

INTRODUCTION

Amici, RCN Telecom Service, LLC, Grande Communications Networks, LLC, and WaveDivision Holdings, LLC¹ (collectively, “RCN”) and the American Cable Association (“ACA”), respectfully moves for permission to file the attached brief *amici curiae* in support of neither party. Amici inquired by email dated May 14, 2018 as to whether the parties consented to the filing of this brief. The U.S. Department of Justice (“DOJ”) had no objection to such filing. Defendants have not responded to Amici's request.

I. Identity of Amici²

RCN is the sixth largest cable company and the eleventh largest multichannel video programming distributor (“MVPD”) in the United States. RCN also offers broadband Internet access services and voice service. In the video and broadband distribution markets, RCN competes with AT&T/DirecTV, and it purchases video programming from Time Warner subsidiaries. In virtually all markets where it operates, RCN competes with vertically integrated distributors, including Comcast-NBC Universal (“Comcast-NBCU”) in several of its largest markets. RCN’s Chief Executive Officer, James Holanda, who testified at trial in this matter, is a member of the Board of Directors for the National Cable Television Cooperative (“NCTC”), which has some 800 operator (distributor) members. NCTC acts as a buying group for these members to negotiate with and obtain video content from programmers, including Defendant Time Warner entities.

¹ RCN Telecom Service, LLC, Grande Communications Networks, LLC, and WaveDivision Holdings, LLC are affiliated entities owned by Radiate HoldCo, LLC.

² Pursuant to Local Rule 7(o)(5), Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

ACA has approximately 700 small and medium-sized independent cable, phone, and fiber-to-the-home operator members, including RCN, all of whom are members of NCTC and most of whom provide service in smaller communities and rural areas.³ All ACA members compete in the video programming market with DirecTV, and a large number compete with AT&T in the video programming and broadband markets. All ACA members carry video programming from Time Warner entities, obtained either through direct negotiations or agreements negotiated by NCTC. ACA members also compete in the video and broadband distribution markets with Comcast-NBCU and carry NBCU programming, obtained either through direct negotiations or NCTC agreements. As a result of its members' interests and those of NCTC, ACA has consistently advocated for full and fair competition, including to the DOJ in the transaction before the Court and to the DOJ and Federal Communications Commission ("FCC" or "Commission") in the 2011 Comcast-NBCU transaction,⁴ so its members can continue to provide affordable video, broadband, and phone services to some seven million homes across the United States. ACA members, including RCN, were covered by the arbitration and standstill conditions in the FCC decision approving the Comcast-NBCU transaction.

II. Amici's Interest

Amici bring a broad, industry-wide perspective to the issues before the court. RCN competes directly with AT&T/DirecTV in all markets in which it operates and purchases video programming from Time Warner. ACA has long sought to protect the interests of smaller video operators against anti-competitive harms caused by vertically integrated video distributors and

³ The vast majority of ACA members have fewer than 5,000 video subscribers.

⁴ See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd. 4238 (Jan. 18, 2011) (hereinafter, "FCC Comcast-NBCU Order")

programmers. Amici are concerned that parties have presented the Court with limited options to address the harms resulting from the vertical combination of the Defendants (AT&T/DirecTV and Time Warner). The DOJ has presented the Court with an all-or-nothing proposal: namely, that if the Court finds a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, it may consider only the structural remedies proposed by the DOJ. According to DOJ, behavioral relief, such as some sort of arbitration and standstill obligations, *e.g.*, a variation of those adopted by the FCC in the Comcast-NBCU merger, is not appropriate because of the risk of “government entanglement in the market” and “greater long-term costs.” DOJ Trial Br. at 24. The Defendants, on the other hand, contend that the standstill and arbitration offer from Time Warner’s subsidiary, Turner Broadcasting, (the “Turner Offer”) constitutes a sufficient “commitment” that the Court should account for in finding the proposed transaction causes no harm – even though the offer is an effective acknowledgement of harm and was not agreed to by virtually any parties to whom it was offered.

Amici submit this brief to emphasize that the Court should, upon finding that the proposed combination is likely to result in substantial harm to competition, use its broad discretion to fashion appropriate relief and to impose, instead of or in addition to any structural remedy proposed by the DOJ, a behavioral remedy that provides a robust arbitration and standstill process. The remedy advanced by Amici in their brief provides straightforward but significant improvements on the Turner Offer, is tailored to the expected harms of the merger, and avoids excessive Court or other government entanglement.

CONCLUSION

Amici respectfully request that the Court grant this motion, allow them to participate in this action as *amici curiae*, and accept for filing the attached brief.

Date: May 14, 2018

/s/ Joseph D. Wilson

Joseph D. Wilson (D.C. Bar #466652)
Edward A. Yorkgitis (D.C. Bar # 418904)
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, DC 20007
(202) 342-8400 (phone)
(202) 342-8451 (facsimile)
Email: jwilson@kelleydrye.com

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I filed this motion with the United States District Court for the District of Columbia using the CM/ECF system, which will cause it to be served on all counsel of record.

Dated: May 14, 2018

/s/ Joseph D. Wilson
Joseph D. Wilson (D.C. Bar #466652)
Edward A. Yorkgitis (D.C. Bar # 418904)
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, DC 20007
(202) 342-8400 (phone)
(202) 342-8451 (facsimile)
JWilson@kelleydrye.com
CYorkgitis@kelleydrye.com

Counsel for Proposed Amici