BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation and Time Warner Cable Inc.	)	MB Docket No. 14-57
	)	
For Consent To Assign Or Transfer Control Of Licenses and Authorizations	)	

PETITION TO DENY

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Pursuant to Section 309(d) of the Communications Act, 47 U.S.C. §309(d), COMPTEL hereby petitions the Commission to deny the above captioned applications ("Applications") of Comcast Corporation and Time Warner Cable, Inc. ("TWC") to approve Comcast's acquisition of TWC.[1] Comcast and TWC have failed to meet their burden of demonstrating that the proposed acquisition is in the public interest and for this reason, the Commission must deny the Applications.[2]

Section 309(d) provides that any party in interest may file a petition to deny an application to transfer licenses and other Commission authorizations. COMPTEL is the leading industry association representing competitive telecommunications service providers, integrated communications companies and their supplier partners. COMPTEL members are both

[1] *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, Applications and Public Interest Statement filed April 8, 2014 ("Applications"). At issue are CARS licenses, wireless licenses, Section 214 authorizations, and earth station licenses and registrations. *Id*. at Exhibit 1.

[2] This Petition reflects the position of a majority of COMPTEL members. Individual members may be filing separate comment where they advocate positions on some issues that are different from those stated herein. Some members do not join in these comments.

competitors and customers of Comcast and TWC. They compete directly with Comcast and TWC in the provision of voice, high speed data and video services to end users using their own network facilities, a combination of their own facilities and network infrastructure purchased from other providers, including Comcast and TWC, and/or through resale; and in the provision of backhaul transport facilities to wireless service providers. They also purchase facilities and services, including last mile fiber and cable modem services, from Comcast and TWC on a wholesale basis in order to provide transport, Ethernet and other high speed broadband services to their end users (collectively "wholesale inputs"). They purchase programming from Comcast and TWC to incorporate into their video programming lineups, and Ethernet and other Internet services to sell to their end users. Because its members are competitors and wholesale customers of Comcast and TWC, COMPTEL, acting on behalf of its members,[3] is a party in interest with standing to oppose these Applications for transfer of control of licenses and authorizations pursuant to Section 309(d) of the Act and Section 78.22 of the Commission's rules, 47 C.F.R. §78.22.

I. INTRODUCTION AND SUMMARY

Comcast's proposed acquisition of TWC will not serve the public interest, convenience or necessity and for this reason, the Commission must deny the Applications. Comcast and TWC are the largest cable operators, Multichannel Video Programming Distributors ("MVPD") and broadband Internet access service providers in the United States. Comcast's network facilities "cover portions of 39 states and the District of Columbia"[4] and serve approximately

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3 *See, e.g., Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1997) (a trade association has standing to file an action in a representational capacity on behalf of its members).

4 Applications at 7-8.

22.6 million residential and business video customers, 21.1 million high speed residential and business Internet service customers and 10.9 million residential and business voice customers.[5] TWC's cable network facilities cover portions of 31 states and serve 11.3 million residential and business video customers, 11.9 million high speed residential and business Internet service customers and 5.3 million residential and business voice customers.[6] Post-acquisition and post-divestiture, Comcast's video/broadband subscriber base will enjoy a net increase of approximately 8 million customers.[7]

Upon approval by the appropriate federal, state and local regulatory authorities of Comcast's acquisition of TWC, and contingent upon the closing of that transaction, Comcast will (1) sell TWC cable systems serving approximately 1.4 million video customers to Charter Communications for cash, (2) trade 1.5 million TWC video customers and the assets serving them for 1.6 million Charter video customers and the assets serving them; and (3) form and spin off to its shareholders a new publicly traded company that will operate the cable systems serving approximately 2.5 million Comcast video subscribers. Comcast shareholders will own 67% of the new company and Charter will acquire the other 33% in exchange for Charter stock issued to the Comcast shareholders of the new company. The Board of Directors of the new company will

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5 *Id.* at 8, 9, 10; June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57 at 2.

6 Applications at 13-15; June 27, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57 at 2.

7 Applications at 25; June 27, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57.

be comprised of six independent directors and three designated by Charter.[8] As a result of the transactions, Charter will become the second largest cable company in the country.[9]

According to Comcast, the combined company's cable systems will pass 84 million homes[10] (75.4 million when the proposed divestiture of approximately 3.9 million customers is taken into account)[11] out of a total of 122,459,000 million households[12] or more than 68 percent of the households nationwide (62 percent post-divestiture). Post-divestiture, the combined company will provide fixed wireline broadband service to 35.5 percent of subscribers nationwide with speeds at or above 3 Mbps downstream and 768 Kbps upstream.[13] The acquisition will vest

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8 See Charter and Comcast Asset Sale Public Interest Statement at 1, 4, filed June 5, 2014; Charter, Comcast and SpinCo Divestiture Public Interest Statement at 1, 3-4, filed June 5, 2014; Comcast and Charter Reach Agreement on Divestitures, dated April 28, 2014, available at http://corporate.comcast.com/news-information/news-feed/comcast-and-charter-reach-agreement-on-divestitures. See also Comcast Divestiture Transaction Fact Sheet, dated April 28, 2014, available at http://corporate.comcast.com/news-information/news-feed/comcast-and-charter-reach-agreement-on-divestitures

9 Charter and Comcast Asset Sale Public Interest Statement at 10. Charter will serve 5.7 million video customers and 5.8 million broadband customers post-transaction. June 27, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57.

10 Applications Ex. 5, Declaration of Gregory Rosston and Michael Topper at ¶51.

11 June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57 at 2.

12 U.S. Census 2013, available at https://www.census.gov/hhes/families/data/cps2013H.html, Table H-1.

13 June 27, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57 at 5. COMPTEL does not concede that 3 Mbps down and 768 Mbps up is the appropriate benchmark for broadband service. The Commission has established a minimum broadband speed benchmark of 4 Mbps download and 1 Mbps upload for recipients of Connect America Funds and for its Broadband Progress Reports, although it currently is seeking comment on raising the benchmark to 10 Mbps download and 1 Mbps upload. *See In the Matter of Connect America Fund*, *et al.*, WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 at ¶ 94 (rel. Nov. 18, 2011); *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans*

enormous control in one entity—Comcast—over the video, content, broadband and Internet access choices available to those households.

Comcast discusses at length the benefits the transactions will bring to its retail business and wireless backhaul customers. Notably absent from the Applications is any discussion of Comcast's intent to continue providing wholesale access to the products and services COMPTEL service provider members today purchase from TWC and Charter. Elimination of these sources of wholesale services and facilities may remove the only alternative that telecommunications carriers have to the incumbent local exchange carrier's wholesale services in many markets. The elimination of a wholesale supplier cannot help but lead to higher prices.

Just over three years ago, the Commission approved Comcast's acquisition of control over NBC Universal.[14] The Commission described that transaction as:

> effectuat[ing] an unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well. The harms that could result are substantial. For example, Comcast-NBCU would have both greater incentive and greater ability to raise prices for its popular video programming to disadvantage Comcast's rival multichannel distributors (such as telephone companies and direct broadcast satellite ("DBS") providers). It would also have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business.[15]

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in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126, Tenth Broadband Progress Notice of Inquiry, FCC 14-113, ¶¶ 14-17 (rel. Aug. 5, 2014). For purposes of its Internet Access Status Form 477 reporting, however, the Commission uses benchmark breakpoints of less than 3 Mbps download and 768 upload; between 3 Mbps download and 768 Mbps upload and 6 Mbps download and 1.5 Mbps upload; and more than 6 Mbps download and 1.5 Mbps upload. The Internet Access Status Reports provide the only publicly accessible numbers of broadband subscribership.

[14] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast/NBCU Decision*"). Comcast now owns 100 percent of NBC Universal.

[15] *Id.* at ¶3.

The acquisition of TWC will further increase Comcast's control over video programming content through ownership and management interests in TWC's "local news channels . . . local sports channels, [ ] local lifestyle channels" and regional sports networks that carry professional, local and college sports programming.[16] Comcast will also expand significantly its control over the means by which programming is distributed to American viewers both offline and online. The combined company will control the distribution of video content to almost 32 million customers nationwide[17] and the means by which both video programming and wireline Internet access are delivered to more than 35 percent of fixed wireline broadband subscribers nationwide with speeds at or above 3 Mbps download and 768 Kbps upload.[18]

The harms that could result from such an aggregation of control are far more substantial than those threatened by the Comcast/NBCU transaction. The combined company would have even greater incentive and greater ability to raise prices for its popular video programming to disadvantage its rival MVPDs, greater incentive and ability to hinder the development of rival online video offerings and third-party devices, and greater incentive and ability to inhibit potential competition from online video distributors that compete with its cable television business. Compounding these harms are those that may result from the substantial increase in the number of customers over whose access to the Internet and Internet content Comcast will exercise bottleneck control.

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16 Applications at 16.

17 Applications, Exhibit. 5, Declaration of Gregory Rosston and Michael Topper at ¶31.

18 See Applications, Exhibit 6, Declaration of Mark Israel at ¶ 42; June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57; June 27, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57.

The Charter systems and customers that will be transferred to Comcast include those in Boston, New York, Los Angeles, Atlanta, Dallas, and Houston. The clustering of customers and facilities in these major metropolitan areas will create even higher barriers to entry for overbuilders and other potential competitors for MVPD and broadband services, which is likely to further deter future competition.

II. LEGAL STANDARD

In reviewing Comcast's acquisition of TWC, the Commission must conduct the public interest analysis required by Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a) and 310(d), to determine whether Comcast and TWC have shown that approval of the acquisition would serve the public interest, convenience and necessity. In making that determination, the Commission must weigh the potential public interest harms resulting from the proposed acquisition against the potential public interest benefits "to ensure that, on balance, the transfers of control serve the public interest, convenience and necessity." *Comcast/NBCU Decision* at ¶22. Comcast and TWC bear the burden of proving by a preponderance of the evidence that the benefits of the acquisition outweigh the potential harms and serve the public interest and convenience. *Id.* This, they have failed to do.

The Commission's public interest analysis examines four factors: "(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits." *Id.* The Commission's analysis must also incorporate the broad objectives of the Act, "which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public. . . ."[19] In other words, the Commission must assess the transaction's likely effect on *future* competition. To find that a transaction is in the public interest, "the Commission must 'be convinced that it will enhance competition.'"[20] Contrary to these objectives, Comcast's acquisition of TWC will not preserve or enhance competition but instead will increase and enhance Comcast's dominance in the broadband, video programming, video device, and video distribution markets on the national, regional and local levels.

As the Commission has recognized, mergers can create "more efficient collections of assets," but they can also threaten the continued existence of competition, eliminate competitors and/or create opportunities to disadvantage rivals in anticompetitive ways.[21] Many of the benefits from the acquisition touted by the applicants are not so much affirmative *public interest* benefits as benefits that will inure to Comcast. For example, Comcast asserts that its increased scale will allow it to compete for additional customers in the areas passed by TWC's cable systems and spread its fixed investment costs across a greater number of "current and future

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19 *In the Matter of Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement,* WT Docket No. 09-194, Memorandum Opinion and Order, FCC 10-116, at ¶23 (rel. June 22, 2010) ("*AT&T/Verizon Order").*

20 *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12, at ¶ 21 (rel. Jan. 22, 2001) ("*AOL Time Warner Order*").

21 *Id.* at ¶ 15.

customers, making it less expensive on a per-customer basis for Comcast."[22] It further asserts that its increased scale will allow it to commit to purchase greater volumes of equipment from manufacturers, which may induce those manufacturers to be "more flexible in reaching baseline economic terms based on greater sales opportunities."[23] Of course, the same can be said with respect to Comcast's post-acquisition dealings with programmers. What is not found in Comcast's Applications is any commitment to pass any expected cost savings from its more efficient and cost-effective operations through to its customers. In determining whether the acquisition of TWC will serve the public interest, the Commission must carefully weigh the extent to which the financial and economic benefits that Comcast attributes to the transaction will come at the expense of its competitors, retail customers and the wholesale customers of TWC. COMPTEL submits that Comcast has not established that the "potential for benefits to the public interest outweighs the potential for harms."[24] For this reason, the Applications should be denied.

III. COMCAST HAS NOT DEMONSTRATED THAT THE PROPOSED ACQUISITION WILL NOT HARM COMPETITION

There are at least four aspects of Comcast's acquisition of TWC that may threaten the existence of competition in both the wholesale and retail markets and that may create opportunities for Comcast to disadvantage its rivals in anticompetitive ways: (1) loss of TWC (and Charter) as a supplier of wholesale inputs; (2) further concentration of bottleneck control over access to the Internet and Internet content: (3) increased bargaining power as both a buyer

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[22] Applications at Exhibit 5, Declaration of Gregory Rosston and Michael Topper at ¶ 10.

[23] Applications at Exhibit 4, Declaration of Michael Angelakis at ¶ 16. See also ¶ 8 (greater scale will allow Comcast to negotiate better per-unit costs for network and customer equipment).

[24] *AOL Time Warner Order* at ¶ 4.

and seller of video programming; and (4) regional clustering of cable and broadband systems serving the largest markets in the country.

A. Foreclosure Of Access To Wholesale Inputs Will Harm Competition

The Commission has astutely recognized that competition in the wholesale broadband market is crucial to enabling competition in the small business and enterprise customer markets.[25] As the National Broadband Plan stated:

> Ensuring robust competition not only for American households, but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another. Because of the economies of scale, scope and density that characterize telecommunications networks, well-functioning wholesale markets can help foster retail competition as it is not economically or practically feasible for competitors to build facilities in all geographic areas.[26]

TWC (and Charter) have been active participants in the carrier wholesale market and provide critical wholesale inputs that COMPTEL members use to compete in the retail market. In evaluating the impact of the TWC acquisition and the divestiture transactions on future competition, the Commission must pay particular attention to the wholesale market.

There is a wide disparity between the wholesale services provided by Comcast and those provided by TWC as described in the Applications. The description of Comcast's wholesale services is vague and brief: "Comcast is active in the wholesale business, particularly with respect to cellular backhaul services that help wireless carriers manage their network bandwidth more efficiently by leasing fiber facilities to transport wireless traffic from their cell towers."[27] In contrast, the description of TWC's wholesale offerings goes far beyond cellular backhaul:

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[25] Connecting America: The National Broadband Plan at 35.

[26] *Id.*at 47.

[27] Applications at 11.

> TWC offers a wide variety of products and services to business customers including high capacity transmission services (such as Metro Ethernet), video, high speed Internet and voice, as well as hosting and cloud computing services (through its NaviSite subsidiary), all in competition with the incumbent local exchange carriers ("ILECs") and other service providers. TWC offers these services on a retail and *wholesale* basis using its own network infrastructure and third-party infrastructure. . . . In addition, TWC offers *wholesale* transport services to wireless providers for cell tower backhaul and to other *service providers*. In December 2013, TWC acquired DukeNet adding new fiber capacity to serve its business customers.[28]

The Applicants do not specifically address the question of whether the combined company will continue to offer TWC's "wide variety" of wholesale products and services post-acquisition or will focus its wholesale efforts primarily on the wireless backhaul market as Comcast does today. Although the Applications set forth in detail the benefits the transaction allegedly will bring to Comcast's ability to better serve retail business customers,[29] there is no discussion of the impact the acquisition will have on service to wholesale customers other than wireless backhaul customers. For example, Michael Angelakis, Vice Chairman and Chief Financial Officer of Comcast, states that the transaction "will provide the combined company the scale and scope needed to invest and compete vigorously against well-established incumbents for

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28 *Id.* at 15-16 (emphasis added). See also the description in TWC's Annual Report for the fiscal year ending December 31, 2013, SEC Form 10-K, identifying its wholesale customers as primarily other telecommunications services providers: "TWC offers a wide and growing variety of products and services to business customers, including business connectivity, video, voice, hosting and cloud computing services. TWC offers these services at retail and wholesale, managed and unmanaged, and using its own network infrastructure and third-party infrastructure as required to meet customer needs. TWC's retail customers range from small businesses with a single location to medium-sized and enterprise businesses with multiple locations as well as government, education and non-profit institutions. *TWC's wholesale customers are primarily other service providers, such as telecommunication carriers and network and managed services resellers*." *Id.* at 3 (emphasis added). "*Wholesale transport services.* TWC offers wholesale transport services to wireless telephone providers for cell tower backhaul and to other service providers to connect customers that their own networks do not reach." *Id.* at 4. *See also* http://business.timewarnercable.com/solutions/carrier-services.html.

29 Applications at 85-100 and Exhibits 4, 5, 6.

two business customer categories: (1) medium-sized, regional or super-regional, and even enterprise businesses; and (2) wireless backhaul services."[30] Noticeably absent from the Applications is any discussion of Comcast's intent to continue offering wholesale services to service provider customers as TWC does today and/or any mention of how combining forces with TWC will enhance Comcast's ability to serve wholesale customers other than wireless backhaul customers. This is a significant omission and calls into question the accuracy for service provider customers of TWC the statements in the Applications that after the transaction, "customers in the Comcast and TWC markets will have as many providers to choose from . . . as they have today" because "Comcast will simply replace TWC as the provider in the latter's service area."[31]

Comcast's silence on its post-acquisition plans to provide wholesale services to carrier customers (other than wireless backhaul), such as transport, Ethernet and other high speed broadband services, should be troubling to the Commission. Because competitive providers rely upon TWC's wholesale offerings to provide service to their end users, any loss or reduction in the availability of TWC wholesale products and services after the acquisition would adversely affect their ability to provide service to and compete for retail customers. In the absence of a commitment to maintain TWC's presence in the wholesale market both for existing and new customers, the Commission must give significant weight to the harm to present and future competition and the public interest that will be caused by the loss of TWC as a wholesale supplier to other telecommunications service providers.

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[30] Applications, Exhibit 4 at ¶ 32.

[31] Applications at 4.

TWC reported that as of December 31, 2013, it had extended fiber and coaxial cable to connect "860,000 serviceable commercial buildings to its network."[32] Elimination of TWC as a wholesale supplier may remove the only alternative that telecommunications carriers have to the incumbent local exchange carrier's wholesale services in TWC's franchise areas.[33] The elimination of a wholesale supplier cannot help but lead to higher prices, especially in those areas where TWC is the only alternative.

Comcast expresses its intention to increase its presence in the business sector and extols the benefits the acquisition will produce by making it a stronger and more cost-efficient competitor in the retail business and wholesale wireless backhaul markets.[34] The acquisition will also, however, increase Comcast's incentive and ability to suppress competition from rivals. It can do so by withdrawing or limiting the availability of wholesale inputs used by its competitors to provide retail business services. Foreclosing rivals from accessing a source of wholesale inputs used to provide services that would compete with Comcast's retail services would substantially frustrate and impair the preservation and enhancement of competition in a manner inconsistent with the goals of the Communications Act and the public interest in promoting the availability of customer choice in providers.

The TWC and Charter transactions will greatly expand Comcast's footprint in some of the largest markets in the country, including through the acquisition of Charter customers in

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[32] TWC Annual Report, for the fiscal year ending December 31, 2013, SEC Form 10-K at 5; see also http://business.timewarnercable.com/solutions/carrier-services.html.

[33] Of course, there are many areas of the country where there is no alternative to the ILEC at all for wholesale services. *See e.g.*, July 16, 2014 Letter from Angie Kronenberg, COMPTEL, to Marlene H. Dortch, filed in WC Docket No. 05-25.

[34] Applications at 85-100.

Boston. New York, Los Angeles, Atlanta, Dallas, and Houston. Charter Business offers high capacity last mile connectivity to wireline carriers, Internet service providers and other competitive carriers on a wholesale basis.[35] In the Public Interest Statement Comcast submitted addressing the transfer of Charter cable systems and customers to Comcast, there is no mention of whether Comcast will continue to offer these wholesale services to existing or new customers.[36] Significantly, Comcast's economic experts address only the "efficiencies in certain customer service and retail operations" that Comcast's acquisition of the Charter systems will generate.[37] Again, to the extent that Comcast's silence on the wholesale issue can be read as an intention not to pursue this segment of Charter's business, the transactions will further disadvantage competitive carriers through the loss of a second wholesale supplier. The elimination of Charter as a source of wholesale inputs as a result of the Comcast transactions will not serve the public interest.

The Commission's public interest analysis must focus on the "transaction's effect on future competition."[38] Whatever weight the Commission may assign to the alleged beneficial effects of the transaction claimed by Comcast must be balanced against the harmful consequences, including Comcast's ability to "enhance barriers to entry by potential competitors

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35 Charter Communications Annual Report for the fiscal year ending December 31, 2013, Form 10-K at 6.

36 Charter and Comcast Exchange Public Interest Statement filed June 5, 2014.

37 *Id.*, Attachment A, Declaration of Gregory L. Rosston and Michael D. Topper at ¶ 12.

38 *In the Matter of Applications for Consent to Assignment and/or Transfer of Control of Adelphia Communications Corporation to Time Warner Cable, Inc.*, MB Docket No. 05-192, Memorandum Opinion and Order, FCC 06-105 at ¶64 (rel. July 21, 2006) ("*Adelphia Decision"*).

and create opportunities to disadvantage rivals in anticompetitive ways."[39] The absence of a commitment by Comcast to continue offering the TWC and Charter wholesale products and services on which competitors rely to provide service to their end users will clearly enhance barriers to entry, create opportunities to disadvantage rivals in anticompetitive ways and limit consumer choice. Comcast's commitment to increase its presence in the wireless backhaul market is insufficient to outweigh the harms that will be caused in the retail wireline market by the loss of critical sources of wholesale inputs.

B. Allowing Comcast To Further Consolidate Its Bottleneck Control Over Access To The Internet And Internet Content Will Not Serve The Public Interest

Comcast repeatedly discounts any possibility that the transaction will have anticompetitive effects in the broadband market on the grounds that Comcast and TWC do not compete with one another for customers and customers will see no reduction in the number of service providers available to them post-acquisition.[40] As Comcast has acknowledged,[41] the relevant geographic market for analyzing the extent of competition in video and broadband services is the cable operator's local franchise area because consumers make decisions based on the MVPD and broadband choices available at their residences.[42] Although Comcast contends that the extent of the combined company's presence in regional or metropolitan areas such as DMAs or MSAs is irrelevant to the competitive analysis,[43] it presents a chart purporting to show

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39 *Id.*

40 Applications at 4, 6, 138. As noted above, there will be a reduction in the number of wholesale service providers as a result of the transactions to the extent that Comcast does not continue to offer the wholesale products and services currently provided by TWC and Charter.

41 Applications at 132, 138.

42 *Adelphia Decision* at ¶25.

43 Applications at 139.

an expansive array of alternative broadband service providers in 19 of the top 20 MSAs in which the combined company will operate to demonstrate how competitive the broadband market is.[44] Each of the MSAs cited covers thousands of square miles, far more than any of the local franchise areas in those MSAs served by Comcast or TWC. According to Comcast's chart, there are as many as 20 alternative providers of broadband service, including Charter, in the Boston-Cambridge-Quincy, Massachusetts MSA; 17 in the Los Angeles-Long Beach-Santa Ana, California MSA; 33 in the Dallas-Fort Worth-Arlington, Texas MSA; 32 in the Houston-Sugar Land-Baytown, Texas MSA; 25 in the Atlanta-Sandy Springs-Marietta, Georgia MSA; and 29 in the New York-Newark-Jersey City MSA.[45] What is missing from Comcast's Applications is any showing of the number of broadband providers with which either Comcast or TWC actually competes for customers in any of their respective local franchise areas, information that clearly would be relevant to the competitive analysis.[46] Nor has Comcast made a showing that bringing TWC under the Comcast umbrella will preserve or enhance competition in any of the local franchise areas in which the combined company will operate.

Ironically, even if an MSA was the appropriate geographic market in which to evaluate competition for broadband services (which it is not), the proposed acquisition and subsequent sale, exchange and divestiture transactions will eliminate at least one alternative broadband

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[44] *Id.* at 142.

[45] Wireless providers are included in these totals. *Id.* It is highly questionable whether wireless broadband service can be considered a substitute for wireline broadband service due to the significantly higher cost and data caps to which wireless customers are subject.

[46] Comcast itself concedes that "Consumers do not buy video, broadband or voice service based on which provider is in their DMA or MSA, but rather on which provider serves their local neighborhood." Applications at 139.

provider cited by Comcast in the MSAs of Boston, New York, Los Angeles, Atlanta, Dallas and Houston when Charter transfers its customers and cable assets in those MSAs to Comcast in exchange for TWC assets and customers located elsewhere.[47] In other words, the effect of the proposed acquisition and divestiture will be a consolidation of Comcast's control over broadband network facilities and access to broadband customers in six of the ten largest MSAs by "fill[ing] in gaps in [its] footprint,"[48] while removing from the mix at least one broadband provider (Charter) whose service Comcast characterizes as an alternative to its own.[49]

The acquisition will result in a dramatic increase in the number of customers over whose access to the Internet and Internet content Comcast will exercise bottleneck control. Comcast's broadband subscriber count will rise from 21.1 million (pre-acquisition) to 29.6 million (post-divestiture).[50] Indeed, even after the divestitures, Comcast will serve more than 35 percent of the fixed wireline broadband subscribers receiving speeds of at least 3 Mbps download and 768 Kbps upload nationwide.[51] While theoretically an end user may be able to switch broadband

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47 See Update on TWC Acquisition, A Message from Brian Roberts and Neil Smit on the Time Warner Cable Transaction, available at https://www.sec.gov/Archives/edgar/data/1166691/0000950103-14-002980-index.html; June 5, 2014 Letter of Kathryn Zachem, *et al.* to Marlene Dortch filed in MB Docket No. 14-57 at Attachment 3 showing elimination of Charter as a broadband provider in those MSAs.

48 *Id.*

49 June 5, 2014 Letter of Kathryn Zachem, *et al.* to Marlene Dortch filed in MB Docket No. 14-57 at Attachment 3.

50 June 24, 2014 letter of Kathryn Zachem, *et al.* to Marlene Dortch filed in MB Docket No. 14-57.

51 June 27, 2014 letter of Kathryn Zachem, *et al.* to Marlene Dortch filed in MB Docket No. 14-57 (post-merger and post-divestiture, Comcast will have 29.6 million broadband subscribers). According to the Commission's latest tally, there were a total of 94.3 million fixed wireline broadband customers nationwide and 70 million with speeds of at least 3 Mbps down and 768 Kbps up as of June 30, 2013. See *Internet Access Services: Status as of June 30, 2013* (June 2014).

providers (if and where there is an alternative available), edge providers face a terminating access monopoly from the broadband provider that serves the end user. Control of the bottleneck local access facilities,[52] together with its national market share and ownership of key video programming assets, will give Comcast a unique ability and incentive to engage in anticompetitive acts that can suppress the delivery of information to its end users and block or degrade the quality of access to certain content and content providers.

As the Commission recognized in the Open Internet Notice of Proposed Rulemaking, both edge providers and end users seeking access to edge providers are subject to the gatekeeper control of a retail broadband provider. An end user has only one option to reach a given edge provider's content and to reach any given end user, an edge provider's content must go through the end user's broadband provider.[53]

Consumers purchase broadband Internet access services from Comcast expecting to be able to reach any lawful content, application, service or edge provider they choose at the speed for which they pay. The increasing availability of, and demand for, video streaming and other multimedia services have allowed consumers to watch television shows, movies and other programming online rather than through their cable television service. Video streaming services, such as Netflix, offer television shows, movies, and original programming over broadband Internet connections and these services directly compete with the online video

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52 In his January 9, 2014 Speech at the Computer History Museum, Chairman Wheeler recognized that the high fixed costs of broadband networks and their very large minimum efficient scale "raises the distinct possibility that the owners and operators of such networks possess, at the least, some local market power."

53 *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 at ¶ 46 (rel. May 15, 2014) ("*Open Internet NPRM").*

services offered by Comcast, such as XFinity TV Go and its affiliates, including Hulu.[54] Because video streaming service providers, content delivery networks ("CDNs") and other edge providers can only reach Comcast subscribers through Comcast's network, Comcast—because of its gatekeeper status, national market share and ownership of Comcast, NBCU and TWC video programming—has both the incentive and the ability to degrade the delivery of services that its subscribers request from competitors in order to make its own video on demand and other subscription services appear more attractive. Comcast also has the incentive and the ability to demand access charges from edge providers seeking to deliver competitive video services that Comcast subscribers request over the broadband Internet access connections for which they have already paid. The result cannot help but be a suppression of competition that will victimize millions of additional end users if Comcast's acquisition of TWC is approved.

Comcast contends that it is not an aggregator of content for its broadband customers, but merely "a means of access for any and all of the Internet content" its customers want.[55] Comcast's control over the "means of access" all edge providers need to reach its customers allows it to also control the "Internet content" and quality of that content its customers receive. The much publicized dispute between Comcast and Netflix that ultimately led Netflix to agree to pay Comcast directly for the interconnection capacity necessary to deliver high quality services to Comcast customers[56] demonstrates how Comcast has been able to leverage its status to exact

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54 Comcast has a 33 percent ownership interest in Hulu. Applications at 13, n.7.

55 Applications at 6.

56 *See e.g.*, http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html; April 21, 2014 Letter from Reed Hastings, Netflix CEO, to Shareholders available at http://ir.netflix.com/; Written Statement of Dave Schaeffer, Chairman and Chief Executive Officer, Cogent Communications Group, Inc., before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Hearing on "Competition in the Video and Broadband Markets: The Proposed Merger of

what are essentially access charges from at least one edge provider delivering video services that compete with its own.[57] As Comcast explained to the Antitrust Law Subcommittee of the U.S. House of Representatives Judiciary Committee, content providers, such as Netflix, typically contract with Internet backbone providers, including transit and content delivery networks, to carry their content to the ISP serving the end user.[58]

Comcast apparently used congestion at the points of interconnection to demand payment from the third party networks carrying Netflix traffic to add the additional capacity necessary to relieve the congestion and stem the buffering, pixelation and download delays that Comcast customers were experiencing as they tried to access Netflix video offerings.[59] Netflix ultimately agreed to pay Comcast for direct interconnection to its ISP network and access to its customers in an effort to improve the streaming quality of the Netflix offerings ordered by Comcast customers.[60] Comcast has characterized this new arrangement as Netflix's decision "to cut out

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Comcast and Time Warner Cable" at 5-8. We understand that the Commission is currently reviewing the terms of the Comcast/Netflix agreement as part of its effort to collect information on Internet traffic exchange and congestion issues between ISPs and other networks and services. *See* Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion dated June 13, 2014.

[57] See *Open Internet NPRM* at ¶ 69 and n. 166 discussing consumer complaints the Commission has received about the "source of slow or congested services" and specifically referencing a complaint alleging that "bandwidth through to Netflix is being artificially restricted."

[58] Joint Written Statement of David L. Cohen, Executive Vice President Comcast Corporation and Robert D. Marcus, Chairman & Chief Executive Officer Time Warner Cable Inc. to the Regulatory Reform, Commercial and Antitrust Law Subcommittee of the U.S. House of Representatives Judiciary Committee, Oversight Hearing on "Competition in the Video and Broadband Markets: The Proposed Merger of Comcast and Time Warner Cable," at 40 ("Cohen and Marcus Joint Written Statement").

[59] *See* n. 57, *supra*.

[60] See August 1, 2014 Ex Parte letter from Markham Erickson, Counsel to Netflix, To Marlene Dortch filed in GN Docket No. 14-28 at Attachment: "In the case of Comcast, Netflix

the middleman and interconnect directly with Comcast's ISP network"[61] and states that it "has over 40 settlement-free routes and 8,000 commercial arrangements, which include dozens of substantial paid peering and transit arrangements with CDNs, ISPs and major content providers which bring content to Comcast's ISP network for delivery to Comcast's customers."[62] The TWC acquisition will increase Comcast's broadband subscriber count and the number of subscribers over which it has gatekeeper control by almost 40 percent and increase Comcast's already substantial stake in the video programming business. The combined company's sheer size and reach will only strengthen Comcast's ability and incentive to demand escalating access charges from edge providers and paid peering and transit arrangements with CDNs and major content providers to reach Comcast subscribers with video offerings that compete with Comcast's own. Comcast's control over "the means of access for any and all of the Internet content" its customers want enables it to delay relieving congestion at the interconnection point to exact access charges from the content providers trying to deliver any and all of the Internet content its customers want at the level of service for which they are paying.

The Commission has previously determined that "innovative streaming video applications and independent sources of video content have spurred end-user [broadband] demand, which, in turn, has led to network investments and increased broadband deployment."[63]

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purchased all available transit to reach Comcast's network. Every single one of those transit links to Comcast was congested (even though the transit providers requested extra capacity). The only other available routes into Comcast's network were those where Comcast required an access fee."

61 Cohen and Marcus Joint Written Statement at 41, n. 103.

62 *Id.* at 41.

63 *Open Internet NPRM* at ¶ 26.

It has also determined that vertically integrated ISPs, such as Comcast, "have incentives to interfere with competitive services and . . . incentives to accept fees from edge providers."[64] Such practices threaten the "virtuous circle" by chilling entry and innovation by edge providers, impeding competition and dampening consumer demand.[65] As broadband subscribers continue to demand more bandwidth-intensive applications and services, Comcast's incentive and ability to demand payment from the edge, transport and CDN providers delivering the traffic its subscribers request will increase, especially where that traffic is generated by services that compete with services offered by Comcast. With the acquisition of TWC, Comcast will have bottleneck control over access to more than 35 percent of the nation's broadband Internet access subscribers with speeds at or above 3 Mbps download and 768 Kbps upload and the quality of the Internet services and content delivered to them. To the extent that Comcast is inclined to restrict access to competitive services and demand fees from edge providers attempting to deliver competitive content to its subscribers, the acquisition will heighten its ability to interfere with the "virtuous circle" and would be contrary to the public interest.

C. Comcast's Potential Influence Over Device Availability and Functionality Also Is Troubling

The TWC acquisition will significantly increase the number of customers over whose very access to streaming video services through third-party devices Comcast can, and will, control and restrict. Comcast already has demonstrated both the ability and willingness to keep popular content off third-party devices. Its development of its X1 platform provides it with every incentive to prevent competing devices to succeed and to keep competitive over-the-top

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64 *Id.* at ¶43.

65 *Id.* at ¶ 26.

applications and services out of the hands of its subscribers. Comcast's expansion into the former territories of TWC and Charter thus greatly would harm consumer choice in those areas. Moreover, if Comcast is successful in suppressing the market for third-party devices, it may also increase the costs of small MVPDs seeking to use those devices as a solution for providing their consumers with a better, more unified, MVPD/OVD experience.

Comcast's incentive to foreclose its subscribers' choice in devices should be self-evident. Comcast has invested heavily in its X1 platform, which is intended to unify MVPD, VOD, and online services into a single device.[66] Comcast reaps significant revenues from leasing set-top boxes and remote controls to its subscribers. Comcast has every incentive, then, to undermine third-party devices that provide consumers with a similar unified experience. Moreover, Comcast will likely prevent consumers from accessing video programming from sources other than those with which it is affiliated. Unsurprisingly, Comcast's X1 currently appears limited to Comcast's video services and does not support third-party OVD applications.

The problems with the proposed transaction extend beyond traditional set-top boxes to other consumer electronic devices. Comcast's authentication system and its significant market power over programming acquisition provide Comcast with the ability to foreclose innovation in the device market. Comcast's authentication system enables its cable subscribers to view some content over the Internet if the subscriber already pays for and receives the same content from Comcast's traditional cable service. As internal Comcast documents acknowledge,

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[66] Comcast, *Xfinity TV's Next Gen X1 Platform: The Future of Television*, http://corporate.comcast.com/news-information/news-feed/xfinity-tvs-next-generation-x1-platform-the-future-of-tv.

"'authentication' is Comcast's and other MVPDs' attempt to counter the perceived threat posed by" online video distributors.[67]

By using its market power over content providers to ensure that Comcast's subscribers must authenticate through Comcast, rather than the content provider itself, Comcast is able to control the devices consumers can use. This concern is more than theoretical: Comcast currently is blocking its HBO subscribers' access to HBO GO from two popular streaming devices—Roku and PlayStation 3[68]—which would otherwise permit Comcast customers to access online video on their television sets without using the cable set top box. By prohibiting third-party devices from having access to popular content like HBO's (content that the consumer is paying for), Comcast would in turn be able to make those devices less popular. Indeed, Comcast's ability to use that strategy against such a popular programmer as HBO raises significant concerns that Comcast may seek to restrict other programmers from making their content available through other third-party devices, which would dramatically increase the scope of the potential harm.

Such discrimination against streaming device manufacturers disserves both Comcast's broadband and cable customers and the broader public interest by stifling innovation and discouraging entry. The largest broadband provider in the country that also controls key video

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67 See *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106, Competitive Impact Statement at 19 filed with the U.S. District Court for the District of Columbia on January 18, 2011, available at http://www.justice.gov/atr/cases/f266100/266158.htm

68 See Joel Mathis, "Comcast Today: Trouble With HBO GO," available at http://www.phillymag.com/news/2014/03/06/comcast-today-trouble-hbo-go/; Jeff Baumgartner, "Comcast Not Authenticating HBO GO On The PS3," available at http://multichannel.com/news/content/comcast-not-authenticating-hbo-go-ps3/356002; see also http://www.hbogo.com/activate/

programming assets should not be permitted to preclude its customers from using any non-harmful third party streaming device of their choice to access Internet content over their broadband connections and television sets.[69] Comcast's conduct in prohibiting its customers from using Roku or PlayStation 3 devices to access HBO GO also appears to be a violation of the Commission's no-blocking rule.[70] Although the D.C. Circuit vacated the no-blocking rule in January,[71] Comcast made a voluntary and enforceable commitment to comply with the open Internet rules, including the no-blocking rule, to secure approval for the Comcast/NBCU transaction,[72] and that commitment remains in effect.[73]

Consequently, approval of the transaction hazards two immediate harms. To the extent that approval of the transactions would allow Comcast to deny the TWC and Charter customers it is acquiring access to HBO GO via Roku and PlayStation 3, the harm stemming from the violation of the no-blocking rule would be visited upon an additional 8 million customers who currently are able to enjoy such access as TWC and Charter subscribers.[74] At the same time, TWC has partnered with Roku and FanTV to provide its MVPD content through an app on their

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69 *See Open Internet NPRM* at ¶ 94 ("safeguarding consumers' ability to access and effectively use the lawful content, applications, services and devices of their choice on the Internet is an essential component of protecting and preserving the open Internet").

70 47 C.F.R. §8.5(a) provides that "a person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services or non-harmful devices, subject to reasonable network management."

71 *Verizon v. FCC*, 740 F. 3d 623 (D.C. Cir. 2014).

72 *Comcast/NBCU Order* at ¶ 94.

73 Applications at 3, 6-7.

74 As a result of the TWC acquisition and the divestiture/exchange transactions, Comcast's broadband subscriber count will increase from 21.1 million to 29.2 million. June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch.

devices[75] – greatly expanding the choice in the devices available to TWC's customers and allowing them to enjoy both OVD and MVPD options side by side. Those options for TWC's customers would likely also be extinguished by this transaction.

The transaction would also create long-term market problems that would significantly harm consumer choice and impede further innovation in this space. In its post-acquisition role as the nation's largest cable and Internet access service provider and owner of key video programming assets, Comcast will have the power to determine which streaming device manufacturers will be able to deliver content to 30 million customers and which content they will be able to deliver. In addition to the harm inflicted on its subscribers, Comcast's ability to discriminate will provide it with a major (and unwarranted) say over which innovative devices succeed or fail in the marketplace. And as noted above, Comcast has a vested interest in ensuring that the only device that succeeds is the one of its own development—the X1. As the Department of Justice asserted in the Comcast/NBCU case, "[b]y quashing or delaying the progress of rivals that attempt to introduce new products and technologies, the merged firm could slow the pace of innovation in the market and thus harm consumers."[76] No MVPD or Internet service provider, including Comcast, should be able to so squelch innovation and dictate which non-harmful streaming devices its customers may use to access programming for which they have already paid.

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[75] *See* John Falcone, TWC TV App Turns Roku into a Cable Box for Time Warner Customers (Hands-On), CNET, Mar. 5, 2013, http://www.cnet.com/news/twc-tv-app-turns-roku-into-a-cable-box-for-time-warner-customers-hands-on/; Ryan Lawler, Fan TV's Streaming Set-Top Box Will Soon Be Available to Time Warner Cable Subscribers, TechCrunch, Apr. 22, 2014, http://techcrunch.com/2014/04/22/fan-tv-twc/.

[76] *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106, Competitive Impact Statement at 21-22.

By impeding further development of third-party devices, the transaction could also significantly increase the future device costs for small MVPDs. For small operators, these third-party devices may offer an opportunity to avoid significant research and manufacturing costs associated with deploying next-generation devices in order to provide consumers with the integrated MVPD/OVD experience they seek. As TWC's collaborations with Roku and Fan TV have demonstrated, integration of MVPD services onto a third-party device can be an effective strategy for providing those capabilities. If Comcast were successful in impeding the deployment or further development of those devices, it therefore would also impede the ability of others to use those devices as a solution—thus forcing smaller MVPDs to either risk a significant investment or forego providing their customers with a more robust service.

D. Comcast's Increased Market Power As A Buyer and Seller Of Video Programming Will Harm Competition

Comcast's acquisition of TWC is also likely to have anticompetitive effects in the market for video programming by further enhancing Comcast's market power[77] as both a purchaser and seller of such programming. Comcast will be negotiating programming and content purchases not only for the 29.8 million Comcast and TWC subscriber,[78] but also for the 2.1 million Bright House Networks subscribers for which TWC acquires programming and content today.[79]

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77 *See Cablevision Systems Corporation v. FCC,* 649 F. 3d 695, 712 (D.C. Cir. 2011) ("clustering and consolidation in the [cable] industry bolsters the market power of cable operators because 'a single geographic area can be highly susceptible to near-monopoly control by a cable company'").

78 June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch filed in MB Docket No. 14-57 at 2.

79 TWC owns 66.67 percent of Time Warner Entertainment-Advance/Newhouse Partnership which owns the licenses and authorizations of Bright House Networks. TWC provides various services to Bright House networks, including "the opportunity to acquire equipment and third-party programming on a joint basis. . . ." June 24, 2014 *Ex Parte* Letter of Katheryn A. Zachem, *et al.* to Marlene H. Dortch at 10-11.

Comcast has more than a 50 percent share of the MVPD market in 12 Designated Market Areas ("DMAs"), including Seattle (62.5 percent), Boston (57.4 percent), San Francisco (55.7 percent), Philadelphia (54 percent), Denver (53 percent) and Portland, Oregon (52.4 percent).[80] Its market shares in Seattle, San Francisco and Portland will increase even more with the addition of the Charter customers being acquired as part of the Exchange transaction.[81] TWC has more than a 50 percent share of MVPD subscribers in 15 DMAs, including Honolulu (90 percent); Rochester, (75.7 percent), Albany, (67.8 percent), Syracuse, (67 percent) and Binghampton, New York (63.5 percent); Portland, Maine (57.9 percent); Palm Springs, California (57.6 percent); and Beaumont, Texas (52.4 percent).[82] Comcast's market share in Albany will increase with the addition of the Charter customers being acquired as part of the Exchange transaction.[83]

Comcast's control of such a large percentage of the MVPD customers in these DMAs together with its presence post-acquisition, post-divestiture in 16 of the 20 largest Metropolitan Statistical Areas (MSAs) and 15 of the 20 largest DMAs will increase its purchasing power for

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80 See Senate Judiciary Committee Hearing, "Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers," Questions for the record submitted by Senator Al Franken for David Cohen at 3, available at April 9, 2014 Cohen Responses.

81 See Update on TWC Acquisition, A Message from Brian Roberts and Neil Smit on the Time Warner Cable Transaction, available at https://www.sec.gov/Archives/edgar/data/1166691/0000950103-14-002980-index.html.

82 See Response to Questions for the Record for Arthur Minson, Executive Vice President and Chief Financial Officer, Time Warner Cable, "Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers," Senate Judiciary Committee, May 1, 2014 at 7, available at April 9, 2014 Minson Responses.

83 See Update on TWC Acquisition, A Message from Brian Roberts and Neil Smit on the Time Warner Cable Transaction, available at https://www.sec.gov/Archives/edgar/data/1166691/0000950103-14-002980-index.html.

programming significantly.[84] Comcast's increased scale as a purchaser (for almost 32 million MVPD subscribers nationwide) will also strengthen its bargaining position and enable it to negotiate better prices than are made available to smaller MVPDs. Comcast itself has predicted that it expects to realize millions of dollars in operating expense efficiencies "from savings on programming costs over a three-year period to the extent and at such time as more favorable rates and terms in some of Comcast's programming agreements supersede some of TWC's existing contracts."[85]

By Comcast's own admission, "[p]rogrammers as a whole have significant bargaining power."[86] Comcast's ownership of highly valued, must-have video programming, such as that of NBCUniversal, its national cable networks, including Bravo, E! and USA Network, and its regional sports networks ("RSNs"), will be enhanced with the addition of the local and regional news, sports and lifestyle channels/networks owned by TWC.[87] Its strong selling position as an owner of must-have programming will enable it to foreclose competitors from access to necessary inputs and/or to raise its rival costs.

Comcast's dominant role as both a buyer and seller of video programming can be used to disadvantage its competitors that also buy and/or sell video programming.

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[84] Prior to the divestiture, Comcast is in 19 of the 20 largest MSAs and 19 of the 20 largest DMAs. Applications at 142, 151. As a result of transferring its cable assets in Chicago, Detroit and Minneapolis to SpinCo, its presence in the top 20 MSAs will be reduced to 16. As a result of transferring its cable assets in Chicago, Detroit and Minneapolis to SpinCo and its transfer of TWC's cable systems in Cleveland to Charter, its presence in the top 20 DMAs will be reduced to 15 markets. See Charter and Comcast Asset Sale Public Interest Statement at Appendix A, filed June 5, 2014.

[85] *See* Applications at Exhibit 4, Declaration of Michael J. Angelakis at 4.

[86] Applications at 78.

[87] Applications, Exhibit 8.

1. Comcast As A Buyer Of Programming

Comcast competes in both the upstream input market for programming and the downstream output market for the retail distribution of cable video services. Comcast has a terminating monopoly over access to its end users and, as a gatekeeper, is able to exercise market power over sellers of programming who wish to reach those end users. By virtue of its status as the largest MVPD in the nation, Comcast already enjoys significant market power as a purchaser of video programming. Comcast repeatedly asserts that its acquisition of TWC raises no horizontal market consolidation concerns because it does not compete with TWC for retail customers.[88] Comcast also asserts that the transaction will not reduce competition in video distribution.[89] Contrary to Comcast's allegation, its acquisition of TWC will in fact reduce by one the number of video distributors seeking to purchase programming from wholesale suppliers. This reduction in competition will further increase Comcast's market power as a purchaser of programming and content. With the addition of the TWC customers it will be acquiring and its position as the programming negotiator for Bright House Networks post-acquisition, any programmer that wants to reach the almost 32 million customers served by Comcast and Bright House Networks will have to strike a deal with Comcast. As the Commission has acknowledged, the more subscribers an MVPD serves, the more favorable will be the rates, terms and conditions it is able to negotiate for programming.[90]

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[88] *See, e.g.*, Applications at 4-5, 127.

[89] Applications at Exhibit 5, Declaration of Gregory Rosston and Michael Topper at ¶23.

[90] *In the Matter of DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utilities, Inc.*, CSR-8480-P, Memorandum Opinion and Order, FCC 14-73, at ¶¶5, 19 (rel. July 16, 2014); *Adelphia Decision* at ¶65 (substantial discounts are negotiated based on the number of MVPD subscribers).

Although its economic experts opined that Comcast will not gain negotiating leverage for programming post-transaction,[91] Comcast's own David Cohen admitted (albeit modestly) that the acquisition of TWC would result in a "potential slight increase in leverage in negotiating programming deals [that] may enable the combined company to negotiate better prices. . . ." [92] COMPTEL submits that Mr. Cohen's assessment is an understatement. Last year, the Commission noted that according to industry tracker SNL Kagan, Comcast and TWC "can better leverage their scale in programming cost negotiations" compared to smaller and mid-sized MVPDs.[93] Comcast's projection of the many millions of dollars it will save on programming costs post-transaction cannot help but be based at least in part upon its increased clout as a purchaser on behalf of more than 30 percent of the MVPD market.[94] Because the programmers will lose a dollar in revenue for every dollar Comcast saves, they will have to raise the prices they charge smaller MVPDs, such as COMPTEL's members, in order to make up the difference. Fees incurred for programming are a major expense for all MVPDs[95] and any increase in such

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[91] Applications, Exhibit 5, Declaration of Gregory Rosston and Michael Topper at ¶183.

[92] See Senate Judiciary Committee Hearing, "Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers," Questions for the record submitted by Senator Mike Lee for David Cohen at 1, available at April 9, 2014 Cohen Responses.

[93] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99, at ¶69 (rel. July 22, 2013).

[94] As Comcast's Mr. Angelakis explained with respect to post-acquisition interactions with equipment suppliers, Comcast's increased scale will allow it to commit to purchase greater volumes of equipment from manufacturers which will lead manufacturers to "be more flexible in reaching baseline economic terms based on greater sales opportunities." Applications at Exhibit 4, Declaration of Michael Angelakis at ¶16. Comcast's increased scale as an MVPD will also allow it commit to purchase greater volumes of programming which should lead programmers to be more flexible in reaching baseline economic terms based on greater sales opportunities.

[95] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Report, FCC 12-81, at

costs to compensate for deeper discounts offered to Comcast will create or enhance barriers to entry by potential competitors, especially smaller providers, and create opportunities for Comcast to disadvantage its rivals in anticompetitive ways.

Comcast's post-transaction programming cost savings are part and parcel of the $1.5 billion in operating expense efficiencies that Comcast expects to realize by the third year, and the operating expense efficiencies at or above the $1.5 billion level it expects to realize each year after that.[96] Comcast has made no commitment to reduce the rates it charges its retail customers to reflect these savings.[97] In contrast to Comcast's claims of the efficiencies in scale and scope that the transactions will generate for its own business operations, one result of the transactions is likely to be an increase in the cable rates paid by customers of smaller MVPDs to account for the increased wholesale programming costs the smaller MVPDs will have to absorb to offset the deep discounts made available to Comcast.

Comcast's purchasing power may also threaten competition in the provision of video programming by allowing it to determine which new and/or unaffiliated national and regional programmers and content providers succeed or fail.[98] As the Commission has recognized,

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¶367 (rel. July 20, 2012); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99, at ¶69 (rel. July 22, 2013).

96 Applications at Exhibit 4, Declaration of Michael J. Angelakis at 3-4.

97 See Jon Brodkin, "Comcast: No promise that prices 'will go down or even increase less rapidly'" available at http://arstechnica.com/tech-policy/2014/02/comcast-no-promise-that-prices-will-go-down-or-even-increase-less-rapidly/

98 Comcast identified nine cable networks that it does not carry that have "not only survive[d], but thrive[d]." See Senate Judiciary Committee Hearing, "Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers," Questions for the record submitted by Senator Mike Lee for David Cohen at 2, available at April 9, 2014 Cohen Responses. Of those nine, NBC Universal owns all or part of three (Chiller, Cloo and Universal Sports); Viacom owns all or part of two (Epix and MTV U); Disney and Univision own one (Fusion);

programmers need to reach a critical mass of subscribers relatively quickly in order to achieve long term viability.[99] Post-acquisition Comcast will serve as the programming gatekeeper for almost 32 million MVPD subscribers and any delay or denial in carriage for particular programming content to these subscribers could be fatal to the programs' viability.

Comcast's enhanced regional concentration in certain major markets, including New York and Los Angeles, will also increase its incentive and ability to discriminate against unaffiliated programmers. At the time it approved the Comcast/NBCU transaction, the Commission found that Comcast discriminated against unaffiliated programming in favor of its own and that conditions relating to program carriage and channel placement were necessary to mitigate harm to competition.[100] Among others, the Commission adopted a specific "news neighborhood" condition to guard against Comcast's increased incentive and ability to discriminate on the basis of affiliation against unaffiliated news programming once it took control of NBCU.[101] After two years of litigating the meaning of that condition, the Commission directed Comcast to carry Bloomberg Television in a news neighborhood on each headend in the top 35 DMAs that (a) carries Bloomberg Television and (b) has a grouping of at least four news channels within five adjacent channel positions.[102] Comcast, of course, was the

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Fox owns one (Fox Soccer Plus); ESPN and University of Texas own one (Longhorn Network); and DirecTV owns one (NFL Sunday Ticket).

99 *In the Matter of Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Memorandum Opinion and Order, FCC 00-202 at ¶55 (rel. June 6, 2000).

100 *Comcast/NBCU Decision* at Appendix B, ¶¶ 70-71.

101 *Comcast/NBC Decision* at Appendix A, Section III.2; *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Memorandum Opinion and Order, FCC 13-124 at ¶ 33 (rel. Sept. 26, 2013) ("*Bloomberg Decision").*

102 *Bloomberg Decision.*

beneficiary of the two year delay by being able to avoid carrying the unaffiliated Bloomberg Television programming in certain of its existing news neighborhoods during the pendency of the case. The life of the Comcast/NBCU program carriage and channel placement conditions is more than half over, but the potential harm to competition arising from Comcast's acquisition of TWC and its regional dominance in the most lucrative markets in the country will live on.

2. Comcast As A Seller of Programming.

Comcast describes itself as a "global media and technology company with two primary businesses – Comcast Cable and NBCUniversal."[103] Comcast itself owns interests in the following cable program networks and services: MLB (8.3 percent); NHL Network (15.6 percent); Midco Sports Network (50 percent); iN Demand (54 percent); Streampix (100 percent); Pittsburgh Cable News Network (30 percent); C2 (100 percent); Comcast Entertainment Television (100 percent); Comcast Hometown Network (100 percent); Comcast Television Network (100 percent); CN 100 (100 percent); Utah Channel 6 (100 percent); and WNFM-TV (100 percent). Through NBCUniversal, Comcast owns the NBC and Telemundo networks; 10 local NBC stations; 17 local Telemundo stations; 80 percent of the Chiller cable network; and 100 percent of Bravo, Cloo, CNBC, CNBC World, E!, Esquire Network, G4, Golf Channel, MSNBC, mun2, NBC Sports Network, Oxygen, Sprout, SyFy, Universal HD and USA Network. NBCUniversal also has ownership interests in a number of regional sports networks, including Comcast SportsNet Houston (22.5 percent); Comcast SportsNet Chicago (30 percent); Comcast SportsNet Bay Area (67 percent); Comcast SportsNet Philadelphia (75 percent); Comcast SportsNet New England (80 percent); Cable Sports Southeast (81percent); Comcast SportsNet

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103 Applications at 7.

California (100 percent); Comcast SportsNet Mid-Atlantic (100 percent); Comcast SportsNet Northwest (100 percent); The Comcast Network (100 percent); and SportsNet New York (8.2 percent).[104] NBCUniversal's "theatrical slate includes films developed internally along with co-productions, acquisitions and films developed by outside parties and distributed by the studio."[105]

With the acquisition of TWC, Comcast will add to its programming portfolio the local news, local sports and local lifestyle channels owned and managed by TWC (including Time Warner Cable News NY1) and two RSNs that carry LA Lakers basketball games as well as other regional sports programming in English and Spanish. Two of TWC's local channels carry professional sports programming and 12 others carry local or regional college sports programming. TWC owns 26.8 percent of SportsNet New York, 6.35 percent of MLB and 29.3 percent of iNDemand.[106] TWC also recently became the exclusive affiliate sales agent for SportsNet LA, the RSN that carries the Los Angeles Dodgers baseball games.[107]

The acquisition of TWC will increase Comcast's market power as a seller of both national and regional video programming, especially must-have programming such as that distributed by NBC/Universal and the RSNs.[108] The vertical aspects of this transaction—where Comcast competes both in the upstream input market for programming and the downstream output market for retail cable services—are likely to have anticompetitive consequences.[109] The

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104 Applications at 12-13.

105 http://www.nbcuni.com/film/universal-pictures/

106 Applications at 16.

107 TWC 2013 Annual Report at 18, 33.

108 *Adelphia Decision* at ¶ 126 (regional sports networks are must-have programming).

109 *See Comcast/NBCU Decision* at ¶34 ("Congress and the Commission have long been concerned about the possibility that an integrated firm may exploit its ability to exclude its

Department of Justice's ("DOJ") description in the Comcast/NBCU case of the harms that may arise from vertical mergers applies equally here. In that case, the DOJ stated that vertical mergers are:

> those that occur between firms at different stages of the chain of production and distribution. Vertical mergers have the potential to harm competition by changing the merged firm's ability or incentives to deal with upstream or downstream rivals. For example, the merger may give the vertically integrated entity the ability to establish or protect market power in a downstream market by denying or raising the price of an input to downstream rivals that a stand-alone upstream firm otherwise would sell to those downstream firms. The merged firm may find it profitable to forego the benefits of dealing with its rivals in order to hobble them as competitors to its own downstream operations.[110]

In its own *Comcast/NBCU Decision*, the Commission appropriately determined that because Comcast's MVPD rivals purchase most, if not all, of Comcast's and NBCU's programming, Comcast would have both the incentive and the ability to withhold its national programming from rival MVPDs, including satellite and online video distributors, or raise the rates it charged rival MVPDs for the programming, [111] either of which tactic could substantially harm competition and result in an increase in its downstream market power. As the Commission explained, Comcast-NBCU:

> would have both greater incentive and ability to raise prices for its popular video programming to disadvantage Comcast's rival multichannel distributors (such as telephone companies and direct broadcast satellite ("DBS") distributors). It would also have the incentive and ability to hinder the development of rival online video offerings

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distribution rivals from access to programming or raise programming prices to harm competition in video distribution."). *See also, In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198, First Report and Order, FCC 10-17 at ¶28 (rel. Jan. 20, 2010) ("clustering enhances the potential profitability of withholding regional programming from rival distributors").

110 *U.S. et al., v. Comcast Corp*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), Competitive Impact Statement at 20.

111 *Comcast/NBCU Decision* at ¶¶27-44, 135-139 and Appendix B. See also, *Adelphia Decision* at ¶ 71.

and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable business.[112]

Comcast's acquisition of TWC will intensify its incentive and ability to foreclose access to programming and raise rates to disadvantage its rival MVPDs not only in Comcast's franchise territories, but also in the TWC territories and the Charter territories it will be acquiring through the Exchange.[113]

In the *Adelphia Decision*, the Commission found that the acquisition of Adelphia cable systems and subscribers by Comcast and TWC "may increase the likelihood of harm in markets in which Comcast or Time Warner have, or may have in the future, an ownership interest in Regional Sports Networks."[114] That harm has surfaced in the ongoing controversy involving TWC and SportsNet LA and that controversy illustrates the market power TWC has been able to exercise over the distribution rights to L.A. Dodgers games.[115] SportsNet LA launched in February 2014,[116] but Dodger games are still unavailable to 70 percent of pay-television

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112 *Comcast/NBCU Decision* at ¶ 3.

113 In contrast to what DOJ and the Commission have found with respect to previous Comcast transactions, Comcast's experts opine that "Comcast will not gain incentives to withhold programming from other video distributors to benefit its distribution business." Applications at Exhibit 5, Declaration of Gregory Rosston and Michael Topper at ¶ 26; *see also, In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, FCC 10-17 at ¶28 (rel. Jan. 20, 2010) ("the grouping of commonly owned cable systems into regional cluster enhances the ability and incentive of vertically integrated cable firms to engage in unfair acts with their affiliated programming")

114 *Adelphia Decision* at ¶ 5.

115 Comcast will assume TWC's rights and obligations as to SportsNet LA. Applications at 154, n. 407.

116 See http://www.sportsnetla.com/faq.html

subscribers in the Los Angeles area.[117] According to press reports, DirecTV, Cox Communications, Dish, Verizon FiOS and other MVPDs have declined to carry the RSN due to the price TWC is demanding[118] and its insistence that SportsNet LA be carried on the basic tier rather than on a premium tier or on an a la carte basis.[119] What this means is that all of an MVPD's subscribers would be forced to pay the premium price for SportsNet LA regardless of whether they had any interest in baseball.

For its part, Comcast has limited the distribution of its popular CSN Philadelphia, the RSN that carries Philadelphia Phillies, Eagles and '76ers games. According to the DOJ complaint filed in the Comcast/NBCU case:

> Comcast has long recognized that by withholding certain content from its competitors, it can gain additional cable subscribers and limit the growth of emerging competitors. Comcast has refused to license one of its RSNs, CSN Philadelphia, to DirecTV or Dish. As a result, DirecTV's and Dish's market shares in Philadelphia are much lower than in other areas where they have access to RSN programming.[120]

Comcast's ability to withhold must-have programming from rival MVPDs and/or online video distributors can be used to weaken its competitors by denying them access to popular programming that consumers demand and that they can only obtain by subscribing to Comcast's cable service.

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117 See, *e.g.*, http://touch.latimes.com/ - section/-1/article/p2p-80960283/ The only two MVPDs other than TWC that currently carry SportsNet LA are Bright House Networks (for which TWC negotiates programming deals) and Champion Broadband. See http://www.sportsnetla.com/faq.html

118 See http://touch.latimes.com/ - section/-1/article/p2p-80960283/

119 See http://touch.latimes.com/ - section/-1/article/p2p-80835546/

120 *U.S. et al. v. Comcast Corp*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), Complaint at ¶ 48.

Both Comcast and TWC have independently demonstrated a willingness to engage in exclusionary program access strategies by withholding programming or charging unreasonable rates and imposing unreasonable terms and conditions. The Commission has previously found that its program access rules are insufficient to remedy the harms posed by Comcast's and TWC's ability and incentive to engage in such behavior.[121] As a condition of approval of the Adelphia transactions, the Commission imposed program access and commercial arbitration conditions designed to mitigate the potentially anticompetitive impacts on Comcast's and TWC's rival MVPDs.[122] When the Commission approved the Comcast/NBCU transaction, it replaced the *Adelphia* program access and commercial arbitration conditions imposed on Comcast with another set of program access and commercial arbitration conditions, again in an effort to mitigate the harmful effects of the transaction on rival MVPDs.[123] Comcast alleges that any program access concerns arising from the TWC acquisition can be redressed by the Comcast/NBCU conditions.[124] The Comcast/NBCU conditions, however, remain in effect only until January 2018.[125] The harms to competition generated by Comcast's acquisition of TWC will not magically disappear by January 2018.

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121 *Comcast/NBCU Decision* at ¶ 49.

122 *Adelphia Decision* at Appendix B. Those conditions were in effect for six years.

123 *Comcast/NBCU Decision* at Appendix A, Section VI.

124 Applications at 153; Applications at Exhibit 5, Declaration of Gregory Rosston and Michael Topper at ¶ 27.

125 *Comcast/NBCU Decision* at Appendix A, Section XX.

IV. CLUSTERING WILL SIGNIFICANTLY INCREASE COMCAST'S MARKET POWER AND LIKELY DETER ENTRY

The acquisition of TWC and the 1.6 million Charter subscribers will give Comcast a far more extensive footprint in California, Georgia, New England, New York, North Carolina, Oregon, Tennessee, Texas, Virginia and Washington.[126] By filling in gaps in coverage, Comcast will not only have a more concentrated regional presence in certain major MSAs and geographic corridors, it will also have a "near-national presence" in the MVPD and broadband markets.[127] Comcast asserts that it expects that the transactions will enhance its competitive position and opportunities most especially in the Northeast Corridor (Boston, New York, New Jersey, Philadelphia, Baltimore, Washington, DC); Texas (Houston, Dallas/Fort Worth, Austin, San Antonio); Southeast (Greensboro, Charlotte, Columbia, Charleston, Atlanta, Tallahassee, Jacksonville, Miami); and the Pacific Coast (San Diego, Los Angeles, San Francisco, Sacramento, Portland, Seattle).[128]

According to Comcast, the expanded geographic reach and additional geographic clustering will result in economic efficiencies by facilitating post-transaction Comcast's ability to serve multi-location customers whose needs span the existing geographic footprints of Comcast and TWC/Charter, including regional and supra-regional businesses, and this in turn will lead to additional investment.[129] In reviewing past transactions involving Comcast and TWC, the Commission has observed that clustering "can have both procompetitive and

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126 Exchange Transaction Public Interest Statement at 3, 5.

127 *Id.*at 12.

128 Applications at 93.

129 Applications at 24-26, 93.

anticompetitive effects."[130] Accepting as true Comcast's allegation that the clustering will make it a more effective competitor especially vis à vis incumbent local exchange carriers ("ILECs"), that benefit must be weighed against the fact that the clustering may also create higher barriers to entry for overbuilders and other smaller competitors interested in offering a triple play alternative to those offered by Comcast and the ILEC.[131] The impact of this transaction on future competition will not be positive.[132]

The cable industry is a very capital intensive business and requires tremendous up-front investment. The Commission has recognized that economies of scale, capital requirements and first mover advantages can all impact a company's ability and incentive to enter a market.[133] There is no question that post-acquisition, Comcast will enjoy enormous economies of scale and first-mover advantages in all of the Comcast and TWC markets as well as in those Charter service areas it will acquire as a result of the Exchange. The substantial financial investment necessary to construct and obtain facilities, programming and consumer premises equipment may also discourage entry, especially because new entrants must spend heavily to win customers away from the incumbent in more mature markets such as those where Comcast, TWC and

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130 *Adelphia Decision* at ¶ 271.

131 *See Cablevision Systems Corporation v. FCC*, 649 F. 3d 695, 712 (D.C. Cir. 2011) ("clustering and consolidation in the [cable] industry bolsters the market power of cable operators because 'a single geographic area can be highly susceptible to near-monopoly control by a cable company'").

132 *See Adelphia Decision* at ¶ 25 (the Commission's competitive analysis must focus on the transaction's effect on future competition).

133 *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99, at ¶68 (rel. July 22, 2013).

Charter operate.[134] These barriers to entry are compounded by the barriers often imposed on competitive franchisees by local franchising authorities ("LFAs").

Despite the Commission's effort to limit the anticompetitive effects of "level playing field" franchise agreement requirements,[135] provisions having the same effect continue to thwart competitive wireline video entry.[136] Prior to the Commission's *Section 621 Order,* LFAs were permitted to enter into franchising arrangements with incumbent cable providers, often at the incumbent cable providers' insistence, that prohibited the LFA from imposing on new entrants terms and conditions that "are []either 'more favorable' []or 'less burdensome' than those to which existing franchisees are subject."[137] Such provisions enabled incumbent cable operators to delay or prevent competitive entry by challenging or threatening to challenge any subsequent

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[134] *See, id.* at ¶¶ 69-72.

[135] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (rel. Mar. 5, 2007) ("*Section 621 Order*"), *aff'd, Alliance for Cmty. Media v. FCC,* 529 F.3d 763 (6th Cir. 2008).

[136] The Commission also has prohibited exclusive access arrangements between cable providers and MDU owners in order to promote competition and broadband deployment. *See In re Provision of Video Services in Multiple Dwelling Units,* MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007). Nonetheless, obfuscation of this prohibition through other arrangements with MDU owners (such as bulk billing and marketing arrangements) can, and does, occur. Some agreements even have the effect of targeting individual competitors or a subset of their service offerings. This is an additional barrier to entry that ultimately harms consumer choice and new video entrants' abilities to deploy their own broadband networks and compete with the incumbent cable operator. Additional clustering likely increases the incentive to obfuscate this Commission prohibition; as such, the Commission should address this incentive should it approve the transactions over COMPTEL's objections.

[137] *Id.* at ¶ 48.

franchise an LFA grants.[138] In the *Section 621 Order*, the Commission pre-empted application of such level playing field provisions, finding that "an LFA's refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the 'unreasonable refusal' prohibition of Section 621(a)(1)."[139]

Level playing field agreements have now evolved to most favored nation ("MFN") provisions that permit the incumbent to opt into a new entrant's franchise agreement should the new entrant's franchise agreement appear to be less burdensome. LFAs, fearing either losing the concessions that they obtained from the incumbent in its franchise agreement if the incumbent opts into the new entrant's agreement or litigation by the incumbent if the LFA resists such opt-in, use such MFNs as justifications (and sometimes, excuses) to attempt to hold new entrants to the same obligations of incumbents, just as before the *Section 621 Order*.

For instance, LFAs continue to attempt to impose build-out requirements to which the incumbent cable provider agreed in exchange for receiving a monopoly to provide service in a geographic area—now under the guise of concerns that the incumbent could demand the same "lesser" competitive treatment. Although the build-out requirements were generally imposed in initial franchise agreements at a time when cable operators were given exclusive franchises to serve a geographic area, they are often carried over into renewal agreements, leaving LFAs seemingly compelled to apply them to new entrants. The Commission has explicitly found that build-out requirements can constitute unreasonable barriers to entry for competitive applicants for whom it may not be economically feasible to build-out an entire local franchising area

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138 *Id.* at ¶¶ 34, 48.

139 *Id.* at ¶ 138.

immediately.[140] For this reason, build-out requirements can substantially delay, reduce or inhibit competitive entry, thereby hindering the deployment of new video and broadband services.[141]

LFAs also continue to demand incumbent-style in-kind payments unrelated to the provision of video service, but not attributable to the five percent cap on permissible franchise fees – that is, asking new entrants essentially to waive the prohibition on such requests established by the *Section 621 Order*.[142] While the incumbent cable provider had the right to refuse to agree to such payments,[143] many were able to agree out of expediency based on a decades-old monopoly position in the market—a luxury that new entrants do not have.

Section 621 of the Communications Act, 47 U.S.C. § 541, prohibits franchising authorities from unreasonably refusing to award competitive franchises. As discussed above, new entrants cannot afford the expense and years of delay entailed in litigating with LFAs over heavy-handed attempts to ignore the *Section 621 Order*. Further, LFAs cannot afford the expense of litigating with incumbent cable providers which may sue if the LFA refuses to allow

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140 *Id.* at ¶ 40.

141 *Id.* at ¶¶ 31-35, 40. The Commission previously noted that cable operators "use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town. Even in the absence of level-playing field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant." *Id* at ¶ 34. The Commission also previously found that build-out requirements may "make entry so expensive that the prospective competitor withdraws its application and simply declines to serve any portion of the community." *Id.* at ¶ 88. Both continue to be the case today.

142 *Id.* at ¶ 105.

143 *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, FCC 07-190 (rel. Nov. 6, 2007).

the incumbent to opt into the new entrant's agreement. The Commission has already recognized the propensity of incumbent cable providers to use litigation based on level playing field claims as an anticompetitive tactic in preventing competitive entry.[144] This threat continues to loom, and Comcast's incentive to use the MFN provisions to disadvantage new entrants likely will increase as its clusters grow as a result of the proposed transaction.

If the Commission were to grant the Applications (which it should not do), it must take steps to mitigate the anticompetitive effect of the higher barriers to entry new entrants will face in the combined Comcast franchise areas so as not to discourage entry. At the very least, the Commission should require Comcast to waive any most-favored-nation (or opt-in rights) in its existing franchise agreements and those it is acquiring when a new entrant seeks to provide competitive service in their existing franchise areas. Such waiver would permit new entrants to negotiate franchise agreements with LFAs on a more reasonable footing so as to promote competitive video entry and expand consumer choice in the wireline MVPD market.

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[144] *Section 621 Order* at ¶ 34.

CONCLUSION

For the forgoing reasons, COMPTEL submits that Comcast's acquisition of TWC will have anticompetitive effects and will not serve the public interest. COMPTEL respectfully requests that the Commission deny the Applications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2014, I served copies of the foregoing Petition To Deny by electronic mail on the following:

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