PREPARED STATEMENT
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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

OVERSIGHT HEARING ON

COMPETITION IN THE VIDEO AND BROADBAND MARKETS:
THE PROPOSED MERGER OF COMCAST AND TIME WARNER CABLE

WASHINGTON, D.C.
MAY 8, 2014

Good morning, Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee. Thank you for giving me the opportunity to appear before you. I will explain why the proposed takeover of Time Warner Cable ("TWC") by Comcast Corporation would be bad for consumers, bad for competition, and bad for innovation. I also will explain why it almost certainly violates the antitrust laws. Of particular concern is the merger's impact on the high-speed residential broadband market, which is the pathway for Internet content providers to reach their audience. The types of conditions imposed on the Comcast/NBCU joint venture simply would be inadequate here. This merger must be rejected.

By way of background, I have spent about 25 years practicing antitrust law, about half with the Antitrust Division of the U.S. Department of Justice and about half in private practice. I led investigations of dozens of media mergers when I was with DOJ and I have continued to work in media and telecommunications since leaving the Department. I have written and co-authored articles on the topic that have been published in the Antitrust Law Journal, the Northwestern Law Review, the University of Connecticut Law Review, and the George Mason Law Review, among others. I have also co-authored two articles and an op-ed on the proposed Comcast/TWC merger with Professor Maurice Stucke.

I. Introduction

Today's hearing is to examine competition in the video and broadband markets. In terms of the video market, we need only look at what the Antitrust Division had to say in the complaint it filed against the joint venture of Comcast and NBC Universal ("NBCU") in 2011 to understand why the proposed combination of Comcast and TWC is very likely to be anticompetitive and illegal. The same analytical theory of liability would apply here and the same type of competitive harm would be present, only more so. Moreover, the same staff at DOJ who investigated the Comcast/NBCU merger will investigate the proposed merger with Time Warner Cable. Many of the same issues DOJ found in the former are present to a more disturbing degree in the latter.

A merged Comcast and TWC would have both the ability and incentive to withhold sports, entertainment and other programming from other multichannel video programming distributors ("MVPDs"), and harm competition. The reduction in competition would lead to less

pressure to control cable bills or to develop new offerings. Little wonder that Comcast is already suggesting remedies—its attorneys no doubt recognize that the proposed merger raises significant anticompetitive issues.

In terms of the broadband market, the Comcast/NBCU complaint and related documents lay out a theory of harm as to why the current proposed merger is likely to be anticompetitive on that score as well. The government raised concerns back in 2011 that Comcast's dominant position in many local markets would give it power to limit the growing competition from "online video distributors" ("OVDs") like Netflix, Hulu, Apple and others. As it alleged in 2011, "Comcast faces little programming distribution competition in many of the areas it serves. Entry into traditional video programming distribution is expensive, and new entry is unlikely in most areas. OVDs' Internet-based offerings are likely the best hope for additional video programming distribution competition in Comcast cable franchise areas."[1] The Division alleged that Comcast recognized the growing competitive threat posed by OVDs, had already taken several steps to respond to that threat, and had an incentive to encumber the development of these newer distribution technologies and raise their costs.[2]

That issue is front and center in this merger. The combination of Comcast's and TWC's residential high-speed broadband services, enhanced by additional Charter Communications subscribers in key market clusters, would give the combined firm far more power over the success or failure of OVDs.

The proposed merger would also increase the combined firm's buyer power over video content providers. The combined firm's larger size may lead to benefits as well as harms. A benefit would take the form of the ability of the merged firm to lower the prices it pays for video content. The harm is that it could induce content buyers to charge higher prices to competing distributors by insisting it should get better terms than any of its rivals. The Antitrust Division has challenged the use of so-called "most favored nation-plus" ("MFN-plus") pricing by dominant firms in the recent past. Again, this is not a novel theory and the facts presented in this merger suggest that it is an issue here as well.

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[1] Complaint, United States v. Comcast Corp., Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), at ¶9, available at http://www.justice.gov/atr/cases/f266100/266164.pdf ("Comcast/NBCU Complaint").

[2] Comcast/NBCU Complaint at ¶¶52-54.

Comcast and TWC argue that they do not compete for subscribers and therefore the merger raises no real issues. But that is simply not correct. Comcast and Time Warner Cable do compete in certain product markets. I illustrate by discussing only two of those markets: regional sports and cable advertising.

In terms of remedies, the proposed merger will give the Antitrust Division and the Federal Communications Commission an opportunity to look back at the behavioral conditions they imposed on the Comcast/NBCU transaction. As discussed below, there are good reasons to conclude that merely applying these same conditions to Comcast/TWC would be insufficient to remedy the competitive harm here. Indeed, in a recent filing in connection with the US Airways/American Airlines merger, the Division itself explained why such behavioral conditions are often inadequate to remedy competitive harm. The most comprehensive study to date has shown that merger-specific regulation, like regulation as a whole, often does not work. Assuming that the Division finds harm to competition, as I believe it will, the merger should be enjoined, not made subject to dozens of conditions.

II. Knowledgeable and Rational Voices are Speaking Out, Including Consumers and Businesses

A Reuters poll in March showed that a majority of Americans – 52% of those polled – were critical of the proposed merger and skeptical about the alleged benefits of the deal.[3] Polls on mergers often have limited value because consumers are not familiar with the products or markets about which they are asked. That is most definitely not the case here. Consumers are well aware of both Comcast and TWC and undoubtedly many of the respondents are or have been customers of one or the other company. Given the long and continuous history of consolidation in the cable industry, many of the people who responded to the Reuters poll undoubtedly experienced first-hand the effects of prior mergers and acquisitions. From 2009 to 2013, Comcast increased prices for basic and premium cable packages far more than competitors AT&T, Cablevision and DISH Network. The public skepticism about this proposed merger is likely based on experience with unkept promises in the past. Hence there is skepticism about the promises being made today.

[3] David Ingram, "Americans take dim view of Comcast, Time Warner Cable deal," Reuters (March 26, 2014), available at http://www.reuters.com/article/2014/03/26/us-usa-antitrust-idUSBREA2P0BD20140326.

The focus of the antitrust laws is on consumer welfare. This transaction involves services primarily used by consumers, and the views of informed consumers should not simply be dismissed out of hand.

Moreover, despite the fact that Comcast is a dominant distributor in many parts of its geographic footprint and owns critically important programming assets, and thus is a force to be reckoned with, an increasing number of businesses in the content and distribution industries are willing to speak out about the likely adverse effects of this merger on competition. Among those recently raising concerns are Univision, a Spanish-language media company,[4] Cogent Communications, a leading Internet backbone network,[5] and Netflix, an online video distributor.[6] It therefore is just plain wrong for Comcast to claim, as it has, that opposition to the merger is coming from "the same group of people" who have opposed media and telecom consolidation without any basis, and there are no "rational, knowledgeable voices . . . coming out in opposition or even raising serious questions about the transaction."[7]

In fact, the concerns are coming from important voices in content and distribution, and include business leaders whom, I think it is fair to say, are both rational and knowledgeable. When Netflix signs a paid interconnect deal with Comcast and its CEO subsequently calls the deal an "arbitrary tax" and a "toll" that demonstrates Comcast's "leverage," we should not simply chalk those comments up to sour grapes or lack of understanding of the market.[8] Given that Netflix is one of the companies that has the potential to unseat cable's dominance, we should pay attention when it refuses to play by Comcast's playbook.

III. Overview of Transaction

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[4] John Eggerton, "Falco Rips Comcast/TWC Combo In Earnings Call," Broadcasting & Cable (April 28, 2014), available at http://www.broadcastingcable.com/news/currency/falco-rips-comcasttwc-combo-earnings-call/130751.

[5] Kaja Whitehouse, "Cogent CEO Bashes TWC deal to FCC," New York Post (April 17, 2014), available at http://nypost.com/2014/04/17/cogent-ceo-bashes-twc-deal-to-fcc/.

[6] Reed Hastings, "Internet Tolls And The Case For Strong Net Neutrality," Netflix US & Canada Blog (March 20, 2014), available athttp://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html. See also Netflix Letter to Shareholders (April 21, 2014), available at http://files.shareholder.com/downloads/NFLX/3109121545x0x745654/fb5aaae0-b991-4e76-863c-3b859c8dece8/Q114%20Earnings%20Letter%204.21.14%20final.pdf ("The Internet faces a long term threat from the largest ISPs driving up profits for themselves and costs for everyone else.").

[7] Sam Gustin, "Comcast Exec Says Time Warner Cable Deal Will Be Great for America," Time (April 1, 2014), available at http://time.com/44562/comcast-time-warner-cable-cohen/.

[8] See supra n.6.

Comcast is the nation's largest provider of video services (22 million residential customers at the end of 2012), internet services (19.4 million customers), and voice services (10 million customers). As the largest video content distributor in many areas of the country, Comcast controls the pipes. But it also creates content through its national cable networks (including CNBC, MSNBC, and USA Network), regional sports networks, broadcast television (including NBC and Telemundo networks) and movie studio Universal Pictures, which produces, acquires, markets, and distributes filmed entertainment worldwide.

In acquiring TWC, the second largest cable provider in the United States, Comcast would extend its footprint in five geographic areas: New York State (including New York City), the Carolinas, the Midwest (including Ohio, Kentucky, and Wisconsin), Southern California (including Los Angeles), and Texas. A combined Comcast/TWC would control as much as half of the country's high-speed broadband access at a time when a record number of Americans are using broadband to get their information, news, and entertainment. The combined firm would also have a significant if not dominant presence in 19 of the top 20 DMAs in the country. The proposed deal Comcast has made with Charter Communications, despite Comcast's claims that it would assuage market concentration concerns due to subscriber divestitures, actually would increase market concentration in the largest DMAs by adding Charter subscribers to existing Comcast and TWC market clusters. Those very same major markets are the most valuable to advertisers and the source of additional bargaining power.

In the past few years, DOJ has alleged, and the parties have not disputed, that both Comcast and TWC have market power in numerous local markets in the video and broadband markets. In its 2011 complaint against the Comcast/NBCU joint venture, the Antitrust Division alleged that "Comcast faces little video programming distribution competition in many of the areas that it serves."[9] Indeed, according to the Division, "[c]able has remained the dominant distributor even as other companies have entered into video programming distribution."[10] This remains true today. In its 2012 complaint against the Verizon Wireless/SpectrumCo commercial agreements, the Division alleged that each of the cable defendants, specifically including Comcast and TWC, "has market power for both broadband and video services in

[9] Comcast/NBCU Complaint at ¶ 9.
[10] Id. at ¶39.

numerous local geographic markets."[11] I see no reason to question this recent finding by the Antitrust Division. The current proposed merger would therefore combine these two giant video and broadband providers, each of which already has considerable market power in numerous local geographic markets, posing far more serious issues of horizontal market concentration than was found in the Comcast/NBCU merger, including significant market concentration in the nationwide market for access to high-speed broadband subscribers.

IV. Antitrust Analysis

Section 7 of the Clayton Act, as amended in 1950, is, at its core, an incipiency statute. It prohibits mergers and acquisitions when the effect of such mergers or acquisitions "may be substantially to lessen competition, or to tend to create a monopoly." The words "may" and "tend" are not accidental. The legislative history demonstrates that Congress understood what it was doing when it passed the Celler-Kefauver Act of 1950. Congress believed correctly that there were anticompetitive mergers that were not being prevented under the Sherman Act and the existing Clayton Act standards, and deliberately chose to make the merger standard one of incipiency. The Supreme Court has stated that Congress's use of the term "may" reflects the fact that the concern is with probabilities, not certainties. The incipiency standard is also mentioned in the 2010 Horizontal Merger Guidelines, which the DOJ and FTC apply.

In other words, the competition agencies are not supposed to wait until mergers produce a firm with full-blown monopoly power or markets susceptible to collusion – they are supposed to nip it in the bud.

One of the theories the Antitrust Division is likely to consider is similar to the theory it litigated in the *Microsoft* case: the proposed transaction may give the merged Comcast/TWC additional power to blunt the impact of innovation – in this case, in the form of content delivered over the Internet by firms like Netflix – that threatens to disrupt Comcast's traditional cable business as customers increasingly move away from bundled cable service into broadband alternatives. The antitrust laws do not say: wait until Comcast has that power, has

[11] Complaint, United States v. Verizon Communications Inc. et al., case number 1:12-cv-01354 (D.D.C. Aug. 16, 2012), at ¶ 33, available at http://www.justice.gov/atr/cases/f286100/286100.pdf ("Verizon/SpectrumCo Complaint").

exercised it, and then fix the problem. Rather, they say: stop the tendency to monopolize in its incipiency.

a. Market Definition

Analytically, the Division is likely to look at the merger in terms of the services offered by Comcast and Time Warner Cable. The two candidate product markets I will focus on are video programming distribution services, and residential high-speed broadband services. Each of these has been recognized as an antitrust market in recent transactions, and they are likely to be the markets of most interest here.

i. Video Programming

In the Comcast/NBCUniversal merger, the Antitrust Division identified the relevant product market to be "the timely distribution of professional, full-length video programming to residential customers."[12] It noted that video programming distribution is characterized by professionally produced, full length content and includes live programming, sports and general entertainment. That is likely to be one of the relevant product markets here as well.

ii. Residential Broadband

In the Verizon Wireless/SpectrumCo matter, the Division identified a relevant product market to be "[t]he provision of broadband Internet services to residential customers."[13] It noted that residential broadband services are characterized by high speeds and allow customers to access large quantities of data for purposes such as high-quality streaming video, gaming, applications, and various forms of interactive entertainment. The Division distinguished residential high-speed broadband from mobile wireless services, which it regarded to be in a separate product market. Contrary to Comcast's claims, it appears highly unlikely that the lines between the wired and wireless markets have blurred so much in the past two years that DOJ will change its views here. Indeed, there are technical, cost and consumer usage reasons to believe that the two markets will remain separate from an antitrust point of view for the foreseeable future.[14]

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[12] Comcast/NBCU Complaint at ¶38.

[13] Verizon/SpectrumCo Complaint at ¶29.

[14] See, e.g., William Lehr and John Chapin, "Rethinking Wireless Broadband Platforms," (April 17, 2009), at 9, available at http://people.csail.mit.edu/wlehr/Lehr-Papers_files/Lehr%20Chapin%20Georgetown%20April%202009%20Talk.pdf ("Wired and wireless broadband are

The market of most concern in this merger is the market for access to broadband customers. The combined firm would have an enormous share of the national high-speed broadband market – as much as 50% by some estimates. Moreover, this is a market with very few competitors. In fact, in 2011, Comcast's CEO characterized Comcast as having only *one* real broadband competitor.[15]

b. Competitive Effects

i. The Merged Firm Would Have Greater Incentive and Ability to Withhold Video Programming from Rivals

In challenging the Comcast/NBCU transaction, the Division alleged that Comcast would have both the incentive and ability to withhold programming from other distributors, including other cable companies, satellite providers and telcos. In antitrust terms, DOJ's theory is referred to as "input foreclosure." It is well-accepted in the economic literature, and can hardly be called novel or radical.[16]

The key allegations in the Comcast/NBCU complaint were as follows. First, Comcast had engaged in such conduct in the past. According to the complaint, "Comcast has long recognized that by withholding certain content from competitors, it can gain additional cable subscribers and limit the growth of emerging competition. Comcast has refused to license one of its RSNs [regional sports networks], CSN Philadelphia, to DirecTV or DISH. As a result, DirecTV and DISH's market shares in Philadelphia are much lower than in other areas where they have access to RSN programming."[17]

Second, the addition of NBC Universal programming would enhance Comcast's ability to pursue a withholding strategy. According to the complaint, "Control of NBCU programming will give Comcast an even greater ability to disadvantage its competitors. Carriage of NBCU

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fundamentally different. . . . Market structure will remain different."). See also In re Economic Issues in Broadband Competition, Ex Parte Submission of the United States Department of Justice (January 4, 2010), at 9, available at http://www.justice.gov/atr/public/comments/253393.pdf ("Wireline and wireless broadband services have fundamentally different cost structures.").

[15] See Susan Crawford, Captive Audience, at 172 (citing Morgan Stanley conference call on March 2, 2011).

[16] See, e.g., Jonathan Baker, "Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis," 25:2 ANTITRUST 36 (2011).

[17] Comcast/NBCU Complaint at ¶48.

programming, including the NBC broadcast network, is important for video programming distributors to compete effectively."[18]

Finally, this withholding strategy could be executed because of Comcast's dominant position in many local markets. DOJ noted in the complaint that "[c]able has remained the dominant distributor even as other companies have entered video programming distribution."[19] It defined the relevant geographic markets to be "the numerous local markets throughout the United States where Comcast is the incumbent cable operator, covering over 50 million U.S. television households (about 45% nationwide), and where Comcast will be able to withhold NBCU programming from, or raise the programming costs to, its rival distributors, both MVPDs and OVDs."[20] It went on to note that the anticompetitive effects of the transaction could actually extend to all Americans because these competitors serve areas outside of Comcast's cable footprint.[21] As a result, the Antitrust Division concluded that the Comcast/NBCU transaction violated Section 7 of the Clayton Act.

The antitrust issue here with respect to the video distribution market is therefore simple to state: In the Comcast/NBCU merger, Comcast, with its existing footprint, was found to have the incentive and ability to harm competition through withholding of programming. Does the current merger, which significantly expands that footprint, confer any additional power on the merged firm? Common sense would suggest, "of course." Post-merger, markets in which TWC is the dominant video distributor would be brought into the fold, and thus have the same power to withhold NBCUniversal programming. What's more, TWC will also bring some regional sports networks with it, thereby enhancing a withholding strategy. To the extent that the Division found the combination of Comcast and NBCU to be anticompetitive in 2011, there is every reason to assume that the agency will find the combination of TWC and NBCU anticompetitive, and for the same reasons.

Comcast essentially has two responses to this conclusion. Its first response is simply to ignore it. Since the day the merger was announced, Comcast has continually stressed that

[18] Comcast/NBCU Complaint at ¶49.
[19] Comcast/NBCU Complaint at ¶39.
[20] Comcast/NBCU Complaint at ¶43.
[21] Id.

consumers today cannot choose between Comcast and Time Warner Cable, and therefore (according to Comcast) the merger will not lessen consumer choice. But that is not the right question. Indeed, the same was true in the Comcast/NBCU merger, where Comcast stated throughout the process that the companies really did not compete for consumers in the same markets. The Antitrust Division nonetheless found the deal to be anticompetitive.

Comcast's second response is to argue that having a bigger footprint does not affect its incentive or ability to withhold programming. This argument defies logic as well as common sense. By adding markets and taking TWC out of the picture, such a withholding strategy is easier, not harder. Indeed, in Congressional testimony at a hearing involving the earlier NBCU deal, Comcast pointed to Time Warner Cable as an independent competitor as a reason that Comcast would not have an incentive to raise its rivals' costs by raising the cost of NBCU programming.[22] It has changed its tune now. In light of the additional Charter subscribers Comcast will acquire in key markets already served by Comcast or TWC, the withholding strategy issue becomes even more foreboding.

ii. The Merged Firm Would Have Greater Control over High-Speed Broadband and the Ability to Limit Competition from OVDs

In terms of the broadband market, the transaction also appears to be anticompetitive. There is a "nascent" form of competition by online video distributors ("OVDs") such as Netflix, Hulu and Apple. These OVDs have the power to be the "next big thing." One of the positive functions of our antitrust laws is to promote economic liberty by keeping the path to innovation open. Innovation is the engine of economic growth. And the economic literature has long abandoned the notion that monopolies and monopoly profits are needed for innovation. The reason this is important is that incumbents, who are threatened by innovation, can use exclusionary tactics to "kill the baby in its cradle." Even if they cannot kill the new idea, they can delay it or make it more expensive. In antitrust law, this is known as "cheap exclusion."[23] It is "cheap" because the cost to the incumbent may be quite low, while the impact on the innovator may be quite large. The theory of harm here is customer foreclosure.

[22] See http://arstechnica.com/tech-policy/2014/04/franken-comcast-called-time-warner-cable-a-competitor-until-they-wanted-to-merge/ (with a link to the testimony of Comcast's CEO).

[23] See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker, Ernest A. Nagata, "Cheap Exclusion," 72 Antitrust L.J. 975 (2005).

Once again, we may look to the complaint in the Comcast/NBCU transaction to understand why this transaction is likely anticompetitive in the broadband market.

First, innovative OVDs represent a growing competitive threat to Comcast's local dominance. As the Antitrust Division stated in the Comcast/NBCU complaint, "OVDs' Internet-based offerings are likely the best hope for additional video programming distribution competition in Comcast's cable franchise areas."[24] The complaint elaborated as follows:

> Online video viewing has grown enormously in the last several years and is expected to increase. Today, some consumers regard OVDs as acceptable substitutes for at least a portion of their traditional video programming distribution services. These consumers buy smaller content packages from traditional distributors, decline to take certain premium channels, or purchase fewer VOD offerings, and instead watch that content online, a practice known as "cord-shaving." A smaller but growing number of MVPD customers also are "cutting the cable cord" completely in favor of OVDs. These trends indicate the growing significance of competition between OVDs and MVPDs.[25]

The competitive effects discussed in the Competitive Impact Statement deserve to be quoted at some length because the Division really stakes out the turf for mergers when innovation is a core concern, as it is here:

> Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as firms' acquisition of the ability to raise prices above levels that would prevail in a competitive market. It also ensures that firms do not acquire the ability to stifle innovation. . . . A merged firm can more readily harm competition when its rivals offer new products or technologies whose competitive potential is evolving. Nascent competitors may be relatively easy to quash. For example, denying an important input, such as a popular television show, to a nascent competitor with a small customer base is much less costly in terms of foregone revenues than denying that same show to a more established rival with a larger customer base. Even if a vertical merger only delays nascent competition, an increase in the duration of a firm's market power can result in significant competitive harm. The application and enforcement of antitrust law is appropriate in such situations because promoting innovation is one of its important goals. The crucial role of innovation has led at least one noted commentator [Professor Herbert Hovenkamp] to argue that restraints on innovation "very likely produce a far greater amount of economic harm than classical restraints on competition," and thus deserve special attention. By quashing or delaying the progress of rivals that attempt to

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[24] Comcast/NBCU Complaint at ¶7.

[25] Comcast/NBCU Complaint at ¶34.

introduce new products and technologies, the merged firm could slow the pace of innovation in the market and thus harm consumers.[26]

The very same concerns are present here, only to a much greater degree. The merged firm's control over a substantial share of the broadband market – as much as 50% by some estimates – is a potent tool to delay or impede the growth of OVDs as a substitute for Comcast's traditional cable business.

As I have written elsewhere, DOJ's approach to online innovation has been consistent over time.[27] It derives from the D.C. Circuit's decision in *Microsoft*. I have to believe that this consistency probably owes much to the fact that *Microsoft* was fully litigated, and the theory had passed muster with the D.C. Circuit, including Judge Douglas H. Ginsburg. Litigation, while rare at the agencies, provides a crucible for theories and approaches to be tested in the real world of trials and appeals. Litigation provides discipline and sets the metes and bounds for later enforcement actions.

In *Microsoft*, the evidence was that Microsoft saw both Netscape and Java as a threat to its operating system monopoly, and took action based on that perceived threat. The action was intended to prevent Netscape from getting the scale it needed to emerge as a full-fledged competitor, and to mislead developers into adopting Microsoft's competing (and incompatible) version of Java. There was objective evidence of both a threat and a response.

According to DOJ, the same ingredients were present in Comcast/NBCU. OVDs represent an innovative threat. The innovation has come about because of the disruptive power of the Internet. An incumbent cable firm, if given the chance, could be expected to slow or stop the innovation through exclusionary conduct. And finally, DOJ asserted in Comcast/NBCU that there was evidence Comcast viewed OVDs as a threat and took steps to respond to that threat.[28]

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[26] Competitive Impact Statement, United States v. Comcast Corp., Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), at 20-22, available at http://www.justice.gov/atr/cases/f266100/266158.pdf.

[27] Allen Grunes, "The Next Big Thing," Competition Policy International Antitrust Chronicle (December 12, 2012), https://www.competitionpolicyinternational.com/the-next-big-thing/.

[28] Comcast/NBCU Complaint at ¶46.

As noted earlier, Section 7 of the Clayton Act contains an incipiency test. Thus DOJ is not forced to wait until Comcast uses the power it has achieved through merger to engage in exclusionary conduct. Rather, such power is to be nipped in the bud.

iii. The Proposed Merger May Harm Upstream Suppliers Through Increased Bargaining Power

The transaction would increase the bargaining power Comcast would have over important suppliers, such as content companies. One potential benefit, which Comcast points to, is that such an increase in bargaining power could help lower Comcast's costs. But an increase in buyer power may also be used anticompetitively to induce suppliers to charge higher prices to rivals. Moreover, there is no guarantee that cost savings would be passed on to consumers, especially if there is limited competition to force that result.

Both the 2010 Horizontal Merger Guidelines and prior DOJ litigation illustrate concerns about buyer power. The Merger Guidelines include an example of an illegal merger that does not directly harm consumers:

> *Example 24*: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

In United States v. Cargill, the Division challenged a merger that would have created a monopsony purchaser of grain in some local markets. The merging companies, however, sold grain in world markets, in which they faced competition from many other grain sellers. Thus, even if the merged firms imposed a loss on farmers by cutting back the quantity of grain they bought from them, consumers of the merging companies would not be harmed because they had numerous other sources of supply. The harm in the upstream market, however, was sufficient to prompt the Division to challenge the merger.[29]

iv. Competition, Not Promises by Merging Parties, Leads to Real Consumer Benefits

[29]United States v. Cargill, Inc., No. 1:99CV01875 (D.D.C. July 8, 1999), available at http://www.justice.gov/atr/cases/f2500/2552.pdf. See also Maurice Stucke, "Looking at Monopsony in the Mirror," 62 Emory L.J. 1509 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094553.

In numerous places in the Comcast/NBCU complaint, the Division alleges that competition has forced, and is continuing to force, the incumbent cable companies to innovate and improve their service offerings. The complaint describes how competition from the satellite providers, and later the telephone companies, has led to improvements in service, and how developing competition from OVDs is "likely the best hope for additional video programming competition in Comcast's cable franchise areas."[30] Competition, not promises by parties wanting to close a deal, is what benefits consumers.

The complaint describes the role of competition as follows:

> Today, consumers buy video programming services only from the distributors serving their local areas. Incumbent cable companies continue to serve a majority of customers, offering services consisting of multiple channels of linear or scheduled programming. Beginning in the mid-1990s, cable companies first faced competition from the direct broadcast satellite ("DBS") providers. More recently, firms that traditionally offered only voice telephony services – the telephone companies or "telcos," such as AT&T and Verizon – have emerged as competitors. The video programming offerings of these competitors are similar to the cable incumbents' programming packages, and their increased competition has pushed cable companies to offer new features, including additional channels, digital transmission, video-on-demand ("VOD") offerings, and high-definition ("HD") picture quality.
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> Most recently, online video programming distributors ("OVDs") have begun to provide professional video programming to consumers over the Internet. This programming can be viewed at any time, on a variety of devices, wherever the consumer has high-speed access to the Internet. Cable companies, DBS providers, and telcos have responded to this entry with further innovation, including expanding their VOD offerings and allowing their subscribers to view programming over the Internet under certain conditions.[31]

Critically, the complaint describes the lessening of competitive pressure from the NBCU transaction:

> Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. As a result, Comcast will face less competitive pressure to innovate, and the future evolution of OVDs will likely be

[30] Comcast/NBCU Complaint at ¶9.
[31] Comcast/NBCU Complaint at ¶¶2, 3.

> muted. Comcast's incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution.[32]

These words apply with even more force in the current transaction. In fact, Comcast's decision to charge Netflix for interconnection shows that the government's predictions in 2011 were on the mark. This development also shows why behavioral conditions, even with the best of intentions, are often insufficient.

V. Comcast's Arguments

a. "We Don't Compete"

Comcast has argued that the combination would not reduce competition because the two cable providers do not compete in local markets. If that claim is taken at face value, there is presumably nothing that would prevent it Comcast from extending its footprint across America by acquiring all the remaining cable companies. It seems difficult to discern a limiting principle, since the same justification for the Comcast/TWC transaction could easily be offered in two years for a deal involving Cox or Charter. Cable companies tend not to compete with one another for customers. After letting this merger through, could DOJ seriously argue that Comcast's expansion into Iowa or Oklahoma may somehow "substantially lessen competition or tend to create a monopoly?" Hardly. Thus, this deal with TWC is critical. Comcast is crossing the regulatory Rubicon.

Moreover, the assertion that Comcast and TWC do not compete for consumers does not mean or imply that they do not compete at all. They certainly compete in many dimensions, including for exclusive rights to carry local and regional sports in a number of geographic areas, and for advertising dollars.

i. Sports

By acquiring TWC properties in Designated Market Areas ("DMAs") in which Comcast already operates, Comcast will have an incentive to raise the license fees for its affiliated regional sports networks (RSNs). In particular, the more of an affiliated RSN's television territory is covered by Comcast's footprint, the greater the chance that Comcast could induce

[32] Comcast/NBCU Complaint at ¶54.

DBS and telco customers in that territory to switch to Comcast (for example, by withholding programming or raising RSN prices) in order to follow must-have RSN programming. Both the DOJ and the FCC recognized in their review of the NBCU transaction that vertical integration allows Comcast to capture this "externality" that is otherwise not available to an independent cable network. Economists have shown empirically that prices for RSNs increased with vertical integration, and more relevant here, the overcharge increased with the size of the affiliated cable operator's downstream footprint.[33]

Further, both Comcast and TWC have shown a propensity to withhold sports programming in order to thwart competitors and gain new subscribers: Comcast pursued such a strategy in Philadelphia (Phillies) and Portland (Trailblazers), while TWC did so in Los Angeles (Dodgers) and Houston (Astros).

There are four DMAs in which (1) both Comcast and TWC currently operate and (2) either Comcast or TWC own an RSN: New York, Charleston (SC), Maine, and Kansas City. These holdings provide a basis for the merged firm to charge higher license fees for its rivals, which will likely be passed onto consumers in the form of higher cable bills. Moreover, in Los Angeles, New York, Portland and other markets already served by Comcast or Time Warner Cable and where the merged company would acquire Charter subscribers, the incentive and ability for the new company to withhold sports programming from competitors is magnified significantly.

ii. Advertising

The merger is likely to affect advertising and advertising-related markets in which Comcast and TWC compete for advertising dollars or to represent advertisers.

If the merger is consummated, the merged firm would likely have the power to increase prices in the spot cable advertising market through its control over a large number of subscribers and key market gateways. In addition, in eliminating Comcast's chief competitor in the spot cable advertising representation services market (which happens to be TWC), the merged firm would have an even greater ability to harm competition by increasing prices to its MVPD customers and controlling access to national spot advertising, regional Interconnects, and the vast majority of local spots on MVPD systems.

[33] See Kevin W. Caves, Chris C. Holt & Hal J. Singer, "Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks," Review of Network Economics, at 66 (2013).

The spot cable advertising market allows national, regional, and local advertisers to cost-effectively geo-target (advertise in specific areas) during the two to three minutes reserved each hour for MVPDs as part of a carriage agreement with cable programmers. Advertisers have three options for purchasing advertising. First, NCC Media ("NCC") is the one and only gateway to purchase national advertising, or advertising across multiple geographic areas. NCC has no competitors and national advertisers have no other choice except to contract with NCC. Yet, if the proposed merger is consummated, the merged firm would have an 80 percent ownership interest in NCC.

Second, advertisers purchase regional spot cable advertising through joint ventures known as "Interconnects." Interconnects roughly align with DMAs and provide a one-stop-shop for an advertiser seeking to reach all subscribers in a given DMA. Interconnect revenues are an important source of income for MVPDs. And access to the Interconnect is a critical avenue for regional advertisers. If the proposed transaction is consummated, the merged firm would have control over the Interconnect in 41 of the top 50 DMAs. In 34 of these DMAs, Comcast would own well over 50 percent of the represented subscribers.[34]

Finally, local spot cable advertising is an especially important market because geo-targeting allows small, local merchants to spend scarce advertising dollars more effectively. Local spot cable advertising is sold to local businesses either by the MVPD directly *or* by its representative.[35] Comcast has offered to trim the number of MVPD subscribers in the combined entity to 30 percent of the macro MVPD marketplace. If Comcast's proffer is accepted and the proposed transaction is consummated, however, the merged firm would still directly control MVPD subscribers for spot cable advertising sales in 38 of the top 50 DMAs. In addition, the firm's post-combination control of spot cable advertising in the top 10 DMAs

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[34] In order of DMA rank, with percentage of owned subscribers, these DMAs are: Los Angeles (52%); Chicago (63%); Philadelphia (65); San Francisco-Oakland-San Jose (83%); Boston (Manchester) (66%); Atlanta (56%); Houston (58%); Detroit (53%); Seattle-Tacoma (78%); Minneapolis-St. Paul (62%); Denver (96%); Cleveland-Akron (Canton) (64%); Sacramento-Stockton-Modesto (73%); Portland, OR (78%); Pittsburgh (65%); Raleigh-Durham (Fayetteville) (68%); Charlotte (59%); Indianapolis (59%); Baltimore (60%); Nashville (62%); Hartford-New Haven (52%); Kansas City (62%); Columbus, OH (71%); Salt Lake City (76%); Milwaukee (72%); Cincinnati (81%); San Antonio (63%); Austin (58%); Harrisburg-Lancaster-Lebanon-York (81%); Greensboro (75%); Albuquerque-Santa Fe (81%); Jacksonville (83%); Louisville (74%); and Memphis (65%).

[35] At present, Comcast is the largest spot cable advertising representation services provider. TWC is the second largest.

would be even more significant. The merged firm would own and represent well over 50 percent of the subscribers for spot cable advertising sales in nine of the top ten DMAs (and in many instances over 80 percent) and would control the Interconnects in all of these DMAs.

The effect of this much control at the national, regional and local levels is problematic for several reasons. Such an outcome would particularly harm independent MVPDs because they would become dependent on their biggest competitor, Comcast, for access to the Spot Cable Advertising market. Moreover, this outcome would allow Comcast to singlehandedly exclude certain MVPDs from participating in NCC and any combination of Interconnects. And it would allow Comcast to use its market power to force an MVPD into a representative deal with Comcast or jeopardize its fair share of the advertising dollars in that particular market. Finally, this outcome would harm local merchant advertisers because the merged firm would have the incentive to limit advertising options, increase prices, or both.

b. Efficiencies

Although the lower US courts (but not the Supreme Court to date) have recognized an efficiencies defense, none have relied upon it to permit a problematic merger. Under the efficiencies defense set out in the Horizontal Merger Guidelines, the merging parties must first show that the efficiencies are merger-specific, that is, the firms cannot reasonably achieve these efficiencies by other means.

Second, the efficiencies must be verifiable. As the Merger Guidelines recognize, "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized." Consequently, the merging parties have "to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."

Third, the efficiencies must benefit consumers, such that "consumers will not be worse off as a result of the merger." The agencies will inquire whether the cognizable efficiencies

likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, for example, by preventing price increases in that market.

Consequently, efficiencies are more likely to make a difference when the likely adverse competitive effects, absent the efficiencies, are not great. The greater the anticompetitive concerns, the greater and likelier the claimed efficiencies must be. Efficiencies are never a justification for mergers to monopolies (or near monopolies).

Comcast generally presents two sorts of efficiency claims in its public interest filing. First, that its business is a high fixed cost business, and the merger will allow it to spread costs across a greater number of subscribers, and thus invest more. Second is the claim that Comcast will provide its superior products to Time Warner Cable subscribers.

What is important to note about both of these efficiency claims is that they do not appear to be merger specific. Moreover, they relate largely, if not entirely, to fixed costs. Finally, they have not been quantified. The Division has traditionally viewed efficiency claims skeptically, did so in the Comcast/NBCU deal, and may be expected to do so here as well.

c. Remedies

Comcast essentially proposes two remedies: first, to bring TWC within the terms of the consent decree that it entered in connection with the NBCU merger. Second, to divest subscribers to bring itself under a self-identified 30% cap for its video subscribers (although not for its broadband subscribers). These remedies are, at best, questionable. More likely, they are entirely inadequate to address the significant competitive harms posed by the merger.

First, one should ask the question: If Comcast had tried to do the deals in different order, and had first proposed a merger with TWC and only later had sought to acquire NBCU, would the DOJ have permitted the NBCU transaction or would it have sought to block it? My guess is that the concerns would have been far greater in that case, and DOJ would have gone to court to block. So should the outcome be different given that the transactions were done in the other order? No.

In words that still ring true, the Supreme Court stated many years ago that the best remedy to an anticompetitive merger is not to allow the merger. That should be foremost in the minds of courts.[36]

There are many reasons to be skeptical of behavioral remedies. First, as economists John Kwoka and Diana Moss have noted,

> The characteristics of the new behavioral remedies – their scope, their intrusiveness, the need for ongoing oversight – raise a number of significant concerns about their likely operation and effectiveness. Significantly, many of these concerns are similar to those raised by traditional industry regulation. Traditional industry regulation is rooted in the belief that the conduct of a profit-maximizing firm with market power can be effectively constrained by the imposition of operating rules combined with administrative oversight. Behavioral remedies in an antitrust context have similar presumptions, objectives, and methods.[37]

Moreover, a major retrospective study by Professor Kwoka suggests that behavioral remedies are spectacularly unsuccessful in preventing post-merger price increases.[38] And even the DOJ has recently expressed skepticism in the context of the recent settlement of the US Airways/American Airlines merger case. The government pointed out that proposed behavioral remedies, which it refused to adopt, "would be exceedingly difficult to craft, entail a high degree of risk of unintended consequences, entangle the government and the Court in market operations, and raise practical problems such as the need for ongoing monitoring and enforcement."[39]

Finally, with respect to the proposed divestitures of subscribers to Charter Communications, this is at best a bait-and-switch. While the overall number of subscribers held by the merged entity would be lower as a result of system sales to Charter, the level of

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[36] United States v. E. I. Du Pont De Nemours & Co., 366 U.S. 316, 329–31 (1961).

[37] John E. Kwoka, Jr. and Diana L. Moss, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," at 22, available at http://antitrustinstitute.org/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

[38] John E. Kwoka, Jr., "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," 78 Antitrust L.J 619 (2013)

[39] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. US Airways Group, Inc., Case No. 1:13-cv-01236-CKK (D.D.C. March 10, 2014), at 30 n.52, available at http://www.justice.gov/atr/cases/f304200/304233.pdf.

concentration in key markets, including the crown jewels of New York and Los Angeles, would be higher as a result of Charter swapping some of its subscribers in these markets to the merged entity. Comcast is not planning to shed subscribers in the largest and most valuable markets. Further, the proposal does little to reduce the parties' share of the high-speed broadband market, which would remain well over 30%.

VI. Conclusion

Thank you for giving me the opportunity to appear before the Subcommittee. In my view, the proposed merger is anticompetitive and the proposed remedies are inadequate. The merger should therefore be rejected.