



The American Antitrust Institute

December 1, 2014

**Via Electronic Filing**

Marlene H. Dortch  
Federal Communications Commission  
Office of the Secretary  
445 Twelfth Street, SW  
Washington, D.C. 20554

***Re: In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for  
Consent to Transfer of Licenses and Authorizations, MB Docket No. 14-57***

Dear Ms. Dortch:

Enclosed please find the American Antitrust Institute's Reply Comments in the above-mentioned proceeding.

Sincerely,

A handwritten signature in black ink that reads "Diana L. Moss". The signature is written in a cursive, flowing style.

Diana L. Moss

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

**In the Matter of** ( )  
**Applications of Comcast Corp. and** ( ) **MB Docket No. 14-57**  
**Time Warner Cable, Inc. for Consent to** ( )  
**Transfer of Licenses and Authorizations** ( )

**Reply Comments of the  
American Antitrust Institute**

**I. Introduction**

The American Antitrust Institute (AAI)<sup>1</sup> submits this Reply to the September 23, 2014 filing made by Comcast Corporation (“Comcast”) and Time Warner Cable, Inc. (“TWC”) (together “Comcast-TWC” or “Applicants”). That filing, Opposition to Petitions to Deny and Response to Comments (“Response”), seeks to rebut the numerous comments and protests filed in opposition to Comcast-TWC’s proposal to transfer the control of licenses described in their Application to the Federal Communications Commission (“FCC” or “Commission”). On June 11, 2014, the AAI issued the White Paper *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked*. That analysis was the basis for the AAI’s Comments to the Commission in this docket, filed on August 25, 2014.<sup>2</sup> In both documents, the AAI analyzes a number of competitive problems raised by the proposed merger of Comcast-TWC, the lack of any credible merger-specific efficiencies, and the non-remediable

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<sup>1</sup> The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The AAI is supported by voluntary donations into its general treasury and has no financial interest in this matter. The AAI is managed by its Board of Directors, which alone has approved this filing. For more information, please see <http://www.antitrustinstitute.org>. The AAI has frequently commented on pending mergers, including mergers that have been before the Commission.

<sup>2</sup> The AAI’s White Paper is available at <http://antitrustinstitute.org/content/antitrust-experts-urge-enforcers-block-comcast-time-warner-cable-merger>. The 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>.

nature of the harms the merger would inflict on competition and consumers. The AAI therefore encouraged both the Commission and U.S. Department of Justice (DOJ) to reject the proposed transaction.

This Reply highlights fundamental flaws in Comcast-TWC's rebuttal arguments to a major competitive concern raised by the AAI, namely the merged company's enhanced incentives to frustrate access by online video distributors (OVDs) (e.g., edge providers and other over-the-top (OTT) applications) that compete directly with Comcast-TWC's own content platforms. Comcast-TWC could foreclose rivals by engaging in exclusionary "gatekeeping" at the point of interconnection with Comcast-TWC's "last mile" cable broadband Internet Service Provider (ISP) distribution network. Behavioral, access-type remedies for addressing this type of anticompetitive conduct would be inadequate and even harmful to competition and consumers, and could complicate or derail the FCC's broader policy efforts to address the emergent access problem involving the Internet "superhighway" or "middle market."<sup>3</sup> For the reasons discussed below, nothing in Comcast-TWC's Response changes the conclusion that the transaction would not serve the public interest, and should be rejected by the Commission.

## **II. Broadband is No Exception to the "Gatekeeping" Problem That is Endemic to Network Industries**

Vertical foreclosure of rivals by guarding the final "gate" on a network is not a complex or novel competitive problem. It is particularly well known in network industries, where distributors are often vertically integrated into upstream products and services, and has survived the test of time, changes in technology, and different business models.<sup>4</sup> We need not look far for

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<sup>3</sup> See 47 U.S.C. §§ 214, 310(d); Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement (filed Apr. 8, 2014) ("Comcast-TWC Application").

<sup>4</sup> See, e.g., Diana L. Moss (ed.), NETWORK ACCESS, REGULATION AND ANTITRUST (2005).

useful analogies. Vertically integrated owners of electric 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 harming wholesale and retail consumers.

Integrated electric transmission owners have employed a variety of tools to frustrate access by rivals, ranging from the early, simple refusals to deal that were the subject of the Supreme Court's sanction in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), to manipulating available transmission capacity, to awarding "native" demand priority over a competitor's request for network service. 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 and conditions of nondiscriminatory access, generator interconnection standards, network planning and expansion, and the creation of independent system (network) operators.<sup>5</sup>

There are numerous and important parallels between the access problem in electricity and broadband. For example, much like electricity transmission, the broadband middle market is a wholesale market for transit and interconnection, tasked with moving packets of content to the distribution networks of broadband ISPs. This Internet superhighway encompasses the transit, peering, and interconnection services offered by Internet Backbone Providers (IBPs), Content Delivery Network (CDNs), and other providers through a variety of paid and/or settlement-free peering arrangements. Moreover, the access problem in electricity was driven by the presence of large, vertically integrated utilities with both the incentive and ability to foreclose rivals from access to high voltage transmission. Similarly, a history of swaps and mergers between broadband ISPs, coupled with vertical integration into content, have increased market power and

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<sup>5</sup> See, e.g., Federal Energy Regulatory Commission, Major Orders and Regulation: Electric, <http://www.ferc.gov/legal/maj-ord-reg.asp?new=sc3>.

the dominance of players at the distribution level. This consolidation and concentration of economic power in cable broadband distribution is driving the emergent access problem – something the proposed merger will exacerbate. Finally, disputes between Comcast, OVDs, and IBPs provide hard evidence that vertical foreclosure strategies are evolving in the cable broadband industry – strategies that bear an uncanny resemblance to the forms of anticompetitive conduct we see in electricity.

In sum, what is happening in cable broadband bears substantial similarities to the age-old, entrenched wholesale access problem in other network industries. But while other sector regulators have developed access regimes to address wholesale markets for interconnection and transit, the FCC has not yet begun to formulate policy.<sup>6</sup> The 20 year-old open access framework that governs the electricity superhighways is designed to promote competition in wholesale generation markets by preventing integrated utilities from foreclosing rivals. The FCC’s regulation of ISP network access is much more limited. Network neutrality principles do not address the middle market where part of the gatekeeping problem resides. These access “lite” principles only apply within the last-mile cable broadband ISP distribution network.

That the FCC and DOJ have repeatedly articulated gatekeeping concerns in the broadband industry reinforces the notion that access problems are alive and well in cable broadband. For example, in its Open Internet order (2010), the Commission described the risks

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<sup>6</sup> See, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,716 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom.* Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh’g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh’g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997). Regional Transmission Organizations, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh’g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

and adverse consequences of gatekeeping on competition and consumers.<sup>7</sup> The DOJ concluded in the 2000 merger of AT&T and Media One Group, Inc. that the proposed combination 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.”<sup>8</sup> This is particularly problematic for new entrants given that the viability of content providers depends on their ability to develop a critical mass of subscribers.<sup>9</sup>

A merged Comcast-TWC’s enhanced incentives and demonstrated ability to engage in exclusionary gatekeeping is likely to increase costs for OVDs and result in higher prices to the existing and prospective Comcast-TWC cable broadband subscribers that have little to no choice in broadband service providers. Exclusionary gatekeeping could potentially restrict the availability of, and degrade quality in, OTT applications and dampen the emergence of new and innovative OVD products and business models. Moreover, anticompetitive conduct by a dominant Comcast-TWC ISP could inflict collateral damage on the Internet middle market, creating inefficiencies and disrupting innovation. For example, OVDs, CDNs, and IBPs would likely be forced to develop alternative transit strategies to cope with anticompetitive conduct, distorting the efficient trading that would otherwise be governed by competition at major levels in the broadband ecosystem.

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<sup>7</sup> 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](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf), at PP. 24. *Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010).

<sup>8</sup> Complaint at 25, U.S. v. MediaOne Group, Inc., Case No. 1:00CV01176 (D.C. Cir. filed May 25, 2000).

<sup>9</sup> *Id.*

### III. Summary of Applicants' Response to Concerns over Vertical Foreclosure of OVDs

Applicants argue that concerns over potential vertical foreclosure of rival OVDs are not specific to the merger. They argue, the fact that commenters have raised questions about access to last-mile broadband distribution networks in the FCC's Open Internet forum supports the notion that foreclosure is not a transaction-specific issue.<sup>10</sup> Moreover, according to the Applicants, issues raised by some edge providers and IBPs reveal old contractual disputes motivated, for example, by an attempt to offload costs onto Comcast customers.<sup>11</sup> These issues aside, Comcast-TWC go on to argue that it would have no incentive or ability to engage in exclusionary conduct post-merger.

First, Applicants argue that they have no incentive to degrade service on or deny rivals access to their last-mile cable broadband networks because such conduct would self-inflict financial harm and injure their brand. Comcast-TWC reiterate the claim in the Application that OVD services are complementary to their cable broadband service. They point to the fact that Comcast has far more broadband subscribers than it has subscribers to its cable multi-video programming distribution (MVPD) services.<sup>12</sup> They argue that the merged firm not only would fail to gain MVPD subscribers as a result of foreclosing rivals, but it would induce its own broadband subscribers to switch to any number of alternatives. These options include cable or fiber overbuilders, telco (DSL) providers, digital broadcast satellite providers, fixed broadband competitors, wireless broadband providers, and new entrants such as Google Fiber.<sup>13</sup>

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<sup>10</sup> See In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Opposition to Petitions to Deny and Response to Comments (filed Sept. 23, 2014) ("Comcast-TWC Response"), at 197.

<sup>11</sup> *Id.*, at 198-197 and 221.

<sup>12</sup> *Id.*, at 201, 203, and 205.

<sup>13</sup> *Id.*, at 204-206, 214.

Applicants support the notion that cable subscribers would switch away from Comcast-TWC by citing surveys where “71 percent of respondents said they would switch to an alternative ISP if their provider were to try to block, slow down, or charge more for services such as Amazon Instant Video, Netflix, Pandora, and Skype.”<sup>14</sup> Applicants dismiss arguments that subscribers face high switching costs, explaining “a few unfortunate incidents with [Comcast’s] own customer service agents over the past year illustrated occasional customer service failures that complicate switching requests.”<sup>15</sup>

Second, Applicants assert that they have no ability to degrade service to rival OVDs. They maintain that commenters’ claims that Comcast’s ISP system is a “terminating access monopoly” is a holdover from the old days of monopolized public switched telephone networks.<sup>16</sup> They argue, “the Open Internet conditions *by which Comcast is uniquely bound* already prohibit blocking and unreasonable discrimination of lawful network traffic over Comcast’s last mile network.”<sup>17</sup> Moreover, they argue, network congestion and capacity issues are uncommon on Comcast’s system and there are over 40 settlement-free routes into the Comcast last-mile network, as well as commercial peering and transit connections with CDNs and ISPs.<sup>18</sup>

#### **IV. Applicants’ Response to Concerns Over the Vertical Foreclosure of OVDs Rests on an Implausibly Broad “Kitchen Sink” Market**

Applicants are wrong that a merged Comcast-TWC would have no incentive to foreclose competing OVDs. Comcast and TWC are the two largest combined cable television and

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<sup>14</sup> *Id.*, at 204.

<sup>15</sup> *Id.*, at 136.

<sup>16</sup> *Id.*, at 212.

<sup>17</sup> *Id.*, at 208.

<sup>18</sup> *Id.*, at 217-219.



broadband ISP providers in the U.S. 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.<sup>19</sup> With greater dominance in downstream broadband ISP distribution, coupled with significant vertical ownership interests in content, the merger enhances the incentive for Comcast-TWC to limit competition from OVD rivals by controlling the gate, or point of interconnection, with their broadband ISP networks. These rivals include edge providers and other OTT applications that compete directly with Comcast’s own content platforms.

A major thread of Applicants’ rebuttal argument is that the merged company would not stand to gain MVPD subscribers, and would lose broadband subscribers, if it were to foreclose rival OVDs post-merger. This argument ignores the elephant in the room, namely that for a successful foreclosure strategy, the merged company does not need to *attract* MVPD subscribers as a result of lower quality or availability of rival OVD services delivered over its last-mile cable broadband distribution system. Instead, the merged company simply needs to *retain* its existing cable broadband subscribers. A larger post-merger video distribution footprint enveloping locked-in subscribers with little to no choice in viable substitutes for cable broadband would likely minimize any lost revenues from foreclosure.<sup>20</sup> And while surveys indicate that consumers “would” switch to rivals if Comcast-TWC were to block, slow down, or degrade service, the reality is that it is unlikely that consumers “could” switch, because there is little-to-no competition from viable substitutes.

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<sup>19</sup> 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).

<sup>20</sup> Early termination fees and minimum duration contracts limit subscribers to switch to alternative providers.

The difference between what Comcast-TWC’s cable broadband subscribers “would” and “could” do in the event rival OVD services were blocked or degraded undermines the plausibility of Applicants’ broad definition of the relevant market. Needless to say, concerns over vertical foreclosure of OVD rivals are minimized, if not dismissed entirely, if the relevant video distribution market is broadly defined. Indeed, Applicants’ proposed relevant market contains essentially every video distribution technology, regardless of price, quality, speed, or convenience. This “kitchen sink” relevant market even includes *inferior* services, such as lower broadband speeds, or cutting the cable broadband cord entirely.

These arguments do not stack up against reality. For example, FCC Chairman 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.”<sup>21</sup> These constraints presumably supported the FCC Chairman’s conclusion that cable broadband distributors more often than not represent the consumer’s only choice for a high-speed broadband connection.<sup>22</sup> Chairman Wheeler’s observations suggest a much narrower relevant market than one that includes virtually every known video distribution technology. Any more narrowly defined relevant market – even short of high speed cable broadband – would be highly concentrated, thereby maximizing incentives for Comcast-TWC to engage in vertical foreclosure of rivals.

## **V. History Demonstrates That Comcast-TWC Possesses the Ability to Foreclose OVD Rivals**

Applicants are wrong that a merged Comcast-TWC has no ability to foreclose competing

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<sup>21</sup> “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](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf).

<sup>22</sup> Wheeler Remarks, *supra* note 17.

OVDs. As a cable broadband ISP distributor with integrated content platforms, Comcast-TWC will have the ability to engage in exclusionary gatekeeping. In disputing this concern, Applicants paint a picture of an Internet middle market and last-mile segment that is divorced from the reality of network engineering-economics. Few networks are congestion-free, with consistently available, multiple paths available for “shippers” (e.g., OVDs) to deliver their services. Much like the tools available for dominant incumbents to foreclose rivals in other network industries, the strategic decisions by a combined Comcast-TWC as to whether, what, and when content and services are allowed through the ISP gate could take a number of forms. These could include denials of access, discriminatory terminating access fees, strategic network congestion, refusals to upgrade capacity to relieve congestion, and other cost-raising strategies.

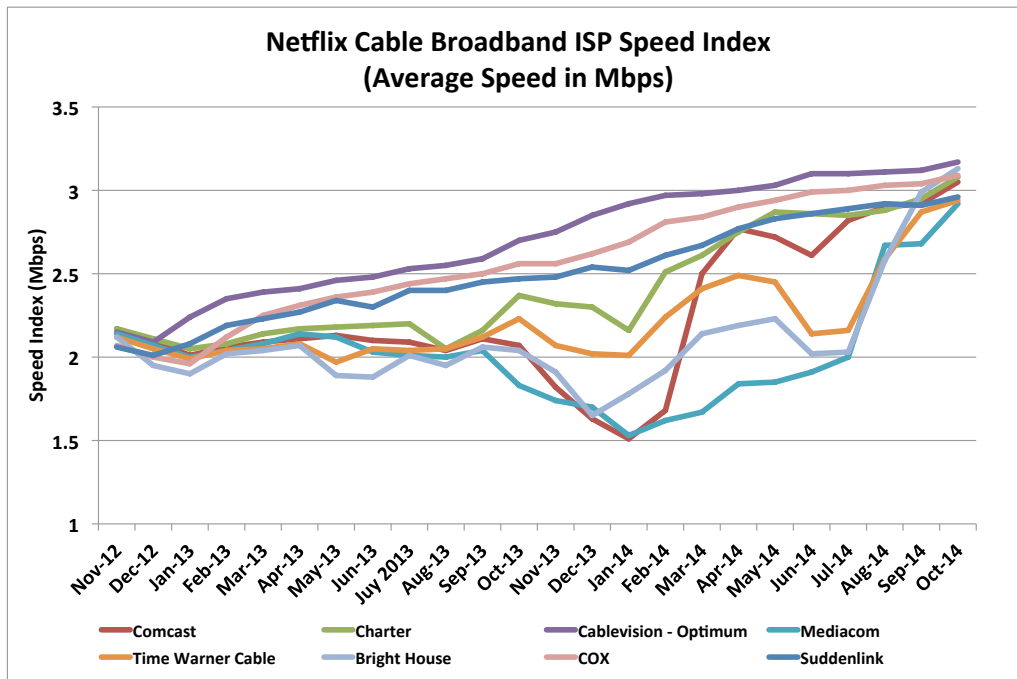
Demonstrated episodes of access problems and gatekeeping provide important verification that Comcast has the ability to foreclose OVD rivals. This is compelling evidence, regardless of the context in which such incidents occurred. Evidence of past gatekeeping also debunks Applicants’ claim that OVDs and other content providers are “complementary” to their broadband ISP systems. OVDs are most certainly Comcast-TWC’s rivals, and disputes between Comcast and middle market participants reflect the problem of competing OVDs having gained access to the Internet superhighway only to be stopped at the “off-ramp” to the distribution system and required to pay again.

Comcast’s ability to guard the gate to their broadband ISP system is evident in the figure below. It shows the ISP speed index posted on Netflix’s website for the eight cable broadband companies from late 2012 through mid 2014.<sup>23</sup> Between September 2013 and January 2014 is the now highly publicized congestion related slow-down in Comcast’s ISP speeds for Netflix’s

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<sup>23</sup> See Netflix USA Speed Index, available <http://ispsspeedindex.netflix.com/results/usa/graph>.

services.<sup>24</sup> These episodes may reflect other forces at work, as opposed disputes over access. But the experiences and testimonials of edge providers such as Netflix and IBP Cogent Communications, as we understand them, strongly indicate otherwise.<sup>25</sup>



<sup>24</sup> 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.

<sup>25</sup> 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).

## **VI. Behavioral “Access” 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 either the FCC’s or the DOJ’s review of the proposed merger. However access is ultimately addressed, it would be poor competition policy to craft a piecemeal access regime in a merger proceeding through behavioral remedies, for two reasons. First, 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 technical issues are best addressed by the sector regulator as part of a generic rulemaking. Second, cobbling together behavioral remedies to create a merger-specific access framework in Comcast-TWC would fundamentally complicate any future FCC access initiative. Any such conditions in Comcast-TWC would be in place for multiple years and would pose multiple and potentially conflicting compliance issues if a regulatory access regime were ever developed.

Moreover, it remains that behavioral access-type remedies imposed by antitrust enforcers and regulators in past cases have been problematic.<sup>26</sup> Placing restraints on post-merger firm conduct while anticompetitive incentives remain intact invariably result in workarounds, or drives anticompetitive conduct underground. Moreover, behavioral remedies result in costly litigation of conditions, involve ongoing monitoring for compliance, and require dispute resolution. Comcast’s ill-conceived proposals to graft the OVD access provisions in Comcast-NBCU onto a very different Comcast-TWC “patient” falls well short of the mark. Such proposals should be rejected in favor of a strong regulatory and antitrust enforcement stance.

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<sup>26</sup> For detailed discussion see, e.g., John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULLETIN 979 (2012).

Saying “no” to the Comcast-TWC merger is the only response to the threat it poses to competition, diversity in the media, and innovation in delivering news, opinion, entertainment, sports, and other forms of vital programming to millions of U.S. cable broadband subscribers.

December 1, 2014

Respectfully submitted,

A handwritten signature in black ink that reads "Diana L. Moss". The signature is written in a cursive, flowing style.

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