



March 2, 2015

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Presentation in MB Docket No. 14-57, *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the Stop Mega Comcast Coalition submits the attached white paper: "Net Neutrality Rules Are No Cure for Mega-Comcast." The white paper explains why the Commission's latest net neutrality rules, adopted February 26, do not mitigate the anticompetitive effects of approving the proposed merger of Comcast and Time Warner Cable. As parties in the record have demonstrated, the proposed merger threatens serious harms to competition and consumers and runs counter to our antitrust and communications laws. No set of conditions can alleviate these harms; therefore, the FCC must reject this merger.

Respectfully submitted,

/s/

Stop Mega Comcast Coalition

Enclosure



NET NEUTRALITY RULES ARE NO CURE FOR MEGA-COMCAST

Executive Summary

An increasingly large and diverse number of stakeholders have engaged the Department of Justice (“DOJ”) and the Federal Communications Commission (“FCC”) to raise concerns with Comcast’s proposed acquisition of Time Warner Cable (“TWC”). Those stakeholders have made a compelling argument that the merger should be blocked. Among other reasons, it would amplify dramatically Comcast’s incentive and ability to do harm, including by foreclosing competition from online video distributors (“OVDs”) through Mega-Comcast’s increased control over the ramp to the Internet.

The Commission’s latest net neutrality rules, which were adopted February 26, do not mitigate the anticompetitive effects of approving Mega-Comcast.

First, the merger would create a hugely increased incentive to defy any net neutrality constraints, as it would be vastly more profitable for Mega-Comcast to do so than it is for Comcast today.

Second, net neutrality restraints already have proven ineffective. Comcast, alone of all Internet service providers (“ISPs”), has been continually subject to the Commission’s 2010 net neutrality rules since it acquired NBCUniversal (“NBCU”). This did not prevent Comcast from throttling Netflix’s traffic over a four month period from November 2013 to February 2014.

Third, even if the net neutrality rules are broader than the 2010 version, for example by extending to interconnection, they will still be subject to interpretation. Comcast has devoted substantial resources to avoiding, evading, or working around the conditions to which it has been subject in the past. There is no doubt Mega-Comcast will do so, too.

Fourth, the net neutrality rules do not relate to many of the harms that the merger would produce. The proposed transaction threatens harms across a variety of markets that fall outside the Commission’s net neutrality rules entirely, including the pay-TV, set-top box, advertising, and Latino markets, among others.

Finally, the fate of the net neutrality rules is uncertain; the merger applicants through their trade association already have made it clear that they will sue the FCC in court. In the meantime, any behavioral remedies adopted if the transaction is approved likely will be subject to their own litigation, as Comcast has demonstrated it is inclined to challenge even the most straightforward enforcement of a merger condition.



The Presence of Net Neutrality Regulations Does Not Detract from the FCC's and DOJ's Public Interest Obligation to Reject Mega-Comcast

The FCC and DOJ have a statutory duty to reject Mega-Comcast notwithstanding the FCC's action on net neutrality. The "unifying theme" of the *Horizontal Merger Guidelines* is "that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."¹ DOJ's *Policy Guide to Merger Remedies* is clear that "the existence of regulation typically does not eliminate the need for an antitrust remedy to effectively preserve competition."²

At its core, this is a horizontal transaction: without the merger, Comcast and TWC represent two separate broadband access options to which OVDs can turn in their effort to achieve near-nationwide critical mass. With the merger, the two options would become one. Mega-Comcast would control over half of the nation's high-speed broadband access subscribers. The DOJ and FCC already have amassed a significant record on the increased incentive and ability of Mega-Comcast to harm competition, consumers, and the public interest as a result.

No regulation, including net neutrality, can make up for this loss of competitive options. Indeed, the DOJ and FCC have blocked mergers between highly regulated companies to preserve competition—most recently by blocking AT&T's attempt to merge with T-Mobile.³ That transaction was blocked despite both firms operating subject to conduct regulations adopted pursuant to Titles II and III of the Communications Act. Significantly, the agencies did not take comfort from the existence of rules restricting the carriers' conduct in key areas of competitive concern, such as voice and data roaming. Antitrust authorities and regulators have blocked other mergers between firms subject to regulation, including proposed mergers involving most recently stock exchanges and airlines.

Further, given the facts developed in the proposed transaction, there is no reason to wait for and engage in a further fact-finding exercise through a subsequent adjudication process under the net neutrality rules.⁴ After spending over one year developing and reviewing the facts in the current proposed transaction, it would make little sense to wait for a complainant to bring an enforcement action under Commission rules that would simply replicate much of the work already done in the merger transaction, would take additional time to adjudicate, and which would be independently subject to appellate litigation.

¹ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, § 1, at 2 (2010), available at <http://www.ftc.gov/sites/default/files/attachments/mergerreview/100819hmg.pdf>.

² Antitrust Division, U.S. Department of Justice, *Policy Guide to Merger Remedies*, at 20 (2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

³ See Applications of AT&T and Deutsche Telekom AG, *Memorandum Opinion and Order*, 26 FCC Rcd. 16184 (2011); see also Applications of AT&T and Deutsche Telekom AG, *Staff Analysis and Findings*, WT Docket No. 11-65 (2011), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-11-1955A2_Rcd.pdf.

⁴ FCC, Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet, at 3 (Feb. 4, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf.



Net Neutrality Restrictions Have Already Been Unsuccessful at Curbing Comcast's Conduct, and Are Not Designed to Rein in the Potential Abuses of a Mega-Comcast

Violations of net neutrality dictated by Mega-Comcast would be difficult to detect and harder to enforce. The gatekeeper role that Mega-Comcast would perform thanks to its broadband access service would be complex, and it could harm OVDs in many opaque and subtle ways. Each business relationship that Mega-Comcast would have, each point on its network, and each technology it employs could potentially be used to undermine its competitors. The Appendix contains 53 currently known ways in which Mega-Comcast could harm competing OVDs, but there are likely many others. With its choice of tactic and of technique, Mega-Comcast could easily elude scrutiny, eschew blame, or engineer around the regulation entirely. In addition, as discussed more fully below, net neutrality rules do not address the various other ways Mega-Comcast could thwart competitors outside of its broadband pipe, for example, through its unprecedented control over the set-top box, local advertising, and Latino markets, among others.

Indeed, the current net neutrality rules have already proven ineffective at curbing Comcast's conduct. Comcast is the only ISP currently subject to the FCC's 2010 net neutrality rules, due to a commitment Comcast made to the FCC to gain approval of its transaction with NBCU. Those rules ostensibly prohibit Comcast from blocking or degrading its own subscribers' access to websites of their choosing. Yet they did not keep Comcast from throttling its subscribers' access to Netflix over the course of several months—culminating in significant degradation of Netflix's service from November 2013 until February 2014, when Netflix finally agreed to pay Comcast an access fee. Pressed on the propriety of its behavior, Comcast has blamed Netflix's choice of transit providers for causing the disruption and argued that its actions are not covered by the net neutrality rules, because they occurred at the edge of its network (at the point of interconnection), rather than within it.

Even if the restrictions are broadened, they are still likely to leave much to interpretation and the imagination of expensive lawyers. Specifically, while we do not yet know the content of the new net neutrality rules, it is likely that any rules relating to interconnection and data caps—two of the immediate harms raised in the proposed merger—will not create a bright line, but rather allow high-level principles to be enforced through ex-post administrative litigation. How the FCC will apply such principles is uncertain. And, the as-applied enforcement of those regulatory proceedings will itself be subject to further appellate litigation.

Unfortunately, Comcast has a well-earned reputation for litigating at every opportunity and for stretching out proceedings for as long as possible. Few would have the time or money to litigate against Mega-Comcast for years in order to see a judgment. Those that do would have to weigh the equally daunting prospect of retaliation as a result of a complaint. With Mega-Comcast controlling half the broadband distribution market, the costs of complaining would be steep.

Indeed, there is no reason to expect that net neutrality rules will be any more effective at restraining Comcast's behavior than any of the conditions whose meaning Comcast has litigated over the years. Take, for example, the "news neighborhood" condition Comcast voluntarily agreed to abide by in exchange for approval of its control over NBCU's news channels, MSNBC and CNBC. That condition requires that, if Comcast "now or in the future carries news and/or business news channels in a neighborhood," it "must carry all independent news and business



news channels in that neighborhood.”⁵ There was nothing obviously deficient about the drafting of that condition, or gaping loophole opened by its language. And yet, when Bloomberg TV sought enforcement of the condition, Comcast spent nearly three and a half years (nearly half the life of the condition) litigating everything from whether the First Amendment prevented the FCC from enforcing Comcast’s voluntary commitment to whether “now” really meant now.⁶ Comcast settled only on the eve of announcing its proposed acquisition of TWC.

No matter what one’s views of net neutrality, those rules would thus not be capable of preventing Mega-Comcast from circumventing their spirit and letter if it is granted the ability and the incentive to act inconsistently with them, all to the detriment of competitors, consumers, and innovation.

Net Neutrality Rules Relate Only to Some of the Numerous Harms that Mega-Comcast Would Be Able to Inflict

The net neutrality rules are insufficient for yet another reason: Mega-Comcast would sell more than residential broadband and the effects of the merger sweep much more broadly than its conduct as a broadband gatekeeper. The proposed transaction threatens harms across a variety of markets that fall outside the Commission’s net neutrality rules entirely, including the pay-TV, set-top box, advertising, and Latino markets, among others.

Parties in the FCC’s merger proceeding, for example, have complained about the formidable oligopsony power that Mega-Comcast will hold over the purchase of programming—potentially insulating Mega-Comcast from competition not only in its retail video service, but also the broadband market, where consumers often demand broadband be bundled with video. Others worry that Mega-Comcast will foreclose its direct competitors from access to NBCU programming—the profitability of which would be significantly greater post-transaction. Still others worry that Mega-Comcast’s ownership of Telemundo will lead to the exclusion of competing non-affiliated Spanish-language channels.

This is because Mega-Comcast would be the nation’s most dominant pay-TV provider, while also owning NBCU, one of the biggest programmers in the world. Mega-Comcast would have the means and the incentive to advance its own content at the expense of other programmers and to force consumers to pay more for content not controlled by Comcast/TWC. In addition, the concentration of the top major metropolitan areas within Mega-Comcast would pose a significant competitive threat to programmers, competing pay-TV providers, and OVDs.⁷

Comcast’s recent foray into the consumer device industry has raised similar concerns about its ability to control the industry-standards for set-top boxes to the disadvantage of online video providers and smaller cable operators. Those who rely on wholesale services provided by TWC

⁵ Applications of Comcast Corp., General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4358, Appendix A, Condition III.2. (2011).

⁶ See *Bloomberg L.P. v. Comcast Cable Communications*, *Memorandum Opinion and Order*, 28 FCC Rcd. 14346, 14350-51 ¶ 7 (2013).

⁷ See *DISH Network Corporation, Petition to Deny*, MB Docket No. 14-57, pp. 70-71, 80-82; Declaration of Roger Lynch at 18-20; Declaration of Professor Sappington at 18-19 (Aug. 25, 2014).



have fretted over Comcast's lack of interest in offering such services. Post-merger, Comcast's X1 Platform would be the default streaming system for the vast majority of broadband subscribers, affording Mega-Comcast extraordinary power over the content available to broadband consumers and forcing competing devices to submit to the combined company's terms in order to gain entry to the marketplace. This means fewer choices for consumers and less motivation for companies to invest in new and innovative technologies.

Still others worry that Mega-Comcast will use its control over FreeWheel, the technology required by many programmers for ad-insertion to harm competitors. Mega-Comcast would control 71% of the local cable advertising market post-merger. Local cable ads are critical for local businesses, particularly small businesses, to reach their customers. Local cable advertising is also a critical component of business for cable companies. Confronted with the combined company's control over 71% of the market, small business marketers and cable companies will have no choice but to pay Mega-Comcast rates, raising small business costs and increasing prices for consumers.

A combined Comcast/TWC would also harm the Latino market. Mega-Comcast would reach more than 91% of Latino households and control programming in 19 of the top 20 Latino media markets. That means virtually the entire Latino community could find itself with far fewer programming choices, lower quality programming and fewer opportunities for Latinos in the creative content industries.

The list goes on and net neutrality rules do not address these other matters. If allowed to come into being, Mega-Comcast could well be free to pursue domination over additional markets to the detriment of competitors, consumers, and innovation. The threat to consumers is every bit as great after the net neutrality rules are promulgated as it was before, and the need for regulators to reject this deal is just as pressing.

Net Neutrality's Fate Is Uncertain

Comcast and Time Warner Cable, through their trade association, and any number of incumbent ISPs already have made it clear they will challenge the net neutrality rules in court. Litigation introduces a layer of uncertainty. Thus, the possibilities as to net neutrality's future are myriad—they form an intricate decision tree with branches shooting out in all directions and may take years to unfold.

The threatened litigation could extend into 2018. Litigation cannot begin until the final rules are published in the *Federal Register*, which may take as long as six months given the need for OMB "paperwork reduction" approval. Proceedings in one of the Courts of Appeals could take a further one to two years, depending on the Circuit Court selected in the multi-judicial lottery to hear the case. Regardless of the outcome, the losing side is likely to seek en banc rehearing and review at the Supreme Court, which could add another year of delay or more.

As a result, even in the most optimistic of circumstances, we may be years away from knowing the true scope of the FCC's net neutrality regulations. Over that time, the rules may be affirmed or changed, or the FCC's interpretation of them may end up leaving important aspects of Mega-Comcast's market power entirely unconstrained. Such speculative protections are too thin a reed on which to approve this transaction, given the significant and likely potential for harm to



consumers from Mega-Comcast. While the fate of the Commission's net neutrality rules may be uncertain, the harms of Mega-Comcast are permanent and irreversible.

APPENDIX: 53 OF THE WAYS MEGA-COMCAST CAN HARM OVDs

- 1) Block OVD content at the last mile;
- 2) Slow down OVD content at the last mile;
- 3) Degrade the quality of OVD content at the last mile;
- 4) Increase specialized services lanes to curtail the speed of the public Internet;
- 5) Create fast lanes for Comcast-TWC services;
- 6) Artificially route OVD content through congested middle-mile facilities;
- 7) Create slow lanes for OVD content;
- 8) Refuse to open sufficient ports for OVD content at the point of interconnection;
- 9) Restrict the ability of OVD applications/services to work on Comcast-TWC's network;
- 10) Close ports to slow down OVD content at the point of interconnection;
- 11) Impose unreasonable terms on transport providers to gain sufficient access to Comcast-TWC's network;
- 12) Impose unreasonable terms on CDN providers to gain sufficient access to Comcast-TWC's network;
- 13) Demand unreasonably high rates on transport providers to gain sufficient access to Comcast-TWC's network;
- 14) Demand unreasonably high rates on CDN providers to gain sufficient access to Comcast-TWC's network;
- 15) Require OVDs to directly connect to Comcast-TWC's network;
- 16) Refuse to directly connect with an OVD while at the same time refusing to expand connections to transit providers and CDNs;
- 17) Impose less favorable terms of interconnection on transit providers that serve the most successful OVDs;
- 18) Impose data caps on OVD content;
- 19) Create data caps at a sufficiently low level to discourage OVD content usage by consumers;
- 20) Charge unreasonably high rates for customers who exceed data caps;
- 21) Exclude Comcast-TWC content from data caps, while subjecting competing services to the caps;
- 22) Exclude from the data caps OVDs who pay Comcast-TWC;
- 23) Restrict the ability of OVD applications/services to work on Comcast-TWC's set-top boxes;



- 24) Demand unreasonably high rates for the ability of OVD applications/services to work on Comcast-TWC set-top boxes;
- 25) Favor or promote NBCU applications/services on Comcast-TWC set-top boxes, to the detriment of competing applications/services;
- 26) Require competing OVD programming to be distributed through Comcast-TWC's cable MVPD service at below-market rates;
- 27) Refuse to provide third-party consumer devices access to linear content through a CableCard or non-CableCard security solution;
- 28) Refuse to allow third-party consumer devices to access the X1 VOD platform through a CableCard or non-CableCard security solution;
- 29) Use their dominance in broadband to subsidize video through bundled discounts to discourage customers from buying OVD services;
- 30) Use their dominance in broadband to subsidize video through bundled discounts to discourage customers from buying other competing video services;
- 31) Impose contractual restrictions on third-party content providers to limit OVD access to content;
- 32) Impose contractual restrictions that limit the ability of OVDs to gain preferential/equal "windowing" of content;
- 33) Impose contractual restrictions on third-party content providers to limit OVD access to "must-have" or marquee programming;
- 34) Impose contractual channel/bundling restrictions on third-party content providers to require OVDs to carry more channels than they otherwise would be required to;
- 35) Impose contractual restrictions on MVPDs seeking to provide OVD content that require these MVPDs to negotiate OVD and linear MVPD channel content at once;
- 36) Impose contractual restrictions on MVPDs seeking to provide OVD content that require these MVPDs to re-open existing linear contractual arrangements to negotiate for OVD content rights;
- 37) Refuse to offer long-term programming contracts, so that OVDs will persistently face uncertainty and be subject to the changing whims of Comcast-TWC;
- 38) Require favorable channel placement for Comcast-NBCU content on OVD platforms;
- 39) Restrict the ability of third-party hardware providers to offer OVD applications/services;
- 40) Restrict the ability of third-party hardware providers to offer Comcast-NBCU content;
- 41) Refuse to allow Comcast-TWC video customers to authenticate on programmer video applications (for example, HBO GO);
- 42) Refuse to allow Comcast-TWC video customers to authenticate on programmer video applications (for example, Watch ESPN) on devices (for example, Roku) that also offer OVD applications/services;
- 43) Refuse to license Comcast-NBCU content to OVDs;
- 44) Impose unreasonable terms to license Comcast-NBCU content to OVDs;

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- 45) Refuse to allow OVDs to advertise their products on NBCU channels;
- 46) Require the transit providers of major OVDs to “reserve” (and pay for) excess capacity on Comcast-TWC’s network;
- 47) Demand unreasonably high rates for carriage by OTT products in return for uncompromised access to Comcast-TWC’s subscribers;
- 48) Discriminate against online advertisers by either favoring certain online advertisers or blocking other online advertisers;
- 49) With deep packet inspection, identify users of competitive MVPD online services, such as on-demand services from satellite providers, and interfere or slow access to that content;
- 50) As the owner of FreeWheel, delay implementation of ad-insertion services for OVDs;
- 51) As the owner of FreeWheel, impose unreasonable terms on OVDs to get access to FreeWheel ad-insertion services;
- 52) As the owner of FreeWheel, interfere with ad insertion by OVDs; and
- 53) As the owner of FreeWheel, tie the FreeWheel product to exclusive Comcast-NBCU content arrangements.