REDACTED – FOR PUBLIC INSPECTION

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	)	

REPLY OF FUTURE OF MUSIC COALITION AND WRITERS GUILD OF AMERICA, WEST, INC.

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SUMMARY

The proposed merger between Comcast Corporation ("Comcast") and Time Warner Cable ("TWC" or "Time Warner Cable," together, "Applicants") and the subsequent divestiture transactions between Applicants, Charter Corporation ("Charter"), and GreatLand Connections will harm competition, programming diversity, and consumer choice. There is broad consensus among industry participants that these transactions do not serve the public interest. Comcast's proposed expansion of traditional and digital media distribution magnifies many of the harms identified by commenters and by the Federal Communications Commission ("Commission" or "FCC") in the Comcast-NBC Universal ("NBCU") merger and also raises new concerns. In *Comcast-NBCU*, the FCC found that the merger would have increased Comcast's ability and incentive to discriminate against unaffiliated programming[1] and to hinder competition from online video distributors ("OVDs") through "its exercise of control over consumers' broadband connections."[2] Now, with the acquisition of TWC, Comcast can expand such harmful practices across a larger share of both the multichannel video programming distribution ("MVPD") and Internet service provider ("ISP") markets. Applicants' attempt to minimize these concerns by offering to comply with voluntary conditions has not been persuasive.

Despite Applicants' claims that the merger does not raise competitive concerns because of a lack of local overlap in service areas, it is clear that Comcast's increased control of national content distribution will harm competition. There is a national market for programming as both

[1] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238 ¶ 110 (2011) ("*Comcast-NBCU Order*").

[2] *Id.* ¶ 93.

television networks and online video distributors ("OVDs") seek programming content for a national audience, and this merger will significantly concentrate control of both television and Internet distribution. In television, Comcast will be able to use its increased control of the MVPD market to reduce payments to television programmers, harming those who create the content that makes a cable television service attractive to consumers. Comcast has already admitted that it pays less for programming than TWC currently does, and we have every expectation that Comcast will use its increased leverage post-merger to lower payments to programmers. With control over 30% of the MVPD market nationally, threats of temporary or permanent foreclosure can be used to force programmers to agree to below market rates.

As Writers Guild of America, West, Inc. and Future of Music Coalition (together, "Content Creator Petitioners") highlighted in our Petition to Deny ("Petition"), there is strong evidence to suggest that Comcast has exercised monopsony power, and its ability to do so will be enhanced by this merger.[3] Comcast exercises monopsony power by paying less for programming, which was confirmed by the programming cost savings provided by Comcast's Chief Financial Officer ("CFO"). Content Creator Petitioners have also found evidence that Comcast restricts output, offering fewer channels in programming bundles than competitors. Applicants' economists have attempted to refute this argument, but they provide misleading information that inaccurately represents the price of Comcast's services. Content Creator Petitioners' subsequent analysis of information supplied by Applicants' economists reveals that Comcast charges consumers *more* for fewer channels.

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[3] Future of Music Coalition and Writers Guild of America, West, Inc., Joint Petition to Deny, MB Docket No. 14-57 (Aug. 25, 2014).

The proposed merger would give Comcast control of half of the high-speed broadband market, giving it the power to determine the development of online content markets. Applicants have attempted to argue that the broadband market should include wireless and digital subscriber line ("DSL") providers, but the speed and data limitations of these technologies make them poor substitutes for cable or fiber broadband. In addition, it is clear from statements made by Comcast executives and actions taken by Applicants that DSL is viewed as a fading competitor and fiber-based broadband is the only technology that constitutes a legitimate competitive threat to cable broadband. Even in 2007, Comcast CEO Brian Roberts dismissed DSL as the "new dial-up."[4] Comcast and TWC, when implementing upgrades to faster broadband speeds, have prioritized the markets where they face fiber competition.

The merger is occurring at a time when both consumers and content creators are beginning to benefit from new video competition and increased content choices, made possible by Internet distribution. But because consumers have few alternatives for high-speed broadband service, Comcast's expanded control of distribution poses a significant threat to the future of a competitive OVD market. OVDs rely on ISPs including Applicants to reach a national market. The merger increases Comcast's control of broadband distribution nationally. Comcast will have the ability to use its distribution power to limit online video competition through control of interconnection, the widespread institution of usage-based billing and the extension of pricing policies that raise the cost of standalone broadband subscriptions to deter substitution of online video for cable television.

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[4] Mike Farrell, *Roberts: Cable's Winning the Fight*, Multichannel News (Mar. 9, 2007) ("Cable's Winning Fight"), http://www.multichannel.com/news/marketing/roberts-cable-s-winning-fight/293168.

In addition to harming competition in national programming markets, the merger also undermines future competition, which would likely develop between the parties in the online video market. Netflix and Amazon have demonstrated the viability of virtual distribution of content, without ownership of the distribution facilities. Comcast's development of its own OVD services, which compete directly with virtual distributors that offer service nationally, indicates that Comcast could begin offering services outside of its geographic footprint. As a result, direct competition between Comcast and TWC is likely, but will be foreclosed if the merger is approved.

The likely harms resulting from this merger pose a significant threat to the public interest, and Applicants' claimed benefits do not provide sufficient relief to mitigate these harms. Applicants claim that scale efficiencies will result in public interest benefits, but offer no concrete commitments. Rather, they offer examples of behavior in past transactions as proof that the benefits of increased scale in this transaction will serve the public interest. The examples of the Adelphia and AT&T Broadband acquisitions provided by Applicants, however, are not applicable here. The public interest benefits of those mergers were transaction specific and related to the financial health of the companies Comcast was proposing to acquire. In contrast, TWC is financially healthy and has already dedicated billions of dollars to upgrade networks in an initiative that is already underway. Applicants are unable to demonstrate that purported public interest benefits would be unlikely to occur in the absence of this transaction.

On balance, the likely harms of the proposed transaction are not outweighed by Applicants' claimed benefits or proposed conditions. Applicants, therefore, have not met the burden of demonstrating, “by a preponderance of evidence that the proposed transaction, on balance, serve the public interest,”[5] and the FCC should not approve the merger.

[5] *Comcast-NBCU Order* ¶ 251.

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I. INTRODUCTION

Writers Guild of America, West, Inc. ("WGAW") and Future of Music Coalition ("FMC") (jointly, "Content Creator Petitioners") respectfully submit this Reply in response to Applicants' Opposition[1] and the Charter Communications, Inc. ("Charter") and Midwest Cable LLC (together, "Divestiture Applicants") Opposition[2] to our Petition to Deny[3] their application for transfer of licenses and authorizations.

In our Petition, we presented information detailing the significant harms to competition likely to occur in upstream television and online video and music programming markets as well as the multichannel video programming distribution ("MVPD") market if Comcast is allowed to acquire TWC, significantly expanding its control over television and online video distribution, and to swap territories with Charter, increasing regional concentration. Participants at all stages of the industry value chain, including independent producers, television programmers, MVPDs, online video distributors ("OVDs") and consumers have echoed these concerns, indicating broad consensus that this merger enhances both the ability and incentive of Comcast to engage in behavior that will ultimately reduce consumer choice, limit competition, and harm innovation.

While Applicants have attempted to dismiss valid claims of harm raised by various parties as expressions of self-interest, even labeling some petitioners as extortionist, WGAW and FMC have made no attempt to suggest Applicants could offer conditions that would sideline our

[1] Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014) ("Opposition").

[2] Charter Communications, Inc. and Midwest Cable LLC, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 24, 2014).

[3] Future of Music Coalition and Writers Guild of America, West, Inc., Joint Petition to Deny, MB Docket No. 14-57 (Aug. 25, 2014).

opposition. Many of the harms raised by Content Creator Petitioners and other parties to the proceeding, in addition, are harms that both the FCC and the Department of Justice ("DOJ") have recognized in prior transactions as likely to occur because of the vertical integration and horizontal control Comcast has in the MVPD and ISP markets.

Applicants have argued that commenters are "rehashing old NBCU arguments"[4] in this proceeding but the reality is that the concerns raised by the Comcast-NBCU merger are extremely relevant to Comcast's current attempt to significantly expand its horizontal control of video and Internet distribution markets. As a vertically integrated company, the FCC found that Comcast, through its acquisition of NBCU, would have the increased ability and incentive to discriminate against unaffiliated programming[5] and to hinder OVD competition through "its exercise of control over consumers' broadband connections."[6] The Commission stated in *Comcast-NBCU*, "[w]hile the transaction does not increase this significant share that Comcast has in distribution, that share gives Comcast an ability not possessed by pre-transaction NBCU to disadvantage rival networks that compete with NBCU networks."[7] The instant transaction, however, will significantly increase Comcast's share of distribution. Applicants have attempted to address these harms by offering to extend certain conditions required by the Commission in *Comcast-NBCU* across acquired cable systems but Content Creator Petitioners and numerous other commenters have documented how such conditions have thus far failed to mitigate

[4] Opposition at 239.

[5] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238 ¶ 110 (2011) ("*Comcast-NBCU Order*").

[6] *Id.* ¶ 93.

[7] *Id.* ¶ 116.

anticompetitive harms. Now, with the acquisition of the second largest joint provider of MVPD and broadband Internet services, Comcast will significantly expand its horizontal control of distribution, renewing focus on the concerns raised in *Comcast-NBCU*. For instance, Comcast will have the opportunity to favor its own networks, through tiering and channel placement, across a larger share of MVPD households, enhancing the benefit of such behavior to the company and the harms to unaffiliated programmers.

In our Petition, we offered information on how the merger enhances the ability and incentive of Applicants to harm unaffiliated video programming competition in both the MVPD and ISP markets. Using information provided by Applicants and examples of Comcast's anticompetitive behavior, we demonstrated that this transaction is not in the public interest. In response, Applicants have attempted to dismiss our evidence with theoretical arguments that are not supported by data. In addition, they have not demonstrated that purported transaction benefits are verifiable or would be unlikely to occur absent the merger. Applicants have also failed to demonstrate that alleged transaction-specific benefits outweigh transaction-specific harms posed by the merger, a requirement of the Commission's public interest standard. The public interest standard also requires that a transaction enhance existing and prospective competition.[8] Contrary to Applicants' assertions, many petitioners and commenters have submitted evidence that this merger will diminish competition, particularly in national distribution markets. In this Reply, Content Creator Petitioners respond to Applicants' claims and offer further evidence to support the key finding of our Petition, which is that this merger

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[8] *Comcast-NBCU Order* ¶ 24; 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*, 23 FCC Rcd. 12348 ¶ 32 (Aug. 5, 2008).

will have significant anticompetitive and anti-consumer outcomes that will harm the public interest and, therefore, the merger should not be approved.

II. THE MERGER WILL SIGNIFICANTLY CONCENTRATE THE MVPD MARKET AND HARM PROGRAMMERS AND CONTENT CREATORS

In our Petition and appended expert testimony, we documented how the proposed transaction would significantly increase concentration in the MVPD market and the relevant submarket of wireline MVPDs. We also detailed how this concentration would increase Comcast's power as a buyer of video programming, enhancing its monopsony power. We relied on information provided by Comcast's CFO Michael Angelakis on estimated programming cost savings, which demonstrates that Comcast pays less for programming than TWC. And while Comcast may pay less for programming than anyone else, our expert economist, Dr. William Comanor, also highlighted information provided in the FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming Report* ("*Annual Video Competition Report*"),[9] which details how, within comparably-priced cable programming bundles, Comcast offers fewer channels than other MVPDs. In addition to enhancing Comcast's monopsony power as a buyer of video programming, we also outlined how Applicants' ability to reduce payments to programmers below competitive levels could force programmers to compensate for the reduction in revenue by raising rates to smaller, competing MVPDs. In response, Applicants and their economists deny the existence of a national programming market, rely on theoretical arguments that are not supported by facts and present inaccurate information on the cost of Comcast's cable packages

[9] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 FCC Rcd. 10496 (2013).

A. The Merger will Significantly Increase Concentration in the MVPD Market and the Wireline MVPD Submarket

Comcast's acquisition of TWC transforms the MVPD market, inclusive of direct broadcast satellite ("DBS" or "satellite") providers, from unconcentrated to moderately concentrated. Applicants do not dispute this fact. In Content Creator Petitioners' initial analysis of the Herfindahl-Hirschman Index ("HHI"), we did not include Bright House Networks ("Bright House") subscribers as attributable to TWC or a merged Comcast-TWC. However, this proceeding has made clear that TWC negotiates program carriage agreements for Bright House, effectively making it the buyer of video programming for Bright House's 2.5 million subscribers. Applicants have also stated their intention to transfer control of TWC's interest in Bright House to Comcast.[10] In addition, TWC's response to the Commission's information request, Specification 19 regarding the networks that TWC negotiates agreements for Bright House carriage, makes clear that TWC {{

}}.[11] TWC's Exhibit 19.2 lists networks that TWC has an agreement to carry "but under which no Bright House Networks system is carrying the covered programing."[12] The list consists of {{

}}.[13] Thus, it is clear that in the buying market for video

[10] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57, at 173 n.468 (Apr. 8, 2014) ("Application").

[11] Time Warner Cable, Inc., Responses to the Commission's Information and Data Request, MB Docket No. 14-57, at 32, 352 (Sept. 11, 2014) ("TWC Responses").

[12] *Id.* at 32.

[13] *Id.* at 352.

programming, Bright House subscribers should be attributed to Comcast-TWC, resulting in a level of concentration above 30% of the market, which Comcast explicitly said it would fall below.[14]

Applicants have objected to our identification of a relevant wireline submarket for MVPD service, perhaps because within this market, the proposed merger results in significant concentration that should concern regulators. Applicants claim that standalone and bundled offerings are not distinct product markets, and highlight growth in DBS subscribers.[15] They also offer quotes from DIRECTV's CFO, who, in the past, had indicated that DBS' standalone service can compete with bundled offerings.[16] Content Creator Petitioners do not dispute the growth of satellite or its current popularity among MVPD customers. But the Commission's mandate under the public interest standard is to engage in a competitive analysis that considers future competition.[17] It is indisputable that the future of video is online. The actions of Applicants, other MVPDs and programmers to develop TV Everywhere applications that extend video consumption to Internet-connected devices confirm this. In its Petition to Deny, DISH wrote, "[t]he video industry has come to depend on broadband, much more so today than the last time Comcast proposed an industry-changing merger."[18] Control of online distribution is in the

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[14] Application at 6.

[15] Opposition at 137-39.

[16] *Id.* at 140.

[17] *Comcast-NBCU Order* ¶ 24.

[18] DISH Network Corporation, Petition to Deny, MB Docket No. 14-57, at 1 (Aug. 25, 2014), ("DISH Petition").

hands of wired MVPDs that also operate as ISPs, such as Applicants, which places satellite providers at a competitive disadvantage.

The actions of the nation's two satellite providers offer strong evidence that satellite is disadvantaged in the future video marketplace. While Applicants cite satellite executive quotes from 2013, they fail to acknowledge the important implications of AT&T's proposed acquisition of DIRECTV. The first page of AT&T-DIRECTV's public interest filing with the Commission states, "each company cannot provide on its own what consumers increasingly demand: an integrated and efficient bundle of high-speed broadband and high-quality video from a single provider."[19]

Further, in a section called "The Rationale for this Transaction" AT&T and DIRECTV write:

> This merger occurs against the backdrop of fundamental shifts in the ways consumers obtain broadband and video services. A high percentage of consumers now purchase MVPD service in a bundle with broadband connections to obtain greater convenience at a lower price. Indeed, more than 97 percent of AT&T's 5.7 million video customers subscribe to bundled services. This consumer preference is not unique to AT&T, as 78 percent of basic subscribers of the six largest cable operators take at least a double-play of services, predominantly video and broadband. Moreover, consumers who subscribe to MVPD service increasingly want to access video programming from any device, including mobile devices, making mobile service a desirable bundle component as well.[20]

The rationale provided by AT&T and DIRECTV confirms the importance of MVPD control of Internet distribution and highlights the necessity of analyzing the merger's

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[19] Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses or Authorizations, MB Docket No. 14-90, at 1 (June 11, 2014) ("AT&T-DIRECTV Application").

[20] *Id.* at 2.

effect on the wireline MVPD submarket. As stated by AT&T and DIRECTV, MVPDs can no longer offer only linear channels to consumers; the service must include on demand content that can be accessed on multiple devices, which requires a broadband component. While DBS providers have developed on demand offerings, they must rely on unaffiliated ISPs to distribute the service to consumers. The proposed merger between AT&T and DIRECTV is a clear indication of how the strategy of relying on another ISP to distribute on demand programming is perceived by the nation's largest DBS provider.

While DIRECTV is attempting to buy its way into the wireline MVPD submarket, the actions of DISH confirm that both satellite providers realize the challenges posed by one-way distribution capabilities in a market that is moving towards on demand, interactive programming. DISH offers on demand video products that require a consumer to use an unaffiliated broadband provider as a complement to its MVPD service. In addition, DISH is attempting to develop a virtual MVPD service without ownership of Internet distribution facilities, but has made clear in this proceeding that such strategies will fail if this merger is approved and new, stronger regulations are not put in place to protect distribution of unaffiliated online content. DISH's Petition to Deny notes, "[e]ach of Comcast and TWC has, and the combined company will have, a formidable arsenal of weapons at its disposal to thwart the competitiveness of rival video providers, including DISH's core satellite service and OTT services."[21] Highlighting the strong incentives of Comcast-TWC to discriminate against DISH in Internet distribution of video content, DISH writes, "online video functionality helps DISH to stem its MVPD customers'

[21] DISH Petition at 54.

churn to competing services, making DISH an enticing target for that reason as well."[22] The Commission may adopt an MVPD market definition that includes DBS, but in doing so will fail to assess competitive issues that will significantly enhance Applicants' control of the video distribution market and facilitate the decline of satellite providers as relevant competitors.

B. There is a National Market for Video Programming and Applicants' Position as a Dominant Buyer in this Market will Harm Upstream Content Providers

In response to the analysis that the proposed merger will concentrate the market of video programming buyers, Applicants, in an attempt to justify their assertion that the combination of Comcast and TWC has no anticompetitive implications, claim that there is no national market for video programming. By this logic, Comcast could acquire every other non-overlapping MVPD, without any harm to competition. Applicants and their economists then repeat their claim that there is no threat of monopsony because Comcast and TWC do not compete directly in output markets, which means they do not compete in input markets. This notion has already been thoroughly refuted by Content Creator Petitioners' economist, who writes:

> 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 conditions in the input market and not on any lack of competitive overlap in their output markets.[23]

A group of prominent professors of antitrust law and economics have also filed a letter

[22] *Id.* at 65 (internal citations omitted).

[23] Dr. William S. Comanor, Testimony of Dr. William S. Comanor on the Competitive and Economic Consequences of the Comcast – Time Warner Cable Merger, at 21-22 (Aug. 25, 2014) ("Comanor Testimony") (attached to Petition).

with the Commission disputing Applicants' assertions that the lack of overlap in cable and broadband service areas indicates there are no competition concerns with the merger. They write, "[s]uch a claim is fundamentally at odds with antitrust law principles. It overlooks the serious anticompetitive harm that can result from substantial increase in national market share even without increased concentration in local markets."[24]

Applicants and their economists also assert that monopsony is not a relevant concept because video programming has virtually no marginal costs.[25] Dr. Comanor notes that the absence of marginal costs in the short run does not mean monopsony cannot occur. In his reply testimony, Dr. Comanor writes, ". . . I agree that the short run supply curve of video programming is horizontal. However, that conclusion does not apply in the long run where programming has not yet been created or purchased."[26] Dr. Comanor also highlights how Applicants' economists Gregory Rosston and Michael Topper's short run analysis of the supply curve is limited, writing, "the long run applies to a new season before programming decisions have been made; and therefore may not be very long at all."[27] This is consistent with Dr. Comanor's initial testimony, where he stated, "[o]ver 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

[24] Letter from Professors of Antitrust Law and Economics, to Tom Wheeler, Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, and Michael O'Rielly, FCC, MB Docket No. 14-57, at 5-6 (Oct. 20, 2014).

[25] Opposition at 151.

[26] Dr. William S. Comanor, Reply Testimony of William S. Comanor on the Competitive and Economic Consequences of the Comcast-Time Warner Cable Merger, MB Docket No. 14-57, at 1 (Dec. 23, 2014) ("Comanor Reply Testimony") (attached hereto as Exhibit B).

[27] Comanor Reply Testimony at 2.

particular program but rather for more and better programs to attract a wider audience."[28] The effect of this merger will be less revenue flowing to upstream content providers, which may reduce investment in original programming, harming content creators and consumers alike.

C. There is Strong Evidence Comcast Exercises Monopsony Power, which will be Enhanced by the Merger

Applicants have already provided evidence to demonstrate that, as a large buyer, Comcast pays less for programming than TWC. Applicants have also stated that they expect to transfer the lower rates paid by Comcast to acquired TWC subscribers.[29] Rosston and Topper attempt to dismiss the reduction in programming costs provided by Comcast's CFO as minimal and refute monopsony claims by stating that the cost saving estimate is based on Comcast's existing programming agreements that have lower rates than TWC. They go on to write, "Comcast did not anticipate any *additional* discounts to its own prices in its due diligence analysis for the TWC transaction."[30] Such an assertion contradicts the logical conclusion of the cost-saving estimates provided by Comcast's CFO. In his declaration, Mr. Angelakis estimates the transaction will result in $1.5 billion in operating efficiencies in the first three years after the merger closes and estimates "operating expense efficiencies recurring at or above the $1.5 billion level each year thereafter."[31] He also writes that "the merger will result in significant annual cost savings that

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[28] Comanor Testimony at 19.

[29] Declaration of Michael Angelakis, MB Docket No. 14-57, ¶ 7 (Apr. 8, 2014) ("Angelakis Declaration") (attached as Exhibit 4 to Application).

[30] Dr. Gregory Rosston and Dr. Michael Topper, An Economic Analysis of The Proposed Comcast Transactions with TWC and Charter In Response to Comments and Petitions ¶¶ 55-56 (Sept. 23, 2014) ("Rosston/Topper Reply Declaration") (attached as Exhibit 2 to Opposition).

[31] Angelakis Declaration ¶ 6.

would be unachievable absent the transaction."[32] For the first three years, Mr. Angelakis offers a breakdown of expected savings among only three categories: corporate overhead, cable operations and programming costs. Mr. Angelakis does not attribute the $1.5 billion in annual savings expected beyond year three to any specific category of operating efficiency but, because only three categories were listed, it is reasonable to assume that some portion of that $1.5 billion will come from lower programming costs as a result of the merger. Comcast, as reported by its own CFO, pays less than TWC for video programming. An MVPD larger than Comcast would likely have the requisite distributor power to pay less for video programming than Comcast currently does.

In an attempt to further minimize Applicants' ability to exercise monopsony power, Rosston and Topper state that content providers may have disincentives to negotiate lower rates with Comcast because it could use the cost advantage to attract subscribers from an MVPD paying a higher rate, thus resulting in reduced affiliate revenue for the programmer.[33] Content Creator Petitioners do not dispute that programmers have disincentives to lower rates to large MVPDs, but the issue is not programmer incentives. Rather, what the data show is that large MVPDs, Comcast in particular, have the requisite buying power to pay less. While little information is available publicly to confirm this, AT&T, currently the sixth largest MVPD, has projected that it will reduce its own programming costs by 20%[34] using DIRECTV's negotiated rates, indicating a 20% difference in pricing between the second and sixth largest MVPD.

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[32] *Id.* ¶ 7.

[33] Rosston/Topper Reply Declaration ¶ 56.

[34] AT&T-DIRECTV Application at 36.

Applicants confirm in their Opposition that large providers such as Comcast and DIRECTV pay less than smaller MVPDs.[35]

Rosston and Topper also object to the information provided by the FCC's *Annual Video Competition Report* that indicates, within comparable cable bundles, Comcast offers fewer channels than other wireline MVPDs. They attempt to replicate the information provided in the FCC's report, but offer a misleading analysis of MVPD offerings. While on the surface, the information provided by Rosston and Topper appears to support their claims, research conducted by Content Creator Petitioners reveals that the information provided was inaccurate.

Rosston and Topper report that Comcast offers a cable television bundle consisting of 140 channels for $29.99 per month.[36] They use this information to claim that Comcast does not exercise monopsony power by restricting channel output because Comcast offers more channels at a lower price point than competitors. They fail, however, to note that the price of $29.99 is not widely available to Comcast subscribers. In fact, that price does not appear to be currently available in a single one of Comcast's top twenty designated market areas ("DMAs"), which account for 70% of its subscribers, based on Content Creator Petitioners' research. This research, undertaken in October and revised in December of 2014, initially showed the $29.99 price available in only four[37] of the top 12 DMAs served by Comcast, while elsewhere, the relevant package was priced between $44.99 and $49.99. However, in the months since Rosston and Topper's report and Content Creator Petitioners' initial research, this lower price has

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[35] Opposition at 157.

[36] Rosston/Topper Reply Declaration Table III.A.1.

[37] San Francisco, Seattle, Denver, and Houston.

vanished; among the top twenty Comcast DMAs, the price range for the 140+ channel package is between $39.99 and $49.99. Not only was Rosston and Topper's reported pricing not representative of Comcast's offerings at the time, that pricing appears to have been transient. Applicants' economists offer information that supports their assertions, but this information does not accurately represent the price of Comcast's services.

The average video package prices across Comcast's top twenty DMAs (covering 70% of Comcast subscribers) compared with the information from Rosston and Topper, confirms that Comcast charges higher prices for fewer channels, at every package level, than other providers. For instance, the average monthly price of the 140+ channel Digital Starter package across the top twenty DMAs is $46.48.[38] According to the information for other operators provided by Applicants' economists, four MVPDs offer seven different packages that provide a greater number of channels for a lower monthly price, ranging from $24.99 for 155+ channels (Cox) to $34.99 for 190+ channels (DISH). This evidence supports Content Creator Petitioners' argument that Comcast exercises monopsony power.

Rosston and Topper also report a monthly price of $39.99 for Comcast's Digital Preferred package.[39] Content Creator Petitioners could not find such an offer in any of Comcast's top 20 markets. Rather, the price for the Digital Preferred package ranges from $49.99 to $59.99 per month, resulting in a weighted average price of $56.48. As such, Comcast's Digital Preferred package is more expensive than other MVPD packages offering a similar number of channels. In addition, according to our research the monthly price for

[38] Weighted by percentage of the sample population in each examined DMA.

[39] Rosston/Topper Reply Declaration Table III.A.1.

Comcast's Digital Premier package in 12 of Comcast's top 20 markets is $99.99. Eight markets list a price of $69.99 per month, which is lower than the $84.99 price reported by Rosston and Topper. The average price of the Digital Premier package across Comcast's top 20 markets, however, is $88.34.

Comcast vs. Other MVPD Prices for Video Packages[40]				
Channel Category	Operator	Package	# of channels	Monthly Price
10-20	Verizon FiOS	FiOS TV Local	17	$10.00
	TWC	Starter TV	20+	$19.99
	Comcast Average	**Limited Basic**	**10+**	**$21.91**
45-55	Dish	Smart Pack	55+	$19.99
	Comcast Average	**Digital Economy**	**45+**	**$30.33**
100-190	Cox	TV Economy	155+	$24.99
	DIRECTV	Select	130+	$24.99
	AT&T U-Verse	U-Family TV	140+	$29.00
	DIRECTV	Entertainment	140+	$29.99
	Dish	America's Top 120	190+	$29.99
	DIRECTV	Choice	150+	$34.99
	Dish	America's Top 120 Plus	190+	$34.99
	Comcast Average	**Digital Starter**	**140+**	**$46.48**
200-250	DIRECTV	Xtra	205+	$39.99
	Dish	America's Top 200	220+	$39.99
	DIRECTV	Ultimate	225+	$44.99
	Cox	Advanced TV	220+	$49.99
	TWC	Preferred TV	200+	$49.99
	Comcast Average	**Digital Preferred**	**220+**	**$56.48**
260+	AT&T U-Verse	U200 TV	300+	$44.00
	Dish	America's Top 250	290+	$44.99
	AT&T U-Verse	U200 TV Latino	350+	$54.00
	Verizon FiOS	Extreme HD	300+	$74.99
	Comcast Average	**Digital Premier**	**260+**	**$88.34**
	Dish	America's "Everything" PAK	320+	$89.99
	Verizon FiOS	Ultimate HD	390+	$89.99

[40] Comcast's average was calculated using prices as of December 2014 from Comcast's Top 20 DMAs: Chicago, Philadelphia, San Francisco-Oakland, Boston, Seattle, Atlanta, Washington DC, Denver, Houston, Detroit, New York, Miami, Minneapolis, Pittsburgh, Portland, Sacramento, Baltimore, Hartford, Indianapolis, Lancaster, and weighting the average by the percentage of the total 20-market sample in each DMA. *Xfinity TV from Comcast: Digital Cable TV Service*, Comcast, http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html, (last visited Dec. 17, 2014); *see also* Appendix (Comcast prices); *Rosston/Topper Reply Declaration*, Table III.A.1, Advertised Video Packages and Channel Counts (comparing Comcast, TWC, Cox, DIRECTV, DISH Network, AT&T, and Verizon FiOS prices).

In addition, Applicants tout the 140 channels in the Digital Starter package but do not mention that the Digital Starter package was only increased from 80 channels to 140 this year. [[

]][41] Providing customers with added content choices is positive, but Content Creator Petitioners remain concerned that such activity only took place because of the merger proceeding and will be reversed post-closing.

It is evident that this merger will concentrate the MVPD market and significantly increase Comcast's power over programmers. The likely outcome, as indicated by Comcast's CFO, is that the merged entity will exercise monopsony power to pay less for the same amount of programming, squeezing upstream industry participants including the writers who create the content that makes Applicants' service valuable. While Applicants claim "standard economics implies that reductions in marginal costs such as programming costs will be passed on to consumers fully or partially,"[42] the data suggest otherwise, as Comcast customers are already offered fewer channels at a higher price than customers of other MVPDs. And, in fact, senior Comcast executives have been adamant that such savings will *not* be passed onto the consumer. Such a practice will likely be extended across acquired cable systems, contrary to the public interest.

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[42] Letter from Kathryn Zachem, Comcast Corporation, to Marlene Dortch, FCC, MB No. 14-57, at 7-8 (Nov. 26, 2014) (internal citations omitted).

III. THE APPROPRIATE BROADBAND MARKET EXCLUDES DSL AND WIRELESS INTERNET SERVICES

Content Creator Petitioners continue to urge the Commission to analyze the merger's effect on a broadband market that appropriately excludes DSL and wireless services. This market definition has received broad support from numerous participants in this proceeding. Applicants, however, continue to object to the exclusion of DSL and wireless services, claiming that both technologies compete with cable broadband.[43] Applicants attempt to support their assertion with evidence from a survey they commissioned and misleading data that conveys a growth in DSL subscribers. For instance, Applicants' economist Dr. Israel writes that [[ ]] of customers have disconnected or downgraded service in recent years have switched to DSL to support Applicant's assertion that DSL is a reasonable substitute for cable broadband service.[44] Still, none of this artfully constructed evidence proves that DSL or wireless broadband are reasonable substitutes for cable or fiber. Rather, Applicants' preference for a 4 Mbps[45] benchmark and a technology-neutral definition either betrays nostalgia for "yesterday's broadband"[46] or, more likely, a market definition that best serves their interests in this proceeding.

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[43] Opposition at 122.

[44] Mark Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters, MB Docket No. 14-57, ¶ 81 ("Israel Reply Declaration") (attached as Exhibit 1 to Opposition).

[45] Israel, seems to concede that 4 Mbps benchmark may be inadequate by stating that the threshold should be no higher than 10 Mbps. *Id.* at 7-8.

[46] Tom Wheeler, Chairman, FCC, Prepared Remarks at the 1776 Headquarters, Washington DC: The Facts and Figures of Broadband Competition, at 2 (Sept. 4, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf ("Wheeler Remarks").

A broadband market defined by technologies capable of delivering faster speeds is consistent with the Commission's approach to assessing broadband needs and market competition. Chairman Wheeler recently stated, "Table stakes for the 21st Century is 25 Mbps, and winning the game means that all consumers can get at least 100 Mbps—and more."[47] Numerous FCC proceedings, independent analyst reports and investor presentations demonstrate that only cable broadband and fiber-based networks are comparable in price and quality and are able to deliver the benchmark speeds advanced by Chairman Wheeler.

In this Reply, Content Creator Petitioners offer additional information to demonstrate that fixed wireless, mobile broadband, and DSL are not comparable technologies to cable and fiber, and should be excluded from the broadband market analysis. An appropriate market definition is critical to protecting upstream content markets, which rely on distribution by ISPs that offer faster service without punitive data limits. Such an analysis reveals the lack of competition currently facing both Comcast and TWC. This analysis also demonstrates that the merger will significantly enhance Comcast's control of high-speed broadband, expanding its incumbency advantage and giving it the market power to determine the development of upstream online content markets.

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[47] *See* Tom Wheeler, Chairman, FCC, Prepared Remarks at the National Association of Telecommunications Officers and Advisors Annual Conference, at 1 (Oct. 1, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329707A1.pdf; Tom Wheeler, Chairman, FCC, Prepared Remarks at the 32nd Annual Everett C. Parker Ethics in Telecommunications Lecture, Washington, D.C., at 2 (Oct. 7, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1007/DOC-329791A1.pdf.

A. Fixed Wireless

Fixed wireless Internet, a terrestrial delivery system that transmits data between a tower site and home antenna, should be excluded from the Commission's market analysis because few providers of this service offer speeds comparable to wireline broadband and many fixed wireless offerings are subject to data caps. Fixed wireless Internet service providers ("WISPs") typically fill a gap in broadband coverage, primarily serving rural communities where wired service may be costly to deploy because of terrain or low population density.[48] Fixed wireless systems can serve 50-100 users per tower base station, within a 5-10 mile radius,[49] but the base station requires a clear line of sight to the user's antenna, a factor which, in addition to capacity constraints, makes this technology difficult to deploy in densely populated urban markets. Broadband speeds also decline the further the subscriber is from the tower.[50] These limitations make fixed wireless service a poor substitute for cable broadband.

Fixed wireless providers currently serve about 49% of the population.[51] Because of the technology constraints discussed above, most WISPs do not target urban centers and thus do not

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[48] Fostering Innovation in the Wireless Communications Market; A National Broadband Plan for the Future, The Wireless Internet Service Providers Association, Comments, GN Docket Nos. 09-157, 09-51 (Sept. 4, 2009).

[49] Matt Larsen, *America's Broadband Heroes: Fixed Wireless Broadband Providers*, WISPA, at 3-4 (2011), http://www.wirelesscowboys.com/wp-content/uploads/2011/10/americas-broadband-heroes-fixed-wireless-2011.pdf.

[50] Declaration of John T. Stankey, MB Docket No. 14-90, ¶ 49 (June 11, 2014) ("Stankey Declaration") (attached to AT&T-DIRECTV Application).

[51] National Telecommunications and Information Association and FCC, National Broadband Map, Broadband Statistics Report: Access to Broadband Technology by Speed, at 2, *available at* http://www.broadbandmap.gov/download/TechnologyBySpeedDec2013_updated.pdf (last visited Dec. 23, 2014) ("Broadband Statistics Report").

compete in Applicants' primary markets.[52] In addition, although WISPs have the ability to offer speeds of up to 1 Gbps, less than half of all Americans have access to fixed wireless service at a speed of even 3 Mbps and only 13% have access to speeds of 25 Mbps.

Percent of Population with Access to Wireless Internet Service, by Download Speed Benchmark[53]							
Speed	3 Mbps	6 Mbps	10 Mbps	25 Mbps	50 Mbps	100 Mbps	1 Gb
% of Population	44.83%	38.17%	23.67%	13.15%	6.29%	4.17%	.09%

Applicants acerbically write, "DISH self-servingly claims in its petition here that wireless broadband cannot compete with wireline, [but] it is already trialing a fixed wireless broadband service in the marketplace that, during initial tests last year, had speeds ranging from 20 Mbps to 50 Mbps."[54] Although this makes for a good anecdote, it does not prove or even suggest that there is a fixed wireless Internet service on the market capable of competing with cable or fiber in densely populated markets at consistent, competitive speeds and comparable data prices.

In June 2013, DISH began trialing a fixed wireless broadband service through a partnership with nTelos in Virginia and in September 2014 began similar trials with Sprint in Corpus Christi, Texas.[55] The fixed wireless service is in an experimental stage, primarily

[52] *Competition in the Video and Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable: Hearing Before the H.R. Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. 3-4 (2014) (written statement of David Cohen, Executive Vice President, Comcast Corporation). In response to a question about RFD network, David Cohen stated that Comcast is, "primarily an urban cluster cable company." *Id.* (oral statement of David Cohen).

[53] Broadband Statistics Report at 3-4.

[54] Opposition at 129.

[55] Phil Goldstein, *Dish Launches Fixed TD-LTE Service With Sprint In Corpus Christi, Offering 10 Mbps For $30/Month With TV*, FierceWireless (Sept. 24, 2014), http://www.fiercewireless.

because the business model is developing and DISH doesn't know how many subscribers the network will be able to support.[56] While tests have reached speeds between 20 to 50 Mbps, DISH currently markets the service as capable of reaching "up to" 10 Mbps in Virginia markets.[57] In Corpus Christi, the service is offered at 10 Mbps for $30 a month with a satellite television subscription. Charlie Ergen, DISH's Chairman and Co-Founder, described the limitations of fixed wireless during an investor call on August 6, 2014. In response to a question about whether wireless broadband could emerge as a substitute for cable, Ergen said:

> [S]ome homes are so densely populated, right, that at least in the foreseeable future, probably running the cable or fiber is probably a better way to do that. Unless you're a low data user, and then I think wireless can be. So for some people who are mostly Internet and not streaming a lot of video, it could be a substitute.[58]

Verizon and AT&T are also exploring fixed wireless Internet service. In 2012, Verizon began offering a fixed wireless LTE product called HomeFusion, which has since been re-branded as LTE Internet (Installed). Verizon's fixed wireless service has data caps and is only capable of delivering speeds between 5 and 12 Mbps. The price of LTE Internet (Installed) is less than mobile data plans but significantly more than wireline broadband which, if capped,

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com/story/dish-launches-fixed-td-lte-service-sprint-corpus-christi-offering-10-mbps-3/2014-09-24.

[56] DISH Network Earnings Call, Q2, 2014 Results, Transcript courtesy of Seeking Alpha (Aug. 6, 2014) ("DISH Q2 Earnings Call"), http://seekingalpha.com/article/2391475-dish-networks-dish-ceo-joseph-clayton-on-q2-2014-results-earnings-call-transcript?part=single. Tom Cullen, EVP of Corporate Development for DISH stated, "[t]he primary objective of these trials is to test the business model, *i.e.*, how many customers can you adequately support and how much spectrum depth?" *Id.*

[57] *Bundle With DISH nTelos Internet and Save*, DISH, http://www.dish.com/entertainment/internet-phone/ntelos/ (last visited Nov. 5, 2014).

[58] DISH Q2 Earnings Call.

usually has a higher data threshold. The table below highlights how little video can be consumed using the Verizon service.

Verizon LTE Internet (Installed) Offers[59]			
Monthly Data Allowance	10 GB	20 GB	30 GB
Monthly Cost	$60	$90	$120
Monthly Video Consumption under Data Allowance	5 hours of HD Video	10 hours of HD Video	15 hours of HD Video

While audio streaming is less bandwidth intensive than video, consumers would use more than 70% of their data allowance under a 10 GB plan to listen to the U.S. average of 4 hours of audio per day.[60]

The Commission has already noted the limitations of Verizon's fixed wireless service, writing in the *Verizon-SpectrumCo Order ("Verizon-SpectrumCo Order")*, "price and usage capacity limitations of the service suggest that it will be of the greatest value to consumers in rural areas and other underserved areas."[61] Implicit in this statement is the belief that consumers

[59] Karl Bode, *Verizon Ditches 'Home Fusion' Brand for Fixed Wireless Services*, DSL Reports, (Aug. 25, 2014), http://www.dslreports.com/shownews/Verizon-Ditches-Home-Fusion-Brand-for-Fixed-Wireless-Service-130183. Verizon has since re-branded the service as LTE Internet Installed. Verizon estimates that 1 hour of HD video streaming uses 2 GB of data. Each GB overage is charged at $10. http://www.verizonwireless.com/b2c/lte-internet-installed/.

[60] Glenn Peoples, "How, and How Much, America Listens Have Been Measured for the First Time," *Billboard*, June 18, 2014, http://www.billboard.com/biz/articles/news/digital-and-mobile/6121619/how-and-how-much-america-listens-have-been-measured-for. Verizon estimates an hour of audio streaming per day to use 1.8 GB per month in data on its LTE Internet (Installed) service.

[61] Applications of CellCo Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign Licenses, Verizon Wireless and Leap for Consent to Exchange Licenses, T-Mobile License LLC and CellCo Partnership d/b/a Verizon Wireless for Consent to

who have a wired broadband option will likely prefer cable or fiber over wireless service. Even Verizon's "Frequently Asked Questions" guide for LTE Internet (Installed) states that the product is offered to "give high speed home broadband option to households where Internet options may be limited or not currently available."[62] The Commission did not adopt specific conditions protecting HomeFusion in *Verizon-SpectrumCo*, which provides further evidence that fixed broadband service is not a substitute for wireline broadband.

AT&T has announced plans to deploy fixed Wireless Local Loop (WLL) to 13 million customer locations. This product will target rural geographies, which AT&T defines as locations with less than 250 residents per square mile.[63] AT&T notes that these markets are not competitive; 20% of target markets have no terrestrial broadband service and 27% are served by either DSL or a "relatively slow cable modem service."[64] Like Verizon's fixed wireless product, AT&T's WLL service will have data caps that limit the amount of high-bandwidth consumption, such as streaming video and music, users can engage in. AT&T and DIRECTV's economist, Dr. Katz, confirms this, writing that WLL technology "will not provide enough capacity to offer a service that is a good substitute for DIRECTV's video service."[65]

Assign Licenses, *Memorandum Opinion and Order*, 27 FCC Rcd. 10698 ¶ 159 n.374 (Aug. 23, 2012).

[62] *LTE Internet (Installed) FAQs*, Verizon, http://www.verizonwireless.com/support/faqs/WirelessService/faq_LTEinternetinstalled.html (last visited Dec. 3, 2014).

[63] AT&T-DIRECTV Application at 44 n.139.

[64] *Id.* at 44.

[65] Michael Katz, An Economic Assessment of AT&T's Proposed Acquisition of DIRECTV, MB Docket No. 14-90 ¶ 135 & n.235 (June 11, 2014) (attached as Exhibit 6 to AT&T-DIRECTV Application).

DISH, Verizon and AT&T have targeted rural markets with little wired competition to deploy fixed wireless broadband, demonstrating that the companies view such technology, in its current stage, as a cost effective way to serve remote communities but not as a competitive alternative to high-speed cable or fiber broadband.

B. Mobile Broadband

Mobile providers offer nationwide coverage that ostensibly places them in competition with Comcast and TWC, but data plans make mobile broadband a cost-prohibitive alternative to wired service, especially for data-intensive activities such as video and music streaming. Even Applicants' economist Dr. Israel acknowledges that mobile offerings are more expensive than other broadband services.[66] Although Dr. Israel predicts that pricing for mobile data plans will decline, he provides no evidence to confirm his assertion.[67]

To support the claim that mobile services compete with wireline broadband, Applicants commissioned a consumer survey from the Global Strategy Group ("GSG survey") on broadband usage. The GSG survey examined the likelihood that consumers would switch broadband technologies in response to cable ISP policies such as blocking content, slowing access speeds for certain content, and allowing paid prioritization, in order to support the claim that consumers view wireless technology as a substitute for wired broadband.[68] In the GSG survey, a random sample of 1000 broadband users found that 10% already use wireless or mobile connections for

[66] Application at 56.

[67] Mark Israel, Implications of the Comcast/Time Warner Cable Transaction for Broadband Competition, MB Docket No. 14-57, ¶ 67 (Apr. 8, 2014) ("Israel Declaration") (attached as Exhibit 6 to Application).

[68] Opposition at 135.

high-bandwidth activity most of the time.[69] Applicants claim these results "confirm that a significant share of broadband consumers already view wireless to be a satisfactory alternative to fixed broadband services."[70] Overall, 41% of respondents said that they use mobile or wireless broadband for high-bandwidth activities at least as often as, or more frequently, than they use cable broadband.[71]

The results of this survey contradict widely available data on video consumption across television, Internet and mobile devices. The table below shows that consumers, on average, watch one hour and 23 minutes of video on mobile devices over the course of a month, compared to 7 hours and 34 minutes online and 155 hours and 32 minutes on television.

Average Monthly Video Consumption[72]			
Platform	**Television**	**Online**	**Mobile**
Hours: Minutes	155:32	7:34	1:23
Consumption Versus Prior Year	-.5%	28%	38%

As noted in our initial comments, using a mobile broadband plan in place of an MVPD subscription or a home broadband connection for all video consumption would be cost-prohibitive.[73] The table below estimates the cost of using a mobile broadband subscription to replace a month of television viewing for the average viewer. Both AT&T and Verizon, the two

[69] *Id.* at 130.

[70] *Id.* at 131.

[71] *Id.*

[72] Nielsen, An Era of Growth: The Cross-Platform Report: Q4 2013, Table 3 (Mar. 5, 2014).

[73] Free Press, Petition to Deny, MB Docket No. 14-57, at 23 (Aug. 25, 2014) ("Free Press Petition").

largest mobile providers in the United States, have unique data plans for mobile devices such as tablets and smartphones. Verizon estimates that an hour of streaming HD video on a tablet requires 1 GB[74] and an hour of streaming video on a smartphone requires 250 MB for a 3G phone and 350 MB for a 4G phone.[75] AT&T estimates that an hour of HD streaming, on a tablet or smartphone, requires 306 MB.[76] Based on this information, to replace an average month of television consumption would require Verizon customers to purchase 50 GB of data for a smartphone at $420 per month or 100 GB for a tablet, which would cost $710 per month, plus data overages and device charges. We estimate that an AT&T subscriber would need 46 GB of data to replace an average month of television consumption. Substituting a home broadband connection with an AT&T smartphone plan would cost about $225 a month plus device charges. In comparison, TWC offers a 15 Mbps (upgraded to 50 Mbps in some service areas) connection for $34.99 a month, with unlimited data consumption.[77]

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[74] Data Calculator, Verizon, http://www.verizonwireless.com/b2c/splash/dataShareCalculator.jsp (select "Tablet"; then select "Calculate"; then select "60 minutes streaming HD video").

[75] *Id.* (select "Internet Device 3G"; then select "Calculate"; then select "60 minutes streaming HD video"); (select "Internet Device 4G"; then select "Calculate"; then select "60 minutes streaming HD video").

[76] Data Calculator, AT&T, Data Legend for Tablet, Data Legend for Smartphone, http://www.att.com/att/datacalculator/#fbid=nqpvsFL08Sd (last visited Dec. 16, 2014). AT&T estimates each hour of streaming HD video takes 306 MB. Consuming 155 hours of video would require 46 GB of data.

[77] *High Speed Internet Plans and Packages*, Time Warner Cable, http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html (last visited Dec. 17, 2014); Press Release, Time Warner Cable, Time Warner Cable Completes "TWC MAXX" Rollout in Los Angeles and New York City (Nov. 13, 2014), *available at* http://www.timewarnercable.com/en/about-us/press/twc-completes-twc-maxx-rollout-in-la-and-nyc.html.

Pricing Mobile Broadband as a Substitute for Home Broadband or MVPD Service Based on 155 Hours of Video Consumption			
Provider	**Estimated Data Required**	**Plan**	**Price to Replace Average American Monthly TV Viewing**
Verizon (4G smartphone)	53 GB	MORE Everything Plan/50 GB	$375/mo + $45 for 3 GB + $40 monthly line access fee
Verizon (4G tablet)	155 GB	MORE Everything Plan/100 GB	$710/mo + $15 per each GB over + $10 device charge
AT&T (smartphone)	46 GB	Mobile Share Value Plans/60 GB	$225/mo + $40 monthly device charge[78]
AT&T (tablet)	46 GB	Mobile Share Value Plans/60 GB	$225/mo + $10 monthly device charge[79]

Applicants offer the GSG survey as evidence that cable broadband providers are constrained from anticompetitive practices by the threat that consumers might supplant cable service with mobile broadband, or even traditional DSL.[80] The results of Applicants' survey, however, belie the realities of the significant cost of mobile data plans and the available information on mobile video consumption.

C. DSL

Applicants also claim that DSL is now, and will remain in the future, a competitive alternative to cable broadband. This claim is a departure from the position Comcast executives have taken in investor presentations, which places significant emphasis on the qualitative

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[78] *AT&T Mobile Share Value plans with Unlimited Talk & Text*, AT&T, http://www.att.com/shop/wireless/plans/mobileshare.html (last visited Dec. 16, 2014). Pricing for 60 GB plan—proxy for 46 GB usage—plus a monthly device charge of $40.00 for a smartphone and $10 for a tablet.

[79] *Id.*

[80] Opposition at 134.

differences between cable and DSL. As early as 2007, Comcast CEO Brian Roberts had termed DSL the "new dial-up" during the Bear Stearns Annual Media Conference.[81] In 2008, Comcast Chief Operating Officer Steve Burke repeated the adage that "DSL is the new dial-up," noting that two-thirds of Comcast's high-speed Internet signups were former DSL subscribers.[82] In this proceeding, however, Applicants attempt to downplay the technological superiority of cable broadband, noting that "continuing investments in DSL technology—including fiber-to-the-node ("FTTN"), IP-DSLAM, VDSL2, and pair bonding—have allowed upgraded DSL technologies to compete effectively against cable."[83] Hybrid services that partially utilize DSL technology, such as AT&T's U-Verse, may serve as a comparable substitute for cable broadband for some customers, though as Applicants continue to upgrade speeds, even U-Verse cannot keep up, as it is constrained to speeds of only 45 Mbps. However, Applicants obscure the varying capabilities of these copper technologies by collapsing them under the rubric of "DSL" and ignoring the reality that the speed and signal degradation varies within each system. For example, AT&T's U-Verse broadband combines FTTN with VDSL2 (very-high-bit-rate digital subscriber line) to the home. The combination of these technologies delivers a broadband connection of up to 45 Mbps. IP-DSLAM (Internet protocol-digital subscriber line access multiplexer), however, can only deliver broadband speeds up to 18 Mbps.[84] With cable broadband able to deliver

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[81] Mike Farrell, *Roberts: Cable's Winning the Fight*, Multichannel News (Mar. 9, 2007) ("Cable's Winning Fight"), http://www.multichannel.com/news/marketing/roberts-cable-s-winning-fight/293168.

[82] Joseph Weisenthal, *Comcast Call: Demand For Online Video Helps Boost Marketshare; Growth On Plan*, The Washington Post (Jul. 30, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073000942.html.

[83] Opposition at 125.

[84] AT&T-DIRECTV Application at 19.

considerably faster speeds, inclusion of even hybrid DSL services that cannot reach what Chairman Wheeler considers the "table stakes" for 21st century broadband makes little sense.

Applicants present the Commission's statistics on broadband subscriptions by technology, as evidence that DSL is growing at a faster rate than cable.[85] To support Applicants' assertion that DSL is a reasonable substitute for cable broadband service, Dr. Israel writes that [[ ]] of customers who have disconnected or downgraded service in recent years have switched to DSL.[86] However, neither Applicants nor the FCC distinguish between traditional DSL and the high-speed, hybrid-FTTN systems deployed by AT&T, CenturyLink, and Windstream. Examining subscriber data for DSL and fiber-based systems as discrete categories shows DSL's share of subscribers declining significantly, while fiber-based technologies are growing.[87]

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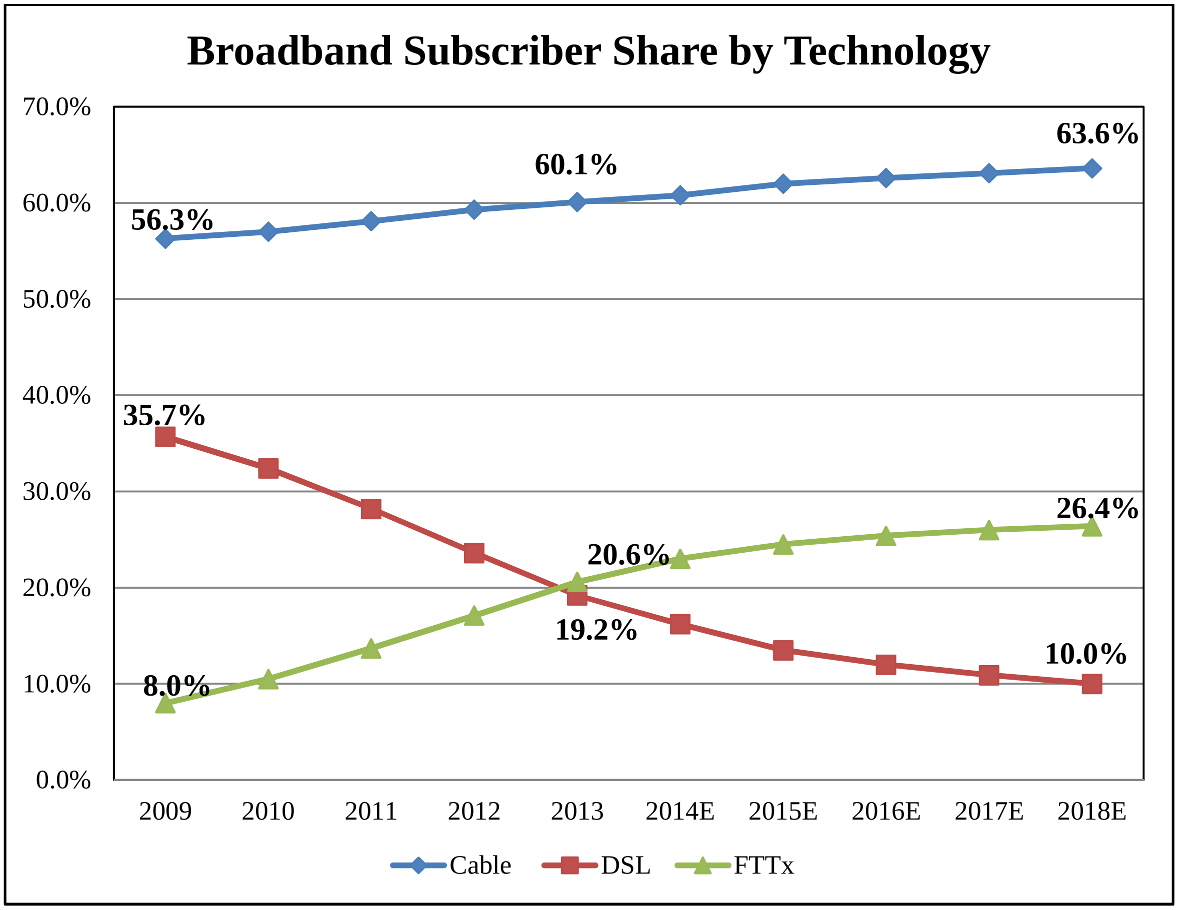
[85] Opposition at 126 & n.380 (citing FCC September 2013 Test Data).

[86] Israel Reply Declaration ¶ 81.

[87] Simon Flannery et al., Wireline Broadband – High Fiber Regimen, Morgan Stanley (Oct. 13, 2014); *see also* Free Press Petition at 30-33.



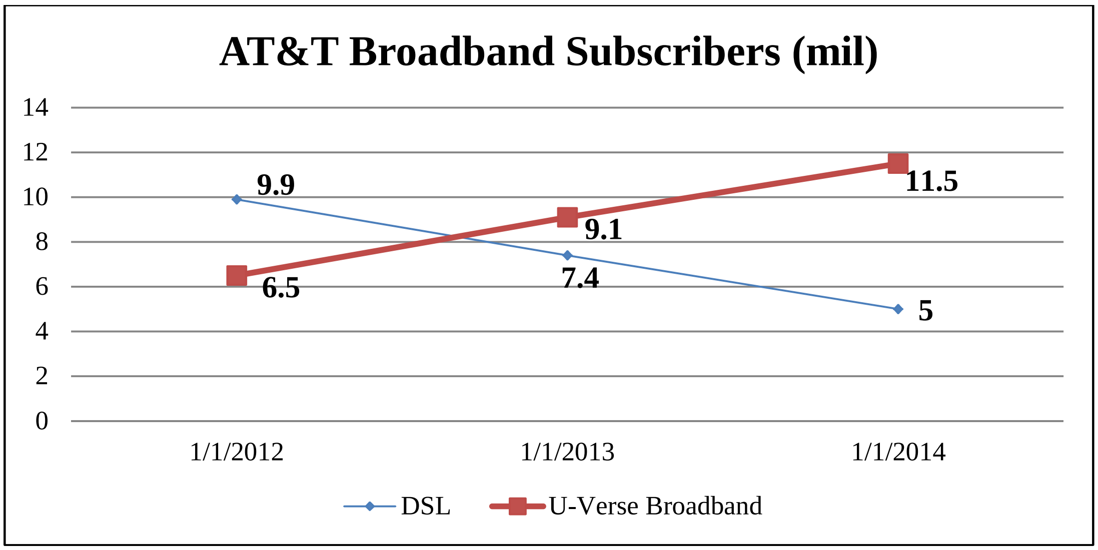
Source: Simon Flannery, Wireline Broadband – High Fiber Regimen, Morgan Stanley, October 13, 2014. (FTTX represents both FTTH and FTTN connections.)

AT&T and Verizon, in addition, are retiring their copper networks, providing further evidence that DSL is a legacy technology that should be excluded from market analysis in this transaction.[88] As previously noted, AT&T's U-Verse service combines fiber to the node and VDSL to the premise to deliver speeds of up to 45 Mbps[89] and in other markets AT&T offers IPDSL, which can deliver speeds of 18 Mbps over copper lines but cannot support MVPD

[88] Petition at 45.

[89] AT&T-DIRECTV Application at 11.

service.[90] AT&T continues to offer legacy DSL service in some markets but households must be within 3 miles of the telephone office and can only receive speeds of 6 Mbps.[91] AT&T views its fiber-based networks as driving broadband growth, which is confirmed by its subscriber trends.[92] In January 2012, AT&T had 10 million legacy DSL subscribers. By January 2014, AT&T had lost *half* of those DSL subscribers. During the same period U-Verse broadband subscribers increased from a little over 6.5 million to 11.5 million.



Source: AT&T Quarterly SEC Filings

[90] *Id*. 12.

[91] *Id.* at 12 n.14.

[92] AT&T Inc., 2013 Annual Report (Form 10-K), at 17 (Feb. 10, 2014), *available at* http://www.att.com/Investor/ATT_Annual/2013/downloads/ar2013_annual_report.pdf. In describing wireline operating results, the report states, "[a]s we transition from basic voice and data services to sophisticated, high-speed, IP-based alternatives, we expect continued growth in our more advanced IP date products while traditional data an DSL revenues continue to decline." *Id.*

In 2013, AT&T began seeking regulatory approval to decommission its copper plant and transition to IP systems in limited geographies, providing further evidence of the increasing irrelevance of DSL technology.[93] AT&T's petition to the FCC described the changes occurring in the broadband industry:

> Providers are not simply infusing new technologies into their legacy network (such as last-mile copper sub-loop facilities used in FTTN architectures). Rather providers are replacing legacy networks and their associated services with new facilities and wholly new services… The end result will be the culmination of a twenty-year trend toward technological convergence. Whereas providers historically offered discrete communications services (such as voice or video) over separate single-purpose "cable" or "telephone" networks, all such services will now be offered as higher-level applications running over unified broadband IP platforms.[94]

Further evidence that DSL is not a comparable broadband product can be found in the Commission's analysis of the Verizon-SpectrumCo transaction in 2012. In that transaction, Verizon purchased unused spectrum from a consortium of cable providers including Comcast and TWC. The companies then entered a joint-operating enterprise ("JOE"), which allowed them to market each other's services. This raised significant concerns about the effect on broadband and video competition. Although the Commission recognized that the JOE could provide a disincentive for Verizon to expand FiOS or offer DSL service in competition with

[93] *Id.* at 36. In describing cost disparities between AT&T and competing broadband providers, the report states, "[o]ver time these cost disparities could require us to evaluate the strategic worth of various wireline operations. To this end, we have begun initiatives at both the state and federal levels to obtain regulatory approvals, where needed, to transition services from our older copper-based network to an advanced IP-based network. If we do not obtain regulatory approvals for this transition or obtain approvals with onerous conditions attached, we could experience significant cost and competitive disadvantages."

[94] AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, and Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution, AT&T Inc., Comments, GN Docket No. 12-353, at 2 (Jan. 28, 2013).

cable–broadband, the Commission declined to adopt specific measures to protect Verizon's DSL service.[95] The Commission explained that:

> As compared to FiOS areas, potential harms within the Verizon footprint where Verizon currently offers only DSL services are reduced to the extent that DSL services are less similar than FiOS to the services of the Cable Companies. As currently deployed by Verizon, its DSL service is less similar to Cable Company services due in part to the lack of a Verizon video service in DSL-only territories and the lower broadband speeds available with DSL compared to FiOS.[96]

The Commission has previously recognized the important differences between cable broadband and DSL, providing further evidence in support of a market definition in this transaction that excludes DSL.

D. Applicants' Response to Fiber Competition

Applicants' response to fiber overbuilders further demonstrates that even they view fiber as their only real competition. Comcast and TWC, when upgrading systems to provide faster broadband speeds, have prioritized the markets where they face fiber competition. For example, in 2012, Comcast introduced a 305 Mbps tier, called "Extreme 305," to match Verizon's 300 Mbps offering.[97] Extreme 305 was offered in select Northeast cities including Baltimore, Boston, D.C., Hartford and Philadelphia, all of which are FiOS markets.[98] In 2013, two months

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95 *Verizon-SpectrumCo Order* ¶ 147. The Commission did restrict Verizon from selling cable products in markets where it was authorized or obligated to deploy FiOS, which included several DSL markets.

96 *Id.* ¶ 153.

97 Karl Bode, *Exclusive: Comcast Prepping 305 Mbps Tier; To Counter Verizon's New Quantum FiOS Offerings*, DSL Reports (July 19, 2012), http://www.dslreports.com/shownews/Exclusive-Comcast-Prepping-305-Mbps-Tier-120450.

98 Steve Donohue, *Comcast Expands 305 Mbps Tier To Boston, Philadelphia, New Jersey, D.C.; Touts Fastest Wireless Gateway*, FierceCable (Sept. 18, 2012), http://www.fiercecable.com/story/comcast-expands-305-mbps-tier-boston-philadelphia-new-jersey-dc-touts-faste/2012-09-18.

after Verizon launched a 500 Mbps tier, Comcast began offering a 505 Mbps tier ("Extreme 505") through a fiber to the premise network. Comcast again introduced Extreme 505 in select Northeast markets that were served by FiOS: Baltimore, Boston, DC, Hartford, Philadelphia and Richmond.[99]

TWC has also prioritized markets for its TWC Maxx initiative of speed upgrades where it faces fiber competition, including Austin, Los Angeles and New York City. Austin has been prioritized because of Google Fiber's entrance into the market. Google's $70 per month gigabit service has prompted competitive offerings from several other ISPs serving the Austin market as well. TWC has completed network upgrades in Austin and is now offering 300 Mbps service, AT&T is planning to offer a $70 gigabit connection and Grande Communications is planning a $65 gigabit service.[100] In Los Angeles, TWC recently announced that it would be able to deliver gigabit speeds by 2016 in response to the City Council's initiative to partner with an ISP to develop a citywide broadband network capable of deliver 1 Gbps.[101] In New York City, TWC faces a number of competitors with high-speed offerings including Cablevision's 101 Mbps,[102]

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[99] Jeff Baumgartner, *Comcast Raises Top-End Residential Broadband Tier to 505 Mbps*, Multichannel News (Sept. 17, 2013), http://www.multichannel.com/news/distribution/comcast-raises-top-end-residential-broadband-tier-505-mbps/261241; Alan Breznick, *Comcast Zips Past Verizon*, Light Reading (Sept. 18, 2013), http://www.lightreading.com/cable-video/comcast-zips-past-verizon/d/d-id/705720.

[100] Karl Bode, *Time Warner Cable Says 300 Mbps 'Maxx' Austin Upgrades Complete*, DSL Reports (Oct. 8, 2014), http://www.dslreports.com/shownews/Time-Warner-Cable-Says-300-Mbps-Maxx-Austin-Upgrades-Complete-130789.

[101] Ryan Faughnder, *Time Warner Cable Promises One-Gigabit Internet For L.A. In 2016*, LA Times (July 18, 2014), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-internet-20140717-story.html.

[102] Judith Messina, *How Broadband Service Lags in NYC*, Crain's (Feb. 18, 2014) (reporting Cablevision offers speeds up to 101 Mbps),

RCN's 110 Mbps[103] and Verizon's 500 Mbps symmetrical service.[104] Applicants' actions demonstrate that fiber broadband, as Chairman Wheeler has stated, is the only technology that "gives the local cable company a competitive run for its money."[105]

Content Creator Petitioners believe that Applicants' enhanced control over the high-speed Internet market, which is appropriately defined by cable and fiber technology, will make them too powerful as distributors of upstream online video and music content. Applicants themselves note that the appeal of high-speed Internet is primarily to support streaming applications. Applicants' economist Dr. Israel writes, "[t]he speed enabled by Comcast's broadband network is well suited to—in fact is *only* fully utilized by—online video content."[106] Although Dr. Israel describes Comcast's high-speed network as "deeply complementary to the growth of online video distributors,"[107] its vertical integration into upstream television and online video markets provides Comcast with significant incentive to use its dominance as a distributor to limit consumer substitution of its MVPD or OVD services for unaffiliated alternatives.

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http://www.crainsnewyork.com/article/20140218/TECHNOLOGY/302169998/how-broadband-service-lags-in-nyc.

[103] High-Speed packages Available in New York City, RCN, http://www.rcn.com/new-york/high-speed-internet/services-and-pricing (last visited Nov. 21, 2014).

[104] *Get Blazing Fast FiOS Internet in New York*, Verizon, http://deals.servicebundles.com/verizon-internet-deals-new-york.html (last visited Dec. 23, 2014).

[105] Wheeler Remarks at 5.

[106] Israel Reply Declaration at 10.

[107] *Id.*

IV. APPLICANTS' DOMINANCE IN THE BROADBAND MARKET WILL HARM UPSTREAM CONTENT MARKETS

In our Petition, we argued that the Commission must recognize that the market for broadband distribution of content is national, that Applicants would have an almost 50% market share of high-speed Internet connections necessary to distribute such content,[108] and that the combination of Comcast's content properties and expanded distribution power from the cable-broadband systems acquired from TWC would significantly enhance Applicants' incentive and ability to harm competition in upstream content markets, particularly among OVDs that compete with Applicants' content offerings.[109] We argued that Comcast's content holdings as well as its subscription video on-demand ("SVOD") and electronic sell-through ("EST") businesses give it an incentive to harm competition in the OVD market, and that its ability to carry out this harm has been demonstrated by the company's actions.[110] This view has been supported by other petitioners in this proceeding. For example, Free Press, Netflix, Inc., and DISH all agree that the market for content distribution over broadband is national, noting Commission and DOJ precedent for this finding.[111] They each also argue that the merger will increase the incentive and ability of the combined company to interfere with unaffiliated OVDs.[112]

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[108] Petition at 48.

[109] *Id.* at 52.

[110] *Id.* at 56.

[111] Free Press Petition at 11; Netflix, Inc., Petition to Deny, MB Docket No. 14-57, at 23 (Aug. 27, 2014) ("Netflix Petition"); DISH Petition at 42.

[112] Free Press Petition at 55-56; Netflix Petition at 75-88; DISH Petition at 69-76.

Applicants attempt to discredit these concerns by claiming that various petitioners misconstrue legal precedent,[113] rehash arguments from the Comcast-NBCU proceeding[114] and cite problems that are not transaction-specific.[115] In particular, Applicants repeatedly attempt to rebut claims of harm by asserting that certain issues are not relevant to this transaction simply because they were or are the subject of other proceedings.[116] Applicants' dismissal fails to allay concerns. Existing incentives and ability to harm the online video market identified in *Comcast-NBCU* and the Commission's Open Internet proceeding remain relevant to this transaction, and will be enhanced if Comcast is allowed to acquire TWC. Allowing Comcast, which has a history of interference with Internet traffic from upstream online content distributors, to acquire TWC, the second largest cable broadband provider, widens the potential for anticompetitive practices such as interconnection interference, usage-based billing and bundling discounts.

A. The OVD Market is National

A number of commenters in this proceeding have cited the market analysis in the AT&T-MediaOne transaction as precedent for recognizing a national market for delivery of broadband content.[117] The AT&T-MediaOne merger would have combined the two largest broadband providers in the nation, giving AT&T control over roughly 40% of the market.[118] That

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[113] Opposition at 20.

[114] *Id.* at 196.

[115] *Id.* at 196-97.

[116] *Id.* at 197.

[117] Free Press Petition at 14; Netflix Petition at 25; DISH Petition at 42-43.

[118] Brian Fung, *14 Years Ago, DOJ Said Letting One Broadband Company Run Half The Country Was A Bad Idea*, The Washington Post (Aug. 28, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/28/14-years-ago-doj-said-letting-one-broadband-company-run-half-the-country-was-a-bad-idea/.

transaction is similar to the proposed Comcast-TWC merger because there was a lack of local competitive overlap between AT&T and MediaOne's broadband services, yet the DOJ found that substantial anti-competitive effects would result from the combined company's control over the national market "for aggregation, promotion, and distribution of residential broadband content."[119] The DOJ considered the effect of the transaction on producers of content for broadband distribution, noting that such providers rely on national distribution to maximize revenue.[120] The DOJ found that through its increased level of control over the broadband market nationally, "AT&T could make it less attractive for unaffiliated or disfavored content providers to invest in the creation of attractive broadband content, and thereby reduce the quality and quantity of content available."[121] Content Creator Petitioners concur with this analysis and urge the Commission to recognize a national market for broadband content delivery in this proceeding.

In other proceedings, the Commission has recognized that some cable programming networks are national, an analysis which should be extended to OVDs.[122] OVDs are an appropriate comparison to national cable networks that "offer programming of broad interest and

[119] Complaint, *United States v. AT&T*, No. 1:00-cv-01176, ¶ 25 (D.D.C. May 25, 2000).

[120] *Id.* ¶ 23.

[121] *Id.* ¶ 34.

[122] General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferees, For Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd. 47331 ¶ 57 (2004); 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*, 21 FCC Rcd. 820339 ¶ 66 ("*Adelphia Order*").

depend on a large, nationwide audience for profitability."[123] Like USA and TNT, which the Commission identified as national cable networks, OVDs such as Amazon or Netflix offer both licensed and original programming across a variety of interest areas. Netflix and Amazon are also spending an estimated $1 billion on original programming in 2014.[124] Series such as Amazon's *Bosch* cost an estimated $2.5 million per episode to produce.[125] To support such investment, OVDs require nationwide distribution. Applicants have also provided information confirming the OVD market is national. In response to the Commission's Information and Data Request number 12, Comcast provides a list of 33 companies entering and exiting the OVD market.[126] Comcast indicates that for all 33 listed OVDs, the service area is national.[127]

The AT&T-MediaOne transaction affirms the importance of assessing the merger's effect on the national market even when there is no direct competitive overlap of service.[128] Because this transaction affects the national market for distribution of broadband content, the Commission must address the significant concentration that will occur in this market if this merger is approved.

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[123] *Adelphia Order* ¶ 66.

[124] 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.

[125] Richard Verrier, *Amazon Is a Rising Star in Hollywood*, LA Times (Sept. 17, 2014), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-onlocation-amazon-hollywood-20140917-story.html.

[126] Comcast Corporation, Supplemental Responses to the Commission's Information and Data Request, MB Docket No. 14-57, Exhibit 12 (Oct. 23, 2014) ("Comcast Supplemental Responses").

[127] *Id.*

[128] Netflix Petition at 25.

B. *Applicants' Well-Established Incentives to Harm Competition in Upstream Online Content Markets will be Enhanced by the Merger*

Applicants claim that they lack the incentive to harm unaffiliated OVDs.[129] This claim contradicts FCC findings in *Comcast-NBCU* as well as business developments in the three years following the merger. In *Comcast-NBCU*, the FCC found that the merged entity would have the incentive to hinder competition from OVDs, noting OVDs that rent or sell movies compete with Comcast's pay-per-view service, and can affect Comcast's pricing.[130] In the years since the Comcast-NBCU merger, OVDs have become more robust alternatives to television networks, leading Comcast to enhance its own OVD services. These developments, in tandem with the proposed merger, significantly enhance Applicants' incentives to harm upstream online content markets.

In our Petition, we documented the growth of the OVD market in terms of subscribers, consumer spending and original programming.[131] While Applicants have attempted to portray the OVD market as complementary to its own services, it is becoming increasingly clear that consumers are spending more time with OVD services, which is leading some content providers to develop their own OVD offerings outside MVPD control. In recent months HBO, CBS, and Univision have announced plans to offer programming directly to consumers online.[132] Michael Nathanson and Craig Moffett of MoffettNathanson Research have highlighted the 9 million U.S.

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[129] Israel Reply Declaration at 93-114.

[130] Comcast-NBCU Order ¶ 81.

[131] Petition at 50-52.

[132] Jared Newman, *Univision Joins HBO and CBS In Hugging Cord Cutters*, TechHive (Oct. 17, 2014), http://www.techhive.com/article/2835323/univision-joins-hbo-and-cbs-in-hugging-cord-cutters.html.

households that have only broadcast television and broadband Internet or only broadband Internet service to explain the trend among television programmers to create OVD services.[133] In addition, Wall Street firm Bernstein Research recently published a report attributing television viewership declines to SVOD offerings.[134] With the OVD market developing as a potential alternative for consumers to MVPD services, the incentive for Applicants to use expanded control of Internet distribution to limit this competitive threat is enhanced.

Since the Comcast-NBCU merger, Comcast has developed several OVD offerings that compete with unaffiliated online distributors. Its OVD services include Xfinity OnDemand, the Xfinity TV Go app, the Xfinity TV Store, and Xfinity Streampix.[135] Some of these services are already comparable to existing unaffiliated OVD offerings. For instance, in December 2013, Comcast reported that its EST service was the number one digital seller of *Despicable Me 2* for the week ending December 3 and the number one digital seller of *The Hunger Games* for the two weeks ending December 3, beating iTunes and Amazon.[136] Comcast was able to take the top spot after launching its EST service only a few weeks earlier, demonstrating the power of its

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[133] Michael Nathanson and Craig Moffett, *It's Baaaack…the OTT Threat Returns with a Vengeance,* MoffettNathanson Research (Oct. 22, 2014).

[134] Todd Juenger, *U.S. Media: The Sharp Decline in C3 TV Audiences Is Real, and SVOD Is to Blame*, Bernstein Research (Oct. 31, 2014).

[135] Press Release, Comcast, Xfinity TV Go Network Roster Tops 50 With Latest Update (Mar. 19, 2014), http://corporate.comcast.com/news-information/news-feed/comcast-customers-can-now-stream-more-than-50-live-channels-anytime-anywhere; *X1: Live TV and On Demand Streaming FAQs*, Comcast, http://customer.comcast.com/help-and-support/cable-tv/live-tv-streaming/ (last visited Dec. 22, 2014).

[136] Todd Spangler, *Comcast Beats Apple and Amazon on Digital Sales of 'Despicable Me2'*, Variety (Dec. 5, 2013), http://variety.com/2013/digital/news/comcast-beats-apple-and-amazon-on-digital-sales-of-despicable-me-2-1200922203/.

subscriber base.[137] In information provided by Comcast to the Commission, it revealed that its Streampix service had almost {{ }} million subscribers as of June 2014,[138] which is {{ }} Hulu has reported for its Hulu Plus subscription service.[139]

These services, like the pay-per-view services identified by the Commission in *Comcast-NBCU*, place Comcast in competition with OVDs and provide incentive to hinder competition in this upstream market. With the addition of 8 million MVPD customers, Comcast's incentive to protect its traditional cable business from customer loss to OVD services is significantly enhanced, and with the acquisition of TWC markets, the potential market for Comcast's OVD services increases along with the incentive to favor its own services over unaffiliated OVDs.

C. Applicants' Increased Control of Broadband Distribution Will Enhance the Ability to Institute Policies that Harm Unaffiliated OVDs

The proposed merger not only increases the incentive of Applicants to harm upstream online markets, but through Comcast's expanded control of Internet distribution, it also significantly increases Applicants' ability to engage in anticompetitive behavior. Because Comcast offers OVD products that compete with unaffiliated providers, its control of roughly 50% of the high speed broadband market will allow it to implement distribution practices that make affiliated products and services more attractive than unaffiliated ones. Through control of interconnection, widespread institution of usage-based billing and extension of Comcast's

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137 *Id.*

138 Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57, {{ }} (Sept. 11, 2014) ("Comcast Responses").

139 Sarah Perez, *Hulu, Now With 6 Million Subscribers, Will Make Some TV Episodes Free on Mobile*, TechCrunch (Apr. 30, 2014), *available at* http://techcrunch.com/2014/04/30/hulu-now-with-6-million-subscribers-will-make-some-tv-episodes-free-on-mobile/.

standalone pricing policies, Applicants can cause significant harm to competition in upstream content markets. The lack of competitive alternatives to cable broadband available to consumers further enhances Applicants ability to successfully engage in harmful behavior.

Numerous commenters, including Content Creator Petitioners, have raised concerns over Comcast's abuse of interconnection agreements to extract unprecedented access fees from unaffiliated OVDs. Applicants have responded that they are precluded from harming OVDs by degrading customer access to OVD content because those customers would switch to other providers. Citing a Comcast-commissioned survey from Global Strategy Group, Applicants claim that "significant majorities of broadband subscribers likely *would* switch ISPs if their provider blocked or degraded access to edge provider content."[140] Applicants also state that "it would be entirely self-defeating and illogical for Comcast to degrade and devalue its services by trying to block or degrade online video traffic or reduce its quality."[141] However, a recent survey found that 47% of broadband users report that it would be difficult to find a broadband ISP in their neighborhood that offers the same quality as their current service,[142] highlighting the reality that many consumers do not have a reasonable alternative should Applicants behave in such a manner. In addition, recent interconnection disputes make clear that the opaque nature of network performance issues limits the ability of consumers to identify the cause of their Internet connection problems.

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[140] Opposition at 203.

[141] *Id.*

[142] John Horrigan, Consumers and Choice In the Broadband and Wireless Markets, at 2 (Nov. 2014), *available at* https://www.publicknowledge.org/assets/uploads/blog/Consumers_and_choice_in_the_Broadband_and_wireless_markets.pdf.

A recent study by M-Lab demonstrates that business disputes between consumer-facing ISPs and backbone Internet providers have “a substantial impact on consumer internet performance.”[143] Yet interconnection issues are so far removed from the consumer experience that an average Internet customer would have little hope of knowing what was preventing him or her from accessing online content. A recent Open Technology Institute (“OTI”) report notes that, during the recent stand-off between Comcast, Netflix and Cogent, “consumers were caught in the middle for at least nine months. Until the press picked up on the issue, and even long after, the companies were not clear with consumers about what was going on.”[144] Susan Crawford’s commentary on the M-Lab study details the experiences of two individuals with higher-than-average tech literacy – a Chief Technology Officer of an investment consultancy firm and a Chief Information Officer of a Pennsylvania school district – who spent months figuring out why their network connections were failing before realizing that interconnection issues were at fault.[145]

The M-Lab study also shows that interconnection issues caused “sustained performance degradation” for customers of AT&T, Comcast, Centurylink, Time Warner Cable and

[143] M-Lab Consortium, ISP Interconnection and its Impact on Consumer Internet Performance, at 4 (Oct. 28, 2014) (“M-Lab Study”), *available at* http://www.measurementlab.net/download/AMIfv94JFcrDC7hm-_myUkP--MKHEVectGpkaKjuuiB2tVGeDLZte2cayIVpOzdFXlL3Qb1ejOu5po19leHyLHc5aMk9qWVdBsy5FFcjypVSOWkcfYJEF96AvCLfbgyWVi898txx7YrUTgaXv-v2SpsFrR_-ImawsA/.

[144] Open Technology Institute, ‘Beyond Frustrated’: The Sweeping Consumer Harms as a Result of ISP Disputes, at 3 (Nov. 2014) (“OTI Interconnection Paper”), *available at* http://newamerica.org/downloads/OTI_Beyond_Frustrated_Final.pdf.

[145] Susan Crawford, *Jammed – The Cliff and the Slope*, Backchannel (Oct. 30, 2014), https://medium.com/backchannel/jammed-e474fc4925e4**.**

Verizon.[146] The OTI report describes complaints from customer forums for multiple providers over time, begging to receive the level of service the customers had paid for.[147] It is dubious to claim that a customer whose ability to view OVD content was impaired would find much recourse by switching to another of these major ISPs. It is clear that interconnection access can be used to harm unaffiliated OVDs and consumers will likely have little understanding of the nature of the problem, much less the power to do anything about it. It is also a foregone conclusion that ISPs such as Comcast will leverage their control over interconnection points to degrade their customers' access to the Internet.

In addition to interconnection, many commenters note that implementation of data caps or usage-based billing ("UBB") practices can harm the OVD market.[148] Applicants claim that such concerns are irrelevant and misguided, and that UBB does not harm consumers.[149] However, UBB practices are a relevant concern for this merger because they provide additional opportunity for anticompetitive behavior against OVDs and because they raise customers' costs in an arbitrary manner. UBB practices have the potential to discourage substitution of online video viewing for a cable subscription and provide opportunities to steer consumers towards affiliated products, a concern Content Creator Petitioners have raised regarding the differential treatment of Comcast's Xfinity Streampix service versus other video streaming services in UBB

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[146] M-Lab Study at 4.

[147] OTI Interconnection Paper at 14-16.

[148] Netflix Petition at 71-73; Roku, Inc., Petition to Deny, MB Docket No. 14-57, at 13 (Aug. 25, 2013) ("Roku Petition"); DISH Petition at 62; Public Knowledge and Open Technology Institute, Joint Petition to Deny, MB Docket No. 14-57, at 34 (Aug. 25, 2014); Free Press Petition at 52.

[149] Opposition at 235-37.

trials. That this claim remains unaddressed demonstrates the inadequacy of *Comcast-NBCU* conditions to prevent such harm.

Applicants claim UBB trials are "based on the principle that those who use more should pay more."[150] This is a sound principle, but such a tiered system is already in place in the form of differentially priced speed tiers. A consumer who intends to use his or her broadband connection more heavily and for such data-intensive activities as video or music streaming is almost certainly *already paying more* than a light-use consumer by subscribing to a higher-speed tier. In addition, consumers who pay for faster speeds, being more likely to be high-use households, will then hit the data caps faster, compounding the price discrimination. Data caps, therefore, raise the cost for those consumers who would use the Internet more, making substitution of Internet video for a cable subscription unaffordable. In addition, the relevant cost to ISPs of making additional capacity available compared to the price to consumers of additional data reflects the behavior of a monopolist.[151] UBB merely allows Comcast to extract more profit from customers who have few alternatives and discourages use of competing online video services.

Indeed, Comcast can significantly increase the cost to its Internet subscribers through UBB practices. Considering the two highest widely-available speed tiers of [[

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[150] *Id.* at 237.

[151] Free Press Petition, at 44-45, Figure 11, Comcast Average Network Speeds vs. Network Investment, Figure 12, Comcast Annual Capital Expenditures for Scaleable Infrastructure, Line Extensions, and Upgrade/Rebuilds. Free Press's data reveal the relatively low cost to Comcast of DOCSIS 3.0 deployment and speed increases.

]][152] which are offered at promotional rates of between $59.99 and $89.99 per month, in Comcast's standard UBB scenario of charging $10 for every 50 GB of data over 300 GB per month, a household would add $130 to their bill by substituting online viewing for average monthly television consumption, resulting in a monthly bill of $199.99 to $219.99.[153] Comcast's Executive Vice President has stated that Comcast envisions moving to a "usage-based billing model" for all customers within the next five years,[154] while TWC has stated that its customers "will always have access to unlimited broadband."[155] The possibility that these harmful and potentially discriminatory practices could be expanded to the entirety of both Comcast's and TWC's cable systems represents significant harm to consumers.

Applicants may also threaten the development of a robust upstream OVD market by raising the price of standalone broadband service. Applicants' Opposition dismisses this

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153 Petition at 56-57; Comcast Reponses at 158. Comcast notes that, in only one of its UBB trials, it provided customers at higher speed tiers larger data allotments than 300 GB. The Extreme 105 tiers were given a 600 GB allotment. A household of two where each watches the U.S. average of 155 hours of television per month would require at least 930 GB of data to completely substitute online video for television viewing, using a Netflix estimate of 3 GB of data for one hour of HD video. This household would still have to pay an extra $70 per month for enough data in Comcast's most consumer friendly UBB trial.

154 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; and Comcast website, http://customer.comcast.com/help-and-support/internet/data-usage-what-are-the-different-plans-launching.

155 Jeff Simmermon, *Launching an Optional Usage-Based Broadband Pricing Plan in Southern Texas*, Time Warner Cable Untangled (Feb. 27, 2012), http://www.twcableuntangled.com/2012/02/launching-an-optional-usage-based-pricing-plan-in-southern-texas-2/.

potential harm, claiming that "[c]ontrary to some commenters' concerns, there is no evidence to suggest that Comcast will limit the attractiveness of standalone broadband to its new customers."[156] Applicants' response fails to reflect the basic facts of their respective services. As documented by the New York Public Service Commission ("NY PSC"), Comcast aggressively discounts the price of its double-play, video and Internet packages in comparison to its standalone Internet products. Comcast's discounts for its bundled service range from just over $10 per month to over $60 per month, averaged over 24 months to account for promotional rates.[157] The pricing of a Comcast bundle is sometimes even less than the cost of the relevant standalone video product.[158] In comparison, TWC's discounts are minimal.[159] Comcast's behavior limits the attractiveness of standalone broadband and reflects the incentive to use its power in distribution to limit the development of a competitive OVD market by keeping customers locked in the cable bundle. Allowing Comcast to extend its control over the national broadband market will increase its ability to engage in such harmful behavior.

V. THE MERGER WILL FORECLOSE THE LIKELY DEVELOPMENT OF DIRECT COMPETITION BETWEEN APPLICANTS

[156] Opposition at 87.

[157] New York Public Service Commission, Comments, MB Docket No. 14-57, at 8 (Aug. 25, 2014).

[158] *Id.* at 9.

[159] *Id.* at 8. The N.Y. Public Service Commission's data show that TWC's bundle discounts consistently under $10 per month.

In our initial filing we noted that distribution of video programming was moving from facilities-based competition to virtual offerings separated from the physical transmission component.[160] Netflix has proven the viability of this model and we noted that both DISH[161] and Sony[162] are preparing to offer linear channel subscription services direct to consumers online. These developments are not speculative, as several programmers including Disney, CBS and Viacom have confirmed licensing deals with these services.[163] In addition, Verizon, the third largest broadband provider, also plans to launch a virtual MVPD service by mid-2015.[164] At the same time, MVPD subscriptions are beginning to decline.[165] With video distribution moving to the virtual space, and with Comcast and TWC already offering online services, we argued that Comcast and TWC would eventually offer their virtual services outside their existing cable markets, thus becoming direct competitors, if the merger were denied.[166] Applicants' economists

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[160] Petition at 59.

[161] *Id.*; Liana B. Baker and Varun Aggarwal, *DISH Eyes Internet TV Services in Landmark Disney Deal*, Reuters (Mar. 4, 2014), http://www.reuters.com/article/2014/03/04/us-dish-disney-idUSBREA222A720140304.

[162] Petition at 59; Dorothy Pomerantz, *Viacom Sony Deal Will Make Cord Cutting Even Easier*, Forbes (Sept. 10, 2014), http://www.forbes.com/sites/dorothypomerantz/2014/09/10/viacom-sony-deal-will-make-cord-cutting-even-easier/.

[163] Jared Newman, *Internet TV from DISH and Sony Isn't Looking So Cheap Anymore*, TechHive (Oct. 7, 2013), http://www.techhive.com/article/2692399/internet-tv-from-dish-and-sony-isnt-looking-so-cheap-anymore.html.

[164] Jeff Baumgartner, *Verizon CEO: Internet TV Service Coming in Mid-2015*, Multichannel News (Sept. 11, 2014), http://www.multichannel.com/news/technology/verizon-ceo-internet-tv-service-coming-mid-2015/383764.

[165] Janko Roettgers, *Pay TV Penetration Continues to Decline as New Households Don't Get Cable*, GigaOm (Sept. 3, 2014), https://gigaom.com/2014/09/03/pay-tv-penetration-continues-to-decline-as-new-households-dont-get-cable/.

[166] Petition at 61.

claim that the companies are not likely to compete with out-of-footprint OVD services.[167] However, because Comcast offers SVOD and EST services that compete in a national market, it makes little economic sense to artificially restrict such offerings to customers within their cable footprint.

A. Video Distribution is Transitioning from Facilities-Based Systems to Virtual Systems

In the few months since initial comments were filed, market developments have provided further evidence of the likelihood that Applicants, absent the merger, would develop virtual offerings that extend outside of their geographic footprint and potentially into direct competition with each other. Chairman Wheeler has asked the Commission to initiate a proceeding to adopt a technology-neutral definition of MVPD service that would include OVDs that offer linear and prescheduled programming lineups.[168] Such a definition has been under consideration for a number of years, starting with a program access complaint initiated by Sky Angel, an OVD, against Discovery Communications in 2012.[169]

As reported in previous sections, both CBS[170] and HBO[171] will begin offering standalone OVD services starting in 2014 and 2015, respectively. HBO CEO Richard Plepler, when

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[167] Rosston/Topper Reply Declaration ¶ 33.

[168] Edward Wyatt, *FCC Proposal Would Allow a la Carte Internet Video Services*, New York Times (Oct. 29, 2014), http://bits.blogs.nytimes.com/2014/10/29/f-c-c-proposal-would-allow-a-la-carte-internet-video-services/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1.

[169] Terms Multichannel Video Programming Distributor and Channel as raised in the pending Program Access Complaint, Writers Guild of America, West, Comments, MB Docket No. 12-83 (May 14, 2012).

[170] Jeanine Poggi, *CBS Starts Offering Its Signal Over the Web as Over-the-Top Gates Open*, Ad Age (Oct. 16, 2014), http://adage.com/article/media/cbs-launches-streaming-top-digital-tv-service/295440/.

announcing the new HBO service, noted that there are 10 million broadband only households in the U.S. and that domestic OVD apps grow revenue through international distribution.[172] Plepler also noted that since MVPDs are the primary broadband providers in the United States, they also stand to benefit from availability of premium OVD service, saying, "[t]hey're [MVPDs] going to make money. I think this is a great inflection point for all of our businesses."[173]

B. *Absent the Merger, Comcast and TWC Would Likely Become Direct Competitors in the National Market for OVD Services*

The DOJ's Doctrine of Actual Potential Competition states that harm to potential competition occurs when the transaction "eliminate[s] the possibility of entry by the acquiring firm in a more procompetitive manner . . . result[ing] in lost opportunity for improvement in market performance resulting from the addition of a significant competitor."[174] Rosston and Topper, claim that the merger will not affect potential competition, stating Comcast and TWC "have not seen it profitable to build new cable systems outside their franchise areas. Therefore, the transaction will not reduce potential competition among MVPD providers."[175] They also write, "[n]or has either company found it in its interest to make the major investment necessary

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[171] Cynthia Littleton, *HBO to Launch Standalone Over-the-Top Service in U.S. Next Year*, Variety (Oct. 15, 2014), http://variety.com/2014/tv/news/hbo-to-launch-over-the-top-service-in-u-s-next-year-1201330592/#.

[172] *Id.*

[173] *Id.*

[174] U.S. Department of Justice, *Non-Horizontal Merger Guidelines*, § 4.112 (June 14, 1984), *available at* http://www.justice.gov/atr/public/guidelines/2614.htm**.**

[175] Declaration of Dr. Gregory L. Rosston and Dr. Michael D. Topper, An Economic Analysis of the Proposed Comcast-Time Warner Cable Transaction, MB Docket No. 14-57 ¶ 173 (Apr. 8, 2014) ("Rosston/Topper Declaration") (attached as Exhibit 4 to Application).

to successfully enter as an OVD, especially given the lead of existing OVDs."[176] While such assertions help Applicants make their case for merger approval, changes in the market as well as Applicants' development of OVD services contradict these statements.

Substantial evidence has been provided to confirm that video distribution no longer necessarily requires control of the physical transmission. Rather, services such as Amazon Prime and Netflix have demonstrated that virtual distribution is viable and attractive to consumers. Applicants have positioned this merger as the only way for Comcast or TWC to grow, but virtual expansion is a pro-competitive alternative that is likely to occur if the transaction is not approved. Comcast also appears to foresee such a future, with CEO Brian Roberts telling the New York Times in March that cable is a "relic of an antiquated model."[177] Mr. Roberts goes on to say, "We want to be a tech company, not a wire company…We want to lead, to innovate."[178] Comcast has already made significant progress in preparing its cable service for virtual distribution. Comcast's X1 set-top-boxes and DVRs are migrating to cloud based systems, which will enhance content portability for their customers.[179] The X1 platform allows customers to DVR up to four programs at once and makes playback available on multiple devices. The capabilities of the X1 platform, supported by Comcast's WiFi network and extensive content holdings, position Comcast to offer a compelling, virtual product. Another

[176] *Id.*

[177] James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, New York Times (Mar. 28, 2014), http://www.nytimes.com/2014/03/29/business/a-vision-for-comcast-in-a-post-merger-world.html.

[178] *Id*.

[179] Peter Lauria, *Why Comcast May Soon Launch an Online-Only Subscription Service*, BuzzFeed News (Sept. 30, 2014), http://www.buzzfeed.com/peterlauria/why-comcast-may-be-next-to-launch-a-streaming-video-service.

sign of Comcast's move toward virtual service is the recent announcement that customers can bring their equipment to any UPS store to return, free of charge.[180] The movement towards a model of shipping items to consumers rather than the requirement of a physical customer location indicates the potential for expansion beyond the company's wired footprint without significant added cost. Comcast's SVOD service, available only in Comcast territories, already has {{ }} subscribers.[181] Expanding this virtual service beyond its geographic boundaries would enhance competition among SVOD services and likely add millions to Comcast's subscriber base.

Comcast's OVD services compete with national providers including Netflix, Hulu, Amazon and Apple. Limiting its offerings to a specific geography makes little strategic sense, because it limits the attractiveness and competitiveness of its service. If the merger is not approved, it is very likely that Applicants will begin to offer services outside of their geographic markets.

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[180] Comcast, *Walk In. Drop Off. That's It* (Oct. 20, 2014), http://corporate.comcast.com/news-information/news-feed/comcast-ups.

[181] Comcast Responses, {{ }}.

VI. MERGER BENEFITS ARE NOT VERIFIABLE OR TRANSACTION SPECIFIC

Applicants argue that a key function of this merger is to provide economies of scale that will drive public interest benefits[182] and enable the deployment of advanced video products and services.[183] Applicants' circular logic asserts that scale is imperative to the claimed public interest benefits, and therefore, the benefits are transaction-specific because they would not occur without the efficiencies of scale produced by this transaction.[184] Applicants draw comparisons to prior transactions such as Comcast's acquisitions of AT&T Broadband and Adelphia, claiming economies of scale resulting from these transactions enabled larger fixed cost investments and the deployment of advanced services.[185]

In an attempt to make the case for economies of scale, Applicants have lost track of their own spin. Comcast claims that the acquisition of TWC's customer base will transform its incentives regarding investment in research and development and product innovation. And Applicants also go to great lengths to diminish the magnitude of this transaction. Applicants and their economists argue that the combination of Comcast and TWC will result in economies of scale that will drive investment in new technology to benefit consumers. Yet, information provided on current and future penetration of the X1 platform raises significant questions about benefits flowing to consumers.

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[182] Opposition at 80.

[183] *Id.* at 60.

[184] *Id.* at 81-82.

[185] *Id.* at 82.

For example, Rosston and Topper claimed in their initial declaration, "Comcast's investment in its X1 platform provides an example of how the increased scale enabled by the transaction can facilitate investment in advanced services."[186] Rosston and Topper then claim that although Comcast made a large investment in X1, "[i]f Comcast had a larger scale, it could have justified additional upfront investment in X1 because having additional X1 customers leads to greater positive net cash flows."[187]

While Applicants' economists claim greater scale is needed, in an attempt to downplay concerns regarding Comcast's consumer premises equipment ("CPE") being used to limit access to unaffiliated content, Comcast notes that the X1 platform is still nascent.[188] Comcast reports that X1 is only used by {{ }} today and only expected to reach {{ }} penetration of Comcast subscribers over the next five years.[189] With Comcast reporting only {{ }} of deployed set-top boxes using X1 today and {{ }} of customers expected to still not have X1 in five years, it is clear that increased scale is not necessary for investment because Comcast invested in a product that will reach only a fraction of customers.[190] Further, the fact that Comcast expects almost {{ }} subscribers will still be using legacy equipment {{ }} from now raises the question of how economies of scale benefit

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[186] Rosston/Topper Declaration at 32.

[187] *Id.* 33 (internal citations omitted).

[188] Comcast Responses at 123.

[189] *Id.*

[190] *Id.*

consumers, particularly when Comcast charges customers an upgrade fee to access the X1 platform.[191]

In addition, while Applicants reference the Adelphia and AT&T Broadband transactions as evidence that increased scale benefits the public interest, the comparisons obscure transaction specific issues. Applicants' economists "set out *specific* examples of how economies of scale in these prior transactions enabled Comcast to undertake larger fixed cost investment in infrastructure and in providing advanced services, showing that such efficiencies are not merely theoretical."[192] The examples cited by Rosston and Topper, however, do not accurately represent the relevant considerations in those transactions. In AT&T Broadband and Adelphia the benefits enabled by scale were evaluated by the Commission in order to assess their likelihood absent the transaction and whether they outweighed the harms posed. Both the AT&T Broadband and Adelphia transactions were significantly different than the instant proceeding, and are inappropriate to use as proof that potential scale efficiencies in this merger result in benefits that sufficiently outweigh the harms.

In the AT&T Broadband merger, Comcast and AT&T argued that scale resulting from the merger would allow Comcast to upgrade AT&T's cable systems and deploy new services, which AT&T had been slow to execute "as a result of rising capital costs and significant budget constraints related to its heavy debt load."[193] The Commission accepted that, because AT&T's

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[191] Jeff Baumgartner, *Comcast Details X1 'Upgrade Fee'*, Multichannel News (Feb. 11, 2014), http://www.multichannel.com/news/content/comcast-details-x1-upgrade-fee/356207.

[192] Opposition at 82 (emphasis in original).

[193] Applications of Comcast Corporation and AT&T Corp. for Consent to the Transfer of Control of Licenses, MB Docket No. 02-70, 30, 32 (Feb. 28, 2002).

upgrades were hindered by financial constraints, Comcast was likely to accelerate the deployment of broadband services in AT&T service areas, and identified this as the only transaction-specific public interest benefit.[194] In addition, there were no vertical integration concerns to be outweighed in this transaction, as AT&T and Comcast each owned minimal interests in video programming aside from AT&T's interest in Time Warner Entertainment,[195] which was divested as a condition of the merger approval.[196] In the absence of additional harms recognized by the Commission, the transaction-specific benefit of accelerated broadband deployment was sufficient to result in a net positive for the public interest. This is not an appropriate comparison for the current transaction, in which there are significant vertical integration concerns and potential harms in both the MVPD and broadband markets. Further, TWC has not been handicapped in its capital expenditures, having already announced investments of $100 million each year in network maintenance[197] and almost $4 billion each year in capital expenditures for, among others things, network line extensions and enhancements.[198]

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194 Applications of Comcast Corporation and AT&T Corp. For Consent to the Transfer of Control of Licenses, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246 ¶¶ 217-18 (2002).

195 *Id.* ¶¶ 14, 19, 20.

196 *Id.* ¶ 216.

197 Time Warner Cable Earnings Call, Q4, 2013 Results, Seeking Alpha (January 30, 2013), http://seekingalpha.com/article/1981291-time-warner-cable-management-discusses-q4-2013-results-earnings-call-transcript?part=single. Arthur Minson, CFO and EVP commented, "[t]o 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." *Id.*

198 Time Warner Cable, TWC Operational and Financial Plan, at 18. (Jan. 30, 2014), *available at* http://ir.timewarnercable.com/files/4Q13/TWC_Operational%20and_Financial%20Plan_vFINAL.pdf.

In the case of Adelphia, the role of scale in Comcast and Time Warner's arguments for the transaction was primarily that geographic clustering would accelerate the roll-out of advanced services and provide efficiencies of scale.[199] Rosston and Topper claim, in the context of this transaction, that "after Comcast's and TWC's acquisition of Adelphia's cable systems, Comcast and TWC substantially increased investments in those systems to enable them to provide advanced digital services,"[200] drawing the conclusion that the economies of scale enabled the investments. While this may be true, the Commission did not ultimately give significant weight to the companies' claim that clustering would lead to efficiencies and savings. In *Adelphia*, the Commission wrote that it "[does] not find that the increased clustering will result in a better competitive environment for video programming service. Therefore, we cannot give weight to this claimed benefit."[201] Instead, the Commission's conclusion that the transaction was likely to accelerate the provision of advanced video services was based on the likelihood that Adelphia's bankruptcy proceedings would delay large-scale upgrades and service improvements, and that they would occur faster if the transaction took place.[202] In addition, while the Commission expressed concern that the transaction could cause some vertical harms given the companies' ownership of regional sports networks,[203] the programming interests held by the companies, and therefore the related vertical harms, were minimal. In *Adelphia*, the

[199] Applications of Adelphia Communications Corporation, Time Warner Cable Inc., Comcast Corporation for Consent to the Assignment and/or Transfer of Control of Licenses, MB Docket No. 05-192, at 69 (May 8, 2005).

[200] Rosston/Topper Reply Declaration ¶ 12.

[201] *Adelphia Order* ¶¶ 2, 75.

[202] *Id.* ¶ 259.

[203] *Id.* ¶ 298.

benefits, though not entirely reliant on scale, were substantively transaction-specific, and were weighed against a relatively smaller set of harms.

In these two transactions, the deployment of advanced services were deemed transaction-specific because they would have occurred significantly more slowly absent the transaction, either due to the lack of requisite capital (*AT&T Broadband*) or the delays caused by bankruptcy (*Adelphia*). In addition, the transactions presented minimal vertical harms because Comcast owned few programming assets. Thus, the AT&T Broadband and Adelphia transactions posed relatively fewer competitive threats than the transaction currently before the Commission.

It is indisputable that there are significant harms posed by this transaction because it amplifies vertical integration concerns of *Comcast-NBCU* by expanding Comcast's control over distribution. This threatens the MVPD market, the national market for video programming, the broadband market, upstream content creators and OVDs, and poses great harm to the public interest. It is also dubious that the benefits Applicants claim to be enabled by scale are actually transaction-specific. TWC's 2013 net income was $1.954 billion,[204] and its investments in network upgrades are already well underway. Despite Comcast's repeated claims to the contrary, there is no evidence that Comcast will execute these upgrades faster than TWC would. Comcast's economists note that the upgrades to TWC's network should be complete within 36 months or by early 2018 if the merger were to be approved in early 2015.[205] Since TWC has already reported that 75% of its systems will be upgraded by 2016, and we reasonably assume

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[204] Time Warner Cable Inc., Annual Report (Form 10-K) (Feb. 18, 2014), *available at* http://timewarnercable.q4cdn.com/4df09cbc-cdb1-44ad-b461-b192c7f32a61.pdf.

[205] Rosston/Topper Reply Declaration ¶ 35.

that TWC will not stop upgrading the system once 75% is reached, Comcast is simply not guaranteeing a faster upgrade. Scale may have been a benefit sufficient to outweigh the harms in Comcast's prior horizontal transactions, but in this case, this speculative benefit does not come close to outweighing the substantial harms.

VII. CONDITIONS

The record in this proceeding demonstrates broad concern that the transaction does not serve the public interest. Many participants, including Content Creator Petitioners, have offered specific evidence to support the finding that a Comcast-TWC merger will result in significant anticompetitive and anti-consumer harms, and that merger benefits, including voluntary conditions offered by Applicants, do not adequately address such harms. The outcome that best serves the public interest is a denial of the merger. However, should the Commission choose to approve the transaction, we urge the adoption of strong, enforceable conditions that limit Comcast-TWC's power as a distributor of television and online programming. The Commission's conditions should be mandatory for a minimum of ten years. While these conditions could mitigate some of the foreseeable harms to upstream content markets, they are in no way exhaustive nor do they address the myriad concerns raised in this proceeding

A. Program Carriage Conditions

1. Comcast and Charter may not negotiate program carriage on behalf of Bright House and GreatLand Connections (formerly Spinco)

As Content Creator Petitioners have detailed, the merger of Comcast and TWC will significantly increase Applicants' power and leverage over television programmers. Post-merger, Applicants will directly control almost 30% of the MVPD market. Applicants also propose to continue to negotiate program carriage agreements on behalf of Bright House's 2.5

million subscribers, which will further increase Comcast's power as a programming buyer. Should the Commission approve the merger, it must require that Applicants sever their relationship with Bright House. In addition, Applicants have framed divestitures to Charter and the creation of a new MVPD, GreatLand Connections, as a pro-competitive outcome of the merger. To prevent further concentration of buyer power among MVPDs, the Commission must also require that Charter and GreatLand Connections negotiate program carriage agreements with networks separately from one another.[206]

2. Enhanced Programmer Protection From Discrimination

Section 616 of the Cable Act of 1992 instructed the FCC to adopt regulations to prevent MVPDs from discriminating against unaffiliated programmers.[207] Complaints of violations of Section 616 require proof that the discrimination constituted an unreasonable restraint on competition. In *Comcast-NBCU,* the FCC enhanced Section 616 protections by requiring that a programmer only prove that Comcast discriminated against them.[208] Despite this modification, several programmers have reported challenges in negotiating carriage agreements with Comcast. Many of the comments filed in this proceeding, in addition, describe Comcast's discriminatory

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[206] Letter from Kathryn Zachem, Comcast Corporation, et al. to Marlene Dortch, MB Docket No. 14-57, Exhibit A (Dec. 2, 2014). The Charter Services Agreement states, "Charter will have the ultimate decision-making authority regarding negotiating and entering into agreements with suppliers of video programming services ("Video Programming Services") to provide Video Programming Services that apply to both the Charter Systems and to the GreatLandGreatLand Systems, including retransmission consent agreements for broadcast television stations . . . ." *Id.*

[207] 47 U.S.C. § 536.

[208] *Comcast-NBCU Order* ¶ 121.

treatment towards unaffiliated programmers.[209] Contrary to Comcast's claim that program access concerns merely rehash NBCU merger issues, Comcast's growth as a distributor enhances its incentive and ability to foreclose unaffiliated programmers.[210] The Commission should, therefore, enhance the anti-discrimination rule in the following ways:

- Extend the non-discrimination prohibition for an additional 10 years.[211]
- Shift the burden of proof so that Comcast, rather than the programmer, has to show that it did not discriminate.[212]
- Offer expedited dispute resolution process and standstill relief.[213]
- Require binding private arbitration when independent programmers are denied carriage or renewal.[214]
- Expand neighborhood conditions to other programming verticals.[215]

3. Additional Distribution Rights

The increased horizontal scale facilitated by this merger will enhance Applicants' power to demand additional or exclusive distribution rights in program carriage negotiations. To protect competition in the OVD market, Applicants must be prohibited from demanding exclusive distribution rights for online, mobile or other technologies from either affiliated or

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[209] *See* RFD-TV, Comments, MB Docket No. 14-57 (Aug. 25, 2014) ("RFD Comments"); WeatherNation TV, Inc., Petition to Deny, MB Docket No. 14-57 (Aug. 25, 2014) ("WeatherNation Petition"); The Tennis Channel, Inc., Comments, MB Docket No. 14-57 (Aug. 25, 2014) ("Tennis Channel Comments"); TheBlaze Inc., MB Docket No. 14-57 (Aug. 25, 2014) ("TheBlaze Comments").

[210] WeatherNation Comments at 8.

[211] Tennis Channel Comments at 24.

[212] *Id.* at 27.

[213] Back9Network Inc., Petition to Impose Conditions on Assignment and Transfer of Licenses, MB Docket No. 14-57, at 19 (Aug. 25, 2014); Tennis Channel Comments at 26.

[214] TheBlaze Comments at 21; and Tennis Channel Comments at 28.

[215] WeatherNation Petition at 11.

unaffiliated programmers or from negotiating provisions that restrict the ability of programmers to distribute content by alternative methods.[216]

B. Content Rights Condition

1. Authentication

Time Warner Cable has a demonstrated a willingness to make content available on third-party devices, while Comcast has engaged in more restrictive, anticompetitive behavior. TWC has made programming available to its cable subscribers on alternative distribution devices such as gaming consoles and Roku. TWC's openness facilitates innovation in the device and application markets, thereby increasing consumer choice. Comcast must commit to reasonable and non-discriminatory authentication procedures that do not favor applications or devices.[217] The Commission should require Comcast authenticate television programmer applications on third-party devices if applications have reached authentication agreements with other MVPDs. Comcast should also be required to offer its TV Everywhere application on third-party devices if other MVPDs offer their TV Everywhere service on such devices.

C. Broadband Access Conditions

1. Standalone Broadband

Numerous commenters have emphasized the need for affordable, standalone broadband, which will support the development of a competitive OVD market, expand content choices for consumers and increase competition. The Commission should adopt strong conditions to ensure that consumers continue to have access to affordable broadband. Such conditions must include:

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[216] Tennis Channel Comments at 28.

[217] Roku Petition at 11-14.

- Retain TWC's Everyday Low Price Internet package and make the package available across all Comcast cable systems. The Everyday Low Price package is offered at a non-promotional price of $14.99 per month for 2 Mbps, or 3 Mbps in upgraded areas.[218] The speed should be indexed to the FCC's definition of broadband and future price increases should be indexed to CPI.

- Enhance the *Comcast-NBCU* standalone broadband condition. TWC currently offers three Internet packages that are more competitive than Comcast's "Performance Starter" package, which offers 6 Mbps for $49.95 per month. In contrast, TWC offers a 6 Mbps service for $29.99 a month, a 15 Mbps service for $34.99 a month, and a 20 Mbps service for $44.99 a month.[219] In the areas where the TWC Maxx upgrades have been completed, these offerings are 10 Mbps for $29.99 a month, 50 Mbps for $34.99 a month, and 100 Mbps for $44.99 a month.[220] Performance Starter was created as a condition of the NBCU merger and Comcast is required to offer it through 2015.[221] To protect the ability of consumers to use online music and video services, the Commission must require Comcast to continue offering TWC's broadband services at the current price point for a minimum of 10 years.

2. Competitive Access to Applicants' Broadband Networks

To promote competition in the provision of broadband services, Comcast should be required to lease access to its network to at least two unaffiliated ISPs in each market served by its cable systems. These agreements shall be reasonably priced and non-discriminatory, so that unaffiliated providers may offer competitive broadband service using Comcast's network. Comcast must not interfere with or discriminate against data transmitted over its network by the unaffiliated ISPs. Such a requirement will address the market concentration enabled by this merger by introducing additional competitors who may offer service using Comcast's network.

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[218] *High Speed Internet Plans and Packages*, Time Warner Cable, http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html (last visited Dec. 16, 2014).

[219] *Id.*

[220] High Speed Internet Plans and Packages, Time Warner Cable (enter "zip code 90048"; select "go"), http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html.

[221] *Comcast-NBCU Order* ¶ 103.

3. Municipal Broadband

As noted in Content Creator Petitioners' initial filing, Comcast has a long history of opposing municipal broadband efforts. Municipal broadband is an important mechanism to promote competition and to deploy high-speed broadband in underserved markets.[222] As a condition of this transaction, Comcast, Charter, and GreatLand Connections must agree to recognize the right of municipal governments to deploy broadband networks within their communities. Applicants must further commit not to oppose or lobby against municipal broadband efforts at the federal, state or local level.[223]

4. Internet Essentials

The spirit of Internet Essentials is admirable and Content Creator Petitioners support Comcast's efforts to provide low-income community members with an affordable Internet service. Numerous commenters have highlighted issues with the program and suggested ways to enhance Internet Essentials ("IE"). We urge the Commission to adopt the following improvements to the Internet Essentials program.

[222] Letter from Public Interest Groups to Eric Holder, U.S. Department of Justice, and Tom Wheeler, FCC, MB Docket No. 14-57 (Apr. 8, 2014). Many commenters have recently advocated in favor of municipal broadband initiatives in both the Petition of the City of Wilson, North Carolina, Pursuant to Section 706, WC Docket No. 14-115, and Electric Power Board of Chattanooga, Tennessee, WC Docket 14-116, proceedings. Parties expressing support for municipal broadband efforts include Institute for Local Self-Reliance, Common Cause, Center for Media Justice, Media Mobilizing Project, National Hispanic Media Coalition, Public Knowledge, Writers Guild of America, West, Benton Foundation, The Utility Reform Network (TURN), the Honorable Tommy Wells, and the Honorable David Grosso.

[223] National Association of Telecommunications Officers and Advisors, Comments, MB Docket No. 14-57, at 5-6 (Aug. 25, 2014).

- Expand Eligibility: Comcast should expand Internet Essentials so that individuals on fixed incomes or in special circumstances, such as senior citizens, veterans or persons with disabilities, are eligible to enroll in the program.[224] Comcast should make Internet Essentials available to all residents who are eligible for or are currently enrolled in any form of public assistance.[225] This would be a significant step towards closing the digital divide as cost is one of the primary barriers to Internet adoption.[226]

- Eliminate Enrollment Barriers: Eliminate the requirement that a person may not have been enrolled in Comcast service for 90 days prior to signing up for Internet Essentials.[227] Comcast should take reasonable steps to ensure that prior debts are not an insurmountable obstacle to enrollment and consider debt forgiveness or payment plans within reasonable parameters.

- Establish Enrollment Benchmarks: Comcast should commit to enrolling at least 45% of eligible households in Internet Essentials within two years of the close of these transactions, culminating when, nationwide, low-income neighborhoods have reached 80% broadband adoption (among all providers).

- Provide WiFi Access: Currently, IE modems require a direct connection to the user's computer through an Ethernet or USB cord. Providing WiFi-enabled modems would allow the whole household to take advantage of Internet Essentials.[228] Comcast should also open its WiFi hotspots, located in streets and public areas, for Internet Essentials subscribers.[229]

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[224] Minnesota Association of Community Telecommunications Administrators, Comments, MB Docket No. 14-57, at 5 (Aug. 25, 2014) ("MACTA Comments").

[225] Office of the Mayor of the City of Los Angeles, Comments, MB Docket No. 14-57, at 5-6, (Aug. 25, 2014); Los Angeles County, California; Montgomery County, Maryland; The City of Portland, Oregon; and the Ramsey-Washington Counties (MN) Suburban Cable Communications Commission, Petition to Deny, MB Docket No. 14-57, August 25, 2014, p. 28 ("Counties Petition").

[226] Kathryn Zickuhr, *Who's Not Online and Why*, Pew Research (Sept. 25, 2013), http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/.

[227] MACTA Comments at 4.

[228] Mayor Martin J. Walsh, City of Boston, Massachusetts, Comments, MB Docket No. 14-57, at 6 (Aug. 25, 2014) ("City of Boston Comments"); City of Los Angeles Comments at 6.

[229] City of Los Angeles Comments at 6; LA County-Montgomery County-Portland Petition at 29.

- Charter and GreatLand Connections: Charter has committed to continuing the Internet Essentials program in the markets it will acquire from Comcast.[230] We ask the Commission to require Charter and GreatLand Connections to adopt the Internet Essentials program throughout their entire footprints.

D. Net Neutrality Conditions

Post-merger, Comcast will have enhanced incentive and ability to discriminate against OVD competitors through blocking, degrading the speed or quality of service, and selectively implementing data caps.[231] The effect of these actions will be to drive consumers to Comcast MVPD and OVD services, causing significant harm to the development of online video as a competitive market. In addition, Comcast will be able to use its power over network facilities to advantage Comcast-affiliated applications and websites by making download speeds faster, pictures clearer and eliminating stutter.

Content Creator Petitioners joins with numerous commenters in support of strong Net Neutrality conditions. These conditions should not be time-limited, should apply to all affected parties including Bright House, Charter, Comcast, and GreatLand Connections, and should only be superseded by stronger Commission rules, such as reclassification.

- Prohibit Comcast from restricting, degrading, or otherwise interfering with consumer choice and access to lawfully-available streaming content, platforms and services.
- Prohibit fast lanes and paid prioritization.[232]
- Interconnection should be reasonable and subject to Commission review.[233] If interconnection points reach 70% capacity, Comcast must be required to upgrade ports and cross-connects to avoid congestion.[234]

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[230] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement of Comcast Corporation and Charter Communications, Inc., MB Docket No. 14-57, at 12 (June 5, 2014).

[231] Free Press Petition at 15, 40; City of Los Angeles Comments at 3.

[232] City of Boston Comments at 8; LA County-Montgomery County-Portland Petition at 30.

- Consumers should be informed of how ISPs manage network traffic at interconnection points as this infrastructure is located substantially in public rights-of-way. Comcast must commit to transparent network management practices.
- For a period of 7 years, peering should be settlement-free for any party that had such a relationship with Comcast or TWC as of February 13, 2014.[235]
- Usage-based billing and data caps should be prohibited.

The Commission should open a docket where consumers, edge providers and transit providers may file complaints alleging violations of these conditions. Given the opacity of network performance, parties should also be able to use this docket as a forum to request that the Commission investigate network management practices.

VIII. CONCLUSION

The proposed merger of Comcast and TWC will have significant anticompetitive and anti-consumer effects on both traditional and digital media platforms. It will give one company tremendous power over what content is available and where and how it is available. This transaction follows Comcast's acquisition of NBC Universal and with it, magnifies the harms of that merger. The expanded distribution power of this vertically-integrated company will threaten unaffiliated programmers on both television and the Internet. The result will be that content creators will have fewer outlets to sell to and will be paid less to create and innovate, and consumers will pay more for fewer choices. This outcome is not theoretical because, as demonstrated in this filing, Comcast already offers fewer channels at a higher price than other MVPDs.

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[233] City of Boston Comments at 8; City of Los Angeles Comments at 7-8; Counties Petition at 31; Cogent Communications Group, Inc., Petition to Deny, MB Docket No. 14-57, at 41 (Aug. 25, 2014) ("Cogent Petition").

[234] Cogent Petition at 39.

[235] *Id.* at 40.

The harms detailed in this filing significantly outweigh any potential benefits, which are speculative at best. Applicants claim that this merger will generate public interest benefits, primarily through scale efficiencies. They rely on examples of behavior in past transactions as proof that the benefits of increased scale in this transaction will not "inure solely to the benefit of the" parties.[236] Unfortunately, the benefits of the prior transactions were specific to the circumstances of Adelphia and AT&T Broadband and are not applicable here. In the instant proceeding, TWC is a large, financially-solvent corporation with a multi-billion dollar project to upgrade its networks already underway. There is simply no evidence that TWC has any financial limitations that would prevent the company from continuing its investment in its networks absent the merger.

Approval of this merger is also likely to undermine future competition between the parties. Distribution of video programming is increasingly moving towards the virtual space. Netflix and Amazon have demonstrated that ownership of the distribution facilities is not required to offer video services directly to consumers. Comcast, through the development of its EST and SVOD services, has moved into direct competition with virtual distributors such as Netflix, Amazon and Apple, which all offer services nationally. To compete, it is very likely that Comcast, absent this merger, would begin to offer some of its services outside of its geographic footprint. This could include within TWC's and Charter's footprint. However, approval of this merger makes such a pro-competitive development unlikely.

[236] *Comcast-NBCU Order* ¶ 226.

With a lack of verifiable benefits and a host of competitive and consumer harms, Applicants have not demonstrated that this merger is in the public interest. Rather, WGAW and FMC, along with many other petitioners and commenters have provided significant evidence that this merger is likely to harm competition and choice. For the foregoing reasons, Content Creator Petitioners respectfully request that the Commission deny Applicants' merger application and license transfers.

Respectfully submitted,

/s/

Casey Rae
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APPENDIX

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EXHIBIT A:

DECLARATION OF ELLEN STUTZMAN

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Reply and its appended material, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the Protective Orders in MB Docket No. 14-57, are true and correct to the best of my information, knowledge, and belief.

Executed on December 29, 2014

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

EXHIBIT B:

REPLY TESTIMONY OF WILLIAM S. COMANOR

ON THE

COMPETITIVE AND ECONOMIC CONSEQUENCES OF THE

COMCAST–TIME WARNER CABLE MERGER

December 2014

I am an economist and submitted testimony in August 2014 on the competitive and economic consequences of the proposed merger of Comcast and Time Warner Cable. More recently, Comcast's economists Drs. Rosston and Topper have objected to my judgment that Comcast has exercised monopsony power in the market for video programming, and that its monopsony power would likely be enhanced by its proposed merger with TWC. In this brief statement, I consider their reasons and respond to their conclusions.

There is much on which I agree with Drs. Rosston and Topper. In large measure, we accept the same economic principles although we apply them differently. They emphasize that the exercise of monopsony power "requires the input (here, video programming) having increasing marginal costs, which leads to an upward sloping supply curve."[1] And for this conclusion, they refer to an economics text that is well known and that I once used in my own classes. There is no dispute here.

There is also no dispute that once created, "the supply curve for a content provider's sale of programming . . . is essentially flat at zero."[2] In these circumstances, I agree that the short-run supply curve of video programming is horizontal. However, that conclusion does not apply in the long-run where programming has not yet been created or purchased; and strikingly Drs.

[1] Reply Declaration of Dr. Gregory L. Rosston and Dr. Michael D. Topper, An Economic Analysis of The Proposed Comcast Transactions with TWC and Charter In Response to Comments and Petitions, MB Docket No. 14-57, at 21 (Sept. 23, 2014) (Rosston/Topper Reply Declaration") (attached as Exhibit 2 to Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014) ("Opposition")).

[2] Rosston/Topper Reply Declaration at 22.

Rosston and Topper do not say it does. In fact, they do not say anything about this longer-run in their report. That omission is telling!

Even though short-run supply curves, based on sales of existing programs, may be flat, longer-run supply curves dealing with the number of channels offered of video programming, may be upward sloping; there is no contradiction here. The long-run applies to a new season before programming decisions have been made; and therefore may not be very long at all. Within their limited setting, Drs. Rosston and Topper may be correct, but they are definitely incorrect in circumstances where programming decisions have not been made.

Strikingly, Drs. Rosston and Topper do not dispute the prospect that small to medium MVPDs "tend to pay a higher price than large MVPDs."[3] In effect, they acknowledge Comcast's current exercise of monopsony power. What they question instead is "whether Comcast will obtain anticompetitive leverage in its programming negotiations after the acquisition of TWC and Charter systems."[4] By this statement, they dispute the likely effect of a merger which increases the relevant Herfindahl-Hirschman Index (HHI) by 307 points from values of 1314 to 1621. This increase in the HHI value is large. It shifts the relevant market from one with an Unconcentrated Structure to one considered by the antitrust enforcement agencies to be Moderately Concentrated. According to the US Department of Justice and the Federal Trade Commission, this type of "merger [can] raise significant competitive concerns and

[3] *Id.* at 23.

[4] *Id.*

often warrant[s] scrutiny."[5] For this reason, Drs. Rosston and Topper's disagreement is as much with the federal antitrust authorities as it is with me.

Strikingly, Comcast acknowledges the lower programming payments it expects to offer because of the merger; and that these lower payments exceed {{ }} over a three year period.[6] Drs. Rosston and Topper cannot dispute this acknowledgment, but instead seeks to diminish its importance by suggesting they are actually small relative to the size if the combined firm's programming budget. While that may be so, it does not diminish the impact of lower payments on specialty stations whose fees are lowered or not paid at all. The impact of reduced monopsonistic prices may not be determined in relation to the major programming channels, which absorb the greater share of a MVPDs programming budget, but rather at the programming margin where decisions are made to include specialty channels or not. And there, Drs. Rosston and Topper's comparison has no implications for Comcast's exercise of monopsony power.

With rising supply curves and lower prices paid, Comcast has exercised monopsony power in the past, and it expects to see that power enhanced through its acquisition of TWC and Charter cable systems. As emphasized in my earlier testimony, paying lower monopsonistic prices for inputs such a video programming leads to higher and not lower prices charged to consumers. This is an established economic principle which Drs. Rosston and Topper do not directly dispute. Not only will programming producers receive less for their efforts but also

[5] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, at 19 (2010).

[6] Declaration of Michael J. Angelakis, MB Docket No. 14-57 ¶ 7 (Apr. 8, 2014) (attached as Exhibit 4 to Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57, at 32 (Apr. 8, 2014)).

consumers will pay more as well. Despite the charges of Drs. Rosston and Topper, I continue to believe that this proposed merger will lead to enhanced monopsony power that result directly in increased consumer harm.

* * *

This Declaration has been prepared in support of the foregoing Reply to Opposition. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

Executed this 23rd day December 2014.

William S. Comanor