



August 25, 2014

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: In the Matter of Applications of Comcast Corporation and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 14-57

Dear Ms. Dortch:

On behalf of the Writers Guild of America, West, Inc. (“WGAW”) and the Future of Music Coalition (“FMC”), and in accordance with the Joint Protective Order¹ adopted in this proceeding, enclosed please find a redacted copy of WGAW and FMC’s Petition to Deny and attached expert economic testimony prepared by Dr. William S. Comanor (“Comanor Testimony”). A copy containing the Confidential and Highly Confidential Information will be delivered via commercial overnight mail to the Office of the Secretary. Additional copies are being delivered via mail and email to the appropriate Commission staff listed in the Public Notice and Counsel for Comcast.

Sincerely,

/s/
Ellen Stutzman
Director of Research & Public Policy
Writers Guild of America, West

¹ See *In the Matter of Applications of Comcast Corp and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Joint Protective Order, DA 14-463, April 4, 2014.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

**JOINT PETITION TO DENY OF FUTURE OF MUSIC COALITION AND WRITERS
GUILD OF AMERICA WEST, INC.**

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August 25, 2014

SUMMARY

The proposed merger between Comcast and Time Warner Cable (“Applicants”) and the subsequent divestiture transactions between Applicants, Charter Corporation and SpinCo are not in the public interest. The merger of Comcast and Time Warner Cable will enhance the market power of Applicants as cable television and online content distributors. The lack of sufficient competition in both multichannel video programming distributor (“MVPD”) and Internet service provider (“ISP”) markets coupled with Applicants’ dominant market share in both content distribution platforms will have significant anticompetitive effects. Increased distribution power, combined with vertical integration into video programming, enhances Applicants’ incentive to engage in practices that harm upstream content markets.

While Applicants may not compete directly in local markets, they are competitors in the market for video programming and this merger eliminates a key market participant. The increased concentration resulting from this merger will occur in a market where evidence provided by Applicants suggests that Comcast already has market power as a buyer, and this merger will enhance such power. With increased ability and incentive, Applicants will have the power to negotiate affiliate and retransmission fees below competitive market rates, which will harm investment in programming, reduce video competition and limit consumer choice. Applicants will also have the ability to use their power as distributors to harm unaffiliated networks that compete with NBC Universal (“NBCU”) networks, through such methods as channel placement or temporary or permanent vertical foreclosure from Applicants’ cable systems.

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Applicants' control of the high-speed Internet market will put Comcast-TWC in control of the direction of online content markets, which will harm online video distributors ("OVDs"), consumers and other online creators. Consumers have little or no choice for high-speed Internet offerings that can meet the growing demand for online video and music services, which grants Applicants significant power as distributors. With the incentive to limit the development of OVD services that compete with NBCU television properties or Applicants' MVPD service, Applicants will have too much power over this new distribution platform. Comcast has already engaged in anticompetitive behavior to harm OVDs and its ability to continue to engage in such behavior will be significantly enhanced by this merger.

The benefits claimed in this Application do not outweigh these potential harms, are not transaction specific and are not verifiable. While it is clear that Applicants' enhanced power as video programming buyers will allow them to exercise substantial power over suppliers, it is not clear that the efficiencies achieved by this transaction will flow to the consumer. TWC is already making substantial investments to upgrade networks and increase Internet speeds. Applicants' assertions that such upgrades will occur faster under the merger do not meet the Commission's standard of requiring parties demonstrate that benefits are unlikely to be realized without the proposed merger. Other benefits, such as increased incentive to invest and offer consumers more and better products and services, are theoretical benefits that cannot be verified.

Merger conditions, including those offered by Applicants and any additional requirements the Commission may consider, will be insufficient to protect the public interest. Comcast has a poor track record of abiding by conditions imposed by regulators and should not be given the opportunity to engage in additional violations on a larger scale. The proposed

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merger has already encouraged additional consolidation among competitors and upstream content providers. This merger and any future consolidation will only further diminish competition, reduce the number of diverse information sources available, limit consumer choice and result in higher prices. The best course of action to protect the public interest is to deny the merger application.

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**JOINT PETITION TO DENY OF FUTURE OF MUSIC COALITION AND WRITERS
GUILD OF AMERICA WEST, INC.**

I. INTRODUCTION

Writers Guild of America, West, Inc. (“WGAW”) and Future of Music Coalition (“FMC”) (jointly, “Content Creator Petitioners”) respectfully petition the Federal Communications Commission (“FCC” or “Commission”) to deny the proposed acquisition of Time Warner Cable Inc. (“TWC”) by Comcast Corporation (“Comcast”) (together, “Applicants”) and the subsequent proposed transaction between Comcast, Charter Corporation (“Charter”) and SpinCo (collectively, “Divestiture Applicants”) to sell, exchange and spin-off certain cable systems. As this Petition to Deny (“Petition”) and the appended expert testimony demonstrate, these transactions will enhance Applicants’ power as distributors of television and online video programming, increasing both incentive and ability to engage in anticompetitive

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behavior that will harm unaffiliated programmers and lead to reduced investment in content, fewer diverse sources of information and less choice for consumers. The agreement between Divestiture Applicants is a collusive agreement to divide markets that only serves to enhance geographic concentration and local market power, and will foreclose future competition.

Following the unprecedented acquisition of NBC Universal only three years ago, Comcast now proposes another previously unthinkable transaction. With emphasis on the lack of local service overlap between Comcast and TWC as their only evidence, Applicants assert that not only does the merger of two of the nation’s largest multichannel video programming distributors (“MVPDs”) and Internet service providers (“ISPs”) not harm competition, but that the transaction is actually pro-competitive. In the name of increased scale and efficiency, Applicants claim that the marked increase in both the size and market share of the largest television and Internet distributor will enhance competition in the market and cause no harm to upstream content markets or downstream consumers. To date, however, the most immediate result of this merger is additional consolidation among MVPDs who are merging to compete with Applicants and an attempted merger between content providers who may soon have to negotiate with a smaller number of larger and more powerful distributors.

Although the Commission previously found that the vertical integration between Comcast and NBC Universal would give the merged entity both the incentive and ability to pursue anticompetitive strategies against unaffiliated television and online video distributors (“OVDs”),¹ Applicants claim that this transaction, and specifically the increased power granted Comcast

¹ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, January 20, 2011. (*Comcast-NBCU Order*).

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through the acquisition of a competing distributor and buyer of video programming, does not increase its incentive or ability to engage in such harmful behavior.

Applicants, in addition, suggest numerous public interest benefits will result from this merger, but the most quantifiable are those that extend *Comcast-NBC Universal Order* (“*Comcast-NBCU*”) conditions imposed by the Commission. It is inaccurate to portray such conditions as public interest benefits created by *this* merger. Rather, they are temporary, protective conditions adopted in a previous merger to limit the public interest harms that a large, vertically-integrated distributor has both the incentive and ability to pursue. Many of the benefits claimed by Applicants, in addition, are theoretical outcomes and some, including network upgrades and faster Internet speeds for TWC customers, and were underway prior to the merger and cannot be considered transaction-specific. Claims that the merger will result in better service, particularly customer service, cannot be given serious consideration because of Comcast’s poor customer service record. TWC’s lack of Internet data caps and wider availability of low-priced standalone Internet offerings, in addition, suggest consumers may suffer from reduced choice and higher prices if this transaction is approved.

This Petition will demonstrate that, contrary to Applicants’ claims, this transaction poses a significant threat to both current and future competition. Applicants’ dominance in traditional and new video markets grants them significant power over television programmers and OVDs. Comcast’s vertical integration has already created an acknowledged increase in its incentive and ability to harm unaffiliated TV and online video programmers, and this merger further increases such tendencies and enhances the ability to successfully pursue anticompetitive strategies. Content Creator Petitioners did not oppose the Comcast-NBC Universal merger but, like the

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Commission, recognized the potential harms that could result from approval and advocated for strong conditions. The Commission, through conditions in *Comcast-NBCU*, attempted to limit Comcast’s “incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast’s cable television business,”² but Comcast’s practices post-transaction have highlighted the ineffectiveness of an “approval with conditions” approach to mergers that harm the public interest. Despite its claims of “promises made, promises kept,”³ Comcast has violated conditions, found ways to circumvent the intent of conditions and used the slow enforcement process to its advantage. As a result, significant harms resulting from the previous merger have not been prevented, and Content Creator Petitioners do not believe that an approval of this merger with conditions will protect the public interest. We respectfully request the Commission deny this transaction.

II. CONTENT CREATOR PETITIONERS HAVE STANDING

WGAW is a labor organization that represents more than 8,000 professional writers of film, television, online video programming, local news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in theaters are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”).

² *Comcast-NBCU Order*, ¶ 3.

³ *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, April 8, 2014, Exhibit 9. (*Application*).

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WGAW has standing in this proceeding because our members create much of the television programming that is distributed by Applicants. A majority of the television content written by Guild members is meant for a national audience. Guild members, as a result, rely on Applicants to reach viewers nationally. Each year, more than 3,000 WGAW members are employed on television projects.⁴ In 2013, almost 3,700 WGAW members reported close to \$700 million in writing compensation for television projects.⁵

WGA members are also the creators of original video programs now offered by OVDs such as Netflix, Amazon, Hulu and Crackle in the rapidly expanding online content market. More than two hundred professional writers have worked on original online video programs, generating almost \$10 million in income. Writers have also benefited from services that offer consumers online availability of television series and feature films. Millions of consumers visit television network websites and Hulu each month to catch up on recent television episodes. Subscription OVDs offer entire television series and thousands of movies for an affordable monthly price. Amazon and iTunes also offer consumers the ability to rent or purchase individual titles. Writers have earned almost \$70 million in residual income from such online services licensing or selling television series and feature films.

The proposed merger of two of the largest distributors of television networks will increase Applicants' power over programmers, leading to reduced affiliate and retransmission fees, which will limit the availability of innovative content from diverse sources, harming creative and economic opportunities for WGAW members and ultimately reducing consumer

⁴ Writers Guild of America West, "Annual Financial Report," June 6, 2014, http://www.wga.org/uploadedFiles/who_we_are/annual_reports/annualreport14.pdf, p. 2.

⁵ *Ibid.*

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choice. Applicants' dominance in the broadband Internet market threatens to stifle the development of the burgeoning OVD market, which is an important new industry segment for video programming created by WGAW members.

FMC is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish and are compensated fairly for their work, and where fans can find the music they want. Founded by musicians, composers, and independent label owners, FMC works closely with musicians, music managers and arts advocates to ensure that the interests of the independent music sector are considered in policy decisions. Musicians and composers require affordable, high-quality Internet service for everything from creating and selling music and merchandise, to booking tours, to staying in touch with fans.

The proposed merger will give Applicants incredible influence over how music is accessed and under what terms. Because Comcast is vertically-integrated, it may have the incentive to lock out or disadvantage emerging platforms that may find favor with creators. Extending Comcast policies such as Internet data caps or thresholds across a wider share of the broadband Internet market threatens the growth of a legitimate digital music market that rewards creators and fans. The low entry barriers of the Internet allow independent artists to compete with major labels, participate in an array of legitimate platforms and partner with emerging services. Business practices that cause consumers to reduce Internet usage or that steer fans towards certain preferred sites or services frustrate competition and have a negative impact on diversity. Moreover, such restrictions help cement a winner-takes-all marketplace in which only well-capitalized creators and innovators enjoy the unfettered ability to reach potential audiences. Currently, the music community is grappling with many complex questions regarding

compensation within digital services. Without the ability for alternative distribution platforms to arise, creators may find themselves locked into potentially disadvantageous economic structures for decades to come.

III. PUBLIC INTEREST REVIEW

Commission review and approval of the proposed merger and license transfers, pursuant to Section 310(d) of the Communications Act, requires the transaction to “serve the public interest, convenience, and necessity.”⁶ Failure to meet these criteria requires the Commission to deny such license transfers. To evaluate the transaction the Commission must weigh the potential public interest harms of the merger against the potential public interest benefits to determine if, on balance, the transfer serves such a purpose. In review of claimed benefits, the Commission must consider whether the benefits are transaction specific, unlikely to occur in the absence of the transaction, and are verifiable.⁷ The Commission may consider and impose transaction-related conditions to mitigate harmful consequences and ensure the public interest is served. Most importantly, in this process, Applicants bear the burden of demonstrating, by a preponderance of evidence, that the proposed transaction will serve the public interest.⁸

⁶ 47 U.S.C. § 310(d).

⁷ *Comcast-NBCU Order*, ¶ 226.

⁸ *Comcast-NBCU Order*, ¶226; and See *Applications for Consent to Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order, MB Docket No. 07-57, August 5, 2008, ¶ 30, (*Sirius-XM Order*); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, MB Docket No. 07-18, February 26, 2008, ¶ 22, (*Liberty Media-DIRECTV Order*); *Application for Consent to Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70, November 14, 2002, ¶ 26 (*Comcast-AT&T Order*); *In the Matter of General Motors Corporation and*

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In evaluating how the transaction affects the public interest the Commission must examine its impact on the broad goals of the Communications Act, which include a preference for preserving and enhancing competition in relevant markets and ensuring a diversity of information sources and services to the public.⁹ The Commission’s review includes an examination of competition, but is not constrained by a traditional antitrust analysis. Under the public interest standard, the Commission’s competitive analysis considers whether a transaction enhances, instead of only lessens, competition and looks broadly at potential and future competition.¹⁰

IV. THE PROPOSED MERGER POSES A SERIOUS THREAT TO COMPETITION

Comcast is the nation’s largest MVPD with more than 22 million cable TV customers.¹¹ With 21 million Internet customers, it is also the nation’s largest broadband ISP.¹² Comcast is vertically-integrated into upstream television production and exhibition markets and is one of the largest owners of television networks; it owns the NBC and Telemundo broadcast networks, 27 local broadcast stations, 12 Regional Sports Networks (“RSN”) and 16 basic cable networks,

Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferees, For Authority to Transfer Control, MB Docket No. 03-124, January 14, 2004, ¶¶ 316, 317, (*News Corp-Hughes*); and *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees*, Memorandum Opinion and Order, MB Docket No. 05-192, July 21, 2006, ¶¶ 24, 25, 244, (*Adelphia Order*).

⁹ *Comcast-NBCU Order*, ¶ 23; *XM-Sirius Order*, ¶ 31; *AT&T-Comcast Order*, ¶ 27

¹⁰ *Comcast-NBCU Order*, ¶ 24; *XM-Sirius Order*, ¶ 32 (2008).

¹¹ Comcast Corporation, “SEC Form 10Q,” Filed July 24, 2014, For period ending June 30, 2014, <https://www.sec.gov/Archives/edgar/data/902739/000119312514278903/d740350d10q.htm>, p. 33.

¹² *Ibid.*

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including the most-watched basic cable network, USA.¹³ Comcast-owned television networks account for approximately 14% of primetime viewers.¹⁴ Through its NBC Universal segment, Comcast is also a major television producer, with a 16.3% market share of television production.¹⁵ When Comcast acquired NBC Universal in 2010, it was an unprecedented combination that the Commission readily admitted posed a threat to “competition, innovation and consumer welfare.”¹⁶

Now, Comcast proposes to increase its size and power as a distributor through the acquisition of Time Warner Cable, the fourth-largest MVPD and third-largest ISP. TWC has 11 million MVPD customers and 11.4 million Internet subscribers.¹⁷ After proposed divestitures, Applicants will control approximately 30% of the MVPD market and according to data provided by Applicants, 35.5% of the fixed ISP market.¹⁸ Data provided by Applicants, however, significantly understates Applicants’ control of broadband Internet by including DSL providers

¹³ *Application*, p. 13; SNL Kagan, *Average Primetime Rating*, 2013. Comcast owns the following basic cable networks—Bravo, Chiller, Cloo, CNBC, CNBC World, E!, Esquire Network, G4, Golf Channel, MSNBC, mun2, Oxygen, Sprout, Syfy, Universal HD, and USA. Comcast has an ownership stake in the following networks—MLB (8.3%), NHL (15.6%), RLTV (7.7%), The Weather Channel (25%), TV One (47.23%), and Universal Sports (11%).

¹⁴ WGAW analysis of Nielsen Data, *Average P2+ viewers in primetime*, 2013, all networks available in Nielsen Galaxy Explorer for full year 2013.

¹⁵ Sarah Turk, “Television Production in the US,” *IBISWorld*, 2014, p. 25.

¹⁶ *Comcast-NBCU Order*, ¶ 4.

¹⁷ Time Warner Cable, “SEC Form 10Q,” Filed July 31, 2014, For period ending June 30, 2014, <https://www.sec.gov/Archives/edgar/data/1377013/000119312514288241/d762137d10q.htm>, p. 12.

¹⁸ *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Letter regarding post-Divestiture data from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, et al. to Marlene H. Dortch, Secretary, FCC, June 27, 2014, p. 5. (“Zachem Broadband Divestiture Letter, June 27, 2014”)

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in the market. DSL technology cannot compete with cable and fiber offerings and when appropriately excluded, Applicants' post-transaction share of the market is substantially greater.

In an effort to divert attention from these facts, Applicants invent an intensely competitive market that requires Comcast and TWC to merge simply to keep pace.¹⁹ Noting the number of Netflix customers, iTunes purchases and videos watched on Google websites is informative to the reader, but irrelevant to the competitive analysis required of this transaction. Rather, this Petition documents how this merger threatens the very online video competition that Applicants highlight. Netflix, Apple, Google and other OVDs do not own the facilities that distribute their content to consumers.²⁰ And, because the OVD market is national, these services rely on Applicants to reach a significant share of the national market. The merging of two of the largest ISPs will significantly enhance Applicants' power as distributors, putting them in control of the direction of this burgeoning market.

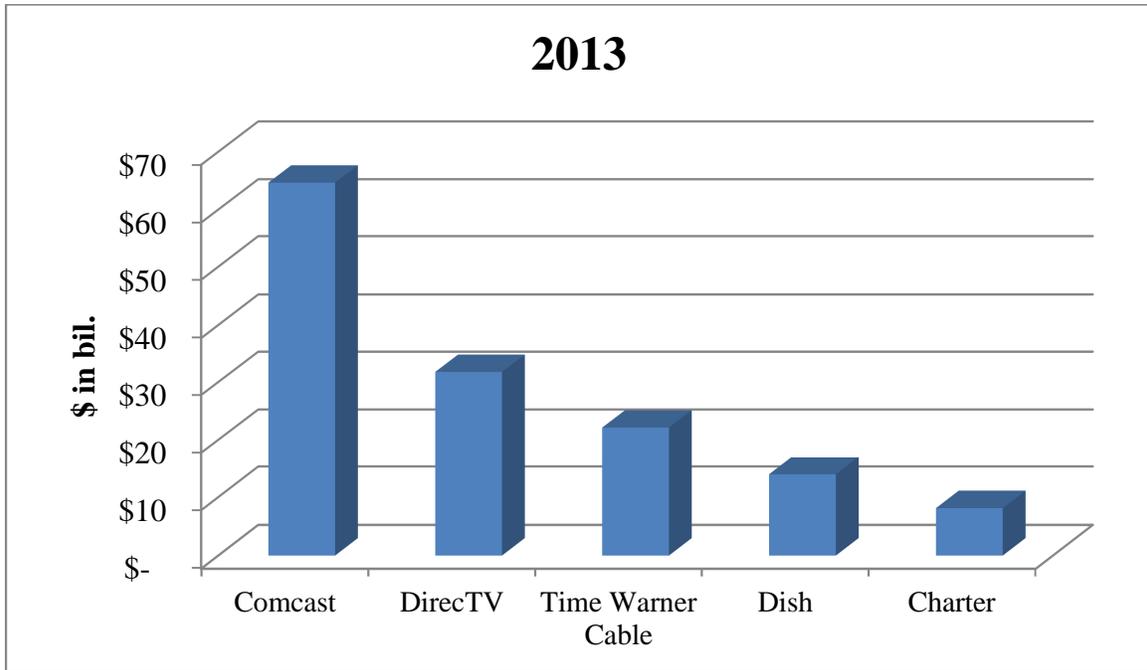
Similarly, the attempt to demonstrate vibrant competition and justify the proposed transaction by including charts that selectively highlight companies, with minimal product overlap, that happen to have larger market capitalizations and annual revenues than Applicants is a poor substitute for rigorous analysis.²¹ It comes as no surprise that Applicants do not choose to compare annual revenue with actual market participants because such a comparison reveals that Applicants are already among the largest providers by annual revenue and this combination will significantly enhance Comcast's power as a distributor of video programming.

¹⁹ *Application*, pp. 20-22.

²⁰ WGAW Comments, *In the Matter of Interpretation of the Terms Multichannel Video Programming Distributor and Channel as raised in the pending Program Access Complaint*, MB Docket No. 12-83, May 14, 2012.

²¹ *Application*, pp. 21-22.

Chart 1. Annual Revenue of Major MVPDs²²



Applicants have also attempted to highlight the lack of service overlap between Comcast and TWC as evidence that the merger does not harm competition. While the Commission’s public interest review is specific to the potential outcomes of this transaction, the context of current market competition is important. The lack of sufficient alternatives for cable television and Internet service significantly enhances the effects of this merger. Competition in the MVPD and ISP markets, despite Applicants’ claims, is not robust. Most consumers have only three choices for MVPD service: a local cable provider and two satellite companies. Almost half of American households have two or fewer choices for Internet service fast enough to stream

²² Companies’ SEC Form 10-K reports for 2013, Annual Revenue.

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videos.²³ The lack of competition has resulted in concentrated markets; four companies control two-thirds of the MVPD market²⁴ and four companies control 68% of the ISP market.²⁵

The proposed merger represents a threat beyond Applicants' dominance in either MVPD or ISP markets alone. Indeed, it is that Applicants will be the dominant provider in both markets that heightens the competitive threat of this merger. Applicants' dominant market share in both video distribution markets grants them the ability to control the development of video services that may compete with television content and MVPD offerings. Such control can be achieved through pricing practices that raise the stand-alone cost of broadband Internet service in order to steer consumers to bundles.²⁶ Bundling can stifle online video competition because it allows MVPDs to capture a greater share of consumer spending on entertainment, reducing the amount available for online video subscriptions. Applicants have the incentive to engage in such behavior to protect their MVPD business segment. Similarly, practices such as Internet data caps, which raise the price of online video and music consumption to discourage consumers from migrating away from traditional entertainment platforms, also harm competition. Discriminatory data caps that discourage use of unaffiliated online video and music services and interconnection tolls that raise the cost of access to "last-mile" providers' network have the same effect.

²³ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, "Internet Access Services: Status as of June 30, 2013," June 25, 2014, p. 9.

²⁴ SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," Q4, 2013.

²⁵ Press Release, Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, <http://www.leichtmanresearch.com/press/031714release.html>.

²⁶ As of Q2, 2014, 61% of TWC's customers and 68% of Comcast's customers subscribe to bundled services. Companies' SEC Forms 10-Q.

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While Applicants choose to highlight the loss of market share by cable providers to newer distributors such as satellite and telephone company (“telco”) MVPDs,²⁷ they fail to mention the technological and competitive advantages of cable technology in both the current and the future broadband Internet market. Cable broadband is the most widely available option for high-speed Internet service, available to 93% of households.²⁸ Applicants note the lack of local service overlap between Comcast and TWC; the same, however, is true of most cable MVPDs. As a result, most consumers have only one cable MVPD to choose from for Internet service. Overbuilding has largely come from telcos that have built fiber networks in a minority of the country. Internet users looking for faster speeds, as a result, will have only one choice in most of the country: the local cable system. For example, AT&T’s U-verse continues to use copper wires for last-mile delivery and is limited, in most markets, to maximum speeds of 45 Mbps.²⁹ AT&T’s IPDSL service, which it expects to offer to 24 million customer locations through its “Project VIP” capital investment project, may be limited to maximum speeds of only 18 Mbps.³⁰ However consumers served by legacy DSL networks are currently limited to a

²⁷ *Application*, p. 67.

²⁸ National Cable & Telecommunications Association, “Industry Data,” <https://www.ncta.com/industry-data>, Accessed August 18, 2014.

²⁹ *Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses or Authorizations*, MB Docket No. 14-90, June 11, 2014, pp. 4, 11. (*AT&T-DirecTV Application*).

³⁰ *Ibid*, p. 12.

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maximum speed of 6 Mbps³¹ and a recent FCC report found that DSL generally delivers less than advertised speeds during peak hours.³²

Cable broadband providers already offer much faster service than DSL and have announced significant speed increases that make cable's technological superiority to DSL even more apparent. Both Comcast and TWC have prominently publicized speed increases, with new tiers of 100 Mbps, 300 Mbps and 505 Mbps Internet service. Time Warner Cable recently told the City of Los Angeles it could offer 1 Gbps service in Los Angeles in 2016.³³ Cable broadband, as a result, already controls a greater share of residential broadband subscribers than telephone ISPs. In the fourth quarter of 2013, cable companies had a 59% market share of wired broadband subscribers and 87% share of new subscribers.³⁴ These numbers will become more pronounced as consumers demand faster Internet connections. According to company financial reports, Applicants added more than 800,000 Internet subscribers in the first half of 2014 alone.

The actual state of competition in relevant MVPD and ISP markets stands in stark contrast to Applicants' portrayal of a robust and competitive market in their Public Interest statement. Comcast and TWC are not disadvantaged providers who must merge to survive. The reality of this transaction is that it will make the largest distributor significantly larger, securing

³¹ *Ibid.*

³² Adrienne Jeffries, "DSL subscribers are more likely to be cheated on Internet speeds, FCC says," *The Verge*, June 18, 2014, <http://www.theverge.com/2014/6/18/5822220/dsl-subscribers-are-more-likely-to-be-cheated-on-Internet-speeds-fcc>.

³³ Ryan Faughnder, "Time Warner Cable promises one gigabit Internet for L.A. in 2016," *Los Angeles Times*, July 18, 2014, <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-internet-20140717-story.html>.

³⁴ Ian Olgairson and Chris Young, "Cable takes big bite of HSD share in 2013 despite smallest gain in more than a decade," *SNL Kagan*, March 13, 2014, <http://www.snl.com/interactivex/article.aspx?id=27257710&KPLT=6>.

its dominance nationally and in the largest media markets. Solidifying Comcast's control over television and Internet will enhance its market power as a video programming buyer and distributor and allow it to engage in behavior that will harm competition, innovation and limit diverse information sources.

V. THE PROPOSED MERGER WILL HARM COMPETITION IN THE VIDEO MARKETPLACE

The merger of Comcast and TWC poses a significant threat to competition in the television industry value chain. Through increased power as a distributor, Applicants will be able to dictate carriage terms for television programmers and negotiate rates below competitive levels. Applicants' control over NBC Universal television networks provides significant incentive to use their distribution power to harm unaffiliated programmers who compete with Applicants' television properties. The ability of Applicants to negotiate discounted rates can also harm smaller MVPDs, because television programmers may attempt to raise programming rates to compensate for Applicants' reduced payments. Applicants may also use their control of NBC Universal television networks to harm competing MVPDs, by withholding content or raising rates for television network carriage.

A. The Proposed Merger Concentrates the Market for Video Programming Buyers and Enhances Comcast’s Monopsony Power

Applicants claim that the lack of competitive overlap in local markets means they do not compete in the market for video programming.³⁵ However, as outlined in the appended expert testimony (“Comanor Testimony”), Comcast and Time Warner Cable are buyers in the same market and “can still exploit any market conditions that restrict the number of prospective buyers available to sellers”³⁶ even without competitive overlap in output markets. Dr. Comanor also writes, “[t]he fact that a proposed merger may not extend the degree of monopoly power in the relevant output markets does not immunize the parties from regulatory consideration of whether the merger exacerbates the degree of monopsony power in the relevant input market.”³⁷ Because Comcast and Time Warner are both buyers of video programming “the competitive effects of the proposed merger are equally important to those arising from their position as sellers,”³⁸ highlighting the position of federal antitrust agencies on the issue:

Enhancement of market power by buyers, sometimes called “monopsony power,” has adverse effects comparable to enhancement of market power by sellers. The Agencies apply an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.³⁹

³⁵ *Application*, p. 147.

³⁶ Expert Testimony of Dr. William S. Comanor on the Competitive and Economic Consequences of the Comcast – Time Warner Cable Merger, p. 21. (Comanor Testimony).

³⁷ *Ibid*, p. 21.

³⁸ *Ibid*, p. 6.

³⁹ US Department of Justice/Federal Trade Commission, “Horizontal Merger Guidelines,” August 19, 2010, <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>, p. 2. (Horizontal Merger Guidelines).

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To examine the proposed merger's effect on monopsony power, the relevant market for analysis is the input market. MVPDs distribute television programming to consumers, but through subscriber fees in the form of affiliate and retransmission payments, which represent 52% of television network revenue, MVPDs are also buyers of video programming.⁴⁰ Television networks rely on MVPDs to reach the public and as a key funding source for programming produced on broadcast, basic cable and pay networks. Because these TV channels are national networks, the market for these inputs is national. Comcast and TWC are, therefore, buyers in the same market and direct horizontal competitors. This merger is an attempt to increase power over television programmers through consolidation of two of the largest program buyers. The Comanor Testimony offers evidence that Comcast has exercised market power as a buyer, or monopsony power, and that this merger will likely enhance such power.⁴¹

The merger between Comcast and Time Warner Cable will increase market concentration among buyers of television programming. Dr. Comanor calculates the Herfindahl-Hirschman Index ("HHI") among current MVPD television program buyers and finds that the proposed Comcast-TWC merger, even after divestitures, will result in a 307 point increase in the HHI index, from 1314 to 1621.⁴² The market, as a result of the merger, becomes moderately concentrated according to the DOJ/FTC Horizontal Merger Guidelines that state, "Mergers

⁴⁰ WGAW analysis of SNL Kagan data estimates for affiliate fees, retransmission revenue and net advertising revenue, 2013, Accessed August 14, 2014.

⁴¹ Comanor Testimony, pp. 17-20.

⁴² Comanor Testimony, p. 10. Dr. Comanor also calculates the HHI index including the merger of AT&T and DirecTV, which further concentrates the video programming market and results in an HHI of 1783.

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resulting in moderately concentrated markets with an HHI increase of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.”⁴³

In addition, as outlined in this filing, the Internet represents an important growth platform for video. The ability of Applicants and other wireline MVPDs to bundle television and Internet services, as well as cable’s nationwide broadband penetration, indicates future market conditions that limit satellite providers as suitable alternatives.⁴⁴ This fact has been well-acknowledged and is one of the factors motivating the merger of DirecTV and AT&T. DirecTV, the largest satellite MVPD, has stated states that it cannot offer programming via the Internet “because its one-way video delivery service lacks broadband capabilities.”⁴⁵ The relevant market for analysis is, therefore, a submarket of only the wireline MVPDs. In this submarket, which is already moderately concentrated with an HHI of 1618, the proposed merger and divestitures will produce an increase of 741 points to an HHI of 2359.⁴⁶ This merger will make the wireline submarket “highly concentrated” and the degree of the increase, according to federal Guidelines, presumes a likely increase in market power.⁴⁷

Comcast is already the largest buyer of video programming. Commission reports have noted that large MVPDs are able to secure more favorable rates for carriage of television

⁴³Horizontal Merger Guidelines, p. 19.

⁴⁴ Free Press Comments, *In the Matter of Revision of the Commission’s Program Access Rules*, MB Docket No. 12-68, June 22, 2012, p 4. Citing research from SNL Kagan and Sanford C. Bernstein, Free Press notes that about 70% of satellite subscribers utilize a DSL connection. Satellite has an estimated subscriber growth rate of 0% after 2019 while the overall MVPD market continues to grow, indicating that the DBS market has peaked and is now on the decline.

⁴⁵ *AT&T-DirecTV Application*, p.3.

⁴⁶ Comanor Testimony, p. 14.

⁴⁷ Horizontal Merger Guidelines, p. 19.

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networks through volume discounts.⁴⁸ AT&T-DirecTV also state in their Application that increased size will allow AT&T to negotiate lower rates.⁴⁹ Applicants' Public Interest statement and related exhibits reveal that Comcast already pays less for certain programming than TWC, indicating that Comcast already has market power as a buyer. Applicants have also indicated that they expect to save {{ }} million on programming costs over the first three years following the transaction "as more favorable rates and terms in some of Comcast's programming agreements supersede some of TWC's existing contracts."⁵⁰ Such information suggests that this merger will enhance Comcast's monopsony power. However, the Commission should require Applicants to provide complete information on fees paid by both parties to programmers to better assess the differences in rates paid and identify which programmers may face reduced rates as a result of the merger.

By any measure, even the largest media companies that negotiate carriage of television networks with Applicants and other MVPDs each represent a much smaller share of television viewers than Applicants' post-transaction share of subscribers. The table below lists the largest channel owners' share of average primetime viewers for national broadcast and cable networks in 2013. While the largest channel owners each control a healthy share of the television audience, none approach the control over TV subscribers that a merged Comcast-TWC will have. Rather, because each of the largest programming groups account for such a smaller share of the audience when compared to Applicants control of subscribers, they will likely have less

⁴⁸ FCC, *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 12-203, released July 22, 2013, ¶¶ 68-70.

⁴⁹ *AT&T-DirecTV Application*, p.36.

⁵⁰ *Application*, Declaration of Michael J. Angelakis ¶7.

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bargaining power and be required to agree to Applicants’ terms and rates for distribution below competitive levels. It is also of note that Comcast is the largest programmer by share of viewers. An anticipated outcome of this merger is additional consolidation among programmers. Indeed, Fox recently attempted to acquire Time Warner, and this is not likely to be the last such attempt.

Table 1. Share of Primetime Viewers by Largest TV Network Owners⁵¹

Programmer	Share of Primetime Viewers
21st Century Fox	12%
CBS	8%
Comcast	14%
Disney	13%
Hearst-Disney	7%
Time Warner	13%
Viacom	11%

Because television networks offer differentiated content that may, as in the case of sports programming, make certain networks more valuable to advertisers and MVPDs than is reflected in ratings alone, we also examine programmer market shares using affiliate/retransmission revenue and advertising revenue as indicators of programmer importance. The table below reveals that only by looking at programming fees does any individual programmer begin to approach the market share of a merged Comcast-TWC. Disney, primarily through its ownership of ESPN, represents a 25% share of the market when analyzing MVPD payments for television

⁵¹ WGAW analysis of Nielsen Data, Average P2+ viewers in primetime, 2013, all networks available in Nielsen Galaxy Explorer for full year 2013. CW viewers split equally and attributed to CBS and Time Warner. Viewers of A&E Networks, jointly-owned by Hearst and Disney, are not included in Disney’s share because it negotiates carriage separately from Disney.

networks carriage. In comparison, the other major programmers control a much smaller share of programming revenue.

Table 2. Market Shares of Largest TV Network Owners by Revenue⁵²

Programmer	Market Share based on Affiliate/ Retransmission Fees	Market Share Based on Advertising Revenue	Market Share Based on Total Network Revenue
21st Century Fox	10%	5%	8%
CBS	6%	12%	9%
Comcast	10%	17%	14%
Disney	25%	16%	20%
Time Warner	18%	9%	14%
Viacom	8%	10%	9%

Other television network owners, such as Scripps, Discovery and AMC, represent a much smaller share of the market and will have significantly less power when attempting to negotiate with Applicants.

B. The Proposed Merger will Harm Investment, Innovation and Choice in Video Programming

In recent years, MVPDs have been publicly critical of rising affiliate and retransmission fees, despite being offered more original programming by television networks, expanded on demand access to content, and online carriage rights for MVPD initiatives such as TV Everywhere. The merger of two large video programming buyers promises to reduce investment in upstream content markets, which will harm WGAW members, stifle innovation in program

⁵² WGAW analysis of SNL Kagan data estimates for affiliate fees, retransmission revenue and net advertising revenue, 2013, Accessed August 14, 2014.

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offerings and limit consumer choice. As music is an important layer of much of this programming, such concentration will also result in harms to both featured and non-featured performers, composers and other producers of audio content.

The advent of basic cable technology, in contrast to the scarcity of broadcast spectrum, brought about new television networks and increased content offerings to consumers. With this expanded capacity, basic cable networks engaged in a strategy of differentiation to diminish the competitive threat of a market capable of distributing so many new networks. Differentiation led to the creation of networks that appeal to niche audiences, which has been a benefit for viewers. The rise of networks catering to more specific tastes, however, has also meant smaller audiences, and with them, less advertising revenue and smaller funds for content licensing. As a result, for much of basic cable's first two decades, the content offered was primarily reruns of broadcast TV series or lower-cost nonfiction programming. What has changed this dynamic is the dual revenue stream of basic cable networks, with advertising and affiliate fees from MVPDs funding network operations. This model, over the last six years, has allowed almost two dozen basic cable networks to become outlets for original comedy and dramas series once found only on broadcast networks or pay TV channels.

Only through this dual revenue stream, where a majority of basic cable network revenue comes from affiliate fees, can these networks afford to produce high-budget series for audiences a fraction of the size of broadcast network series. Because the basic cable market has made space for content with niche appeal, writers are able to push creative boundaries, to the benefit of storytelling innovation. The results, which include *Breaking Bad*, *Mad Men*, *Damages*, *The Closer*, *Army Wives*, *The Shield* and *Louie*, have ushered in what many consider to be a new

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Golden Age of television. This has generated new economic and creative opportunities for writers and important new choices for consumers. This programming also creates opportunities for music creators, as such creative storytelling is often accompanied by songs and compositions from artists not heard on traditional broadcast platforms such as commercial radio. But Applicants will have the power to reduce fees below competitive levels and harm investment in this market.

Applicants complain about rising programming costs and point to growth in affiliate fees as evidence of sufficient bargaining power on the part of programmers.⁵³ But, the table below reveals that basic cable network programming costs, which represent network investment in original and acquired programming, have kept pace with the affiliate fees paid by MVPDs to television networks. Affiliate fees and programming costs have each grown approximately 9% per year since 2008.

Table 3. Basic Cable Network Affiliate Fees and Programming Costs⁵⁴

(\$ in bil.)	2008	2009	2010	2011	2012	2013	CAGR
Affiliate Fees	\$20.4	\$22.7	\$24.8	\$27.0	\$28.7	\$31.5	9.1%
Programming Costs	\$17.3	\$18.4	\$19.9	\$21.7	\$24.0	\$26.4	8.8%

A calculation of the average annual growth rate, however, disguises important trends.

The table below examines the actual annual growth rate of both affiliate fees and programming

⁵³ *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Letter documenting Ex Parte Communications from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, August 13, 2014, p. 3.

⁵⁴ SNL Kagan, "TV Network Industry Benchmarks: Basic Cable," Accessed August 17, 2014.

costs. Only in 2013, after four years of declines in the rate of affiliate fee growth and increases in the programming cost growth rate, did affiliate fee growth match the annual increase in investment in programming by basic cable networks. In other words, the rate of growth for the fees paid by MVPDs to programmers has decreased while the rate of growth in programming investment has continued to rise.

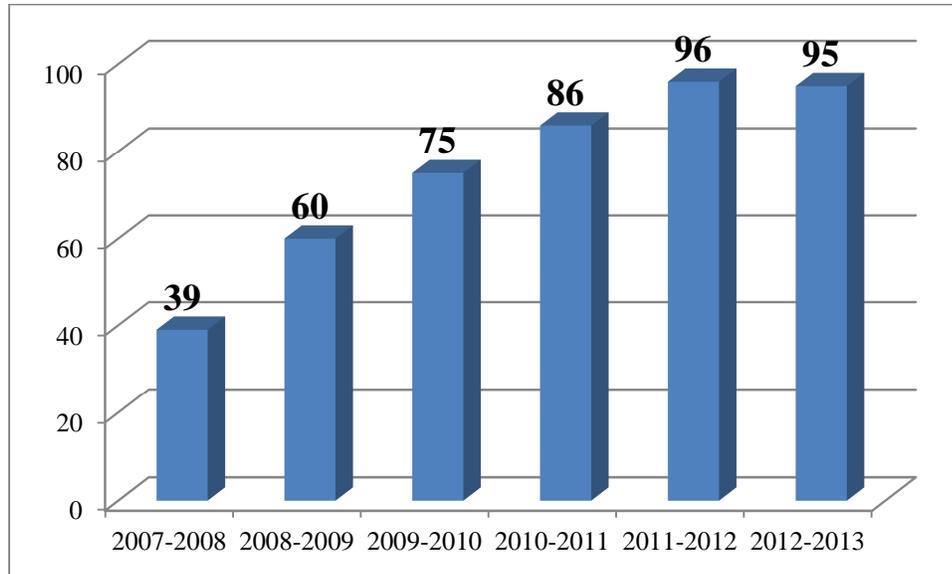
Table 4. Basic Cable Network Affiliate Fees and Programming Cost Annual Growth Rates⁵⁵

	2008	2009	2010	2011	2012	2013
Affiliate Fee Annual Increase	12%	11%	9%	9%	6%	10%
Programming Cost Annual Increase	8%	7%	8%	9%	10%	10%

The continued growth in basic cable programming investment is reflected in the substantial increase in original dramatic series offered by these networks. Between 2007 and 2011, the number of comedies and dramas airing on basic cable more than doubled and has continued to grow since then. The number of original, scripted series on basic cable is now close to the number of such series airing on broadcast networks.

⁵⁵ *Ibid.*

Chart 2: Original Comedy & Drama Series Airing on Basic Cable Networks



Basic cable networks, supported by affiliate revenue, have invested heavily in programming that has attracted viewers and helped MVPDs retain subscribers despite rising cable bills. Content, is, after all, the reason that consumers subscribe to MVPD service. But the market concentration resulting from this transaction will harm those who create much of the value for an MVPD service. In markets with few buyers, a large buyer may have disproportionate power to dictate terms and prices to program suppliers. Monopsony buyers can leverage the threat of foreclosure to negotiate lower rates for programming, undermining investment. Comcast has already acknowledged that it pays lower rates for some programming and expects to extend these lower rates to TWC.

A reduction in affiliate fees challenges the ability of networks to develop or license content.⁵⁶ This development would threaten the Golden Age of television that viewers, writers and music creators are currently benefitting from, resulting in a decrease in the quality and diversity of programming. Despite claims by Applicants that they are at the mercy of programmers, the analysis presented above indicates that Comcast already has significant leverage as a buyer of programming and this proposed merger will only further enhance Comcast's market power.

C. The Proposed Merger will Enhance Applicants' Incentive and Ability to Harm Unaffiliated Programmers

As a vertically-integrated MVPD, Comcast controls a significant amount of must-have programming. Comcast owns the NBC and Telemundo broadcast networks, highly-rated cable networks including USA and MSNBC, and 12 Regional Sports Networks.⁵⁷ In *Comcast-NBCU* the Commission found that the vertical integration of Comcast's distribution network and NBCU's programming assets would increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming.⁵⁸ The proposed transaction significantly enhances Comcast's ability to engage in such anticompetitive behavior. Applicants may leverage their power as distributors to advantage NBC Universal programming by placing unaffiliated channels in less desirable positions within basic cable tiers or lineups, by temporarily or permanently foreclosing unaffiliated networks from carriage on Applicants' cable systems, or

⁵⁶ *Comcast-AT&T Order*, ¶ 44.

⁵⁷ *Application*, p. 13.

⁵⁸ *Comcast-NBCU Order*, ¶ 110.

by using increased scale as a distributor to negotiate payments to unaffiliated networks below competitive market rates.⁵⁹

1. Applicants’ Control of Channel Placement & Tiering Can be Used to Harm Unaffiliated Programmers

MVPDs make strategic decisions about channel and tier placement to develop programming packages that appeal to consumers. Vertically-integrated MVPDs, however, have an incentive to favor affiliated networks in channel assignment and tier placement. Comcast has already demonstrated a willingness to engage in such behavior, which harms competing programmers. To facilitate consumer discovery of competing networks and limit the advantage of vertically-integrated distributors, Bloomberg TV has advocated for “neighborhooding” similar types of programming.⁶⁰ In *Comcast-NBCU*, the Commission agreed that Comcast had incentive and ability to favor NBCU networks by placing them in more advantageous tiers or channel positions.⁶¹ The Commission sought to remedy these anticompetitive practices by adopting a “neighborhood” condition, which requires Comcast to place all unaffiliated news and business networks in adjacent channel positions if it chooses to group a significant number or percent of news and business networks together.⁶² Comcast, however, refused to locate Bloomberg TV in a neighborhood with its affiliated business and news networks and only did so after a two-year enforcement dispute.

⁵⁹ Volume discounts are typically framed as an economy of scale advantage, but our research suggests that monopsony power, rather than operating efficiencies, allow large MVPDs to negotiate lower rates.

⁶⁰ *Comcast-NBCU Order*, ¶ 112.

⁶¹ *Ibid*, ¶¶ 116, 122

⁶² *Ibid*, Appendix A § III.2. The Commission later clarified that a neighborhood consists of at least four HD channels.

Similarly, Comcast’s long-standing practice of placing the Tennis Channel in a separate sports tier, which costs an additional \$5 per month fee, illustrates a preference for its affiliated networks, the Golf Channel and, post-NBCU merger, NBC Sports, both of which are included in the expanded basic cable tier.⁶³ Although the Commission found that Comcast’s placement of the Tennis Channel was discriminatory, Comcast has successfully appealed the Commission’s *Order* and the Tennis Channel is still not included with comparable affiliated sports networks in the expanded basic package.⁶⁴

Bloomberg TV and the Tennis Channel demonstrate how Comcast uses channel placement and tiering to disadvantage unaffiliated networks. Unaffiliated networks may, as a consequence, have smaller audiences and lower ratings, which translates to less advertising revenue and affiliate fees. The elimination of a competing video programming buyer and the resulting increase in Comcast’s size as a distributor enhances Applicants’ ability to harm competitors in the upstream content market. The experience of Bloomberg TV and the Tennis Channel, in addition, suggests that the Commission may not have the power to effectively enforce carriage conditions.

2. The Proposed Merger will Allow Applicants to Engage in Vertical Foreclosure

Applicants’ increased scale in distribution will enhance their power to foreclose programming competitors from their cable systems, by refusing to carry unaffiliated networks

⁶³ Ted Johnson, “Tennis Channel Asks FCC to Look Again at Comcast Case,” *Variety*, March 11, 2014, <http://variety.com/2014/biz/news/tennis-channel-asks-fcc-to-look-again-at-comcast-case-1201129620/#>.

⁶⁴ David Lieberman, “Tennis Channel Asks FCC to Revisit Challenge Against Comcast,” *Deadline*, March 11, 2014, <http://deadline.com/2014/03/tennis-channel-asks-fcc-to-revisit-challenge-against-comcast-697336/#>.

temporarily or permanently. In their Public Interest filing, Applicants claim to have little power in upstream television network markets, despite evidence presented in this Petition that highlights Comcast as the largest programmer by share of primetime viewers. Applicants predict that if they were to withhold NBCU programming from a competing MVPD, “many customers might instead watch substitute programming network (e.g, TNT instead of USA Network) rather than switch video providers....thus frustrating the foreclosure strategy.”⁶⁵ By this logic, the reverse is equally likely to be true. Applicants could, for example, temporarily or permanently refuse to carry AMC, FX or TNT in order to increase viewership of the USA network.

Applicants could also refuse to carry the WE tv basic cable network in an attempt to attract viewers to Oxygen, a Comcast-owned basic cable network targeting the female demographic. An extended foreclosure from the nation’s largest MVPD, in addition, would be a significant hardship for unaffiliated networks, potentially making them more susceptible to acquisition or failure. In the most calculating scenario, Applicants could strategically refuse carriage to acquire unaffiliated programming suppliers such as AMC.

3. Applicants’ Monopsony Power Can be Used to Negotiate Affiliate Fees Below Competitive Market Rates

As the largest MVPD, Applicants will have substantial power to negotiate affiliate fees below competitive market rates. The power of large distributors to negotiate lower rates is typically framed as a volume discount⁶⁶ but is more accurately described as an exercise of monopsony power. This difference is outlined in the Comanor Testimony: “There are few cost

⁶⁵ *Application*, p. 166.

⁶⁶ *Comcast-AT&T Order*, ¶ 36, ¶ 44.

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savings associated with servicing a larger number of viewers particularly since production costs are the same regardless of the number of viewers, and furthermore all transmission services are covered by the MVPD buyers.”⁶⁷ Large MVPDs are able to negotiate lower per-subscriber rates because they control a larger share of the audience. Programmers may try to balance these “discounts” by charging small and medium distributors more or by decreasing investment in content. ACA member companies estimate that their per-subscriber license fees are 30% higher than the license fees paid by the largest cable operators.⁶⁸

Applicants attempt to refute their power as distributors, claiming that programmers have more power than distributors because programming costs have “outstripped inflation and retail cable rates for many years.”⁶⁹ But, as outlined in the Comanor Testimony, basic cable networks rely on a dual revenue stream of advertising and affiliate fees. Because advertising represents close to half of basic cable network revenue, programmers “are necessarily wary of placing excessive demands on MVPDs for fear of restricting distribution and the concomitant volume of advertising revenue.”⁷⁰ The dependence on both affiliate fees and advertising revenue limits the incentive of programmers to engage in negotiations that may result in a lack of carriage or placement in a specialty tier.

Basic cable networks, as outlined in this Petition, are increasing investment in programming each year, with original comedies and dramas available across many networks.

⁶⁷ Comanor Testimony, p. 17.

⁶⁸ Comments of ACA, *In the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, January 3, 2008, p. vi.

⁶⁹ *Application*, p. 78.

⁷⁰ Comanor Testimony, p. 16.

This programming and increased access to it through on demand platforms is undeniably what makes an MVPD attractive to consumers. Rates set in a competitive market would reflect the value created by respective segments of the television value chain. But a monopsonist in the MVPD market exercises power “by buying fewer channels and paying less overall for its programming content.”⁷¹ Applicants have indicated that Comcast pays less for programming and expects to extend those cost savings to TWC. Dr. Comanor finds that “[t]hese are the admitted gains expected from Comcast’s enhanced exercise of monopsony power.”⁷²

Exercising this power may also have qualitative outcomes, influencing what programming is produced or the way that unaffiliated suppliers bundle their networks. Former FCC Commissioner Michael Copps foresaw this possibility in the Comcast-AT&T transaction, writing, “Its [Comcast’s] expanded control over the channels of program distribution could afford it the ability to not only influence but perhaps determine on its own what programming will be produced and offered to the consuming public and at what cost. That is just too much raw commercial power.”⁷³

D. The Proposed Merger Enhances Applicants’ Ability and Incentive to Harm Competing MVPDs

The horizontal combination of Applicants’ cable systems, and the proposed customer swaps and divestures to Charter and Spinco, will increase Applicants’ scale nationally and concentrate their power regionally. These transactions increase Applicants’ incentive and ability

⁷¹ *Ibid*, p. 19.

⁷² *Ibid*, 20.

⁷³ *Comcast-AT&T Order*, Dissenting Statement of Commissioner Michael J. Copps.

to harm competing MVPDs through control of access to important “must-have” programming. The Commission has previously found that regional sports networks, broadcast television and marquee programming, which includes pay networks and highly-rated cable channels, are “must-have” programming which have no close substitutes.⁷⁴ Applicants may deny competing MVPDs access to NBC Universal networks once *Comcast-NBCU* conditions expire in 2018 and they may raise programming costs for competitors by applying a uniform price strategy to its affiliated networks.

1. Applicants May Foreclose Access to Affiliated Programming

In 1992, in response to rising cable bills following cable deregulation, Congress found that emerging MVPDs, such as satellite providers, needed access to popular programming to effectively compete with incumbent cable operators. Program Access conditions were enacted to prohibit exclusive contracts between satellite-delivered cable networks and cable systems. The intent of Program Access rules was to support the viability of new video distribution technologies.

In the 2007 review of Program Access rules, the Commission found that in markets where a competing MVPD had a smaller market share, a vertically-integrated MVPD had the incentive to withhold programming. In this scenario, the FCC found that a short-term loss from advertising and subscriber revenues for the vertically-integrated MVPD would lead to long-term gains as subscribers switched from the competing provider to gain access to exclusive

⁷⁴ In *Adelphia* and *News Corp-Hughes* the Commission found that broadcast networks and RSNs were must-have programming; in *Comcast-NBC Universal* the Commission included highly-rated cable networks as a category of programming which has no suitable substitutes.

programming. The Commission described these exclusive contracts as a “kind of an ‘investment,’ in which an initial loss of profits from programming is incurred in order to achieve higher profits later from increased cable distribution.”⁷⁵ In the Order approving the purchase of Hughes Electronics by News Corporation (“*News Corp-Hughes*”), the Commission held that temporary foreclosure could be profitable even when permanent foreclosure is not, particularly in markets that exhibit consumer inertia. The Commission found that “consumers choosing an MVPD are subject to inertia and partial lock-in, because, among other things, there are switching costs associated with changing providers...”⁷⁶

In the 2012 review of Program Access rules, the Commission allowed the exclusivity ban to sunset in favor of a case-by-case review. The sunset was predicated on market gains by satellite and telco MVPDs, as well as *Comcast-NBCU* conditions, which prohibit exclusivity between Comcast cable systems and affiliated networks through 2018. The proposed transaction increases the ability and incentive of Applicants to pursue a withholding strategy to expand market control regionally once *Comcast-NBCU* conditions expire.

2. Applicants May Engage in a Strategy of Uniform Price Increases to Harm Competing MVPDs

As a program supplier, Comcast has the ability to set prices for its affiliated networks. Although the Communications Act prohibits discriminatory pricing of affiliated content by

⁷⁵ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Report and Order*, 22 FCC Rcd 17791 (2007).

⁷⁶ *News Corp-Hughes*, ¶ 79.

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MVPDs, a uniform price increase, wherein Applicants raise the price of their affiliated networks for all distributors, circumvents this prohibition. In this scenario, Applicants will only have to shift revenue from one business segment to another while a competing MVPD would likely have to pass these costs along to its customers. The FCC found in *Comcast-NBCU* that a uniform price increase would not necessarily violate its policies on price discrimination because the increase would be applied to all MVPDs, rather than select competitors.⁷⁷ While the FCC sought to address this loophole by adopting enhanced arbitration provisions in *Comcast-NBCU*, arbitration can be a lengthy and cost-prohibitive option for small and medium MVPDs seeking redress from harm.

The anticompetitive effects of such discrimination are evident in Comcast's strategic use of its affiliated sports networks to gain local market share. Prior to 2006, MVPDs were allowed to enter exclusive contracts with terrestrial RSNs. The "terrestrial loophole" allowed Comcast to enter an exclusive contract with its affiliated network, Comcast SportsNet Philadelphia. Denying satellite providers' access to SportsNet was a "long standing business policy" for Comcast.⁷⁸ In approving the joint acquisition of Adelphia by Comcast and Time Warner Cable ("*Adelphia*"), the FCC noted that lack of access to RSNs in the Philadelphia area reduced satellite's market share by a projected 40%.⁷⁹ To correct for the competitive advantage of RSN ownership, the FCC applied program access conditions to sports networks owned by Comcast and TWC in *Adelphia*, and then closed the terrestrial loophole for all MVPDs in 2010. However, even with specific program access conditions, Comcast has kept the price of SportsNet Philadelphia so high

⁷⁷ *Comcast-NBCU Order*, ¶ 49.

⁷⁸ *Ibid*, ¶ 71.

⁷⁹ *Adelphia Order*, ¶ 149.

that neither DirecTV nor Dish has entered into a carriage agreement for the network. Speaking in 2012, former Executive Vice President of DirecTV Derek Chang said, “They [Comcast] win either way... They’re either going to gouge our customers, or they’re going to withhold it from our customers.”⁸⁰ In *Adelphia* the Commission recognized that geographic clustering could allow vertically integrated distributors to raise the prices for local programming, particularly for RSNs. The proposed merger and subsequent market swaps with Charter will strengthen Applicants’ market share in geographic clusters, many of which will be in and around large media markets, including LA and NY where post-merger Applicants will also have an RSN.⁸¹ Applicants’ enhanced regional market share combined with TWC’s sports networks increases the incentive to withhold content from competitors in markets with affiliated RSNs.

E. Merger Conditions Cannot Mitigate Harms to Unaffiliated Programmers and Rival Distributors

This transaction enhances Applicants’ regional and national control of the video distribution market. As a vertically-integrated distributor, Applicants will have both the incentive and ability to leverage must-have networks to harm competing MVPDs and to use their control of distribution to harm unaffiliated programmers. The principle concerns presented by this transaction are unique to Comcast; no other MVPD owns a broadcast network or a comparable portfolio of sports and cable programming. Applicants’ offer to extend *Comcast-NBCU*

⁸⁰ Jeff Gelles, “Comcast and satellite companies at impasse over SportsNet programming,” *Philly.com*, April 15, 2012, http://articles.philly.com/2012-04-15/business/31345434_1_satellite-providers-cable-companies-comcastsportsnet.

⁸¹ *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. 4 (2014) (statement of Matthew M. Polka, President and CEO, American Cable Association).

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conditions will be insufficient to address the potential harms to upstream content markets and competing MVPDs because these conditions have already failed to prevent Comcast's anticompetitive practices.

Although Program Access rules prevent MVPDs from restraining “the ability of an unaffiliated programming vendor to compete fairly”⁸² by discriminating based on affiliation, commenters in *Comcast-NBCU* expressed concern with the length and cost of Commission's process and fears of retaliation.⁸³ In response, the Commission relaxed requirements for unaffiliated programmers to demonstrate discrimination.⁸⁴ While this action enhanced the ability of programmers to seek redress from harm, the experience of Bloomberg TV highlights the limitations of Commission conditions. It took more than two years for the FCC to issue a decision ordering Comcast to relocate Bloomberg TV to a news neighborhood.⁸⁵ Comcast has relocated Bloomberg TV, but it continues to appeal the decision. The protracted fights with Bloomberg TV and the Tennis Channel demonstrate Comcast's willingness to engage in anticompetitive behavior to disadvantage unaffiliated programmers in upstream content markets. But more troubling, these issues demonstrate that the Commission, despite its intentions, may be hamstrung from enforcing merger conditions.

⁸² 47 C.F.R. § 76.1301(c).

⁸³ *Comcast-NBCU Order*, ¶ 114.

⁸⁴ *Ibid*, ¶ 121.

⁸⁵ *In the Matter of Bloomberg L.P. v. Comcast Cable Communications, L.L.C.*, Memorandum Opinion and Order, MB Docket No. 11-104, September 26, 2013, ¶ 40.

VI. THE MERGER WILL HARM COMPETITION IN THE BROADBAND MARKET

Comcast is the largest broadband provider in the United States, with a 25% share of the Internet subscriber market.⁸⁶ Post-merger, and after divesting broadband subscribers to Charter and Spinco, Applicants report that they will have 29 million broadband subscribers and an estimated 35.5% of the broadband market.⁸⁷ Applicants' estimate is based on a threshold speed of 3 Mbps, but this analysis includes DSL providers as market participants. Such an inclusion is an attempt to present a more competitive market that understates Applicants' dominance in Internet distribution post-merger. Not all Internet distribution technologies are created equal and DSL is a particularly poor substitute for cable-delivered Internet. Because the Commission's public interest review includes an assessment of how the transaction will affect both current and future competition, it is essential to define the appropriate market for broadband Internet competition.

The Commission must appropriately define the market because the Internet is poised to become the next platform for video distribution and consumption. Online video currently represents only a fraction of television viewing but growth is occurring rapidly, as OVDs offer original content that attracts consumer attention and spending, creating new funds that are reinvested in more new programming. The online video market's continued growth, however, requires faster Internet speeds. The Commission's recent notice of inquiry on broadband progress, suggests a few speed benchmarks for low, moderate and high bandwidth use. The NOI

⁸⁶ Press Release, Leichtman Research Group, "Nearly 1.2 Million Add Broadband in the First Quarter of 2014," May 2014, <http://www.leichtmanresearch.com/press/052014release.html>.

⁸⁷ Zachem Broadband Divestiture Letter, June 27, 2014, p. 5.

suggests a single user streaming an HD movie would need a connection of 5 Mbps while a user streaming a super HD movie would need a connection of 7 Mbps.⁸⁸ Netflix currently recommends a 5 Mbps connection to stream HD video and a 25 Mbps connection for Ultra HD streaming.⁸⁹ 4K technology, which is the next advancement in video quality, will require a 50 Mbps connection.⁹⁰ As technological improvements enhance video quality and online video consumption continues its dramatic rise, faster Internet connections are a necessity.

Because growth of the online video market depends on increasing Internet speeds, a market definition that excludes DSL providers is appropriate for review of this transaction. DSL should be excluded because it is too slow to compete with cable and fiber in Internet delivery. Although DSL providers represent approximately one-third of the Internet market, their share is shrinking as consumers switch to cable and fiber providers offering superior service.⁹¹ For example, AT&T's fastest speed offering through IPDSL is 18 Mbps, but only 6 Mbps for legacy DSL customers.⁹² The Commission's broadband data, in addition, shows that only 10.6% of DSL

⁸⁸ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, August 5, 2014, Table 2, p 8.

⁸⁹ Netflix Help Center, "Internet Connection Speed Recommendations," <https://help.netflix.com/en/node/306>, Accessed August 18, 2014.

⁹⁰ Jacob Siegal, "Netflix 4K streaming will require twice as much bandwidth as U.S. average," *BGR*, September 23, 2014, <http://bgr.com/2013/09/26/netflix-4k-streaming/>.

⁹¹ "Broadband Internet Penetration Deepens in US; Cable is King," *IHS Technology*, December 9, 2013, <https://technology.ihs.com/468148/broadband-internet-penetration-deepens-in-us-cable-is-king>; and Om Malik, "The DSL death march continues...", *GigaOm*, April 24, 2012, <http://gigaom.com/2012/04/24/the-dsl-death-march-continues/>.

⁹² *AT&T-DirectTV Application*, p. 12.

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connections offer speeds of 10 Mbps and faster.⁹³ The Commission's Measuring Broadband America report recently noted that DSL service generally delivers less than advertised speeds during peak hours.⁹⁴ Applicants assert that DSL service should offer much faster speeds in the future, but both AT&T and Verizon are in the process of phasing out their use of copper lines, which are costly to maintain and offer low returns, in favor of wireless Internet-based services.⁹⁵ This is in direct contradiction to the claim that telco providers will continue to invest in their copper networks to increase Internet speeds.

The Commission has historically found the fixed and wireless Internet markets to be separate. We encourage continued employment of such analysis despite Applicants' attempts to include mobile broadband providers in an expansive definition of competitors. Wireless data plans are not a viable alternative for online video viewing because of high costs and Internet data thresholds. For example, Verizon currently charges \$20 per month for 2 GB of data for a tablet and \$15 for each additional GB. Smartphone data plans start at \$50 a month for 2 GB and \$15 for each GB over.⁹⁶ Using a mobile device to replace an average month of television viewing,

⁹³ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, "Internet Access Services: Status as of June 30, 2013," June 25, 2014, p. 28.

⁹⁴ Adrienne Jeffries, "DSL subscribers are more likely to be cheated on Internet speeds, FCC says," *The Verge*, June 18, 2014, <http://www.theverge.com/2014/6/18/5822220/dsl-subscribers-are-more-likely-to-be-cheated-on-Internet-speeds-fcc>.

⁹⁵ Stacey Higginbotham, "Here's AT&T's \$14B plan to kill its copper network and leave rural America behind," *GigaOm*, November 7, 2012, <http://gigaom.com/2012/11/07/heres-atts-14b-plan-to-kill-its-copper-network-and-leave-rural-america-behind/>; and Scott Moritz and Todd Shields, "Fire Island Becomes Test Case as Verizon Abandons Copper," *Bloomberg*, July 9, 2013, <http://www.bloomberg.com/news/2013-07-08/fire-island-becomes-a-test-case-as-verizon-abandons-copper-tech.html>.

⁹⁶ Data Calculator and Pricing from the "More Everything Plan," VerizonWireless.com, Accessed August 19, 2014.

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currently 155⁹⁷ hours, with HD video on a mobile network would require at least 155 GB of data for a tablet and 37 GB a month for a smart phone. For tablets, data costs would exceed \$710—the price for a 100 GB plan—and smartphones would require about \$300 a month—the cost for a 40 GB plan.⁹⁸

Cable broadband, because it offers faster speeds and is widely available, currently represents 61.4% of Internet connections of at least 3 Mbps downstream and 74.6% of connections of at least 10 Mbps downstream.⁹⁹ Comcast and TWC are the largest cable broadband providers and among cable providers, Comcast offers the highest residential connection at 505 Mbps.¹⁰⁰ Only fiber providers have surpassed this speed by deploying networks that can support gigabit connections. The appropriate market for analysis is a broadband market that consists of cable and fiber to the home (“FTTH”) providers because FTTH providers are the only viable competitor to cable broadband in terms of Internet speed and network capacity.

Although fiber networks can offer long-term savings for ISPs, because they require less maintenance than copper or coaxial connections and offer more capacity than other technologies,

⁹⁷ Nielsen, “An Era of Growth: The Cross Platform Report, March 2014,” Table 3—Monthly Time Spent by Medium, Composite data for all users 2+, collected in the 3rd Quarter of 2013, p11. (Cross Platform Report). Data shows viewers spent 155 hours and 32 minutes watching linear television a month.

⁹⁸ *Supra* 96. Verizon estimates that each hour of HD video streamed on a tablet uses 1 GB of data; each hour of video streamed to a smartphone over a 3G network requires 250 MB of data. To stream 155 hours of HD video on a tablet would require 150 GB of data. Streaming 155 hours of video over a 3G network would take 38,750 Mb or 37.8 GB.

⁹⁹ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, “Internet Access Services: Status as of June 30, 2013,” June 2014, p. 28.

¹⁰⁰ National Cable & Telecommunications Association, “Tracking Cable’s Top Internet Speeds,” <https://www.ncta.com/industry-data>.

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the cost to deploy fiber is quite high. Verizon estimates that each FiOS connection costs the company \$1350.¹⁰¹ With such high capital outlays, Verizon has indicated that it will not expand FiOS beyond current service areas until capital costs are recouped.¹⁰² Google has become the newest major entrant to offer a fiber to the home (“FTTH”) product. Currently, Google is deploying its fiber network in Austin, Kansas City and Provo. Google offers an affordable gigabit service to residential customers at \$70 a month¹⁰³ and is reportedly considering expanding service to 34 cities, but only intending to cover about 3 million homes in total.¹⁰⁴ FTTH will be an effective competitor to cable, where offered. But because the costs to deploy fiber are high, nationwide availability or even availability of FTTH in all Applicants’ markets is unlikely.

Broadband providers, including Applicants, have already demonstrated that they also believe fiber networks to be their only competition. Where fiber networks have been deployed, cable broadband providers have responded by increasing speeds and lowering prices. For example, in response to Google Fiber’s planned deployment in Austin, TX, Time Warner Cable prioritized Austin as a TWC Maxx market, which will see increased speeds of 300 Mbps.¹⁰⁵

¹⁰¹ Roger Cheng, “Verizon to Offer FiOS Without Contract,” *The Wall Street Journal*, June 22, 2010, <http://online.wsj.com/news/articles/SB10001424052748704895204575320700280294646>

¹⁰² Sean Buckley, “Verizon’s Shammo: We’ll look at FiOS expansions once it returns the cost of capital,” *FierceTelecom*, March 10, 2014, <http://www.fiercetelecom.com/story/verizons-shammo-well-look-fios-expansions-once-it-returns-cost-capital/2014-03-10>.

¹⁰³ Google Fiber Support, Service Pricing and Plans, <https://support.google.com/fiber/answer/2657118?hl=en>, Accessed August 19, 2014.

¹⁰⁴ Google Fiber, Expansion Plans, <https://fiber.google.com/newcities/>, Accessed August 19, 2014.

¹⁰⁵ Time Warner Cable, “Time Warner Cable Bringing Incredibly Fast Internet Plans Across its Entire Austin Service Area,” February 20, 2014, <http://www.timewarnercable.com/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html>.

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After Google Fiber’s introduction in the Kansas City metro area, Time Warner Cable doubled its top Internet speed to 100 Mbps and offered discounts of up to 70% for lower tiers.¹⁰⁶ Following Google Fiber’s announced expansion into Provo, Utah, Comcast introduced a new 250 Mbps tier at \$70 per month compared to about \$400 per month for 505 Mbps service in other Comcast markets.¹⁰⁷

Within a broadband market that appropriately omits DSL service, Applicants’ post-merger market share is closer to 50%. It is appropriate to examine the broadband Internet market nationally because ISPs are “last-mile” distributors of OVD services. These services, which include Netflix, Amazon, Crackle, YouTube and many others, are national providers that require access to Applicants’ network to reach consumers. Applicants’ share of the market post-merger will be substantial, granting Comcast-TWC significant power as a distributor.

Because Applicants offer Internet service to consumers at a local level, local market competition must also be examined. Here, the information is also troubling. According to Applicants, their service areas post-merger and divestitures will have only a [[]]% overlap with FTTH and cable Internet providers.¹⁰⁸ In [[]]% of their post-divestiture footprint,

¹⁰⁶ Lauren K Ohnesorge, “Will Google Fiber mean lower-cost Time Warner Cable service?” *Charlotte Business Journal*, February 21, 2014, <http://www.bizjournals.com/charlotte/blog/morning-edition/2014/02/will-google-fiber-mean-lower-cost-time-warner.html?page=all>.

¹⁰⁷ Sean Buckley, “Google Fiber now faces Comcast’s 250 Mbps offering in Provo,” *FierceTelecom*, August 29, 2013, <http://www.fiercetelecom.com/story/google-fiber-now-faces-comcasts-250-mbps-offering-provo/2013-08-29>; and Jeff Baumgartner, “Speed Upgrade of \$300 Fiber-Fed Service Comes On Heels of Verizon’s New 500-Meg FiOS Offering,” *Multichannel News*, September 17, 2013, <http://www.multichannel.com/distribution/comcast-raises-top-end-residential-broadband-tier-505-mbps/145511>; updated price of \$399.95 per month based on Comcast’s website, Accessed August 19, 2014.

¹⁰⁸ *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Letter regarding post-

Applicants will face competition from AT&T UVerse, a service which uses a hybrid of fiber and copper wire, but relies on copper wire for last mile distribution to homes, resulting in a service that will not be able to match the increasing speeds offered by cable and FTTH operators. The [[]] overlap comes from DSL providers that offer service in [[]]% of Applicants' post-transaction footprint. As outlined in this Petition, DSL is not a reasonable substitute for Applicants' broadband service and is therefore a poor competitor. In [[]] of their footprint will Applicants face any real competition in broadband Internet service.¹⁰⁹

Applicants' control over high-speed Internet connections and the lack of alternative providers gives Applicants power to set prices for services and dictate access and distribution terms for edge providers. Applicants' size will enable Comcast-TWC to exert significant influence over the development of entertainment online, encouraging innovation that only benefit Applicants' own business. Future competition to Applicants' content and MVPD offerings will be foreclosed.

A. Applicants' Control of Broadband will Harm Upstream Online Content Markets

Internet distribution has resulted in new markets for video programming and music. The growth of online video and music services has led to new outlets for creative expression, expanded consumer choice and enhanced competition in programming markets. This transaction poses a direct threat to these positive developments because Applicants will have increased ability and incentive to stifle online video and music competition.

Divestiture data from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, et al. to Marlene H. Dortch, Secretary, FCC, June 24, 2014, pp. 4-5. WGAW Estimates of FTTH and Cable include figures provided by Applicants for Verizon Fios, CenturyLink Fiber, Frontier Fios, RCN, Windstream Fiber, WOW!, Other Cable Overbuilders, Other Telco Fiber and Municipal Fiber.

¹⁰⁹ *Supra* 109.

1. The OVD Market has Enhanced Competition and Choice in Video Programming

OVDs have introduced important new competition for writers' ideas and viewers' attention. The Internet has allowed new entrants to the video programming market to emerge outside of television distribution. 2013 marked the debut of original television-length programming online as Netflix and Amazon began offering original drama and comedy series directly to consumers. OVDs, which include Netflix, Amazon, Hulu, Crackle, Yahoo and PlayStation, are developing and programming content in direct competition with television networks. The Netflix original series' *Orange is the New Black* and *House of Cards* were recently nominated for 12 and 13 Television Emmy nominations, respectively. It is estimated that Netflix and Amazon will spend close to \$1 billion on original series in 2014.¹¹⁰ Netflix pioneered the release model of offering an entire season of new episodes on the same day, an innovation that is now being copied by Comcast.¹¹¹

These new entrants have generated a striking increase in the quantity of original, high-quality video programming available online. According to WGAW research, in 2008, there was only one television-length, original online video series – *Dr. Horrible's Sing-Along Blog*. By 2014, the number of such series set to be released has grown to 27.¹¹² Online video has also created space once again for independent producers. Many of the original series debuting on

¹¹⁰ Samantha Bookman, "A closer look at the billions of dollars Netflix, Amazon and Hulu are spending on original content," *FierceOnlineVideo*, June 4, 2014, <http://www.fierceonlinevideo.com/special-reports/closer-look-billions-dollars-netflix-amazon-and-hulu-are-spending-original>.

¹¹¹ Jeff Baumgartner, "Comcast, FX, test Live TV/VOD Hybrid for 'The Bridge'," *Multichannel News*, August 14, 2014, <http://www.multichannel.com/news/technology/comcast-fx-test-live-tv-vod-hybrid-bridge/383193>.

¹¹² Comments of WGAW *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, July 15, 2014.

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Netflix have come from independent producers who are not vertically integrated, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television.

The millions of consumers who have flocked to these series demonstrate pent-up demand for new content choices. Consumers spent \$5.45 billion on online video subscriptions, rentals and purchases in 2013, with spending expected to reach \$10 billion by 2018.¹¹³ The number of online videos viewed each month by Americans has also increased, from 7.2 billion in January of 2007 to 52.4 billion in December of 2013.¹¹⁴ OVDs offer consumers more choice in programming, as well as more control over the viewing experience and lower prices than the traditional cable TV bundle. A Netflix or Hulu Plus subscription is available for less than \$10 per month, and both offer the choice of thousands of streaming video on demand (“SVOD”) titles. These services are not substitutes for an MVPD, because they rely on a third party for distribution and offer more limited content. Rather, they provide important, new competition to the programming offered by traditional television networks. But, combining such offerings with the ability to watch news, sports and music events online begins to create the possibility for consumers to build their own, more flexible content bundles. These markets will grow or be hindered depending on the ability of OVDs to offer compelling content to users.

¹¹³ Deana Myers and Wade Holden, “Online video market remains hot,” *SNL*, June 30, 2014, <http://www.snل.com/interactivex/article.aspx?id=28507994&KPLT=6>.

¹¹⁴ Press Release, comScore, “Primetime US Video Streaming Activity Occurs on Weekdays Between 5-8 PM,” March 21, 2007, <http://www.comscore.com/Insights/Press-Releases/2007/03/Primetime-US-Online-Video>; and Press Release, comScore, “comScore Releases December 2013 U.S. Online Video Rankings,” January 10, 2014, <http://www.comscore.com/Insights/Press-Releases/2014/1/comScore-Releases-December-2013-US-Online-Video-Rankings>.

The OVD market has enhanced the diversity of sources offering news, information and entertainment. It has created new competition in content markets and led to innovations in distribution. But OVDs are dependent on ISPs to reach consumers and to ensure quality delivery. An OVD subscription is worthless without an Internet connection fast enough to stream high-quality video, let alone fast enough to stream video without freezing, buffering or endlessly reloading. Music concerts streamed online, such as Lollapalooza or even smaller “house concerts” from smaller artists, rely on speedy connections to deliver the participatory experience that fans expect. OVDs, as a result, are extremely susceptible to the anticompetitive tendencies of Applicants.

2. The Proposed Merger Increases Applicants’ Incentive and Ability to Harm OVDs

In the Comcast-NBCU merger, both the FCC and DOJ concluded that the post-merger entity would have the ability and incentive to harm emerging OVD competition.¹¹⁵ The combination of Comcast and Time Warner Cable will further increase both the incentive and ability of Applicants to harm OVDs by combining the existing content assets of NBCU with increased distributor power through Applicants’ dominance in the broadband Internet market. OVDs have the potential to become alternatives to television networks. While they currently not reasonable substitutes for television networks, by offering original scripted programming OVDs have created new competition in video programming markets. Comcast has already engaged in behavior that harms online video competition and this transaction will allow the company to extend such practices over a larger share of the market. With control of upwards of 50% of high-

¹¹⁵ *Comcast-NBCU Order*, ¶ 78; DOJ Competitive Impact Statement in *Comcast-NBCU*, ¶¶ D(4) and D(1).

speed broadband, Applicants will have an undeniable ability to determine how this market develops.

Comcast, because it is vertically-integrated into upstream content markets, has an incentive to limit the growth of OVDs that could become direct competitors with TV networks as the market matures. The increased size resulting from this merger enhances Applicants' ability to engage in behavior that harms the OVD market. While Applicants benefit from consumer demand for OVD services, which drives demand for broadband Internet service, it is inaccurate to state that Comcast has *no* incentive or ability to harm unaffiliated OVDs. Comcast currently offers several products that compete with third-party OVD services. Comcast's on demand video application XFINITY is a competitor to Netflix and Amazon Prime. It has also launched an electronic sell through ("EST") business where it rents and sells television series and feature films, in direct competition with iTunes, Amazon and other services. Because Comcast has its own OVD product offerings, it has an incentive to use its power as a broadband distributor to harm competitors in the upstream OVD market.

Applicants' expanded control over Internet distribution will enhance the company's ability to engage in anticompetitive behavior. Applicants claim that the substantial competition in broadband from other providers would prevent Applicants from exercising bottleneck power against OVDs or edge providers because customers would respond to such behavior by switching providers.¹¹⁶ However, consumers are not quick to switch ISPs even when their ability to access online video is impaired. A contributing factor is that many customers do not have an alternative Internet provider that can meet their needs, and that switching costs are often

¹¹⁶ *Application*, p.158.

prohibitively high for those consumers that do have multiple provider options. In only [[]]% of Applicants' footprint will consumers have a choice to switch to another cable or FTTH provider. In the rest of Applicants' service area, consumers will only have a choice of DSL or AT&T Uverse.

For consumers who have more than one option for high speed Internet service, significant switching costs are a deterrent to changing providers. Practices such as early termination fees, protect ISPs that exercise bottleneck power from suffering customer losses as a result. Changing one's MVPD or ISP frequently represents significant costs in both money (fees to set up a new account, service appointment) and time (service calls, appointment windows, trips to service center to return equipment), not to mention the irritation of interacting with an industry notorious for its dismal customer satisfaction ratings. In the case of Comcast, the recently publicized incident in which a subscriber attempted to cancel his Comcast service demonstrates that customers who wish to exercise their theoretical power to switch providers are presented with a process that is as difficult and dissuasive as possible.¹¹⁷ Comcast claims that it is prevented from exercising bottleneck power against edge providers by the ability and inclination of consumers to switch providers if they are not able to access the content or services that they want, but its practices and the paucity of options keep consumers locked in.

¹¹⁷ The incident referenced included both a lengthy and abusive service call and the instruction that, in order to return Comcast's equipment, the customer would have to visit a service center and would not be able to return the equipment by mail. A subsequent memo from the Comcast COO confirms that the incident was mainly consistent with Comcast's customer retention methods. Vice Motherboard, "Comcast Is Investigating a Customer Service Call From Hell," July 15, 2014, <http://motherboard.vice.com/read/comcast-investigating-customer-service-call-from-hell>; Jon Brodtkin, "Comcast memo on viral cancellation call: it was 'painful to listen to'," *Ars Technica*, July 22, 2014, <http://arstechnica.com/business/2014/07/comcast-memo-on-viral-cancellation-call-it-was-painful-to-listen-to/>.

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Edge providers have similarly little recourse if they experience discrimination in the form of denied access or degraded service. Comcast maintains that such providers have myriad ways to access Comcast's network without negotiating directly with Comcast.¹¹⁸ However, Netflix disputes this characterization, claiming that while there may be a number of pathways that edge providers and transit providers can use to reach Comcast's network, every point of access is ultimately controlled by Comcast.¹¹⁹ Prior to Comcast and Netflix's agreement for paid interconnection, Netflix had purchased all of the transit capacity into Comcast's networks that was available, from multiple transit providers, but still suffered degraded service because Comcast would not make sufficient interconnection capacity available.¹²⁰ There was no alternative route into Comcast's network aside from acquiescing to Comcast's demands.

The dispute with Netflix is evidence of Comcast's ability and incentive to interfere with an OVD that competes with Comcast's content. Before Netflix, Comcast degraded BitTorrent connections in 2007,¹²¹ illustrating its long-standing practice of leveraging control over Internet service to interfere with online video products that could disrupt Comcast's business model and compete with its cable services and content. The actions to degrade Netflix's video streaming quality were also undertaken while Comcast was subject to the much-touted Net Neutrality condition imposed in *Comcast-NBCU*. The Net Neutrality condition requires Comcast to follow

¹¹⁸ *Application*, pp.159-162.

¹¹⁹ Comments of Netflix, Inc., *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, GN Docket No. 10-127, July 15, 2015, pp.14-15; Letter from Christopher Libertelli, Vice President, Comcast Inc. to Senator Al Franken, April 23, 2014, pp.2-3.

¹²⁰ *Ibid.*

¹²¹ Tim Conneally, "FCC finds Comcast in violation of net neutrality rules for BitTorrent Blocking," *betanews*, August 1, 2008, <http://betanews.com/2008/08/01/fcc-finds-comcast-in-violation-of-net-neutrality-rules-for-bittorrent-blocking/>.

the Commission’s 2010 *Open Internet* rules, which prohibit discrimination in the transmission of lawful Internet traffic. Comcast has found ways to circumvent the intent of this condition, highlighting the inadequacy of conditions to protect competition in the online video market. The lack of protection for OVDs serves as a disincentive for content providers to invest and innovate.

Comcast’s use of data caps or data thresholds represents another anticompetitive measure that threatens the development of OVDs and music streaming services. TWC Internet service currently offers consumers unlimited data but Comcast is testing data caps in select markets and has said that it envisions moving to a “usage-based billing model” for all customers in the next five years.¹²² Under “usage-based billing,” Comcast customers who exceed certain levels of data usage are required to pay for additional Internet usage within the billing cycle. Whether called data caps or thresholds, these measures have the effect of increasing consumer costs and restricting consumers’ ability to substitute a more flexible combination of Internet services and online video subscriptions for the ever-escalating monthly cable bill. The amount of data consumed by a customer who would substitute all of his or her cable TV viewing with online video viewing would make a capped Internet service prohibitively expensive. For example, Nielsen reports that Americans spend 155 hours a month watching traditional television.¹²³ Netflix estimates that an hour of HD video requires 3 GB of data, indicating a household of two would need at least 930 GB of data to completely substitute online video for television

¹²² Josh Lowensohn, “Comcast could mandate a monthly data cap on all customers in the next five years,” *The Verge*, May 14, 2014, <http://www.theverge.com/2014/5/14/5718746/comcast-says-it-could-bring-data-caps-to-home-Internet-service-for-all>.

¹²³ Cross Platform Report, Table 2, p. 11.

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viewing.¹²⁴ In areas where Comcast is currently testing data caps, the company charges \$10 for every 50 GB of data over 300 GB per month.¹²⁵ Under this pricing model, Comcast customers would have to pay an additional \$130 per month for two average viewers to substitute television viewing with online video.

Usage caps, therefore, are an effective restraint on the development of online video and music markets and ensure that consumers continue to subscribe to cable TV service. That these usage caps also artificially restrict bandwidth creates an opportunity to prioritize Comcast's own products and discriminate against unaffiliated content and services. Comcast has engaged in such discriminatory conduct. In markets currently under data caps, Comcast has exempted its online video service, Xfinity Streampix, from such caps when viewed on an Xbox, while the viewing of content from unaffiliated video services, such as Netflix or YouTube, or streaming music counts against a user's data cap. Comcast's plan to impose data caps on all of its customers will harm online video by preventing viewers from taking full advantage of its increased offerings, particularly as HD viewing continues to rise. It will also stifle growth in online music streaming services for the same reasons. If Comcast is allowed to merge with Time Warner Cable, this harm will be correspondingly greater as more customers are precluded from taking full advantage of online video and music offerings, which is integral to the virtuous circle of innovation.

¹²⁴ Netflix, "How can I control how much data Netflix uses?," <https://help.netflix.com/en/node/87>, Accessed August 4, 2014.

¹²⁵ Comcast, "What XFINITY Internet Data Usage Plans will Comcast be Launching?," updated May 29, 2014, <http://customer.comcast.com/help-and-support/internet/data-usage-what-are-the-different-plans-launching>, Accessed August 5, 2014.

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Data caps are one of several ways that Comcast seeks to control its customers' use of online content. Comcast's closed online video platform, X1, is another way Comcast exerts control over online content. X1, which is presented as an innovative platform offering a net benefit to consumers, is actually a closed system that increases Comcast's control over video offerings and restricts consumer choice. The X1 platform makes it more difficult for viewers to watch video using certain third-party devices such as a Roku or Sony PlayStation 3 ("PS3").¹²⁶ For instance, Comcast does not authenticate the HBO Go application on the Roku or PS3, Comcast X1 customers cannot use the devices of their choice to view HBO content. While customers are paying the same amount to Comcast whether they view HBO content via Roku or a set-top-box, Comcast restricts access to television-connected, streaming devices in order to tie consumers to the X1 platform. In contrast, Comcast has made an X1 SVOD app available for iOS and Android. Selective device authentication demonstrates Comcast's inclination to lock subscribers to their set-top-box in the living room but keep their attention outside the home by making content available on mobile platforms. This is simply because Comcast does not have a mobile device that competes with tablets or smartphones, but consoles and streaming devices do compete with the cable box. In contrast, Time Warner Cable allows customers to view HBO Go on Roku and Playstation devices.¹²⁷

¹²⁶ Jeff Baumgartner, "Comcast Not Authenticating HBO Go On the PS3," *Multichannel News*, March 5, 2014, <http://multichannel.com/news/content/comcast-not-authenticating-hbo-go-ps3/356002>.

¹²⁷ Chris Welch, "Comcast isn't letting customers watch HBO Go on PlayStation 3," *The Verge*, March 5, 2014, <http://www.theverge.com/2014/3/5/5474850/comcast-isnt-letting-customers-watch-hbo-go-on-ps3>.

The X1 platform also allows Comcast to be an online content gatekeeper. To access the platform, online content services must be approved by Comcast, which grants the company significant power to decide which online video services are available to consumers. The X1 platform has a similarly restrictive effect regarding music, as it includes a Pandora app but not apps for other streaming music services such as Soundcloud or Bandcamp. This has the effect of determining what services customers will use to listen to music, and discriminates against music creators whose work is not hosted on pre-selected services.

B. The Proposed Merger and Divestiture Transaction will Foreclose Competition

Historically cable operators have not competed, choosing to deploy service in non-overlapping areas. MVPD competition has only emerged through new technologies such as satellite providers and telephone companies. Now, Internet distribution has enabled the development of video services that do not require ownership of the facilities used to distribute content to the public. This development has made additional, and much needed, video competition possible. In recent years, press reports have indicated that new providers such as Sony PlayStation are attempting to launch virtual MVPD services. Dish has also publicized its plans to offer a virtual MVPD service by the end of 2014.¹²⁸ Dish's development of a virtual MVPD service is a strategic choice, which recognizes the maturation of satellite as a video distribution platform and attempts to position the company to compete in the future video marketplace. Most notably, Dish is attempting to do this without acquiring its own broadband facilities.

¹²⁸ Todd Spangler, "Dish's Ergen Says Satcaster Has Critical Mass of OTT Deals, Eyes Launch by End of 2014," *Variety*, May 8, 2014, <http://variety.com/2014/biz/news/dishs-ergen-says-satcaster-has-critical-mass-of-ott-deals-eyes-launch-by-end-of-2014-1201175489/#>.

While Applicants and Divestiture Applicants have emphasized the necessity of these transactions to compete in the changing video marketplace, Dish's route represents a viable, pro-competitive alternative that will be foreclosed if the merger and the Divestiture transactions are approved. For Time Warner Cable and Charter, future customer growth does not have to be restrained by geographic boundaries. Dish has demonstrated that an MVPD can negotiate with television programmers to offer a virtual MVPD service. To adapt to changing market conditions, smaller cable operators could potentially develop a similar service to offer to consumers outside of their local markets. Such action would enhance video competition, but the merger and subsequent transactions foreclose such a possibility. The agreement to merge and divide markets, even though the companies will operate separately, is a collusive agreement to divide markets that will undercut competition. In addition, Spinco will be owned by Charter and Comcast shareholders, which will diminish any possibility of Charter or Spinco making a strategic decision to compete with Applicants. Simply put, these transactions ensure that as the marketplace changes, none of these companies will expand into the other's territory to compete.

C. Merger Conditions Will be Insufficient to Protect Online Content Markets from Applicants' Anticompetitive Practices

Applicants have offered to extend existing *Comcast-NBCU* conditions to acquired TWC cable systems. This offer, however, is insufficient to address the harm this merger poses to competition online. Comcast, as outlined in this Petition, has found ways to circumvent existing conditions meant to protect online competition. The Commission, therefore, cannot allow these conditions to be considered effective restraints on Applicants' ability to harm upstream online content markets and online innovation.

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One of Comcast’s most-touted benefits of the merger is extension of the FCC’s 2010 Net Neutrality rules to all Time Warner Cable customers. These rules govern treatment of Internet traffic by “last-mile” Internet service providers, and are in effect until January of 2018.¹²⁹ In the context of the merger proceeding, Comcast has repeatedly highlighted that the company is the only ISP required to abide by these rules, which were partially vacated by the U.S. Court of Appeals for the District of Columbia Circuit in *Verizon v. FCC* in early 2014. These rules represent important protections of an open Internet, but do not sufficiently protect consumers and online video providers because Comcast has found ways to institute discriminatory practices that harm competition without necessarily violating the rules. For instance, because Comcast cannot discriminate in treatment of Internet traffic on its network, it has moved discrimination to interconnection points or ports, where its network connects with other networks. Comcast harmed Netflix by passively allowing interconnection ports to become congested, which degraded quality of service to Comcast subscribers attempting to watch Netflix content. Comcast then demanded payments to open more ports into their networks. Because Netflix has no way to reach Comcast subscribers other than through Comcast’s network, it was forced to pay the ISP’s toll despite the fact that Comcast’s customers have already paid both Netflix and Comcast for that Internet traffic. The proposal to extend Net Neutrality rules to TWC systems, therefore, does little to limit the ability of Applicants to engage in anticompetitive conduct because the rules do not address interconnection.

Comcast has also effectively circumvented the *Comcast-NBCU* condition that prohibits it from using “caps, tiers, metering, or other usage-based pricing” to treat affiliated Internet traffic

¹²⁹ *Comcast-NBCU Order*, Appendix A, § XX.

differently from unaffiliated traffic.¹³⁰ Comcast has violated this condition by exempting its online video service, Xfinity Streampix, from data caps when viewed on an Xbox, while the viewing of content from unaffiliated video services such as Netflix or YouTube counts against a user's data cap. To explain why this behavior does not violate the FCC's merger condition, the company has said that its online video traffic travels over a private channel, but tests by a network engineer suggests that both general Internet and Comcast traffic were traveling over the same network channel.¹³¹ Online content markets require meaningful protections to limit the anticompetitive practices of Comcast, which will be extended across acquired cable systems. The conditions offered by Applicants will not suffice.

VII. MERGER BENEFITS ARE NOT TRANSACTION SPECIFIC AND CANNOT BE VERIFIED

The Commission's public interest review of this transaction requires the Applicants to demonstrate that the benefits alleged are unlikely to occur without the merger, and such benefits must be verifiable.¹³² Content Creator Petitioners have demonstrated that the harms resulting from this merger are likely to be substantial, which requires Applicants to demonstrate that claimed benefits are of a significant magnitude to overcome the expected harms.¹³³ Applicants have not made such a showing. Rather, many of the claimed benefits are theoretical outcomes of the merger that cannot be verified, and still others are not specific to the transaction.

¹³⁰ *Comcast NBCU Order*, ¶ 94.

¹³¹ Andrew Dugan, "An IP Engineer and Consumer View of Xfinity Traffic Prioritization," *Level 3 Communications Blog*, May 17, 2012, <http://blog.level3.com/internet-broadcast/an-ip-engineer-and-consumer-view-of-xfinity-traffic-prioritization/>.

¹³² *Comcast NBCU Order*, ¶¶ 226-227; *NewsCorp-Hughes Order*, ¶ 317; *Adelphia Order* ¶244.

¹³³ *Comcast-NBCU Order*, ¶¶ 22, 226; *NewsCorp-Hughes Order*, ¶317.

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Close examination of Applicants' claims regarding upgrades and investments, for instance, reveals that TWC has already committed to network improvements. The benefits to consumers stemming from such investment are, therefore, not merger specific. At the close of its 2013 fiscal year, TWC announced TWC Maxx, a three-year project to enhance TWC's network and complete the conversion of all television channels from analog to digital across 75% of its footprint. The conversion frees up bandwidth, allowing TWC to increase Internet speeds up to 300 Mbps. To accomplish these goals TWC is investing \$100 million each year in network maintenance¹³⁴ and almost \$4 billion each year in capital expenditures for, among others things, network line extensions and enhancements.¹³⁵ As TWC's plans had already been announced, claims that such upgrades will occur more quickly because of the transaction must be discounted.

TWC has increased broadband speeds in parts of NYC and Los Angeles with speeds up to 300 Mbps. While Comcast alleges that digital conversion and faster Internet speeds will occur more quickly as a result of the merger, it offers no faster timetable. Mark Reilly, the Senior Vice President for Government and Regulatory Relations at Comcast, has also stated that Comcast

¹³⁴ Time Warner Cable Earnings Call, Q4, 2013 Results, January 30, 2013, Transcript courtesy of Seeking Alpha, <http://seekingalpha.com/article/1981291-time-warner-cable-management-discusses-q4-2013-results-earnings-call-transcript?part=single>. Comments of Arthur Minson, CFO and EVP, "To achieve all this, we plan to increase total capital spending to \$3.7 billion to \$3.8 billion a year in each of the next 3 years and to invest an incremental \$100 million a year in operating expense in proactive maintenance of the network and Max [sic] rollout activities."

¹³⁵ Time Warner Cable, "TWC Operational and Financial Plan," January 30, 2014, http://ir.timewarnercable.com/files/4Q13/TWC_Operational%20and_Financial%20Plan_vFINA L.pdf, slide 18.

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does not know the condition of the TWC network, which makes Comcast’s promise of a faster upgrade still more questionable.¹³⁶

Many of the other claimed benefits of the merger are vague, such as the claim that the merger will result in gains to consumers resulting from economies of scale. The Rosston/Topper economic report argues that the transaction will produce economies of scale through the ability to spread fixed costs over a larger customer base.¹³⁷ However, the Comanor Testimony documents how the presentation of the relevant costs and economies of scale are largely conceptual and without an appropriate assessment of magnitude.¹³⁸ The most significant aspects of Comcast’s cost structure, such as its provision of cable, Internet and voice services to residential customers, are provided at the local level and will not be substantially affected by the merger.¹³⁹ Applicants’ investment in intangible assets such as research, development and deployment could benefit from economies of scale, but Comcast’s annual R&D spending is only \$1 billion, or 3% of total costs.¹⁴⁰ While the merger may generate some economies of scale, the magnitude is rather small.

Claims of better service resulting from this merger are also suspect because certain TWC offerings appear to be a better value for consumers. While MVPD websites often make service

¹³⁶ Transcript from the Public Service Commission of the State of New York’s Buffalo Informational Forum in the case of the Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, Case 14-M-0183, p. 54.

¹³⁷ Gregory L. Rosston and Michael D. Topper, “An Economic Analysis of the Proposed Comcast-Time Warner Cable Transaction,” April 8, 2014, p. 16.

¹³⁸ Comanor Testimony, p.22.

¹³⁹ *Ibid.*

¹⁴⁰ Comanor Testimony, p. 22, citing Rosston/Topper Report, p.16 and Comcast Corp., “SEC Form 10-K,” Filed February 12, 2014, For period ending December 31, 2013 <http://www.sec.gov/Archives/edgar/data/902739/000119312514047522/d666576d10k.htm>.

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comparisons extremely difficult, requiring a specific address to see available options, there are some offerings that, by comparison, are better from TWC. For instance, Time Warner Cable offers an extremely valuable service for lower-income consumers: a standalone Internet offering of 2 Mbps for a retail (not promotional) cost of \$14.99 per month, available to anyone without restrictions or eligibility qualifications, unlike Comcast's Internet Essentials program.¹⁴¹ The speed of this offering is also due to be upgraded, along with the rest of TWC's Internet plans, to 3 Mbps.¹⁴² Comcast's lowest-priced, widely-available standalone Internet offering is \$49.95 per month for 6 Mbps.¹⁴³ TWC service is also not subject to data caps or thresholds. With Comcast's acquisition of TWC, these offerings are likely to be eliminated. Indeed, Comcast executive David Cohen has said the company envisions moving to a "usage-based billing model" for all customers in the next five years.¹⁴⁴

The only remaining quantifiable benefits that the Applicants ascribe to the transaction are those extending conditions imposed by the Commission in the *Comcast-NBC Universal* transaction to TWC's customers. These conditions, however, are not organic benefits resulting from the combination of the two entities. They are temporary regulations implemented by the Commission in an attempt to limit the public interest harms that the NBCU transaction posed and

¹⁴¹ Time Warner Cable, "High Speed Internet Plans and Packages," <http://www.timewarnercable.com/en/internet/internet-service-plans.html>, Accessed August 7, 2014.

¹⁴² Time Warner Cable, "Time Warner Cable Bringing Incredibly Fast Internet Plans Across its Entire Austin Service Area," February 20, 2014, <http://www.timewarnercable.com/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html>.

¹⁴³ Comcast website, Non-promotional rate, Accessed August 1, 2014.

¹⁴⁴ Josh Lowensohn, "Comcast could mandate a monthly data cap on all customers in the next five years," *The Verge*, May 14, 2014, <http://www.theverge.com/2014/5/14/5718746/comcast-says-it-could-bring-data-caps-to-home-Internet-service-for-all>.

that the current transaction will only amplify. Such conditions have also been insufficient for the stated purpose, as documented in this Petition.

VIII. MERGER CONDITIONS WILL BE INSUFFICIENT TO PREVENT THE HARMS ENABLED BY APPLICANTS' MARKET POWER

The merger of Comcast and Time Warner Cable has broad anti-competitive and anti-consumer implications, which will cause harm to video programming competition in both the MVPD market and the ISP market. In the Comcast-NBCU transaction, Content Creator Petitioners advocated for strong merger conditions. Comcast's actions in the intervening years, however, have demonstrated the limitations of merger conditions. Content Creator Petitioners believe that any conditions the FCC might impose on this transaction in an effort to generate quantifiable benefits to the public will also fail to mitigate the harms outlined in this filing.

In previous sections of this document, Content Creator Petitioners have outlined how Applicants voluntary extension of *Comcast-NBCU* conditions will be insufficient to remedy the harms to upstream television and online content markets. A historical review of Comcast's adherence to merger conditions reveals, in addition, that the company will try to circumvent regulatory orders, leaving affected parties to face an uphill battle to enforce conditions. Comcast has sidestepped and challenged the Commission's interpretation of conditions, and due to Comcast's vast financial, legal and political resources, enforcement is too slow and too challenging to effectively maintain a level playing field. Adopting merger conditions to remedy these concerns will simply be ineffective against a powerful company with unlimited resources.

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For instance, the FCC required that Comcast offer and market a standalone broadband product for \$49.95 for three years to preserve customers' ability to access online video without a cable subscription.¹⁴⁵ Comcast did not sufficiently market this offering and was fined \$800,000 by the FCC in 2012.¹⁴⁶ The FCC appropriately used its enforcement powers to address Comcast's failing, but the fine is a miniscule amount to Comcast, and can hardly be considered a deterrent to future non-compliance.

Comcast has failed to follow merger conditions in letter as well as intent. Comcast is required by the FCC to file quarterly reports detailing the news and information programming aired on its owned & operated stations in order to establish compliance with the requirement to air additional original, local news and information programming on NBC and Telemundo local stations.¹⁴⁷ However, a Free Press study of the first report filed by Comcast found that the company failed to provide the required programming information, such as descriptions of each program, and inflated the calculation of local programming time by including commercials.¹⁴⁸ Comcast's professed commitment to diverse and independent programming has been shown to be similarly weak. While Comcast was also required to add ten new independently owned-and-operated channels to its digital tier, most of the channels added to date lack the robust, original programming which would make them successful competitors and meaningful additions to the

¹⁴⁵ *Comcast-NBCU Order*, Appendix A § D.1.

¹⁴⁶ Stacey Higginbotham, "Comcast pays \$800,000 to U.S. for hiding stand-alone broadband," *Gigaom*, June 27, 2012, <http://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/>.

¹⁴⁷ *Comcast-NBCU Order*, Appendix A §§ XI.2.a-b, XI.4.

¹⁴⁸ Corie Wright, "No News is Bad News: An Analysis of Comcast-NBCU Compliance with FCC Localism Conditions," Free Press, May 2011, http://www.freepress.net/sites/default/files/fp-legacy/No_News_Is_Bad_News.pdf.

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market.¹⁴⁹ Comcast also supports these networks only insofar as they are placed in its channel lineup; the networks do not receive financial support from Comcast. These programming additions offer little to consumers and less to creators.

Affected parties that attempt to use the enforcement process to challenge Comcast's discriminatory behavior may have to wait years for a resolution. Bloomberg TV is a relatively well-known and established news outlet that was able to expend the resources to struggle against Comcast for two years, during which time it remained outside of Comcast's news neighborhoods and lost revenue as a result. A smaller, less established or less well-resourced competitor to Comcast could be easily bested simply by the cost required to fight the battle against discrimination.

Comcast's record of compliance with *Comcast-NBCU* conditions, as outlined in this filing, makes clear that approval of the Application with conditions will fail to protect the public interest. The conditions imposed by the Department of Justice and the FCC in the Comcast-NBCU merger were required to limit the potential for harm that both agencies acknowledged, recognizing that Comcast-NBCU would have both the incentive and the ability to act anti-competitively and harm competing distributors, programmers and platforms, as well as viewpoint diversity and localism.¹⁵⁰ However, these merger conditions have been ineffective in mitigating the harm because Comcast has failed to abide by or found ways to circumvent conditions.

¹⁴⁹ *Comcast-NBCU Order*, Appendix A § III.3. For example, Aspire (one of the new channels) airs mainly reruns of older shows such as "The Bill Cosby Show" (1969-71) and "Julia" (1968-71).

¹⁵⁰ *Comcast-NBCU Order*, ¶¶ 3, 29, 44, 61, 67, 78, 93, 97, 207.

Department of Justice Competitive Impact Statement in *Comcast-NBCU*, ¶ D(4), ¶ (D)(1).

IX. CONCLUSION

The proposed transaction will cause substantial harm to the public interest and is broadly anticompetitive. The Comcast-NBCU merger was an unprecedented combination of content and distribution. Both the Commission and the DOJ’s analysis of that transaction found that the merged entity had increased ability and incentive to discriminate against unaffiliated programmers and stifle online video competition. In the years since the merger, Comcast has demonstrated its substantial market power by engaging in anticompetitive practices as an MVPD and ISP, despite Commission-imposed conditions meant to limit such behavior.

Now, this vertically-integrated entity seeks to increase its power as a distributor, magnifying the previous risks and creating new ones. A Comcast-Time Warner Cable merger would harm programmers and those responsible for the creation of television content, competing MVPDs, broadband competition and upstream online music and video services. The diversity of viewpoints and increased content competition brought about by the rise of online content markets will be threatened, and future competition will be foreclosed as Applicants gain insurmountable control of the broadband market.

Applicants are required to demonstrate, “by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.”¹⁵¹ They have failed to make such a showing. The Commission’s public interest review includes “a deeply rooted preference for preserving and enhancing competition in relevant markets,” and “ensuring a diversity of

¹⁵¹ *Comcast-NBCU Order*, ¶ 251; *NewsCorp-Hughes Order*, ¶ 15.

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information sources and services to the public.”¹⁵² Neither of these values is served by this transaction. Based on Comcast’s existing ability to circumvent and challenge merger conditions, an ability that increases in tandem with its size, an approval of this merger with conditions will be wholly insufficient to protect the public interest. There are no merger conditions that could mitigate the magnitude of harms presented by this transaction. For the foregoing reasons, Content Creator Petitioners respectfully request that the Commission deny Applicants’ merger application and license transfers.

¹⁵² “FCC Transaction review: Competition and the Public Interest,” *National Journal*, August 13, 2014, <http://www.nationaljournal.com/library/178364>. *NewsCorp-Hughes Order* ¶ 16; *Adelphia Order*, ¶ 24.

Respectfully submitted,

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EXHIBIT 1.

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TESTIMONY OF WILLIAM S. COMANOR
ON THE
COMPETITIVE AND ECONOMIC CONSEQUENCES OF THE
COMCAST – TIME WARNER CABLE MERGER

August 2014

Qualifications

I am an economist and Professor of Economics at the University of California, Santa Barbara. I am also a Professor in the School of Public Health at the University of California, Los Angeles. At UCSB, I regularly teach a course in Antitrust Economics.

I joined the University of California faculty in 1975. From 1978 to 1980, on leave from my faculty position, I was Director of the Bureau of Economics at the Federal Trade Commission in Washington, D.C. In that capacity, I supervised a staff of over 200 government employees, including more than 85 economists. This staff was responsible for providing economic support for all Commission activities as well as for carrying out economic research activities that dealt with competition and consumer protection issues.

Prior to 1975, I was Assistant and Associate Professor of Economics at Harvard and Stanford Universities. I also served as Professor of Economics for a year in Canada at the University of Western Ontario, and was Fulbright Lecturer in Economics at the University of Tokyo. In 1964, I received my Ph.D. in economics from Harvard University; and in 1965 and 1966 served as Special Economic Assistant to the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice.

In April 2003, I received the Distinguished Fellow Award from the Industrial Organization Society. That award is given annually in recognition of excellence in Research, Education and Professional Leadership in the field of Industrial Organization. My work in Antitrust Economics lies within that field of study.

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During my professional career, I have studied, lectured, written, and consulted on many issues dealing with the antitrust economics. A more detailed statement of my professional and educational background, including a list of publications, is attached as Appendix A.

Assignment and Opinions

I have been asked by officials at the Writers Guild of America, West to review the economic evidence related to the prospective competitive effects in the provision of cable television services of the proposed Comcast – Time Warner Cable merger. I have also been asked to apply this evidence to established antitrust standards in order to draw conclusions as to whether the proposed merger complies with these standards. And finally, I have been asked to respond to both the Public Interest Statement of the merging parties and the economic report supporting the merger.

A striking feature of that Public Interest Statement is the considerable attention paid to the question of whether the proposed consolidation will enhance Comcast's monopsony power. Apparently the parties recognize this is an important regulatory issue which could lead to the merger's rejection on public interest grounds. It is therefore not surprising that the parties find "there is no economic basis for applying monopsony theory to this transaction."¹ Evaluating that contention is an important part of my assignment.

From the evidence and analysis presented below, I agree with the parties' conclusion that with only a few exceptions, there is little competitive overlap between the cable TV and

¹ Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement* Before the Federal Communications Commission, April 8, 2014, p. 146.

broadband Internet services that the two firms offer. However, I disagree with their contention that this factor means they do not compete in the market for video programming, which is an important input in their business. Furthermore, I find that Comcast may have exercised monopsony power in this relevant input market and that its monopsony power may be enhanced by the proposed merger with Time Warner Cable.

The Markets at Issue in this Merger

Comcast and Time Warner Cable (TWC) are both cable TV and broadband Internet service providers. As a result, they are direct horizontal competitors and subject to the *Horizontal Merger Guidelines* promulgated by the US Department of Justice and the Federal Trade Commission.² These Guidelines establish policy standards for their antitrust enforcement efforts. Furthermore, as the merging parties recognize, the FCC's standards for evaluating competitive effects are those embodied in these Guidelines.³

The enforcement agencies explicitly state in their Guidelines their goal for horizontal merger policy:

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. ... A merger enhances market power if it is likely to encourage one or more firms to raise prices, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives.⁴

In this testimony, I apply these standards to the proposed merger.

² US Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines* August 19, 2010.

³ Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement*, Before the Federal Communications Commission, April 8, 2014, p. 138.

⁴ *Horizontal Merger Guidelines*, p. 2.

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Because competitive effects occur within market settings, the first step is to define the market or markets where prices and output levels are set. For the merger at issue, the parties engage in various markets as either buyers or sellers. On the selling side, they supply cable TV and broadband Internet services to household and business subscribers; while on the buying side, they acquire the programming content offered to their subscribers.

As a supplier of cable TV services, Comcast is the nation's largest seller with approximately 22 million subscribers. It also serves about 21 million broadband customers.⁵ Somewhat smaller, TWC services about 11 million cable TV subscribers and almost 12 million broadband customers, which makes them the nation's second largest joint provider of these services.⁶ Although this proposed merger joins the two largest joint suppliers of cable TV and broadband services, the parties largely but not entirely serve different markets. Comcast acknowledges that the two companies compete in the New York, Kansas City and Louisville market areas,⁷ so at least in these local areas, the two firms are direct competitors.⁸ Elsewhere, however, that is not the case.

As buyers of television programming, the market circumstances are quite different. Cable systems exist primarily to distribute this content to their subscribers and are commonly referred to as "multichannel video programming distributors" or MVPDs. An

⁵ *In the matter of Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (Applications)*, MB Docket No. 14-57, before the Federal Communications Commission, April 8, 2014, pp. 8-9.

⁶ *Ibid.*, p. 10.

⁷ Presentation of Brian L. Roberts, Chairman and CEO, Comcast Corporation, *Comcast and Time Warner Cable*, February 13, 2014, p. 6.

⁸ Comcast has stated that it is prepared to divest certain cable systems if that were required for regulatory approval. Presentation of David L. Cohen, Executive Vice President, Comcast Corporation, *Comcast and Time Warner Cable*, February 13, 2014, p. 16.

essential market for their business is therefore the one in which they purchase this programming. Moreover, an increasing share of television content is distributed via broadband Internet services,⁹ so these purchases apply to that segment of their business as well. The competitive effects of the proposed merger are equally important to those arising from their position as sellers. Indeed, the antitrust enforcement agencies state explicitly:

Enhancement of market power by buyers, sometimes called “monopsony power,” has adverse effects comparable to enhancement of market power by sellers. The Agencies apply an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.¹⁰

A critical issue is therefore whether the proposed merger is likely to enhance the exercise of monopsony power by the newly combined firm in the market for television programming.

Buyers in the Market for the Delivery of Video Programming

The buying side of this market is represented by the MVPDs, which include cable TV systems, direct broadcasters such as DirectTV and Dish Network, and telephone providers through AT&T’s U-verse services and Verizon’s FiOS. As indicated in Tables 1 and 2, Comcast is the largest MVPD provider in terms of both number of video subscribers and related revenues, while TWC is the fourth largest in the number of subscribers but third

⁹ See *Independent Lens*, “Poll: Nearly Half of People Watch “TV” on Devices Other Than TVs,” January 4, 2013 (accessed on August 13, 2014) reporting that 49 percent of viewers watch television on computers and mobile devices. Available at: <http://www.pbs.org/independentlens/blog/poll-nearly-half-of-people-watch-tv-on-something-other-than-tvs>. See also Jim Edwards, “TV Is Dying, And Here Are The Stats That Prove It,” *Business Insider*, November 24, 2013 (accessed on August 13, 2014), reporting that 20 percent of U.S. consumers view media on mobile devices compared to 38 percent on televisions in 2013. Available at <http://www.businessinsider.com/cord-cutters-and-the-death-of-tv-2013-11>.

¹⁰ *Horizontal Merger Guidelines*, p .2.

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largest in related revenues. All other firms on the buying side of this market are much smaller.

TABLE 1: MVPD Video Subscribers (in millions)

	End of Year 2010	End of June 2011	End of Year 2011	End of June 2012
MVPD Total	100.8	N/A	101.0	100.5
Cable	59.8	58.9	58.0	57.3
Comcast	22.8	22.5	22.3	22.1
Time Warner Cable	12.4	12.2	12.1	12.5
Cox	4.9	4.8	4.8	4.7
Charter	4.5	4.4	4.3	4.3
Cablevision	3.3	3.3	3.3	3.3
All Other Cable	11.9	11.6	11.3	10.5
Satellite Transmission	33.4	33.5	33.9	34.0
DIRECTV	19.2	19.4	19.9	19.9
DISH Network	14.1	14.1	14.0	14.1
Telephone	6.9	N/A	8.5	9.2
AT&T U-verse	3.0	3.4	3.8	4.1
Verizon FiOS	3.5	3.8	4.2	4.5
All Other Telephone	0.4	N/A	0.5	0.6

Source: Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report (July 22, 2013), 61-62.

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TABLE 2: MVPD Revenue (in billions)

	End of Year 2010	End of Year 2011	Year to Date June 2011	Year to Date June 2012
Cable	\$93.8	\$97.9	N/A	N/A
Comcast	\$35.4	\$37.2	\$18.4	\$19.5
Time Warner Cable	\$18.9	\$19.7	\$8.6	\$9.1
Charter	\$7.1	\$7.2	\$3.6	\$3.7
Satellite Transmission	\$32.9	\$35.9	\$17.2	\$18.3
DIRECTV	\$20.3	\$21.9	\$10.4	\$11.1
DISH Network	\$12.6	\$14.0	\$6.8	\$7.2
Telephone	\$11.2	\$15.0	N/A	N/A
AT&T U-verse	\$4.3	\$6.7	N/A	N/A
Verizon FiOS	\$6.9	\$8.3	N/A	N/A

Source: Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report (July 22, 2013), 66.

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Prices in this market are traditionally set on a per-subscriber basis, which reflects the buyers' valuation of the programming acquired. As purchases are made on a nation-wide basis, the relevant market includes the entire country. From Table 1, it is apparent there are four large firms in this market along with five middle-sized firms. The indicated market shares are for June 2012:

Comcast	22.0%
DirectTV	19.8%
Dish Network	14.0%
Time Warner Cable	12.4%
Cox	4.7%
Verizon FiOS	4.5%
Charter	4.3%
AT&T U-verse	4.1%
Cablevision	3.3%
All Others	<u>11.0%</u>
Total	100%

The importance of market shares, such as those reported above, is emphasized in the federal agency Guidelines mentioned above:

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects ... for the ultimate purpose of determining whether a merger may substantially lessen competition.¹¹

As their preferred measure of concentration, the agencies calculate the Herfindahl-Hirschman Index (HHI) which is determined by summing the squares of the individual firms' market shares. Following the guidelines' recommended procedures, I calculate the HHI values under four conditions: 1) the current market structure, 2) the market structure

¹¹ *Ibid.*, p. 15.

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that would result from the proposed merger between Comcast and TWC, and 3) the market structure that would result from the proposed merger and the proposed divestiture of certain cable systems¹², and 4) the market structure that would result from the proposed merger together with a second proposed merger between AT&T and DirectTV. The resulting values are:

HHI in the current market structure	1314
HHI with the market structure created by a merger between Comcast and TWC -increase of 546	1860
HHI with the market structure created by a merger between Comcast and TWC and proposed divestiture -increase of 307	1621
HHI with the market structure created by both proposed mergers and proposed divestiture -increase of 469	1783

These values are relevant in comparison with the standards offered in the Guidelines. While the Guidelines state that mergers with HHI values below 1500 describe Unconcentrated Markets, which generally do not raise competitive problems, that is not so with higher HHI values. The Guidelines refer specifically to “Moderately Concentrated Markets, which are those with HHI values between 1500 and 2500,” and state the “Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100

¹² Comcast has proposed to spin off 1.4 million subscribers to Charter and 2.5 million subscribers to an undisclosed cable system. Comcast and Charter Communications, “Charter and Comcast Agree to Transactions that will Benefit Shareholders, Industry and Consumers,” April 28, 2014, p. 6.

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points potentially raise significant competitive concerns and often warrant scrutiny.”¹³ From these HHI values, the proposed merger between Comcast and TWC would create a “moderately concentrated market” that by Guidelines standards requires scrutiny for potential anti-competitive effects.

The data employed above are limited to content received via television, whether through cable or satellite. They do not include programming content received via a broadband connection on a personal computer or other devices such as tablets and smart phones. This latter vehicle for the receipt of programming content is expanding but still remains a small share of the total. In September 2012, for example, consumers watched online video programming on average only about 7 hours of content per month as compared with 34 hours of television programming per week.¹⁴ This factor is relevant for appraising future market conditions because while cable systems and the telephone companies can now offer both televising and broadband Internet services, the technology is not yet available for widespread transmission of broadband signals through satellite-based systems.

This point is not in dispute and has been acknowledged by both the largest satellite and telephone MVPD entities. Thus, DirectTV, the largest satellite transmitter, states specifically that it cannot offer programming via the Internet “because its one-way video delivery service lacks broadband capabilities.”¹⁵ As for providing broadband Internet services by the telephone companies, that option is technically feasible but requires various

¹³ *Horizontal Merger Guidelines.*, p. 19.

¹⁴ US Government Accounting Office, *Video Marketplace Competition is Evolving and Government Reporting Should Be Reevaluated*, GAO-13-576, June 2013, p. 12.

¹⁵ AT&T-DirectTV Application to the FCC, *Description of Transaction, Pubic Interest Showing, and Related Demonstrations*, redacted version, June 11, 2104.

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upgrades. AT&T, the largest telephone MVPD, states that “it can only provide video service, and thus a broadband/video bundle, to those homes where it has deployed ‘fiber to the node’ (FTTN) or ‘fiber to the premises’ (FTTP) technologies. While AT&T plans to cover approximately 33 million customer locations with these technologies, that geographic region will cover less than one-quarter of U.S. TV households.”¹⁶ AT&T’s CEO makes this point explicitly. He states: “Due to technology and economic limitations, we can offer video in only a small portion of the country – less than a quarter of American households and even in our wireline service territory, only in more densely populated areas.”¹⁷ Apparently, there is considerable non-substitutability in supply as between the cable company MVPDs and their rivals who use other technologies in their ability to offer programming content on both television sets and via the Internet.

This factor has important competitive implications. Markets are defined in terms of degrees of substitutability in both demand and supply. To the extent that technological factors impede the joint supply of conventional and Internet-based programming content which large numbers of consumers desire to have, then those suppliers face an important market disadvantage which limits their ability to compete. For those customers, the market is limited to the cable companies and portions of the telephone companies who can provide both forms of programming content. Interestingly, this specific point was made recently in Congressional testimony by the CEO of DirectTV. In that testimony, he writes:

¹⁶ *Ibid.*

¹⁷ Statement of Randall Stephenson, AT&T CEO, Statement on the Proposed Merger of AT&T and DirectTV, Before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, June 24, 2014, p. 2.

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In recent years, ... the market has changed. Bundles have largely replaced pure video. Video itself has combined with the Internet to satisfy customers' demands for more video on demand, TV Everywhere, and expanded recording capabilities.¹⁸

The evident non-substitutability between satellite-based and more conventional video-delivery platforms raises questions of whether all MVPDs compete in the same relevant economic market. That issue was addressed recently by Professor Michael Katz, and I repeat here his conclusions:

Market shares [of different MVPDs] do not provide a complete and accurate picture of competition because there are differences between a wireline multichannel video programming distributor (MVPD) and a satellite-based MVPD that tends to make them more distant competitors than would be two wireline MVPDs (or two satellite MVPDs) having the same market shares.¹⁹

I agree with Professor Katz's conclusion. The implication of this conclusion is that separate relevant submarkets exists which alternatively are wireline and satellite-based MVPDs.

Market shares in the wireline MVPD submarket for June 2012 are therefore:

Comcast	33.5%
Time Warner Cable	19.0%
Cox	7.1%
Verizon FiOS	6.8%
Charter	6.5%
AT&T U-verse	6.2%
Cablevision	5.0%
All Others	<u>15.9%</u>

¹⁸ Statement of Michael White, DirectTV CEO, Statement on the Proposed Merger of AT&T and DirectTV, Before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, June 24, 2014, p. 2.

¹⁹ Michael L. Katz, *An Economic Assessment of AT&T's Proposed Acquisition of DirectTV*, June 11, 2014, pp. 7-8. [Redacted version for public inspection].

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Total 100%

These market shares describe a much more concentrated market. The computed HHI values are now:

HHI in the current market structure	1618
HHI with the market structure created by a merger between Comcast and TWC -increase of 1288	2906
HHI with the market structure created by both the merger between Comcast and TWC and the proposed divestiture -increase of 741	2359

Under the standards used by the federal antitrust agencies, the proposed merger when evaluated in this relevant sub-market increases the HHI value by over 1000 points and transforms a “Moderately Concentrated Market” into a “Highly Concentrated Market.” In such cases, the federal Guidelines state: “Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.”²⁰ However, including the proposed divestiture places the proposed merger at the upper reaches of the “Moderately Concentrated Market” category with an increasing HHI value of 741. On these grounds, the question of whether the satellite transmission MVPDs who are technically foreclosed from offering broadband Internet services can effectively compete in a general market where broadband Internet transmission of programming content is increasingly important is an essential issue to be addressed in evaluating the competitive implications of the proposed merger.

²⁰ *Horizontal Merger Guidelines*, p 19.

Sellers and Prices in the Market for the Delivery of Video Programming

Sellers into this market are firms which produce the content watched by consumers and thereby supply video programming.²¹ They include primarily the following suppliers

CBS: CBS broadcast network and studios, Showtime

Discovery Communications: Discovery Channel, TLC, Animal Planet

Disney: ABC broadcast network and studios, ESPN, Disney Channel

NBC Universal: NBC broadcast network and studios, Universal, USA Network, MSNBC

21st Century Fox: Fox broadcast network and studios. Fox News, 20th Century Fox television

Time Warner: CW Network, CNN, HBO, TBS, Warner Bros. Studios

Viacom: MTV, Comedy Central, Nickelodeon, Paramount Pictures²²

To be sure, these suppliers sometimes purchase programming from independent producers and sometimes produce their own content. In either case, they combine this programming into bundles, which are then sold as packages to the MVPDs, who distribute the product to consumers.

A feature of this market is the extent of vertical integration between suppliers and distributors. Among the largest four MVPDs, only Comcast has a large presence among national suppliers of programming content, which includes 50 national networks.²³ TWC's affiliation with the different Time Warner programming suppliers is unclear because although their formal connections were

²¹ In a 2013 report, the FCC distinguishes between entities that supply video programming and those that distribute it, which are the MVPDs.

²² GAO Report, p. 7.

²³ Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, July 22, 2013, pp. 20, 189.

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severed, there may still remain legacy effects. In any event, it appears that the merging firms are the only ones among the four largest MVPDs with substantial integration of national programming suppliers across this market interface.

The extent of integration is relevant for the market for video programming to the extent that integrated distributors treat their affiliated suppliers different from independents. A 2005 study examined this question empirically and reached the following conclusions:

In each of the four network groups studied - basic outdoor entertainment, basic cartoon, basic movie and premium movie networks – vertically affiliated networks were almost uniformly favored by Comcast, Time Warner, and AT&T in terms of higher carriage and/or more frequent positioning on analog program tiers that are more widely available to consumers. In the majority of cases, unaffiliated networks that we identified to be rivals to these integrated networks were carried less frequently and they were more often placed on limited-access tiers.²⁴

Suppliers in this market typically receive revenues in the form of both a monthly fee for each subscriber and from any advertising revenues received. The latter are based in part on the number of subscribers who receive the programming.²⁵ Because of this composite source of potential revenues, content providers are necessarily wary of placing excessive demands on MVPDs for fear of restricting distribution and the concomitant volume of advertising revenues. This revenue structure limits the bargaining strength of programming suppliers relative to the MVPDs and enhances the MVPDs' pricing power in this market.

Although FCC rules require MVPDs to include over-the-air broadcast channels in their basic packages offered to consumers, that is not so for cable networks whose inclusion is subject to

²⁴ Doug Chen and David Waterman, "Vertical Foreclosure in the U.S. Cable Television Market: an Empirical Study of Program Network Carriage and Positioning," October 2005, p. 34.

²⁵ *Ibid.*, pp. 13, 88.

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negotiation between the video programming supplier and the MVPD. While carrying the most popular programming may be essential to the MVPD’s successful penetration in its local markets, that is not so for many “specialty” networks. This contrast is readily seen in the wide distribution of fees paid to the programming providers. For 2013, the highest affiliate fee averaged across all MVPDs was paid for ESPN at \$5.54 per subscriber per month.²⁶ However, were only six channels in all whose fees exceeded 50¢ and only 36 channels with affiliate fees exceeding 25¢.²⁷ There were over 150 channels where affiliate fees were lower than that including ten channels with no fees charged at all. For the great bulk of channels, their primary source of revenues are those obtained from advertisers, where the number of subscribers is a critical factor.

An important feature of this market is that the largest MVPDs are reported to pay less for their programming content than their smaller rivals.²⁸ These reports are confirmed by Comcast whose Chief Financial Officer states that its merger with TWC will lead to reduced programming costs of more than {{ }} per year.²⁹ These lower prices paid for video programming are sometimes described as “quantity discounts,” but they are actually quite different than that. There are few cost savings associated with servicing a larger number of viewers particularly since production costs are the same regardless of the number of viewers, and furthermore all transmission services are covered by the MVPD buyers. This statement suggests that Comcast pays lower prices for its primary input, which is consistent with its exercise of monopsony power.

Another feature of monopsony power is the reduction of quantities, which here refers to the

²⁶ SNL Financial.

²⁷ *Ibid.*

²⁸ GAO Report, p. 22, and FCC Report of July 22, 2013, p. 34.

²⁹ Declaration of Michael J. Angelakis, Before the Federal Communications Commission, MB docket No. 14-57, April 7, 2014, p. 4.

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number of channels purchased by video programming suppliers and distributed to their subscribers. Although programming suppliers typically offer their programming in terms of collections of channels which they seek to sell as a bundle, outcomes are subject to negotiation so the final outcomes are not so neatly packaged. One means to exercise monopsony power is to reject the seller's proposed bundles and agree only to pay for a smaller number of channels. Strikingly, that appears to be the means by which Comcast has acted. See the evidence below on the number of channels carried in its medium-tier packages on its cable networks along with the numbers carried by other wireline distributors:³⁰

	<u>2012</u>	<u>2013</u>
Comcast	160 channels	160 channels
Time Warner Cable	NA	200 channels
Cox	236 channels	280 channels
Verizon VOS	285 channels	290 channels
Charter	NA	NA
AT&T U-verse	270 channels	270 channels
Cablevision	NA	NA

While this data is incomplete and requires confirmation, it suggests that Comcast cable systems offer fewer programming channels than do its rivals to most of their subscribers, which again is consistent with its exercise of monopsony power.

Despite the parties' contention, this suggestion is not overturned by the recognition that the costs of producing video programming are largely sunk and borne prior

³⁰ Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, July 20, 2012, p 58; and July 22, 2013, p 59.

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to their consumption with minimal or zero marginal costs or transmission. That cost structure is not unique in the economy and applies as well to the production of bridges (where the marginal cost of another person walking across a bridge is effectively zero) and software (where the marginal cost of another download is effectively zero). Over time, however, there is also a rising supply price of video programming, and it is on this margin that a monopsonist can exploit its position. The relevant cost structure in the market for video programming is not for increased sales of a particular program but rather for more and better programs to attract a wider audience.

To be sure, suppliers in the market for video programming will seek to sell the same product to various buyers just as any seller wants to reach as many buyers as he can. Prices and quantities are still sought to maximize profits. And from the buyer's vantage point, he or she will still pay either the competitive price or that set through the exercise of monopsony power.

In the economic theory of monopsony, a dominant buyer exercises his or her market power by purchasing fewer units and thereby paying a lower price by moving down the supply curve of the input; in this case for video programming. This result is achieved here not by buying fewer units of the same channel's programming but rather by buying fewer channels and paying less overall for its programming content. As noted above, these reduced payments to video programming suppliers are expected to reach {{ }} million over a three year period as a result specifically of "more favorable rates and terms in some

of Comcast’s programming agreements”³¹ gained because of the proposed merger. These are the admitted gains expected from Comcast’s enhanced exercise of monopsony power.

An essential feature of the reduced monopsony prices paid for an input is that they do not lead to lower prices of the related output. As Blair and Harrison emphasize in their treatise on Monopsony: that while it might be tempting to infer that any lower input costs secured by a monopsonist will be passed on to consumers in the form of lower output prices, that would be a mistake. They write: “Although the monopsonist does pay a lower price for some inputs, it does not pass on these costs simply because its relevant costs for decision-making purposes are marginal costs and these are not lower.” In fact, they proceed, “**when the monopsonist has market power in its output market, the reduced input prices translate into higher output prices.**”³² Since the merging parties exercise some degree of market power in their current operations of cable television systems, this economic result indicates that any enhanced monopsony power resulting from the proposed merger will likely lead to higher prices for wireline consumers.

Responding to an Economic Report

Among my assignments was to evaluate and comment on the economic report submitted in support of the Comcast-TWC merger by Drs. Rosston and Topper.³³ From the start, these writers emphasize that with only a few exceptions, Comcast and TWC operate in

³¹ Declaration of Michael J. Angelakis, Before the Federal Communications Commission, MB docket No. 14-57, April 7, 2014, p. 4.

³² Roger D. Blair and Jeffrey L. Harrison, *Monopsony, Antitrust Law and Economics*, Princeton University Press, 1993, pp. 39-42. (emphasis added)

³³ Gregory L. Rosston and Michael D. Topper, *An Economic Analysis of the Proposed Comcast – Time Warner Cable Transaction*, April 8, 2014.

separate geographic regions and therefore do not directly compete as sellers of Cable TV services. However from this observation they draw the further conclusion that as a result, they do not also compete as buyers of video programming. In other words, unless these firms were competing as sellers in the same market place, they cannot compete as buyers of the same essential input. On this point, Rosston and Topper write: “Because Comcast and TWC do not compete for customers, they do not compete in purchasing programming.”³⁴

I disagree with this judgment. It rest on the argument that competition in an output market is required for competition to exist in an input market, which is an issue directly explored by Blair and Harrison. In their section on Horizontal Mergers, Blair and Harrison state: “the merger to monopsony may or may not involve monopoly in the output market.” They continue: “In the following analysis, monopsony power without any corresponding monopoly power is assumed. In this case, the merged monopsonist still imposes welfare losses on society.”³⁵ This point is well known: the fact that a proposed merger may not extend the degree of monopoly power in the relevant output markets does not immunize the parties from regulatory consideration of whether the merger exacerbates the degree of monopsony power in the relevant input market, as in effect Rosston and Topper claim.

Throughout the economy, firms who sell into different markets compete for purchases of the same or similar inputs and this includes inputs with low or minimal marginal costs such as business software. Even though buyers may operate in different industries and thereby not be direct competitors, they can still exploit any market conditions that restrict the number of prospective buyers available to sellers. That result depends on

³⁴ *Ibid.*, p. 68.

³⁵ Blair and Harrison, p. 82.

conditions in the input market and not on any lack of competitive overlap in their output markets.

The second major point made in the Rosston-Topper report is that there may be substantial gains to consumers from the realization of economies of scale resulting from the merger. For the most part, they suggest, these economies result from the presence of fixed costs: “fixed costs lead to economies of scale because average costs decrease as output increases.”³⁶ Implicit in their discussion on this point is that there will be no need for any increased costs to be borne by a substantially larger firm. While this could be so, they offer no evidence on this matter.

More relevant for our purposes are the quantitative magnitudes of the fixed costs at issue here. The authors state that “Comcast invests around \$1 billion each year in intangible assets, most of which is devoted to software research, development, and deployment to improve its products and services and to develop new ones.”³⁷ While a significant sum, it represents only about 3 percent of Comcast’s total costs in 2013.³⁸ Expressed differently, this investment represents about \$45 per subscriber which would fall to about \$29 per subscriber were the merger to take place. Although the principle stated might be correct, the magnitudes involved are small.

Consider Comcast’s cost structure. Its cable communication business is primarily engaged in offering cable television, broadband Internet and voice services to residential

³⁶ Rosston-Topper Report, p. 19.

³⁷ *Ibid.*, p. 19.

³⁸ Comcast Corp., Form 10-K, 2013.

customers. These three services account for nearly 83 percent of its total revenues.³⁹ As we are reminded by their documents, these services are provided at the local level which should not be greatly affected by the merger. The second major component of costs are those for programming which now represent about 37 percent of total costs.⁴⁰ What remains to be done at the corporate level are product and system development, and while important, do not account for a major share of total costs. The authors' discussion of fixed costs and economies of scale is highly conceptual and pays little attention to the magnitudes involved. In fact, these magnitudes appear to at best represent minor cost savings for a combined firm.

To explore these issues further, consider Comcast's Operating cost data provided in Table 3. For the most part, these costs apply to the provision of wireline services in local markets which are not directly affected by the proposed merger. The only elements of costs directly impacted by the merger are those associated with multi-system operations, and it is striking that the only figure given for such costs represent only about 3 percent of total costs. Furthermore, Comcast's anticipated savings in overhead costs of {{ }} per year⁴¹ would need to be derived from the company's investment in research, development and deployment of only about \$1 billion per year.

See also Table 4 where similar data for Time Warner Cable is presented. Again, it appears that most costs apply to the provision of local wireline services either for television reception or broadband Internet services. While there may be some level of scale economies that can be achieved through this merger, the parties have not disclosed their source.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Declaration of Michael J. Angelakis, Before the Federal Communications Commission, MB docket No. 14-57, April 7, 2014, p. 4.

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TABLE 3: Comcast Cable Communications Operating Costs, 2011-2013
(\$ millions)

	2013	2012	2011	Percent of Operating Costs and Expenses		
				2013	2012	2011
Programming	\$9,107	\$8,386	\$7,851	37.0%	35.9%	35.8%
Technical and product support	\$5,349	\$5,187	\$5,048	21.7%	22.2%	23.0%
Customer service	\$2,097	\$1,995	\$1,911	8.5%	8.5%	8.7%
Franchise and other regulatory fees	\$1,246	\$1,176	\$1,104	5.1%	5.0%	5.0%
Advertising, marketing and promotion	\$2,896	\$2,731	\$2,430	11.8%	11.7%	11.1%
Other	\$3,936	\$3,874	\$3,594	16.0%	16.6%	16.4%
	\$24,631	\$23,349	\$21,938	100.0%	100.0%	100.0%
Other costs						
Depreciation & amortization	\$64,394	\$6,405	\$6,395			

Source: Comcast Corporation, Form 10-K

Definitions

Programming expenses, our largest operating expense, are the fees we pay to license the programming we distribute to our video customers. These expenses are affected by the programming license fees charged by cable networks, fees for retransmission of the signals from local broadcast television stations, the number of video customer we server and the amount of content we provide.

Technical and product support expenses include costs to complete server call and installation activities, as well as network operations, product development, fulfillment and provisioning costs.

Customer service expenses include the personnel and other costs associated with handling customer sales and service activity.

Franchise and other regulatory fees: no definition given.

Advertising, marketing and promotion: no definition given.

Other: no definition given.

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TABLE 4: Time Warner Cable Operating Costs, 2011-2013 (\$ millions)

	2013	2012	2011	Percent of Costs of Revenue		
				2013	2012	2011
Video programming	\$4,782	\$4,621	\$4,342	46.2%	46.5%	47.5%
Employee	\$3,019	\$2,865	\$2,621	29.2%	28.8%	28.7%
High Speed Data	\$175	\$185	\$170	1.7%	1.9%	1.9%
Voice	\$554	\$614	\$595	5.4%	6.2%	6.5%
Video Franchise and other fees	\$500	\$519	\$500	4.8%	5.2%	5.5%
Other direct operating costs	\$1,312	\$1,138	\$910	12.7%	11.4%	10.0%
	\$10,342	\$9,942	\$9,138	100.0%	100.0%	100.0%
Other costs						
Selling, general and administrative	\$3,798	\$3,620	\$3,311			
Depreciation & amortization	\$3,281	\$3,264	\$3,027			
Other	\$119	\$115	\$130			

Source: Time Warner Cable, Form 10-K

Definitions

Video Programming: no definition given.

Employee and other direct operating costs include costs directly associated with the delivery of the Company's video, high-speed data, voice and other services to subscribers and the maintenance of the Company's delivery systems.

High speed data: no definition given.

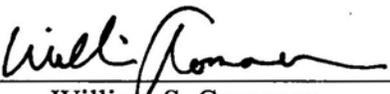
Voice costs associated with the delivery of voice services, including network connectivity costs.

Video franchise and other fees include fees collected on behalf of franchising authorities and the FCC.

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This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and Time Warner Cable. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

Executed this 22nd day August 2014.



William S. Comanor

APPENDIX A

Curriculum Vitae

NAME William S. Comanor

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DATE OF BIRTH May 11, 1937

BIRTHPLACE Philadelphia, Pennsylvania

EDUCATION 1951-1955 Central High School, Philadelphia, PA
1955-1957 Williams College, Williamstown, MA
1957-1959 Haverford College, Haverford, PA
A.B. in Economics
1959-1963 Harvard University, Cambridge, MA
Ph.D. in Economics
1963-1964 London School of Economics,
London, England

THESIS TITLE The Economics of Research and Development in
the Pharmaceutical Industry

FIELDS OF INTEREST Applied Microeconomics
Industrial Organization and Public Policy

PROFESSIONAL
OFFICES Vice President, Industrial Organization
Society, 1990
President, Industrial Organization Society,
1991

AWARD Distinguished Fellow Award, Industrial
Organization Society, 2003

BOARD OF EDITORS Review of Industrial Organization
Antitrust Bulletin
Journal of Industrial Economics
International Journal of Advertising

Professional Experience

- Teaching Fellow, Harvard University, 1961-1963.
- Instructor in Economics, Harvard University, 1964-1965.
- Special Economic Assistant to the Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 1965-1966.
- Assistant Professor of Economics, Harvard University, 1966-1968.
- Associate Professor of Economics, Graduate School of Business, Stanford University, 1968-1973.
- Fulbright Visiting Lecturer, University of Tokyo, 1972.
- Visiting Associate Professor of Economics, Harvard University, 1973-1974.
- Professor of Economics, University of Western Ontario, 1974-1975.
- Director, Bureau of Economics, Federal Trade Commission, 1978-1980.
- Professor of Economics, University of California, Santa Barbara, 1975-
- Chairman, Department of Economics, University of California, Santa Barbara, 1984-1987.
- Visiting Professor of Law, University of California, Los Angeles, 1988-90.
- Visiting Professor of Public Health, University of California, Los Angeles, 1990-93
- Professor, Department of Health Policy and Management, Fielding School of Public Health, University of California, Los Angeles, 1993-

Books and Monographs

Advertising and Market Power, Harvard University Press, 1974 (with Thomas A. Wilson).

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REDACTED – FOR PUBLIC INSPECTION

EXHIBIT 2.

DECLARATION

I, Ellen Stutzman, declare under penalty of perjury that:

1. I have read the foregoing “Petition to Deny of Future of Music Coalition and Writers Guild of America, West, Inc.”
2. I am the Director of Research & Public Policy for the Writers Guild of America, West (WGAW), a labor organization representing writers of feature films, television series and online video programs, who, to the best of my knowledge and belief will be adversely affected if the Commission approves the merger.
3. WGAW members create a majority of the original scripted television programming distributed by Applicants through their MVPD service as well as original series available online through OVDs, who rely on Applicants to reach viewers.
4. In my best knowledge and belief, WGAW members will be directly and adversely affected if the Commission allows the proposed merger of Comcast and Time Warner Cable to proceed. They will face fewer creative and economic opportunities if this merger is approved.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s/

Ellen Stutzman
Director of Research & Public Policy
Writers Guild of America, West

REDACTED – FOR PUBLIC INSPECTION

CERTIFICATE OF SERVICE

I, Ellen Stutzman, Director of Research & Public Policy for the Writers Guild of America, West, Inc., certify on this 22nd day of August, 2014, I caused true and correct copies of the foregoing letter and Petition to Deny to be served via electronic mail and mail on the following parties listed below:

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/s/
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