Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corp. and Time Warner Cable Inc.	))	MB Docket No. 14-57
	)	
For Consent to Assign or Transfer Control of Licenses and Authorizations	))	

REPLY TO OPPOSITION

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EXECUTIVE SUMMARY

As Applicants prepared to unleash their plans for this massive horizontal merger upon already consolidation-weary consumers, an interesting display of market power occurred. Comcast sells its customers a best-efforts Internet access connection often advertised at speeds exceeding 30 megabytes per second (Mbps) down stream. Yet it failed to adequately deliver to its customers Internet streaming content that only requires a best-efforts capacity of a few megabytes per second, far less than the 30 Mbps Comcast often promises.

Comcast did this despite the fact that its own customers had requested this content, and despite the fact that the carrier of this content was willing to bring this it as close as possible to Comcast's individual end-users—benefiting the customers, the content provider, and Comcast alike. Comcast even failed to provide best-efforts service to its own customers once the carrier of the requested streaming content offered to install, maintain, and pay the minimal costs needed to ensure that Comcast customers' Internet Access Service worked as advertised. Instead, Comcast demanded a large payment from the content owner, not the miniscule one-time payment of a few thousand dollars needed to fix the problem to all parties' mutual benefit. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

If this seems wrong, that's because it is. Comcast sells more than 20 million customers a best-efforts service that allows them to access Internet content at very high speeds, often exceeding 10, 20, even 50 Mbps. Certainly implicit in offering this product is Comcast's acknowledgment that its customers are going to use a portion of this capacity at certain times of the day or night. And also implicit in its offer, based on the asymmetrical transfer speeds of its service with downstream capacity often more than six times larger than upstream, is that

Comcast expects its customers to make greater use of content delivered to their homes than they do of content uploaded by those customers. Yet despite the fact that Comcast markets this service, its customers were unable to access certain Internet content that only requires a small fraction of the capacity those customers purchased. The content owners were more than willing to bring this content to Comcast's front door, and did not ask for any special treatment. All they wanted to do was hand over the data requested by Comcast (via its customers).

Instead of accepting this traffic, Comcast engaged in a cynical game of brinksmanship and exercised its market power. It asked the content provider and its carrier to *pay for the privilege* of having Comcast accept this content that Comcast itself requested, although such content that is the sole source of the value of Comcast's lucrative broadband service offerings.

Comcast's actions harmed millions of consumers, and the aftermath sent a chilling signal to innovators and investors in small startups seeking to provide services via the Internet. This harm took place in the emerging online video market, the core market of concern in the instant transaction review. Comcast's actions demonstrate the company's current market power, and its willingness to exercise that power, in order to control the evolution of the video markets to the benefit of its own bundled video/data products. That market power would be greatly enhanced if Comcast were allowed to consummate its merger with Time Warner Cable.

But while the Commission's review should focus on these likely harms in the online content distribution market, the Commission must recognize also that this transaction is chiefly about the long-term future of this country's telecommunications market. Users' ability to transmit the information of their choosing, between points of their choosing, free from undue discrimination, is of paramount importance. This is the legal and practical description of telecommunications services. If approved, this merger would grant Comcast control over this

nation's primary infrastructure capable of providing high-speed telecommunications services in more than 60 percent of the country. Yet Comcast claims that it does not and will not provide telecommunications services, based on the Commission's current interpretation of the term.

This is not just semantics. It's a crucial failing. Comcast refused to spend a few thousand dollars to ensure that its 23 million broadband customers' connections would function properly. This refusal specifically impacted the ability of millions of Comcast customers to use an online service that just so happens to represent an existential threat to Comcast's own video services, which still bring in a substantial majority of the company's revenues at this time. This anticompetitive and anti-consumer behavior made headlines, but generated little interest from the Commission for months after millions of Comcast's customers were harmed, and not until Comcast had already established a precedent for imposing terminating access charges on what is essentially a "called party."

And Comcast exercised its market power and harmed consumers and competition all while operating under the now-demonstrably ineffective 2010 Open Internet Rules.

If the Commission were to recognize (as it should) that Comcast is offering a telecom service, this entire episode never would have happened. Comcast's incentives would be properly aligned. It would be in the business of ensuring its advertised best efforts data-transfer services were functioning properly, transmitting the information of its customers choosing at the advertised capacity. Comcast would be in the business of actually giving its customers a best efforts routing performance that is true to the word "best" and lives up to the 60 percent operating margin that Comcast reaps from this service—a monopoly-level profit that indicates just how high a premium consumers are willing to pay for this service. If Comcast were operating as a telecommunications service provider it would happily take this 60 percent

operating margin and be gleefully embarrassed about the service's voluntary churn rate, which is below **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, because it would be one of the most profitable businesses in telecommunications industry history.

But it did happen, and millions were harmed. And the Commission cannot be naive: this incident represents just the tip of the iceberg we can expect in a communications system that would be highly vertically integrated, and at best a duopoly, where consumers lack the legal protections afforded to them in other telecommunications services markets that are legally recognized as such. And consumers and telecom customers receive greater protections in those other markets, even though several of them are far more competitive than the residential wireline broadband market.

Applicants would have the Commission ignore all of these facts. They would have the importance of telecommunications services be erased from the Commission's mind completely. But the Commission must be mindful of the central role that nondiscriminatory telecom services play in this country's prosperity, and it must faithfully implement Congress's directive to make that broadband telecom services market more competitive. The Commission cannot forget the availability of telecommunications services is what let experimenters connect computers together to build the Internet half a century ago. A telecom services market ensured that local exchange carriers could not treat dial-up Internet access as a metered toll call, as they once fiercely advocated to do, though it would have destroyed the Internet in its commercial infancy.

By dint of regulatory mistakes and misapplication of the Communications Act, we do not have a telecommunications market anymore in this country. And as noted above, with this Application, Comcast proposes to control the infrastructure that is most capable of providing

high-capacity telecommunications to a substantial majority of the country. One company controlling that much of the telecom-capable infrastructure, but refusing to sell telecommunications services, would mean future innovators could not build the next interconnected network of computers. They won't be able to construct a better, more secure Internet. If this transaction were approved, these innovators would have available to them only Comcast's supposed broadband information services. And so Comcast would have the unilateral power to dictate what the Internet is today, and how that platform would be allowed to evolve.

This is simply an unacceptable prospect for the public interest. It certainly is too steep a price to pay for the benefits Comcast claims for this merger. Indeed, as we discuss below, Comcast and Time Warner Cable failed to meet their burden of proof that this transaction would have any merger-specific benefits, let alone enough to possibly offset its unfathomable harms.

Below we respond in detail to Applicants' Opposition, using their own internal data to demonstrate again that the transaction 1) would lead to no merger-specific benefits but ample transaction-specific harms; 2) would occur in a market already trending towards a nationwide cable modem monopoly, and thus approval would bring substantial unilateral and coordinated harms that cannot be mitigated by conditions, including the now proven to be ineffective 2010 Open Internet Rules; and 3) would give Comcast, despite its protestations, a uniquely strong incentive to discriminate against and control the emerging high-speed online services market (exemplified today by online video distribution, but by no means limited to video), and would greatly enhance the merged firm's ability and incentives to exercise its market power.

We have facts. Comcast has nothing but self-serving theories, all which have already proven wrong, or are now undermined by Applicants' own financial and operational data. The weight of the evidence is too strong; the Commission has no choice but to reject this transaction.

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I. Introduction.

Applicants have failed to meet their burden of proof and show that the transaction is in the public interest. They cannot adequately demonstrate any merger-specific benefits of their proposed massive consolidation of the broadband telecom and cable TV distribution markets. This is not surprising. The basic facts of this transaction are clearly not in Applicants' favor.

The only rebuttal Applicants could muster in their Opposition is that petitioners are self-serving. If this substance-free, tellingly defensive line sounds familiar, it should. It's the same rebuttal Comcast offered for its takeover of NBC Universal. In that 2010 Opposition, Comcast said, "[d]espite the *self-serving* claims of various competitors and the predictable responses from certain familiar critics, this transaction will not diminish competition in any relevant market."[1]

But deal opponents' arguments then weren't self-serving; they were accurate, and ultimately put forth by the Department of Justice (DOJ) and Commission. Their concerns were the same type of competitive concerns at the heart of the current transaction, spurred by Comcast's already large share of the nation's media distribution platforms and the company's unique incentives to foreclose equal access to these platforms. DOJ, in its review of Comcast-NBCU, noted: "Comcast and other MVPDs recognize the threat posed to their video distribution business from the growth of [Online Video Distributors, or] OVDs. Many internal documents reflect Comcast's assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution."[2]

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[1] Comcast Corp., General Electric Co., and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at iii (filed July 21, 2010) ("Comcast-NBCU Opposition").

[2] *United States of America, State of California, et. al. v. Comcast Corp., General Electric Co., and NBC Universal, INC.*, Case: 1:11-cv-00106, Competitive Impact Statement, at 19, Jan. 18, 2011 ("Competitive Impact Statement").

As DOJ's analysis found, "Comcast's and other MVPDs' reactions to the emergence of OVDs demonstrate that they view OVDs as a future competitive threat [but] are adjusting their investment decisions today in response to that threat."[3] DOJ's concern stemmed from Comcast's level of control of broadband telecommunications, and use of its bottleneck control over this essential facility to thwart competitive content distribution, perhaps in subtle ways:

> ISPs' management and pricing of broadband services may also affect OVDs. In particular, OVDs would be harmed competitively if ISPs that are also MVPDs (*e.g.*, cable companies, telcos) were to impair or delay the delivery of video because OVDs pose a threat to those MVPDs' traditional video programming distribution businesses. *Because Comcast is the country's largest ISP, an inherent conflict exists between Comcast's provision of broadband services to its customers, who may use this service to view video programming provided by OVDs, and its desire to continue to sell them MVPD services*.[4]

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[3] *Id.* at 20. This present response by Comcast and other MVPDs defined the relevant product market for the merger review. "Because OVDs today affect MVPDs' decisions, they are appropriately treated as participants in the market. Market definition considers future substitution patterns, and the investment decisions of MVPDs are strong evidence of market participants' view of the increased likelihood of consumer substitution between MVPD and OVD services. This effect on investment is significant and could be diminished or even lost altogether if Comcast . . . acquires the ability to delay or deter the development of OVDs." *Id.* (internal citation omitted). As the Competitive Impact Statement explained:

> A merged firm can more readily harm competition when its rivals offer new products or technologies whose competitive potential is evolving. Nascent competitors may be relatively easy to quash. For example, denying an important input, such as a popular television show, to a nascent competitor with a small customer base is much less costly in terms of foregone revenues than denying that same show to a more established rival with a larger customer base. Even if a vertical merger only delays nascent competition, an increase in the duration of a firm's market power can result in significant competitive harm. The application and enforcement of antitrust law is appropriate in such situations because promoting innovation is one of its important goals. The crucial role of innovation has led at least one noted commentator to argue that restraints on innovation "very likely produce a far greater amount of economic harm than classical restraints on competition," and thus deserve special attention. *By 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*."

Id. at 21-22 (emphasis added, internal citations omitted).

[4] *Id.* at 11 (emphasis added).

These concerns about the Comcast-NBCU vertical transaction do not simply disappear in this current horizontal transaction. Indeed, Comcast's proposed acquisition here of the nation's second-largest pay-TV distributor and third-largest fixed line Internet service provider only serves to magnify these concerns, growing them to a level never considered by regulators in the Comcast-NBCU transaction review. When the Commission and DOJ conditionally approved Comcast's acquisition of NBCU, the U.S. video streaming market was in its infancy. Since that time, the use of streaming video has exploded and along with it so too have Comcast's incentives to exercise its existing gatekeeper power.

This is why the prospect of allowing Comcast to increase its share of the high-speed broadband market from **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** of all such existing users is such a concern.[5] This merger would result in a near 700-point increase in the HHI of this national high-speed broadband telecommunications market, bringing the post-transaction market HHI to nearly 3,800—a level at which Comcast would have substantial ability to exercise the market power that the agencies identified in the NBCU transaction review (see Figure 1).

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[5] These market concentration figures refer to Comcast's existing and resulting share of all fixed line connections capable of receiving telecommunications at 10 Mbps or greater as of December 31, 2013. This demarcation essentially removes first generation ADSL and mobile wireless Internet access services from the product market, which is the appropriate market definition for reasons discussed in Free Press' Petition to Deny, at 9–40, filed Aug. 25, 2014 ("Free Press Petition"). This data is sourced from the Commission's Form 477 data, as summarized in a December 9, 2014 release. *See* Letter from William T. Lake, Chief, Media Bureau, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 14-57 (Dec. 9, 2014) ("December 9th Media Bureau Letter"). In Free Press' analysis submitted in our Petition, we estimated Comcast's post-divestiture share of the high-speed broadband market so defined would be approximately 41 percent, based on data as of June 30, 2014. *See* Free Press Petition at 18, Figure 1.

Figure 1: Comcast-TWC – Change in National Broadband Market Shares
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Comcast insists this deal will somehow enhance competition, despite regulators' valid concerns in the NBCU transaction with Comcast's then-lesser degree of control over the broadband market when OVD competition was nascent. Comcast now proposes to control nearly half of the country's streaming-capable broadband connections at a time when OVD competition is exploding. As before, Comcast asks the Commission to ignore the facts and bless a massive merger with glaring public interest flaws. As before, Comcast's response to legitimate concerns is misdirection, name-calling and self-aggrandizement. It questions petitioners' motives, even as it shows it knows better than anyone how to put the "pro" in *quid pro quo*.[6]

[6] Applicants' Opposition cites support for the transaction from a variety of outside parties and supposed subject matter experts, without disclosing whether any such endorsers receives funding from Comcast. Such transparency would help elucidate the self-serving nature of these endorsements and their ultimate lack of value for the Commission's review. This is especially the case with a transaction involving Comcast, which has a demonstrated track record of tying charitable donations to support of the company's merger plans. *See, e.g.*, Cecilia Kang, "Reel Grrls turns down Comcast funds, cites free expression," *Wash. Post*, May 20, 2011.

Indeed, in a transparent attempt to use the tired Machiavellian play of turning an opponent's strength into a weakness, Comcast describes what some petitioners are doing as "extortion." In making such a ludicrous charge, Comcast somehow forgets that it's the one with the gatekeeper power to facilitate extortion. The petitioners have no such leverage.

Below we respond to Applicants' attempts at substantive rebuttals to the various petitioners' demonstration that this merger is not in the public interest. We once again demonstrate that Applicants have failed to meet their burden of proof, and that the transaction fails to promote competition and the public interest chiefly because the merged entity would have increased market power in the advanced telecommunications market, the national market for delivery and other transmittal of content and information via broadband telecommunications. We demonstrate that the transaction would increase the Applicants' incentive to abuse this enhanced market power.

We show once more that this transaction contains zero merger-specific benefits, and that the benefits alleged by Applicants cannot be said to outweigh the public interest and competitive harms of this transaction. We respond to Applicants' dismissal of the petitioners' product market definitions, and offer additional evidence of a looming cable modem platform monopoly—a trend that the Applicants recognize, and on which they seek to capitalize by consummating this transaction to reap the benefits of enhanced market power. Finally, we show that Applicants failed to demonstrate this transaction would not enhance the merged firm's incentives to discriminate against competing content providers. Indeed, as we discuss using Applicants' own internal communications and data, it is beyond doubt that thwarting robust over-the-top competition is a key driver behind this needlessly expensive and inefficient transaction.

Once the Commission considers all the evidence, it can only reach one conclusion: This transaction would cause irreversible harm to competition and the public interest, and thus must be rejected outright.

II. Applicants Have Failed to Meet Their Burden of Proof. There Are No Merger-Specific Benefits, and Any Alleged Benefits Could Not Outweigh the Competitive and Public Interest Harms of this Unprecedented Market Concentration.

In their Opposition, after restating the transaction's supposed benefits, Applicants say "[t]here are no credible rebuttals of these principal benefits from any commenters."[7] But this is simply not the case. Not only have various petitioners rebutted the supposed benefits, we have collectively demonstrated that these supposed benefits are non-merger specific.

First, Applicants claim the transaction will bring a benefit of "the accelerated deployment of an upgraded broadband network, faster broadband speeds, innovative broadband technologies, and a more robust Wi-Fi network."[8] But as certain petitioners noted,[9] Comcast has fully deployed DOCSIS 3.0, while Time Warner Cable is not far behind.[10] Furthermore, there's no

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[7] Comcast Corp. and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 36 (filed Sept. 23, 2014) ("Opposition").

[8] *Id.*

[9] *See, e.g.*, Petition to Deny of Netflix Inc., MB Docket No. 14-57, at 99 (filed Aug. 25, 2014) ("Netflix Petition") ("At best, the merger would slightly accelerate the timeline for deployment of such upgrades and services, although the delays caused by the difficulty of integrating a company the size of TWC into Comcast suggests otherwise.").

[10] *See, e.g.*, Comments of Rob Marcus, Time Warner Cable Inc., Chairman & CEO, at UBS Global Media and Communications Conference, Dec. 8, 2014 ("Marcus December 2014").

> So in 2014, . . . we rolled out an initiative which we call TWC Maxx internally, which included going all-digital . . . and probably most significantly, we increased [ ] speeds across the board. So standard HSD became a 50 x 5 service from a 15 x 1 service and the top speed that's available in the Maxx markets is now 300 x 20. We rolled that out in New York City, LA and we've actually increased the speeds across the board in Austin. . . . And we will do that in 2015. We've announced the next Maxx markets for 2015. It will include Dallas, San Antonio, Raleigh, Charlotte, KC, San Diego, and Hawaii. And we will again do all-digital and speed increases there as well as some other enhancements both to the quality of plans, reliability, and service.

evidence to suggest that this transaction is needed to, nor that it will accelerate Time Warner Cable's *actual* deployment schedule for these upgrades already in progress in Time Warner Cable markets. Most importantly, Applicants have not offered any data quantifying this supposed benefit, and therefore have failed to show that the supposed potential benefits of the merger-specific accelerated deployment offset the merger-specific harms conclusively identified by petitioners.[11] Furthermore, the fact that Time Warner Cable (along with other cable MSOs) already participates in a reciprocal Wi-Fi network sharing agreement with Comcast also demonstrates that the supposed Wi-Fi benefit is a pre-existing one, and decidedly *not* transaction-specific.

Second, Applicants claim the transaction will generate a benefit of "[i]ncreased competition and innovation throughout the broadband ecosystem."[12] Setting aside the analytical immeasurability of the empty rhetoric used here, Applicants are claiming their transaction is somehow responsible for other unrelated announcements such as AT&T's advanced broadband deployments. Causal relationships are often difficult to establish, but in this case Applicants are simply wrong to take credit for other developments in the broadband market that are unrelated to or predate their own merger aspirations.

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[11] In addition to the non-merger specific nature of Applicants' claims about accelerated DOCSIS 3.x deployment, there is also no evidence that the transaction is needed to accelerate Time Warner Cable's all digital deployment. These plans are always evolving, subject often to macroeconomic factors. However, it should be noted that the consumer benefits of the all-digital migration are open to interpretation, as for some consumers it creates the need to rent additional consumer premise equipment (such as additional set-top boxes or other digital terminal adapters) and the power consumption and other hassles that come with the move away from plug-and-play analog service. Comcast can claim a benefit, but to satisfy its burden of proof must at least attempt to quantify the size of this benefit and address likely costs. In this case, even if there were some *minor* acceleration of all digital deployment in TWC territories, the size of this claimed benefit would likely be minimal. In fact, it might be outweighed by the reality that consumers on these tiers may have higher costs and lower perceived value, due to the negative associations with having to pay for channels, devices, and capacity they are not using.

[12] Opposition at 36.

AT&T's Project VIP deployments were planned well ahead of Comcast's announcing its proposed acquisition of Time Warner Cable,[13] while the AT&T Gigabit deployments Comcast highlights are largely phantom activities that exist only in a vague press release.[14] Comcast simply cannot offer any evidence that its acquisition of Time Warner Cable is changing or *accelerating* any other carrier's deployment plans, because it plainly is not. Indeed, just this month Verizon's CFO noted that it long ago halted its fiber deployment plans, and is content to slowly lose share to cable companies in its markets Verizon hasn't upgraded.[15] If Comcast's suggestion of direct, merger-specific changes in LEC fiber deployment were real, there would be ample evidence of this. There simply is no such evidence, and thus Applicants' unsupported rhetoric suggesting otherwise is not evidence of a merger-specific benefit.

Third, Applicants claim the transaction will lead to "the expansion of Comcast's acclaimed Internet Essentials broadband adoption program."[16] This often-touted yet often-criticized program is a fine example of regulatory candy; but expansion of Internet Essentials is not a cognizable merger-specific benefit, and certainly not one that can be said to offset the collective harms that the transaction would create.

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[13] *See* "AT&T to Invest $14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services," AT&T Newsroom, Nov. 7, 2012.

[14] *See* "AT&T Eyes 100 U.S. Cities and Municipalities for its Ultra-Fast Fiber Network," AT&T Newsroom, April 21, 2014 ("AT&T will work with local leaders in these markets *to discuss ways* to bring the service to their communities. . . . [C]ommunities that have suitable network facilities, and show the strongest investment cases based on anticipated demand and the most receptive policies will influence these *future selections* and coverage maps within selected areas.") (emphases added).

[15] *See* Comments of Fran Shammo, Verizon Communications Inc., Chief Financial Officer, at UBS Global Media and Communications Conference, Dec. 8, 2014 ("Outside of FiOS where I only have copper to compete against cable, I am not going to win that battle: We can't compete on speed and we made a strategic decision not to invest in that copper plant so now it's trying to maintain that and keep customers as long as we can.").

[16] Opposition at 36.

Numerous petitioners and commenters noted the flaws in the program.[17] Even more telling in the context of the merger review, however, is the fact that there is no discernible transaction-specific benefit from expanding it. As Free Press noted in our Petition, TWC "currently offers a $14.99 entry-level Internet service, $5 more than Internet Essentials and without all of the eligibility restrictions. In the absence of the merger, it is certainly possible that just as wireless companies eventually had to market products to lower income consumers as that market saturated, so too would Comcast as home broadband adoption becomes saturated."[18]

The fourth supposed benefit claimed by Applicants is that "the newly acquired TWC and Charter customers will benefit from Comcast's singular, legally-binding commitment to an open Internet."[19] But we noted in our Petition, this "is also an illusory benefit, since all of [Comcast's] ISP peers make the same sorts of claims about supporting openness. Furthermore, as evidenced by its imposition of access fees on Netflix and the Commission's slow response to the ongoing consumer harms from that situation, Comcast's ability to evade the spirit of the rules while consumers suffer makes this commitment totally meaningless."[20]

Whatever the outcome of the Commission's ongoing *Open Internet* proceeding, it is clear that the porous 2010 rules must now be seen as the floor and not the ceiling for any future nondiscrimination protections applied to Comcast and Time Warner Cable's broadband Internet access services. Comcast is the only company currently held to these rules, yet it still managed to engage in the *very type of conduct* that led to this condition in the NBCU transaction.

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[17] *See, e.g.*, Petition to Deny of Public Knowledge and Open Technology Institute, MB Docket No. 14-57, at 58-59 (filed Aug. 25, 2014); *see also, e.g.*, Comments of the Institute for Local Self-Reliance and Media Mobilizing Project, MB Docket No. 14-57, at 3 (filed Aug. 25, 2014).

[18] Free Press Petition at 79.

[19] Opposition at 36.

[20] Free Press Petition at 79.

That alone is proof of the ineffectiveness of those rules and of these conditions in particular, as well as Comcast's ability to evade these supposed safeguards. Therefore, Comcast's Open Internet commitment is not real and not quantifiable in a manner that offsets the harms that the transaction would create. Comcast would be the largest provider of two-way telecommunications services in America, far larger than any Bell Operating Company was at the time of the AT&T divestiture. Yet Comcast is not subject to even the most basic obligations of a telecommunications service provider, and until it is any voluntary commitment will not be able to safeguard against the harms of giving this one company such a large share of the national high-speed broadband market.

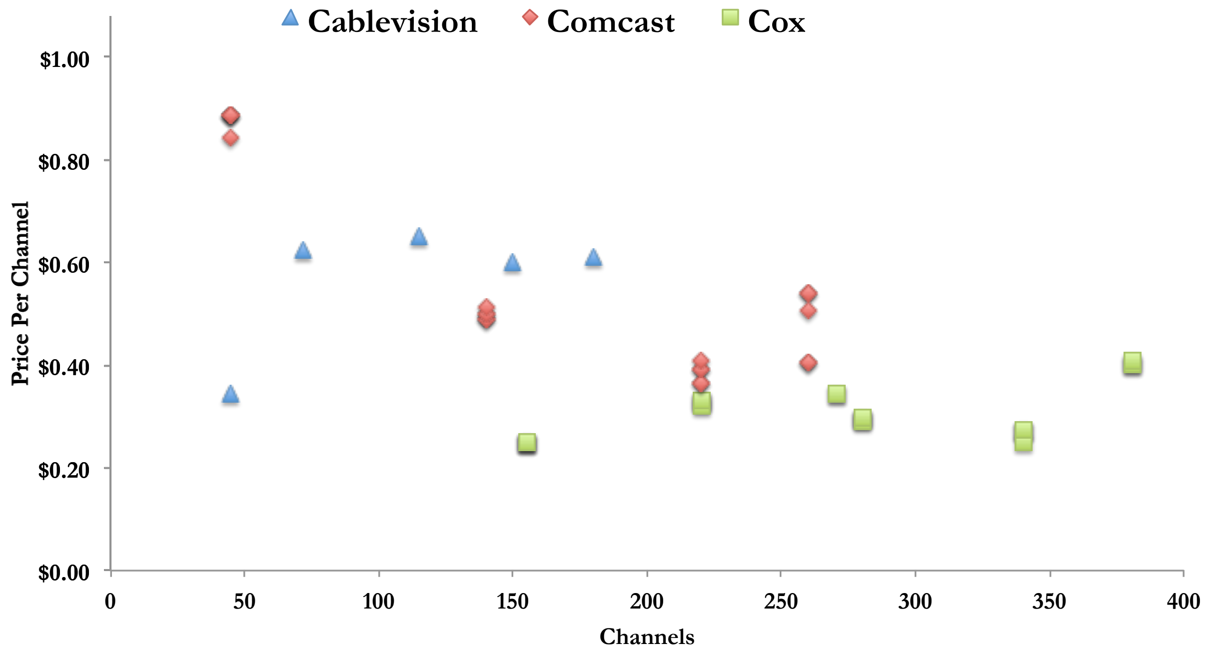
Applicants' claimed benefits listed above are all related to the broadband access services market. Applicants also make equally specious claims of benefits in the pay-TV distribution market, which various petitioners have already conclusively demonstrated to be illusory. For example, two experts hired by Applicants do their best to regurgitate generic economic theory, stating that "[t]he benefits of economies of scale are likely to be realized because they are based on the fundamental economics of the fixed investment costs needed for innovation. These benefits should flow to consumers through improved service, more advanced features, or lower prices that would not occur absent the transactions."[21] Applicants also cite supposed experts from the Discovery Institute observing that "[b]roadband services involve 'very substantial fixed' costs and are subject to 'large economies of scale' . . . . [A] larger firm can place itself in a better position to promote innovation and competition that will yield more choices and ultimately lower prices for consumers."[22]

[21] Opposition, Rosston and Topper Declaration ¶ 8.

[22] Opposition at 40.

This all sounds nice, but as one Petitioner rightly noted, "facts trump theory."[23] Comcast *already* has benefits of scale. We can therefore test against reality the abstract economic theory that greater scale equates to lower prices. As Figure 2 below shows, Comcast's scale is not currently translating into lower prices or more value for its customers. Despite having more than five-times as many multichannel subscribers as Cox or Cablevision, Comcast's per-channel prices for its cable TV packages are often higher than those of its substantially smaller peers.

Figure 2:
Comcast, Cablevision and Cox –
Price Per Channel for Stand-alone Video Packages in Various Markets



Source: Published stand-alone prices for various multichannel service packages in various markets for Cablevision, Comcast and Cox, collected by SNL Kagan and reported in "Multichannel Video Pricing Report (Mid-2014)," Sept. 19, 2014. Comcast prices for Boston, MA; Philadelphia, PA; San Francisco, CA; Chicago, IL; and Atlanta, GA. Cablevision prices for New York, NY. Cox prices for Hampton Roads, VA; Phoenix, AZ; San Diego, CA; and Hartford, CT.

These data show that the lower prices that supposedly come with scale are not real. If they were, Comcast would have certainly presented such evidence as opposed to generic

[23] Netflix Petition, Declaration of David S. Evans, ¶ 159.

speculation about what might occur if the company gets even bigger. As an analyst from the Capitol Forum recently stated, "Comcast already serves 21.7 million subscribers, which is likely to be many times larger than minimum efficient scale. There are little or no operating efficiencies the existing firms cannot presently fully realize at their already extremely large scale."[24] As we discussed in our Petition, Comcast's existing scale has only translated into higher operating margins for Comcast relative to its smaller peers. Indeed, Comcast's video margins are double that of MSOs that are less than half its size.[25] Comcast's scale economies have not translated into lower prices for consumers, as the theory espoused by Comcast's hired experts predicts it should. The Commission therefore must set aside Applicants' theory in favor of facts.

Furthermore, Comcast's scale has not equated into *any other* benefits for consumers either. Comcast's service record is worse than its competitors, and given the trajectory of the broadband access market towards a cable modem monopoly, the market forces that Comcast's paid-consultants cite won't work as expected. Without adequate competitive pressure, the benefits of scale will always accrue to the firm, not the customer.

The other supposed benefits cited by Applicants are even more illusory and non-transaction specific than the five major claims debunked above. For example, Applicants claim that "[c]ustomers in the acquired TWC and Charter systems will gain access to the fastest in-home Wi-Fi gateways."[26] But this is certainly not a transaction-specific benefit, since the

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[24] *See* "Comcast/Time Warner Cable: A Closer Look at FCC, DOJ Decision Processes; Merits and Politics May Drive Merger Challenge, Especially as Wheeler Unlikely to Embrace Title II Regulation for Net Neutrality," The Capitol Forum, Oct. 9, 2014.

[25] For the third quarter of 2014, Comcast's video operating margin was 19.3 percent; Time Warner Cable's video operating margin was 9.9 percent; and Charter's video operating margin was 11.7 percent. *See* Tony Lenoir, "Top operators' video margins hit all-time low," *SNL Kagan*, Nov. 3, 2014.

[26] Opposition at 41.

customer has to rent these later-generation Wi-Fi routers, paying up to $9.95 per month plus tax—far more than the purchase price over the lifetime of the use of the product.[27] Furthermore, Time Warner Cable and Charter customers can purchase dual-band 2.4GHz/5GHz 802.11n or 802.11ac routers from any number of retail vendors today. Applicants pretend a merger is necessary for customers to gain faster in-home Wi-Fi, but this is simply untrue. Paying more for something that already can be had today is hardly a benefit, much less a merger-specific one.

Applicants also claim that acquired customers "will also benefit from greater access to public Wi-Fi hotspots" and tout Comcast's recently deployed Wi-Fi sharing as something the Commission should consider as a transaction-specific benefit.[28] But as Applicants themselves recognize, "Comcast and TWC participate in the Cable WiFi consortium."[29] Counting as beneficiaries then the few Charter customers that will be swapped to Comcast does not equate to a cognizable benefit, particularly given that Comcast has not supplied the Commission with any evidence of the magnitude of the perceived benefit of having access to these networks.[30] And Time Warner Cable recently announced a reciprocal Wi-Fi arrangement with Boingo, granting

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[27] Comcast recently increased the rental fee for its home Wi-Fi gateway from $7 per month to $9.95 per month. *See, e.g.*, sample bill notice posted by a Comcast customer posted at DSL Reports forum, *available at* http://goo.gl/1GLo14 (last visited Dec. 22, 2014). This combination DOCSIS 3.x and 802.11ac router can be replicated by off-the-shelf devices for less than $130, a price that is rapidly falling. If the user is content with the 300 Mbps speeds offered by an 802.11n router, the combination can be replicated for less than $80. *See, e.g.*, Amazon device search results, *available at* http://goo.gl/sI6w1T (last visited Dec. 22, 2014) (DOCSIS 3.0 modem); http://goo.gl/yi57D0 (802.11ac router); http://goo.gl/uM0Ysi (802.11n router).

[28] Opposition at 41-42.

[29] *Id.* at 43.

[30] Applicants bear the burden of supplying some sort of quantification of this supposed benefit to the acquired Charter customers, particularly given the availability of other open Wi-Fi networks and the anecdotal evidence suggesting that users often experience poor connection speeds when connected to these networks. Furthermore, these networks are increasingly vectors used to hack unsuspecting users. *See, e.g.*, Sean Gallagher "'Free' Wi-Fi from Xfinity and AT&T also frees you to be hacked," *Ars Technica*, June 22, 2014.

TWC's customers free access to Boingo's more than 1 million access points using "Hotspot 2.0" technology that enables secure, login-free use.[31]

It is also highly dubious to suggest that turning the customer's in-home Wi-Fi into a public access point is a benefit. This program recently deployed by Comcast is opt-out rather than opt-in, with users who wish to opt out finding it exceedingly difficult to do so.[32] It also requires the customer to rent a modem from Comcast for $9.95 per month, which is certainly a benefit to Comcast, not its customers. This scheme to turn the customer's router into a public access point also comes with a hidden cost: increased power consumption to the tune of nearly $30 per year.[33] Also, even Comcast admits that the program creates interference issues, which no home consumer would perceive as a benefit.[34]

Outside of these sham Wi-Fi benefits, Applicants go to great lengths to suggest the merger will "inject much-needed competition into the business services market and will bring about new, competitive choices for businesses of all sizes."[35] But given the fact that the business services market is one of the brightest segments of the cable industry, it is a tremendous stretch for Applicants to claim this as a merger-specific benefit. Time Warner Cable has repeatedly and recently indicated that the commercial (or "enterprise") segment is an area of strong interest and

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[31] *See* Mari Silbey, "Boingo & TWC Share Hotspots for the Holidays," *LightReading*, Dec. 17, 2014.

[32] *See* Karl Bode, "Comcast Users Struggle To Keep Rented Routers From Sharing Wi-Fi," *DSL Reports*, Dec. 5, 2014.

[33] *See* Raj Haldar, "Is There a Hidden Cost to your Xfinity Router?," *Speedify*, Aug. 7, 2014.

[34] *See* Mari Silbey, "How Home Hotspots Could Hit Hurdles," *Light Reading*, Oct. 27, 2014 ("Charlie Douglas, executive director of corporate communications at Comcast, confirmed that home hotspots could experience network congestion from guest users simply because of the way that WiFi works.")

[35] Opposition at 68.

investment for the company, and that it is *currently* operating at the same aggressive level that it would be if and when it were acquired by Comcast.[36]

Indeed, the data indicates that Time Warner Cable is currently outperforming Comcast in the business services sector. For example, for the first three quarters of the year, Comcast generated $2.893 billion in business service revenues, compared to the $2.083 billion generated by the smaller Time Warner Cable.[37] When adjusted for the population in each company's service area, we see that for the first 9 months of 2014 Comcast generated $26 per capita in commercial service revenues, while TWC generated $31.[38] Over the past year, Time Warner Cable saw a greater level of growth in commercial service revenue than Comcast (21.9 percent vs. 20.9 percent), and commercial service revenues were a greater overall contributor to cable service revenues for Time Warner Cable than for Comcast (12.7 percent vs. 9.2 percent).[39] TWC's near 22 percent year-over-year growth in commercial service revenues not only exceeds Comcast's, but is also the highest of the six largest cable companies over the past year. Thus the claim that the acquisition of Time Warner Cable by Comcast will improve the business service offerings in TWC's footprint is completely wrong. The business market is a high investment and

[36] *See, e.g.*, Comments of Rob Marcus, Time Warner Cable Inc., Chairman & CEO, Time Warner Cable 3Q 2014 Earnings Call, Oct. 30, 2014 ("In Business Services, we've now reached a $3 billion annual revenue run rate, right on track toward our goal of over $5 billion of annual revenue by 2018. . . No surprise, we're very bullish on Business Services. *If all of this sounds like we're running the business as if we were operating it to the long haul, it's because we are. Until it's time to pass the baton to Comcast, we're intent on strengthening and growing our business and improving our customers' experience*.") (emphasis added); *see also* Marcus December 2014 ("[W]e're investing in line extensions on the residential side. We're connecting new buildings to our network to drive commercial growth and I think the opportunities are there.").

[37] *See* Kamran Asaf, "Commercial services revenue clocks over 4% quarterly growth for 6th consecutive period," *SNL Kagan*, Dec. 5, 2014.

[38] Data for population coverage obtained from broadbandmap.gov.

[39] *See* Asaf, *supra* note 37.

growth area. That trend holds among other cable companies, and it will continue in the absence of this transaction.[40]

Applicants simply cannot claim as a merger-specific benefit the outcomes that already would occur if present trends continue. This is especially the case given that TWC is currently outperforming Comcast in this particular market segment. Indeed, given the high margins generated from the commercial services sector, more than any other segment this is the most likely one in the cable market to see future overbuilding. TWC, as the industry leader in commercial services, is thus the most likely MSO to expand its commercial footprint outside its existing cable territory in the future. Thus the merger not only fails to create cognizable benefits in the business services market segment, it is likely to cause tangible harms to investment and competition by removing a potential, future head-to-head competitor from the market.

Applicants also state that "the Transaction will expand a long-term commitment to [offer standalone broadband service] throughout the acquired systems."[41] But they also note that "TWC and Charter offer standalone broadband services today."[42] Thus Applicants cannot claim this as a merger-specific benefit either, since standalone broadband is available in the areas served by the to-be-acquired systems, and Applicants offer no evidence to suggest this won't continue in the future absent the transaction. Furthermore, the claim that offering a highly profitable product with substantial consumer demand is somehow a special benefit, and one offered by Comcast only in fulfillment of its past merger commitments, is a perfect encapsulation of the sorry state of

[40] *Id.* ("The U.S. commercial services segment cemented its place as a core growth component, with reporting MSOs posting a combined 19.6% year-over-year increase in revenues to $2.21 billion in the third quarter. Revenues increased 4.4% from the $2.12 billion recorded for the three months ended June 30, making it the sixth consecutive period in which sales proceeds grew by more than 4% since the beginning of 2013.").

[41] Opposition at 87.

[42] *Id.*

competition in the broadband market—which would only be diminished by this transaction. That Comcast needs such a merger commitment to entice it to sell standalone broadband is a strong indicator of market power and market failure. Implicit in Comcast's claim that this qualifies as a benefit is the acknowledgment that it must be forced through the conditioned approval of this transaction to continue meeting the growing demand for standalone broadband. Absent the transaction—or more importantly, upon expiration of any condition—Comcast would require customers who want the standalone product to purchase video services they may not want in order to obtain the broadband they do want. This is a strong indication of a potential harm of this transaction, and of Comcast's ability to act on its anticompetitive incentives to thwart over-the-top competition.

In sum, Applicants have utterly failed to identify any cognizable, merger-specific benefits. Those claimed are either non-merger specific or not in fact benefits at all. Applicants claim credit for external events unrelated to this transaction, and ignore that many of the outcomes they claim to be only possible through the merger would in fact manifest in its absence—sometimes far more than they would if the merger were approved. Applicants also rest their primary consumer benefits case on generic economic theory concerning the supposed outcomes for consumers from scale economies, but readily available facts dispel their claims of predicted benefits. The Commission must conclude that Applicants have failed to meet their burden to demonstrate, conclusively and convincingly, that the proposed transaction would enhance competition and serve the public interest.[43]

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[43] *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 2 (1997).

III. Applicants Cannot Wish Away the Facts About the Looming Cable Broadband Monopoly and Comcast's Pending Domination of the U.S. High-Speed Telecommunications Market.

In our Petition we illustrated that 1) Comcast currently faces little meaningful competition in the high-speed broadband market;[44] 2) broadband access providers, including Comcast, set prices nationally;[45] 3) Comcast faces declining video profits,[46] but such traditional video content segments still comprise nearly three-quarters overall of the company's revenues,[47] a market trend that drove its acquisition of NBCU and its pending acquisition of Time Warner Cable. Taken together, these facts explain precisely why Comcast's acquisition of Time Warner Cable poses substantial public interest harms in the form of higher prices, online discrimination, reduced access to diverse content, harms to third party innovation, worse customer service, and other negative impacts. All of these harms should be expected to arise if the deal were consummated, with a single firm controlling half the nation's advanced telecommunications customers (and nearly two-thirds of all such potential customers), particularly in a regulatory regime that fails to apply basic telecommunications service obligations to Comcast.

The case against this merger begins with the fact that the online content distribution market is a national product market, something recognized previously by the Commission and DOJ.[48] Given the existence of this national product market, the Commission should view this transaction as a horizontal merger, and use the appropriate analytical lens for reviewing such combinations. A key question for that review is what competitive alternatives would remain if

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[44] Free Press Petition at 11-40.

[45] *Id.* at 37.

[46] *Id.* at 35 n.61.

[47] *Id.* at 54.

[48] *Id.* at 14 (citing *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176 (RCL), Amended Complaint, ¶¶ 25, 28 (filed May 26, 2000)).

the merger were consummated? As we conclusively demonstrated in our Petition, for a substantial portion of the country (which Comcast and Time Warner Cable collectively serve today), there would be no alternative provider of advanced broadband service. This is because of the inherent limitations in telcos' first-generation Asymmetric Digital Subscriber Line (ADSL) technology that no longer competes effectively against cable modem service; and because of the natural monopoly economics that always have, and always will, govern the last mile.

Applicants' response to these facts is to simply wave them away by pretending that first generation ADSL and mobile wireless products are economic substitutes for cable modem service, despite substantial evidence to the contrary. Applicants shamelessly trot out a highly misleading repackaging of FCC Form 477 data that lumps in Fiber-to-the-Home and Fiber-to-the-Node (collectively "FTTx") with ADSL subscriber counts in an effort to portray DSL as gaining market share.[49] They also cite misleading availability data in an effort to portray the market as something other than a duopoly, when they certainly know this data is wrong.[50]

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[49] *See* Opposition at 21, claiming that DSL's growth rate exceeded that of cable modem since June of 2009, and claiming that this growth rate was more pronounced for services above 10 Mpbs. Of course, the source for all of this growth is VDSL Fiber-to-the-Node service that Free Press considered in its analysis of the broadband market. Such services belong in the product market, but these particular growth rates are irrelevant because deployment of VDSL was minimal prior to 2009 and accelerated subsequently. The relevant considerations are the current and future availability of these substitutable services in the merged firm's territory. As Free Press documented in our Petition, deployment of such advanced broadband services by incumbent telephone companies is largely complete, and even in a favorable investment climate the cost advantages enjoyed by cable will ultimately force ILECs to focus on their more lucrative wireless and commercial services. *See* Free Press Petition at 29-40.

[50] *See* Opposition at 44, citing data from the National Broadband Map which suggests that "78 percent of households are located in census tracts where at least three or more fixed broadband providers reported offering at least 3 Mbps downstream." It is important for the Commission and other policymakers to understand the fundamental flaw in NTIA's availability data, which Comcast tries to exploit. The NTIA data *vastly overstates* the availability of non-ILEC offerings, as it includes several CLECs that do not actually serve large portions of the areas they claim to serve, but instead report areas where they are *willing potentially to serve* business customers using leased ILEC facilities if such service is requested. For example,

Applicants are not daft; surely they read and understood the case made by Free Press and other Petitioners that the very same data proves the appropriate product market excludes first-generation ADSL services, but includes FTTx services that are capable of delivering over-the-top streaming video and multichannel services.

Applicants' attempt to mislead is an expected response, as they are simply on the wrong side of the facts: There is a looming cable monopoly for advanced broadband in America, and there is no hope for widespread fiber deployment to counter this growing trend.[51] ILECs have made this abundantly clear. Consider recent comments from Verizon's Chief Financial Officer Fran Shammo: "Outside of FiOS where I only have copper to compete against cable, I am not going to win that battle: We can't compete on speed and we made a strategic decision not to invest in that copper plant, so now it's trying to maintain that and keep customers as long as we

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Platinum Equity Inc., the parent company of MegaPath and Covad, is shown in NTIA data as serving a whopping 44 percent of the country, when this is plainly not the case. Indeed, according to the NTIA's data, Platinum Equity is allegedly the *largest* wired ISP in the country as measured by availability, ahead of Comcast, AT&T, Verizon, Time Warner Cable and every other incumbent cable or telco provider! *See* National Broadband Map search results for Platinum Equity Inc., *available at* http://goo.gl/sZbeO6 (last visited Dec. 22, 2014). The Commission simply cannot rely on NTIA's availability data as reported, and must correct for this CLEC-over reporting in this or any other matter. Given that the FCC's name is attached to the National Broadband Map website and data, it would serve the public interest if the Commission were to insist on better quality control before such misleading information is reported publicly.

[51] Nor is there any reason to believe that advances in technologies that rely on existing copper will ever be economically viable, as new services such as G.Fast require extremely short loop lengths. *See* Sean Buckley, "BT achieves 1 Gig rates with G.Fast copper trial, creates new broadband lab," *FierceTelecom*, Sept. 25, 2014 ("Over a 19 meter length of existing copper, BT said it achieved downstream speeds of about 800 Mbps and upstream speeds of over 200 Mbps in the trial. On longer lines of 66 meters, a distance that it says encompasses about 80 percent of such connections, the telco reported speeds of around 700/200 Mbps."). This equates to a range of 66 to 216 feet. By comparison, the FTTN VDSL deployments (such as AT&T's U-Verse) typically locate the digital terminals at 3000-4000 feet, with the maximum distance for the 45Mbps downstream tier at approximately 3,330 feet. *See* "Examining AT&T's 45 Mbps U-Verse Tier (And If You Can Get It)," *DSL Reports*, Oct. 15, 2013, http://goo.gl/YUbfUo.

can."[52] Or consider the view from the other side, as expressed by TWC's own CEO: "[W]e're going after DSL. We estimate there [are] still 4.5 million DSL customers in our footprint, one-third of whom take video from us. Given the superiority of our broadband offerings to DSL, we find that inconceivable and unacceptable. It's an opportunity we must capitalize on."[53]

Applicants can try hiding behind misleading portrayals, but the underlying facts are clear: ADSL is a dying technology, ILECs are done deploying FTTx services, the nation's largest ILEC never bothered to deploy residential FTTH, and Google will never be a national fiber overbuilder.[54] That means this merger would cement Comcast's monopoly status in more than a third-of the national market, and its dominance in the duopoly in another quarter of the market.[55]

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[52] *See supra* note 15.

[53] *See* Comments of Robert D. Marcus, Time Warner Cable Inc., President, Chief Operating Officer and Director, Time Warner Cable, 3Q 2013 Earnings Call, Oct. 31, 2013.

[54] As Comcast Executive Vice President David Cohen reportedly told *National Journal*, "even if the deal fails, Comcast and Time Warner Cable will likely never compete head-to-head in any market. Building cable networks is too expensive to try to compete with an existing cable provider, he said." *See* Laura Ryan e*t al.*, "Is Net Neutrality a Public-Safety Issue?," *National Journal*, Sept. 25, 2014. This is a curious admission given Comcast's position that it expects to face increased competition from Google Fiber and other overbuilders in addition to hypothetical future LEC fiber deployments. But it's an important admission nonetheless. Comcast is essentially saying it's profitable for the company to spend nearly $70 billion in capital to expand its territory by purchasing Time Warner Cable, but only if it knows the combined company would face at most one other competitor. This is a strong indication to the Commission that there is a market failure resulting partly from incumbents' incentives to avoid investing in new competitive facilities (which bring a return on capital beyond the 5 year mark) in favor of wildly expensive mergers that lessen competition. However, absent this transaction, Comcast likely would expand in numerous ways, such as offering over-the-top multichannel TV services outside its own footprint, as well as overbuilding in certain markets. *See* Free Press Petition at 74-78.

[55] *See* Free Press Petition at 20, Figure 3, showing Comcast as the only provider of 10 Mbps or greater services for 36 percent of the homes where broadband is available, and as one of two providers in another 26 percent. The December 9th Media Bureau Letter provides in Figure 3a data from the State Broadband Mapping Initiative suggesting Comcast would be a monopoly provider at this level of services in 29 percent of its resulting footprint, or approximately 18 percent of the country. This data however is based on flawed NTIA availability estimates, which count numerous CLECs that own no facilities and serve no customers in most of the areas they report serving. *See supra* note 50 for further explanation and an example of this over-reporting.

A. Contrary to Applicant's Assertions, The Merged Firm's Potential Market Reach is a Critical Factor to Measure its Resulting Market Power and Potential For Future Transaction-Specific Harms.

Given the inherent long-term advantages of coaxial systems over copper systems, and the fact that a merged Comcast-TWC would control the cable wire attached to 6 out of every 10 U.S. homes, this transaction also poses long term monopoly issues that go well beyond the already troubling level of control the firm would enjoy immediately following the merger's consummation. Applicants suggest that "[t]he number of homes passed has no validity in the assessment of the potential for horizontal harms. The Commission long ago rejected a homes passed measurement in the subscription video market as an appropriate test for assessing a cable company's size or relative market power in favor of measuring share of actual MVPD subscribers."[56] However, Applicants seem to miss the plain meaning of the Commission's words they cite, and the context behind that conclusion. As the Commission wrote, "[w]hile an operator may pass a large number of homes in its franchise area, the operator *could have a low penetration rate in that area due to competition from other MVPDs* or other factors, thereby rendering the number of homes passed an inaccurate indicator of the operator's market power."[57] Yes, the Commission rejected homes passed in favor of market share as the appropriate metric *for enforcing Congress' mandate of a horizontal ownership limit*. But this does not mean that homes passed is an irrelevant metric for gauging *potential* market power resulting from a merger.

As DOJ's horizontal merger guidelines make clear, the number of available substitutable products and the future competitive viability of the remaining firms are key factors in

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[56] Opposition at 143.

[57] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098, ¶14 (1999) ("*Third Report and Order*") (emphasis added).

determining a firm's market power.[58] Given that the appropriate product market in this transaction is the national market for online content distribution, and that on average the merged firm would face less than one competitor, the number of homes passed is a necessary input to determine market power and whether or not the transaction would likely produce harms via unilateral and/or coordinated effects.

The horizontal ownership limit is primarily concerned with the ability of an independent programmer to reach enough of the addressable market to maintain viability. Thus an MVPD's subscriber count *relative to the total number of subscribers* is the key metric (and this is why Free Press used Applicants' market share and not homes passed in our analysis of the addressable market for online content distribution).[59] The use of market share is of course entirely reasonable and appropriate given that the MVPD market is a market with *3 or more providers* available at every location.

In the *Third Report and Order*, the Commission explained that "[i]n situations where there is only a single multichannel video provider, whether subscribership or homes passed data is used is largely a mechanical issue in terms of the market power issue."[60] This is instructive, as the market of concern in the instant transaction is closer to this hypothetical monopoly than it is to the current MVPD market. A key factor in the instant transaction is that the merged firm would be the *only provider* of advanced broadband service in a third of the country, and *one of only two* providers in another quarter, with a substantial portion of the duopoly areas served by

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[58] *See* U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," § 4 (2010) ("*Horizontal Merger Guidelines*") ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

[59] *See* Free Press Petition at 58-66.

[60] *Third Report and Order* ¶14.

copper-based VDSL services that cannot match the capacity/cost advantages that the merged firm's DOCSIS network would enjoy.

Furthermore, unlike MVPDs that operate a private carriage platform on which content providers sell content *chosen by the MSO* to the MSO, the broadband market involves a *de facto* common carriage platform on which content providers deliver content chosen by the broadband network owner's customers. This is a key difference, particularly when the customer can use her broadband connection to access online video distribution services that substitute for the network owner's multichannel video service. Customers' ability to use broadband (which brings in about a quarter of an MSO's revenues) to reduce their use of the multichannel video service (which still brings in half or more of the MSO's revenues) creates a large incentive for the MSO to engage in discriminatory behavior. And if one single MSO gains a large enough share of the nation's broadband access market, these incentives to discriminate pose an escalating threat to the entire Internet ecosystem. A large enough number of available alternatives may mitigate the ability of that MSO to act on these incentives. But in broadband, there simply are not now and never will be enough competitive alternatives. Thus, if Comcast were allowed to control the major broadband access platform for 6 of every 10 homes, it would have the ability to completely shape the future of the U.S. telecommunications market, and would do so in the total absence of the statute designed to govern two-way telecommunications services.

If the transaction were approved, Applicants would immediately control **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** percent of the high-speed broadband subscriptions and **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION**] percent of the connections capable of telecommunications at speeds greater

than 25 Mbps.[61] Today the relevant product market is closer to the 10 Mbps figure represented by the first statistic, but based on current trends it is a certainty that the market will shift to the higher-capacity threshold of the latter category in a matter of a few short years.

Given that many of the LECs currently offering 10 Mbps-level services will not be able to offer services at the 25, 50 or 100 Mbps-level (nor of course at the multi-gigabit level that MSOs could soon offer using their DOCSIS 3.1 capabilities) without substantial and expensive new FTTH or very-short loop FTTN deployments, Comcast's potential *reach* is a key factor for determining the likely future competitive and public interest impacts of this transaction. If Comcast eventually controls nearly two-thirds of the broadband access market, and it is treated by the Commission as a private carriage platform, then Comcast will be *the only relevant* platform. This is the precise concern and the same level of platform control that lead the government to break up Ma Bell, an antitrust enforcement action that took decades to achieve. It would be foolhardy for the Commission to approve the creation of a nationwide platform monopoly again now, particularly one that would exist in a near-total vacuum devoid of the safeguards provided by our nation's telecommunications service laws and common carrier protections.

Thus, Applicants are simply wrong to suggest that "homes passed has no validity in the assessment of the potential for horizontal harms," since in combination with current subscribership data, this metric speaks to the Applicants' combined market power immediately following consummation of the transaction as well as their potential future market power should this deal be approved.

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[61] *See* December 9th Media Bureau Letter.

IV. Applicants Failed to Demonstrate that This Transaction Would Not Enhance Market Power in the National Broadband Market, and Failed to Demonstrate That This Transaction Would Not Enhance Incentives to Discriminate Against Competing Content Owners and Distributors.

A. Comcast Already Has Strong Incentives to Thwart and Control Over-the-Top Services and Those Incentives Would Be Greatly Enhanced by This Proposed Horizontal Expansion.

Applicants failed to meet their burden of proof to demonstrate any merger-specific benefits. Applicants also failed to counter the data demonstrating that a key relevant product market is the national advanced broadband market for content and services distribution. And they simply cannot explain away the data showing that the merged firm would have substantial market power in this product market. Having failed in each of these areas, Applicants attempt to argue that despite their pending domination of the national broadband market if the merger were approved, despite their increase in market power, and despite their massive incentives to discriminate as a vertically integrated MSO, the merged firm would not act on these incentives and abuse its gatekeeper power.

Comcast claims it would lose customers if it throttled, blocked or otherwise violated the open pathway. It cites research from Global Strategy Group to support this claim, suggesting that 76 percent of customers would switch if their ISP slowed down Netflix.[62] However, this is a prime example in which survey data about what customers say they *would* do is trumped by real-world evidence of what they *did*. According to Comcast's data the churn rate for its high-speed Internet customers was **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] during the period when Netflix documented a decline in its performance on Comcast's network due to Comcast's unwillingness to provision enough capacity for the data requested by its customers.

[62] Opposition, Pollock Declaration ¶ 7.

As Figure 3 below shows, during Fall 2013/Winter 2014, Netflix users on Comcast saw their performance decrease by nearly 30 percent. However, during this time the monthly churn rates for Comcast's standalone data, double play data plus video, and triple play services **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] respectively. Here again, we see that the facts trump Applicants' theories.

Figure 3: Comcast Churn Rates During Period of Poor Netflix Performance

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As Free Press explained in our Petition, Comcast's composition as a large vertically integrated MVPD gives the company substantially different incentives for how it acts towards over-the-top content providers, as compared to how a standalone telecommunications access

provider would act.[63] This is not just the view of Free Press and other petitioners: it is the judgment of DOJ and the Commission. In the *Comcast-NBCU Order*, the Commission found

> that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and stand-alone OVDs, through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video.[64]

The Commission's findings extended beyond how Comcast might manage its broadband platform, analyzing as well how Comcast-NBCU might use its market power to force third-party content owners to refuse or restrict licensing content to online distributors.[65] This method of leveraging scale to harm smaller competitors is not merely theoretical. Cable executives have

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[63] *See, e.g.*, Free Press Petition at 54-55; *see also, e.g.*, Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order,* 26 FCC Rcd 4238, ¶ 93 (2011) (*"Comcast-NBCU Order*"):

> Although we agree with the Applicants that these concerns affect all ISPs, we also identify particular transaction-related harms that arise from the increased risk that Comcast will engage in blocking or discrimination when transmitting network traffic over its broadband service. Specifically, we find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections. . . . Furthermore, if Comcast or Comcast-NBCU were to discriminate against disfavored online content or distributors after the transaction, that conduct could render our online program access conditions ineffective.

Of course the same logic applies to the Comcast-TWC transaction, and is in fact magnified, as Comcast is proposing to substantially increase its share of the addressable market. Comcast's resulting share would be so large, and its ability to stifle over-the-top competition so enhanced, that acting on its discriminatory incentives would become a much more profitable undertaking.

[64] *Comcast-NBCU Order* ¶ 61.

[65] *See id.* ¶ 73 ("We also conclude that Comcast-NBCU will have increased leverage to negotiate restrictive online rights from third parties, again to the detriment of competition.").

acknowledged deploying it in the past, though it is an admission they don't often tout publicly.[66]

The recognition of these incentives by regulators (as well as by two of the market's major participants, AT&T[67] and Verizon[68]) is nothing new. Comcast surely remembers the

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[66] *See, e.g.*, Andy Fixmer and Alex Sherman, "Time Warner Cable Content Incentives Thwart New Web TV," *Bloomberg*, June 12, 2013:

> Time Warner Cable Inc. and other pay-TV operators are offering incentives to media companies that agree to withhold content from Web-based entertainment services such as those pursued by Intel Corp. and Apple Inc., people with knowledge of the matter said. The incentives can take the form of higher payments, or they can include threats to drop programming, said the people, who asked not to be identified because the discussions are private. Cable companies are seeking to keep customers by ensuring access to exclusive content while fending off competition from upstart Web providers. Time Warner Cable has more than 300 contracts, and some of them may bar media outlets from providing content to online pay-TV services, Chief Executive Officer Glenn Britt said yesterday in a meeting with analysts at the National Cable & Telecommunications Association show.

See also Shalini Ramachandran, "A Cable TV Exec Considers a Future That's Online and On-Demand," *Wall Street Journal*, Aug. 23, 2013 ("[O]perators like Time Warner Cable had insisted that those programmers could only sell their content to other infrastructure-based distributors, like satellite operators or phone companies.").

[67] For example, SBC previously told the Commission that it

> need not speculate about whether a combined AT&T/Comcast might favor its own affiliated content to the exclusion of competing content. Both companies have a demonstrated history of doing so. . . . A combined AT&T/Comcast would diminish the ability of other platforms to compete on an equal footing. . . . Because a combined AT&T/Comcast would have substantial interests in Internet content and the ISPs and portals they use to access it, the merger substantially increases the parties' incentive and ability to discriminate in favor of affiliated content. As one analyst put it, "[t]o the benefit of its shareholders—but to the detriment of . . . vendors in the cable and communications industries—AT&T–Comcast would be a powerful gatekeeper on a scale unrealized since the late 1980s."

See Comments of SBC Communications, Inc, *In the Matter of Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., to AT&T Comcast Corporation*, MB Docket 02-70, at 2, 16-18, 33 (filed April 29, 2002).

[68] In a prior horizontal national broadband merger, Verizon presciently recognized the future problematic incentives MSOs would have, expressing concern about Comcast proposed control of just one-fifth of the market at the time it acquired AT&T's former cable operations. Verizon told the Commission that "broadband Internet access represents both an alternative source of video programming and a potential consumer substitute for video programming," so that "broadband conduits outside of cable control represent a 'competitive threat to the significant

Commission and DOJ's prior findings about Comcast-NBCU's incentives to thwart online video competitors, yet in this Application argues implausibly that nothing in the present transaction increases those incentives. This is simply not true. In its 2011 Competitive Impact Statement, DOJ was concerned about Comcast's incentives given the company's status even then as the nation's largest ISP.[69] This potential market harm from an MVPD-ISP acting on its discriminatory incentives increases exponentially with the firm's size. If a small ISP serving a few thousand customers discriminated against an OVD, it would harm that ISP's own customers; but in isolation that small ISP's actions would not remove enough of the addressable market to deprive OVD a chance to grow into a viable substitutable distributor nationally.

Horizontal scale is of course a key consideration in estimating the potential harms of this transaction. Though Applicants pretend that it doesn't matter now, just a few short years ago

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market power of the cable industry' in the market for distribution of video programming"; and that "[w]hile current broadband offerings do not [ ] support the transmissions of broadcast-quality television signals over the Internet, next-generation offerings such as VDSL and fiber-to-the-home will," giving "Internet-based video programming [ ] the potential to exert a competitive constraint on cable prices"; noting finally that "apart from DBS, the Internet is the only existing or potential source of widespread competition to cable in the distribution of video programming" so that a combined AT&T-Comcast "could undermine the development of the Internet as an alternative video distribution platform in a variety of ways [using] its control over a significant number of broadband subscribers to create technical impediments to the distribution of Internet-based video programming over its broadband facilities, thereby threatening the viability of the Internet as a video distribution platform." *See* Petition To Deny of Verizon Telephone Companies and Verizon Internet Solutions D/B/A Verizon.net, *In the Matter of Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., to AT&T Comcast Corporation*, MB Docket 02-70, at 15-24 (filed April 29, 2002). Verizon concluded that Comcast would "have a strong incentive to use this market power over broadband content to steer the development of broadband Internet access away from content that would compete with its primary cable service offerings" and "undermine the development of the Internet as an alternative platform for the distribution of video programming and other innovative broadband content that could compete with its core cable service offerings" by thwarting "the delivery of compelling, new broadband-specific content (*e.g.*, interactive, on-demand content) to its own cable modem platform, thus precluding alternative last mile platforms such as DSL, wireless and satellite services from obtaining desirable content."

[69] Competitive Impact Statement at 19-20.

Comcast recognized the legitimacy of these concerns about its share of the addressable market. When asked by Senate Judiciary Committee Chair Herb Kohl, "Won't Comcast have the incentive to raise its rivals' costs?" Comcast's CEO Brian Roberts responded, "there are robust distributors—DirecTV, Dish Network, Time Warner [Cable], [WOW!]—all negotiating with other programmers," and later noted "[w]e are not getting any larger in cable distribution."[70] The quoted discussion specifically concerned Comcast's selling NBCU content to other traditional MVPD distributors. But the concerns about the instant transaction are much greater than those in the traditional MVPD market, in which no single distributor controls more than a 30 percent share of the national market, and each customer has 3 or more available providers. There are multiple programming vendors, and there is market power on both sides of the negotiating table. NBCU charging another distributor an inflated rate would certainly harm the competing distributor and its customers, though it would be unlikely to drive that distributor out of business.

However, in the advanced broadband market, Comcast-TWC would control nearly half the market, and that share is projected to rise given present trends. Furthermore, in a third of the country Comcast would be the only available provider, while in another quarter of the country it would face competition from just one other access provider. If Comcast exercised its market power and acted upon its discriminatory incentives, it could easily drive an OVD out of business by depriving it of reasonable access to the majority of the addressable market. This concern applies to all OVD companies, but is particularly acute for newer online distributors.[71]

What's more, the concern about the NBCU acquisition was primarily about the potential

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[70] *See* "The Comcast/NBC Universal Merger: What Does the Future Hold For Competition and Consumers?," Hearing before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary, United States Senate, Feb. 4, 2010.

[71] *See Comcast-NBCU Order* ¶ 78 ("New OVD services and new deals are announced seemingly daily. Comcast has an incentive to prevent these services from developing to compete with it and to hinder the competition from those that do develop.").

for Comcast to *unilaterally* exercise market power in the MVPD market to induce a marginal increase in costs of competing facilities-based distributors. In the instant transaction, however, the concerns are different. Both Comcast, and any local exchange carrier that provides MVPD and ISP services and against which Comcast competes, have the *same* incentives to thwart OVD competition. Thus the potential for harms from coordinated effects are a chief concern here, particularly considering the national reach and market share of the merged firm.

As we discussed in our Petition, the major concerns with this proposed transaction are identical to the concerns expressed by Judge Greene in the 1982 divestiture of AT&T.[72] But unlike the market and the regulatory structure in place in 1982, approving this transaction would represent the creation of a provider of telecommunications to a majority of American homes *without* any of the Congressionally mandated duties of telecommunications carriers. Indeed, as Comcast's "voluntary" commitment to offer standalone broadband shows, the company doesn't even recognize the existence of a two-way telecommunications market separate from its bundled video-plus-telecom offerings. The lack of a broadband telecommunications services market legally classified as such by the Commission means this merger would create substantial future shifts in the very nature of competition across all communications markets—and do so in a manner that lets Comcast's priorities, not the market's, drive innovation.[73]

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[72] *See* Free Press Petition at 67-70.

[73] The Commission has recognized that the availability of competitive standalone broadband is something that could mitigate the impacts of Comcast's vertical integration on the content distribution market (though we note here that the controversies following approval of the NBCU merger and Comcast's subsequent favoring of its own services, such as Comcast exempting its own streaming service from its data caps, and the terminating access dispute with Cogent and Netflix, illustrates that the offering of standalone broadband is not a strong mitigating factor). However, many major LECs refuse to offer standalone broadband services, and in the markets in which Comcast would face competition from LECs offering FTTx services, those LECs posses the same discriminatory incentives. Neither Comcast nor its LEC competitors are subject to basic common carrier obligations, which only increases the specter of coordinated and unilateral harms

Comcast's commitment to abide by the 2010 Open Internet Rules is no substitute for common carriage, and offers no meaningful protections against the harms of this transaction. This commitment failed to protect the millions of consumers harmed when Comcast purposefully refused to provide adequate capacity for the online video content requested by its customers. There is no reason to expect that reapplying the same condition would prevent similar or worse harms.

As we discuss below, consumer behavior strongly indicates that it is the bundle, and not the separate video or Internet access services, that comprise the product market. Thus this merger would not only lessen competition in the national broadband market, but because of the trend towards triple-play offerings and the scale and scope economies therein, satellite providers would not be able to compete as effectively as they did prior to the market shifting towards bundled services. Comcast's 30 percent MVPD market share today would be greater than that tomorrow due to the expected continued decline in satellite resulting from the shift in the product market to the bundle, and the increasingly essential nature of broadband services. The monopoly power likely to result from this merger cannot yet be completely observed today, but would certainly equal that of the old Bell System. The concerns that led the Commission, and subsequently Congress, to impose *Computer II*-style separation not only on AT&T but also on

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from this merger. Simply stated, unless Comcast is required to offer a common carrier broadband telecommunications service, consumers and producers have no recourse against unreasonable or unjust discrimination in rates, terms, or conditions. *See, e.g.*, *Comcast-NBCU Order* ¶ 102 (explaining that "Comcast's ability to harm potential competition with its video distribution business will be enhanced by this transaction" yet arguing that "this threat would be reduced and future competition in video distribution markets would be protected by ensuring that consumers have the flexibility to choose an MVPD provider that is separate from their broadband provider"; while acknowledging "the limited choice of broadband providers that many Americans have, particularly for higher speed connections" and noting that "Comcast could . . . hinder competition from DBS and OVD providers, both of which provide video over a third-party's broadband network, by requiring a cable subscription in order to receive broadband services or by charging an excessive price for stand-alone broadband services").

all telecommunications providers, are present here. The only way to adequately address these concerns, if they could be addressed at all at Comcast's resulting scale, would be through structural separation of the last mile. Conditions such as functional separation requirements similar to those provided under *Computer II* might initially seem adequate, but they would crumble under the weight of Comcast's size.[74] Indeed, when Judge Greene ordered divestiture of the Bell System monopoly, the bottleneck companies were split into smaller companies so that no Baby Bell had more than a high teens share of the market.

Only ensuring consumers' ability to purchase a broadband telecommunications service, backed by bedrock common carriage obligations and the right to complain under Section 208—now and in the future—could potentially mitigate the anticompetitive harms of this transaction. But even with common carriage, the merged firm's market share and political power would still be too great, thus making this transaction harmful to the public interest no matter the governing regulatory structure.

B. Analysis of Comcast's Internal Data Confirms that This Transaction Would Increase Its Incentives to Harm Third-Party Content Made Available via The Public Internet.

Comcast claims it has no incentive to exercise its gatekeeper powers, and that in fact the rise of the OVD market and the revenues it generates for the company's content division create a

[74] Were the Commission to require Comcast to *indefinitely* grant wholesale access to its physical plant, this could facilitate competitive Internet service offerings, as well as competitive private carriage offerings including multichannel distribution, home security, and other dedicated DOCSIS-based services. Yet while this would help to address many of the central concerns stemming from this merger, as well as those from the lack of a telecom services market in general, the scale of Comcast's national facilities monopoly would be too great for this access regulatory regime to survive regulatory capture of the kind that doomed the Bell system and more recent attempts to open the market to competition. In every way possible, this transaction is just too big to manage.

disincentive to interfere with Internet content and applications.[75] However, a firm with the scale and scope of Comcast has numerous incentives. While it is true that Comcast profits from selling its own content to OVDs, that is only part of the story. As we detailed in our Petition and discuss further below, Comcast has tremendous incentives to maintain the status quo in the MVPD market, and the rise of over-the-top content threatens that status quo.

As we explained in our Petition, in 2013 "pay-TV and content comprised 72 percent of Comcast's total revenues ($20.5 and $26.2 billion respectively out of a total of $64.7 billion). Although high-speed data is Comcast's highest-margin product, it brought in just half the amount of revenue ($10.3 billion) that pay-TV earned, and less than a quarter of the combined pay-TV and content revenues."[76] If over-the-top competition continues to take hold, this could produce a fundamental change in Comcast's business model, reducing its market power in both programming and content distribution. This is not mere speculation. Comcast's own internal data reflects its concern for this scenario and the incentives driving this transaction.

Since the first quarter of 2011, Comcast's residential customer growth is **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[75] *See* Opposition at 201.

[76] Free Press Petition at 54.

[END HIGHLY CONFIDENTIAL INFORMATION] (see Figure 4).[77] And this doesn't even speak to the phenomenon of cord shaving, which doesn't show up in this data but has the same ramifications for the company's cash flow and revenues.

Figure 4: Cord Cutting at Comcast –
Percent of Residential Customers Taking Internet or Video Services (Q1 2011 – Q2 2014)
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We can better understand the implications of this shift by looking at what services new

[77] *See* Comcast September 11, 2014 Response, Exhibit 4.2(a).

Comcast customers are taking. Figure 5 below plots the percentage of each service package type's customers that are new to Comcast, from Q1 2011 through Q2 2014. Because customer churn is seasonal, the figure also contains quarterly moving averages shown as trend lines.

Figure 5:
New Comcast Customers by Service Type – Percent of Each Service Type's Customers that Are New Comcast Customers (Q1 2011 – Q2 2014)

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The implications of these data for Comcast are clear: Multichannel video subscription service, which accounts for 49 percent of its cable-segment revenues[78] and is an important component in its triple-play strategy (as we explain below), is in decline. This decline is due to the increased viability of online content distribution alternatives, and changing preferences of millenials. These shifts pose an existential threat to the traditional cable distribution model, which is a particularly heightened threat for Comcast's vertically-integrated business model in which video and content account for nearly three-quarters of the company's revenues.

The challenge for Comcast is to control this shift, and to monetize it. Comcast's own streaming video offerings and the MSO industry's "TV Everywhere" offerings have helped the

[78] *See* Comcast NBCU 2013 10-K. In 2013, Video comprised $20.535 billion of Comcast's $41.836 billion in cable segment revenues, with high-speed Internet bringing in $10.334 billion, followed by $3.657 from digital voice, $3.241 billion from the business services segment, $2.189 from advertising, and $1.88 billion attributed to "other." Comcast-NBCU's cable and broadcast networks, and its filmed entertainment segments earned an additional $21.773 billion. Theme park revenues, which are classified as content-related revenues earned another $2.235 billion, bringing the total for pay-TV and content to $46.732 billion, or 72 percent of the firm's $64.7 billion in net revenues.

company to control this shift, but it's not enough. The only ways Comcast can stay the course, with top and bottom line growth, is through capturing a share of the OVD market's economic rents and/or using Comcast's market power in content and its relationships with other programmers to make OVD a permanent niche product, and one for which millennials are eventually upsold into the traditional bundles.

Figure 6: Comcast Residential Video – Average Revenue Per User (by Month, and 3-Month Moving Average, January 2009 – May 2014)

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Figure 7: Comcast Residential High-Speed Data – Average Revenue Per User (by Month, and 3-Month Moving Average, January 2009 – May 2014)

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Cash flow and top line revenues are important for a company like Comcast. This is why video remains a critical component of its business, even as consumer preferences shift and programming costs escalate. The evidence suggests that Comcast **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] But as long as the company relies on video and the old model of distribution for so much of its revenues, it will have incentive to diminish the full potential of the online

video distribution market. Comcast's business is the bundle, not telecommunications or pay-TV distribution. Online video competition threatens the video portion of that bundle—the portion that is responsible for the most revenue (subscriptions plus lucrative equipment rental fees) and that is responsible for **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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Comcast's response to these facts is an attempt to portray video as an irrelevant component of its business by citing the Customer Lifetime Values (CLV) of its video customers compared to its data customers.[79] However, the data presented by Comcast is misleading, as the company compared the CLV of its data-only customers to the value for its video-only customers. What Comcast failed to mention is that its triple-play and double-play customers have the **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[80] Customer Lifetime Value isn't the only financial performance metric data that demonstrates video's critical importance to Comcast's bundled business model. This fact is also made clear by comparing the customer acquisition costs, ARPU, churn, and cash flow margins of standalone high-speed Internet with the bundles that contain video (see Figure 8).

[79] Opposition at 201-203.

[80] *See* Comcast September 11 Response, Exhibit.4.15(d).

Figure 8: Comcast Bundled vs. Standalone Products
(Acquisition Costs, ARPU, Churn, Cash Flow Margins, and Customer Lifetime Values)
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This data shows that the bundles containing video **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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The churn data for the bundled vs. non-bundled services is also instructive, illustrating once again the indispensible value of the bundle. In its Opposition, Comcast goes to great lengths to suggest that it faces significant competition by highlighting the level of customer churn in its broadband services. However, Comcast is in a business in which customers churn not just because they are switching to a competitive alternative, but because they are moving. For example, in June of 2014, out of its **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] of the level of monthly churn seen in the national mobile wireless market, where two-year contracts and early termination fees are common. (See Figures 9 and 10 below).[81]

This more granular churn data clearly demonstrates just how little meaningful competition Comcast's faces, and how important video bundles are to keeping Comcast's customers from voluntarily switching to an alternative provider. The bundle not only generates substantial revenues and critical cash flow, it is also a sticky product that acts to increase switching costs even for those customers fortunate enough to reside in areas with another

[81] Subscriber-weighted average churn among the four national wireless carriers was approximately 1.63 percent in 2013, based on Free Press's calculation from carriers' publicly reported SEC data. In the nationwide wireless market, moving to a new address not served by the same carrier is not the factor it is in the MSO market, but most wireless customers are locked into 24-month agreements, tied often to a device that is locked to the carrier. That Comcast's voluntary customer churn is **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** than that seen in the wireless market (where there are more providers but contractual obligations mitigate churn) suggests that MSO consumers (who have fewer alternative providers but are not as constrained by service contracts and early termination fees) do face substantial switching costs, whether material (time and effort to switch providers, return equipment) or perceived (value placed on learning new interfaces, relinquishing existing email address). These switching costs are real, and are a material factor in a consumer's willingness to pay. These costs, which are strongest in the bundled product market, limit competition and promote unilateral and coordinated effects even in markets where Comcast faces triple-play competition.

equivalent provider. Thus the video product's lower margins (compared to standalone data) are more than offset by the product's importance to the bundle, seen in its contributions to cash flow and customer lifetime value.

Figure 9: Comcast Bundled vs. Standalone Products – Churn (2011 – First Half of 2014)

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Figure 10: Comcast Bundled vs. Standalone Products – Proportion of Customer Disconnects By Type (2011 – First Half of 2014)

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The above CLV, cash flow and churn data also demonstrates that increasingly the relevant product market is not video or broadband separately, but the bundle itself. If Comcast truly faced the level of competition it pretends it faces, its escalating prices would result in far higher customer turn over and lower cash flow. The reality is that Comcast benefits from facing no bundled competitor in the majority of its service area.

Viewed in context of this data demonstrating the critical importance of its video product to its bundle-driven business, the terms of the contract that Comcast forced upon Netflix are both sensible for Comcast's business motives and damning of its excessive market power—not exculpatory of Comcast's market power-abusing behavior. The data proves that Comcast's present success still lies in traditional video distribution. But its most important product is the video-and-data bundle, one that is increasingly used by a growing portion of its customer as a video distribution platform. As market behavior and demographic trends continue, a growing portion of Comcast's customer base will curtail its use of the video service, switching out of the high-cash flow bundle into the lower-value standalone Internet access service. In light of these trends, Comcast's best option is to establish a new structure in which it is able to capture a portion of the revenues from existing online video distributors, and to send a clear signal to the market that creates a disincentive for new OVD entry. This is a move to shape the market over the long-term, with Comcast softening any downside if OVD continues to grow, and producing an upside if OVD does not. The key to this strategy's success is Comcast gaining enough share of the national broadband market in order to have the market power needed to produce coordinated effects that complement its unilateral efforts to mitigate the OVD threat.

Comcast argues that OVDs are complementary to its business.[82] This is correct to a point

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[82] Opposition, Israel Declaration, ¶ 122.

in the isolated case of Comcast's, or any other provider's, *broadband* business. After all, consumers are willing to pay more for the higher-margin/higher-cash flow-generating DOCSIS 3.0 services because they are able to use these services for high-bandwidth, real-time communications such as streaming video. Indeed, as we showed in our Petition, streaming video is in fact the main driver of the virtuous cycle; it is even pushing MSOs to offer higher-speed tiers that, historically, they have been reluctant to offer.[83] However, Comcast's business is not simply broadband: it is primarily traditional multichannel video distribution and content licensing, the latter coming with economic rents generated by the limited competition inherent to the traditional distribution model itself. Cash flows matter more than any other factor, and Comcast's ability to continue to generate growing cash flow depends on maintaining its existing model. Over-the-top video distribution is a threat to that existing model, hence the vastly different behavior of the four largest bundled service providers who currently have substantial market power (Comcast, Time Warner Cable, Verizon, and AT&T, who each levied terminating access fees on Netflix after refusing to make appropriate terminating capacity available) compared to their smaller counterparts (such as Sonic.net, Cablevision and Google Fiber, who embraced settlement free termination in order to ensure their best-efforts Internet access services worked as advertised).

Applicants would have the Commission believe that these evidence-supported explanations of their recent exercises of market power are nothing but fantasy. Applicants tried to explain these access fees by arguing that "[n]etwork and edge providers all contribute[ ] through various paid transport arrangements and other mutual exchanges of value, and customers

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[83] Free Press Petition at 40-58.

contribute[ ] through broadband service charges" to paying for the delivery of such content.[84] They claimed that eliminating the content providers' contributions would "seesaw" prices upward for broadband customers, while disrupting the funding necessary to continue the evolution of the "interconnection marketplace" and the Internet itself.

These views from Applicants' paid experts are yet another example of Applicants' own "self-serving" theories, which are built upon a fantasy view of the market and its value chain, but that fantasy is trumped by facts. As Free Press explained these facts in our Petition: Investment by cable MSOs is declining, particularly in network deployment, since the hybrid-fiber coaxial deployments made in the late-1990s/early-2000s have shown to be future-proof in terms of bandwidth capabilities. The bulk of current and expected future MSO capital spending is on customer premise equipment, rented to customers and used as a tool for revenue generation and customer lock-in to the bundle.

Comcast and other MSOs have ample bandwidth to support their current high-speed data offerings that are already being used to access streaming video services, and they can make more bandwidth available without investing any appreciable new capital, all while generating monopoly-level profit margins. Indeed, as we demonstrated, streaming video is driving the MSOs to release some of their held-back capacity in the form of higher speeds, which are priced to generate very high margins, benefiting the MSOs greatly. Furthermore, the access charges that Comcast's paid experts pretend are essential to the Internet's evolution are not in fact interconnection charges, paid peering charges or transit fees, as these experts take great pains to describe them; rather, these new tolls are simply terminating access monopoly fees levied on the *called* parties, who cannot avoid such charges when they are simply delivering the Internet

[84] Opposition at 49.

traffic requested by Comcast's customers using Comcast's Internet access service in the manner advertised. Thus these new terminating access monopoly fees are a tool for protecting the majority of Comcast's vertically integrated cable TV and video revenues. Indeed, even by Comcast's own admission these charges are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**.[85]

Comcast and its paid experts repeatedly describe the supposed marginal costs that OVDs *impose* on Comcast's networks.[86] This is an absurd way of viewing the allocation of costs, since it is Comcast's own customers who pay for a connection to the Internet and thus *cause* the cost.[87] It is also completely backwards for Comcast to suggest that non-Netflix users are somehow subsidizing Netflix users, since the demand for Netflix has in fact benefited all customers in the form of higher capacity (and lower value-adjusted price) services that Comcast would have otherwise had little reason to offer.[88] Applicants' analysis is therefore very bizarre, as it seems ignorant to basic supply and demand behavior of consumers and ISPs in this market. It purports to see value in *unused* connectivity, when in fact the value is in the applications that require connectivity. Indeed, if viewed through the appropriate analytical lens, what Comcast is doing

[85] Opposition, Israel Declaration, ¶ 242.

[86] *See, e.g.*, *id.*, Israel Declaration, ¶¶ 136-138.

[87] Comcast has no rational argument that its practice amounts to paid-peering and not a terminating monopoly access charge—not just one imposed on a calling party like the access charges in telephony, but one imposed on the *called party*. This is a twist on the terminating access concept that is a glaring example of Comcast's market power. Just because an edge company can pick multiple paths to the destination does not change the fact that the destination ISP is *the requester* of the traffic. Terminating access monopoly is a well-established concept in telephony, and there it is also the case that the party seeking termination could utilize multiple paths to reach the terminating endpoint (such as using any of the "10-10" prefix dialers that were popular in the late 1990s, calling cards, numerous interexchange carriers (IXCs), or the IXC itself working with a tandem carrier to gain entry to the terminating network).

[88] *See* Free Press Petition at 40-58.

here is not cost recovery,[89] but the age-old monopolist behavior of capturing economic rents for the activity taking place on its network. Somehow missing from the surely expensive analysis Comcast commissioned from its economists is an estimate of the increased revenues that streaming video brings to Comcast, since online video more than any other Internet-available application is responsible for consumers' willingness to pay for the higher-speed, higher-margin Internet access services.

In sum, the truth is not that Comcast wants to eviscerate OVDs: it is that OVDs pose a threat to the Comcast's pay-TV-reliant business over the near-to-mid term, and thus they are something that Comcast wants to control. There should be no doubt that Comcast, as the potential gatekeeper for more than half of the addressable market, would be in a position to control innovation in the OVD market. And not only would it have the ability to do so, it's unique composition and reliance on the traditional video delivery model means it could exercise that ability and would have substantial incentive to continue doing so.[90] Comcast says it would make little business sense to harm its broadband offering in order to favor its video service. Perhaps in the abstract this would be true for firms whose business is broadband and not the bundle. But consumers were so uncertain about what was going on during Comcast's dispute with Netflix and Cogent that many people affected by the slowdown upgraded to more expensive high-speed Internet services. And that, along with the rent-capturing and the chilling signal that

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[90] Opposition at 201-203.

Comcast's actions sent to future OVDs, worked to Comcast's favor and consumers' detriment—today and in the long-term.

V. Conclusion.

Applicants have failed to meet their burden. They have offered no demonstrable merger-specific benefits, and their case against the glaring transaction-specific harms is weak, ignorant and predictably self-serving. The facts prove that this transaction would enhance Comcast's discriminatory incentives in the national broadband market, and that the firm would have substantially increased market power in order to act on these incentives. The transaction's resulting market concentration would also bring additional coordinated effects, as the top bundled video/data/managed services providers would all have increased ability to exercise gatekeeper control and shape the future of the U.S. telecommunications market to their vision, not the vision dictated by consumers and the invisible hand of the free market.

The chief concern of this merger is that it represents the replacement of Ma Bell with Father Cable some three decades after regulators and the courts went to great lengths to rid this nation of such pernicious, facilities-based monopolies. Except that unlike in the aftermath of the break-up of Ma Bell, Comcast would operate a majority of this nation's telecommunications infrastructure free from the statutory safeguards Congress continues to apply to telecommunications service providers. Applicants are keenly aware of this regulatory vacuum, which explains their readiness to adhere to the 2010 Open Internet Rules as a meaningless salve for the anticompetitive concerns raised by petitioners and policymakers alike.

It may be tempting for the Commission to think it can use a myriad of temporal conditions to manage the merged firm's incentives and ability to exercise its market power. But the Commission must heed the lessons of its own history, where it once freely admitted the

management of the Bell monopoly and its political power was an impossible task even with the tools of common carriage. Indeed, as one analyst recently put it, "reclassification of broadband as Title II telecommunications [ ] could actually reduce the merger's potential anticompetitive effects regarding interconnection, data caps and broadband pricing models. However, weak rules will leave these anticompetitive effects unchecked, necessitating more aggressive action against the merger."[91]

This merger would harm the public interest. The hubris underlying its original proposal and Applicants' defense of it provide ample evidence of an already-broken national communications market. The Commission has much work to do to fix that broken market and improve the public interest. Its first step should be rejection of this Application.

Respectfully submitted,

______/s/______________

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[91] *See supra* note 24.