The American Antitrust Institute

September 16, 2014

William J. Baer
Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: Proposed Comcast-Time Warner Cable Merger – Exclusionary Gatekeeping and the Emergent Access Problem

Dear Assistant Attorney General Baer:

On June 11, 2014, the American Antitrust Institute (AAI) issued the White Paper *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked*.[1] That analysis is the basis for the AAI's comments to the Federal Communications Commission (FCC) regarding the proposed merger, filed on August 25, 2014.[2] In both the White Paper and comments to the FCC, the AAI analyzes a number of competitive problems raised by the proposed merger of Comcast and Time Warner Cable (TWC) – a combination that would significantly increase the size of the already largest cable broadband Internet Service Provider (ISP) in the U.S. These concerns are amplified by the lack of any credible merger-specific efficiencies. The AAI therefore encouraged the U.S. Department of Justice (DOJ) to block the proposed merger and the FCC to reject it as not in the public interest.

The AAI has looked more closely at a major competitive issue raised by the proposed Comcast-TWC merger, namely the merged ISP's enhanced incentives to use its power as a "gatekeeper" of the crucial last-mile interconnection to tens of millions of U.S. broadband subscribers to restrict competition. Such conduct would limit or control competition from rival "edge" providers *and* inflict collateral damage on middle market participants that deliver their services. This letter: (1) reiterates this concern; (2) sketches out the broader landscape of an emergent, consolidation-driven "access" problem in the U.S. cable broadband industry; and (3) explains why behavioral access-type antitrust remedies to address exclusionary gatekeeping concerns would be misplaced.

[1] The AAI is an independent Washington D.C.-based non-profit education, research, and advocacy organization. AAI's mission is to increase the role of competition, ensure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economies. *See* www.antitrustinstitute.org for more information.

[2] The AAI White Paper is available at http://antitrustinstitute.org/content/antitrust-experts-urge-enforcers-block-comcast-time-warner-cable-merger. AAI's comments to the FCC are available at http://antitrustinstitute.org/content/antitrust-experts-urge-federal-communications-commission-reject-comcast-time-warner-cable-0.

I. Comcast-TWC Will Have an Enhanced Incentive to Engage in Gatekeeping

Comcast and TWC are the two largest combined cable television and broadband ISP providers in the U.S. FCC Chairman Tom Wheeler recently noted that cable broadband accounts for "the overwhelming percentage of high speed broadband connections," with cable's advantage over DSL continuing "for the foreseeable future," and where "mobile broadband is just not a full substitute for fixed broadband."[3] Comcast-TWC's combined footprint will encompass a substantial base of cable broadband subscribers, with some estimates of the company's combined market share exceeding 50 percent.[4]

With greater dominance in downstream broadband ISP distribution, coupled with significant ownership interests in upstream content, the merger enhances the incentive for Comcast-TWC to limit or shape competition from its upstream rivals by controlling the "gate," or point of interconnection with their broadband ISP networks. These rivals include "edge" providers such as online video distributors (OVDs) and other over-the-top applications that compete directly with Comcast's own content platforms. Comcast plans to extend these platforms to TWC if the merger moves forward.

It is well known that the success of content providers depends on their ability to develop a critical mass of consumers. Comcast-TWC's ability and enhanced incentive to frustrate access could effectively make or break these players and stifle the emergence of new and innovative OVD products and business models .[5] Strategic decisions by a combined Comcast-TWC as to whether, what, and when content and services are allowed through the ISP gate could include denials of access; discriminatory terminating access fees, strategic network congestion, refusals to upgrade constrained capacity, and other cost-raising or foreclosure strategies.

But the story does not end with edge providers. Also caught in the vise of Comcast-TWC's exclusionary incentives are the "middle market" participants that bridge the gap between upstream edge providers and downstream broadband ISPs. These are the transit, peering, and interconnection services offered by Internet backbone providers (IBPs) and content delivery networks (CDNs) through a variety of paid and/or settlement-free peering arrangements. Post-merger exclusionary gatekeeping could disrupt innovation and create inefficiencies in the middle market, since edge providers require those services to reach the ISP gate.

Comcast-TWC's anticompetitive incentives will not be checked by the loss of subscribers due to lower quality or reduced availability of rival content. A larger post-merger video distribution footprint, bundling strategies, locked-in subscribers, and lack of competition in high-speed

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[3] "The Facts and Future of Broadband Competition," Prepared Remarks of FCC Chairman Tom Wheeler, September 4, 2014, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

[4] See, e.g., Petition to Deny of Free Press at 2, Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, FCC MB Docket No. 14-57 (August 25, 2014),; and Petition to Deny of Public Knowledge and Open Technology Institute at 1, Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations, FCC MB Docket No. 14-57 (August 25, 2014).

[5] Complaint at 25, U.S. v. MediaOne Group, Inc., Case No. 1:00CV01176 (D.C. Cir. filed May 25, 2000)..

broadband would easily minimize such lost revenues. Moreover, the specter of exclusionary gatekeeping debunks Comcast-TWC's claim that the proposed merger will foster the "virtuous cycle of innovation." Central to this efficiencies argument is the notion that merger-driven expansion is required to support new technologies and uses of Comcast-TWC's broadband ISP network. But the only way this works is if Comcast-TWC views new these new technologies and uses to be complementary to their vertically integrated content/broadband ISP system. This does not appear to be the case. As explained later, Comcast has been at the center of access debates involving edge providers and middle market participants. These disputes would likely not arise if Comcast viewed edge providers as complementary. Edge providers are Comcast's rivals. And with a vastly larger broadband ISP footprint, Comcast-TWC will have an enhanced incentive to keep rivals off its system.

In sum, post-merger exclusionary gatekeeping would harm competition and limit consumer choice, degrade quality, and raise prices to the already beleaguered American consumer, who faces little to no choice in medium to high speed broadband service. And there is no credible efficiencies argument that could countermand this concern.

II. The DOJ and FCC Have Clearly Articulated Gatekeeping Concerns in Broadband

The FCC and DOJ have repeatedly articulated exclusionary gatekeeping concerns in the broadband industry. In its Open Internet order (2010), the Commission described the real and significant risks, and adverse consequences of gatekeeping on competition and consumers.[6] The DOJ concluded in the 2000 merger of AT&T and Media One Group, Inc., that the proposed merger would impair competition in the market for the distribution of broadband content and services. The agency explained that "[b]y exploiting its 'gatekeeper' position in the residential broadband content market AT&T could make it less profitable for unaffiliated or disfavored content providers to invest in the creation of attractive broadband content, and thereby reduce the quantity and quality of content available."[7]

III. Gatekeeping is a Pervasive and Entrenched Problem in Network Industries

Exclusionary gatekeeping is not a complex or novel competitive problem, and it has survived the test of time, changes in technology, and different business models. It is particularly well known in network industries, where distributors are often vertically integrated into upstream products and services. We need not look far for useful analogies. Vertically integrated owners of generation, transmission, and distribution have a lively history of frustrating their rivals' access to high voltage transmission systems, thereby stifling competition in the wholesale generation markets and ultimately harming retail consumers of electricity. Much like transmission, the middle market is a wholesale market for transit and interconnection, tasked with moving the packets of content and edge providers to the distribution networks of broadband ISPs.

Integrated electric transmission owners have used a variety of tools to frustrate access by rivals,

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[6] Federal Communications Commission, In the Matter of the Preserving the Open Internet and Broadband Industry Practices, Report and Order, Docket Nos. GN09-191 and WC07-52 (December 23, 2010), available https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf, at PP. 24.

[7] Complaint at 25, U.S. v. MediaOne Group, Inc., *supra* note 5.

ranging from the early, simple refusals to deal that were the subject of the Supreme Court's sanction in *U.S. v. Otter Tail Power Co.* (1973), to manipulating available transmission capacity, to awarding "native" demand priority over a competitor's request for network service. As noted above, similar strategies appear to be evolving in the cable broadband industry. The stark difference between electricity and broadband Internet, of course, is that there has been an open access regime in place for 20 years that specifically governs the electricity "superhighways." This system is designed to promote competition in wholesale generation markets by preventing integrated utilities with the ability and incentive to use their market power to foreclose or raise the costs of upstream rivals by frustrating their access to transmission.

Dealing with the access problem in electricity has occupied the time of the Federal Energy Regulatory Commission and courts for years. Multiple rulemakings have encompassed: the terms of nondiscriminatory access; generator interconnection standards; network planning and expansion; to functional unbundling with independent systems operators in control of transmission. The FCC's regulation of ISP network access is much more limited. For example, the FCC's network neutrality principles do not address the middle market where the gatekeeping problem resides. These access "lite" principles only apply within the last-mile cable broadband ISP distribution network. Moreover, recent debates highlight uncertainty over whether interconnection is even in the bailiwick of a reasonably proscribed FCC open Internet policy.

In short, the emergent access problem in broadband – driven by consolidation and concentration at the cable broadband ISP level – bears substantial similarities to the now age-old, entrenched wholesale access problem in other network industries, and for which regulators have developed complex regulatory access regimes.

IV. Comcast-TWC is Forcing the "Access" Question in Cable Broadband

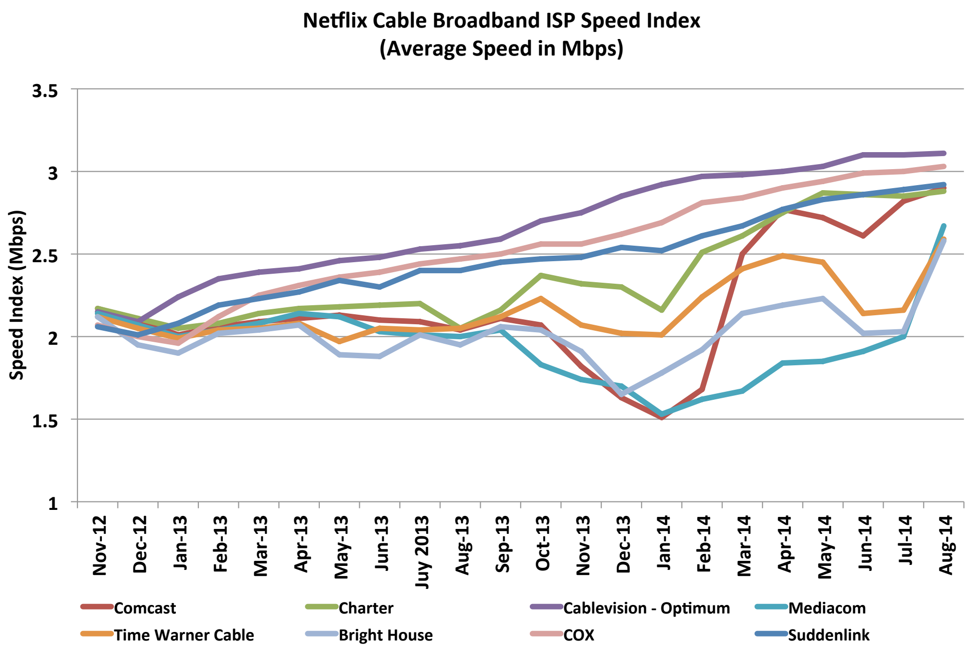
Until recently, the broadband industry has worked serviceably without the need for a comprehensive access regime. A competitive and growing market for content, multiple transit providers and other middle market participants, and relatively few (at least publicized) gatekeeping incidents involving broadband ISPs have forestalled the need for a serious access regime. The terms of trade in the middle market have evolved largely from market forces, resulting in the balance of settlement-free peering and system of paid access that we see today.

But that is changing. A history of "swaps" and mergers between broadband ISPs has increased market concentration and the dominance of individual players. Powerful, integrated broadband ISP distributors such as Comcast have the ability and incentive to engage in exclusionary gatekeeping, an incentive that will grow more powerful if it acquires TWC. Those distributors more often than not represent the consumer's only choice for a high-speed broadband connection.[8] Growing disputes between Comcast and OVDs, CDNs, and transit providers reveal the emergent access problem that threatens to stifle competition. In simple terms, these disputes represent the equivalent of edge providers having sought and paid for access to the Internet superhighway only to be stopped at the off-ramp to the one local road for reaching the consumer and required to pay again.

The figure below shows the ISP speed index posted on Netflix's website for the eight cable

[8] Wheeler Remarks, *supra* note 3.

broadband companies from late 2012 through mid 2014.[9] Between September 2013 and January 2014 is the now highly publicized congestion related slow-down in Comcast's ISP speeds for Netflix's services.[10] These slowdowns involving a competing OVD's access to Comcast's broadband ISP networks may reflect other forces at work, as opposed disputes over access. But the experiences of Netflix and IBP Cogent Communications, as we understand them, strongly indicate otherwise.[11]



V. Behavioral "Access" Antitrust Remedies Would be Misplaced in Comcast-TWC

Whether the broadband industry warrants a more comprehensive access regime – and what it would look like if it does – is beyond the scope of an antitrust inquiry. If the FCC takes on the access problem in cable broadband, however, the appropriate starting point should be the economic incentives associated with an industry that is structured *as competitively as possible*. In other words, an access policy should not be the product of unchecked horizontal and vertical consolidation that creates dominant broadband ISPs with enhanced incentives to engage in exclusionary gatekeeping. Moreover, the question of whether other changes in the broadband industry that are independent of consolidation are necessitating an access framework can only be revealed over time, and are best assessed by the FCC.

What is relevant for an antitrust inquiry is the increased incentive – and lack of effective constraint on that incentive – for an even more powerful Comcast-TWC broadband ISP to engage in

[9] See Netflix USA Speed Index, available http://ispspeedindex.netflix.com/results/usa/graph.

[10] Speeds for Time Warner Cable, Charter, Bright House, and Mediacom appear also to have dipped over this same time period, while speeds through Cablevision, COX, and SuddenLink appear to have been unaffected.

[11] See, e.g., Cogent Communications Group, Inc.'s Petition to Deny, Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations, FCC MB Docket No. 14-57 (August 25, 2014), Petition to Deny of Netflix, Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations, FCC MB Docket No. 14-57 (August 25, 2014).

exclusionary gatekeeping. This immediate problem necessitates a strong antitrust enforcement stance. More important, a number of compelling reasons militate *against* behavioral access-type antitrust remedies to remedy this concern:

- Behavioral access-type antitrust remedies in past cases have been problematic. Placing restraints on post-merger firm conduct while anticompetitive incentives remain intact invariably result in workarounds, or drive anticompetitive conduct underground. Moreover, behavioral remedies result in costly litigation of conditions and require ongoing monitoring for compliance, and dispute resolution.[12]

- The type of access problem that is raised by Comcast-TWC involves complex technical, engineering, economic, and institutional features of transit and interconnection involving the Internet middle market. This landscape is very different from access remedies imposed in Comcast-NBCU that focused on nondiscriminatory treatment of rival OVDs within the last-mile ISP networks. These highly technical matters are best addressed by the sector regulator, which has the clear comparative advantage, after the structural tools available to antitrust enforcers are exhausted.

- Cobbling together behavioral antitrust remedies to create a merger-specific access framework in Comcast-TWC amplifies the risk of complicating any future FCC access initiative. Any such conditions in Comcast-TWC would be in place for multiple years and would pose dual and potentially conflicting compliance issues if a regulatory access regime were ever developed.

Comcast's hazy, ill-conceived proposals to graft the OVD access provisions in Comcast-NBCU onto a very different Comcast-TWC "patient" provides a sobering glimpse into some of the problems with access remedies. Antitrust enforcers and courts have always been, and remain, ill suited to administer and police access-type remedies. Given these concerns, the DOJ should pursue structural remedies to address the gatekeeping problem. Better yet, the agency should move expeditiously to block the merger altogether. This very real risk posed by the Comcast-TWC merger threatens millions of U.S. cable broadband consumers and the innovative products and services for delivering news, opinion, entertainment, sports, and other forms of vital programming to those consumers.

Sincerely,

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[12] For detailed discussion see, e.g., John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULLETIN 979 (2012).