* & n.35; *see also* Viamedia NYPSC Comments ¶ 1.

deals to represent other providers.[50] CenturyLink uses the largest remaining independent representative – Viamedia.

Regional advertising is typically sold through what are known as "interconnects," a group of cable systems within a particular DMA that make spots available on multiple MVPD systems to ad buyers. Interconnects essentially provide "one-stop shopping": advertisers can go to the interconnect and reach a large number of the cable subscribers in the DMA in one buy.[51] The interconnects in turn are controlled by the DMA's dominant MVPD, which acts as the interconnect manager. The interconnect manager interacts with the advertisers or advertising agencies, collects the revenue, and distributes the revenue *pro rata* by number of subscribers to the participating MVPDs. If an MVPD is excluded from the interconnect, the advertiser would need to transact separately with that MVPD if the advertiser wanted to reach the subscribers of that particular MVPD. Post-merger, Comcast would control at least 40 of the 50 top interconnects.[52]

National spot advertising on local avails is used by advertisers that want to advertise across the entire country. NCC Media is the only national spot representation firm representing MVPDs in all 210 DMAs; if a company wants to advertise on the spot cable market nationally,

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[50] *See* Viamedia NYPSC Comments ¶ 2.

[51] *See* Comcast, Glossary (defining Interconnect as "[a] collection of two or more cable TV systems that work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to reach all cable households within a market with one buy, one contact and one tape"), *available at* http://www.comcastspotlight.com/resources/glossary.

[52] *See* Cabletelevision Advertising Bureau, Major Market Interconnects (showing top 50 interconnects and the current interconnect operator; 40 of the top 50 are currently operated by Comcast or TWC*), available at* http://www.thecab.tv/main/cablenetworks/marketinterconnects/.

NCC Media is the only firm that can facilitate such a buy.[53] Currently, Comcast has a 60% ownership interest in NCC Media,[54] and TWC and Cox Communications own the rest.[55] Post-merger, Comcast's share of NCC Media would grow to 80%.[56] In a typical transaction for national spot cable advertising, the advertiser or advertising agency purchases the advertisements from NCC Media, which then sends the advertisements to the MVPDs. Once the advertisements are run, NCC Media sends the proceeds from the sale to the MVPD. While many of the larger MVPDs deal directly with NCC Media through their in-house advertising representative firms (*e.g.*, Comcast Spotlight and TWC Media Sales), smaller MVPDs often outsource the functions of trafficking, running, billing, and selling the advertisements to a firm that represents MVPDs. CenturyLink uses Viamedia for these functions.[57]

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[53] *See* Grunes Testimony ¶ 17 (NCC "is the one and only gateway to purchase national advertising, or advertising across multiple geographic areas. NCC has no competitors and national advertisers have no other choice except to contract with NCC."); *see also* Markets, NCC Media ("NCC Media enables you to advertise and promote your brand in every market in the country."), *available at* http://nccmedia.com/cable-advertising/cable-advertisingmarkets/.

[54] *See* Questions for the Record Submitted by Senator Al Franken for David Cohen, Executive Vice President, Comcast, ¶ 26, *Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (Apr. 9, 2014), *available at* http://www.judiciary.senate.gov/imo/media/doc/April%209,%202014%20-%20Cohen%20Responses.pdf.

[55] *See* NCC Media, Owners & Affiliates, *at* http://nccmedia.com/about/owners-affiliates/.

[56] *See* Grunes Testimony ¶ 17; Viamedia NYPSC Comments ¶ 2; *see also* Questions for the Record Submitted by Senator Al Franken for David Cohen, Executive Vice President, Comcast, ¶ 26, "Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers": Hearing Before the S. Comm. on the Judiciary, 113th Cong. (Apr. 9, 2014) (post-merger Comcast will own 76.7% of NCC).

[57] *See* Viamedia, MVPD Solutions, *available at* http://www.viamediatv.com/MVPD_solutions.htm.

B. Comcast's Enhanced Control of Local Spot Advertising Would Give It The Ability To Harm Competition

Comcast and TWC already wield substantial market power in the market for spot cable advertising; the proposed transaction would substantially enhance that power and threaten significant competitive harm to competitors and consumers at various points in the advertising transaction chain.

First, combining the first and second largest representation firms for local spot advertising (Comcast Spotlight and TWC Media Sales) would allow the combined entity to take a greater percentage of the revenue from this segment. That would be the case because the representation firm affiliated with the combined entity would have the ability to put both competing MVPDs and independent representative firms at a greater disadvantage in dealings with advertisers in all market segments. Given the post-merger entity's significantly larger number of MVPD subscribers, access to Comcast/TWC will often be a "must have" for advertisers, which will give the combined entity greater incentive and ability to increase their market share and squeeze out independent representative firms. It could also give the combined entity the increased scale and ability to offer short-term discounts that could threaten the viability of independent firms. Such actions, in turn, would lead to further consolidation in the representation market and the ability of the combined entity's representation firm to raise rates for small MVPDs (thus increasing Comcast competitors' costs) and advertisers alike.

Second, the combined entity's control over the crucial regional interconnects means that it can discriminate against smaller MVPDs and deny access to the interconnects unless the MVPDs comply with conditions not imposed on the combined entity. In addition, the combined entity can use its control to deny access to the interconnects to force smaller MVPDs to deal with

Comcast Spotlight and TWC Media Sales, instead of independent firms like Viamedia, or risk being excluded from the interconnect.

Comcast has already exhibited this kind of anticompetitive behavior against smaller competitors in the interconnects it controls. In the Midwest, for example, Comcast has terminated interconnect agreements of Viamedia, the agency that CenturyLink uses to represent it in the spot cable advertising market, in order to exclude the MVPDs represented by Viamedia from the interconnects unless the MVPDs use Comcast, not Viamedia, to represent them.[58] Comcast has also denied Viamedia entry into other interconnects it controls.[59] By requiring MVPDs to use Comcast to gain access to these crucial interconnects, Comcast can harm competition both by denying competing MVPDs from these important sources of advertising revenue and by eliminating competition from Viamedia and other independent representatives, allowing it to raise the rates it charges for representation of its competitors. As CenturyLink continues to try to increase consumer choice in the cable market by launching Prism in new markets, CenturyLink would be denied access to this important regional advertising revenue stream unless it (and its representative, Viamedia) have equal access to the interconnects.

The combined entity would also be able to use its control over the interconnects, particularly in combination with its control over NCC Media, to deprive smaller competitors like CenturyLink of advertising revenue by steering advertisers to interconnects that Comcast controls. For example, Comcast, using its control of NCC Media, could steer advertisers looking to buy across a significant portion of the country to DMAs where Comcast controls the

[58] *See* Viamedia NYPSC Comments ¶ 7 ("Comcast has already terminated Viamedia's participation in key Interconnects that it controls currently in the Midwest and denied entry into other Interconnects. We believe that Comcast took this action to force MVPDs into entering Spot Cable Representation agreements with Comcast by threatening to otherwise exclude the MVPD from the Interconnect.").

[59] *See id.*

interconnect. That would increase Comcast's revenues at the expense of its competitors that control other interconnects. Comcast could further deny smaller competitors revenue by steering advertisers from those DMAs where, in order to reach a significant percentage of the market, the advertiser would also have to buy from smaller cable operators who are not represented in the particular interconnect. In this regard, advertisers or their representatives seeking to place commercials across parts of a region or the country may be largely indifferent between two or more similar markets, so Comcast may be able to use discounts or other mechanisms to steer them to markets where the post-merger Comcast/TWC would benefit most.

Third, the combined entity's greater control over NCC Media would perpetuate and intensify incentives for discrimination that already exist. Such a concentration of market power in this segment would allow NCC Media to charge higher rates to competitor cable operators for access to its one-stop-shop for national advertising than it charges to itself, harming smaller competitors such as CenturyLink.[60] Such control would also allow Comcast to discriminate against smaller MVPDs that use the independent representation firm Viamedia. NCC has already warned Viamedia that it is unlikely to renew its contract with Viamedia at the end of its term.[61]

C. If the Commission Does Not Reject This Transaction, It Should Adopt Structural And Conduct Remedies To Protect Competition In The Spot Advertising Market

If the Commission does not reject the transaction outright, it should impose at least the following conditions.

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[60] *See* Apr. 2014 Senate Hr'g ¶ 30 (Statement of Public Knowledge President and CEO Gene Kimmelman) ("One-stop shopping is great on one level. On the other level, if it leads to market power and the ability to dominate in the market, it may strip off advertising opportunities for potential competitors to Comcast, particularly on the programming side.").

[61] *See* Viamedia NYPSC Comments ¶ 6.

1. The Commission Should Require Divestiture Of Affiliated Advertising Representation Firms

Comcast should be required to divest the Spotlight and TWC Media Sales representation firms that act as middlemen in these markets. This would ensure that MVPDs have a competitive choice in representatives, and help ensure that independent firms like Viamedia can continue to compete on the merits. Divestiture is more effective than any conduct safeguards – which, while necessary, tend to be difficult to monitor and to enforce – because it would remove anticompetitive incentives for a captive representative firm to favor the competitive interests of its affiliated MVPD in the market for video distribution.

However, if the Commission chooses not to mandate divestiture of the representation firms Comcast Spotlight and TWC Media Sales, they should be required to treat unaffiliated and affiliated MVPDs on non-discriminatory terms and conditions. This would include ensuring that Comcast Spotlight and TWC Media Sales represent unaffiliated and affiliated MVPDs on the same terms and conditions; the Commission may also wish to consider additional safeguards, including establishment of independent boards, to promote the independence of those operations.

2. The Commission Should Impose Non-Discrimination Requirements On Comcast-Controlled Interconnects

There should be enforceable, auditable non-discrimination conditions imposed on all Comcast-controlled interconnects. This would prevent Comcast from denying its competitors access to a crucial revenue source by discriminating against smaller MVPDs. Indeed, implicitly recognizing these concerns, Comcast has already promised Congress that it is not going to exclude competitors from the interconnects,[62] and the Commission should make that promise enforceable through these conditions.

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[62] *See* Testimony of David L. Cohen, Executive Vice President, Comcast Corp., *Competition in the Video and Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable,*

3. The Commission Should Mandate Non-Discriminatory Access to National Spot Cable Advertising

NCC Media should be required to provide access to national spot cable advertising to all MVPDs on non-discriminatory terms and conditions. This would ensure that Comcast does not use its increased control over the one-stop-shop for national advertisers to harm other MVPDs.

III. The Merger Would Enhance Comcast's Incentive And Opportunity To Use Franchise Proceedings To Delay Competitive Entry

A. Comcast Has Used Franchising Proceedings To Delay Entry And, Post-Merger, Would Have Increased Ability To Do So

Congress and this Commission have both recognized that the requirement that new cable entrants obtain a local franchise[63] can delay or even prevent competitive entry. The Communications Act thus provides that a local franchising authority ("LFA") "may not unreasonably refuse to award an additional competitive franchise."[64] As this Commission has explained, Congress imposed that limitation on local authorities to further the "statutory

Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 52 (May 8, 2014) (available on LexisNexis):

> [REP.] BACHUS: So, your short answer is that you're not gonna exclude competitors or advertising . . .
> COHEN: Correct.
> [REP.] BACHUS: . . . from the interconnects.

[63] *See* Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 6 (2007) ("*621 Order*") ("Subsection (b)(1) of Section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise, and subsection (a)(1) grants to franchising authorities the power to award such franchises.") (footnote omitted), *petitions for review denied*, *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[64] 47 U.S.C. § 541(a)(1).

imperative to foster competition in the multichannel video programming distribution ("MVPD") market."[65]

Franchising proceedings can be delayed, however, not only by the actions of the LFA, but also by the actions of incumbent cable providers. In conflict with the statutory goal of enhancing facilities-based MVPD competition, incumbent cable operators have the incentive and ability to inject delay and uncertainty into franchising proceedings (both before and after a formal franchise application is filed) to protect themselves from competition. As the Commission has previously concluded (in the context of so-called level-playing-field requirements), there is "troubling . . . evidence" that incumbent providers have sought "to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry." [66] Moreover, incumbent cable operators have "use[d] threatened or actual litigation against LFAs . . . and have successfully delayed entry or driven would-be competitors out of town."[67] And, although the Commission's 2007 *621 Order* imposed helpful limits on the time-period for LFA action on franchise requests, at the prompting of incumbent cable providers, LFAs can (and do) still extend the process by imposing stringent application requirements. Even aside from that, new entrants are reasonably hesitant to invoke the "shot clock" for fear of antagonizing the entity with which it will need to deal to obtain relief. Incumbent providers can exploit that fear to delay proceedings even after an application is filed.

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[65] *E.g.*, *621 Order* ¶ 3; *see also* Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 29 FCC Rcd 1597, ¶ 2 (2014) ("Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 . . . amended the Communications Act of 1934 . . . and directed the Commission to establish regulations for the purpose of increasing competition and diversity in multichannel video programming distribution, increasing the availability of satellite delivered programming, and spurring the development of communications technologies.").

[66] *621 Order* ¶ 138 n.476.

[67] *Id.* ¶ 34; *see also id.* ¶ 138 n.476.

Concerns about the competitive effects of delay in obtaining a franchise create a transaction-specific harm that Comcast must address before the Commission should consider approving this transaction. Indeed, Comcast has been uniquely and extraordinarily aggressive in seeking to delay CenturyLink's entry into new markets. For example, in the Denver metropolitan area, where CenturyLink is currently pursuing local video franchises, Comcast appears to be sending a similar letter to each local franchising authority from which CenturyLink is seeking a franchise or potentially might be seeking a franchise providing Comcast's "concerns" regarding CenturyLink's entry into the video market.[68] The "concerns" that Comcast has raised, while couched in terms of "fair competition," are in reality an effort to have the LFA impose such onerous and unreasonable buildout requirements that the new entrant will not be able to obtain a franchise agreement that will support a feasible business plan. As this Commission has recognized, "[b]uild-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment. Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding."[69]

[68] CenturyLink has been provided the letters that Comcast has sent to two LFAs in the Denver metropolitan area where CenturyLink is currently seeking franchises to provide video service. *See* Attachments 1 & 2 hereto. CenturyLink representatives have been told that Comcast has sent similar letters to other LFAs in the Denver metropolitan area as well.

[69] *621 Order* ¶ 35 (footnote omitted); *see also id.* ¶ 36 ("In many cases, build-out requirements also adversely affect consumer welfare. [The Department of Justice] noted that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices.").

Moreover, even where Comcast has not obtained the end result of wholly precluding entry by a competitor, it at least is able to use these tactics to delay that entry. Thus, in Colorado Springs, where CenturyLink ultimately obtained a franchise to provide video service in 2012, Comcast undertook extensive but ultimately unsuccessful efforts to have the Colorado Springs City Council impose onerous buildout requirements on CenturyLink.[70] Comcast's efforts succeeded in causing CenturyLink to spend 20 months to obtain a single franchise.

In CenturyLink's experience, other providers have not engaged in similar conduct. In the Phoenix, Arizona metropolitan area, Cox is the incumbent cable provider. CenturyLink has 18 franchises to provide video service in this metropolitan area, six of which either have been renewed or are currently in the renewal window. Not once has Cox attempted to intervene in CenturyLink's franchise application process – either the initial application process or any renewals. The same is true in the Omaha, Nebraska metropolitan area where Cox is the incumbent provider and CenturyLink currently has nine franchises, six of which have recently been acquired and three of which have recently been renewed. CenturyLink was able to acquire and renew all nine Omaha franchises in a single 11-month period in 2012-2013.

The merger of Comcast and TWC would allow Comcast to extend its anticompetitive behavior into areas currently served by TWC. Absent action by the Commission, the result would be delayed competitive entry, higher costs for new entrants, and, in some instances, even a decision by a potential new entrant not to compete. Those transaction-specific harms are contrary to congressional and Commission policy, and they hurt consumers and the public interest.

[70] In markets where the process for obtaining a video franchise does not afford others an opportunity to intervene in the process, such as Florida's statewide franchising process, Comcast has not delayed CenturyLink's entry as a video provider in those markets.

B. To Prevent These Harms, If the Commission Does Not Reject This Transaction, It Should Impose Conditions That Help Preserve The Ability of Facilities-Based Providers To Enter And To Compete

If the Commission does not determine that this harm, and the others discussed here, warrant denying the license transfer applications, it nevertheless should not approve the transaction unless Comcast voluntarily agrees to take steps to ensure that new entrants are not delayed in their ability to provide enhanced facilities-based video competition.

1. The Commission Should Not Approve This Merger Unless Comcast Agrees To Stop Intervening In Franchising Proceedings

Consistent with its repeated assurances that this merger will not harm competition in local video markets, Comcast should agree not to oppose or intervene in any effort by a competitive franchise applicant to obtain a local franchise before the Commission approves this merger. Only such an assurance will fully protect entrants from the massive combined Comcast/TWC entity acting on its incentive post-merger to take action to protect itself from new facilities-based video (and broadband) competitors. That result would be consistent with past cases, where the Commission has approved transactions only after the merging parties agreed not to participate in proceedings or seek regulatory relief in a manner that the Commission understood to be contrary to the public interest.[71]

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[71] *See* Memorandum Opinion and Order, *News Corp. and the DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, Application For Authority to Transfer Control*, 23 FCC Rcd 3265, ¶ 83 & n.246 (2008) (adopting, as a condition of approval to transfer control of DIRECTV to Liberty Media, a requirement that Liberty Media "not offer any of its . . . programming services on an exclusive basis to any MVPD," thus forgoing "the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4)"); Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, 5812, App. F – Merger Commitments: Special Access ¶ 7 (2007) ("*AT&T/BellSouth Order*") (adopting commitment that AT&T and BellSouth would not oppose request for mediation of disputes by purchasers of interstate special access services); *id.* ¶ 5815,

2. In The Alternative, Comcast Should Agree To Conditions That Limit Delay and Improve Transparency

If the Commission is not willing to impose such a condition, however, at the least, Comcast must agree (1) not to oppose any competitive franchise applicant's request to expedite a local franchising proceeding and (2) to make available in a single, readily accessible location on its website copies of all communications and descriptions of all oral and written ex parte contacts made by or on behalf of Comcast with LFAs related to a potential competitive cable operator's application for a franchise. The specificity of the descriptions of any ex parte contacts and the timeliness of the posting of the information should be consistent with this Commission's rules on ex parte communications.[72] The last condition ensures that, at a bare minimum, there is transparency as to what arguments Comcast is making (and to whom) so that entrants, this Commission, and other interested entities may evaluate whether Comcast is acting in a manner consistent with legal requirements or, alternatively, seeking to create an unreasonable barrier to entry.

IV. The Commission Should Ensure That Comcast Continues To Provide Reasonable And Non-Discriminatory Access to Headend In The Sky

CenturyLink provides traditional cable services to several thousand customers in Wisconsin and Iowa.[73] Like many other small cable providers, CenturyLink relies on Comcast's "Headend in the Sky" ("HITS") service to deliver digital programming to those consumers. HITS is a digital content transmission technology that multiplexes multiple digital cable channels

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App. F – Merger Commitments: Forbearance ¶ 2 (requiring that AT&T/BellSouth not seek or give effect to any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities relating to its merger commitments).

[72] *See* 47 C.F.R. § 1.1200 *et seq.*

[73] The specific locations are Platteville, Randolph, Casco, and Thorp, Wisconsin, and Postville, Iowa.

into a signal that is then sent to a satellite. The signal is then downlinked from the satellite to many MVPDs, which in turn forward the channels to their subscribers. In sum, as the Commission has explained, this service "allows cable operators to receive prepackaged digital video channels by satellite which then are passed through the headend to subscribers."[74]

Smaller cable providers such as CenturyLink rely on HITS to provide cost-effective digital cable to their customers for small systems in more rural areas. There is no current commercially reasonable alternative to HITS for aggregating and delivering digital content for these small systems. Accordingly, absent the availability of HITS, these cable providers would not be able to provide access to a robust suite of digital programming, including HD and Video on Demand, without building additional facilities in each of the locations where they provide service (or building one such facility and then arranging to transport the programming to the others) in order to account for potential content and technology differences. Those costs would be prohibitive for small providers such as CenturyLink, and the predictable result would be fewer channels and options to subscribers in the generally more rural, sparsely populated locations served by small cable companies.

After this transaction, the combined Comcast/TWC may choose not to offer HITS service to some or all of the small cable providers that currently use it. This is particularly a concern where TWC, which is not now under common control with HITS, offers service in contiguous or overlapping areas to small cable providers – as is the case for CenturyLink in Casco, Wisconsin.

[74] Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, ¶ 196 (2000).

Smaller cable providers raised a similar issue in a 2002 transaction involving Comcast.[75] In response, Comcast agreed that it would (1) provide HITS to small cable providers for the foreseeable future; (2) honor all existing service agreements; and (3) communicate in advance any substantial changes in the service relationship.[76]

The Commission explicitly relied in that case on Comcast's commitment in concluding that there was no harm warranting further action.[77] Comcast has made no similar commitment to date in this proceeding. To be sure, the Commission also noted that the record indicated that there were "alternative sources of packaged digital programming," including "direct feed options from the programmers themselves."[78] As discussed above, however, whatever the Commission thought to be the case in 2002, in *today*'s market, there are no commercially reasonable alternatives, and obtaining and constructing the facilities necessary to support such a direct feed would be prohibitive for small providers such as CenturyLink.

If the Commission Does Not Reject This Transaction, It Should Mandate That Comcast Commit to Continued HITS Access at Current Rates. To ensure that, post-merger, the combined entity does not act to deprive small cable companies of this needed input, the Commission should require the post-merger entity to continue to provide HITS at current rates (adjusted as necessary for inflation) for seven years. Alternatively, at the very least, the Commission should require a commitment in this proceeding equivalent to the one Comcast made in the 2002 proceeding with regard to HITS.

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[75] *See* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, ¶¶ 110-116 (2002), *aff'd*, *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003).

[76] *Id.* ¶ 113.

[77] *Id.* ¶ 116.

[78] *Id.*

V. As An Entity Larger Than Every ILEC And With More Customers Than Nearly All ILECs, Comcast/TWC Should Not Be Permitted To Order UNEs Or Interconnection Under Section 251(c)

If this transaction is completed, the post-merger entity would dwarf CenturyLink in size. Its market capitalization would be more than 800% of CenturyLink's (roughly $185 billion, compared to approximately $22 billion for CenturyLink).[79] Even more to the point, *even as a local telecommunications provider*, the combined entity would be larger than CenturyLink (and all but two other incumbent LECs). Based on public filings from this year, Comcast and TWC would serve approximately 16 million voice access lines, as opposed to approximately 12.8 million for CenturyLink.[80]

In such circumstances, it makes no sense for CenturyLink and other ILECs to continue to be required effectively to subsidize Comcast/TWC by providing them access to UNEs at low, regulated TELRIC rates. To say the least, the post-merger entity would have the resources and scale to invest in any facilities it needs without obtaining them from smaller competitors at regulated rates.

The Commission, moreover, has properly recognized that permitting access to UNEs at TELRIC rates in circumstances where entities can and do compete without that access undermines

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[79] *See* Google Finance: Comcast. (n.d.). Google. Retrieved July 29, 2014, 12:40 PM EDT from https://www.google.com/finance?q=NASDAQ%3ACMCSA&ei=L8rWU_jPAoTLqAG3vYCQAQ; Google Finance: Time Warner Cable Inc. (n.d.). Google. Retrieved July 29, 2014, 12:40 PM EDT from https://www.google.com/finance?q=NYSE%3ATWC&ei=OM_WU5jID4ekqwGmooCYDA; Google Finance: CenturyLink Inc. (n.d.). Google. Retrieved July 29, 2014, 12:40 PM EDT from https://www.google.com/finance?q=NYSE%3ACTL&ei=E8rWU5j0KobPrQGu_4HwCA.

[80] *See* Comcast Corporation, Form 10-Q at 28 (SEC filed Apr. 22, 2014), http://www.sec.gov/Archives/edgar/data/902739/000119312514152328/d706957d10q.htm; Time Warner Cable Inc., Form 10-Q at 11 (SEC filed Apr. 24, 2014), http://www.sec.gov/Archives/edgar/data/1377013/000119312514155814/d714931d10q.htm; CenturyLink Inc., Form 10-Q at 21 (SEC filed May 9, 2014), http://www.sec.gov/Archives/edgar/data/18926/000144530514002030/ctl2014033110q.htm.

sound policy. As the Commission explained, "unbundling can create disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities, and is an especially intrusive form of economic regulation – one that is among the most difficult to administer."[81] That is why, for instance, the Commission has declined to require UNE access for wireless and long-distance providers. The Commission explained that those entities could (and did) compete in the relevant markets without UNE access.[82] Thus, even where the "impairment" standard of 47 U.S.C. § 251(d)(2) was met, the Commission exercised its authority under the "at a minimum" clause of that provision to deny access to UNEs in those circumstances because that would undermine the policies of the Telecommunications Act of 1996.[83]

Nor does allowing such continued access bear any resemblance to the circumstance that the Commission foresaw when it initially adopted TELRIC rates for UNE access. On the contrary, the Commission explained nearly two decades ago that it was mandating that incumbent LECs such as CenturyLink make available UNEs at TELRIC rates in order to allow new entrants to take advantage of the "economies of scale and scope" of incumbent providers.[84] Simply put, the rules were designed to enable competition by new, small entrants that otherwise lacked the resources and scale to compete on a level playing field with incumbents.[85] They were

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[81] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 36 (2005), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[82] *Id.*

[83] *Id.* ¶ 37.

[84] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 232, 679 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[85] *See, e.g.*, *id.* ¶ 679 ("We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs

not designed to give a further cost advantage to massive communications entities that not only have their own network facilities, but also have greater resources and more voice customers than nearly all the incumbents.

It likewise makes no sense to require CenturyLink and other ILECS to provide interconnection to Comcast under section 251(c) (as opposed to section 251(a)). Comcast has the scale and leverage to negotiate reasonable terms for interconnection without the regulatory thumb on the scale provided by TELRIC rates. Equally significant, it makes no sense to maintain an asymmetrical scheme under which the massive post-merger Comcast entity may demand interconnection "at any technically feasible point" on an incumbent LEC's network under section 251(c)(2)(B), as well as other regulatory benefits under section 251(c) and the Commission's rules, but smaller incumbent LECs can make no similar demands of Comcast.

Comcast Should Agree To Cease Ordering UNEs or Interconnection Under Section 251(c) Before the Commission Approves This Transaction. Because Comcast/TWC are plainly able to compete without UNE access or interconnection under section 251(c), allowing such access after this transaction would only create the public-interest harms that the Commission has recognized in other circumstances, including the disincentive to investment by both incumbent LECs and competitive LECs, without providing any countervailing benefit. For that reason, if the Commission does not decline to approve the transaction for other reasons, it should not allow the merger to be completed unless the merged entities agree to forgo seeking UNE access

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similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including . . . small entities seeking to enter the local exchange markets . . . .").

or interconnection under existing interconnection agreements or to seek new agreements that permit such UNE access or interconnection under section 251.[86]

CONCLUSION

The Commission should not approve this transaction unless it adopts the conditions described above.

Respectfully submitted,

CENTURYLINK

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Its Attorney

August 25, 2014

[86] This condition is similar to one the Commission imposed in approving the AT&T/BellSouth merger. *Cf. AT&T/BellSouth Order*, 22 FCC Rcd ¶ 5815, App. F – Merger Commitments: Forbearance ¶ 1 (requiring that the merged entity would not seek or give effect to a ruling altering UNE obligations).

8000 E. Iliff Ave.
Denver, CO 80231

July 2, 2014

Honorable City Council Members
City of Centennial
13133 East Arapahoe Road
Centennial, CO 80112

RE: Draft CenturyLink franchise submitted to Centennial, CO.

Dear Honorable Council Members:

I am writing to provide you with Comcast's position in regard to the model cable franchise document that was negotiated between the Colorado Communications and Utilities Alliance (CCUA) and Qwest Broadband Services, Inc., (d/b/a CenturyLink,) a version of which (referred to herein as the "Draft CenturyLink Franchise") has been submitted to the City of Centennial for consideration. Thank you, in advance, for considering our views.

Comcast welcomes a fair and robust competitive marketplace made up of responsible competitors, and we do not oppose the granting of an equitable cable franchise to Centurylink. Consumers can choose from numerous video options today, including Comcast, DirectTV, DISH Network, over-the-airwaves broadcast TV, and "over the top" – services like Netflix, Amazon, Apple TV and Hulu. This fiercely competitive landscape is challenging but it brings out the best in each company – at least when competitors face a level playing field that treats similar providers in a similar manner.

Of the many franchise obligations that Centennial has imposed on Comcast in our existing franchise (and on our predecessor companies in previous franchise agreements), one of the most material and impactful to the City's constituents is the "build out" provision, which requires Comcast to offer equivalent video service to all parts of your community (that meet a minimum density threshold). The public policy underlying that obligation is clear: private companies gaining access to valuable rights of way must make their video services available to all residents, and not cherry-pick based on a neighborhood's age, ethnicity, affluence, market potential or any other factor. Centennial's commitment to that policy has guaranteed, historically, that all of Centennial's residents have had access to the same video services.

But today, that requirement means much more. Because broadband is delivered over that same video infrastructure, and because broadband speeds accelerate as those facilities are upgraded, the build out requirement in our franchise ensures that <u>every</u> resident in Centennial having access to our services has precisely the same access to the industry-leading broadband speeds (currently up to 105 Mbps for residential services, and multi-Gig for commercial services) that we offer today. So, when we invested millions of dollars over the last several years in Centennial alone to increase the capacity of your community's broadband network, every resident having access to our services benefitted. And every time we increased our residential broadband speeds in Centennial, which we have done 12 times in the last 12 years, every single resident having access to our services benefitted, equally.

Simply put, when Comcast and its predecessors entered your community, it did so with full understanding of the investment necessary to build out (over time, and subject to reasonable density thresholds) to serve the entire community. There are no cable "haves," and "have nots" in Centennial. And we all know what discrimination in access means. Today's fast broadband connection has become a critical link to a world of educational and economic opportunities. Those who are connected have instant access to online learning tools, they can more easily find jobs, and they can efficiently access health care and government services. Those who do not have access to affordable broadband will get left behind.

Imposing reasonable (but binding and enforceable) full-community build out requirements on all companies serving the community would safeguard against discriminatory practices such as redlining or cherry-picking. It would equalize the investment that all providers would be required to make in return for access to the public rights of way. And it would ensure that competition develops according to which provider can best serve subscribers, and not according to which provider enjoys the most advantageous regulatory requirements.

Thus, we were surprised to see that the Draft CenturyLink Franchise lacks binding build out obligations on CenturyLink. The Cable Act provides that "in awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area," *see* 47 U.S.C. Section 541(4)(A), implying that build-out requirements will be imposed, and the FCC (in its 2006 Franchising Order) specifically clarified that reasonable build out requirements are certainly allowed, and it listed what constitutes unreasonable versus reasonable build-out provisions.[1] Yet the provision that addresses build out in the Draft CenturyLink Franchise in Section 12.1 (entitled "Service Availability") falls far short of this in the version that we are seen: it allows CenturyLink to self-select initial service territory that would comprise no more than 15% of the community, and contains no binding obligation on Centurylink to expand that initial service territory – ever – unless specified market penetration thresholds are reached. This is hardly a "reasonable period" to serve "all households" as stipulated in the Cable Act – rather, it is essentially total deference by the City to Centurylink on whether it ever expands its advanced offerings throughout the community.[2]

Even if CenturyLink hits those market penetration thresholds based on the schedule outlined in Section 12.1 of the Draft, it would be a minimum – and remarkable – 15 years before CenturyLink would ever be required to serve the entire community of Centennial.

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[1] The FCC concluded that it would be unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone, to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service, to require a new entrant (absent other factors) to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operators, and to require a new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve. Comcast is not recommending any of those requirements—but there should be language that requires CenturyLink to provide service to all subscribers over a reasonable period of time and subject to reasonable density requirements.

[2] Moreover, the Draft also lacks even the most fundamental nondiscrimination provisions, even though such provisions are required by the Federal Cable Act. *See* 47 U.S.C. Section 541(a)(3)(2011).

The impact of the purported build out (or "service availability") language in Section 12.1 of the Draft CenturyLink Franchise, accordingly, likely equates to <u>no</u> impact for the vast majority of Centennial's residents, which could mean that the small minority of residents getting access to Centurylink's new services would have advanced services from Centurylink while the rest are stuck with plain old legacy phone service. As CenturyLink itself asserts in materials shared with other communties, consumers will benefit when it enters the video marketplace in Centennial, because "[b]y expanding Prism in this market, CenturyLink is making a substantial investment in the region to deliver a new digital TV platform and increased broadband speeds." (*See* the CenturyLink powerpoint presentation submitted to the Town of Parker entitled "CenturyLink Wants to Expand the Benefits of Cable Competition to Parker and surrounding areas"). If, as CenturyLink says, increased video competition is good for consumers and will lead to faster broadband speeds, then shouldn't all of Centennial's residents get the benefits of a new telecommunications provider competing for their business, at least over some reasonable period of time?

As stated above, Comcast does not oppose CenturyLink's entry into the Colorado market. But we are concerned that competitive providers who make use of the same rights of way as Comcast, and who are subject to the same federal law, be held to the same standards of fairness and access that we embrace. This issue was recently addressed by the City of Colorado Springs, when CenturyLink approached that City in 2012 with an initial draft franchise which, like the Draft CenturyLink Franchise in Centennial, contained no consumer protection or build out provisions whatsoever.

In response to significant community concerns about potential redlining and cherry picking, Colorado Springs obtained during its franchise negotiations significant commitments that CenturyLink build out its video service in a balanced way that does not systematically exclude less affluent neighborhoods. Among the significant commitments that CenturyLink provided to Colorado Springs during that 2012 cable franchise negotiation are:

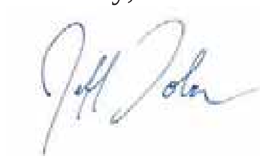
- An explicit franchise commitment that CenturyLink would not discriminate based on income in providing service. This goes beyond federal anti-redlining rules because it can be enforced by the city, which is in the best position to ensure that cherry-picking is prohibited.
- A franchise commitment that CenturyLink would direct a "significant" portion of its initial capital investment to lower-income portions of Colorado Springs.
- A franchise obligation to meet with the Colorado Springs City Council quarterly to demonstrate that it is following through with the nondiscrimination commitments. This gives the city leverage to ensure that CenturyLink is backing up its words with action.
- In addition, CenturyLink shared upgrade maps with members of the City Council and the Mayor, showing exactly where it would roll out services. The map included various low-income neighborhoods.
- A letter from CenturyLink to the Mayor which, as described by a Councilmember in open council session, included a commitment to focus half of its video build out in neighborhoods where the average household income is $65,000 or less.

While Comcast believes that Colorado Springs should have imposed on CenturyLink the same build out requirements contained in our franchise, these commitments do offer at least some guarantees for fair video and broadband access in that community. We would hope that the City of Centennial will use these commitments as a starting place, and – at minimum – exercise in any franchises granted to new entrants its authority to prohibit redlining or discriminatory practices, and that it will adhere to its historic practice of requiring cable video providers to provide near-universal service throughout the entire community, through a binding, reasonable, and enforceable build out obligation.

Again, thank you for the opportunity to share our views with you on this important issue. Please do not hesitate to contact me if you have any questions, or if you need any additional information.

With best wishes, and

Sincerely,



Jeff Dolan
Vice President of Regulatory and Government Affairs

Cc:
City Manager John Danielson
City Attorney Robert Widner
Jill Hassman
Eric Eddy

COMCAST

8000 E. Iliff Ave.
Denver, CO 80231

June 20, 2014

Kendra Carberry
Hayes, Phillips, Hoffman & Carberry P.C.
1530 16th Street, Suite 200
Denver, CO 80202

RE: Draft CenturyLink franchise submitted to your client, Parker, CO.

Dear Kendra:

I am writing to provide you with Comcast's position in regard to the model cable franchise document that was negotiated between the Colorado Communications and Utilities Alliance (CCUA) and Qwest Broadband Services, Inc., (d/b/a CenturyLink,) a version of which (referred to herein as the "Draft CenturyLink Franchise") has been submitted to the Town of Parker for consideration. Thank you, in advance, for considering our views.

Comcast welcomes a fair and robust competitive marketplace made up of responsible competitors, and we do not oppose the granting of an equitable cable franchise to Centurylink. Consumers can choose from numerous video options today, including Comcast, DirectTV, DISH Network, over-the-airwaves broadcast TV, and "over the top" – services like Netflix, Amazon, Apple TV and Hulu. This fiercely competitive landscape is challenging but it brings out the best in each company – at least when competitors face a level playing field that treats similar providers in a similar manner.

Of the many franchise obligations that Parker has imposed on Comcast in our existing franchise (and on our predecessor companies in previous franchise agreements), one of the most material and impactful to the Town's constituents is the "build out" provision, which requires Comcast to offer equivalent video service to all parts of your community (that meet a minimum density threshold). The public policy underlying that obligation is clear: private companies gaining access to valuable rights of way must make their video services available to all residents, and not cherry-pick based on a neighborhood's age, ethnicity, affluence, market potential or any other factor. Parker's commitment to that policy has guaranteed, historically, that all of Parker's residents have had access to the same video services.

But today, that requirement means much more. Because broadband is delivered over that same video infrastructure, and because broadband speeds accelerate as those facilities are upgraded, the build out requirement in our franchise ensures that <u>every</u> resident in Parker having access to our services has precisely the same access to the industry-leading broadband speeds (currently up to 105 Mbps for residential services, and up to 10 Gig for commercial services) that we offer today. So, when we invested millions of dollars in the last several years in Parker alone to increase the capacity of your community's broadband network, every resident having access to our services benefitted. And every time we increased our residential broadband speeds in Parker, which we have done 12 times in the last 12 years, every single resident having access to our services benefitted, equally.

Simply put, when Comcast and its predecessors entered your community, it did so with full understanding of the investment necessary to build out (over time, and subject to reasonable density thresholds) to serve the entire community. There are no cable "haves," and "have nots" in Parker. And we all know what discrimination in access means. Today's fast broadband connection has become a critical link to a world of educational and economic opportunities. Those who are connected have instant access to online learning tools, they can more easily find jobs, and they can efficiently access health care and government services. Those who do not have access to affordable broadband will get left behind.

Imposing reasonable (but binding and enforceable) full-community build out requirements on all companies serving the community would safeguard against discriminatory practices such as redlining or cherry-picking. It would equalize the investment that all providers would be required to make in return for access to the public rights of way. And it would ensure that competition develops according to which provider can best serve subscribers, and not according to which provider enjoys the most advantageous regulatory requirements.

Thus, we were surprised to see that the Draft CenturyLink Franchise lacks binding build out obligations on CenturyLink. The Cable Act provides that "in awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area," *see* 47 U.S.C. Section 541(4)(A), implying that build-out requirements will be imposed, and the FCC (in its 2006 Franchising Order) specifically clarified that reasonable build out requirements are certainly allowed, and it listed what constitutes unreasonable versus reasonable build-out provisions.[1] Yet the provision that addresses build out in the Draft CenturyLink Franchise in Section 12.1 (entitled "Service Availability") falls far short of this: it allows CenturyLink to self-select initial service territory that would comprise no more than 15% of the community, and contains no binding obligation on Centurylink to expand that initial service territory – ever – unless specified market penetration thresholds are reached. This is hardly a "reasonable period" to serve "all households" as stipulated in the Cable Act – rather, it is essentially total deference by the Town to Centurylink on whether it ever expands its advanced offerings throughout the community.[2]

Even if CenturyLink hits those market penetration thresholds based on the schedule outlined in Section 12.1 of the Draft, it would be a minimum – and remarkable – 15 years before CenturyLink would ever be required to serve the entire community of Parker. That should be

[1] The FCC concluded that it would be unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone, to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service, to require a new entrant (absent other factors) to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operators, and to require a new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve. Comcast is not recommending any of those requirements—but there should be language that requires CenturyLink to provide service to all subscribers over a reasonable period of time and subject to reasonable density requirements.

[2] Moreover, the Draft also lacks even the most fundamental nondiscrimination provisions, even though such provisions are required by the Federal Cable Act. *See* 47 U.S.C. Section 541(a)(3)(2011).

compared to the 10 months that Comcast's predecessor had in its initial 1982 franchise agreement with the Town to ensure service to all subscribers.

The impact of the purported build out (or "service availability") language in Section 12.1 of the Draft CenturyLink Franchise, accordingly, likely equates to no impact for the vast majority of Parker's residents, which could mean that the small minority of residents getting access to Centurylink's new services would have advanced services from Centurylink while the rest are stuck with plain old legacy phone service. As CenturyLink itself asserts, consumers will benefit when it enters the video marketplace in Parker, because "[b]y expanding Prism in this market, CenturyLink is making a substantial investment in the region to deliver a new digital TV platform and increased broadband speeds." (*See* the CenturyLink powerpoint presentation submitted to the Town of Parker entitled "CenturyLink Wants to Expand the Benefits of Cable Competition to Parker and surrounding areas"). If, as CenturyLink says, increased video competition is good for consumers and will lead to faster broadband speeds, then shouldn't all of Parker's residents get the benefits of a new telecommunications provider competing for their business, at least over some reasonable period of time?

As stated above, Comcast does not oppose CenturyLink's entry into the Colorado market. But we are concerned that competitive providers who make use of the same rights of way as Comcast, and who are subject to the same federal law, be held to the same standards of fairness and access that we embrace. This issue was recently addressed by the City of Colorado Springs, when CenturyLink approached that City in 2012 with an initial draft franchise which, like the Draft CenturyLink Franchise in Parker, contained no consumer protection or build out provisions whatsoever.

In response to significant community concerns about potential redlining and cherry picking, Colorado Springs obtained during its franchise negotiations significant commitments that CenturyLink build out its video service in a balanced way that does not systematically exclude less affluent neighborhoods. Among the significant commitments that CenturyLink provided to Colorado Springs during that 2012 cable franchise negotiation are:

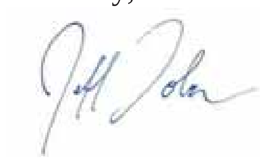
- An explicit franchise commitment that CenturyLink would not discriminate based on income in providing service. This goes beyond federal anti-redlining rules because it can be enforced by the city, which is in the best position to ensure that cherry-picking is prohibited.
- A franchise commitment that CenturyLink would direct a "significant" portion of its initial capital investment to lower-income portions of Colorado Springs.
- A franchise obligation to meet with the Colorado Springs City Council quarterly to demonstrate that it is following through with the nondiscrimination commitments. This gives the city leverage to ensure that CenturyLink is backing up its words with action.
- In addition, CenturyLink shared upgrade maps with members of the City Council and the Mayor, showing exactly where it would roll out services. The map included various low-income neighborhoods.
- A letter from CenturyLink to the Mayor which, as described by a Councilmember in open council session, included a commitment to focus half of its video build out in neighborhoods where the average household income is $65,000 or less.

While Comcast believes that Colorado Springs should have imposed on CenturyLink the same build out requirements contained in our franchise, these commitments do offer at least some guarantees for fair video and broadband access in that community. We would hope that the Town of Parker will use these commitments as a starting place, and – at minimum – exercise in any franchises granted to new entrants its authority to prohibit redlining or discriminatory practices, and that it will adhere to its historic practice of requiring cable video providers to provide near-universal service throughout the entire community, through a binding, reasonable, and enforceable build out obligation.

Again, thank you for the opportunity to share our views with you on this important issue. Please do not hesitate to contact me if you have any questions, or if you need any additional information.

With best wishes, and

Sincerely,



Jeff Dolan
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