STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Time Warner Inc. And Comcast Corporation for Approval of a Holding Company Level Transfer of Control	)))))))	Case 14-M-0183

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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I. INTRODUCTION

The proposed merger between Comcast and Time Warner Cable (jointly, "Petitioners") is not in the public interest of the State of New York. The New York Public Service Commission ("PSC" or "Commission") should use its regulatory authority to block Comcast's acquisition of Time Warner Cable ("TWC") within the state. Petitioners have argued that this merger does not affect competition because Comcast and TWC have little overlap in service areas, but this claim ignores the anti-competitive implications of the nation's largest cable television and Internet service provider ("ISP") significantly increasing in size. Comcast's growth nationally and within New York will augment the company's power as a distributor of television networks and online video programming. With enhanced power over television networks, Petitioners will cut fees paid for the right to carry TV networks and harm investment in programming, including programs produced in New York. The merger will harm competing video providers and ISPs operating within the state and consumers will face higher prices and fewer choices. The benefits alleged by Petitioners do not outweigh these potential harms and are not specific to the transaction.

Merger conditions, including those offered by Petitioners in their "Application and Public Interest Statement" before the Federal Communications Commission ("FCC") and any additional requirements the PSC may contemplate, will be insufficient to protect the public interest. Comcast has a poor track record of abiding by conditions imposed by regulators and should not be given the opportunity to engage in further violations on a larger scale. The best course of action to protect the public interest is to deny the merger application. If, however, the transaction is approved, the PSC must adopt strong, measurable conditions that include deployment of broadband to unserved areas, continued availability of affordable, standalone Internet and cable products for New York consumers, a prohibition on data caps or thresholds for Internet usage, expansion of eligibility to Comcast's Internet Essentials program and a commitment to sign-up a majority of eligible customers over a five-year period.

II. THE WRITERS GUILD OF AMERICA, WEST

Writers Guild of America, West Inc. ("WGAW") is a labor organization which represents more than 8,000 professional writers of film, television, online video programming, local news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). WGA members are also the creators of original video programs debuting online through services such as Netflix, Amazon, Hulu and Crackle.

WGAW members will be harmed by Comcast's acquisition of Time Warner Cable nationally and within New York because they write for television series that are produced in New York State and receive State film incentives. Comcast is already the largest multichannel video programming distributor ("MVPD") and will become significantly more powerful through its acquisition of Time Warner Cable. The merged entity will have the power to reduce its payments to television networks, known as affiliate fees, below competitive market levels. Affiliate fees are necessary for investment in original television programming, including programs filmed in New York. New York State, through its tax incentive program, has made local television and motion picture production a priority but Petitioners' increased ability to reduce fees paid to television networks will limit investment in content and could have an adverse impact on New York State employment in the television production industry. In addition, almost 300 WGAW members reside within New York State and will be harmed as consumers of cable television and broadband Internet services.

III. STANDARD OF REVIEW

New York State Public Service Law §222 conditions approval of the proposed transaction on a demonstration by Petitioners that the merger, and subsequent cable franchise transfer, is in the public interest. The appropriate public interest standard of review for this transaction is the Commission's approach in the *Order Approving the Acquisition of New York State Electric and Gas Corporation and Rochester Gas & Electric Corporation by Iberdrola* and reiterated in the *Order Approving the Acquisition of CH Energy Group by Fortis*.[1] This standard requires Petitioners to make a three-part showing: "That the transaction would provide customers positive net benefits, after considering (1) the expected benefits properly attributable to the transaction, offset by (2) any risks or detriments that would remain after applying (3) reasonable mitigation measures."[2] If the transaction fails this three-part test, the Commission must deny the transaction.

The public interest standard requires the Commission to evaluate the transaction with a much broader enquiry than that of a standard antitrust analysis. Though the effect on competition must be considered, the Commission must also consider the effect of this transaction broadly on New York consumers, on values such as diversity and localism, and on State efforts to expand

[1] Order Authorizing Acquisition Subject to Conditions in Case 07-M-0906, the Joint Petition of Iberdrola, S.A., Energy East Corporation, RSG Energy Group, Inc., Green Acquisition Capital, Inc., and New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., Order Authorizing Acquisition Subject to Conditions in Case 12-M-0192, the Joint Petition of Fortis Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions.

[2] Order Authorizing Acquisition Subject to Conditions in Case 12-M-0192, the Joint Petition of Fortis Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions, p. 59.

broadband availability and increase adoption. In addition, any potential benefits must be properly analyzed to ensure that they are transaction-specific and would not otherwise occur.

When measured against this standard, the Joint Petition unequivocally falls short. While Petitioners claim that consumers will benefit from access to Comcast video products, they provide little evidence of how Comcast's service is superior to TWC's offerings. Petitioners also claim that the transaction will enhance broadband competition and accelerate deployment and adoption, but fail to offer quantifiable details to support this assertion. Many of the benefits enumerated in the Joint Petition are not transaction-specific. For example, TWC's investment in broadband network upgrades and planned transition to all digital cable offerings in the State were already underway and, therefore, cannot be claimed as a merger-specific benefit. The Joint Petition also fails to address the serious harms posed to consumers, the upstream television and online video programming markets and competing video and Internet service providers.

While the PSC may consider conditions to mitigate the harms posed by this merger, an analysis of Comcast's past behavior clearly demonstrates that conditions cannot adequately address harms and Comcast may fail to abide by conditions that it does not agree with. These facts make clear that appropriate PSC action is to deny the Joint Petition.

IV. THE PROPOSED TRANSACTION

Comcast's proposed acquisition of Time Warner Cable will combine the assets of the two largest cable MVPDs and the first and third largest broadband providers in the country. Post-merger, Comcast will control 30% of all MVPD subscribers and 40% of the broadband Internet market in the United States. In New York State, if both the Time Warner Cable and Charter transactions are approved, Comcast will control 36% of the MVPD market and 32% of the broadband market.[3] However, statewide statistics fail to capture the level of control Petitioners will have in local markets. Table 1 provides MVPD subscribers information by Designated Market Area ("DMA"). The table reveals that in many DMAs across New York State, Comcast-TWC will control a majority of subscribers in the local market, and in some areas the level of control will be greater than 70%.

Table 1. Major MVPD Subscribers by Designated Market Area in New York[4]

DMA® Rank	Market Name	AT&T-DirecTV	Verizon	DISH	Cablevision	Comcast-TWC	Market Total	Comcast-TWC Market Share
1	New York, NY	697,074	1,414,403	320,204	2,761,209	1,890,207	7,083,097	27%
52	Buffalo, NY	121,171	62,192	89,221		262,029	543,613	49%
58	Albany-Schenectady-Troy, NY	78,683	20,071	38,724	76	347,616	485,170	72%
78	Rochester, NY	47,480		33,055		258,206	338,741	76%
85	Syracuse, NY	48,252	34,249	32,330		246,010	360,841	68%
98	Burlington, VT-Plattsburgh, NY	80,932		73,377		148,561	302,870	49%
159	Binghamton, NY	24,396		14,033		77,278	115,707	67%
171	Utica, NY	22,075		11,498		54,385	87,958	62%
174	Elmira (Corning), NY	19,478	205	12,254		50,113	82,050	61%
176	Watertown, NY	18,624		11,500		49,667	79,791	62%

The anti-competitive effects of this merger are already evident, with additional consolidation in the video distribution industry occurring as a result. In May, AT&T announced its agreement to acquire DirecTV, the nation's second largest MVPD. AT&T's petition to

[3] David Salway, "NYS Fall Provider and Partner Summit," New York State Broadband Program Office, November 4, 2013, http://nysbroadband.ny.gov/sites/all/files/David-Salway_NYS-BPO_Provider-and-Partner-Summit.pdf, slide 5. Post transaction, Comcast will have 4.86 million broadband subscribers in the state, becoming New York's largest Internet service provider. The Charter transaction proposes to swap certain strategic markets with a Post-merger Comcast-TWC. Comcast will cede Midwestern markets to Charter and will gain subscribers in major cities such as New York City and Los Angeles. A new corporation will also be formed with 2.5 million subscribers from Charter and Comcast and is currently called "Spinco."

[4] SNL Kagan. DMA level info may include subscribers outside of New York State in some markets.

acquire DirecTV cited the transaction as necessary to compete with a merged Comcast-TWC.[5] Combined, these transactions will see New York lose three MVPDs, as TWC, Charter and DirecTV are absorbed by competitors. If these mergers are approved, two companies will control 47% of video subscribers in the state. These mergers have also prompted a response from content providers, with 21st Century Fox recently making a failed attempt to acquire Time Warner.[6] News reports indicate the possibility of combinations between other content providers.[7] Consolidation among television networks and studios will harm New York consumers and content creators by limiting competition in programming and reducing consumer choice.

The proposed transaction will make Comcast, already the nation's largest MVPD and broadband service provider, significantly more powerful. The transaction is unprecedented because in addition to its size as a distributor, Comcast is vertically-integrated into upstream content exhibition and production markets; it owns two broadcast networks, almost twenty basic cable networks including the most-watched basic cable network, USA,[8] as well as film and television studios. Comcast-TWC's horizontal scale and vertical integration will give it the incentive and ability to harm competition in upstream content markets and competing MVPDs, which will result in fewer choices and higher prices for New York consumers.

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[5] *Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses or Authorizations*, FCC MB Docket No. 14-90, June 11, 2014, pp. 4, 23, 24.
[6] Dominic Rushe, "Fox, Time Warner, and Rupert Murdoch's last game of thrones," *The Observer*, July 19, 2014, http://www.theguardian.com/media/2014/jul/20/rupert-murdoch-21st-century-fox-time-warner-game-thrones.
[7] Amol Sharma and Keach Hagey, "Entertainment Companies Scout for Mergers," *Wall Street Journal*, June 15, 2014, http://online.wsj.com/articles/entertainment-companies-scout-for-mergers-1402876065.
[8] SNL Kagan, Average Primetime Rating, 2013.

V. THE PROPOSED TRANSACTION WILL HARM UPSTREAM CONTENT MARKETS

Petitioners' dominance in the MVPD and broadband Internet distribution markets post-merger will harm competition in upstream television and online video content markets. The harm will occur nationally but will be felt in New York, where the State has made significant efforts to incentivize local television and online video production. Between 2008 and 2012, New York provided more than $500 million in production incentives to television pilots, television series and online video series for services such as Netflix.[9] The television networks and online video distributors ("OVDs") that commission these pilots and series rely on MVPDs and ISPs to reach consumers. Even broadcast networks, which are available to viewers over-the-air, rely on MVPDs to reach 90% of consumers.[10] Both of these distribution markets, however, lack meaningful competition. Most consumers have only three choices for MVPD service: a local cable provider and two satellite companies. Two-thirds of American households have only one or two choices for Internet service fast enough to stream videos.[11] The lack of competition has resulted in concentrated markets; four companies control two-thirds of the MVPD market[12] and four companies control 68% of the ISP market.[13] If the Comcast-TWC and AT&T-DirecTV mergers are approved, two companies will control more than half of the MVPD market and half

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[9] WGAW Analysis, "NYS Film Tax Credit Program Information," received September 20, 2013 pursuant to Freedom of Information Law request.
[10] FCC, *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 12-203, ¶199 (2013).
[11] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012,* December 2013, p. 9.
[12] SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," Q4 2013.
[13] Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, http://www.leichtmanresearch.com/press/031714release.html.

of the ISP market.[14] In New York State, the two combined companies will control almost half of the MVPD market.

Faced with little competition and a substantial market share, Comcast-TWC will be a powerful distributor with the ability to harm upstream content providers. With almost 30% of MVPD subscribers nationwide after proposed divestitures, the merged entity's power as a buyer of content will be significantly enhanced. Comcast-TWC will be able leverage its buyer power to force television networks to accept to below market rates, harming investment in programming. Petitioners have already acknowledged that Comcast pays lower rates for some programming and expects to extend these lower rates to TWC "as more favorable rates and terms in some of Comcast's programming agreements supersede some of TWC's existing contracts."[15]

WGAW is concerned about the enhanced buyer power enabled by the merger because affiliate fees paid by Comcast, Time Warner Cable and other MVPDs to television networks have helped to fuel the growth of original comedy and drama series across the basic cable market. Affiliate fees, which are monthly per-subscriber fees paid by MVPDs such as Comcast and Time Warner Cable to basic cable networks, represent more than half of the total revenue of basic cable networks.[16] As a result, two dozen cable networks are now developing and airing original comedies and dramas, providing additional content choices to consumers and new creative and economic opportunities for writers and other entertainment industry workers.

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[14] Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, http://www.leichtmanresearch.com/press/031714release.html. Subscriber information from company filings and SNL Kagan.

[15] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Declaration of Michael J. Angelakis ¶ 7.

[16] SNL Kagan, "TV Network Industry Benchmarks," 2013, Accessed July 16, 2014.

Petitioners' dominance in the MVPD market could also harm broadcast networks, which rely on MVPDs to reach almost all consumers. In recent years, broadcast networks have begun to negotiate retransmission fees, which are similar to the affiliate fees received by basic cable networks. This new revenue source has allowed the broadcast television market to remain healthy even as the majority of television viewing now occurs across basic cable. Retransmission fees, according to SNL Kagan, represent only 6% of MVPD programming costs but distributors have resisted paying these fees, as TWC did when it blacked-out CBS stations in a 2013 dispute. The increased size of Comcast-TWC will give it more power to negotiate retransmission payments below competitive market levels.

The merger threatens competition in upstream television content markets because, with the ability to blackout programming to one-third of households, programmers will have no choice but to submit to Comcast-TWC demands. Reducing fees paid to television networks will reduce the investment available for television programs. Many such programs including *The Good Wife, The Carrie Diaries*, *The Americans, White Collar,* and *Louie,* are filmed in New York. Petitioners' ability to cut programming costs by exerting downward pressure on affiliate and retransmission fees threatens continued investment in content and New York television production employment.

Comcast-TWC's control over the broadband Internet market also threatens to harm the burgeoning online video market. Both consumers and content creators are just now beginning to benefit from innovative online video services. The number of online videos viewed each month by Americans has increased from 7.2 billion in January of 2007 to 52.4 billion in December of

2013.[17,18] The segment of Americans who watch or download videos has grown from 69% of adult internet users in 2009 to 78% in 2013.[19] YouTube and Netflix now make up half of all downstream Internet traffic in North America.[20] The number of people signing up for online video subscriptions is yet another indicator of consumer demand for new, innovative video offerings. Hulu Plus now counts more than 6 million paying subscribers and Netflix has nearly 36 million customers in the U.S.[21,22]

The growth of the online video market has created new opportunities for writers and new competition to television programming. 2013 marked the debut of original television-length programming from outside the television ecosystem as Netflix and Amazon began offering original drama and comedy series directly to consumers. Press reports indicate Yahoo! and Playstation will be the next online providers to offer such programming.[23] The Netflix original series' *Orange is the New Black* and *House of Cards* were recently nominated for 12 and 13

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[17] comScore, "Primetime' U.S. Video Streaming Activity Occurs on Weekdays Between 5-8 P.M" March 21, 2007, http://www.comscore.com/Insights/Press-Releases/2007/03/Primetime-US-Online-Video.
[18] comScore, "comScore Releases December 2013 U.S. Online Video Rankings," January 10, 2014, http://www.comscore.com/Insights/Press-Releases/2014/1/comScore-Releases-December-2013-US-Online-Video-Rankings.
[19] Kristen Purcell, "Online Video 2013," Pew Research Center, October 10, 2013, http://www.pewinternet.org/2013/10/10/online-video-2013/.
[20] Sandvine, *Global Internet Phenomena Report: 2H 2013*, https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/2h-2013-global-internet-phenomena-report.pdf.
[21] Mike Hopkins, "Welcome Jenny Wall, SVP Marketing," Hulu Blog, May 13, 2014, http://blog.hulu.com/2014/05/13/welcome-jenny-wall-svp-marketing/.
[22] Rob Golum, "Netflix Rises to Record as Analyst Predicts Viewer Gains," *Bloomberg*, July 1, 2014, http://www.bloomberg.com/news/2014-07-01/netflix-rises-to-record-as-analyst-predicts-viewer-gains.html.
[23] Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014; Mike Shields, "First Netflix and Amazon. Now Yahoo to Get Into TV Programming Game," *The Wall Street Journal*, April 5, 2014.

Television Emmy nominations, respectively. It is estimated that Netflix and Amazon will spend close to $1 billion on original series in 2014.[24]

These services have emerged outside of the cable bundle only because of the development of the Internet as a video distribution platform. But a merged Comcast-TWC will control as much as 40% of the broadband Internet market nationally, giving it significant market power over OVDs trying to reach consumers. Comcast has already shown a willingness to use its bottleneck power to extract tolls from online video providers such as Netflix. In late 2013, Comcast customers began experiencing difficulty streaming Netflix content. Netflix later reported that the quality of its service was degraded because Comcast refused to make sufficient interconnection capacity available to Netflix and its transit providers.[25] Comcast would only make sufficient capacity available to Netflix after it agreed to pay for interconnection.[26] The exchange of Internet traffic between networks has historically been done without compensation, but as media analyst Richard Greenfield wrote, “Comcast was willing to use its size and scale to force Netflix’s hand.”[27] Netflix Vice President Christopher Libertelli also wrote in a letter to U.S. Senator Al Franken,

> “Comcast is already dominant enough to be able to capture unprecedented fees from transit providers and services such as Netflix. The combined company would possess

[24] 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.
[25] Ken Florance, Vice President, Content Delivery, Netflix, Inc.,“The Case Against ISP Tolls,” *Netflix US and Canada Blog,* April 24, 2014, http://blog.netflix.com/2014/04/the-case-against-isp-tolls.html.
[26] Christopher Libertelli, Vice President, Global Public Policy, Netflix, Inc., “Letter to Senator Al Franken,” April 23, 2014.
[27] Dawn C. Chmielewski and Meg James, “Netflix-Comcast Deal Ends Internet Consumption Dispute,” *The Los Angeles Times*, February 25, 2014, http://articles.latimes.com/2014/feb/25/entertainment/la-et-ct-comcast-netflix-20140225.

> even more anti-competitive leverage to charge arbitrary interconnection tolls for access to their customers."[28]

Comcast has incentive to limit the growth of online video providers because these services compete with its cable television offering and its NBC Universal content. As demonstrated by its treatment of Netflix, the company's size has given it the ability to harm competition by raising the cost to gain access to consumers. With Comcast already having sufficient market power over OVDs, the merger will only increase such power and, therefore, is a significant threat to continued growth and investment in the OVD market. If OVDs are required to pay "unprecedented fees" for access to ISP end-users, they will have less money to invest in programming or have to charge consumers more for content. Either outcome is anti-competitive.

Petitioners' control of Internet distribution threatens investment and industry employment in New York. The Netflix series *Orange is the New Black* is filmed in New York and the four upcoming Marvel series for Netflix will also be filmed in the state. The Walt Disney Company is expected to spend $200 million over three years filming the Marvel series in New York.[29] The productions are expected to create 400 full-time jobs and 3,000 part-time jobs.[30] These programs are the recipients of State tax incentives and are creating local entertainment industry jobs, but a merged Comcast-TWC threatens progress in this market. Petitioners' market power will allow the merged entity to charge OVDs for access to ISP customers, which will reduce investment in

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[28] Christopher Libertelli, Vice President, Global Public Policy, Netflix, Inc., "Letter to Senator Al Franken," April 23, 2014.
[29] Todd Spangler, "Disney to Spend $200 Mil on Marvel Series for Netflix Set to Film in New York," *Variety,* February 26, 2014, http://variety.com/2014/biz/news/disney-chief-bob-iger-new-york-gov-andrew-cuomo-set-11-am-et-news-conference-1201121502/.
[30] *Ibid*.

original programming and limit the development of this market. Fewer original online video series may be produced as a result.

VI. THE PROPOSED TRANSACTION WILL HARM NEW YORK STATE CONSUMERS

Allowing Comcast to replace Time Warner Cable in New York will result in higher prices for cable and Internet service, fewer options, particularly for low-income consumers, and restrictions on how consumers may use their services. These harms significantly outweigh the alleged benefits to consumers.

The Joint Petition claims that Comcast will provide a better service to New York than what TWC offers. The alleged benefits include a faster transition to an all-digital network, more VOD choices, and increased video functionality offerings through Comcast's X1 Platform.[31] However, Petitioners have failed—in the Joint Petition and at Informational Forums—to demonstrate that Comcast provides a better value to consumers than Time Warner Cable. This is perhaps because, by comparison, it is clear that TWC offers more choice, more affordable service and allows consumers to have greater control over how they access content.

Time Warner Cable currently offers New York City customers a cable tier of 200 channels for a promotional rate of $49.99 per month for 12 months.[32] Seventy-one percent of TWC video subscribers in the NYC DMA purchase this tier.[33] But a Comcast customer in nearby Philadelphia pays the same amount over 12 months for only 140 channels.[34] The companies both offer a low-cost cable option for $20 per month, but TWC's tier offers a package of twenty-plus

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[31] Joint Petition, pp. 21-25.
[32] SNL Kagan, "Multichannel Video Pricing Report," April 1, 2014.
[33] SNL Kagan, "TV Network Packaging and Subscribers," Q1 2014.
[34] SNL Kagan Multichannel Video Pricing Report, April 1, 2014, updated based on Comcast's website.

channels, while Comcast only offers ten-plus channels.[35] Similar pricing differences exist for Internet offerings. Comcast's top Internet speed in Philadelphia is 150 Mbps for $89.99 per month for the first 12 months, but Time Warner Cable currently offers NYC customers 100 Mbps for $64.99 per month, soon to triple to 300 Mbps for no added cost.[36]

In addition to these lower priced offerings, Time Warner Cable also offers an extremely valuable service for lower-income consumers: a standalone Internet offering of 2 Mbps for a retail (not promotional) cost of $14.99 per month, available to anyone without restrictions or eligibility qualifications.[37] The speed of this offering is also due to be upgraded to 3 Mbps along with the rest of Time Warner's Internet plans.[38] Comcast's lowest-priced, widely-available *standalone* Internet offering is $49.95 per month for 6 Mbps.[39]

Beyond a simple price comparison, the availability of affordable standalone cable and Internet offerings has important competitive implications. It allows consumers to purchase their Internet and video service from different providers, or to purchase Internet at a reasonable price without also being required to purchase a cable television subscription. The recent trend towards cord-cutting (subscribing to Internet service only and substituting online video offerings for

[35] Comcast and Time Warner websites and SNL Kagan Multichannel Video Pricing Report, April 1, 2014.
[36] Comcast and Time Warner websites; Time Warner Cable, "Time Warner Cable Begins Major Internet Speed Increases in Los Angeles and New York City," April 22, 2014, http://www.timewarnercable.com/en/about-us/press/twc-begins-major-Internet-speed-increases-la-nyc.html.
[37] Time Warner Cable, "High Speed Internet Plans and Packages," http://www.timewarnercable.com/en/internet/internet-service-plans.html, Accessed August 7, 2014.
[38] Time Warner Cable, "Time Warner Cable Bringing Incredibly Fast Internet Plans Across its Entire Austin Service Area," February 20, 2014, http://www.timewarnercable.com/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html.
[39] Comcast website, Non-promotional rate, Accessed August 1, 2014.

cable television) demonstrates an interest from consumers in new video choices.[40] The increased choice for consumers is, however, a concern for Comcast because it loses cable subscription revenue as well as advertising revenue from fewer viewers watching the broadcast and cable networks it owns. Comcast, therefore, has a significant incentive to protect its video offerings by steering customers towards bundled video and Internet offerings and will likely eliminate the affordable standalone options TWC currently offers New York residents.

There is yet another cost that comes with Comcast's Internet service, the threat of data caps (or, as Comcast sometimes prefers to call them, "data thresholds") and higher fees that come with additional Internet usage.[41] TWC Internet service currently offers consumers unlimited data but Comcast is testing data caps in select markets and has said that it envisions moving to a "usage-based billing model" for all customers in the next five years.[42] Under "usage-based billing," Comcast customers who exceed certain levels of data usage are required to pay for and additional Internet usage. Whether called data caps or thresholds, these measures have the effect of increasing consumer costs and restricting consumers' ability to substitute a more flexible combination of Internet services and online video subscriptions for the ever-escalating monthly cable bill. The amount of data consumed by a customer who would substitute all of his or her cable TV viewing with online video viewing would make a capped Internet service prohibitively expensive. For example, Nielsen reports that Americans spend 152 hours a month

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[40] Shalini Ramachandran, "Evidence Grows on Pay-TV 'Cord Cutting'," *Wall Street Journal*, August 7, 2012, http://online.wsj.com/news/articles/SB10000872396390443792604577574901875760374.
[41] Karl Bode, "Comcast: We Don't Have Caps, We Have 'Data Thresholds'," *DSLReport*, May 22, 2014, http://www.dslreports.com/shownews/Comcast-We-Dont-Have-Caps-We-Have-Data-Thresholds-129061.
[42] 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.

watching traditional television.[43] Netflix estimates that an hour of HD video requires 3 GB of data, indicating a household of two would need at least 900 GB of data to completely substitute online video for television viewing.[44] In areas where Comcast is currently testing data caps, the company charges $10 for every 50 GB of data over 300 GB per month.[45] Under this pricing model, Comcast customers would have to pay an additional $120 per month for two average viewers to substitute television viewing with online video. Usage caps, therefore, are an effective restraint on online video competition and ensure that consumers continue to subscribe to cable TV service. These usage caps also create an opportunity for discrimination against unaffiliated content and services, and Comcast has engaged in this type of discriminatory conduct, discussed in detail later in this filing. Data caps or thresholds will increase prices for New York residents and will limit their ability to enjoy new online video offerings.

Comcast has presented as a benefit to New York consumers access to its X1 video operating system, which is an IP and cloud-enabled video platform delivered via a set-top box that provides search functionality, recommendations for content, access to certain Internet applications, DVR functionality and the Xfinity On Demand video library. However, this "innovative platform" is, in reality, a closed system that increases Comcast's control over video offerings and restricts consumer choice. The X1 platform, for instance, makes it more difficult for viewers to watch video using certain third-party devices such as a Roku or Sony Playstation 3

[43] Nielsen, "A Look Across Media: The Cross-Platform Report," Nielsen, December 2013, p. 6.
[44] Netflix, "How can I control how much data Netflix uses?," https://help.netflix.com/en/node/87, Accessed August 4, 2014.
[45] Comcast, "What XFinity Internet Data Usage Plans will Comcast be Launching?," updated May 29, 2014, http://customer.comcast.com/help-and-support/internet/data-usage-what-are-the-different-plans-launching, Accessed August 5, 2014.

("PS3").[46] Because Comcast does not authenticate the HBO Go application on the Roku or PS3, Comcast X1 customers cannot use the devices of their choice to view HBO content. While customers are paying the same amount to Comcast whether they view HBO content via a Roku or not, Comcast restricts how customers can enjoy the video content that they have subscribed to. In contrast, Time Warner Cable allows customers to view HBO Go on Roku and Playstation devices.[47]

VII. THE PROPOSED TRANSACTION WILL HARM MVPD MARKET COMPETITION IN NEW YORK STATE

The proposed merger will make Comcast the only cable and fixed broadband provider with a statewide footprint in New York. It will also be the state's largest MVPD and control almost one-third of the New York's MVPD subscribers. Petitioners' horizontal scale and vertical integration provides both incentive and ability to harm competing MVPDs. As the owner of key programming assets, including the NBC broadcast network, the Telemundo broadcast network, highly-rated basic cable networks such as USA and MSNBC, and Regional Sports Networks ("RSN"), Comcast may have the incentive to withhold programming from competitors once the FCC's *Comcast-NBC Universal* merger conditions expire in 2018. Withholding strategies and anti-competitive pricing practices would be detrimental to competing MVPDs, whose ability to compete with Petitioners is determined in part by their ability to offer popular programming.

In 1992, in response to rising cable bills, Congress found that emerging MVPDs, such as satellite providers, needed access to popular programming to effectively compete with incumbent

[46] Jeff Baumgartner, "Comcast Not Authenticating HBO Go On the PS3," *Multichannel News*, March 5, 2014, http://multichannel.com/news/content/comcast-not-authenticating-hbo-go-ps3/356002.
[47] Chris Welch, "Comcast isn't letting customers watch HBO Go on PlayStation 3," *The Verge*, March 5, 2014, http://www.theverge.com/2014/3/5/5474850/comcast-isnt-letting-customers-watch-hbo-go-on-ps3.

cable operators. In the FCC's review of Program Access rules in 2007 and 2010, it found that in markets where a competing MVPD had a smaller market share, a vertically-integrated MVPD had the incentive to withhold programming. The FCC's analysis found that a short-term loss from advertising and subscriber revenues for the vertically-integrated MVPD would lead to long-term gains as subscribers switched from the competing provider to gain access to exclusive programming. The Commission described exclusive contracts as a "kind of an 'investment,'" in which an initial loss of profits from programming is incurred in order to achieve higher profits later from increased cable distribution."[48]

Vertically-integrated MVPDs such as Comcast have the ability to set prices for content they own, and can use this ability to disadvantage competing MVPDs by raising prices. Even if price increases were uniformly applied to Comcast as well as its competitors, a competing MVPD would likely have to pass these costs along to its customers while Comcast will only have to shift revenue from one business segment to another.

While there is limited direct competition between wired MVPD providers outside New York City, Long Island and the Mid-Hudson region, there are some rural towns and small communities where TWC's footprint overlaps with a competing provider. For example, Slic Networks, an incumbent local exchange carrier ("ILEC") that provides video and broadband, competes directly with TWC in Canton, Potsdam, Masena and Ogdensburg. These are small

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

markets where Comcast-TWC could potentially benefit from withholding strategies or uniform price increases at a minimal cost. [49]

The anti-competitive effect of withholding and pricing strategies is evident in nearby Philadelphia where Comcast is the dominant provider, controlling 56% of the market, and owns an RSN. Prior to 2006 MVPDs were allowed to enter exclusive contracts with terrestrial RSNs. The terrestrial loophole allowed Comcast to enter an exclusive contract with its affiliated network, Comcast SportsNet Philadelphia. As such, denying satellite providers access to SportsNet was a "long standing business policy" for Comcast.[50] In approving the joint acquisition of Adelphia by Comcast and Time Warner Cable, the FCC noted that lack of access to RSNs in Philadelphia area reduced satellite's market share by a projected 40%.[51] To correct for the competitive advantage of RSNs, the FCC applied program access conditions to sports networks owned by Comcast and TWC in the *Adelphia Order*, and then closed the terrestrial loophole for all MVPDs in 2010. However, even with specific program access conditions, Comcast has kept the price of SportsNet Philadelphia so high that neither DirecTV nor Dish has entered into a carriage agreement for the network. Speaking in 2012, former Executive Vice

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[49] Alan Rizzo, "Slic TV, Internet, phone bundles under $100 a month; infrastructure growing," *Watertown Daily Times*, July 13, 2014, http://www.watertowndailytimes.com/article/20140713/NEWS05/140719583/1004.

[50] FCC, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket NO. 10-56, January 20, 2011. Hereinafter "Comcast NBC Universal Order."

[51] FCC, *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation to Time Warner Cable Inc, Adelphia Communications Corporation to Comcast Corporation, et al.,* Memorandum Opinion and Order, MB Docket No. 05-192, July 21, 2006.

President of DirecTV Derek Chang said, “They [Comcast] win either way…They’re either going to gouge our customers, or they’re going to withhold it from our customers.”[52]

Although the FCC rules protect against price discrimination, such behavior is difficult to detect since non-disclosure provisions are a standard component of contracts between MVPDs and TV networks. The FCC found in the *Comcast-NBC Universal Order* that a uniform price increase would not necessarily violate its policies on price discrimination because the increase would be applied to all MVPDs, rather than select competitors.[53] While the FCC sought to address this by adopting arbitration in the Comcast-NBC Order, arbitration can be a cost-prohibitive option for small and medium MVPDs seeking redress from harm.

A record of these anticompetitive practices is well-established at the national level, but this transaction raises specific concerns for the State of New York. Unlike Comcast, Time Warner Cable does not own broadcast or cable networks, and only has minority stakes in RSNs. TWC’s lack of vertical integration has allowed competition with satellite providers, Verizon and numerous small MVPDs to occur on a more level playing field. Post-merger, the state’s largest MVPD will be one that has a well-documented history of using the content it owns to engage in anti-competitive strategies in increase local market share.

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

[53] Comcast NBC Universal Order, ¶49.

VIII. THE PROPOSED TRANSACTION DOES NOT ADVANCE BROADBAND DEPLOYMENT

Governor Cuomo directed the PSC to examine how this merger would affect low-income consumers, pricing, and State efforts towards universal broadband service and better Internet access for schools.[54] According to the most recently available data, 1.1 million NY residents did not have access to broadband services, and 6 million NY residents were not connected, with 43% of non-adopters citing affordability as the reason. In addition, 5% of upstate New York residents lack broadband access at New York's targeted speed of 6 Mbps. In the most underserved counties, Greene and Columbia, 80% and 84% of citizens respectively do not have any access to broadband.[55] Petitioners have not made specific commitments regarding broadband expansion or service improvements in the State of New York. Rather, much emphasis has been placed on Comcast's Internet Essentials program.

A. Internet Essentials

In the Joint Petition, statements at Informational Forums, and in marketing materials promoting the merger, Petitioners have repeatedly highlighted the Internet Essentials program as a key public interest benefit of the merger.[56] Internet Essentials been presented as a solution to the problem of broadband affordability and adoption, and held up as evidence of Comcast's

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[54] Office of the Governor of NY, "Governor Cuomo Announces Review of Comcast, Time Warner Merger Underway," May 19, 2014, https://www.governor.ny.gov/press/05192014Comcast-Time-Warner-Merger.

[55] New York State Broadband Program Office, "Annual Report, 2012-13," http://nysbroadband.ny.gov/sites/default/files/documents/2012_13BBAnnualReport_43014.pdf, pp. 8, 9, 28.

[56] Joint Petition, p. 26; PSC Informational Forums Transcripts from Buffalo (pp18-19), Albany (pp17-18, 54, 56, 57-59) and NYC (pp12, 50-52); Simon Dumenco, "Comcast/Time Warner Cable Merger: Do It for the Children!," *AdAge*, July 8, 2014, http://adage.com/article/the-media-guy/comcast-time-warner-cable-merger-children/294030/.

commitment to children, schools and low-income consumers.[57] This program, while commendable as a low-price offering to a specific segment of the market, is fundamentally inadequate to solve the digital divide, and must not be treated as a sufficient public interest benefit for New York. The criticisms of the program have been well documented in this proceeding by groups such as Stop the Cap!, the Public Utility Law Project, Free Press and Common Cause. WGAW echoes the concerns raised by these groups because Internet Essentials is offered as the sole specific evidence by Petitioners of how the merger will resolve issues with access to affordable broadband.

Internet Essentials offers Internet access with a speed of 5 Mbps for $9.95 per month, as well as the opportunity to purchase an Internet-ready computer for $150 and receive computer training. The program is limited to families in Comcast's existing service area who meet several criteria: they have children in the National School Lunch Program, they have no overdue Comcast bills or equipment charges and they have not been Comcast Internet customers for the prior 90 days.[58] On August 4th, 2014, Comcast announced that it will allow customers with past due bills to sign up if the overdue bills are more than a year old.[59] In the three years since the program was launched in the summer of 2011, 300,000 households have signed up.[60] According to Comcast, this represents an adoption rate of 10% of qualifying households.[61]

This low adoption rate reflects the true function of this program: it is a low-cost public relations offering, not a viable means to meet the needs of low-income consumers, close the

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[57] *Ibid*.
[58] Internet Essentials from Comcast, "How It Works," http://www.internetessentials.com/how-it-works, Accessed August 4, 2014.
[59] Joel Mathis, "Comcast Expands Access to Internet Essentials," *Philadelphia Magazine,* August 4, 2014, http://www.phillymag.com/news/2014/08/04/comcast-expands-access-internet-essentials/.
[60] Comcast, "Year Three Internet Essentials Progress Report," March 4, 2014, http://corporate.comcast.com/comcast-voices/year-three-internet-essentials-progress-report.
[61] Transcript from NYC PSC Informational Forum, p. 52.

digital divide or address the serious issue of broadband affordability. It does not expand broadband availability because it is only provided in Comcast's existing service area (meaning that it poses no build-out cost to Comcast). It prevents Comcast's existing customer base from reducing their costs, and the prohibition against having recent overdue bills or charges locks out many households that would otherwise qualify for a program aimed at low-income consumers. The application process, which is entirely separate from the rest of Comcast's products, has been criticized as onerous and staying in the program requires subscribers to re-establish eligibility on a yearly basis.[62,63,64] The focus on the National School Lunch Program makes the program very restrictive, with qualifying families unable to take advantage of Internet Essentials once their children are grown, and the needs of families without school-aged children and older individuals are completely ignored. The recent expansion of the program to include a portion of customers with long overdue bills does little to change these fundamental inadequacies.

Currently, there are more than 2.5 million New York residents over the age of 65, 12% of whom are below the poverty line and another 11% of whom are between 100% and 149% of the poverty line, for a total of more than 575,000 below 150%.[65] One-fifth of those in New York's Supplemental Nutrition Assistance Program ("SNAP") are elderly, and another 12% are non-disabled, non-elderly adults not living with children.[66] Given that Americans over age 65 have by

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[62] Eric Mayes, "Protestors: Comcast outreach falls short," *Philly Tribune*, January 26, 2012, http://phillytrib.com/ metros/item/2469-protestors-comcast-outreach-falls-short.html.

[63] Kate Cox, "How Comcast Uses Low-Income Families to Look Good For Regulators," *Consumerist*, March 29, 2014, http://consumerist.com/2014/03/29/how-comcast-uses-low-income-families-to-look-good-for-regulators/.

[64] Internet Essentials from Comcast, "Program Terms & Conditions," https://www.internetessentials.com/content/program-terms-conditions, Accessed August 7, 2014.

[65] 2008-2012 American Community Survey 5-Year Estimates, "Populations 65 Years and Over in the United States," Census Bureau data: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_S0103.

[66] Center on Budget and Policy Priorities, "New York Supplemental Nutrition Assistance Program," June 9, 2014, http://www.cbpp.org/files/1-14-13fa/NY.pdf.

far the lowest rates of broadband adoption, this population ought to be a focus of any attempt to address adoption or affordability, and yet they are excluded from Comcast's program.[67] When measured against the need, the Internet Essentials program simply does not do enough to qualify as a worthwhile solution. Worse, it offers the illusion that sustainable progress is being made while millions remain shut out.

As commentators in this proceeding have repeatedly highlighted, broadband has become as necessary to modern life as electricity and water. It is the avenue through which citizens of New York and the country get news and entertainment, communicate with family, carry out business, apply for jobs and manage their healthcare. The related issues of broadband affordability and broadband adoption, about which the PSC is clearly concerned, cannot be solved only with Internet Essentials, which benefits a fraction of the underserved populations. Time Warner's offering of a $14.99 per month standalone Internet product has none of the restrictions or barriers to entry of Internet Essentials and is listed on Time Warner's main website, making it an easily accessible option for a much larger percentage of the lower-income population.[68]

B. Municipal Broadband

While Petitioners offer little detail about how the merger benefits broadband deployment beyond Internet Essentials, it is clear that Comcast's growth in New York could undermine State goals and policies regarding broadband access. For unserved or underserved communities, municipally-owned broadband networks may be another strategy to provide affordable, universal

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[67] New York State Broadband Program Office, "Annual Report, 2012-13," http://nysbroadband.ny.gov/sites/default/files/documents/2012_13BBAnnualReport_43014.pdf, p. 27.
[68] Time Warner Cable, "High Speed Internet Plans and Packages," http://www.timewarnercable.com/en/internet/internet-service-plans.html, Accessed August 4, 2014.

service. New York State has endorsed municipal broadband initiatives as one approach to meet the State's connectivity goals. The 2012-13 Annual Report of the New York State Broadband Program Office recommended that publicly owned fiber assets be leveraged to support last-mile connections through public-private partnerships.[69] However, Comcast has invested substantial resources to fight municipal broadband in other communities. In Longmont, CO, Comcast was a key funder, through the Colorado Cable Telecommunications Association ("CCTA"), of two referendums to stop a municipal network.[70] CCTA spent $225,000 opposing the municipal network ballot initiative in 2009 and $385,000 on a 'No' campaign in 2011. CCTA spent $615,000 in total opposing municipal broadband in a community of only 27,000 households.[71] Despite CCTA's opposition, the initiative passed with 61% of the vote. Outside Longmont, Comcast has fought municipal broadband initiatives in communities that include Seattle, WA and Batavia, IL through lobbying and political campaigns that limit the autonomy of municipal governments.[72] Municipal broadband is a way to increase broadband availability and local market competition. Allowing Comcast to become the state's largest cable and Internet service provider will introduce a formidable opponent to such initiatives and contradicts the goal of increasing broadband access in the state.

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[69] New York State Broadband Program Office, "Annual Report, 2012-13," http://nysbroadband.ny.gov/sites/default/files/documents/2012_13BBAnnualReport_43014.pdf, p. 47.
[70] Colorado Cable Telecommunications Association, "CCTA System Members," http://www.cocabletv.com/?page_id=9, Accessed August 4, 2014. Listed members are Comcast, Optimum, US Cable and Rocky Mountain Communications.
[71] Brian Fung, "Big cable may have felled Seattle's mayor, but it couldn't stop this Colo. Project," *Washington Post*, November 6, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/06/big-cable-helped-defeat-seattles-mayor-mcginn-but-they-couldnt-stop-this-colorado-project/.
[72] Christopher Mitchell, "Comcast Sets Sights on Seattle Mayor; Payback for Encouraging Competition," Community Broadband Networks, November 1, 2013, http://www.muninetworks.org/content/comcast-sets-sights-seattle-mayor-payback-encouraging-competition; and Jason Koebler, "Comcast Used This 'Spooky' Propaganda to Kill Off a Local Internet Competitor," *Vice*, July 28, 2014, http://motherboard.vice.com/en_au/read/the-fliers-full-of-lies-comcast-used-to-kill-off-a-local-internet-competitor.

IX. ALLEGED MERGER BENEFITS ARE NOT TRANSACTION SPECIFIC

The State's public interest standard requires applicants to demonstrate that the benefits alleged are specific to the merger and would not occur without the proposed transaction. This filing has demonstrated that many of the alleged benefits will actually harm consumers and competition. Close examination of Petitioners' claims regarding upgrades and investments, in addition, reveals that TWC has already committed to improvements. The benefits to consumers stemming from such investment are, therefore, not merger specific. At the close of its 2013 fiscal year, TWC announced TWC Maxx, a three-year project to enhance TWC's network and complete the conversion of all television channels from analog to digital across 75% of its footprint. To date 17% of TWC's national footprint has completed the conversion, including New York City, Augusta, ME, and parts of Kentucky and Indiana.[73] The conversion frees up bandwidth, allowing TWC to increase Internet speeds up to 300 Mbps. To accomplish these goals TWC is investing $100 million each year in network maintenance[74] and almost $4 billion each year in capital expenditures for, among others things, network line extensions and enhancements.[75] As TWC's plans had already been announced, vague claims that such upgrades will occur more quickly because of the transaction must be discounted. It is worth noting that the TWC markets prioritized for these increases are among the company's most competitive. TWC's digital conversion in NYC is complete; Los Angeles is partially complete; and, facing impending

[73] Joint Petition, p.5; and Time Warner Cable, "Annual Report to Shareholders," 2013, http://ir.timewarnercable.com/files/doc_financials/Annual%20Reports/twc%20ar%202013.pdf, p.6.
[74] Time Warner Cable Earnings Call, 4th Quarter 2013 Results, January 30, 2013, Transcript courtesy of Seeking Alpha, http://seekingalpha.com/article/1981291-time-warner-cable-management-discusses-q4-2013-results-earnings-call-transcript?part=single. Comments of Arthur Minson, CFO and EVP, "To achieve all this, we plan to increase total capital spending to $3.7 billion to $3.8 billion a year in each of the next 3 years and to invest an incremental $100 million a year in operating expense in proactive maintenance of the network and Max [sic] rollout activities."
[75] Time Warner Cable, "TWC Operational and Financial Plan," January 30, 2014, http://ir.timewarnercable.com/files/4Q13/TWC_Operational%20and_Financial%20Plan_vFINAL.pdf, slide 18.

competition from Google Fiber, TWC began deploying Maxx in Austin, TX starting in June 2014.[76]

TWC has increased broadband speeds in parts of NYC and Los Angeles with speeds up to 300 Mbps. Across New York State, 40% of TWC's system has already been converted to digital.[77] While Comcast alleges that digital conversion and faster Internet speeds will occur more quickly as a result of the merger, it offers no faster timetable. Mark Reilly, the Senior Vice President for Government and Regulatory Relations at Comcast, has also stated that Comcast does not know the condition of the TWC network, which makes Comcast's promise of faster upgrade still more questionable.[78]

X. MERGER CONDITIONS ARE INSUFFICIENT TO AMELIORATE HARMS

The public interest analysis previously employed by the Commission has included an assessment of whether reasonable mitigation measures would increase the benefits of the merger and outweigh transaction risks.[79] In this proceeding, the Commission has asked interested parties if there are conditions that the PSC could impose on the Comcast-Time Warner merger to address potentials harms.[80] WGAW believes merger conditions cannot sufficiently mitigate the harmful effects of this merger on content markets, consumers and MVPD and ISP competition, as outlined in this filing. A historical review of Comcast adherence to merger conditions reveals,

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[76] Jeff Baumgartner, "TW Cable Plans Major Service Upgrades in NYC & LA," *Multichannel News,* January 30, 2014, http://multichannel.com/news/content/tw-cable-plans-major-service-upgrades-nyc-la/356338; Time Warner Cable, "Time Warner Cable Bringing Incredibly Fast Internet Plans Across its Entire Austin Service Area," February 20, 2014, http://www.timewarnercable.com/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html.
[77] Joint Application, p. 21.
[78] Transcript from Buffalo PSC Informational Forum, p. 54.
[79] NY PSC Order Authorizing Acquisition Subject to Conditions, Joint Petition of Fortis Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions, Case 12-M-0192. p. 29.
[80] Transcript from NYC PSC Hearing, p. 44.

in addition, that the company will look for ways to circumvent regulatory orders and affected parties face an uphill battle to enforce conditions. A strategy of merger conditions will simply be ineffective against a powerful company with unlimited resources.

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

Comcast has also effectively circumvented the *Comcast-NBCU Order* merger condition that prohibits it from using "caps, tiers, metering, or other usage-based pricing" to treat affiliated Internet traffic differently from unaffiliated traffic.[81] Comcast has violated this condition by exempting its online video service, Xfinity Streampix, from data caps when viewed on an Xbox, while the viewing of content from unaffiliated video services such as Netflix or YouTube counts against a user's data cap. To explain why this behavior does not violate the FCC's merger condition, the company has said that its online video traffic travels over a private channel, but tests by a network engineer suggests that both general Internet and Comcast traffic were traveling over the same network channel.[82] Comcast's behavior demonstrates that it cannot be trusted to abide by the intent of merger conditions.

Affected parties that attempt to use the enforcement process to challenge Comcast's discriminatory behavior may have to wait years for a resolution. One Comcast-NBCU merger condition stipulated that if Comcast groups any news and/or business channels in a "news neighborhood," it must group all independent news and business news channels in that neighborhood.[83] Comcast failed to place Bloomberg TV, an unaffiliated business news channel headquartered in New York City, in a news neighborhood, thereby discriminating against the unaffiliated network in favor of its affiliated business network, CNBC.[84] It took more than two

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[81] Comcast NBC Universal Order, at ¶94.
[82] Andrew Dugan, "An IP Engineer and Consumer View of Xfinity Traffic Prioritization," *Level 3 Communications Blog*, May 17, 2012, http://blog.level3.com/internet-broadcast/an-ip-engineer-and-consumer-view-of-xfinity-traffic-prioritization/.
[83] Comcast NBC Universal Order, at Appendix A, Conditions, § III.2. The condition was intended to ensure that Comcast not discriminate against unaffiliated news networks by placing them far away from other news networks, including affiliated ones, that were grouped together, thereby making the unaffiliated network harder to find and reducing its competitive impact.
[84] FCC Public Notice DA 11-1077, released June 20, 2011. http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-11-1077A1.pdf.

years for the FCC to issue a decision ordering Comcast to relocate Bloomberg TV to a news neighborhood.[85] Comcast has relocated Bloomberg TV, but it continues to appeal the decision.[86]

Comcast has also failed to follow merger conditions regarding localism and diversity in programming. Comcast was required by the FCC to file quarterly reports detailing the news and information programming aired on its stations in order to establish compliance with the requirement to air additional original, local news and information programming on the NBC and Telemundo owned and operated local stations.[87] However, a Free Press study of the first report filed by Comcast found that the company failed to provide the required information regarding the programming, such as descriptions of each program, and inflated the calculation of local programming time by including commercials.[88] Comcast's professed commitment to diverse and independent programming has been shown to be similarly weak. While Comcast was required under the merger conditions to add ten new independently owned-and-operated channels to its digital tier, most of the channels added to date exhibit a dearth of the kind of robust, original programming that would make them successful competitors and meaningful additions to the market.[89] These programming additions offer little to consumers and less to creators.

Finally, the FCC required that Comcast offer and market a standalone broadband product for $49.95 for three years to preserve customers' ability to access online video without a cable

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

[86] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses,* FCC MB Docket No. 10-56, Third Annual Report of Compliance with Transaction Conditions (filed February 28, 2014), p.2.

[87] Comcast NBC Universal Order, at Appendix A § XI.2.a-b and § XI.4.

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

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

subscription.[90] Comcast did not sufficiently market this offering and was fined $800,000 by the FCC in 2012.[91] The FCC appropriately used its enforcement powers to address Comcast's failing, but the fine is a miniscule amount to Comcast, and can hardly be considered a deterrent to future non-compliance.

Comcast's record of compliance with *Comcast-NBCU Order* merger conditions, as outlined in this filing, makes clear that approval of the Joint Petition with conditions will fail to protect the public interest. The conditions imposed by the Department of Justice and the FCC in the Comcast-NBCU merger were required to limit the potential for harm that both agencies acknowledged through their merger reviews, recognizing that Comcast-NBCU would have both the incentive and the ability to act anti-competitively and harm diversity and localism.[92] However, these merger conditions have been ineffective in mitigating the harm because Comcast has failed to abide by or found ways to circumvent conditions.

XI. MERGER CONDITIONS IF APPROVED

WGAW strongly believes that this merger fails to meet New York State's public interest standard and the PSC has the authority to deny the franchise transfer. The previous section outlined the pitfalls of adopting conditions to limit the harm posed by the merger. However, should the PSC decide to approve the transaction, it must adopt meaningful conditions that protect New York consumers and advance the State's public interest goals. This section outlines several merger conditions that the PSC should consider.

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[90] Comcast NBC Universal Order, at ¶4.
[91] Stacey Higginbotham, "Comcast pays $800,000 to U.S. for hiding stand-alone broadband," *Gigaom*, June 27, 2012, http://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/.
[92] Comcast NBC Universal Order, at ¶¶3, 29, 44, 61, 67, 78, 93, 97, 207.
Department of Justice Competitive Impact Statement, ¶D(4), ¶(D)(1).

A. Broadband Deployment

The PSC should require, as a condition of approval, that Comcast-TWC install Internet cables to areas adjacent to existing services areas that currently lack access to broadband. The PSC should institute timetables for deployment and adopt penalties for failure to meet deadlines.

B. Standalone Cable and Internet Offerings

Time Warner Cable currently offers New York consumers many affordable options for standalone cable and Internet service. The PSC should require Comcast to continue to offer any existing TWC standalone offerings at their current price for the next five years.

C. Internet Usage Data Caps or Thresholds

The PSC should prohibit the implementation of data caps or thresholds for TWC customers in New York. Both Time Warner Cable and Comcast offer customers different levels of service based on speed. Comcast should not be allowed to add another layer of price discrimination, which will limit consumer choice and harm the online video market.

D. Internet Essentials

To make Comcast's Internet Essentials program effective in addressing the State's digital divide, the PSC should require Petitioners to expand eligibility and increase Internet Essentials' speed. The PSC should mandate the offering be made available to any New York resident within 150% of the poverty line. The PSC should also mandate that Internet Essentials be made available to existing customers who meet the income guidelines. Consistent with New York's broadband targets, Internet Essentials should be offered at 6 Mbps. If the FCC, which recently released a Notice of Inquiry on this matter, increases the broadband benchmark speed above 6

Mbps, then Internet Essentials should be increased to match the federal standard.[93] Petitioners should also be required to prominently market Internet Essentials on its website. The PSC should, in addition, require Petitioners to meet sign-up requirements. The Commission should mandate that Comcast-TWC sign-up a majority of eligible customers within five years of approval of the transaction.

XII. CONCLUSION

Comcast's acquisition of Time Warner Cable does not serve the public interest of the State of New York. The merger will harm competition in upstream content markets, lead to higher prices and fewer choices for New York consumers and harm competing MVPDs and ISPs operating in the state. Many of the alleged benefits are unsubstantiated and not merger specific. In addition, the merger does not support State's public interest goal of broadband deployment, nor does it do enough to address the State's digital divide. The merger will significantly enhance Comcast's ability to discriminate against unaffiliated programmers and services, and to inhibit the development of competition in online video. Previous conditions imposed on Comcast at a national level have failed to limit Comcast's anti-competitive behavior. Mitigating measures adopted in this proceeding will likely prove insufficient to limiting the merged entity's power. In summary, the Joint Petition has failed to demonstrate that this merger has transaction-specific, net positive outcomes for consumers. As such, we respectfully request that this merger be denied.

[93] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,as Amended by the Broadband Data Improvement Act*, Notice of Inquiry, GN Docket No. 14-126, August 5, 2014.

Dated: August 8, 2014

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