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August 25, 2014

*Filed electronically via ECFS*

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Suite TW-A325  
Washington, DC 20554

Re: MB Docket No. 14-57, Application of Comcast Corp. and  
Time Warner Cable Inc. for Consent to Transfer Control  
Of Licenses and Authorizations; New York State Public Service  
Commission Initial Comments

Dear Ms. Dortch:

On behalf of the New York State Public Service Commission, I have enclosed the Initial Comments of the New York State Public Service Commission for filing in the referenced docket.

Thank you for your attention. Please contact me at (518) 474-2510 if you have any questions.

Respectfully submitted,

A handwritten signature in cursive script that reads 'Kimberly A. Harriman'.

KIMBERLY A. HARRIMAN  
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Public Service Commission  
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Enclosure

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20544

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

**INITIAL COMMENTS OF THE  
NEW YORK PUBLIC SERVICE COMMISSION**

INTRODUCTION

On July 10, 2014, the Federal Communications Commission (FCC) issued a Public Notice (Notice) seeking comments in the above-referenced matter. Pursuant to that Notice, the New York Public Service Commission (NYPSC) respectfully submits these comments.<sup>1</sup> According to the applications, Comcast Corporation (Comcast) and Time Warner Cable Inc. (Time Warner) (together the Petitioners or combined company) are seeking to transfer certain licenses and authorizations from Time Warner to Comcast. Following the proposed transaction, Comcast would acquire 100 percent of Time Warner's equity in exchange for Comcast stock. The result of the proposed transaction would be that the company currently operating as Time Warner would become a wholly owned subsidiary

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<sup>1</sup> The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to the New York Public Service Law (PSL) §12, the Chair is authorized to file comments on behalf of the NYPSC. These comments, however, should not be construed as the NYPSC's final disposition on matters currently pending before it in Case 14-M-0183, Joint Petition of Time Warner Cable, Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control (filed May 15, 2014).

of Comcast. As a result, Comcast would become the largest cable provider in the United States, with approximately 30 million subscribers.

In New York, Comcast currently provides video, Internet and telephone services to a relatively small number of subscribers, about 22,000, while Time Warner provides those services to more than 2.5 million subscribers in approximately 1150 cities, towns, and villages. Time Warner is also a major presence in four out of the five New York City boroughs and each of the major upstate cities. Since New York is situated between established Comcast service territories in Vermont, Connecticut, Massachusetts, New Jersey, and Pennsylvania, the proposed transaction would enable the combined company to round out its presence in the Northeast region. Perhaps more importantly, the proposed transaction would give the combined company access to the New York Metropolitan media market, the largest in the country. Accordingly, Time Warner's significant New York customer base, combined with its unique geographic location, makes New York State a critical component of the outcome of these proceedings.

On May 15, 2014, the Petitioners filed for state-level NYPSC approval of the proposed transaction.<sup>2</sup> The NYPSC is currently undertaking its own public interest review, which runs concurrently with the FCC's review and review by the Department of Justice (DOJ). The NYPSC has broad authority to review all aspects of the proposed transaction and, similar to the FCC's standard of review, must determine it is in the public interest. Under New York Public Service Law (PSL) §99(2): "[n]o telephone corporation shall transfer or lease its works ... without the

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<sup>2</sup> Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation For Approval of a Holding Company Level Transfer of Control (filed May 15, 2014) (Joint Petition).

written consent of the [NYPSC]... Any other transfer or lease between non-affiliates regardless of cost shall be effective without the commission's written consent within ninety days after such corporation notifies the commission that it plans to complete such transfer or lease ... unless the commission, or its designee, determines within such ninety days that the public interest requires the commission's review and written consent." Moreover, under PSL §100(1) and (3): "[n]o telegraph corporation or telephone corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold any part of the capital stock of any telegraph corporation or telephone corporation ... unless authorized so to do by the [NYPSC]."

Similarly, under the newly amended PSL §222(3)(b): "[t]he [NYPSC] shall not approve the application for a transfer of a franchise, any transfer of control of a franchise or certificate of confirmation, or of facilities constituting a significant part of any cable television system unless the applicant demonstrates that the proposed transferee and the cable television system conform to the standards established in the regulations promulgated by the commission ... that approval would not be in violation of law, or any regulation or standard promulgated by the commission, and that the transfer is otherwise in the public interest..."<sup>3</sup> Thus, the burden of demonstrating that the transaction satisfies the public interest rests with the Petitioners.

Following the May 15, 2014 filing of the Petitioners' application at the NYPSC, a Notice Inviting Comments was issued on May 16, 2014. The New York Department of Public Service Staff (NYDPS Staff) and other interested stakeholders filed

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<sup>3</sup> L. 2014, Ch. 57 (Part R).

comments with the NYPSC on or about August 8, 2014<sup>4</sup> with replies due August 25, 2014.<sup>5</sup>

The NYPSC also held three Informational Forums and Public Statement Hearings concerning the Joint Petition and the proposed transaction. Those hearings were held in Buffalo on June 16, 2014, in Albany on June 18, 2014 and in New York City on June 19, 2014. Dozens of speakers, including non-profit organizations, good government and business groups and members of the general public provided their input on whether the NYPSC should approve the proposed transaction. Many of the statements reflected a need for low-income Internet access, additional competition and consumer choice in the cable market, enhanced customer service and meaningful Internet neutrality conditions.

In the New York State proceeding, the following issues have been identified for consideration: affordability of broadband service, a level playing field for New York business customers, overall service quality, job retention, universal broadband service (including rural deployment), network deployment to unserved/underserved areas, and general infrastructure investment. The NYPSC shares the FCC's significant interest in closing the digital divide to enable hundreds of thousands of New Yorkers, and millions of Americans, to access crucial Internet resources. At the federal level the Petitioners argue that, among other things, the proposed

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<sup>4</sup> See, Case 14-M-0183, Joint Petition of Time Warner Cable, Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, Comments of the NYSDPS Staff (filed August 8, 2014). These comments were also filed with the FCC pursuant to Ex Parte rules on August 8, 2014.

<sup>5</sup> Pursuant to 47 U.S.C. §537, New York's review of the proposed video transaction must be completed within 120 days of the filing of the application, unless the Petitioners agree to further extensions. In New York, the Petitioners agreed to extend until October 8, 2014.

transaction is in the public interest because it will result in a combined company that is better positioned to compete in an increasingly complex video market, will create efficiencies of scale that will provide savings, and will increase access to high-speed broadband within the current Time Warner footprint. At this time, the NYPSC is not offering an opinion as to whether the FCC or the DOJ should approve the proposed transaction. At a minimum however, the Federal Government's review, especially that of the FCC's, should focus on market power issues.

#### DISCUSSION

The Petitioners claim that the transaction does not "present any plausible threat of 'vertical' anticompetitive effects."<sup>6</sup> They argue that in order for such concerns to be valid, the combined company would need to possess market power. They argue further that the transaction would increase the combined company's incentive and ability to gain customers by leveraging its size and content. The Petitioners point to the various competitive pressures they face as evidence that the proposed transaction would not result in vertical market power concerns. The Petitioners' view appears too narrow.

While we acknowledge that both Comcast and Time Warner face competitive pressures in the provision of services from satellite, wireless, and telephone providers, the combined company would have access to the same NBC-Universal line of business that Comcast currently enjoys. With the proposed transaction the potential for vertical market power issues

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<sup>6</sup> MB Docket No. 14-57, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement (Comcast/Time Warner Applications), p. 128.

associated with the interplay of Comcast's significant position in the upstream video programming market, with its activities as the largest cable television provider in the downstream video distribution market, may be increased as the Comcast video distribution footprint expands to the Time Warner service areas.<sup>7</sup> The combined company could, therefore, be a more powerful buyer of programming and other upstream wholesale services. This added buying power and control over a larger footprint could increase the combined company's incentive to engage in exclusionary practices that increase its market power over retail customers and result in less of an incentive to pass along savings to those consumers.

Indeed, the FCC previously recognized these issues in approving Comcast's acquisition of NBC-Universal.<sup>8</sup> In approving that transaction, the FCC and the DOJ put in place specific conditions falling into several important categories, including: 1) access to Comcast/NBC-Universal programming, 2) access to Comcast's distribution system, 3) development of online competition (including standalone broadband requirements), and 4) other public interest protections and benefits (e.g., broadcasting, localism, diversity, and broadband adoption and deployment). And, to the extent there have been shortcomings with the adequacy and enforceability of other behavioral remedies, those shortcomings may only be magnified by Comcast's

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<sup>7</sup> The NYPSC, however, recognizes that Comcast's ownership of NBC/Universal generates valuable economic activity and creates jobs in New York State.

<sup>8</sup> See, MB Docket No. 10-56, 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, Memorandum Opinion and Order, Appendix A (issued January 20, 2011)(Comcast/NBC-Universal Order)

acquisition of Time Warner.<sup>9</sup> As explained by the DOJ in its Competitive Impact Statement in U.S. v. Comcast/NBCU, Comcast has both the incentive and experience to engage in exclusionary practices which may harm competitive providers of video programming and competitive video distributors.<sup>10</sup> The incentives and success of exclusionary practices are possibly heightened with respect to new and innovative market entrants like the combined company.<sup>11</sup>

The NYPSC has other potential concerns as well. As discussed above, the combined company may have enhanced market power over programming and other upstream wholesale services. While this should reflect an opportunity to pass on savings, associated with more favorable deals with suppliers on to consumers, the size of the combined company creates the possibility of an increased incentive to engage in exclusionary pricing practices, to the detriment of its customers and the

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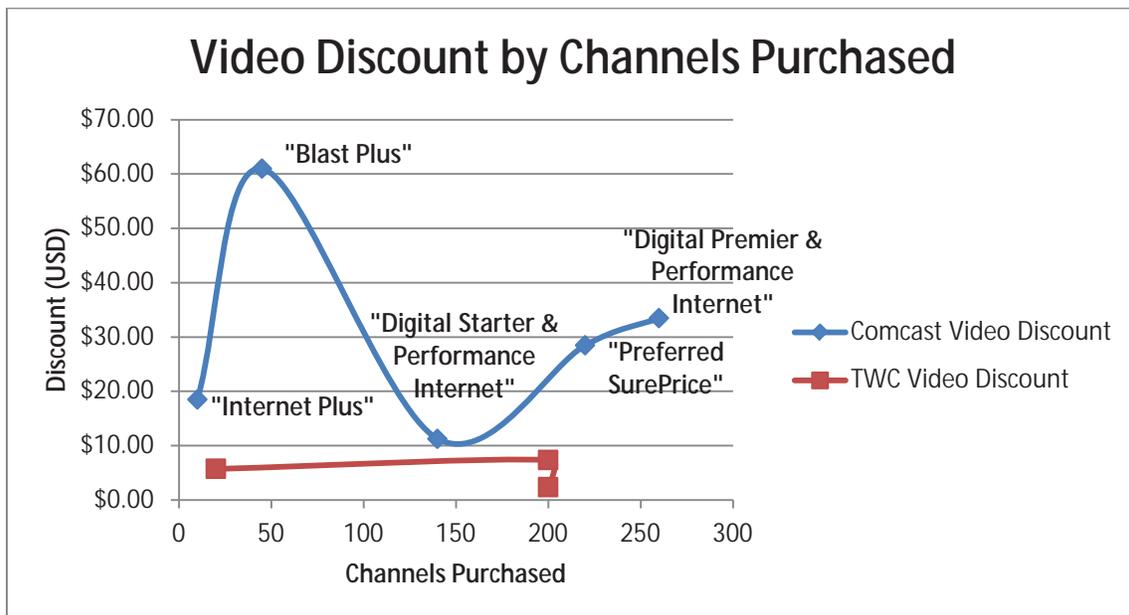
<sup>9</sup> The Comcast NBC/Universal behavioral remedies instituted by the DOJ and the FCC included, among others, a requirement for non-discriminatory licensing of content to rival on-line distributors, a must carry news requirement which also specifies that news channels should be clustered together, a prohibition against discrimination in program carriage on the basis of affiliation, a net neutrality clause prohibiting Comcast from unreasonable discrimination in the transmission of content over its network, and a requirement to provide and market its \$49.95 standalone Internet broadband service for a fixed period of time. A number of these remedies, however, have proven to be ineffective. See, American Antitrust Institute, Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked, pp. 18-19, available at: <http://www.antitrustinstitute.org/content/antitrust-experts-urge-enforcers-block-comcast-time-warner-cable-merger>.

<sup>10</sup> See, Competitive Impact Statement, p. 25, U.S. v. Comcast Corp. (D.C. Circuit 2011) (1:11-cv-00106), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

<sup>11</sup> Id., p. 21.

public interest. For example, the combined company may price standalone Internet service artificially high in favor of its bundled video and Internet services. This issue was raised by the NYDPS Staff in their comments to the NYPSC.<sup>12</sup>

Moreover, based on our review of current pricing structures for Comcast and Time Warner, Comcast appears to significantly discount its bundled services, whereas Time Warner's discounts are more modest. Comparing the marginal price consumers pay to add video service to an Internet connection from each respective company illustrates this point. The graph below represents the discounts associated with Comcast and Time Warner's Internet and video service bundles, the difference between the additional cost of adding video service to their Internet plans, and purchasing standalone video service, averaged over a 24-month period, to incorporate differences in promotional and retail pricing. We are offering the following facts for the FCC to consider in its analysis.



<sup>12</sup> See, Case 14-M-0183, supra, pp. 37-38.

The pattern of bundled discounts between the two companies, respectively, graphed over the number of channels purchased in each bundle, showcases the difference in pricing incentives. While the discounts for Time Warner's menu of bundles are relatively constant, and modest, the discounts offered by Comcast vary significantly across its various bundled offerings. Of particular note is the "Blast Plus," \$49.99 a month (for the first 12 months) Internet-video bundle offering. Unlike the next step-up and next step-down bundles ("Digital Starter & Performance Internet" and "Internet Plus" priced \$79.99 and \$39.99 for the first twelve months, respectively, which offer a 25 Megabits per second (Mbps) Internet connection), this "45+" video channel bundle also offers a 105Mbps Internet connection, ideal for households interested in "cutting the cord" and utilizing multiple video streams. The video "discount" for this particular bundle is so large that it actually exceeds the average cost of the standalone video package over 24 months, due to the large promotional bundled discount.<sup>13</sup> By offering such a large discount on video service, Comcast may render Internet-only plans unattractive and discourage customers from foregoing video service all together, allowing the combined company to perhaps compete unfairly with over-the-top video-service competitors like Netflix, Hulu, and AppleTV.

The standalone production cost of providing either video or broadband service for both companies may be comparable, and the minimum price for either video or broadband service should be the incremental cost of providing that service. Since the incremental cost to a company of providing video service

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<sup>13</sup> The promotional bundle cost is \$49.99 per month, versus \$59.99 for Internet only.

when that company already is providing Internet service is likely very low, the NYPSC would expect the minimum price either firm would charge for video service to also be low. The NYPSC believes each firm should price the video service somewhere in between the incremental cost and the standalone cost of providing video without broadband service. Comcast, however, appears to have set a negative price for some of its video offerings when bundled with broadband in order to provide greater discounts, effectively tying the two products together. We note that the FCC attempted to mitigate this issue in the Comcast/NBC-Universal Order.<sup>14</sup>

Finally, the Petitioners also describe the proposed transaction as a merger of two firms that do not compete in each other's service territories and, therefore, argue that "the transaction presents no 'horizontal' competitive concerns."<sup>15</sup> The Petitioners' horizontal view of competition appears too narrow. While it is true that Comcast and Time Warner do not compete directly against one another in overlapping service territories, they do compete with other providers of telephone, video and broadband services, whose competitive position could be undermined as a result of the proposed merger given the combined company's enhanced market power over programming and other upstream wholesale services. The combined company may be able to exercise its increased capital and financial resources to discourage new entrants into these markets thereby stifling technological innovation and competition, while keeping prices artificially high.

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<sup>14</sup> Comcast/NBC-Universal Order, supra, p. 25.

<sup>15</sup> Comcast/Time Warner Applications, supra, p. 127.

Based on the foregoing, the FCC should examine the following issues in its review of the combined company's potential market power.

#### 1. Comcast NBC-Universal Order Conditions

The FCC should examine the extent to which the conditions imposed on Comcast's acquisition of NBC-Universal, should be extended to the Time Warner footprint, because the same market power concerns would impact Time Warner's customers as a result of the proposed transaction. If the conditions are extended to the Time Warner footprint, consideration also should be given to extending them through 2020 and modifying them to recognize the changing landscape in which Comcast and Time Warner operate. This would give consumers increased protection from potential anticompetitive behaviors, as well as access to broadband services. This extension of the NBC-Universal Order conditions would also help to alleviate the market power concerns outlined above.

In the years since the Comcast/NBC-Universal transaction was approved by the FCC, access to broadband Internet services has become increasingly important. As such, the NYPSC is especially focused on broadband in New York State. The FCC should examine the feasibility of changes on a national scale, which could include requiring the combined company to offer a \$50/month service with download speeds of 10Mbps or greater. The NYPSC notes that the FCC attempted to do this in the Comcast/NBC-Universal Order by requiring Comcast to offer what became "Performance Starter," a 6Mbps, \$49.95/month offering. That offering, however, like so many things in the Internet age, is no longer relevant in an environment where consumers are choosing to consume video through Internet connections rather than cable television boxes. Therefore, to

avoid the fate of the "Performance Starter" offering, the FCC should consider this evolving landscape in its review.

## 2. Enforcement

The Comcast/NBC-Universal Order allows for arbitration of complaints made with respect to Comcast's compliance with the conditions of that Order. That Order allows an arbitrator to assess all or a portion of other party's costs and expenses (including reasonable attorney fees) against the offending party if the arbitrator finds one party's conduct unreasonable.<sup>16</sup> Given the potential for increased vertical and horizontal market power as a result of this transaction the FCC may want to consider modifying condition number eight, "Modifications to AAA Rules for Arbitration" by adding language that gives an arbitrator the power to award attorney fees for successful enforcement complaints. This would provide claimants with a support mechanism to encourage the pursuit of credible harms and would also act as a deterrent to inappropriate, anticompetitive behaviors in which the combined company may engage. In addition, the FCC may also want to examine whether, in the event that arbitration fails and litigation of a claim is required, any successful claimant should be awarded attorney fees and associated litigation costs upon a finding of unreasonableness.

## 3. Local Programming Diversity

The NYPSC also recommends that the FCC carefully examine the proposed transaction to ensure that remedies are sufficiently robust to thwart potential harms stemming from vertical and horizontal market power that include the loss of

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<sup>16</sup> Comcast/NBC-Universal Order, Appendix A, p. 133.

local news, local programs, and programming diversity. The continued availability of these services is in the interest of New Yorkers and should be maintained.<sup>17</sup> Excepting Public Educational and Governmental programming, which is a subset of local programming that comes under the franchising agreements negotiated by municipalities and reviewed by the NYPSC, programming in the areas listed above fall within the category of broadcast programming not typically within our purview. Therefore, the NYPSC recommends that the FCC use its broad authority in this area to ensure that local programming, including programming designed for rural audiences, is allowed to thrive.

The Comcast/NBC-Universal merger conditions do, to an extent, address these concerns. For example, Comcast asserts that as a result of the NBC-Universal Order, it has made additional investments in programming by expanding Telemundo, which provides content aimed at the Spanish-speaking marketplace. Additionally, Comcast committed to expansion of independent and unaffiliated programming. The NYPSC recommends however, that the FCC examine whether these commitments and investments have done enough to preserve programming diversity. The FCC should also examine whether it should establish a separate commitment to preserve and enrich the output of local news, local public affairs, and other public interest programming to ensure that these options are maintained and allowed to thrive for the benefit of consumers in New York and elsewhere.

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<sup>17</sup> See, e.g., Case 14-M-0183, *supra*, Comments of Mayor of New York City (filed August 6, 2014), p. 7; Comments of Common Cause (filed August 11, 2014), p. 13, 15; Comments of Stop the Cap!, (filed August 11, 2014); Comments of Alliance for Community Media, New York State Chapter (filed August 8, 2014).

CONCLUSION

The foregoing issues, including access to and affordability of broadband service, continuing local program diversity and enhancing the Comcast/NBC-Universal conditions should be analyzed by the FCC in its review of the proposed transaction. While the NYPSC is undertaking its own robust review of the proposed transaction, issues like bridging the digital divide and mitigating market power harms are areas where both New York State and the FCC have concrete interests. We look forward to continuing to engage with the FCC in its review of the proposed transaction.

Respectfully submitted,



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Dated: August 25, 2014