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Before the
U.S. Senate
Committee on the Judiciary

Hearing On:
Examining the Comcast-Time Warner Cable Merger
and the
Impact on Consumers

Washington, DC

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After years of suffering from enormous rate increases and poor service from Comcast and other providers,² a vibrant broadband economy is just beginning to bring exciting new alternatives to subscription television.³ Everything from new devices -- like Roku, Xbox, Amazon's Fire, and AppleTV -- to new video services -- like Amazon Prime, YouTube, Netflix, and Aereo -- are demonstrating that online video can compete with some elements of traditional cable TV.

These new competitors may begin to help consumers avoid overpriced large "tiers" or bundles of channels, many of which force customers to purchase access to channels they do not want simply to access the channels they do want.

However, Public Knowledge believes the proposed acquisition of Time Warner Cable,

¹ Public Knowledge is a public interest nonprofit dedicated to the openness of the Internet and open access for consumers to lawful content and innovative technology. Public Knowledge has a long history of opposing mergers and other transactions that reduce choice and competition in the telecommunications sphere, including those between Comcast and NBCU-Universal, AT&T and T-Mobile, and Verizon and SpectrumCo.

² See Free Press, *Comcast Gets Bigger, You Get Poorer*, http://www.freepress.net/sites/default/files/resources/Free_%20Press_Comcast-TWC%20Infographic_Video_Price_Hikes_0.pdf; see also Bureau of Labor Statistics, Consumer Price Index.

³ While some consumers have the option to choose between cable and satellite providers, very few have viable options if they wish to bundle both television and broadband services. At one time, Verizon appeared to be a potential competitor in the combined subscription TV and broadband space, but its FiOS service is offered in only 15% of Comcast's markets and Verizon has no plans to expand that service. Satellite continues to lack a meaningful broadband option to make it a competitor to cable broadband. It appears that AT&T has no plans to devote significant additional resources to expanding U-Verse in the residential broadband space. Google has only committed to a limited number of small experiments. Finally, mobile broadband is a complement, not a substitute.

the nation's second largest cable company, by Comcast, the nation's largest cable company and owner of all NBCU content, will threaten the continued viability of nascent competitors and endanger the continued emergence of innovative new video and other types of services delivered over the Internet. The proposed transaction is inconsistent with antitrust policy, the goals of the Communications Act, and the broader public interest. Therefore, it should not be approved.

As a result of the merger, Comcast will control nearly 50 percent of high speed Internet access in this country, over 30 percent of Multi-Channel Video Programming Distributor (MVPD) subscribers and almost 60 percent of cable subscribers.⁴ Comcast will also have a significant presence in 19 out of 20 of the largest DMAs in the country.⁵ This unprecedented accumulation of market power, combined with Comcast's vertical integration into content, creates the incentive and enormous leverage for Comcast to:

- (1) stifle slowly emerging competition from rivals such as Netflix and Amazon that require high speed Internet access to deliver quality service to their customers, thwarting not only competition from existing rivals but discouraging investment in new innovative services delivered over the Internet;
- (2) slow the pace and dictate the direction of equipment, device, and service innovation to lock in maximum revenue for Comcast's own infrastructure and business model;
- (3) pay content suppliers less than the market value of their products and services, driving up the cost of programming to other distributors and increasing prices to consumers;
- (4) artificially raise the prices of Comcast-owned programming to Comcast rivals hampering their ability to compete and raising prices to consumers; and
- (5) position itself as the dominant gatekeeper for all new services (both video and non-video) that rely on fast, reliable broadband connections to reach customers.

The Department of Justice (DOJ) recognized the competitive dangers inherent in Comcast's vertical integration into content with its merger with NBC-Universal:

⁴ Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable"*, Consumer Federation of America, at 6 (Apr. 2014), available at <http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf>.

⁵ Filing by Comcast Corporation, SEC File No. 001-32871, at 5 (Feb. 13, 2014), available at http://www.sec.gov/Archives/edgar/data/1166691/000095010314001082/dp44005_425-it.htm ("Comcast SEC Filing").

Comcast has an incentive to encumber, through its control of the [Joint Venture], the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. As a result, Comcast will face less competitive pressure to innovate, and the future evolution of OVDs will likely be muted. Comcast's incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution.⁶

That transaction proceeded after Comcast committed not to unfairly discriminate against either traditional video distributors or emerging online competitors. The proposed merger of Comcast and Time Warner Cable, however, presents competitive dangers that far exceed traditional regulatory policing practices. As new threats arise to Comcast's business interests, it has at its disposal myriad ways of slowing down its competitors, degrading their services, and increasing their costs in ways that cannot be effectively monitored and prevented.

By expanding its customer base to control almost one-third of all subscription TV households in the country and almost one-half of all the high speed broadband customers in the U.S., Comcast would position itself to dictate how much consumers must pay, determine what packages of services customers must buy, and influence what devices people can use to receive the type of video content they want. Through vertical control of NBCU's "must have programming" and its enormous customer base, a combined Comcast-Time Warner Cable could become the dominant Internet gatekeeper and choke point for innovative video services and products, inflating prices and preventing millions of consumers from receiving these services and products at competitive market prices.⁷

The Numbers Tell a Story of National Dominance

If this merger takes place, Comcast would accumulate unprecedented market power. Comcast would have a significant presence in 19 of 20 top media markets.⁸ It would have nearly 50 percent of the critically important market for the provision of high speed

⁶ *United States v. Comcast*, Case No. 11-cv-00106, Compl. at ¶ 54 (D.D.C. Jan 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266164.htm>.

⁷ See Cooper, *supra* note 4, at 6 (HHI analysis showing Comcast-Time Warner Cable firm share of True Broadband at 49 percent, Wireline Cable of 54 percent, and MVPD of 35 percent).

⁸ Comcast SEC Filing, *supra* note 5, at 5.

Internet access⁹ and dwarf the closest in size cable system by a factor of nearly eight times.¹⁰ It would have about 35 percent of the MVPD market.¹¹ This increased size would magnify its status of gatekeeper for both new and emerging Internet services and conventional distribution of content to consumers.

The merged company would be a vertically-integrated powerhouse. Comcast owns or partially owns eleven regional sports networks.¹² It owns Universal Pictures, one of the major film studios.¹³ It owns well-known cable networks like USA, Syfy, Oxygen, E!, MSNBC, CNBC, Golf Channel, and Bravo.¹⁴ It owns two broadcast networks, Telemundo and NBC, and 26 broadcast stations.¹⁵ The Department of Justice has already recognized the value of Comcast's content businesses and the competitive dangers of this vertical integration between Comcast's distribution and programming businesses.¹⁶

Time Warner Cable is a vertically-integrated company itself. Time Warner Cable controls three major sports networks in Los Angeles alone (Time Warner Cable SportsNet, Time Warner Cable Deportes, and SportsNet LA), manages 26 local news channels, 16 local sports channels, and ten "lifestyle" channels.¹⁷ If Comcast is allowed to buy Time Warner Cable, these new properties will add to its ability to drive up the prices of programming to other program distributors and impede the development of new competition.

⁹ Free Press, *Comcast-Time Warner Cable: Too Much Control*, <http://freepress.net/comcast-time-warner-cable-too-much-control>.

¹⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report ¶ 137, Table 9 (rel. July 22, 2013) ("MVPD Competition Report").

¹¹ See Cooper, *supra* note 4, at 6.

¹² MVPD Competition Report, App. D.

¹³ Filmed Entertainment, Comcast (last visited Apr. 7, 2014), <http://corporate.comcast.com/our-company/businesses/nbcuniversal#accordion-2>.

¹⁴ NBCUniversal Cable Networks, Comcast (last visited Apr. 7, 2014), <http://corporate.comcast.com/our-company/businesses/nbcuniversal#accordion-0>.

¹⁵ About NBCUniversal Owned Television Stations, NBCUniversal (last visited Apr. 7, 2014), <http://www.nbcuni.com/broadcast/nbc-owned-television-stations/>.

¹⁶ *United States v. Comcast*, Case No. 11-cv-00106, Competitive Impact Statement § II.D.1 (D.D.C. Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.htm> ("Competitive Impact Statement").

¹⁷ Time Warner Cable, *Form 10-K* at 5 (Feb. 18, 2014).

The Merger Will Allow Comcast to Stifle Internet Competition

Comcast and its supporters claim this merger cannot harm competition because Comcast and Time Warner Cable service territories do not overlap. Mergers between horizontal competitors are just one type of concern under the antitrust laws. Another, equally problematic form of merger is one that involves vertical integration of a firm with market power at one stage of the industry in a competitive or potentially competitive adjacent market. Comcast has market power as a distributor of content and provider of high speed Internet access. Comcast already owns NBCU and thus has an incentive to leverage its cable and Internet access operations to protect its content business. Similarly, Comcast has an incentive to leverage its control over NBCU to protect its cable and Internet distribution interests.

The Department of Justice recognized this competitive concern in the NBCU merger when it found that online video providers “are dependent upon ISPs’ access networks to deliver content to their subscribers,” and there is a danger that Comcast could “adversely affect [] the quality of [online] services that compete with Comcast’s own” video service.¹⁸

The scope of the market power at issue then -- and thus the scope of the competitive harm from its exercise -- will increase dramatically with the merger with Time Warner Cable. The merger will give Comcast almost 50 percent of the market for high speed Internet access. This unprecedented degree of control over a critical resource for innovation by a single company is reason enough to block the transaction. No new service that requires high speed Internet access can hope to achieve the necessary critical mass for success without being able to reach the 50 percent of high speed Internet subscribers controlled by Comcast. Post-merger, Comcast will have the ability to impede the quality of services offered by new competitors, artificially raise the costs of doing business for such competitors, or both.

Comcast’s dominance in broadband access would position it as more than just the gatekeeper for online video innovation. Any innovative new technology provider that relies on reliable, high speed Internet access would be wary of doing anything that could expose it to retaliation by Comcast. Control of 50 percent of high speed Internet subscribers would mean that Comcast’s discrimination against any new service could be the difference between its failure and success. As the Federal Communications Commission (FCC) has recognized, had such discrimination occurred earlier “some innovative edge providers that have today become major Internet businesses might not

¹⁸ Competitive Impact Statement § III.A.5.

have been able to survive.”¹⁹

A Merged Comcast-Time Warner Cable Would Be Able to Exercise Market Power Over Suppliers

The merger will also give Comcast market power as a purchaser of programming (monopsony power). After the merger, programming suppliers will be faced with a single large buyer and a fringe of smaller buyers. No program supplier will be able to obtain the critical mass of “eyeballs” necessary to successfully launch or sustain a program or channel without placement on the post-merger Comcast systems. This enables Comcast to demand less than market prices for programming. Programmers will seek to make up lost revenues by increasing prices to other distributors, harming the ability of smaller distributors to compete and raising prices to consumers.

Monopsony power also gives Comcast enormous control over how independent programming is seen by subscribers. In the past, Comcast has exercised its existing influence to prevent independent programming such as HBO from being accessed on devices Comcast does not control such as the Roku and Playstation 3.²⁰

Post-merger, Comcast’s monopsony power will harm consumers outside of its geographic footprint as well. After the merger, Comcast’s infrastructure will serve almost 60 percent of all cable subscribers along with its large share of high speed broadband customers. This will give Comcast an enormous degree of leverage over equipment manufacturers and standard setting organizations that establish the cost-effective business opportunities for offering cable and broadband customers new wireless, cloud storage, and in-home viewing options. No innovation in cable services or infrastructure will be adopted unless it is in Comcast’s interest to do so.

Post-Merger Comcast Will Artificially Raise the Price of its Programming to Rivals

In addition to being the nation’s largest cable operator, Comcast also provides its rivals with programming. Post-merger, Comcast will have an incentive to increase the prices

¹⁹ *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order, ¶ 23 (Dec. 23, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

²⁰ Karl Bode, *Comcast Still Blocking HBO Go On Roku (And Now Playstation 3), Incapable Of Explaining Why*, Techdirt (Mar 7, 2014) <http://www.techdirt.com/articles/20140-3-incapable-explaining-why.shtml>;

²⁰ Chris Welch, *Comcast isn’t letting customers watch HBO Go on Playstation 3*, The Verge (Mar 5, 2014).

its rivals pay for that programming since doing so would give Comcast a competitive advantage in providing MVPD services. For example, recent economic analysis shows that the prices for regional sports channels owned by cable companies are higher than those charged by independent sports channels.²¹ By increasing programming prices for competitors, Comcast can make its own pay-television service more attractive when compared to rivals.²²

A Dominant Distributor Damages Internet Content and Services

A merged Comcast and Time Warner Cable would be positioned to act as the dominant gatekeeper for all types of online services.

For an Internet service to reach Comcast's customers, at some point either its data network or a third-party network must interconnect with Comcast's network. However, after a merger Comcast may have the means to use these interconnection relationships anticompetitively.²³ No matter how competitive the transit market may be, at some point all transit providers must face the reality that there is no way to reach Comcast's

²¹ Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, Review of Network Economics, at 66 (2013). (“We find that, all else equal, when an RSN is owned by a cable or satellite operator, the RSN charges rival distributors a significantly higher license fee. Most significantly for our purposes, the vertical integration premium increases significantly with the local down-stream market share of the RSN’s affiliated distributor.”) *Id.* at 69 (“According to the FCC, Comcast’s refusal to license its affiliated regional sports network in Philadelphia, Comcast SportsNet Philadelphia, to DirecTV and Dish Network caused ‘the percentage of television households that subscribe to DBS in Philadelphia [to be] 40% below what would otherwise be expected.’ The FCC also concluded that Comcast’s foreclosure of its DBS rivals in Philadelphia ‘had a material adverse impact on competition in the video distribution market’ (footnotes omitted.).

²² Cooper, *supra* note 4, at 5 (“The regional sports and news networks that Comcast and Time Warner control would enhance the market power of the post-merger firms both as a bottleneck (withholding access to marquee content) and a buyer (reaching high value regional sports audiences). Comcast has used access to this marquee content to weaken competition in the past.”). Generally, Cooper notes the dangers of buyer market power (“when a firm becomes so large a buyer of goods or services that it can use its market power to dictate prices, terms and conditions that hurt the firms from which it buys those goods and services”) and bottleneck market power (“When a firm has a large market share for an input that is necessary for other firms to compete with it, then it can use its control over that bottleneck to undermine competition....”). *Id.* at 2.

²³ Indeed, there is some indication that it already has. See, e.g. Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, Netflix Blog (Mar. 20, 2014), <http://blog.netflix.com/2014/03/Internet-tolls-and-case-for-strong-net.html>; Comments of Level 3, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Preserving the Open Internet*, GN Docket No. 09-191 (Mar. 21, 2014). However, a merger would only increase Comcast’s ability to demand interconnection fees that bear no relationship to actual network costs by substantially adding to its captive customer base.

customers except through Comcast. Because of the size of the combined Comcast and Time Warner Cable's customer base, if Comcast decides to begin charging popular Internet services for access to its customer base, those large Internet services would have no choice but to acquiesce.²⁴

Furthermore, given the leverage Comcast would have over Internet content and service companies, many of the same problems that manifest in the video space today could spread to the Internet market. If Internet service companies are forced to pay a toll to access Comcast's customers, they may have to raise their prices, and the entire industry could suffer reduced investment. Similarly, popular Internet companies and content providers may decide to offset interconnection fees paid to Comcast by charging smaller ISPs for interconnection themselves. This is a path towards introducing today's "TV-style" blackouts to the Internet.

Conclusion

Claims that Comcast and Time Warner Cable systems do not overlap geographically in no way eliminate antitrust and communications policy concerns about the proposed transaction. Comcast's vertical integration of its programming interests into additional bottleneck monopolies is as much in the mainstream of antitrust as the concerns that led to the Microsoft and AT&T cases.

The merger will even more firmly entrench Comcast as the gatekeeper at the crossroads of Internet, television, and communications innovation. Because the merged company will have both the incentive and ability to thwart development of innovative Internet services that threaten Comcast's excessively priced offerings across a much broader swath of the market than is true today, this merger must be rejected.

²⁴ See Competitive Impact Statement § III.A.5.