

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

In the Matter of)	
)	
Application of Comcast Corporation, Time)	MB Docket No. 14-57
Warner Cable, Inc., Charter Communications,)	
Inc., and Spinco to Assign and Transfer)	
Control of FCC Licenses and Other)	
Authorizations)	

**PETITION TO DENY OF LOS ANGELES COUNTY, CALIFORNIA; MONTGOMERY
COUNTY, MARYLAND; THE CITY OF PORTLAND, OREGON; AND THE
RAMSEY-WASHINGTON COUNTIES (MN) SUBURBAN CABLE
COMMUNICATIONS COMMISSION**

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SUMMARY

The Commission cannot approve the applications unless it finds that doing so is in the public interest, convenience, and necessity. To make that finding, the Commission must consider whether any verifiable benefits of the transactions outweigh or mitigate the transactions' potential harms.

The transactions proposed here could significantly harm competition and the Communication Act's fundamental goals. These harms flow from, among other things, a reduction in competition, or the elimination of potential competition, among Comcast, Time Warner Cable, and Charter in markets where their systems abut one another; the increased regional concentration that may threaten existing and deter future overbuilders; the extension of the vertical impacts that concerned the Commission in the NBCUniversal merger to Time Warner Cable markets; and the increased market power of Charter, which is also vertically integrated. There is a real prospect that this increased power will be used in a way that dominant companies often use power: to deter competition, increase prices, and reduce output.

Against these harms, the companies propose only to extend the NBCUniversal conditions to Time Warner Cable systems, and otherwise suggest that the Commission should approve the transactions because they will result in centralization and consolidation, which may translate into system and service improvements. These benefits are vague, and not guaranteed by any proposed conditions. The companies make no significant effort at all to deal with the increased concentration that will face communities and consumers in the ten states that Charter will dominate.

Petitioners therefore believe that if the Commission approves the transactions, it must subject all the surviving companies—Comcast, Charter and Midwest Cable—to conditions that mitigate harms and that ensure that real and substantial public benefits flow from the transactions. The conditions must be clear and enforceable, and they must address the

transactions' long-term impacts. The companies' compliance with the conditions must also be verifiable. Specifically, the Commission should adopt conditions that:

1. ***Protect and promote local programming, especially PEG programming.*** The Commission will need to build upon conditions it adopted in connection with the NBCUniversal merger to ensure that PEG channels are not relegated to second-class status, and can produce and disseminate vital local programming to the public, taking full advantage of advances in cable technology.

2. ***Advance broadband deployment and adoption.*** Among other things, the Commission should ensure that Comcast's Internet Essentials program is expanded and altered to encourage broadband adoption. This will require some fundamental changes to the program, and its extension to Charter and Midwest Cable. It will also require the companies to work more closely with local governments and schools to ensure that the program is publicized and implemented in ways that make sense for individual communities. As importantly, the Commission should include conditions that ensure that improvements to systems and to broadband speed materialize.

3. ***Safeguard the open Internet.*** The conditions must protect the open Internet, but must go beyond net neutrality principles to ensure that content may flow freely onto and off the companies' networks, and that the companies cannot evade conditions by creating a "private Internet" to provide content and applications to its customers.

4. ***Help consumers see real improvement in customer services.*** The Commission should condition any approval on specific enhancements to customer service. There should be genuine improvements—not just maintenance of the status quo across more concentrated companies.

5. ***Prevent further limits on competitive entry.*** Among other things, the companies should not be permitted to enforce level playing field clauses to prevent development of new systems, including those that take advantage of new technologies.

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PETITION TO DENY OF LOS ANGELES COUNTY, CALIFORNIA; MONTGOMERY COUNTY, MARYLAND; THE CITY OF PORTLAND, OREGON; AND THE RAMSEY-WASHINGTON COUNTIES (MN) SUBURBAN CABLE COMMUNICATIONS COMMISSION

This Petition to Deny is filed by Los Angeles County, California; Montgomery County, Maryland; the City of Portland, Oregon; and the Ramsey-Washington Counties Suburban Cable Communications Commission.¹ Petitioners submit that the transactions, if consummated, would result in an unprecedented concentration of ownership of wireline video and broadband assets

¹ *Los Angeles County, California.* Both Charter and TWC provide cable service in Los Angeles County today. After the transactions, Charter would exit the Los Angeles market, and Comcast would provide cable service to both Charter and TWC customers in the County.

Montgomery County, Maryland. Montgomery County is the franchising administrator for the County as well as 18 municipalities in the County. The County includes density populated urban and suburban communities, as well as low density exurban and rural communities. Although home to biotech, computer science, hospitality and military contractor companies, one-third of the County’s land mass is reserved for agriculture use. Comcast provides cable service in Montgomery County today and would continue to do so after the proposed transactions.

City of Portland, Oregon. Comcast provides cable service in Portland today, and would continue to do so after the proposed merger and divestiture transactions.

Ramsey-Washington Counties Suburban Cable Communications Commission. The Cable Commission is a joint powers authority that is responsible for cable franchise administration for 12 suburban municipalities located east of Minneapolis, Minnesota. Comcast provides cable service in these communities today, and after the transactions, these communities would be served by Midwest Cable/Charter.

servicing residential subscribers across the country. Charter Communications, Inc. (“Charter”) directly, and indirectly through a services agreement with a new company (“Midwest Cable”),² would dominate video and broadband markets in the Midwest and Rocky Mountain states (with the exception of Chicago), and Comcast Corporation (“Comcast”) by acquiring its largest cable rival, Time Warner Cable (“TWC”), and swapping systems with Charter, would control almost every other major United States market.

The companies claim that the resulting economies of scale, expanded geographic reach, and concentration of technology and services portfolios will lead to public benefits. But whether the benefits will materialize and trickle down to the public is questionable. On the other hand, the transactions’ harms are undeniable. The transactions can be expected to create barriers to competitive entry, and to expand the incentive to block or degrade programming, broadband applications and services, and other over-the-top video services that rely on access to the operators’ networks to reach customers. The transactions would allow the vertical integration that the Commission found highly problematic in the NBCUniversal merger to reach millions of new Comcast subscribers.

Charter’s, Time Warner’s, and Comcast’s franchise areas now abut or overlap in several markets, including Los Angeles and in the Twin Cities area. The transactions eliminate that overlap, thereby eliminating a potential source of competition. By increasing the companies’ size and regional concentration, the transactions would make it more difficult for smaller operators to compete, and may deter new competitive entry. And by concentrating technologies and services portfolios, the transactions could stifle innovation and increase product homogenization. As a result, subscribers can expect higher prices and reduced services, and local governments can expect more difficulty protecting local needs and interests under the Communications Act. The

² Midwest Cable is called SpinCo in the Applications.

question before the Commission is whether the public interest benefits outweigh these potential harms.

The Commission must therefore review the transactions closely. At the very least, if the Commission approves the transactions, it must establish conditions that ensure that the anticipated harms are mitigated and the claimed public benefits actually materialize. This requires formal, effective, and enforceable conditions that include: (a) protecting and promoting local programming; (b) safeguarding the open Internet; (c) protecting consumers and consumer choice; and (d) limiting the impact on competitive entry. Moreover, because the transactions create interrelationships among the companies and divide power between them regionally, the Commission must ensure that the conditions apply to *all* the post-merger companies involved: Comcast, Charter, and Midwest Cable.

I. THE COMMISSION MUST EVALUATE WHETHER THE TRANSACTIONS, VIEWED AS A WHOLE, FURTHER THE PUBLIC INTEREST.

A. The Proposed Transactions

The transactions would allow Comcast and Charter to eliminate their largest cable rival, TWC, significantly increasing the percentage of the nation's cable and broadband subscribers that each serves. The companies would also swap cable systems, highly concentrating each company's national market share in certain geographic regions. Systems serving approximately 2.5 million Comcast customers would be spun off to a company created by Comcast, Midwest Cable. Though nominally independent, Midwest Cable would have Charter supply virtually all services of relevance to business and residential customers. Charter would vanish from five of the top seven DMAs where it now abuts or overlaps systems owned by Time Warner or Comcast (including Los Angeles); and Charter would operate Comcast and TWC systems in markets like Detroit and Minneapolis. As a result, Charter would "own 5.7 million video customers and

manage systems comprising 8.2 million video customers” clustered to make Charter/Midwest Cable “the leading cable operators in 10 states,”³ primarily states in the Midwest, and just east of the Continental Divide.⁴ Comcast would be dominant in most of the remainder of the country, including the largest media markets, Los Angeles and New York. Effectively these transactions would result in Comcast or Charter/Midwest Cable serving more than 70% of the nation’s cable video subscribers.⁵

B. Standard of Review

The Commission must determine whether the proposed transactions serve the public interest, convenience, and necessity.⁶ To do so, the Commission must weigh the potential public interest harms and benefits,⁷ and also find that the transactions do not violate a statute or rule or otherwise interfere with the Communications Act’s objectives.⁸ The applicants bear the burden of demonstrating that the transactions are in the public interest and must do so by a preponderance of the evidence.⁹

³Comcast, Charter Communications, *Charter and Comcast Agree to Transactions That Will Benefit Shareholders, Industry and Consumers*, April 28, 2014, at 9, available at: <http://files.shareholder.com/downloads/CMCSA/3368052640x0x747845/e572c896-c3f2-496e-9241-0c98c9f18b16/Investor%20Presentation.pdf>.

⁴ See Letter from Comcast and TWC to Marlene H. Dortch, MB Docket No. 14-57, at 2-4, Attachment 2 (June 5, 2014).

⁵ According to NCTA, there are 54 million cable video subscribers and Comcast, TWC, and Charter currently have 22.6, 11.4 and 4.4 million subscribers respectively. NCTA, *Industry Data*, available at: <https://www.ncta.com/industry-data> (last accessed August 25, 2014).

⁶ 47 U.S.C. §§ 214; 309(e); 310(d).

⁷ *In re General Motors Corp. and Hughes Elec. Corp. and the News Corp. Ltd., for Authority to Transfer Control*, 19 FCC Rcd. 473 ¶ 15 (2004) (“*GM/News Corp Order*”).

⁸ *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, 15 FCC Rcd. 9816 ¶¶ 8,9 (2000); *GM/News Corp Order*, 19 FCC Rcd. 473, ¶ 16.

⁹ *In re News Corp. and the DIRECTV Group, Inc., and Liberty Media Corp., For Authority to Transfer Control*, 23 FCC Rcd. 3265 ¶ 22 (2008).

The public interest standard is very broad and “necessarily encompasses the broad aims of the Communications Act.”¹⁰ Although the standard encompasses evaluating the transactions’ competitive effects, it is much broader than the Department of Justice’s review.¹¹ Rather than limiting itself to antitrust concerns, the Commission may ensure that the transactions actually enhance, and not simply preserve, competition.¹² The public interest standard includes evaluating the transactions’ other impacts on the general public interest.¹³ For example, the Commission has determined that the public interest includes promoting media diversity as a goal separate from its competitive effects.¹⁴ It also involves determining whether the transactions will affect the quality of services or “will result in the provision of new or additional services to consumers.”¹⁵

The companies have urged the Commission to process and consider the transactions at the same time,¹⁶ and we agree that is appropriate provided that the Commission views all the transactions as a whole. Given the intended, regional concentration that the transactions would create, the Commission should apply all approval conditions to all the companies involved.

¹⁰ *In re Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Comm. Inc. and its Subsidiaries to FairPoint Comm., Inc.*, 23 FCC Rcd. 514 ¶ 12 (2008); *In re AT&T and Bell South Corporation, Application for Transfer of Control*, 22 FCC Rcd. 5662 ¶ 20 (2007) (*AT&T/Bell South Order*).

¹¹ *GM/News Corp Order*, 19 FCC Rcd. 473, 484 ¶17.

¹² 47 U.S.C. §§ 521(4), (6), 532(a); *GM/News Corp Order*, 19 FCC Rcd. 473 ¶17, n 56.

¹³ *GM/News Corp Order*, 19 FCC Rcd. 473, 484 ¶17.

¹⁴ 47 U.S.C. §§ 521(4); *AT&T/Bell South Order*, 22 FCC Rcd. 5662 ¶ 20.

¹⁵ See *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18290 ¶ 17 (2005).

¹⁶ Letter from Comcast and TWC to Dortch, MB Docket No. 14-57, at 2 (June 5, 2014).

II. THE COMPANIES HAVE NOT SHOWN THAT THE TRANSACTIONS WOULD PRODUCE BENEFITS THAT OUTWEIGH THE HARMS.

Although the companies claim that the transactions are “pro-consumer, pro-competitive, and will generate substantial public interest benefits,”¹⁷ they have not shown that the transactions would produce benefits that outweigh the harms. An applicant must provide the Commission with sufficient information to verify the “likelihood and magnitude” of each benefit.¹⁸ A claimed benefit must be “verifiable” and it must be unlikely to be realized by other means that present fewer anticompetitive concerns. The benefits must also “flow through to consumers, and not inure solely to the benefit of the” companies.¹⁹ The transactions can be expected to lead to public harms, and the companies have failed to substantiate the claimed benefits.

A. Creating Larger And More Geographically Concentrated Companies Creates No Inherent Public Benefits.

Although Comcast and Time Warner Cable argue that the core benefits from their combination derive from three economic mechanisms: “(a) economies of scale, (b) expanded geographic reach, and (c) sharing of technologies and services,”²⁰ the companies do not demonstrate how this will lead to specific improvements.

Scale. Comcast argues that increasing its scale will allow it to hire more developers and engineers, and therefore to improve technologies more quickly.²¹ It claims its larger scale and scope will also help the company to attract more collaborators including equipment

¹⁷ Application and Public Interest Statement of Comcast Corporation and Time Warner Cable Inc., MB Docket No. 14-57 (Apr. 8, 2014) (“Comcast-TWC Public Interest Statement”) at 20.

¹⁸ *Applications of Comcast Corp., General Elec. & NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd. 4238 ¶ 226 (2011) (“Comcast-NBCUniversal Order”).

¹⁹ *Id.*

²⁰ Comcast-TWC Public Interest Statement at 23.

²¹ *Id.* at 24.

manufacturers, app developers, and programmers, who will be more willing to take chances on technology projects with a larger company.²² Similarly, Charter argues that it will benefit from increased scale when it becomes “the second largest cable company in the country.”²³

But Comcast is already the largest cable operator in the country and already claims to be providing industry-leading technology, services, and programs.²⁴ Eliminating TWC would also eliminate an independent source of research and development, and a potential partner for equipment manufacturers, app developers, and programmers. For example, while Comcast was developing its X1 box, TWC was entering into a contract with a San Francisco startup to make “fan-tv” available to its subscribers.²⁵ Moreover, the companies support the Charter/Midwest Cable transaction by arguing that while Midwest Cable subscribers will “los[e] Comcast’s larger scale,” Midwest Cable will still have “enough” presence and reach to foster innovation and fuel competition.²⁶ Even if one views that claim skeptically, it at least suggests that increasing Comcast’s or Charter’s scale is not necessary to foster innovation or fuel competition. Petitioners appreciate the investments and the innovations that operators have made in their communities and look forward to, and hope to encourage, additional investment and innovation. But the prospect of innovation and investment does not alone justify these transactions.

²² *Id.* at 25.

²³ *Public Interest Statement of Charter Communications, Inc. and Comcast Corporation, Comcast-to-Charter Exchange and Sale Transactions*, MB Docket No. 14-57, at 10 (June 4, 2014) (“Public Interest Statement for Comcast-to-Charter Exchange and Sale Transactions”).

²⁴ Comcast-TWC Public Interest Statement at 2.

²⁵ Time Warner Cable, *Fan TV Coming to Time Warner Cable Subscribers Nationwide*, April 22, 2014, available at: <http://www.timewarnercable.com/en/about-us/press/fan-tv-coming-to-twc-subscribers-nationwide.html> (last accessed August 25, 2014).

²⁶ Public Interest Statement for Comcast-to-Charter Exchange and Sale Transactions at 14.

Geographic reach. Comcast and TWC contend that the combined firm’s expanded geographic reach and clustering can increase “economic efficiencies by enhancing the ability of the combined entity to serve customers whose needs span the existing geographic footprints of the two firms.”²⁷ Comcast and Charter similarly emphasize that by “clustering” systems, geographically the company gains “operational, procurement, and marketing efficiencies.”²⁸ But that in and of itself is no guarantor of any public benefit.

Consolidating Technologies and Services. Comcast and TWC contend that by combining their portfolios and services, they can provide more products and services at lower cost—although the companies do not promise or contend that they will actually lower prices or extend service to underserved areas. The claim is little more than a recognition that centralization and homogenization may lead to cost savings. Whether that will create a public benefit, however, is a different question. For example, further centralizing and consolidating customer service may cut costs, but given the well-known and troubling record of all the companies involved in this transaction, it is difficult to see how it would benefit consumers. Likewise, consolidating technologies may create detriments rather than benefits. As Comcast’s filing indicates, “Comcast generally deploys products in a relatively homogeneous manner throughout a region and often throughout its entire footprint.”²⁹ Thus, increased homogenization may decrease overall innovation by removing competing products from the marketplace.

* * *

²⁷ Comcast-TWC Public Interest Statement at 24.

²⁸ Public Interest Statement of Charter Communications, Inc. and Comcast Corporation, Comcast-to-Charter Exchange and Sale Transactions, MB Docket No. 14-57 at 8 (June 4, 2014).

²⁹ Comcast-TWC Public Interest Statement, Exhibit 6, Declaration of Dr. Mark A. Israel at ¶ 108.

Any company or group of companies that is allowed to monopolize or dominate markets through direct ownership or through cooperative arrangements could make claims of efficiency similar to those the companies make here. There is no reason as a general matter to expect public benefits from these “efficiencies” as opposed to the public harms that typically arise in concentrated markets: reduced output and higher prices.

B. The Transactions Can Be Expected To Lead To Public Harms.

1. The Companies’ Increased Size and Concentration Can Be Expected to Harm the Public, and To Negatively Impact Cable Service and Broadband Deployment.

The transactions would have impacts on competition in the provision of cable services. In several markets, Comcast, TWC, and Charter systems abut one another. Eliminating and combining systems would remove one of the most readily available competitive entrants—the neighboring cable provider. It also has the impact of limiting “yardstick” competition. Further, because the companies are all implementing “TV Everywhere” strategies, the transactions may limit the likelihood that the companies will enter each other’s markets through over-the-top strategies.

Of course, the companies claim that the transactions present no “horizontal” concerns because their service areas are distinct and the companies “do not compete in any relevant market.”³⁰ But even if one assumes that the companies will divide markets and not compete with one another at all, the Commission would still need to consider the impact on competition with existing small operators and on innovative providers. By clustering systems geographically, the companies reduce any prospect of new entrants expanding into the regions. The Commission has

³⁰ Comcast-TWC Public Interest Statement at 127.

recognized that clustering reduces the likelihood that overbuilders will enter a market.³¹ This is consistent with empirical studies that have found overbuilders are significantly less likely to enter into markets located within a cluster.³² Carriers can also “distribute programming terrestrially and extract exclusivity deals from independent programmers, thereby denying programming to competing distribution media (overbuilders and satellite). They have more leverage over local governments to obstruct the entry of overbuilders.”³³

In recent years, entrepreneurs have begun providing services that meet the Cable Act’s definition of cable service via the Internet. The Commission has recognized that the vitality of these services, which could provide competition to the incumbent’s cable offerings, is dependent on consumers’ access to *affordable* broadband without draconian bandwidth caps, and online video distributors’ access to these consumers over broadband networks.³⁴ The increased control that the transactions will give the companies over critical broadband connections could “eliminate or reduce competition” in the provision of cable service—a matter that the Cable Act recognizes is of real concern.³⁵ These anticompetitive effects are compounded when applied to

³¹ *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd. 8203 ¶ 271 (2006).

³² Hal J. Singer, *Does Clustering by Incumbent Cable MSOs Deter Entry by Overbuilders?*, Social Science Research Network, May 2003, at 4, at <http://ssrn.com/abstract=403720> (last visited August 22, 2014); Testimony of Gene Kimmelman, On behalf of Consumers Union and Consumer Federation of America, Before the Senate Committee on Commerce, Science and Transportation on Escalating Cable Rates: Causes and Solutions, March 25, 2004, at 10 available at: <http://consumersunion.org/wp-content/uploads/2013/04/0325-senate-commerce-testimony-on-cable-rates.pdf> (Consumer Union Testimony).

³³ Consumer Union Testimony, at 10.

³⁴ *In re Status of Competition in the Market for Delivery of Video Programming*, 28 FCC Rcd. 10496 (2013) (“Fifteenth Video Competition Report”) at ¶ 254.

³⁵ See 47 U.S.C. § 533(c).

the top twenty-five DMAs. These DMAs account for a disproportionate percentage of U.S. population, industry, and commerce. Approximately 49% of U.S. television households reside within a top twenty-five market.³⁶

These impacts may be of particular importance because the Commission has acknowledged that there is already a lack of effective competition in the video market. In 2007, the Commission recognized that DBS “competition” is insufficient to curb the market power of a wireline cable operator. Its Order focused on an need for *wireline* competition to incumbent cable operators: “[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS.”³⁷ Moreover, the largest DBS provider, DirecTV, has cautioned that due to trends in bundling, and multiplatform video programming delivery, the “video only market” no longer captures competitive challenges as broadband is becoming the “anchor” product of the wireline MVPDs, and service bundles that include broadband are difficult for DBS providers to compete with.³⁸

Today, a majority of consumers still have only one wireline provider, the incumbent cable operator. The Commission’s Fourteenth Video Competition Report indicates the percentage of homes with access to two *wireline* MVPDs (i.e., at least four separate MVPDs including the two DBS providers) only recently grew to a significant figure—from 4.7 percent in

³⁶ See Nielsen, Local Television Market Universe Estimates, available at: http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_Household_DMA_Ranks2.pdf (last accessed August 25, 2014).

³⁷ *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101 ¶ 50 (2006); see also *id.* at ¶ 35 (analyzing the new entrant as the “second provider,” without counting DBS companies as competing providers). These statements were based on cable price data from 2005, and as discussed further *infra*, areas with effective competition now have higher prices than regulated areas.

³⁸ Comments of DirecTV, LLC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 27 FCC Rcd. 8581 (2012), MB Docket No. 12-203 (Sept. 10, 2012).

2006 to 32.5 percent in 2010 (42.9 million homes).³⁹ The Fifteenth Video Competition Report shows the wireline MVPD growth has slowed significantly, increasing only to 35.3 percent (46.8 million homes) in 2011.⁴⁰ That means the vast majority of Americans, **64.7 percent of homes**, only have access to one wireline MVPD, the incumbent cable operator. And for more than 70 percent of those homes, the incumbent cable operator is Comcast, TWC, or Charter.

If these transactions are allowed to go forward without conditions that protect consumer choice and future competition, the operators will be in a position to raise prices further; to invest only in the most profitable areas; and to reduce or eliminate services that they do not deem most profitable. Services such as the delivery of traditional video PEG programming may be particularly vulnerable, but companies will also have incentives to eliminate the institutional network capacity now provided at no charge in many communities and that help create a critical anchor institution backbone. Petitioners are not arguing that the companies lack good intentions; they simply point out that such behavior is consistent with the behavior of companies that dominate markets with limited competition.

2. *The Transactions Will Extend and Compound the Harms Associated with the NBCUniversal Merger.*

Four years ago, the Commission found that combining NBC's extensive programming library with Comcast's dominant role as a content distributor would lead to a number of serious anticompetitive problems.⁴¹ In the Commission's view, the transactions would position Comcast to harm both competing programmers that require access to Comcast's distribution network, and

³⁹ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd. 8610 (2012) ¶ 40, Table 2. Because the two DBS providers are included in that tally, only areas that have 4 or more MVPDs have two wireline providers.

⁴⁰ Fifteenth Video Competition Report at ¶ 36, Table 2.

⁴¹ Comcast-NBCUniversal Order.

competing content distributors—both traditional and online—that require access to NBC’s programming. Because the proposed transactions will merge (and expand) Comcast’s extensive content library with an even larger cable and distribution network, the transactions will heighten its ability and incentive to disadvantage other distributors and programmers. The Commission found that Comcast could engage in a range of anticompetitive conduct, including but not limited to:

- Withholding programming from rival distributors.
- Impeding competition from online video distributors.
- Weakening competition from other video distributors by bundling broadband and cable service.
- Harming unaffiliated programming.
- Disadvantaging PEG programming.

The transactions significantly compound these anticompetitive problems. Four years ago, Comcast downplayed the vertical concerns associated with the company’s combining such extensive content rights with its distribution network, repeatedly stressing that its “nationwide share of MVPD subscribers has steadily decreased” and was “less than 25 percent.”⁴² That its national share of subscribers had been falling was, in the company’s view, “important.”⁴³ Even so, the Commission recognized that Comcast’s size as a distributor was a significant cause for concern. Now that Comcast controls NBC’s extensive content library, it would expand its share

⁴² Comcast Corporation, General Electric Company, NBC Universal, Inc., Applications and Public Interest Statement, *In re Applications for Consent to the Transfer of Control of Licenses*, MB Docket No. 10-56, at 3, 107 (Jan. 28, 2010).

⁴³ *Id.* at 108.

of national MVPD subscribers dramatically through these transactions—increasing its nationwide video and broadband customers by over 31% and 38% respectively.⁴⁴

The passage of time has not alleviated these problems, which involve not just the last mile, but the “last foot”—at the interface that connects the consumer to the network (whether a converter or gateway).⁴⁵ The Commission has not been able to require development of a competitive replacement for company-leased converter boxes and other customer premises equipment. These devices may give the cable operator enormous control over the management of traditional data and video traffic into the home, but also provide a significant potential barrier for entities that wish to provide applications tailored to the “Internet of things.” Moreover, Comcast, Charter, and Midwest Cable can create “private Internets” that operate without restrictions that apply to public Internet services (data caps, speed limits, etc.) and that are only open to programming, programmers, and applications it selects or controls, making the simple “open Internet” conditions that the Commission imposed in NBCUniversal far less relevant.

Similarly, technological developments have created significant new ways to disadvantage PEG programming. The ability to easily record PEG programming depends on programs being listed on interactive programming guides, but the channel listings require the operator’s consent and cooperation. Almost 80% of U.S. households now have at least one HDTV,⁴⁶ and PEG centers have been replacing equipment with HDTV equipment (in addition, consumers have their

⁴⁴ Letter from Comcast, Charter, and TWC to Secretary Dortch dated June 24, 2010, MB Docket No. 14-57, at 2. Charter is vertically integrated in a different way. See M. Polka, *Vertical integration stifles competition*, Feb. 13, 2014, available at: <http://thehill.com/blogs/ballot-box/198250-vertical-integration-stifles-competition>. It would have similar incentives to use its increased regional dominance to favor affiliated programming and disadvantage PEG programming.

⁴⁵ Comcast-NBCUniversal Order at ¶ 97.

⁴⁶ A. Burger, Telecompetitor, *LEG: HDTV Penetration in U.S. Households Reaches Nearly 60%*, March 7, 2014, available at: <http://www.telecompetitor.com/lrg-hdtv-penetration-u-s-households-reaches-nearly-60/> (last accessed August 25, 2014).

own HD cameras and are producing programming for distribution through access centers). Yet, again, actually delivering programming in HD depends on the operator's willingness to provide adequate upstream and downstream connections. In addition, with hundreds of potential channel listings, it is easy to segregate and disadvantage programming by moving channel locations. Because of the companies' "increased inventory of programming content and broadcast outlets,"⁴⁷ and their increasing control over connections to the home, it is at least as important, if not more important, to protect local programming here. And it will require conditions in addition to those imposed through the NBCUniversal proceeding.

C. The Companies Make Virtually No Specific Or Enforceable Commitments About How Or When Consumers Will Benefit From The Transactions.

Because the public interest statements do not identify any harms, they do not propose conditions or benefits to address them. The alleged public benefits all derive from vague promises to convert the "benefits" of scale and scope and geographic concentration into consumer benefits. The companies do not commit to any specific obligations and offer virtually no concrete details about when potential benefits will become reality. Nor do they provide any reason to suppose that the public benefits resulting from the transactions are more than marginal. To take a few examples from the discussion of the benefits of the Comcast-Time Warner merger:

Faster broadband speeds. The companies state that Comcast's higher broadband speeds can be "deployed not only more quickly to the acquired TWC systems than it would be otherwise, but also on a more cost-efficient basis."⁴⁸ Yet TWC had already promised to roll out

⁴⁷ Comcast-NBCUniversal Order at ¶ 214.

⁴⁸ Comcast-TWC Public Interest Statement at 34.

300 Mbps Internet to nine of its major urban markets within 14 months.⁴⁹ There is no indication that the Comcast merger will result in ubiquitous high speed broadband to more rural portions of Counties like Montgomery County, or for that matter, Los Angeles County. And of course, without knowing the impact on Comcast subscribers, it is not clear whether the net effect of the merger is to increase broadband roll-out nationally, or simply to allow the company to selectively upgrade the most profitable areas in the country.

Backbone Investments. The companies claim that the transactions will facilitate Comcast’s continued investment in and deployment of its backbone and dark fiber network, and “may even” accelerate these efforts.⁵⁰ The company states that the additional scale—combining the firm’s backbone networks—“will lead to additional innovations around capacity and architecture” and “may accelerate” Comcast’s contemplated upgrades to its national backbone infrastructure.⁵¹ The “may even” suggests just how tenuous this “benefit” is.

Better and More Convenient Wi-Fi in and Outside the Home. The companies contend that the transaction will “ensure that TWC customers enjoy access to today’s best gateway devices,” which Comcast, but not TWC, has already deployed on a significant scale. The companies also argue that the transaction “will provide a more seamless fabric of Wi-Fi connectivity across the combined company’s footprint.”⁵² TWC has deployed Wi-Fi in several of its markets, including Los Angeles, and has entered into deals with other operators, including

⁴⁹ B. McNew, *4 Things Time Warner Cable’s Management Wants You To Know*, Aug. 20, 2014, available at: <http://www.fool.com/investing/general/2014/08/20/4-things-time-warner-cables-management-wants-you-t.aspx> (last accessed August 25, 2014).

⁵⁰ Comcast-TWC Public Interest Statement at 36.

⁵¹ *Id.*

⁵² *Id.* at 41.

Comcast, that allow its customers to “roam” while traveling. Absent commitments to ubiquitous deployment, it is not clear that there are meaningful consumer benefits.⁵³

Customer Service. The companies explain that the combined firm “will be able to invest ever more in centralized service systems and will bring a dedicated effort to improving performance in the TWC markets.”⁵⁴ But Comcast and TWC ranked at the bottom in American Customer Satisfaction Index surveys for 2013 (and Charter was also at the bottom). Offering to improve TWC is not the same as committing to improve customer service across all companies. Nor do the companies show that centralized systems, as opposed to local and distributed systems, provide more effective customer service. Centralization in Comcast systems has led to complaints as local offices are shut down or understaffed.

Improved and Expanded TV Everywhere. The companies contend that the transactions’ increased scale and geographic benefits will allow the combined firm to invest in fixed-cost programming rights and to create marketing efficiencies to improve and enhance products like “TV Everywhere.” Both companies already offer versions of “TV Everywhere” with Time Warner touting that “[w]ith the TWC TV app, enjoy more than 300 live channels and more than 6,000 On Demand titles on an industry-leading eight platforms. You can watch on your computer, iPad, Fan TV, Xbox 360, iPhone, Android, Roku, Kindle Fire HD/HDX and Samsung Smart TV!” Similarly, the companies argue that merger will allow Comcast to begin deploying

⁵³ There may be detriments to consumers to the Comcast approach. It has been widely reported that Comcast provides customers with devices that automatically convert the modem in the home into a public hotspot without consumer consent – the consumer must opt out. See D. Silverman, *Comcast is Turning Your XFINITY Router Into a Public Wi-Fi Hotspot*, June 9, 2014, available at: <http://blog.seattlepi.com/techblog/2014/06/09/comcast-is-turning-your-xfinity-router-into-a-public-wi-fi-hotspot/#24139101=0>. The network likewise necessarily uses the internal wiring that the consumer owns and maintains without the consumer’s consent.

⁵⁴ Comcast-TWC Public Interest Statement at 73.

its X1 entertainment operating system in TWC systems.”⁵⁵ But TWC had contracted with a startup San Francisco firm to roll out something called “Fan TV” that was designed to provide an innovative approach to selecting and viewing television. What is not clear, then, is why the “benefits” are actually benefits in fact.

Compliance with NBC-Universal Conditions. The companies contend that consumers will benefit from the extension of the Commission’s conditions in the Comcast-NBCUniversal Order to the TWC systems.⁵⁶ But that is true only if those conditions have actually proven effective and resulted in proven benefits to consumers; and if they are adequate for the future. Otherwise, the transactions would simply extend the harms of the NBCUniversal merger across more markets.

When the companies address the divestiture and system exchanges, the companies are similarly vague about when any benefits will materialize. Comcast and Charter emphasize that delivering Charter’s systems to Comcast will make Comcast “more likely” to invest in new network infrastructure.⁵⁷ They argue that subscribers will benefit from advanced services “more quickly.”⁵⁸ They add that Comcast is “likely” to deploy additional Wi-Fi hotspots in these regions.⁵⁹ They note that Comcast “should” be able to deploy service centers, stores, and truck fleets in areas “potentially” closer to customers;⁶⁰ and that the company should be able to

⁵⁵ *Id.* at 81.

⁵⁶ *Id.* at 106-120.

⁵⁷ Public Interest Statement of Comcast Corporation and Charter Communications, Inc., Charter-to-Comcast Exchange Transaction, MB Docket No. 14-57 (June 4, 2014) (“Public Interest Statement Exchange to Comcast”) at 7.

⁵⁸ *Id.*

⁵⁹ *Id.* at 8.

⁶⁰ *Id.*

improve its offer to business customers, and market more efficiently.⁶¹ They add that the acquired systems will experience the benefits that Comcast and Time Warner claim arise out of their combination, but, again, they offer few specifics.⁶²

The benefits are therefore unclear, and lack the sort of specificity that is required for a transaction of this nature. As the Commission has recognized, “[b]enefits expected to occur only in the distant future are inherently more speculative than more immediate benefits.”⁶³ If the merger is approved, the Commission should insist that the companies replace their open-ended discussion of potential benefits with concrete details and specific commitments/

III. EXTENDING THE NBCUNIVERSAL CONDITIONS IS NOT ADEQUATE.

The only condition that the companies propose is to extend the NBCUniversal conditions to TWC systems. That is not an adequate solution. Those conditions have not been particularly effective, and do not reflect changes in technology. These transactions also present greater harms and therefore require additional conditions.

A. The Commission’s Conditions Have Failed To Protect PEG Programming.

Recognizing the substantial public benefits of PEG channels, their “special status in order to promote localism and diversity,” and the harms that could result without protections, the Commission conditioned its approval of the NBCUniversal merger on a number of PEG conditions.⁶⁴ The conditions were designed to ensure that as commercial programming benefits

⁶¹ *Id.* at 9.

⁶² The companies offer no more specific commitments in the public interest statements regarding the delivery of Comcast systems to Charter or the creation of Spinco.

⁶³ Comcast-NBCUniversal Order at ¶ 226.

⁶⁴ *Id.* at ¶ 226.

from new technology, PEG would not be left behind. Unfortunately, this is exactly what has occurred.

Several of the conditions were designed to address the transition from digital to analog systems, but before all the problems associated with that transition were understood. For example, the transition to digital, in combination of with the operators' scrambling of channels, has prevented many institutional users from delivering programming over their internal wiring. The Commission prohibited Comcast from adopting delivery methods that would result in any "material degradation of signal quality or impairment of viewer reception of PEG channels."⁶⁵ The Commission explained that the condition was intended to achieve equality of treatment with broadcast channels: "Comcast cannot discriminate against PEG with respect to the functionality, signal quality, and features from those of the broadcast stations that it carries."⁶⁶ This condition applied to the carriage of PEG channels in high-definition, but the Commission indicated that Comcast would not need to upgrade a signal that the programmer delivered to it in other formats:

With respect to signal quality, this condition will not require Comcast to carry a PEG channel in a higher quality format than that of the channel delivered to it, only that it not degrade the quality. For example, Comcast is not required to carry a PEG channel in high definition where the PEG signal is delivered in standard or enhanced definition, no matter in what format it carries local broadcast signals.⁶⁷

The Commission also required Comcast to develop "a platform to host PEG content On Demand and On Demand Online."⁶⁸ The Commission required Comcast to develop these platforms in a manner that will "maximize their long term benefit to the public."⁶⁹ The objective was "to

⁶⁵ Comcast- NBC Universal Order, Appendix A, Condition XIV.3.

⁶⁶ Comcast-NBC Universal Order at ¶ 214.

⁶⁷ Comcast- NBC Universal Order at ¶ 214, n.567.

⁶⁸ Comcast-NBC Universal Order, Appendix A, Condition XIV.4.

⁶⁹ Comcast-NBC Universal Order at ¶ 215.

enhance existing PEG channel carriage” and “not affect Comcast’s existing franchise requirements for traditional linear PEG channel carriage.”⁷⁰

Unfortunately, the Commission’s conditions have proven to be inadequate. While PEG programmers have moved to implement HD and digital technologies, Comcast has been reluctant—with some limited exceptions (Portland being one)—to deliver all PEG in HD, even if the programmer delivers the signal to the operators in HD. Subscribers in many areas cannot select PEG programming via the program guide; this limits consumers’ ability to record the programming and creates particular barriers for persons with disabilities. Although the NBCUniversal condition intended for Comcast “to develop a platform to host PEG content On Demand,” it still vigorously resists dedicating On Demand capacity to PEG. PEG programmers in TWC and Charter areas face problems similar to those that were intended to be mitigated by the PEG conditions, and additional problems. Rather than provide a PEG channel from point of origination to the subscriber, for example, Charter has required communities to pay to deliver signals to it. Charter has also changed PEG channel formats in ways that required customers to obtain additional equipment to view them. Thus, if the NBCUniversal conditions are to serve the goals that the Commission intended them to serve, they need be clarified and expanded.

B. The Commission’s Conditions Have Failed To Expand Broadband Deployment and Adoption

The Commission also imposed conditions to make key communications services available to a significant portion of the population that either lacked service or had low broadband penetration rates. Unfortunately, these conditions also have not achieved their promise.

⁷⁰ Comcast-NBC Universal Order, Appendix A, Condition XIV.4.d.

The Commission's conditions sought to expand the footprint of Comcast's existing broadband network, to upgrade rural Internet service, to provide courtesy video and broadband accounts to additional schools, libraries, and other community institutions, and to offer a reduced rate broadband service to low income homes. These conditions became known as the "Internet Essentials" program.⁷¹

A California Emerging Technology Fund ("CETF") study, filed with the Commission in these proceedings, indicates that Comcast's Internet Essentials has displayed a very low take rate in California.⁷² CETF found a variety of problems with Comcast's eligibility and application procedures. We will not repeat those here, but the complaints are consistent with the complaints Petitioners have received. Eligible families desiring to sign up for the program face numerous barriers, including long delays in sign-up.⁷³ Comcast market-rate customer representatives often do not know about Internet Essentials, and fail to guide interested customers to the service.⁷⁴ Surveys performed by TWC indicate that the absence of marketing and clear information can be particularly discouraging for communities that are slow adopters.⁷⁵ Further, because Comcast's only makes the service available to new customers, sign-up can be delayed for months while Comcast decides whether a customer is eligible for service.⁷⁶

⁷¹ Comcast-NBC Universal Order, Appendix A, Condition XVI.

⁷² Letter to Commissioners from California Emerging Technology Fund, July 11, 2014, MB Docket No. 14-57 ("CETF Filing July 11, 2014"), at 20.

⁷³ CETF, *Summary of Challenges To Signing Up Eligible Families for Comcast Internet Essentials*, included in CETF Filing July 11, 2014, at 1.

⁷⁴ *Id.* at 5.

⁷⁵ M. Matsaganis, *Broadband Adoption and Internet Use Among Latinos*, Time Warner Cable Research Program on Digital Communications, available at: http://www.twcresearchprogram.com/pdf/TWC_MatsaganisReport.pdf.

⁷⁶ CETF Filing July 11, 2014 at 5

Comcast only offers a wired modem to Internet Essentials customers, which restricts the number of users to one at a time, and obviously limits the utility of the service to families.⁷⁷ In addition, CETF reports that the modems Comcast *does* provide are often not compatible with computing devices issued by schools—many schools now allow students to bring home school-issued tablets, which require a wireless modem to connect to the internet.⁷⁸

These concerns are not limited to California. Reports indicate consumers have been denied access to the service because it is only available to new Comcast customers.⁷⁹ Others have been rejected due to old unpaid bills—in one case, as little as \$53 from over a decade ago.⁸⁰ In Philadelphia, where the program got its start, computers donated by Comcast stopped working within months, or were frustratingly slow to use.⁸¹ Extending this program as-is to TWC systems, or to the Charter systems is not likely to lead to better results. And absent an effective program, it is not clear that the benefits touted for the transactions will be achieved, or potential harms from concentration mitigated.

C. The Commission’s Conditions Were Not Clear Enough To Protect the Open Internet.

The Commission’s NBCUniversal conditions were also not clear enough to protect the open Internet. Comcast Executive Vice President David Cohen recently indicated that he does not think that the Commission’s 2010 *Open Internet* order prohibits fast lanes or paid

⁷⁷ *Id.* at 6.

⁷⁸ *Id.*

⁷⁹ Cecilia Kang, “Comcast is trying to improve its image with a program for low-income consumers”, The Washington Post, May 9, 2014, available at: http://www.washingtonpost.com/business/technology/comcast-is-trying-to-improve-its-image-with-a-program-for-low-income-consumers/2014/05/09/cab489cc-d231-11e3-937f-d3026234b51c_story.html (last accessed August 25, 2014).

⁸⁰ *Id.*

⁸¹ *Id.*

prioritization: “I believe that whatever it is, a fast lane, paid prioritization, whatever you want to call it, has been completely legal for 15 or 20 years.”⁸² If that is the company’s position, it suggests more clarity may be required.

In 2012, Comcast indicated that a video-streaming service it would provide to Xbox consoles, Xfinity TV, would not count toward its customers’ monthly data limits because it delivered the service over its private network, not the public internet. It is not at all clear that the NBCUniversal conditions on “specialized services” are adequate to protect against the harms that may follow from creation of “private Internets” across wireline and wireless platforms. The conditions do very little to address the Netflix “interconnection” issue – and it is far from clear that absent conditions, the Commission will be in a position to protect against abuses.

IV. THE COMMISSION MUST REVISE THE NBCUNIVERSAL CONDITIONS AND EXTEND THEM TO ALL THE COMPANIES.

Based on the foregoing, Petitioners believe that at the very least, the proposed transactions, if approved, must be subject to conditions that satisfy the following criteria.

First, the conditions must apply to Comcast, Charter, and Midwest Cable. Among other reasons, within their respective service areas, each benefits from consolidation and protection from competition; each will be the dominant provider; each will have incentives to limit local programming that is not under its control; each will have incentives to control and limit use of the Internet (directly or through specialized services) to favor its own content.

Second, the conditions must be clear and enforceable to mitigate the harms and to ensure that the asserted benefits of the transactions are realized. Among other things, the Commission should be clear that local governments may enforce conditions through 47 U.S.C. § 401(b) as a

⁸² See, Jon Brodtkin, “AT&T claims to embrace net neutrality but could still offer ‘Fast lanes,’” Arstechnica, May 19, 2014, available at: <http://arstechnica.com/tech-policy/2014/05/att-claims-to-embrace-net-neutrality-but-could-still-offer-fast-lanes/>.

party injured by the failure of companies to comply with transfer conditions. As importantly, there must be publicly available and verifiable information to allow the companies' performance to be monitored.

Third, the conditions should not expire after an arbitrary period of time. The merger will have long term consequences. The conditions should remain in place absent a showing by the company that the conditions are no longer required to protect the public interest.

Fourth, the conditions should be subject to adjustment to ensure that the purposes of the conditions continue to be served as the technologies used by the companies change.

Among the areas where we believe conditions will be required are the following:

A. Conditions To Promote and Protect Local Programming—Especially PEG Programming.

The companies do not even acknowledge the NBCUniversal PEG conditions, although, as noted above, imposing PEG conditions in enhanced form is even more important here.⁸³ As discussed above, these transactions will not only expand Comcast's vertical integration to more communities—giving more communities' cable operator an incentive to use limited system capacity for its own commercial programming, not PEG. The Transactions will also diminish the prospect of meaningful competition in local markets. This will only make operators less responsive to local needs, including the need for local programming and the technology required for it to succeed.

A revised PEG condition would include at least the following components, designed to ensure PEG is not relegated to second-class status:

⁸³ The companies acknowledge that many TWC systems are not digital. Those systems (whether controlled by Comcast or Charter) should be subject to the same transitional conditions that applied to Comcast system before those systems went digital under the NBCUniversal conditions.

- Each of the companies should be required to treat PEG signals in the same manner that the primary signals of local broadcast channels are treated.⁸⁴ If a broadcast channel is carried in HD and SD, each PEG channel should also be carried in HD and SD (if the channel is delivered to the company in an HD format). The quality of the PEG signal should be the same as the quality of the broadcast signal, if the signal is delivered to the company at that quality.
- Consumers should be able to access, record, view and otherwise interact with PEG signals (whether directly or via menus) in the same way as local broadcast signals. A subscriber should not need to pay any additional fee to receive PEG channels—no special or additional equipment should be required beyond that which the customer already uses to receive commercial services.
- Channel positions should be stable, and near other local programming.
- PEG programming information must be available on all guides and menus, whether voice-activated, written, or otherwise with the same level of detail as is available for local broadcast programming.
- PEG must be picked up from origination points, connected, carried, and delivered “end to end” by the companies without charging the local government.
- PEG programming must be accessible via any platform that the cable operator uses to deliver its own content/applications, without discrimination. Among other things, a consumer who wishes to view a City Council meeting or a streamed educational program should not be subject to data caps.

⁸⁴ Of course, where there is no local broadcast signal, a different yardstick would be used.

- Each of the companies should implement a meaningful PEG video-on-demand solution. To be sure, Comcast has suggested that a streaming solution (where stored PEG content is accessed via a website) is a more effective means of providing PEG “on demand.” That is certainly one way many PEG providers are offering content on demand, and as suggested in the preceding condition, ought to be encouraged. However, that solution is obviously not a substitute for the populations that do not have television but not high-speed Internet connections (a segment that includes many minorities and lower income people).

But the broader impacts of the transactions, and the experience with the NBCUniversal video-on-demand conditions, suggest that the companies must do more to ensure local programming is promoted and can take advantage of changes in the technologies that companies use to reach customers. One of the best ways to promote local programming, and to provide flexibility to shape PEG to changing technologies and consumer demands, is to require the companies to agree that PEG funding may be used for any purpose, whether operational or capital, and whether for delivery of traditional linear channels to a television set, or streamed communications to subscribers.

Conditions should also require companies to mitigate the negative impacts of their technological choices. As Charter and Comcast have scrambled basic-tier signals, for example, schools and other public institutions that could view and tune PEG signals at every receiver suddenly discovered that they could no longer view or tune signals delivered via the cable system—including PEG signals—without paying for additional equipment. The requirement may effectively limit the availability of service in many schools and other anchor institutions.

B. Conditions To Advance Broadband Deployment and Adoption.

1. An Expanded Internet Essentials Program Should Apply To All Companies

The Commission should also impose an updated “Internet Essentials” requirement that ensures that the program will make a meaningful difference in our communities. The program should include at least the following components:

- ***Expanded Eligibility.*** To the extent that the companies may apply any income test,⁸⁵ it must apply to all low-income homes, regardless of whether they have children.⁸⁶ It should also include low-income seniors, people with disabilities, and veterans. Eligibility also must not depend on whether one is an existing customer. The program must be available in all areas. This includes rural and low-density areas, as well as urban, high density areas.
- ***Enhanced Application Procedure.*** The Commission must require the companies to streamline and improve the application process and to prevent improper denials of service. In particular, the operators must ensure that there are no significant hurdles (such as high initial fees and deposits) that are likely to discourage connection.
- ***Increased Outreach.*** The companies must increase outreach about the program. The Commission should impose specific requirements to address how the companies will publicize the program, including to populations for whom English

⁸⁵ There is a good argument that Internet Essentials should be offered without a means test. To the extent that higher speeds offer benefits, customers are unlikely to shift to a slower speed if the higher speed is affordable. And in terms of effectiveness, it addresses adoption benefits directly by ensuring that there is a “universal service” option available.

⁸⁶ *Id.*

may not be the first language. In addition, the companies must train their own employees, and ensure that all sales material promote the program.

- ***Increased Service Performance.*** The companies' service must meet strict performance goals. The companies must regularly increase the level (and speeds) of broadband access that is deemed "essential."
- ***Wireless Access.*** The companies should include a Wi-Fi component. One of the benefits of the transactions, we are told, is that they will result in significant Wi-Fi deployment. To be meaningful, that deployment needs to be near-universal and as importantly, needs to be available to Internet Essentials and other Comcast customers, not just the highest end customers.
- ***Expanded Anchor Institution Program.*** The Commission should expand the requirement in the Comcast-NBCUniversal order that required free video and high-speed Internet service to 600 new anchor institutions in underserved, low-income areas. At least until Internet Essentials is broadly adopted in homes, as a central element of that program, the companies should offer high-speed, multi-user connections to anchor locations designated by local governments, so that underserved or lower income neighborhoods have immediately available Internet options.
- ***Improved Reporting.*** The Commission should add a more granular local reporting requirement so that individual communities can measure their progress and make adjustments.

- *Advisory Committee.* The Commission should establish an advisory committee with rights to supervise and adjust the program as needed.⁸⁷

2. *Conditions Should Ensure That Underserved Areas Are Built Out.*

Rather than approve the transactions based on claims that approval may result in additional investment and system improvements, the Commission should:

- require enforceable commitments to expand service to currently underserved areas.
- prevent discrimination against customers – whether business or residential – based on the neighborhood in which the customer happens to be located. Similar services should be available throughout franchise areas. If not, communities may be divided into “have and have not” areas – making it difficult to redevelop and revitalize struggling neighborhoods.

Finally, because the mergers envision increasing reliance on the companies’ infrastructure for basic services, it is important that the Commission require the companies to take steps to ensure that all of their systems are reliable. Comcast systems in this area, for example, have suffered significant outages because back-up power sources have not proven adequate.

C. Conditions To Protect the Open Internet.

In addition to requiring the companies to comply with the NBCUniversal open Internet conditions, the Commission needs to be clear that:

No fast lanes or priority service on the Internet. The companies may not create fast lanes or other enhanced or priority services for itself or for particular edge providers.

⁸⁷ *Id.*

No discriminatory use of specialized services. The companies may not create “private Internets” or offer other “specialized services” to residential users, in ways that, from the perspective of end users, would give the operators’ own content or any content preferential treatment, or effectively prevent the delivery of competitive services via the Internet. For example, the operators may not create or enforce a data cap that applies to most Internet content and services (including that from local governments) but that does not apply to the operators’ own or preferred content.

Open interconnection to Comcast systems. Finally, the Commission needs to impose conditions that not only ensure that traffic is handled neutrally once on the Comcast network, but that it also ensure that it is possible to interconnect with the Comcast system on reasonable and pro-competitive terms and conditions.

D. Conditions To Protect Consumers.

The Commission should condition any approval on specific enhancements to operators’ customer-service practices: the companies have stressed that improvements in customer-service are a key potential benefit, and it is important for the Commission to ensure that this benefit is realized. Recent reports have shown in painful detail how cable operators are already failing to satisfy basic customer-service obligations nationwide; as we have suggested, there is every reason to fear that the merger will exacerbate problems.⁸⁸

⁸⁸ For example, The Verge” (a Vox Media-owned tech publication) presented a series of articles about Comcast’s customer-service problems. See, e.g., A. Jeffries, *Comcast Confessions: when every call is a sales call*, July 28, 2014, available at: <http://www.theverge.com/2014/7/28/5936959/comcast-confessions-when-every-call-is-a-sales-call> (last accessed August 25, 2014); A. Jeffries, *Comcast Confessions: why the cable guy is always late*, Aug. 4, 2014, available at: <http://www.theverge.com/2014/8/4/5960251/comcast-confessions-why-the-cable-guy-is-always-late> (last accessed August 25, 2014); A. Jeffries, *This is Comcast’s internal handbook for talking customers out of cancelling service*, Aug. 4, 2014, available at: <http://www.theverge.com/2014/8/4/5967255/this-is-comcasts-internal-handbook-for-talking-customers-out-of> (last accessed August 25, 2014).

The Commission should begin to address the problem by shining light on the issue. Too often, cable operators make it difficult for local governments to gain or share basic information about the operators' procedures and performance, making effective regulation impossible. Therefore, the Commission should develop strict and comprehensive public reporting metrics about the operator's customer-service practices and performance record. The records should be community-specific to the extent possible,⁸⁹ and should be easily and publicly available to consumers and local governments.⁹⁰ A failure to adhere to metrics that apply across a region or nationally should be addressable at the local level but should also be addressable at the national level (the goal is not to displace local enforcement, but to ensure consumers have a remedy in cases where local government either is not able or is prohibited from enforcing customer service standards – and more importantly, to ensure the company understands that there is a risk if customer service is not improved across the board). Moreover, because the dangers associated with consolidation apply to all services, customer service protections should apply to all services. Whether a telephone is answered should not depend on whether a customer who purchases bundled services selects “Internet” or “cable” service when calling to register a complaint.

Finally, the Commission should insist that the companies avoid practices that prevent customers from clearly identifying and choosing among service options, or that require them to “opt out” of service offerings. Some practices—including the well-publicized willingness of Comcast to offer different prices to some customers—raise significant discrimination concerns.⁹¹

⁸⁹ The centralization of customer service functions may make this more difficult.

⁹⁰ It should be clear how the companies are measuring performance, so that obvious abuses in recordkeeping can be identified and corrected. For example, whether a customer call is handled locally, nationally or internationally, the company should be responsible for maintaining records that permit local governments and the Commission to assess customer service performance.

⁹¹ T. Lee, Forbes, *Comcast's Pricing Shell Game*, available at: <http://www.forbes.com/sites/timothylee/2012/06/06/comcasts-pricing-shell-game/> (last accessed August 25, 2014).

The Commission should include a requirement for clear disclosure of rates, ancillary equipment costs, and other data that would assist consumers in making informed choices about services and what is the true cost of such services.

E. Conditions To Prevent Operators From Engaging In Practices That Limit Competitive Entry.

The Commission should also condition any approval of the transactions on a requirement that the operators not engage in any practices that will *further* decrease competition or discourage future competition.

Bar “level playing field” enforcement. Cable operators often demand that if local governments enter into an agreement with a new entrant, they must give the incumbent operator the identical deal. Proposed “level playing field” clauses now seek to reach cable systems and non-cable systems, as long as video is delivered to the end users. The incumbent operators make these demands even though the incumbent and the new entrant are not similarly situated. The Commission has recognized the harms of such clauses,⁹² although as a general matter, it has permitted incumbent operators to enforce existing level playing field agreements that apply to competing franchised cable systems. Given the increased concentration resulting from this transactions, the Commission should go a step further and prevent these companies from enforcing “level playing field” conditions. This does not leave the companies without remedy—the companies might still be able to pursue equal protection claims—but it does ensure that communities have flexibility to allow providers to enter that offer unique services or facilities, or that are not in a position to serve an entire franchise area.

⁹² *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 5101 ¶ 26 (2007).

Prevent exclusive marketing arrangements. Many cable operators have entered into exclusive marketing arrangements with building owners, which make it difficult or possible for other providers to compete for customers. The Commission should prevent operators from enforcing exclusive marketing agreements with buildings and home owners associations, and require notice to those associations so that associations and home owners may consider alternative service providers.

CONCLUSION

The proposed transactions promise to change the communications landscape across the country. The Commission must apply the public-interest test and rigorously analyze all aspects of the transactions as a whole. At the very least, it must establish strong and enforceable conditions that ensure that the alleged benefits of the transaction are realized, and the harms are mitigated.

Respectfully submitted,

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