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

In the Matter of	)	
	)	
Applications of Comcast Corp., Time Warner Cable Inc, Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations	))))	MB Docket No. 14-57

NTCA–THE RURAL BROADBAND ASSOCIATION
REPLY TO OPPOSITION TO PETITIONS TO DENY
AND RESPONSE TO COMMENTS

I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association ("NTCA") hereby submits its Reply to the Comcast/Time Warner Opposition[1] to Petitions to Deny and Response to Comments in the above-captioned proceeding. NTCA is a national association of more than 900 members. All of NTCA's members are rural incumbent local exchange carriers ("RLECs"), many of whom also provide video, wireless, and broadband services to their rural communities. Many NTCA members also act as competitive carriers in other rural towns and outlying areas, offering voice, video, broadband, and wireless to consumers and businesses. A number of NTCA members compete directly with Comcast or Time Warner for voice, video, and/or broadband subscribers in at least a portion of these serving areas.

The record in this proceeding demonstrates that Comcast and Time Warner Cable ("Applicants") have not met their burden of proving that the public interest benefits of the proposed transaction outweigh the harms to competition and consumers. As NTCA stated in its

[1] Comcast Corporation and Time Warner Cable, Inc. Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (fil. Sept. 23, 2014) ("Opposition").

Petition to Deny,[2] the proposed acquisition by Comcast of Time Warner Cable would increase Comcast's ability and incentive to engage in abusive practices in the video programming market that unnecessarily increase programming costs and negatively affect RLECs' ability to invest in their video and broadband networks. The record compiled thus far in this proceeding contains petitions to deny from a large and diverse group of stakeholders that detail the numerous anti-consumer and anti-competitive harms that will result from approval of the transaction. Indeed, as discussed further below, the record demonstrates that rural consumers of the kind that NTCA members serve would bear the brunt of the harms arising out of this transaction. Choices would decrease, prices would increase, and the deployment of advanced services would be impeded. Applicants fail at rebutting these claims, and in particular fail to demonstrate that any benefits will be realized beyond that to Comcast's bottom line. NTCA therefore urges the Commission to deny the proposed transaction.

II. APPLICANTS HAVE NOT MET THEIR BURDEN OF PROOF AND HAVE NOT DEMONSTRATED THAT THE PROPOSED TRANSACTION WOULD SERVE THE PUBLIC INTEREST

A. Standard of Review

The proposed license transfers associated with Comcast's acquisition of Time Warner Cable are subject to the Commission's review pursuant to the standard found in Section 301(d) of the Communications Act.[3] Applicants must show not only that the transaction would be a benefit to the public interest, but also that the benefits outweigh the harms. Applicants bear the

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[2] NTCA–The Rural Broadband Association, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014).

[3] 47 U.S.C. § 310(d).

burden of proof in this proceeding. As the Commission noted in the Comcast/NBC Universal proceeding, the "public interest evaluation necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for *preserving and enhancing competition* in relevant markets, *accelerating private-sector deployment of advanced services,* ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest."[4]

If approved, the transaction will create the nation's largest video and broadband provider that will also own substantial, "must have" and non-substitutable video programming. The combined entity will have the ability and incentive to drive up and/or withhold video content from competitors, which would have the effect of increasing prices for consumers, reducing competition, and limiting RLECs' ability to invest in improving the quality and reach of their broadband networks. As discussed further below, Applicants have not met their burden of proof.

B. Applicants Have Not Met Their Burden of Proof in Demonstrating that the Public Interest Benefits of the Proposed Transaction Outweigh the Harms to Competition and Consumers

The record compiled thus far in this proceeding contains petitions to deny from a large and diverse group of stakeholders detailing the numerous anti-consumer and anti-competitive harms that would result from approval of the transaction. For RLECs, the proposed transaction threatens to drive their multichannel video programming distributor ("MVPD") affiliates' video programming costs even higher, as the combined entity will have an even greater ability and

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[4] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4 (rel. Jan. 20, 2011) ("*Comcast/NBCU Order*"), ¶ 23 (Internal Citations Omitted) (Emphasis Added).

incentive to drive RLECs' video programming costs to untenably high levels and engage in a variety of tactics to price their services below cost to drive out competitors. Moreover, this increase in video programming costs will have a ripple effect, as RLECs' ability to offer affordable video services to consumers has been shown to increase broadband adoption. The proposed merger is thus a threat to diversity, competition, and the interests of rural consumers in accessing services that are comparable to those available in urban areas at affordable rates.

RLECs have made great strides in overcoming the hurdles of distance, topography, and lack of density in making high quality video services (via traditional cable TV and IPTV systems) to a large majority of the consumers in their rural service areas. Despite their success in overcoming these many challenges, access to video content on reasonable terms and conditions remains the single biggest hurdle NTCA members face in providing their consumers with affordable video services. Indeed, ninety-nine percent of respondents to a survey of NTCA members stated that access to reasonably priced programming was a barrier to the provision of video programming at rates affordable to consumers or to entry into the market in the first place.[5] Moreover, the availability of video service and the bundling of it with broadband is a key driver in rural broadband deployment and take rates.

As discussed in NTCA's Petition to Deny, video programmers use several tactics that unnecessarily increase RLECs' costs of obtaining video content. While a comprehensive discussion of these abusive tactics needs not be repeated here, in sum, these practices include "forced tying" (where RLECs are required to purchase programming their customers do not want

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[5] NTCA 2013 Broadband/Internet Availability Survey Report (May 2014). http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcabroadbandsurveyreport.pdf

as the price for “must have” content consumers demand) and “forced tiering” (where video programmers require certain content to be placed in MVPDs’ lowest cost programming tier). Moreover, the broken retransmission consent regime has led to substantial increases in programming costs and enables broadcasters to threaten to withhold valuable “must have” content to extract astonishingly higher and higher fees each year. In the face of these abusive practices, RLECs’ must either increase end-user rates for their video services or absorb them, diverting resources that could be put to better use in actually improving the quality and reach of their video and broadband networks. Moreover, their size alone typically precludes RLECs from obtaining the volume discounts on video programming available to carriers of the size and scale as Comcast and Time Warner. To the extent that they compete directly with these providers, this limits their ability to offer video services at competitive rates.

The proposed acquisition of Time Warner Cable by Comcast threatens to increase RLECs’ untenably high video programming costs, as the combined entity will have a greater ability and incentive to engage in the practices such as those discussed above. If the proposed transaction is approved, the combined Comcast/Time Warner will be the nation’s largest video provider, controlling nearly 30 percent of the nation’s pay-TV subscribers. Despite claims to the contrary contained in their Opposition, Comcast will increase through the acquisition of Time Warner Cable its already substantial library of video programming.[6] Much of this programming is unique, “must-have” content. That is, such content cannot be replicated elsewhere, and any

[6] CenturyLink, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), pp. 8-9; COMPTEL, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), p. 35.

MVPD hoping to enter into or survive in the video services market cannot do so without access to such content.

In terms of the analysis of the proposed transaction and its effect on the video services market and competition therein, the most recent and relevant example of how the Commission should analyze the instant transaction is the Comcast acquisition of NBCU. In that proceeding, the Commission analyzed Comcast's ability and incentive to "harm competing MVPDs by withholding content or raising programming prices."[7] The Commission's analysis of this issue rightly concluded that the "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."[8] Central to this conclusion was the Commission's finding that "the loss of Comcast-NBCU programming, including the programming contributed by NBCU, would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers."[9]

As a number of parties in the record correctly state, both Comcast and Time Warner have already shown their willingness to withhold must-have programming from competitors in order to extract increasing payments for must-have content or to deny them the ability to effectively compete. As one example, as CenturyLink cites in its Petition to Deny, Time Warner Cable has been in a dispute with DirecTV over SportsNet LA,[10] a dispute that Chairman Wheeler has

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7 Comcast/NBCU Order, ¶ 28.

8 *Id.*, ¶ 36.

9 *Id*.

10 CenturyLink, pp. 10-11; *See also*, COMPTEL, p. 38.

acknowledged has troubling consequences for competition and consumers.[11] Other parties point to Comcast's refusal to allow for carriage of its regional sports network in Philadelphia.[12] Indeed, in the Comcast/NBCU proceeding, the Commission itself cited the Philadelphia regional sports network as an example of why it could not rely on Comcast's assurances that it would not engage in anticompetitive behavior through the withholding of must have content.[13] Yet approval of the instant transaction would likely increase the combined entity's ability and incentive to engage in such tactics.

Applicants unsuccessfully attempt to rebut the numerous Petitions to Deny. Of particular note is Applicants' feeble attempt to argue that many of the abusive practices discussed above are not "transaction-specific" and therefore not properly within the scope of the Commission's review. More specifically, Applicants state that because "Comcast's video programming ownership will not substantially increase, there is no basis to conclude that such claims are transaction-related and accordingly no basis for restricting Comcast alone from commonplace commercial practices."[14] Yet, the record is clear that the combined entity's library of content will increase substantially, as will its sheer scope and resulting market power in the video services market.

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11 Letter from FCC Chairman Tom Wheeler to Robert D. Marcus, Chairman and Chief Executive Officer, Time Warner Cable, Inc. (Jul. 29, 2014).

12 ITTA, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), p. 14; Dish Network Corporation, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), pp. 66-67; Frontier Communications Corporation, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), p. 7.

13 Comcast/NBCU Order, ¶ 71.

14 Opposition, p. 240, fn. 746.

Beyond their ability and incentive to engage in abusive tactics such as those noted above, a number of parties also point to the effect that the merger will have on the overall video programming market.[15] More specifically, Comcast and Time Warner as stand-alone entities already receive substantial volume discounts from video programmers. The combination of the nation's largest and second largest MVPDs will create a video provider that controls nearly one-third of all cable TV subscribers across the nation. The combined entity will have the ability to bargain for even greater volume discounts not available to their MVPD competitors. Applicants' response that video programmers will not seek to make up these losses by charging Comcast's rivals higher programming fees misses the point. That is, even if video programmers do not seek to make up these losses, Comcast's rivals will still be at a competitive disadvantage due to an inability to purchase content at rates as low as Comcast. And again, the argument that such concerns are not "transactions-specific" seek to ignore the vastly increased scope and scale of the combined Comcast/Time Warner.

Indeed, it is Applicants themselves that fail to make a convincing case that the supposed public interest benefits of the proposed transaction are truly "transaction-specific." As Free Press and the Consumer Federation of America state, there is no indication that the professed benefits of the merger are indeed merger-specific or cognizable, much less of such importance or benefit to *consumers* such that they outweigh the harms to consumers and competition. In fact as COMPTEL correctly notes, "[m]any of the benefits from the acquisition touted by the applicants

[15] ITTA, pp. 11-12; RCN Telecom Services, LLC and Grande Communications Networks, LLC, Petition to Deny, MB Docket No. 14-57 (fil. Aug. 25, 2014), pp. 17-18; Comments of Hargray Communications Group, Inc., MB Docket No. 14-57 (fil. Aug. 25, 2014), p. 4.

are not so much affirmative *public interest* benefits as benefits that will inure to Comcast."[16] COMPTEL goes on to state that "[w]hat is not found in Comcast's Applications is any commitment to pass any expected cost savings from its more efficient and cost-effective operations through to its customers."[17] Finally, the California Public Utilities Commission smartly states that the Commission should "require the applicants to show why the claimed merger benefits – such as higher broadband speeds, more advanced video and voice services, a more secure network, and better system reliability – could not be provided by Comcast and Time Warner if they remain separate entities."[18]

III. CONCLUSION

Applicants have failed to meet their burden of demonstrating that this transaction is in the public interest. The harms to competition and consumers arising out of the combination of Comcast and TWC are likely to outweigh any potential benefits for American consumers as a whole, and for rural Americans in particular. The combined entity would have the ability and incentive to exercise its market power to control video markets and to discriminate against non-affiliated video and broadband providers and increase RLECs' video programming costs to levels that will severely limit or even negate their ability to effectively compete. Should the merger be approved, rural consumers of the kind that NTCA members serve will bear the brunt of this transaction, as choice will decrease, prices will increase and the deployment of advanced

[16] COMPTEL, p. 8 (emphasis in original).

[17] *Id.*, p. 9.

[18] Comments of the California Public Service Commission, MB Docket No. 14-57 (fil. Aug. 25, 2014), p. 8.

services will be impeded. For these reasons, NTCA urges the Commission to deny the proposed merger of Comcast and Time Warner Cable.

Respectfully Submitted,

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