Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

STATEMENT IN OPPOSITION TO COMCAST'S PROPOSED ACQUISITION OF TIME WARNER CABLE

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August 25, 2014

Comcast's proposed acquisition of Time Warner Cable (TWC) would position Comcast as a veritable gatekeeper over vast swaths of the nation's telecommunications industry, resulting in higher prices, fewer choices, and worse service for consumers in Minnesota and across the country. The proposed acquisition also would threaten innovation and economic activity on the Internet, and it would jeopardize the free flow of information and ideas on which our democracy depends. Because the proposed acquisition does not advance the public interest – but, rather, is inimical to it – it must be rejected.

I.

Comcast, the nation's biggest cable company and biggest broadband Internet service provider (ISP), seeks the Federal Communications Commission's (FCC) blessing to acquire TWC, the nation's second biggest cable company and third biggest ISP.[1] Make no mistake about it: the proposed acquisition is a great deal for the cable companies, their corporate executives, and their Wall Street investors. Within hours of the proposed acquisition being announced, Comcast's executives were boasting to Wall Street analysts that Comcast stood to make billions of dollars from the deal.[2] In the ensuing weeks, Comcast's and TWC's executives repeatedly assured Wall Street that they had gone "line-by-line" through the books, had done "meaningful diligence," and were "very comfortable" and "quite confident" that the deal would be a boon for

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[1] *See* Comcast's Applications and Public Interest Statement: Description of Transaction, Public Interest Showing, and Related Demonstrations (April 8, 2014) (hereinafter *Comcast's Public Interest Statement*); Leichtman Research Group, MVPD Data (Mar. 14, 2014) (showing that Comcast and TWC are the nation's largest cable companies, with 21.69 million and 11.39 million subscribers, respectively); Leichtman Research Group, Broadband Data (Mar. 17, 2014) (showing that the three largest ISPs are Comcast, AT&T, and TWC, with 20.66 million subscribers, 16.43 million subscribers, and 11.61 million subscribers, respectively).

[2] *See, e.g.*, *Transcript of Comcast/TWC Conference Call with Wall Street Investors* at 5 (Feb. 13, 2014) (Comcast's Chief Financial Officer (CFO): "Our analysis includes run-rate synergies of approximately $1.5 billion in operating expenses and approximately $400 million in capital expenditures. . . . We also see strong opportunities for revenue synergies"); *Transcript of Deutsche Bank Conference* at 1 (Mar. 10, 2014) (Comcast's Executive Vice President (EVP): "I think that we have been very conservative in our estimates [about synergies and capital expenditures]. And we did not include any revenue upside potential, which I believe the revenue potential, the upside synergies there are greater than the cost savings"). Note that all conference call and presentation transcripts cited herein were obtained from the Securities and Exchange Commission (SEC) or from Comcast's or TWC's investor relations websites.

Comcast's bottom line.[3] Comcast's Chief Financial Officer (CFO) told Wall Street investors that the acquisition would result in "pretty darn good returns" for the cable giant,[4] which already enjoys industry-leading margins.[5]

Comcast has guaranteed that the proposed acquisition would be a bonanza for TWC's outgoing executives, too: they will receive golden parachutes worth up to $80 million if this deal is approved.[6] These golden parachutes are said to be among the largest bestowed upon corporate executives in recent years.[7] TWC's leadership has either dodged or offered unsatisfactory answers to basic questions about how such lavish payouts to a handful of corporate officers – some of whom had been on the job for a matter of months – would benefit the public interest.[8]

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[3] *See, e.g.*, *Transcript of Comcast/TWC Conference Call with Wall Street Investors* at 8 (Feb. 13, 2014) (Comcast's CFO stating that the companies had "go[ne] line-by-line on a whole variety of operating efficiencies . . . and are quite confident that there's about $750-million-plus in year one, and then it grows from there to a steady state of about $1.5 billion. So there's been meaningful diligence done by both sides to work through those numbers."); *Transcript of Technology, Media, and Telecommunications Conference* at 2 (March 4, 2014) (Comcast's CFO, stating that "we feel very comfortable, we have done our diligence and we are working collaboratively with the Time Warner Cable folks to fine-tune those [figures]" and "we are quite comfortable that the $1.5 billion that we've set as a synergy number is achievable"); *Transcript of the Technology, Media, and Telecommunications Conference* at 2 (March 5, 2014) (TWC's CFO explaining that the companies "went line-by-line item really through our P&L" and were "very comfortable with the synergies" to be realized from the deal); *see also Transcript of Technology, Media, and Telecommunications Conference* at 1 (March 4, 2014) (Comcast's CFO stating, "And obviously, we spend a fair amount of time evaluating this."); *Transcript of Q2 2014 Comcast Earnings Call* at 15 (Comcast's CFO stating that "we feel very good about the synergies . . . And we have gone through quite a bit of detail . . . and we feel very good about them.").

[4] *Transcript of Comcast/TWC Conference Call with Wall Street Investors* at 10 (Feb. 13, 2014).

[5] *See Transcript of Goldman Sachs Communacopia Conference* at 8 (Sept. 24, 2013) (Comcast's CFO stating, "Our margins are the highest in the industry."); *see also* Susan Crawford, *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* at 10 (Yale University Press 2013) (hereinafter *Captive Audience*) ("Comcast and Time Warner Cable are concentrating on wired access and reaping profit margins of about 95 percent for the service.").

[6] *See* David Gelles, *$80 Million for 6 Weeks for Cable Chief*, N.Y. Times (Mar. 20, 2014) (noting that TWC's CEO "will receive nearly $80 million if the deal closes, a severance payment that amounts to more than $1 million a day for the six weeks he ran the company before agreeing to sell").

[7] *See* Jena McGregor, *Dismantling CEOs' Golden Parachutes*, Washington Post (Mar. 26, 2014) ("If [TWC's CEO] ultimately receives the payout, it would be among the largest 'golden parachute' benefits awarded since 2011, according to an analysis by executive compensation research firm Equilar.").

[8] *See, e.g.*, Senate Judiciary Committee Hearing, *Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers*, Hearing Webcast at 1:16:20 (Apr. 9, 2014) (hereinafter *Examining the Comcast/TWC Merger Hearing*) (Sen. Leahy: "Now, Mr. Minson, you must be expecting this question, but your CEO will get $80 million for his two months of work as CEO before he agreed to sell the company. You will get $27 million if the merger is approved for less than the year you were there in your position. Now, do these golden parachutes help your shareholders?" TWC's CFO: "Let me give you our perspective on how we make operating and strategic decisions at the company and really the North Star for us is what is best for the consumer, and we concluded that this deal is far

Then there is Charter Communications, the nation's third biggest cable company and sixth biggest ISP.[9] Charter initially opposed Comcast's proposed acquisition of TWC, urging TWC's shareholders to reject the deal because "it is difficult to imagine a transaction that could concentrate the industry more than the Proposed Comcast Merger."[10] Not long thereafter, Comcast offered Charter a sweetheart deal: if Comcast's proposed acquisition of TWC were approved, Comcast would give Charter millions of new cable subscribers, exclusive control over new territories, and a significant equity stake in a newly formed cable company, which would pay Charter a handsome "management fee."[11] Charter accepted Comcast's offer,

Comcast Offers Charter New Territories as Part of the Proposed Acquisition

What Charter said Before	What Charter said After
"From a regulatory perspective, it is difficult to imagine a transaction that could concentrate the industry more than the Proposed Comcast Merger. Post-merger, Comcast would control nearly 40 percent of the broadband market, around 33 million TV subscribers and a major programmer in NBC Universal."	"We plan to be a supportive player in the industry to help foster its continued development. Our agreement supports the proposed Comcast/ Time Warner [Cable] transaction, and we think it's a good outcome for the industry at large and shareholders generally."

and away the best outcome for our consumers. The reason for that is in our marketplace a few things really matter. Products matter, innovation matters, and speed matters. And I think as a result of this deal, you will have positive outcomes in all three areas."); *id.*, Responses to Questions for the Record (QFRs) for TWC's CFO from Sen. Franken at 6 ([Question:] "Please explain how the golden parachutes identified in question 3(a) serve the public interest." [Answer:] "As the parties have explained in their public filings, the transaction will benefit competition and consumers, and thus will serve the public interest. Accordingly, compensation provisions that facilitate the completion of this transaction serve the public interest as well."). Note that all citations to Congressional hearings reference the Government Printing Office (GPO) transcript of the proceeding except for citations to 2014 hearings, which reference other sources available on the Committee's website as specified.

[9] *See* Leichtman Research Group, MVPD Data (Mar. 14, 2014) (showing that Charter is the nation's third largest cable company with 4.34 million subscribers); Leichtman Research Group, Broadband Data (Mar. 17, 2014) (showing that Charter is the sixth largest ISP with 4.64 million subscribers).

[10] Charter Communications, Solicitation of Proxies in Opposition to the Proposed Combination of Time Warner Cable with Comcast Corporation at 2 (SEC Form 14A) (Mar. 2014) (hereinafter *Charter Solicitation of Proxies*).

[11] *See* Cecilia Kang, *Comcast Sells Subscribers to Charter to Help Clear Way for Merger with Time Warner Cable,* Washington Post (Apr. 28, 2014) ("[B]y selling those subscribers to a company that has been openly critical of the proposed merger, Charter Communications, Comcast removed another obstacle to the deal."); Comcast Press Release, *Comcast and Charter Reach Agreement on Divestitures* (Apr. 28, 2014) (describing deal); *Transcript of Comcast/Charter Conference Call to Discuss Agreement on Divestitures* at 4-5 (Apr. 28, 2014) (describing deal).

telling Wall Street investors that Charter henceforth would "be a supportive player in the industry."[12] Just weeks after saying that Comcast's proposed acquisition of TWC would result in unimaginable industry consolidation, Charter changed its assessment, saying that the acquisition actually would be "a good outcome for the industry at large."[13]

But what does the deal mean for consumers? Whereas Comcast and TWC told Wall Street investors that they painstakingly had analyzed what the deal meant for Comcast's own bottom line, they had no good answer to what understandably is the primary concern for many consumers – what the deal means for their own bottom lines. As Comcast's profits have risen, so too have consumers' cable bills, increasing at more than double the rate of inflation since the mid-1990s.[14] As Senator Orin Hatch put it during a 2010 Judiciary Committee hearing, "cable

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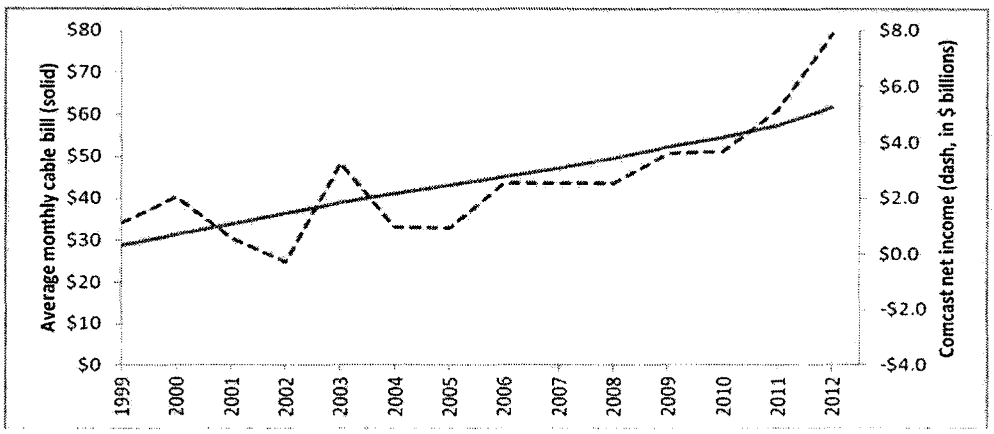
[12] *Transcript of Comcast/Charter Conference Call to Discuss Agreement on Divestitures* at 4 (Apr. 28, 2014).

[13] *Contrast id. with supra*, note 10.

[14] *Compare* FCC, *Report on Cable Industry Prices* at 8-9 (Jun. 7, 2013) (showing that prices for the most popular cable television service increased by 6.1% per year from 1995 to 2012 while inflation was 2.4%) *and* S. Derek Turner, Free Press, *Combating the Cable Cabal: How to Fix America's Broken Video Market* at 10 (2013) (hereinafter *Cable Cabal*) (noting that cable prices have risen by 5% since the recent recession, while inflation was 1.4%) *and* Amadou Diallo, *Comcast's Own History is Best Argument Against Time Warner Deal*, Forbes (Mar. 12, 2014) ("[Comcast's customers have] paid escalating prices for services that can charitably be described as mediocre.") *and* Senate Commerce Committee Hearing, Subcommittee on Communications, Technology, and the Internet, *Consumers, Competition, and Consolidation in the Video and Broadband Market* at 62 (Mar. 11, 2010) (hereinafter *Consumers, Competition, and Consolidation Hearing*) (Consumer Federation of America's (CFA) Research Director testifying that "Comcast has raised cable rates for consumers every year") *with* Ravi Somaiya, *Comcast Profits Up Sharply, Along with TV Subscribers*, N.Y. Times (Jan. 28, 2014) ("Comcast, the nation's largest cable provider and the owner of NBCUniversal, on Tuesday reported a sharp increase in profit for the fourth quarter of 2013, helped by an increase in television subscribers after six years of decline. . . . The results helped lift Comcast's net income for the three months that ended Dec. 31 by 26 percent, to $1.9 billion, compared with a year ago.") *and Consumers, Competition, and Consolidation Hearing* at 63 (CFA's Research Director testifying that "the operating cash-flow of the cable operators – that is the cash left over after all operating expenses, including programming costs – has increased four times faster than the rate of inflation.") *and Cable Cabal* at 12 ("While many other sectors of the economy struggled during the recent recession, the multichannel video distribution industry showed great resilience. From 2007-2011, multichannel distributors' video revenues increased by 27 percent as the price of expanded basic cable service increased by 22 percent.") *and Transcript of Q2 2014 Comcast Earnings Call* at 4-5 (Jul. 22, 2014) (Comcast's CFO describing large increases in operating cash flow) *and supra*, note 5; *see also* Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, Free Press at 7 (January 2010) ("Cable operators have the lowest consumer satisfaction ratings of any industry, even while they soak up large profit margins and raise prices.").

prices have continued to rise at rates that are difficult to understand."[15] In Minneapolis, Comcast's "every day price" for its "triple play package" has reached nearly $170 per month, a significant chunk of an average family's take-home pay.[16] Naturally, then, one of the first questions posed to Comcast and TWC after they announced their proposal was whether any relief was in sight for consumers as a result of the deal.[17]

Comcast's Rising Profits, Consumers' Rising Prices



Source: FCC, *Report on Cable Industry Prices* at 8-9 (Jun. 7, 2013) (prices for expanded basic cable); Comcast's Annual SEC Earnings Reports.

The day after Comcast's and TWC's executives told Wall Street analysts that they had gone line-by-line through their books and were quite confident about their financial predictions, TWC told its own customers that it simply "[didn't] have any information yet on how pricing or

[15] Senate Judiciary Committee Hearing, Antitrust Subcommittee, *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers* at 3 (Feb. 4, 2010) (hereinafter *Comcast/NBC Universal Merger Hearing*); *see also Consumers, Competition, and Consolidation Hearing* at 61 (CFA's Research Director testifying that the history of the cable industry since the mid-1990s "has been a history of consolidation and higher prices").
[16] *See Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for Comcast's EVP from Sen. Franken at 28 (showing "every day pricing" rates for various services); *see also Transcript of Q2 2014 Comcast Earnings Call* at 5 (Jul. 22, 2014) (Comcast's CFO saying that total revenue per customer increased 4.5% to $137 driven, in part, by "rate adjustments").
[17] *Transcript of Comcast/TWC Conference Call with Reporters* at 15 (Feb. 13, 2014) (Reporter asking, "[W]ill this have any impact on consumers' bills?").

services would change."[18] Comcast's Executive Vice President (EVP) actually conceded that consumers' bills might rise even faster.[19] Meanwhile, analysts at J.P. Morgan – the Wall Street firm that Comcast hired to advise it on the proposed acquisition – reportedly had been telling the cable companies that they could continue squeezing consumers, who have no real choice but to pay high bills.[20] The suggestion is alarming, but it is nothing new: Comcast's executives are on record assuring Wall Street analysts that Comcast uses its market power to exercise "pricing leverage" over consumers.[21]

Comcast Announces the Proposed Acquisition of TWC	
What it told Wall Street	What it told Consumers
"[W]e are quite confident that there's about $750-million-plus in year one."	"We don't have any information yet on how pricing or services would change."
"And obviously, we spend a fair amount of time evaluating this."	"We're certainly not promising that customer bills are going to go down, or even that they're going to increase less rapidly."
"[T]here's been meaningful diligence done by both sides to work through those numbers."	
"We feel very comfortable, we have done our diligence."	
"[We] went line-by-line item really through our P&L"	

[18] *Contrast supra*, notes 2-3 *with* TWC, *Customer Frequently Asked Questions* (SEC Form 425) (Feb. 14, 2014) ("[Question:] Am I going to have to pay more / Is my pricing going to change? [Answer:] We don't have any information yet on how pricing or services would change.").

[19] *Transcript of Comcast/TWC Conference Call with Reporters* at 16 (Feb. 13, 2014) (Comcast's EVP stating, "We're certainly not promising that customer bills are going to go down, or even that they're going to increase less rapidly"). Although Comcast's EVP went on to say that many pricing factors are beyond Comcast's control, the same surely could be said about the cost savings, synergies, and revenue increases about which Comcast's and TWC's executives spoke with confidence. And one must wonder: if Comcast expects to receive billions of dollars from the proposed acquisition, why is it unable or unwilling to say that it will pass some of those savings along to consumers in the form of lower prices?

[20] *See* David Gelles, *Comcast Hires JPMorgan as Adviser for Possible Time Warner Cable Bid*, N.Y. Times (Dec. 8, 2013); Reinhardt Krause, *Netflix Be Damned, Cable Told to Pass on Higher Costs*, Investor's Business Daily (Apr. 4, 2014) ("Cable TV companies should hike their prices to offset rising programming costs, despite the threats posed by Netflix (NFLX) and cord-cutting, according to a new JPMorgan report.").

[21] *See, e.g., Transcript of Goldman Sachs Communacopia Conference* at 6 (Sept. 19, 2012) ([Goldman Sachs Analyst:] "[A]s you think about the formula [for prices based on broadband market share], which way do we move from here? Is there a way to exercise pricing leverage to a greater extent?" [Comcast's CFO:] "I think that we have actually exercised some pricing leverage. We've increased the cost of the service by roughly $4 to $5 per customer

Against this backdrop, it is no wonder that so many consumers are concerned that Comcast's proposed acquisition of TWC will further enrich Comcast, TWC's executives, and Wall Street investors – all at consumers' expense.[22] Those concerns are well founded. Comcast already is a vertically integrated,[23] horizontally expansive[24] corporation with persistently high prices, [25] industry-leading profits,[26] an abysmal reputation among customers,[27] and a questionable record of dealing fairly with competitors.[28] By giving Comcast even more reach and power, the proposed acquisition would make Comcast a veritable gatekeeper over vast swaths of the telecommunications industry.[29] Not only will Comcast continue to own an extensive content portfolio, it also will operate in nineteen of the nation's top twenty markets and forty-three of the top fifty, controlling about two out of every five broadband Internet subscriptions and about a third of all television subscriptions in the country.[30] The post-

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per month over the last few years. So if you really look at our [average revenue per user] come, say, three years ago to where they are today, there probably is a $4 give or take gap").

[22] *See, e.g.*, Capitol Forum, *Comcast/Time Warner Cable: Capitol Forum Consumer Survey Shows Implications for 2014 Elections; Few Think Merger is in the Public Interest* (Jun. 6, 2014) ("Only 21.2% of respondents agreed with the following statement: 'A merger between Comcast and Time Warner Cable is in the public interest.' More than twice as many respondents disagreed (44.2%), with the remainder having a neutral opinion."); *id.* (showing that nearly 60% of respondents are concerned about one company controlling broadband access for one-third of the country, while about 10% of respondents are not concerned); Consumers Union, *Consumer Reports Poll: Most Consumers Oppose the Comcast/Time Warner Cable Merger* (June 19, 2014) (showing that 56% of Americans oppose the deal, 11% support it, and 32% have no opinion; that 74% of Americans believe that it will result in higher prices; that 74% of Americans believe that it will result in fewer choices; and that 81% believe that Comcast will use its increased market share to favor its own content); Consumers Union, *Press Release: 400,000 People Join Chorus of Protest Against Comcast-Time Warner Cable Merger* (Apr. 9, 2014).

[23] *See infra*, notes 95-97.

[24] *See supra*, note 1; *see also infra*, notes 30-31.

[25] *See supra*, notes 14, 16.

[26] *See supra*, note 14.

[27] *See infra*, notes 50-54, 144.

[28] *See, e.g., infra*, notes 122, 124-130, 154-156.

[29] *See Examining the Comcast/TWC Merger Hearing*, Written Testimony of Public Knowledge's CEO at 8 (explaining that the deal "will even more firmly entrench Comcast as the gatekeeper at the crossroads of Internet, television, and communications innovation"); Editorial, *A Cable Merger Too Far*, New York Times (May 26, 2014) ("The merger will concentrate too much market power in the hands of one company, creating a telecommunications colossus the likes of which the country has not seen since 1984 when the government forced the breakup of the original AT&T telephone monopoly.").

[30] David Carr, *Questions for Comcast as It Looks to Grow*, N.Y. Times (Apr. 6, 2014) (stating that the proposed acquisition would give Comcast "control over 19 of the country's top 20 markets – corralling a 30 percent market share in cable and a 40 percent share in broadband"); *Examining the Comcast-Time Warner Cable Merger Hearing*,

acquisition Comcast will dwarf its purported competition, nearly doubling the size of the nation's next biggest broadband ISP and accounting for more cable subscribers than all of the other major private cable companies combined.[31]

That amount of power is unprecedented.[32] It is dangerous, too. It will leave consumers with higher prices, fewer choices, and even worse service. As a former FCC Commissioner put it, the proposed acquisition "will run roughshod over consumers in the end."[33] The proposed acquisition also would threaten innovation and economic activity by putting both start-ups and established technology firms at Comcast's mercy.[34] And Comcast and TWC do not sell widgets; they control the means by which Americans connect with each other, share ideas, and get information.[35] To consolidate so much power in the hands of a corporation whose interests are

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Written Testimony of Public Knowledge's CEO at 2 (discussing post-acquisition market share data); *Comcast's Public Interest Statement* at 150 (showing that the post-acquisition Comcast will operate in 19 of the top 20 markets); *Transcript of Comcast Conference Call with Wall Street Investors* at 1 (Feb. 13, 2014) (Comcast's CEO, stating that "[t]he combination gives us exposures to 19 of the top 20 markets and 43 of the top 50.").

[31] *See* Leichtman Research Group, Broadband Data (Mar. 17, 2014) (showing that Comcast and TWC combine for more than 32 million broadband subscribers, compared to 16.43 million for AT&T and 9.02 million for Verizon, the next biggest competitors); Leichtman Research Group, MVPD Data (Mar. 14, 2014) (showing that all other major private cable companies combine for less than 20 million subscribers).

[32] *See infra*, note 93; *Examining the Comcast-Time Warner Cable Merger Hearing*, Written Testimony of Public Knowledge's CEO at 2 (testifying that "[t]his unprecedented accumulation of market power, combined with Comcast's vertical integration into content, creates the incentive and enormous leverage for Comcast to [stifle competition]"); *see also Order in re: Applications of Comcast, General Electric, and NBC-Universal for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd. 4238, ¶ 3 (Jan. 20, 2011) (hereinafter *Comcast/NBCU Order*) (stating that Comcast's acquisition of NBC Universal "effectuate[d] an unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well"); House Judiciary Field Hearing, *The Proposed Combination of Comcast and NBC Universal* at 112 (June 7, 2010) (Communication Workers of America's (CWA) Vice President testifying that "[t]he public must be protected from the significant harms created by a combination of such unprecedented scale").

[33] Michael J. Copps, *From the Desk of a Former FCC Commissioner: Journalists Need to Generate a National Discussion on the Future of the Internet*, Columbia Journalism Review (Feb. 13, 2014); *see also* Diana Moss, *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should be Blocked*, American Antitrust Institute at 2, 21 (Jun. 11, 2014) (hereinafter *Rolling Up Video Distribution*) (identifying "major competitive issues" with the proposed acquisition and concluding that consumers would be better off if it were rejected).

[34] *See, e.g.*, Letter from the Computer and Communications Industry Association's (CCIA) President to Sen. Franken at 5 (Jun. 9, 2014) (hereinafter CCIA Letter) ("Therefore, regulators should block this merger, not only for the good of innovation, the Internet industry, and of consumers; but also for the sanctity of antitrust law itself.").

[35] *See Consumers, Competition, and Consolidation Hearing* at 62 (CFA's Research Director: "NBC and Comcast do not sell widgets. They sell news and information and access to the primary platforms [Americans] use to receive this news and information. Control over production and distribution of information has critical implications for

not necessarily aligned with the public's is to jeopardize the free flow of communication that is essential to our democracy.

Consumers in Minnesota and across the country are counting on the FCC to fulfill its statutory mandate to protect the public interest.[36] Just a few years ago, the FCC warned that Comcast had both the incentive and the ability to manipulate the flow of information on television and the Internet.[37] Those concerns certainly were appropriate at the time; they are heightened to unacceptable levels now that Comcast returns to the FCC, seeking to become even bigger and even more powerful. The proposed acquisition is detrimental to the public interest, and it must be rejected.

II.

Comcast advances five central arguments in support of the proposed acquisition. It argues (a) that the deal will give it the economies of scale that it needs to compete and innovate; (b) that consumers will benefit if Comcast is permitted to replace TWC in TWC's existing distribution footprint; (c) that the proposed acquisition is appropriate given the competitive context in which Comcast operates; (d) that the proposed acquisition will not harm consumers or competition in the television content or distribution markets; and (e) that the proposed

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society and democracy."); House Judiciary Committee Hearing, *Competition in the Media and Entertainment Distribution Market* at 75 (hereinafter *Distribution Market Hearing*) (Feb. 25, 2010) (President of Media Access Project: "Unlike any other line of business, media properties raise important questions which go to the very nature of democratic self-governance. Our viewpoints and perspectives on political and social issues are the outgrowth of what we hear and watch.").

[36] *See* 47 U.S.C. § 310(d) (2012) (stating that the FCC may approve the proposed transaction only upon a "finding by the Commission that the public interest, convenience, and necessity will be served thereby."); *United States v. Federal Communications Commission*, 652 F.2d 72, 104 (D.C. Cir. 1980) (stating that the FCC's "overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest"); *Consumers, Competition, and Consolidation Hearing* at 6 (FCC's Chairman testifying that "[t]his is a statutory requirement to protect and promote the interests of all Americans"); *Comcast/NBCU Order* at ¶ 22 (Jan. 20, 2011) ("The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.").

[37] *See infra*, notes 98, 100-102, 110-111, 131.

acquisition will not compromise the open nature of the Internet. None of these arguments is persuasive; each is discussed below.

A.

Comcast would have the FCC believe that it needs to acquire TWC to achieve economies of scale that are necessary for the company to remain competitive.[38] Comcast's EVP told the Senate Judiciary Committee that "increased scale [is] not only desirable but *essential*"[39] and that "the business reason for this transaction is to create the scale that will enable Comcast to invest more in innovation and infrastructure and enhance our ability to compete more effectively."[40] In its Public Interest Statement, Comcast reiterated that "[s]cale efficiencies are key" and that "economies of scale" are among the "powerful economic mechanisms [that] will drive the core competitive benefits from the transaction."[41]

But Comcast disavowed these very claims in conversations it had with Wall Street analysts less than six months before announcing its proposed acquisition of TWC, making it clear at the time that Comcast already had sufficient scale – that it was unnecessary to grow from

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[38] *See, e.g.*, *Comcast's Public Interest Benefits Summary* at 1 ("The proposed transaction will create economies of scale that will facilitate even greater investment in broadband deployment, adoption, speeds, and competition."); *Comcast's Public Interest Statement* at 21 (stating that Comcast and TWC "have a more limited scale and scope" than companies like Apple, Google, and Amazon); *id.* at 23-26 (stating that "[w]ith greater scale in a far more demanding and capital-intensive marketplace, a combined Comcast-TWC will be able to drive even more innovation and consumer benefits over the next decade – and beyond"); *Examining the Comcast-TWC Merger Hearing*, Written Joint Testimony of Comcast's EVP and TWC's CFO at 2 ("By combining with TWC, Comcast can also achieve the increased coverage and economies of scale necessary to invest the billions of dollars required for next-generation technologies, greater service reliability, secure networks, and faster Internet speeds."); *id.* ("With larger scale and network coverage, Comcast will also have the capability to deploy other new products and technologies more quickly and efficiently than either company could do on its own[.]"); *see also* John Eggerton, *Comcast's Cohen Calls Hastings Peering Arguments 'Hogwash'*, Broadcasting & Cable (Mar. 27, 2014) ("Comcast execs, including chairman Brian Roberts, have been making the point that Comcast needs scale to compete with national distribution platforms like satellite and over-the-top (Netflix). Cohen echoed that. Cohen also owned that, saying that Comcast is going to get bigger to expand in investment and R&D. 'I'm not walking away from that.'").

[39] *Examining the Comcast/TWC Merger Hearing*, Written Joint Testimony of Comcast's EVP and TWC's CFO at 8 (emphasis in original).

[40] *Id.*, Hearing Webcast at 45:55 (testimony of Comcast's EVP).

[41] *Comcast's Public Interest Statement* at 23.

a colossus to a gargantuan colossus to innovate and compete. On September 24, 2013, a Goldman Sachs analyst questioned Comcast's assertiveness with respect to mergers and acquisitions in the telecommunications industry. He told Comcast's CFO that "the cable industry is sort of caught up in this enthusiasm for consolidation at this point" and asked: "I mean[,] it just seems like you could have very, very accretive opportunities in cable consolidation at this point, [and] I'm wondering why you're not part of this conversation[.]"[42]

What Comcast Says about Economies of Scale

To Congress and the FCC (Spring 2014)	To Wall Street (Fall 2013)
"[T]he business reason for this transaction is to create the scale that will enable Comcast to invest more in innovation and infrastructure and enhance our ability to compete more effectively[.]"	"We actually think we have meaningful scale on the distribution side, and we also think we have meaningful scale on the content side."
"[I]ncreased scale [is] not only desirable but *essential*[.]"	"We think we have scale."
	"I think we've already executed on that."

Comcast's CFO defended Comcast's decision to refrain from seeking out cable company acquisitions, explaining that further consolidation was not necessary for Comcast because, directly contrary to what Comcast now tells the FCC, Comcast already had the scale it needed to succeed in the market. He observed that "a lot of the conversation [about consolidation] has been about scale and the benefits of scale,"[43] which was not something Comcast needed: "We think we have scale. I think people who are talking about [consolidation] are looking for benefits of scale whether it be on the programming side or the technology side, and I think we've already executed on that."[44] He reiterated that "we actually think we have meaningful scale on the distribution side, and we also think we have meaningful scale on the

[42] *Transcript of Goldman Sachs Communacopia Conference* at 13-14 (Sept. 24, 2013).
[43] *Id.* at 14.
[44] *Id.*

content side" and that "[w]e don't particularly believe that adding a couple million more customers to our footprint is going to change dynamics around content costs."[45]

Thus, less than six months before Comcast told the FCC that it needs to acquire TWC to achieve scale, it told Wall Street that it was not considering any acquisitions because it already had scale.[46] Comcast's conflicting statements to Wall Street and the FCC raise questions: Did something change in the intervening six months? And if Comcast believed that it already had sufficient economies of scale, why would it seek to acquire TWC anyway? The answers are apparent from comments made during the same conference: Comcast's CFO said that consolidation had nothing to do with scale and everything to do with Comcast's own bottom line, explaining that "it's a financial decision in terms of getting larger" and that Comcast "would absolutely look at" a deal that "had a really terrific financial return for [Comcast]."[47] The acquisition of TWC is nothing if not a "terrific financial return" for Comcast – but it comes at unacceptable costs to consumers.

B.

Comcast also argues that the proposed acquisition would benefit the public interest because Comcast offers superior products and services that now will become available to TWC

[45] *Id.*; *see also Transcript of Citi Internet Media and Telecommunications Conference* at 1 (Jan. 7, 2014) (Comcast's CEO saying, in response to a question about cable consolidation, "I think we've taken a lot of years building Comcast and we have great scale.").

[46] Comcast has offered a post hoc rationalization for its conflicting statements, acknowledging that "Comcast has scale, as was stated during the referenced conference call," but that the deal will "result in *greater* scale by combining the two companies." *Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for Comcast's EVP from Sen. Franken at 18 (emphasis in original). Even taking that argument at face value, it remains the case that any public interest benefits to be realized from Comcast's increased scale must be measured relative to the status quo, where Comcast, by its own admission, already has sufficient scale. In other words, this is not a case where a small company seeks to acquire the scale necessary to compete; it is a case where a company with sufficient scale seeks more. Comcast also has noted that it would benefit from additional scale in the business services market – that is, in the provision of telecommunications services to businesses, as contrasted with residential consumers. *See, e.g.*, *Transcript of Goldman Sachs Communacopia Conference* at 6 (Sept. 24, 2013) (Comcast's CFO saying that Comcast is not "operating at optimal scale right now" in that market). However, there is no reason that Comcast cannot obtain the scale it needs in the business service market through partnerships with, rather than acquisitions of, other cable companies, as Comcast already is doing. *See Public Interest Statement* at 90-91 (explaining that Comcast and TWC already partner to serve customers that span both companies' footprints).

[47] *Transcript of Goldman Sachs Communacopia Conference* at 14 (Sept. 24, 2013).

customers.[48] For example, Comcast's EVP has explained that "[t]his transaction will accelerate the deployment of Comcast['s] technologically advanced products and services to consumers and improve the customer experience."[49] This argument is flawed in several respects.

First, the argument's underlying premise – that TWC customers will benefit from becoming Comcast customers – is subject to dispute, given survey after survey showing that Comcast's own customers are dissatisfied with Comcast service.[50] Notably, Comcast points to the J.D. Power Satisfaction Surveys as evidence of Comcast's improved customer service reputation, even though those surveys show that Comcast remains among the lowest ranked players in its industry.[51] On the same day that Comcast told the FCC that it "has made improved customer service a key focus over the past several years," a subsidiary of Consumer Reports named Comcast the "Worst Company in America," marking the second time in five years that

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[48] *See, e.g., Comcast's Public Interest Statement* at 36, 39, 73, 81, 120; *Examining the Comcast/TWC Merger Hearing*, Hearing Webcast at 46:26 (Comcast's EVP: "Our investment will bring Time Warner Cable residential customers faster Internet speeds, more programming choices, our next-generation X1 entertainment operating system, and more robust WiFi."); Comcast Press Release, *Time Warner Cable to Merge with Comcast Corporation to Create a World-Class Technology and Media Company* (Feb. 13, 2014) (TWC's CEO saying that Comcast has an "industry-leading platform and innovative products and services" and that TWC is "excited to be part of delivering all of the possibilities of cable's superior broadband networks to more American consumers").

[49] *Transcript of Comcast/TWC Conference Call with Reporters* at 4 (Feb. 13, 2014).

[50] *See, e.g.*, Harris Interactive, *The Harris Poll 2013 RQ Summary Report: A Survey of the U.S. General Public Using the Reputation Quotient* at 9 (2013) (showing that Comcast's reputation is "poor" and ranks 51st out of the nation's 60 most visible corporations); Temkin Customer Service Rankings (2014) (showing that Comcast ranks last among 232 companies in terms of customer satisfaction); American Customer Satisfaction Index (ACSI), *ACSI Telecommunications and Information Report 2013: First Quarter 2013 Update on U.S. Overall Customer Satisfaction* at 4, 6 (May 21, 2013) (showing that Comcast and TWC are the two lowest ranked television and Internet service providers); MSN Money and Zogby Analytics, *2013 Customer Service Hall Of Shame* (showing that, out of 115 companies, Comcast received the second most "poor" ratings in a survey of 1,500 consumers); *Consumers, Competition, and Consolidation Hearing* at 62 (CFA Research Director testifying that Comcast "is among the lowest ranked companies in terms of customer service"); *see also infra*, note 144.

[51] *See Comcast's Public Interest Statement* at 72 n.173 (citing J.D. Power Press Release, *Loss of Signal Is the Most Frequently Mentioned Performance Issue When TV Customers Experience Problems with Service Interruptions* (Sept. 26, 2013) (summarizing the results of the 2013 J.D. Power Residential Television Service Provider Satisfaction Survey, which shows that Comcast ranked sixth of eight, sixth of seven, eighth of ten, and sixth of nine in the North Central, East, South, and West, respectively) *and* J.D. Power Press Release, *Customer Satisfaction is High Among Internet Customers Who Upgrade to Premium Speed Offerings to Boost Performance* (Sept. 26, 2013) (summarizing the results of the 2013 J.D. Power Residential Internet Service Provider Satisfaction Survey showing that Comcast ranked fifth of seven, sixth of ten, and fourth of eight in the East, South, and West, respectively, and that Comcast ranked in the top half of providers only in the North Central, where it was third of eight)).

Comcast received that designation.[52] A little over a month later, the American Consumer Satisfaction Index (ACSI) announced that Comcast and TWC had the nation's most dissatisfied customers and that both companies' reputations were plummeting.[53] As ACSI's Director observed, "it's a concern whenever two poor-performing service providers combine operations [because] ACSI data consistently show that mergers in service industries usually result in lower customer satisfaction, at least in the short term."[54]

Second, if Comcast's services really were as vastly superior to TWC's as Comcast suggests, then Comcast could prove it – by entering TWC's markets and competing for customers. It is no answer for Comcast to assert that the costs of entering these new markets are prohibitive, as that contention squarely contradicts Comcast's argument that companies like Google, Verizon, and AT&T are competitive threats to Comcast precisely because they are entering new markets.[55] Put differently, it cannot be the case that it is simultaneously cost prohibitive for Comcast to expand into TWC's footprint to compete with TWC and not cost prohibitive for Google, Verizon, and AT&T to expand into Comcast's footprint to compete with Comcast – yet that is the internally inconsistent position that Comcast has taken.

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[52] *Contrast Comcast's Public Interest Statement* at 72 *with* Consumerist, *Congratulations to Comcast, You're 2014 Worst Company in America!* (Apr. 8, 2014); *see also Transcript of Bank of America Merill Lynch Global Telecom and Media Conference* at 10 (Comcast's CFO: "Our [average revenue per user] is growing nicely. And I think that's the formula we want to continue in place. And customers seem quite happy and that's sort of the biggest and most important point.").

[53] ACSI Press Release, *Subscription TV and ISPs Plummet, Cell Phone Satisfaction Climbs* (May 20, 2014) ("Cable giants Comcast and [TWC] have the most dissatisfied customers. Comcast falls 5% to 60, while [TWC] registers the biggest loss and plunges 7% to 56, its lowest score to date. . . . Customers rate Comcast (-8% to 57) and [TWC] (-14% to 54) even lower for Internet service than for their TV service. In both industries, the two providers have the weakest customer satisfaction.").

[54] *Id.*

[55] *Contrast* James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, New York Times (Mar. 28, 2014) (reporting that Comcast's CEO "flatly ruled out that possibility [of entering the TWC-dominated New York City market], given the prohibitive costs of replicating Time Warner Cable's infrastructure") *with Comcast's Public Interest Statement* at 50 (arguing that Google is a competitive threat to Comcast because Google "is now deploying a competitive fiber network in several areas of the country") *and id.* at 49-50 (identifying Verizon as a competitor because Verizon is bringing fiber-based services into new markets) *and id.* at 48-49 (stating that AT&T plans to expand its U-Verse offering to millions of new homes) *and id.* at 88 (stating that AT&T and CenturyLink have "intensified efforts to expand fiber").

Third, even if one were to assume for the sake of argument that (1) Comcast's acquisition of TWC would result in a service upgrade for TWC customers and (2) the proposed acquisition is the only way that Comcast can expand into TWC's footprint, it would remain the case that the resulting public interest benefit would be insufficient to outweigh the many and substantial harms arising from this deal. This is so because TWC readily acknowledges that it already "plans to invest billions of dollars over the next three years to upgrade [its] network" on its own,[56] and TWC's executives are on record stating unequivocally that these upgrades are going forward as planned, notwithstanding the proposed acquisition.[57]

In fact, shortly after TWC rejected a takeover bid by Charter, TWC touted these plans to Wall Street analysts, explaining that there was no need for TWC to combine with Charter because TWC already was undergoing a "reinvention" that involved "ultra-fast speeds coupled with even better WiFi both inside and outside the home" and that TWC's "customers are going to be blown away" by the new service.[58] Thus, Comcast is not promising to bring to TWC customers a service upgrade that would not happen otherwise or for which an acquisition is necessary; rather, Comcast merely is offering to "shorten the innovation timeline" that TWC already has in place.[59] Put differently, the proposed acquisition will not result in "public interest benefits that could not be achieved if there were no merger."[60]

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[56] *Examining the Comcast/TWC Merger Hearing*, Hearing Webcast at 52:02 (testimony of TWC's CFO); *see also id.*, Responses to QFRs for TWC's CFO from Sen. Klobuchar at 1 ("TWC Maxx initiative promises to deliver [TWC] subscribers faster Internet speeds, more community WiFi hotspots, improved video service with more content offerings, and a differentiated, exceptional customer service experience."); *id.*, Responses to QFRs for TWC's CFO from Sen. Franken at 3 ("TWC is rolling out a number of initiatives to improve the customer service it offers to subscribers[.]"); *Comcast's Public Interest Statement* at 2 (acknowledging that "TWC has upgraded its entire network to DOCSIS 3.0 and has plans to improve speeds and further digitize its network"); *id.* at 28 (noting TWC's announced plans to upgrade its networks).
[57] *Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for TWC's CFO from Sen. Franken at 4.
[58] *Transcript of TWC Q4 2013 Earnings Call* at 5 (Jan. 30, 2014).
[59] *Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for TWC's CFO from Sen. Klobuchar at 1; *see also Comcast's Public Interest Statement* at 2 ("This transaction will accelerate network upgrades in the TWC markets and produce a more advanced broadband network.").
[60] *Order in re: MediaOne Group-AT&T*, 15 FCC Rcd. 9816, ¶ 154 (2000).

C.

Comcast says that it faces "stiff competition" in a "dynamic" and "highly competitive marketplace"[61] and that "[a]ll of this competition is great for American consumers."[62] But American consumers know better. In a recent survey, more than 70% of respondents said that "cable companies are predatory in their practices and take advantage of consumers' lack of choice" and more than half said that they would leave their current cable company if only they had a viable option to do so.[63] The proposed acquisition will only make matters worse. One commentator summarized consumers' sentiments well, writing: "There is absolutely no way that Comcast can argue it would have meaningful competition in wired broadband or cable after the merger. It's impossible."[64]

That has not stopped Comcast from trying. Comcast says that it faces competitive pressure from Verizon FiOS[65] – but FiOS has minimal overlap with Comcast and TWC,[66] and Verizon's leadership has announced that it will not expand its footprint any time soon.[67]

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[61] *Comcast's Public Interest Statement* at 20; *see also id.* at 42 (stating that "[t]he broadband market is competitive today, and this transaction will make it more so."); *id.* at 140 ("[I]t bears emphasis that Comcast and TWC also face robust competition in the local markets for video, Internet, and voice that they respectively serve.").

[62] *Examining the Comcast/TWC Merger Hearing*, Written Joint Testimony of Comcast's EVP and TWC's CFO at 1.

[63] *See* Brian Fung, *A Soup of Misery: Over Half of People Say They'd Abandon Their Cable Company, if Only They Could*, Washington Post (Jun. 6, 2014); *see also* Jonnelle Marte, *Ten Things Cable-TV Companies Won't Say*, Wall Street Journal (Dec. 2, 2012) ("[A] 2011 survey by the Federal Communications Commission showed that 61.5% of customers still only had one main choice of cable provider. Mergers between cable companies and partnerships between providers have hampered competition over the years, experts say.").

[64] Adi Robertson, *Comcast Has Very Bad Reasons for Wanting to Buy Time Warner Cable*, The Verge (Apr. 9, 2014).

[65] *See, e.g., Comcast's Public Interest Statement* at 49 (stating that Verizon FiOS presents "substantial and well-known competition").

[66] *See Captive Audience* at 157 ("In most areas served by Comcast and Time Warner [Cable], Verizon FiOS – the only real competition the two face for wired Internet access – is not present. (Comcast and FiOS overlap in just 15 percent of Comcast's physical market; Time Warner [Cable] and FiOS overlap in 11 percent of Time Warner [Cable's].)").

[67] *See Transcript of Deutsche Bank Media, Internet, and Telecom Conference* at 12 (March 10, 2014) (Verizon's CFO, stating: "But growth will slow and the key for us is I'm not going to build beyond the [local franchising authorities] that we have today. We have to generate more cash within the wireline business. And then once we do that when I feel that FiOS has finally returned its cost of capital, then we can look at expansion. But at this point I think we are happy with what we have."); *see also* Chris Morran, *Don't Count on Verizon FiOS Coming to Your Town Anytime Soon*, Consumerist (Mar. 12, 2014) ("[I]f your local regulators haven't made a deal with Verizon for

Comcast says that it faces competitive pressure from AT&T U-Verse[68] – but U-Verse also has minimal overlap with Comcast and TWC,[69] and AT&T itself has admitted that U-Verse's video component is "uneconomic and not fully competitive with cable providers."[70] Comcast says that it faces competitive pressure from Google Fiber[71] – but Google Fiber currently exists in just three markets, a tiny sliver of Comcast's and TWC's footprints.[72] Comcast says that it faces competitive pressure from wireless carriers[73] – but data caps and slower download speeds make mobile broadband an imperfect substitute for Comcast's offerings,[74] something that TWC's own executives publicly have acknowledged.[75] Comcast says that it faces competitive pressure from satellite companies, like Dish and DirecTV[76] – but those companies rarely offer broadband Internet service to complement their video distribution offerings.[77] Comcast says that it faces

FiOS by this point, then you're probably out of luck and stuck with your current, most likely monopolistic cable company for broadband service.").

[68] *See, e.g.*, *Comcast's Public Interest Statement* at 48 ("AT&T's DSL and FTTN U-verse services significantly overlap both Comcast and TWC – with U-verse currently provisioned at speeds up to 45 Mbps downstream – and AT&T has affirmed its plans to continue to enhance and expand these services.").

[69] *See* Kate Cox, *Comcast Officially Files for TWC Merger, Claims Broadband Competition is Fine Because You Have a Smartphone*, Consumerist (Apr. 8, 2014) (providing maps showing the minimal overlap between U-Verse and both Comcast and TWC).

[70] *See AT&T-DirecTV Application and Public Interest Statement*, Executive Summary at 1 ("AT&T has world-class wireline and wireless broadband facilities, but its video service, which is available in only a minority of customer locations within AT&T's 22-state incumbent local exchange carrier ('ILEC') region, is uneconomic and not fully competitive with cable providers.").

[71] *See, e.g.*, *Comcast's Public Interest Statement* at 50-51 (stating that Google Fiber is a "new and ambitious entrant").

[72] *See* Fiber.Google.com/Cities (showing that Google Fiber exists in Provo, Austin, and Kansas City).

[73] *See, e.g.*, *Comcast's Public Interest Statement* at 51 ("[W]ireless is already a meaningful broadband alternative. And it will become an increasingly effective competitor in the near future[.]").

[74] *See, e.g.*, Susan Crawford, *The New Digital Divide*, New York Times (Dec. 3, 2011) (explaining why mobile Internet is not a substitute for wired broadband); Letter from Netflix's Vice President for Global Public Policy to Sen. Franken at 3 (Apr. 23, 2014) (hereinafter Netflix Letter) ("[C]onsumers do not view mobile broadband as a wireline broadband substitute for applications like streaming video because of low data caps and reliability issues.").

[75] *See* Anton Troianovski, *Cord-Cutters Lop Off Internet Service More than TV*, Wall Street Journal (May 29, 2013) (quoting TWC's Senior Vice President for Corporate Development, as saying: "The way we think about it is, wire-line and wireless networks are going to coexist. It would be hard for somebody to rationalize getting rid of their home connection and moving all of that traffic to a wireless rate plan.").

[76] *See Comcast's Public Interest Statement* at 20, 24, 67 (citing competition from satellite companies).

[77] *See* Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Cable Merger Unapprovable*, Consumer Federation of America, at 7 (Apr. 8, 2014) (hereinafter *Buyer and Bottleneck Market Power*) ("Satellite has never been able to discipline cable pricing power and is at a severe disadvantage vis-a-vis cable because of the emerging dominance of bundles."); *see also* John Quain, *What's Wrong with the Comcast-Time Warner Deal? A Lot*, Fox News (Mar. 12, 2014) ("Bills are high, bundled services are annoying, and when the cable

competitive pressure from companies like Apple, Microsoft, Amazon, Google, and Facebook[78] – but none of those companies offers broadband Internet access, and, in fact, each depends on Comcast's vast distribution network to reach its own consumers.[79]

If the relevant markets were as saturated with competition as Comcast makes them out to be, consumers would not tolerate monopolistic behavior: they instead would exercise their other options, putting pressure on Comcast to lower prices and improve service.[80] But the reality of the situation is that Comcast is able to maintain its market position because it operates in areas that lack sufficient competition and consumer choice. The issue is not just that Comcast has a presence in so many markets,[81] it is that Comcast's presence in many of those markets is dominant. Comcast alone already controls at least 40% of television distribution in 7 of nation's 10 biggest markets and in 13 of the top 20, and it controls over 60% in some areas.[82] If it is permitted to acquire TWC, Comcast would hold more than half of the television distribution market in even more cities and towns across the country.[83] With respect to broadband Internet

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goes out, customers have virtually no alternatives. Satellite TV isn't practical in many urban environments, and it can't adequately replace broadband Internet service.").

[78] *See Comcast's Public Interest Statement* at 21-22.

[79] *See, e.g.*, CCIA Letter at 2 ("[T]he merger would enhance Comcast/Time Warner Cable's bottleneck market power over last-mile Internet access, thus allowing it to more easily discriminate against online competitors that require transit over the merged company's network to access Comcast/Time Warner Cable's customers.").

[80] *See* Susan Crawford, *The New Digital Divide*, New York Times (Dec. 3, 2011) ("Lacking competition from other cable companies or alternate delivery technologies, each of the country's large cable distributors has the ability to raise prices in its region for high-speed Internet services."); *cf.* David Talbot, *Google Fiber's Ripple Effect*, MIT Technology Review (Apr. 26, 2013) (explaining how Google Fiber's entry into Kansas City forced broadband providers to offer dramatically improved service).

[81] *See supra*, note 30.

[82] *See Comcast/NBCU Order* at n. 275; *see also id.* at ¶ 113 ("[Comcast] holds a 40 to 65 percent share of the pay television subscriber market in major business centers within the top 15 DMAs."); *see also* Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, Free Press at 6 (January 2010) ("In a market worth billions annually, a cable operator such as Comcast, Time Warner Cable or Cox is usually the lone local cable operator, having long ago received government-backed monopolies and guaranteed returns.").

[83] This could be the case in places like Philadelphia, San Francisco, Boston, Seattle, Denver, Portland, OR, Cincinnati, Harrisburg, Jacksonville, Albany, Fort Myers, Dayton, Honolulu, Rochester, Portland, ME, and Syracuse. *See Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for TWC's CFO from Sen. Franken at 7 (listing DMAs in which TWC has greater than 50% of the television distribution market)); *id.*, Responses to QFRs for Comcast's EVP from Sen. Franken at 3-4 (listing DMAs in which Comcast has greater than 50% of the television distribution market).

access, data suggest that about a third of Americans have no choice for high speed home broadband service – there is just one game in town – and another 37% of households can choose between just two ISPs.[84] The FCC itself has noted "the limited choice of broadband providers that many Americans have."[85] And leaders of the nation's technology sector have observed "acute competitive problems" in the consumer broadband market.[86] The proposed acquisition will not make the situation better.

Tellingly, one of Comcast's primary and most oft-repeated arguments for the proposed acquisition is simply that the deal will not make things any worse, either – because Comcast and TWC do not compete against each other in any market in the country.[87] As one commentator put it, Comcast essentially argues that the proposed acquisition "would take cable competition from

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[84] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012* at 9 (Dec. 2013); see *also* Editorial, *Cable Consolidation In America: Turn it Off*, The Economist (March 15, 2014) ("More than three-quarters of households have no choice other than their local cable monopoly for high-speed, high-capacity internet."); Grant Brunner, *Woe is ISP: 30% of Americans Can't Choose their Service Provider*, ExtremeTech (Mar. 14, 2014) ("You can pick any ISP you want... as long as it's Comcast. In the United States, many of us have no choice whatsoever in the way of broadband ISPs."). Data showing Comcast's and TWC's share of broadband subscriptions in local markets is not publicly available, and the corporations have not provided it in response to Congressional inquiries. *See Examining the Comcast/TWC Merger Hearing*, Responses to QFRs for TWC's CFO from Sen. Franken at 6-7 (referencing National Broadband Map data, which show the number of providers in various markets, but not each provider's market share); *id.*, Responses to QFRs for Comcast's EVP from Sen. Franken at 8-10 (referencing same). The FCC should request and take into account such data when evaluating the proposed acquisition.

[85] *Comcast/NBCU Order* at ¶ 102.

[86] CCIA Letter at 2; *see also* Netflix Letter at 3 ("Few Americans have a meaningful choice in broadband Internet access service provider. . . . [M]ost consumers feel that they have to take whatever their ISP offers.")

[87] *See, e.g.*, *Transcript of Comcast/TWC Conference Call with Reporters* at 3 (Feb. 13, 2014) (Comcast's EVP: "[T]he proposed transaction will not reduce competition in any relevant market. Let's start with the important reality that Comcast and Time Warner Cable do not compete in any market in the country. There is absolutely no competitive overlap between the two companies. None."); *Comcast's Public Interest Statement* at 4 ("After the transaction, customers in the Comcast and TWC markets will have as many providers to choose from – for Internet, video, or voice – as they have today. Said another way, there is no change in local market share – the only geographical market of any relevance here – in *any* market Comcast or TWC serves, because Comcast and TWC do not compete today, and Comcast will simply replace TWC as the provider in the latter's service areas." (emphasis in original)); *id.* at 138 ("Because Comcast and TWC serve almost entirely distinct geographic areas, they do not compete for any of these services and the transaction will not result in any reduction in competition or consumer choice for broadband, video, or voice providers – nor will it increase Comcast's market share in any geographic product market."); *id.* ("Indeed, the absence of any reduction in competition should end the inquiry into any potentially anticompetitive effects in these consumer markets resulting from the horizontal aspects of the transaction."); *Examining the Comcast/TWC Merger Hearing*, Written Joint Testimony of Comcast's EVP and TWC's CFO ("This simple but critically important fact has been lost on many who would criticize our transaction, but it cannot be ignored – competition simply will not be reduced.").

zero to double zero and thus there isn't really much to worry about."[88] This is a peculiar argument, and it undercuts Comcast's own assessment of the competitive landscape. That the biggest and second biggest cable companies in America do not compete with each other is a compelling indictment of the status quo, not an assurance about the future. If this argument tells the FCC anything at all, it is that competition in the relevant markets is sorely lacking because the cable companies have divided the nation into their own respective fiefdoms.[89] And to say, in effect, that "things could not possibly get any worse" does nothing to show that Comcast's proposed acquisition of TWC affirmatively would serve the public interest, which is what the law requires.[90]

D.

In 2010, after it announced its plans to acquire NBC-Universal, Comcast told Congress not to be concerned about that deal because, among other things, "[w]e are not getting any larger in cable distribution here[.]"[91] Now, just a few years later, Comcast is trying to do exactly that –

[88] Matthew Yglesias, *The Real Problem with Supersizing Comcast*, Slate (Feb. 19, 2014); *see also* Andrew Couts, *Why You're Right to Fear the Comcast-Time Warner Cable Mega-Merger from Hell*, Digital Trends (Feb. 13, 2014) ("So the merger would not hurt competition because there already is no competition. In other words, the Comcast-TWC deal moves the Internet service industry in exactly the wrong direction." (emphasis omitted)); John Quain, *What's Wrong with the Comcast-Time Warner Deal? A Lot*, Fox News (Mar. 12, 2014) ("[S]ome have argued that two monopolies don't make a wrong. Sure, they say, Comcast and Time Warner [Cable] are veritable monopolies within their markets, but they are in different markets, so a merger would not affect the competitive landscape. Nothing could be further from the truth."); CCIA Letter at 4 ("Comcast and Time Warner Cable argue that because they do not compete directly for cable subscribers, then this merger fails to raise competition concerns. However, not only is this argument lacking, it fails the common sense test.").

[89] *See* Editorial, *Cable Consolidation In America: Turn it Off*, The Economist (March 15, 2014) ("Comcast will argue that its share of customers in any individual market is not increasing [because of the acquisition]. That is true only because cable companies decided years ago not to compete head-to-head, and divided the country among themselves."); Susan Crawford, *Cable Purchase Sounds Scary Because it Is*, Pittsburgh Post-Gazette (Feb. 18, 2014) ("Cohen sounded particularly bullish on this point, pointing out that these two companies don't compete in a single ZIP code in America. That's because they long ago clustered their operations and divided markets: Where consolidation is possible, competition is impossible."); *Rolling Up Video Distribution* at 6 ("[C]able TV providers and broadband ISPs have a history of dividing up markets and solidifying their dominance in market areas."); *Buyer and Bottleneck Market Power* at 1 ("Far from excusing the merger from antitrust and Communications Act scrutiny, however, the fact that Comcast and Time Warner [Cable] do not compete head-to-head merely reminds us of the sad state of horizontal competition in the video distribution markets that they dominate in their local areas – broadband Internet access and multichannel video.").

[90] *See supra*, note 36.

[91] *The Comcast/NBC Universal Merger Hearing* at 22 (testimony of Comcast's CEO).

get larger in cable distribution. It does so even though the FCC already has recognized that Comcast's huge distribution footprint, combined with its vertically integrated nature, gives it both the power and the incentive to act as a gatekeeper over the flow of information on television.[92] Allowing Comcast to get even bigger only exacerbates this problem. As one consumer advocate has explained: "At a time when cable companies already serve as gatekeepers in the delivery of a number of communications services, this merger represents an unprecedented move to consolidate market power even further. A Comcast-Time Warner Cable merger will mean fewer competitive incentives to invest in network infrastructure, and will likely lead to higher prices and less innovation."[93] Consumer advocates from across the country agree.[94]

Vertical leverage can be exercised – and abused – in many ways. If a consumer is watching television, there is a good chance that he is watching something that Comcast owns.[95] When Comcast acquired NBC-Universal, it became not just a massive television distribution company but also the self-proclaimed owner of "one of the world's leading media, news, and entertainment companies" – a company that owns NBC, Telemundo, Bravo, CNBC, MSNBC, Golf Channel, USA Network, NBC Sports Network, several regional sports networks (RSNs),

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[92] *See, e.g.*, *infra*, notes 98, 100-102, 110-111.

[93] Sam Gustin, *Massive Cable Deal Means Your Bill May Jump*, Time Magazine (Feb. 14, 2014) (quoting Senior Policy Counsel for the Open Technology Institute at the New American Foundation).

[94] *See, e.g.*, Letter from Consumers Union, Free Press, Public Knowledge, Media Literacy Project, National Alliance for Media Arts and Culture, et. al. to FCC Chairman at 1 (Apr. 8, 2014) ("The proposed Comcast – Time Warner Cable merger would give one company enormous power over our nation's media and communications infrastructure. This massive consolidation would position Comcast as our communications gatekeeper, giving it the power to dictate the future of numerous industries across the Internet, television and telecommunications landscape.").

[95] *See* Cecilia Kang, *A New Kind of Company, A New Challenge for Feds*, Washington Post (Nov. 27, 2009) (citing research indicating that NBC-Universal controls about one-in-five viewing hours on television); *Transcript of Goldman Sachs Communacopia Conference* at 1 (Sept. 24, 2013) (Comcast's CFO stating that "at NBC, with regard to both the broadcast and the cable, we represent about 20% of the market").

and additional networks.[96] When measured by revenues, Comcast is the fourth largest owner of national programming, behind Disney/ABC, Time Warner, and Viacom.[97]

Comcast's extensive content portfolio, when coupled with its vast television distribution business, raises all kinds of anticompetitive problems. For one thing, the FCC has made it clear that Comcast has the power and the incentive to use its programming to disadvantage rival television distribution companies,[98] a concern that has been shared by consumer advocates and small businesses.[99] Comcast could benefit from a number of exclusionary strategies at its disposal – outright foreclosure, meaning that Comcast could simply block rival distribution companies from accessing NBC-Universal programming; [100] excessive bundling, meaning that Comcast could deny rivals access to NBC-Universal programming unless they also buy content that they otherwise would not buy; [101] or supracompetitive pricing, meaning that Comcast could

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[96] *See Comcast's Public Interest Statement* at 12-13; *see also Transcript of Bank of America Merrill Lynch Media, Communications, and Entertainment Conference* at 2 ("We have a very broad and impressive group of cable channels, USA the number one channel, measured in terms of ratings, Sci-Fi, Bravo, E!, MSNBC, CNBC, NBC Sports, a lot of regional sports networks, very, very strong portfolio of cable channels.")

[97] *See Comcast's Public Interest Statement* at 152.

[98] *See, e.g., Comcast/NBC Universal Order* at ¶ 44 ("[W]e conclude that post-transaction Comcast will have the ability as well as the incentive to employ program access strategies to exclude all its [multichannel video programming distribution] rivals in every franchise area market, by raising prices in all markets or withholding programming in at least some."); *id.* at ¶ 36 ("[W]e agree with commenters who assert that this transaction gives Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors.").

[99] *See e.g.*, WOW! CEO, et. al. Letter to FCC Chairman at 1 (Feb. 25, 2014) (expressing concern that "consumers and the competitive pay-TV market overall stand to be harmed" by "the incentive and ability of cable-affiliated programmers to charge our companies discriminatory fees"); *Comcast/NBC Universal Order* at ¶ 31 (summarizing concerns); *Consumers, Competition, and Consolidation Hearing* at 4 (CFA Research Director testifying that Comcast can use its content portfolio "as an anticompetitive tool" to "extract[] higher prices from competitors to induce subscribers to switch to Comcast").

[100] *Comcast/NBCU Order* at ¶ 29 ("The proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [new company] would come to control or raise programming costs to its video distribution rivals. These exclusionary strategies could raise distribution competitors' costs or diminish the quality of the content available to them.").

[101] *See id.* at ¶ 57 ("We are particularly concerned about the anticompetitive possibilities arising from bundling of marquee programming."); *Consumers, Competition, and Consolidation Hearing* at 65 (CFA's Research Director testifying that "Comcast will have the opportunity and incentive to charge its competitors more for NBC programs and force competitors to pay for less desirable Comcast cable channels in order to get NBC programming – those added costs will mean bigger bills for cable subscribers."); *Cable Cabal* at 21 ("It's clear that the cable

charge prices that a competitive market would not bear,[102] just to name a few. These practices artificially weaken competition among distributors, resulting in higher prices and fewer choices for consumers.[103]

The proposed acquisition would only make things worse.[104] First, expanding Comcast's distribution network into new markets enhances Comcast's incentive to engage in exclusionary strategies because it increases the number of markets in which Comcast's distribution business would benefit from such anticompetitive behavior. Today, it makes relatively little difference to Comcast whether a customer in a non-Comcast market chooses TWC or a competitor. But that changes if Comcast replaces TWC in that market. At that point, Comcast has a greater stake in the game, and it would profit by forcing consumers to choose: subscribe to Comcast and receive NBC-Universal programming or subscribe to a local competitor and go without NBC-Universal programming (or pay more for it, as artificially high prices are passed along to consumers). In other words, every market in which Comcast replaces TWC is a new market in which Comcast can profit from using its content portfolio to divert customers away from rival distribution companies – all at significant cost to consumers.

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programming business is a good one to be in, particularly for those programmers that can leverage their ownership of the higher-demanded channels to force multichannel distributors to purchase much less desired channels.").

[102] *See Comcast/NBCU Order* at ¶ 38 ("Comcast-NBCU could raise the price of programming to Comcast at the same time it raises prices to Comcast's rivals, thereby shifting to Comcast-NBCU some of the profits that Comcast earns by exercising market power in video distribution."); *The Comcast/NBCUniversal Merger Hearing* (Sen. Kohl expressing concerns that "Comcast will be able to raise the programming costs to all of its cable and satellite rivals."). It is of little comfort that Comcast itself is subject to the prices it sets for NBC-Universal programming because Comcast can pay itself by taking money from one pocket (i.e., its distribution business) and putting it in the other (i.e., its content business)). *See Distribution Market Hearing* at 73 (Media Access Project CEO: "As long as Comcast overcharges itself, it can overcharge everyone else.").

[103] *See supra*, notes 98, 100-101; *see also Consumers, Competition, and Consolidation Hearing* at 76, 79 (WOW! CEO testifying that "[c]onsumers are harmed by the pass-through of some of these inflated costs" because distribution companies "will have little choice but to either raise prices for its customers far above what would occur in competitive markets or limit the content it acquires from other suppliers, including smaller, independent providers.").

[104] *See, e.g., Examining the Comcast/TWC Merger Hearing,* Written Testimony of Public Knowledge's CEO at 2 (explaining that the proposed acquisition gives Comcast even more power to "artificially raise the prices of Comcast-owned programming to Comcast rivals hampering their ability to compete and raising prices to consumers.").

Second, Comcast not only is seeking to acquire TWC's distribution footprint, it also seeks to acquire TWC's programming interests, which include several regional sports networks (RSNs) and some national content as well.[105] More programming means more leverage for Comcast, which could withhold these additional resources from rival distributors, putting them at an unfair disadvantage – and weakening competition. This concern is especially pronounced here because the proposed acquisition involves the transfer of sports programming rights, for which there are few if any substitutes.[106]

Third, the proposed acquisition would remove from the market a major television distribution company that currently acts as a check on Comcast's behavior as a content owner. Indeed, when Comcast acquired NBC-Universal, it assured Congress that Comcast would not be able to engage in anticompetitive misbehavior with respect to NBC-Universal programming because "robust distributors" operating in a "defined marketplace" would prevent Comcast from doing so, as those distributors could bargain with Comcast or complain to the FCC.[107] Comcast specifically cited TWC among the "robust distributors" that prevented Comcast from artificially raising content costs.[108] Now, just a few years later, Comcast returns to the FCC, seeking to remove TWC from the market. If this acquisition is approved, Comcast never again will have to

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[105] *See Comcast's Public Interest Statement* at 16 (describing TWC's cable programming); *Examining the Comcast-Time Warner Cable Merger Hearing*, Written Testimony of Back9Network's CEO at 8 (describing TWC's content portfolio).

[106] *See Examining the Comcast-Time Warner Cable Merger Hearing*, Hearing Webcast at 2:09:48 (Sen. Blumenthal explaining: "Combined, the merged entity would own the rights to a very formidable amount of local sports programming in the largest media markets in the country. These are unique products of tremendous value. Access to them is crucial to a pay-TV provider's ability to remain competitive. And the cost of sports programming continues to rise with no end in sight."); Chris Morran, *Regional Sports Channels Highlight Problem with Comcast/TWC Merger*, Consumerist (Apr. 29, 2014) ("A bigger Comcast with more money behind it will only continue to leverage exclusive regional sports deals in order to keep subscribers from cutting the cord and to convince sports fans to stay away from satellite.").

[107] *The Comcast/NBCUniversal Merger Hearing* at 17 ([Sen. Kohl:] "Won't Comcast have the incentive to raise its [competitors'] costs by raising the cost of NBC programming if this merger is completed?" [Comcast's CEO:] . . . So there are robust distributors – DirecTV, Dish Network, Time Warner [Cable], Ms. Abdoulah's company – all negotiating with other programmers. There is a very defined marketplace and a third party to adjudicate whether somebody is playing games[.]").

[108] *Id.* at 17 (although Comcast's CEO referenced "Time Warner," which is not a distributor, he clearly meant "Time Warner Cable," which is).

sit across the table from TWC, currently the nation's second biggest cable company, to negotiate the terms of NBC-Universal carriage on TWC's platforms. Comcast cannot have it both ways: it cannot say that competitive pressures from distributors like TWC are a reason to approve its acquisition of NBC-Universal and then turn around a few years later and say that the complete absence of competition with TWC is a reason to approve this deal.

Just as Comcast can use its extensive content portfolio to weaken competition by disadvantaging rival television distribution companies, it also can use its clout as the nation's largest distributor to disadvantage competing content providers.[109] When Comcast acquired NBC-Universal, the FCC warned that "Comcast's large subscriber base" gave it leverage over content producers.[110] The problem was not just that Comcast controlled access to so many viewers, it was that Comcast also had an incentive to steer those viewers toward Comcast's own programming,[111] which it treats "like siblings," and away from other companies' programming, which it treats like "strangers."[112]

Comcast's proposed acquisition of TWC exacerbates this problem by making "Comcast's large subscriber base" even larger. Today, content producers depend on Comcast for access to

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[109] *See, e.g.*, *Distribution Market Hearing* at 76 (Media Access Project's CEO: "Comcast [has] every incentive to favor its own programming over independently produced cable channels. This can include refusal to carry competitors, paying them far less for carriage or placing them on a lesser watch program tier.").

[110] *Comcast/NBC Universal Order* at ¶ 116 ("Comcast's large subscriber base potentially allows it to limit access to customers for any network it wishes to disadvantage by either denying carriage or, with a similar but lesser competitive effect, placing the network in a less penetrated tier or on a less advantageous channel number (making it more difficult for subscribers to find the programming)."); *see also id.* at ¶ 102 ("Comcast's ability to harm potential competition with its video distribution business will be enhanced by this transaction.").

[111] *Id.* at ¶ 119 ("By foreclosing or disadvantaging rival programming networks, Comcast can increase subscribership or advertising revenues for its own programming content."); *id.* at ¶ 110 ("We agree that the vertical integration of Comcast's distribution network with NBCU's programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming."); *see also Transcript of Citi Internet Media and Telecommunications Conference* at 8 (Comcast's CEO explaining that some Comcast content performs better in Comcast's distribution markets "because of our working together").

[112] *Order in re: Tennis Channel v. Comcast*, 27 FCC Rcd. 8508, ¶ 46 (Jul. 24, 2012) (citing testimony from Comcast executives who conceded that Comcast's affiliated programming gets special treatment and is "treated like siblings as opposed to like strangers"); *see also Transcript of Citi Internet Media and Telecommunications Conference* at 8 (Jan. 7, 2014) (Comcast's CEO explaining that hundreds of executives have moved back-and-forth between Comcast's content and distribution businesses).

about 20 million television subscribers; if this deal is approved, programmers will be at Comcast's mercy for about 30 million subscribers, spanning the nation's biggest markets.[113] As the American Antitrust Institute has explained, "All told, the combination would grant Comcast-TWC a vast measure of economic control over whether, what, how and when important news, opinions, sports, and entertainment video programming is delivered to tens of millions of Americans."[114]

Comcast dismisses these concerns, telling content producers, "you guys can be calm."[115] That is easier said than done, given the stakes for unaffiliated and independent content producers. As one independent programmer explained to Congress, "a programmer that is shut out of distribution from all four of the largest distributors [which includes Comcast and TWC] will struggle to compete for enough advertising and audience to succeed," meaning that "Comcast's affiliated networks will have successfully foreclosed competition for audience, programming[,] and advertising dollars, and consumers will have fewer choices available to them."[116] Another testified that the proposed acquisition will strengthen Comcast's ability to quash independent content, something that Comcast has an incentive to do when that content competes against Comcast's own for ratings.[117] And Comcast can exercise its market power in more subtle ways,

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[113] *See supra*, notes 1, 30.
[114] *Rolling Up Video Distribution* at 2.
[115] *Transcript of Comcast/TWC Conference Call with Reporters* at 7-8 (Feb. 13, 2014) (Comcast's EVP, saying: "So, I, I mean I can't speak for the programmers, but for the programmers I have an opportunity to speak with, I'm going to make the argument to them, you guys can be calm. This is not going to have a dramatic impact on our ability to negotiate with you.").
[116] *Examining the Comcast-Time Warner Cable Merger Hearing*, Written Testimony of Back9Network's CEO at 2, 12; *see also id.*, Hearing Webcast at 59:24 (Back9Network's CEO: "But when it comes to getting on the air, our story is very similar to that of other truly independent networks. We are up against a distribution system that stifles innovation and consumer choice. It is dominated by a few large players. We are concerned that this merger may make a bad situation even worse.").
[117] House Judiciary Committee Hearing, *Competition in the Video and Broadband Markets: the Proposed Merger of Comcast and Time Warner Cable*, Written Testimony of RFD-TV's Founder at 2 (May 8, 2014) (hereinafter *Competition in the Video and Broadband Markets Hearing*) ("Sadly, the choice and diversity in rural independent programming that RFD-TV offers is threatened by ongoing consolidation and vertical integration in the cable industry. Comcast is a vertically integrated powerhouse with a track record of favoring affiliated programming

too, as it has with "most favored nations" clauses in carriage agreements, which stifle innovation and competition by preventing content producers from experimenting with new terms or platforms unless they make them available to Comcast.[118]

That Comcast would use its vertical leverage to harm competition in television content and distribution is not a theoretical possibility. Bloomberg's dispute with Comcast over the latter's carriage of Bloomberg TV is illustrative. When Comcast acquired NBC-Universal, it took ownership of certain news and business news networks, including MSNBC and CNBC.[119] Owners of competing, non-affiliated networks, like Bloomberg TV, were concerned that Comcast would use its distribution platform to give its newly acquired content an unfair advantage by, for example, keeping Comcast's networks in a favorable position in the Comcast line-up while relegating competitors to distant channels that viewers were less likely to find.[120] Therefore, as a condition of Comcast's acquisition of NBC-Universal, the FCC required Comcast to place all news and business news channels in the same "neighborhood" on Comcast's line-up.[121] Comcast refused to abide by the condition, resulting in a protracted legal battle that ended with not one, and not two, but three FCC orders requiring Comcast to place Bloomberg TV in

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channels. When an independent programmer becomes stronger and more competitive, its ratings increase and Comcast's incentives to foreclose that competition increase as well. Comcast has the strength to foreclose such competition now, and will be in an even stronger position to do so following its merger with Time Warner Cable.").

[118] *See e.g.*, Shalini Ramachandran, *'Favored Nations' Fight for Online Digital Rights*, Wall Street Journal (Jun. 14, 2012) ("[T]he clauses are in some cases limiting how and where channel owners can make their programming available online, industry executives say."); Jodie Griffin, *Why the FCC Should Cut the Cord on the Comcast/Time Warner Cable Deal*, Public Knowledge (Feb. 14, 2014) ("Comcast can also use its own content holdings or its leverage over other programmers to restrict online video providers' access to content. Comcast could do this . . . through 'most favored nation' clauses that give Comcast the right to offer content online if any other distributor gets that right.").

[119] *Comcast/NBCU Order at* ¶ 1.

[120] *Id.* at ¶ 112.

[121] *Id.* at ¶ 122 ("[W]e require that if Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.").

the same neighborhood as CNBC and MSNBC, consistent with Comcast's legal obligations.[122] Remarkably, after all of that, Comcast has suggested to Congress that the FCC did not even "[find] it necessary to look at" Comcast's compliance with the neighborhooding condition.[123]

The Comcast-Bloomberg dispute does not appear to be an isolated incident. Although many television distributors and content owners understandably are reluctant to come forward with complaints against Comcast,[124] the FCC has received reports of Comcast "engag[ing] in foreclosure strategies in the past when it had even less ability and incentive to do so."[125] The Founder and Chairman of RFD-TV testified that Comcast dropped his company's programming in favor of Comcast-affiliated content shortly after Comcast acquired NBC-Universal.[126] The CEO of Back9Network said that its program carriage negotiations with TWC broke down after the proposed acquisition was announced, apparently because Back9Network competes with the Golf Channel, which Comcast owns.[127] Tennis Channel engaged in a protracted legal battle with Comcast over Comcast's treatment of programming that competed with Versus and the Golf

[122] *Order in re: Bloomberg v. Comcast*, 27 FCC Rcd 4891 (May 2, 2012) (first order); *Order in re: Bloomberg v. Comcast*, 27 FCC Rcd 9488 (Aug. 14, 2012) (second order); *Order in re: Bloomberg v. Comcast*, 28 FCC Rcd. 14346, ¶ 1 (Sept. 26, 2013) ("[W]e affirm Media Bureau orders that direct Comcast to place Bloomberg Television in news neighborhoods, consistent with a condition of the Comcast-NBCU Order.").

[123] *See Examining the Comcast-Time Warner Cable Merger Hearing*, Written Testimony of Comcast's EVP at 34 n.84 ("Out of these [conditions], the FCC has only found it necessary to look at one issue. In 2012, the FCC investigated Comcast's compliance with the standalone broadband condition[.]"); *id.*, Hearing Webcast at 2:53:30 ([Sen. Franken:] "Okay. But let me ask you: Is this true, then, that out of these conditions, the FCC has only found it necessary to look at one issue? Is that still true?" [Comcast's EVP:] "It is. What is true is that we were – we only had a compliance issue with one condition. That Bloomberg issue was not a compliance issue. It was an interpretive issue."); *see also id.* at 2:53:43 (Comcast's EVP testifying, "We did not know what a news neighborhood was.").

[124] *See, e.g., Examining the Comcast-Time Warner Cable Merger Hearing*, Hearing Webcast at 1:01:54 (RFD-TV President: "The choice to testify today was very difficult because we want nothing more than to be in business with [Comcast and TWC]."); *id.*, Written Testimony of Public Knowledge's CEO at 5 ("Any innovative new technology provider that relies on reliable, high speed Internet access would be wary of doing anything that could expose it to retaliation by Comcast.").

[125] *See, e.g., Comcast/NBCU Order* at ¶ 30.

[126] *Competition in the Video and Broadband Markets Hearing*, Written Testimony of RFD-TV's Founder at 1 ("In spite of all of these accolades [for RFD-TV], following its merger with NBCUniversal, Comcast dropped RFD-TV in all of Colorado and New Mexico. Because there is no clear business reason to understand Comcast's decision, we can only speculate that RFD-TV has become competitive with Comcast's affiliated programming.")

[127] *See Examining the Comcast-Time Warner Cable Merger Hearing*, Written Testimony of Back9Network's CEO at 2-3; *id.*, Hearing Webcast at 1:01:20 (Back9Network's CEO: "We are competing directly with a Comcast-owned network, the Golf Channel, and that gives Comcast every incentive to keep us off the air. More tellingly, productive conversations that we had with Time Warner Cable stalled as the merger was announced.").

Channel, both of which Comcast owned.[128] Comcast has raised prices for or withheld its RSNs in markets like Philadelphia, Northern California, and Houston, sometimes leaving sports fans to choose between missing their team's games or switching to Comcast.[129] And the FCC itself has expressed concerns about "Comcast's past behavior in foreclosing competing [television distribution companies] from accessing certain programs," behavior that "contradict[s] [Comcast's] contentions that for whatever theoretical reason, it would not do so in the future." [130]

E.

Perhaps nowhere is the proposed acquisition more incompatible with the public interest than it is on the Internet, where consumers' interests in lower prices, better service, and more choices collide directly with Comcast's interests in maximizing its own profits, promoting its own content, and protecting its own cable business. The FCC does not write on a blank slate here: it already has concluded that Comcast has both the power and the incentive to manipulate Internet traffic to serve its own purposes, thereby harming competition and consumers.[131] The

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[128] *See Order In re: Tennis Channel v. Comcast*, 37 FCC Rcd. 8508 at ¶ 107 ("[W]e conclude that Tennis Channel has demonstrated that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, and that this discrimination unreasonably restrained Tennis Channel's ability to compete[.]"); *but see Comcast v. FCC*, 717 F.3d 982 (May 28, 2013) (reversing FCC's order because the record did not show economic benefits to Comcast from carriage of Tennis Channel).

[129] *See* Bob Fernandez, *Blackout Warning as Comcast Sports Network Pitches a Surcharge*, Philadelphia Inquirer (Mar. 27, 2014) ("Pay-TV operators will either pass the surcharge along to customers with cable-TV rate hikes, or absorb the new costs."); *Comcast/NBCU Order* at ¶ 67, 71(documenting RSN issues in Philadelphia); Steve Johnson, *TV Dispute Puts Sharks Fans on Ice*, San Jose Mercury News (Dec. 10, 2010) (reporting that Comcast tried to persuade customers to switch from a satellite company to Comcast cable after the Bay Area RSN was blacked out of the former's lineup); Loren Steffy, *Blame for TV Blackouts Begins with the Teams*, Houston Chronicle (Apr. 16, 2013) (describing Houston RSN dispute and reporting that "[n]etwork general manager Matt Hutchings insists that Comcast isn't using the deal to drive customers to its cable system, even if that may be a short-term result"); *see also* Richard Sandomir, *Dispute May Prevent Viewers from Watching NHL Openers on DirecTV*, New York Times (Oct. 1, 2009) (describing dispute between DirecTV and Versus, which Comcast owns).

[130] *Comcast/NBCU Order* at ¶ 44, 71.

[131] *See, e.g.*, *Comcast/NBCU Order* at ¶ 61 ("We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other [online video distributors], both traditional [television distribution companies] and standalone [online video distributors.]"); *id.* at ¶ 78 ("We conclude that Comcast-NBCU will have the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against [online video distributors.]"); *id.* at ¶ 79 ("[We] conclude that Comcast has an incentive and ability to diminish the potential competitive threat from these new services[.]"); *id.* at ¶ 93 ("[W]e 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

proposed acquisition would make matters unacceptably worse,[132] and it would do so at a time of great uncertainty for net neutrality on the Internet's last mile, transit on its backbone, and interconnection between the two.[133] All told, the proposed acquisition poses a substantial threat to the open Internet – and that alone is reason to reject it.

The proposed acquisition would give Comcast exclusive control over the only roads on the information superhighway that end in the living rooms and offices of tens of millions of Americans.[134] Comcast would be able to dictate the terms by which edge and transit providers could access about 40% of the nation's broadband Internet subscribers. That market share would give Comcast a terminating access monopoly on the Internet – market power that it will be able to leverage across the entire Internet ecosystem.[135] Anyone who uses the Internet to connect

against unaffiliated content and distributors in its exercise of control over consumers' broadband connections."); *id.* at ¶ 102 ("As we previously explained, Comcast's ability to harm potential competition with its video distribution business will be enhanced by this transaction.").

[132] *See, e.g.*, *Competition in the Video and Broadband Markets Hearing*, Written Testimony of Cogent's CEO at 8-9 ("A merged Comcast and TWC will make current anticompetitive practices demonstrably worse and incent the merged entity to find new, more powerful ways to exercise its dominance. . . . One entity controlling access to so many of America's 'captive eyeballs' should immediately raise red flags."); Netflix Letter at 2 ("Comcast is already dominant enough to be able to capture unprecedented fees from transit providers and services such as Netflix. The combined company would possess even more anti-competitive leverage to charge arbitrary interconnection tolls for access to their customers."); James Stewart, *A Vision Beyond Cable for Comcast After Merger*, New York Times (Mar. 28, 2014) (quoting Susan Crawford as saying, "The deal takes an already terrible situation and makes it worse.").

[133] *See Notice of Proposed Rulemaking in re: Protecting and Promoting the Open Internet*, 29 FCC Rcd. 5561 (May 15, 2014); Ben Popper, *Google, Netflix, and Facebook Ask FCC to Intervene in Fight Over Internet "Congestion,"* The Verge (Jul. 14, 2014) ("The [Internet Association] wrote in its letter that 'interconnection should not be used as a choke point to artificially slow traffic or extract unreasonable tolls.'").

[134] *See* Klint Finley, *Why the Comcast-Netflix Pact Threatens our Internet Future*, Wired (Feb. 24, 2014) ("If one highway becomes too congested – or starts charging a high toll – you could try taking another highway into the city. But if one company controls all the residential streets in the city, you're not going to be able to avoid dealing with that company if you want to reach the residents of the city. . . . There's no way to reach Comcast's millions of customers without dealing with Comcast.")

[135] A terminating access monopolist is one that controls the means, usually a telecommunications network, by which a large share of the consumer market accesses other products or services. *See* Federal Trade Commission, *Staff Report: Broadband Connectivity Competition Policy* at 6 (June 2007) (explaining that a terminal access monopoly "could result from broadband Internet access providers charging content or applications providers terminating fees for delivery to end users over the last mile"); Timothy Lee, *Comcast is Destroying the Principle that Makes a Competitive Internet Possible*, Vox (May 6, 2014) (describing the terminating access monopoly problem); David VanHoose, *E-Commerce Economics*, Taylor & Francis at 299 (Mar. 18, 2011) ("Terminating access monopoly: Possession of market power by a firm providing customers with access to a telecommunications network, giving the firm the capability to require payment of above-market fees to other companies seeking to interact with its customer via that network."); CCIA, *Open Internet: Abstract* (Apr. 2014) ("[T]he few Internet service providers that actually

with the world – a small business, a blogger, a content producer, a start-up, a newspaper – will face an untenable choice: do as Comcast demands or lose access to two-in-five American broadband subscribers.

The market power that Comcast seeks to obtain through the proposed acquisition is troubling in its own right, but it is downright disturbing when considered in light of Comcast's incentives to abuse that power. First, not only can Comcast continue to charge consumers high prices, but it also will have the clout to double-dip by extracting tolls from edge providers and transit providers whose data connect with or travel along Comcast's last mile networks.[136] As one prominent scholar recently put it: "The larger Comcast gets, the more of a menace it will become to the rest of the Internet economy. Comcast is already demanding payment whenever it detects weakness. The math is simple: the bigger it gets, the more credible its threats become, and the more money it drains from everyone."[137] The costs generated by such behavior are passed along to consumers in the form of higher prices, and they could prove prohibitive for small businesses and start-ups.[138]

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own wired facilities that connect to end users acquired an unprecedented level of control over the information that flows through their local networks to and from the Internet. This is sometimes called the 'terminating access' monopoly.").

[136] *See, e.g.*, *Rolling Up Video Distribution* at 12 ("A merged Comcast-TWC could also extract higher tolls from middle market participants for direct or priority access to Comcast-TWC's ISP networks, thus raising their costs."); CCIA Letter at 2 (explaining that the post acquisition Comcast could "raise the operating costs of over-the-top content competitors, such as Netflix and Amazon Prime, by charging inflated interconnection prices to rivals that threaten the merged entity's legacy cable revenue"); *see also supra*, notes 132-133; *infra*, notes 138, 147.

[137] Tim Wu, *Comcast Versus the Open Internet*, New Yorker (Feb. 24, 2014); *see also* Timothy Lee, *Comcast is Destroying the Principle that Makes a Competitive Internet Possible*, Vox (May 6, 2014) ("Comcast has evidently begun demanding that other transit and content providers pay it for faster connections, too. 'Every day, I have someone come up to me and say, 'Comcast came up to us asking for money,'' says Tim Wu, the Columbia law professor who coined the term 'network neutrality.'").

[138] *See* Art Brodsky, *Here's How Comcast Plans to Rule American Cable and Internet*, Wired (Mar. 10, 2014) ("Comcast now will determine which program providers, like Netflix, have the privilege of paying extra to provide content [Comcast's] customers want. Big companies like Netflix, or other video providers, can afford those direct connections. Smaller, newer services can't, and their growth with suffer."); Matthew Yglesias, *The Real Problem with Supersizing Comcast*, Slate (Feb. 19, 2014) ("[A] broadband giant serving almost half the households in the country would be very dangerous indeed. Its client base would be so large that it could force big, rich tech companies to send it side payments to avoid throttling their services. Startups and small players would simply have to accept second-class Internet service."); Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*,

In addition, Comcast has an incentive to use its market power to protect its legacy cable business from cord cutting, which happens when consumers replace cable with Internet-based over-the-top video providers, such as Netflix, Amazon, and YouTube.[139] In fact, when Comcast acquired NBC-Universal, the FCC recognized that Comcast had a strong incentive to keep customers tethered to cable, which is why the FCC required Comcast to offer and promote a standalone broadband Internet option for consumers.[140] Not long thereafter, the FCC began to receive complaints that Comcast was limiting consumers' choices by concealing the standalone

Allowing Customers to Cut the Cable Cord	
What the FCC Required Comcast to Do	What Comcast Told Wall Street it Would Do after Acquiring TWC
"Training of customer service representatives: . . . The purpose of such training shall be to reinforce the Customer Service Representatives' awareness and familiarity with the [standalone broadband] service."	"[W]e would seek to bundle more and that is call center training, that's teaching people to sell another RTU on a call, on a service call, fix a billing problem, upsell to a third product, so just bundling better."
"[W]e require Comcast to visibly offer and actively market standalone retail broadband Internet access service."	"[W]e are confident that revenue opportunities exist by including greater bundling penetration in residential[.]").

Netflix Blog (Mar. 20, 2014) ("[B]ig ISPs can demand potentially escalating fees for the interconnection required to deliver high quality service. The big ISPs can make these demands – driving up costs and prices for everyone else – because of their market position."). Worse still, Comcast can escape accountability for the burden these new costs impose because they will be borne, and therefore shared with consumers, by edge providers, putting Comcast at least one step removed from consumers' pocketbooks.

[139] *See supra*, note 131; *infra*, note 147; *Examining the Comcast/TWC Merger Hearing*, Written Testimony of Public Knowledge's CEO at 2 ("[The proposed acquisition] will threaten the continued viability of nascent competitors and endanger the continued emergence of innovative new video and other types of services delivered over the Internet."); *id.* at 8 ("[Comcast has] both the incentive and ability to thwart development of innovative Internet services that threaten Comcast's excessively priced offerings across a much broader swath of the market than is true today."); CCIA Letter at 1 ("[T]he merged company would be better able to impede innovation that threatens to erode its legacy cable business model[.]").

[140] *See Comcast/NBCU Order* at ¶102; *Consent Decree in re: Comcast Standalone Broadband Condition*, 27 FCC Rcd. 6983, ¶ 2-3 (Jun. 27, 2012) ("[T]he Commission identified potential concerns associated with Comcast's post-transaction incentives to require its customers interested in purchasing broadband services to also purchase other bundled services – to the detriment of customers who desired to purchase Broadband Internet Access Service without also purchasing cable television or other services. . . . [Therefore,] Comcast shall visibly offer and actively market standalone retain Broadband Internet Access Service[.]").

broadband option and pushing them into bundled packages that included cable service.[141] The FCC fined Comcast for its non-compliance with the condition and ordered it to better train its employees about the importance of customers' options, including the availability of standalone broadband service.[142] Nonetheless, Comcast now promises Wall Street investors that it will use the proposed acquisition of TWC as an opportunity to do the opposite, namely, train its employees to "upsell" and "just bundl[e] better."[143] These statements take on even greater meaning in light of recent reports that Comcast trains and incentivizes its employees to resist customers' requests to terminate services.[144]

As is the case with bundling and aggressive sales tactics, Comcast has a powerful incentive to use its distribution platform to prevent cord-cutting or, to the extent that consumers do select over-the-top videos as a replacement or complement to cable, to steer viewers toward its own online videos and away from competitors'.[145] In either case, Comcast has multiple choke points at its disposal. It can – and now threatens to – impose data caps, which could operate as a tax on consumers who use the Internet to watch over-the-top videos from content providers other

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[141] *Id.* at ¶ 5.
[142] *Id.* at ¶ 16 (fine); *id.* at ¶ 17 (compliance training requirements).
[143] *See, e.g.*, *Transcript of Deutsche Bank Conference* at 3 (Mar. 10, 2014) (Comcast's EVP: "[W]e would seek to bundle more and that is call center training, that's teaching people to sell another RTU on a call, on a service call, fix a billing problem, upsell to a third product, so just bundling better."); *see also Transcript of Comcast/TWC Conference Call with Wall Street Investors* at 5 (Feb. 13, 2014) (Comcast's CFO: "[W]e are confident that revenue opportunities exist by including greater bundling penetration in residential[.]").
[144] *See, e.g.*, Adrianne Jeffries, *Comcast Confessions: When Every Call is a Sales Call*, The Verge (Jul. 28, 2014) ("Internet not working? Confusing charges on your bill? Moving and need to cancel your service? It doesn't matter why you're calling Comcast – get ready for a sales pitch. Dozens of current and former Comcast employees told The Verge they had to constantly push products, even if they worked in tech support, billing, and general customer service."); Adrianne Jeffries, *Comcast Confessions: Why the Cable Guy is Always Late*, The Verge (Aug. 4, 2014) ("[T]he Verge interviewed more than 100 Comcast employees in an effort to explain the company's lousy reputation. We heard the same stories over and over again: customer service has been replaced by an obsession with sales, technicians are understaffed, tech support is poorly trained, and the telecommunications behemoth is hobbled by internal fragmentation."); Adrianne Jeffries, *This is Comcast's Internal Handbook for Talking Customers out of Cancelling Service*, The Verge (Aug. 4. 2014) (providing copy of employee training manual); *see also* Lisa Eadicicco, *Ex-Comcast Employee: That Nightmare Customer Service Call is Totally Normal and Happens all the Time*, Business Insider (Jul. 16, 2014) ("This type of behavior is typical for representatives at Comcast, a former employee told Business Insider.").
[145] *See supra*, note 131; *infra*, notes 147-148.

than Comcast.[146] Comcast also can degrade competitors' traffic that travels along its last mile networks, or it can impede competitors' access to those networks altogether.[147] As one commentator has explained, "If Comcast controls access to a large enough number of customer[s], it can make it hard for the competitor to succeed by raising its rival's cost, degrading its quality of service, or blocking the delivery of its product altogether."[148]

For example, around the summer of 2007, Comcast customers experienced difficulty using BitTorrent, a peer-to-peer networking protocol that consumers used to watch online videos, including content offered by CBS, Twentieth Century Fox, and Sports Illustrated.[149] As the FCC later explained, peer-to-peer applications had "become a competitive threat to cable operators such as Comcast."[150] When customers' complaints became widespread and public, Comcast "misleadingly disclaimed any responsibility for customers' problems."[151] One of its

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[146] *See Examining the Comcast/TWC Merger Hearing*, Responses to QFR for Comcast's EVP from Sen. Franken at 16-17 (explaining Comcast's past and future plans for data caps); James O'Toole, *Comcast Plans Data Limits for All Customers*, CNN Money (May 15, 2014); Michael Weinberg, *Comcast Exempts Itself from its Data Caps, Violates (at least the Spirit of) Net Neutrality*, Public Knowledge (Mar. 26, 2012) ("Recently it came to light that when Comcast customers are able to stream Comcast Xfinity video to their Xbox360s, it will not count against their data cap. This decision is a perfect example of the behavior that net neutrality rules were designed to prevent and raised additional questions about the true motivation behind data caps.").

[147] *See* John Quain, *What's Wrong with the Comcast-Time Warner Deal? A Lot*, Fox News (Mar. 12, 2014) ("[A] merged Comcast-Time Warner [Cable] would wield even more control over the Net, potentially cutting off the alternative path [to cable]. Comcast could throttle back certain traffic – say, a streaming video channel or movies from a competitor – while keeping its own services at full speed."); *Comcast/NBCU Order* at ¶ 61 (explaining that Comcast could "block[], degrad[e], or otherwise violat[e] open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers"); *Competition in the Video and Broadband Markets*, Written Testimony of Cogent's CEO at 7 ("It is no coincidence that companies like Netflix offer content that competes with Comcast-owned programming and its content delivery platform, Xfinity. . . . As the last-mile ISP providing the only way to access these subscribers, Comcast will continue to exert its control over this last mile to dominate its subscribers' experience. Such efforts are anticompetitive and harm consumers."); Netflix Letter at 1-2 ("By degrading consumers' experience, Comcast can demand that content providers pay [Comcast] a toll to avoid congestion and reach their captive subscribers. If content providers cannot effectively reach Comcast subscribers, they cannot compete.").

[148] *Buyer and Bottleneck Market Power* at 2-3.

[149] *See Order in re: Formal Complaint of Free Press and Public Knowledge Against Comcast for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 at ¶ 4 (hereinafter *Comcast-BitTorrent Order*).

[150] *Id.* at ¶ 5.

[151] *Id.* at ¶ 6; *see also* Marvin Ammori, *We're About to Lose Net Neutrality – And the Internet as We Know It*, Wired (Nov. 4, 2013) ("Comcast had begun secretly trialing services to block some of the web's most popular applications that could pose a competitive threat to Comcast, such as BitTorrent.").

representatives flat out denied that Comcast was throttling Internet traffic.[152] However, when subsequent investigations revealed that Comcast was, in fact, selectively interfering with its prospective competitor, Comcast admitted that it had degraded BitTorrent's traffic.[153] The FCC issued an order against Comcast, stating that Comcast's "discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet."[154] Such behavior should not be rewarded with a permission slip for the offending party to acquire the nation's second biggest ISP and assume even greater control over broadband in America.

More recently, Comcast allowed congestion to accumulate at the ports where Netflix traffic exited the Internet's backbone and entered Comcast's last mile networks.[155] The congestion caused problems for Netflix viewers – whose videos froze, buffered often, or arrived in granular pictures, if at all – but it also may have harmed other Comcast customers, including businesses whose employees suddenly had difficulty using the Internet to work remotely.[156] If the last mile of the broadband Internet market were sufficiently competitive, an incident like this would not arise, or, if it did, it would not be tolerated.[157] Instead, however, Comcast was able to

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[152] *Comcast-BitTorrent Order* at ¶ 6.
[153] *Id.* at ¶ 9.
[154] *Id.* at ¶ 1; *but see Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (reversing on legal grounds).
[155] *Competition in the Video and Broadband Markets*, Written Testimony of Cogent's CEO at 5; Netflix Letter at 1 ("Comcast is limiting the capacity of connections between its network and other networks, unless the network agrees to pay Comcast for access."); Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, Netflix Blog (Mar. 20, 2014)
[156] *Competition in the Video and Broadband Markets*, Written Testimony of Cogent's CEO at 6 (explaining how "[t]he resulting traffic jam hurt Comcast subscribers and Cogent customers"); Netflix Letter at 1 ("This congestion causes delays when traffic enters Comcast's network through the settlement-free connections. Consumers experience these delays as slow page loads, poor streaming quality, and frequent streaming pauses."); Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, Netflix Blog (Mar. 20, 2014) ("[D]ue to a lack of sufficient interconnectivity, Netflix performance has been constrained, subjecting consumers who pay a lot of money for high-speed Internet to high buffering rates, long wait times and poor video quality.").
[157] *See* CCIA Letter at 4 ("Comcast charges websites and online services extra money so Comcast's own customers can get access to the content they want. In a truly competitive market, a firm would welcome complementary services that actually increase demand for the underlying product, in this case broadband access." (emphasis omitted)); Tim Wu, *Comcast Versus the Open Internet*, The New Yorker (Feb. 24, 2014) ("Imagine a restaurant whose most popular dishes are made with fresh tomatoes. Given the large quantity in which these dishes are produced, tomato shortages are frequent, yielding patron complaints. In response, the restaurant's tomato supplier promises to build a storage facility nearby, in order to insure that the restaurant never runs out of tomatoes. In a

use its market power to demand payments from Netflix and Netflix's transit providers in exchange for access to Comcast's subscribers.[158] Forced to choose between paying the toll or losing access to millions of customers, Netflix chose the former.[159] Incredibly, Comcast then told Congress that the entire arrangement was Netflix's idea, a contention that Netflix has denied in no uncertain terms.[160]

Notwithstanding the overwhelming evidence to the contrary, and notwithstanding the FCC's prior findings, Comcast denies that the proposed acquisition would give it the power or the incentive to manipulate Internet traffic to serve its own purposes.[161] But none of Comcast's

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competitive market, the restaurant would gladly accept this offer, fearing that its uneven tomato supply will cause it to lose customers. But, if the restaurant industry resembled today's broadband-Internet market, the restaurant would be the only place in town that served tomato dishes. Facing no competition, it might try to extort extra payments from the tomato supplier, knowing that without its business the supplier would go under. That kind of backward logic is the essence of the deal that Comcast and Netflix announced on Sunday.").

[158] *Competition in the Video and Broadband Markets*, Written Testimony of Cogent's CEO at 6 ("To remedy the congestion, Comcast demanded that Cogent enter into a 'commercial relationship' with Comcast to connect to Comcast's network and reach Comcast's customers."); Tim Wu, *Comcast Versus the Open Internet*, The New Yorker (Feb. 24, 2014) ("This is the first-ever direct interconnection deal between a broadband provider, like Comcast, and a content company, like Netflix or Google. And it makes clear that Comcast, which recently proposed acquiring Time Warner Cable, has already accumulated too much market power for the health of the Internet economy, and should not be allowed to accrete more."); Netflix Letter at 3 ("Until Netflix agreed to pay Comcast, the more that Comcast subscribers requested Netflix content, the more congested these connections became, and the more that their Netflix video quality suffered. That is where Comcast is able to leverage its market power most effectively. It can restrict transit capacity into its network to force content providers into paying for uncongested interconnection."); *see also* Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, Netflix Blog (Mar. 20, 2014) ("Without strong net neutrality, big ISPs can demand potentially escalating fees for the interconnection required to deliver high quality service.").

[159] Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, Netflix Blog (Mar. 20, 2014) ("A few weeks ago, we agreed to pay Comcast and our members are now getting a good experience again."); Netflix Letter at 1 ("Netflix has seen firsthand how Comcast can leverage its existing market power to extract arbitrary tolls to reach consumers, particularly from Internet video companies like Netflix that pose a competitive threat to Comcast's own video services.").

[160] *Contrast Examining the Comcast/TWC Merger Hearing*, Hearing Webcast at 3:10:34 (Comcast's EVP testifying, "In the Netflix case, this was – I hate to say this. This was Netflix's idea. . . . That is where that agreement came from; that is, the Netflix desire to pay us directly and cut out a middleman. . . . So once again, the customers are the winner here[.]") *with* Netflix Letter at 2 ("During the Senate Judiciary hearing on the proposed merger, [Comcast's EVP] said that it was 'Netflix's desire to pay us directly and cut out a middleman.' That is not an accurate description. Netflix agreed to paid peering with Comcast to reverse an unacceptable decline in our members' video experience. . . . Our agreement with Comcast is the first time that Netflix was forced to pay an ISP for what amounts to access to their subscribers.") *and id.* at 3 (explaining that "[i]t is inaccurate for Comcast to suggest that by paying Comcast directly, Netflix is simply swapping out payment for services that it used to pay transit providers to perform" because Comcast had to internalize transit functions that it formerly outsourced).

[161] If that truly were the case, then Comcast's commitment to abide by the FCC's 2010 Open Internet Order until 2018 – a commitment that it aggressively has touted to the public in connection with the proposed acquisition – would be of little value. *See* Sen. Franken Letter to Comcast's CEO (May 21, 2014).

rebuttals is persuasive. As a general matter, Comcast says that "the Internet ecosystem as a whole will benefit" from the proposed acquisition, and that "[e]dge providers in particular will have better tools with which to build novel services[.]"[162] If that were true – if the proposed acquisition offered so much promise for the Internet's future – then one would expect edge providers and Open Internet advocates to come forward in support of the deal. The opposite has happened.

For example, the Computer & Communications Industry Association (CCIA), which represents leaders of the technology sector,[163] has written that, it "is concerned that this merger poses a significant threat to innovation and competition in many parts of the marketplace, including the layer that most users are familiar with: the websites, platforms and online services that the vast majority of Americans use everyday."[164] Netflix opposes the proposed acquisition because "competition and consumers will suffer" from higher prices and degraded service.[165] Cogent, one of the nation's leading transit providers, believes that "this merger has the potential to cause grave anticompetitive and consumer harms for tens of millions of Americans who require access to high-speed, high-quality, affordable broadband Internet access."[166] The nation's leading Open Internet advocacy groups and scholars oppose the deal, too.[167]

Comcast also argues that, "if Comcast were to impair its customers' access to popular content such as online video, it would quickly pay a steep price – both economically in terms of

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[162] *Comcast's Public Interest Statement* at 57.
[163] *See* CCIA Website (listing twenty-four members: Aereo, allegrogroup, BT, Data Foundry, dish, eBay, Facebook, foursquare, Google , intuit, LightSquared, Microsoft, Motorola, netacces system technologies, NVIDIA, OpenConnect, Pandora, redhat, Samsung, Sprint, TiVo, T-mobile, XO Communications, and Yahoo!).
[164] CCIA Letter at 3.
[165] Netflix Letter at 4.
[166] *Competition in the Video and Broadband Markets*, Written Testimony of Cogent's CEO at 1-2.
[167] *See, e.g.*, Letter from Consumers Union, Free Press, Public Knowledge, Media Literacy Project, National Alliance for Media Arts and Culture, et. al. to FCC Chairman at 1 (Apr. 8, 2014); *Examining the Comcast/TWC Merger Hearing*, Written Testimony of Public Knowledge's CEO at 2 ("The proposed transaction is inconsistent with antitrust policy, the goals of the Communications Act, and the broader public interest.").

lost subscribers or reduced demand for broadband services, and in the court of public opinion."[168] Each premise of Comcast's argument is flawed. First, Comcast is unlikely to face significant consequences in the consumer market if it degrades access to content because customers often lack a meaningful alternative to Comcast's broadband Internet service.[169] As Netflix has explained, "Comcast subscribers are largely stuck with Comcast[.]"[170] Second, Comcast's impairment of competing online video content likely would not decrease overall demand for broadband Internet service so significantly that the costs to Comcast would outweigh the benefits of artificially sustaining demand for cable – which, after all, is the point.[171] Third, as Comcast itself demonstrated in its experience with BitTorrent, the court of public opinion often lacks the information necessary to determine whether service disruptions are attributable to an offending ISP or to the content producer.[172]

Finally, Comcast argues that "it is a misconception that Comcast or TWC serves as a 'gatekeeper' controlling access to its own last mile and to end users," but "[r]ather, edge providers have multiple avenues for reaching Comcast's broadband subscribers, undermining Comcast's ability to deny access or degrade service to such providers[.]"[173] Comcast's argument reflects a fundamental misunderstanding of edge providers' and consumers' concerns with the proposed acquisition. It does not matter how many routes are available to a final destination if

[168] *Comcast Public Interest Statement* at 157.
[169] *Supra*, notes 66-67, 69, 74-75, 84-86; Netflix Letter at 3 ("[M]ost consumers feel that they have to take whatever their ISP offers."); *see also* Timothy Lee, *Comcast is Destroying the Principle that Makes a Competitive Internet Possible*, Vox (May 6, 2014) ("If customers can easily switch between broadband providers, then it would be foolish for a broadband provider to allow network quality to degrade as a way to force content companies to the bargaining table.").
[170] Netflix Letter at 1.
[171] *Supra*, notes 131, 139, 150; *Comcast-BitTorrent Order* at ¶ 16 (explaining that online videos could rapidly become an alternative to cable television" and that "[t]he competition provided by this alternative should result in downward pressure on cable television prices, which have increased rapidly in recent years.").
[172] *See Comcast-BitTorrent Order* at ¶ 52 ("Many consumers experiencing difficulty using only certain applications will not place blame on the broadband Internet access service provider, where it belongs, but rather on the applications themselves, thus further disadvantaging those applications in the marketplace.")
[173] *Comcast Public Interest Statement* at 159.

every single one of them ultimately requires entry to and travel along the same toll road.[174] As Netflix has explained: "The fatal flaw in this assertion is that the number of transit providers or pathways into Comcast's network is irrelevant to this issue. Every transit provider must ultimately negotiate with Comcast for a connection to Comcast's network and Comcast controls the terms of that access. Simply put, there is still one and only one way to reach Comcast's subscribers: through Comcast."[175]

III.

The proposed acquisition does not serve the public interest. To the contrary, it would result in significant harms to consumers and competition, pose a serious threat to the open nature of the Internet, and compromise the free flow of information and ideas that is vital to our economy and our democracy. It must be rejected.[176]

Respectfully submitted,

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[174] *See supra*, note 134.
[175] Netflix Letter at 2-3.
[176] Should the FCC nonetheless make the ill-advised mistake of approving the proposed acquisition, it must, at the very least, impose extensive conditions to mitigate the many public harms that would result otherwise. If the FCC decides to take that route, it should announce its intention to the public and initiate an additional period of public comment focused on proposed conditions.