Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of	)	
Comcast Corporation,	)	**MB Dkt No. 14-57**
Time Warner Cable Inc. and	)	
Charter Communications Inc.	)	
For Consent to Transfer Control of	)	
Licensees and Authorization	)	

PETITION TO DENY OF
CONSUMER FEDERATION OF AMERICA, ARIZONA CONSUMERS COUNCIL, ARIZONA PIRG, CALPIRG, CENTER FOR CALIFORNIA HOMEOWNER ASSOCIATION LAW, CHICAGO CONSUMERS COALITION, COLUMBIA CONSUMER EDUCATION COUNCIL, CONNPIRG, CONSUMER ACTION, CONSUMER ASSISTANCE COUNCIL OF CAPE COD, CONSUMERS EMPOWERED, CONSUMER FEDERATION OF THE SOUTHEAST, FLORIDA CONSUMER ACTION NETWORK, ILLINOIS PIRG, MASSACHUSETTS CONSUMERS' COALITION, MASSACHUSETTS CONSUMERS' COUNCIL, MASSPIRG, NATIONAL CONSUMER LAW CENTER ON BEHALF OF ITS LOW-INCOME CLIENTS, NORTH CAROLINA CONSUMERS COUNCIL, OREGON CONSUMER LEAGUE, TEXAS CONSUMER ASSOCIATION, U.S. PIRG, VIRGINIA CITIZENS CONSUMER COUNCIL WISCONSIN CONSUMERS LEAGUE, WISPIRG

August 25, 2014
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SUMMARY

In this Petition, the Consumer Federation of America and its member groups show that the Federal Communications Commission (FCC) must block Comcast's acquisition of Time Warner Cable and the swap of additional systems with Charter Communications.

Just four years ago the FCC and the Department of Justice (DOJ) found that Comcast has market power as the nation's largest buyer of professional video content and the largest provider of both multichannel video programming and broadband Internet access service. The Comcast-Time Warner merger poses a much greater threat to competition, consumers and the public interest than the Comcast-NBCU merger, which has not benefited the public.

The acquisition of Time Warner would increase that market power by at least 50% and create a goliath that would tower over the industry. Comcast would be

- 1.5 times as large as the next largest MVPD.
- 2 times as large as the next largest Internet access service provider.
- 3 times as large as the next largest service provider with the capacity to deliver an integrated bundle of video and broadband,
- the dominant cable and broadband operator in 24 of the nation's largest 25 video markets, including the addition of the most important media markets, New York and Los Angeles."

According to the DOJ/FTC *Merger Guidelines* the merger would have a devastating impact on the market structure.

- The merger creates highly concentrated markets in multichannel video, high capacity broadband and regional news and sports programming.
- It fractures the *Guidelines*, exceeding the thresholds by five to ten times.
- It must be "presumed to be likely to enhance market power."
- The merger and system swaps with Charter divide the nation into "fortress regions," with Comcast dominating the coasts, while Charter would dominate the upper Midwest.

There is nothing in the recent past or near future that has or will change the fact that cable is the dominant technology and has substantial market power in the distribution of professional video and broadband Internet access.

- Comcast has been expanding its share of the broadband market and enjoys high margins because competition is weak.
- Comcast's fixed-line, true broadband technology has much higher capacity than DSL and wireless.
- Entry has been minimal and there are no prospects for significant, wide scale entry of new technologies or new players.

Because Comcast has such a commanding position in distribution and owns a huge slate of national and regional programming, with well over a billion subscribers, it has the incentive and ability to leverage its market power to distort and weaken competition in local, regional and national video and Internet markets.

Comcast has a long history of abusing its market power that has been reaffirmed by its behavior since its acquisition of NBC.

- It has shown it is willing to press its advantage to the limits of the law and beyond in disputes with video programmers in both the traditional and online markets.
    - Netflix: discrimination, degradation of service quality, raising rival's cost
    - Conductive: denial of access to content
    - Bloomberg News: delay in providing fair channel location
    - Tennis and Wealth Channels: denial of carriage
- In contrast, Comcast has done as little as possible to deliver on its public interest promises.
    - Participation in Comcast's broadband lifeline program has been meager, one-quarter of what well-run assistance programs in the communications sector achieve.
    - The standalone broadband offer was badly mismanaged.

Comcast remains a laggard in capital expenditures.

- It invests the lowest percentage of its free cash flow in capital expenditures (CapEx) than any of the large video and Internet access providers.
- In fact, it takes more capital out through depreciation and amortization than it puts back in with CapEx, with the total disinvestment over the past decade reaching $15 billion.

The performance of the cable sector has gotten worse since the Comcast-NBCU merger.

- Price increases have accelerated and Comcast's price increases are above average.
- Usage caps have spread and Comcast is the leader.
- Broadcast retransmission fees have skyrocketed, contradicting the claim that the integration of broadcast content and distribution would moderate increases.
- Video and Internet services continue to ranks last in consumer satisfaction and Comcast is among the worst of the worst.

Given the long-standing "gentlemen's agreement" among cable operators to not compete head-to-head in physical space and their decision to extend that agreement to cyberspace with their "authentication" scheme, online video competition is the last and only hope to break the stranglehold of cable.

- No regulatory tools exist to control the market power over customers, set top boxes and "middle mile" transport that Comcast will have if it is allowed to acquire Time Warner.
- Competition, consumers and the public interest can only be served by blocking this merger.

I. OPPOSITION

BASIS OF THE OPPOSITION

In these comments, the Consumer Federation of America[1] on behalf of its member groups demonstrates that the Federal Communications Commission (FCC) should reject the transfer of licenses from Time Warner to Comcast because the deal poses a severe threat to competition, consumers and the public interest. We agree with the *Economist* magazine, which concluded,

> "the deal would create a Goliath... For Consumers the deal would mean the union of two companies that are already reviled for their poor customer service and high prices. Greater size will fix neither problem… The biggest worry is Comcast's grip on the Internet… Comcast will have extraordinary power over what content is delivered to consumers, and at what speed."[2]

The Comcast-NBC Merger

Just four years ago, in the public interest filing and expert testimony accompanying the request for the transfer of broadcast licenses from NBC to Comcast, Comcast took the position that because it was largely a vertical merger and all of the market segments involved were vigorously competitive, the merger posed no actual or potential threat to competition, consumers or the public interest.[3] The Department of Justice (DOJ)[4] and the Federal Communications

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[1] The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly. CFA has been involved in communications, media and Internet policy for decades in legislative, regulatory and judicial arenas and has advanced the consumer view in policy and academic publications. All of the listed groups are members of CFA.

[2] "Turn it off: American regulators should block Comcast's proposed deal with Time Warner Cable," *Economist*, March 15th 2014.

[3] Applications and Public Interest Statement of General Electric Company, Transferor, to Comcast Corporation, Transferee (Jan. 28, 2010), as amended on May 4, and November 3, 9, 17, 18 and 29, 2010.

[4] Complaint, Competitive Impact Statement, United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106).

Commission (FCC)[5] rejected the Comcast arguments and analyses, finding that the merger posed significant threats and could not be approved without substantial remedial actions and ongoing conditions. The Comcast-Time Warner merger poses a much greater threat of harm.

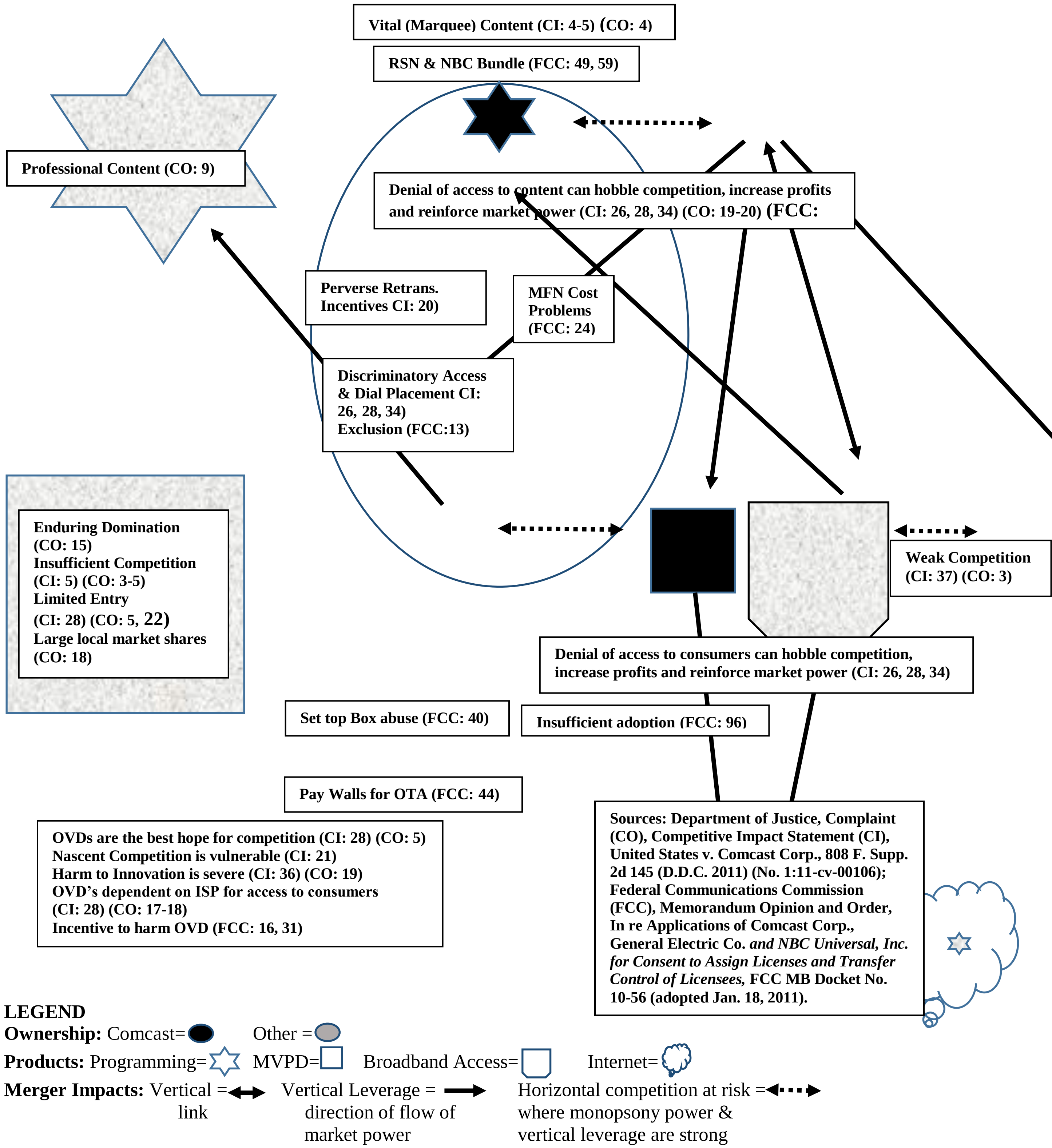
The core of the concern in the Comcast-NBC merger was Comcast's significant market share at key points in the supply chain of video and communications service (see Exhibit I-1). As the nation's largest multichannel video program distributor (MVPD) and the nation's largest provider of broadband Internet access service (BIAS), Comcast's large market share occurs at strategic chokepoints where competition is feeble at best. The DOJ/FCC concluded that allowing it to gain control over additional "marquee" content would give Comcast the incentive and ability to exercise market power, at the expense of competition, consumers and the public interest in all the video content and distribution markets in which Comcast participates. The Comcast-Time Warner merger would increase Comcast's control over the strategic choke points by 50%.

The agencies reached the conclusion that the Comcast-NBC merger posed these threats based on a close examination of the record in which they found that Comcast's claims of no harm were contradicted by its own words. As the FCC put it with regard to Online Video Distribution (OVD)

> despite their arguments in this proceeding, the Applicants' internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat. The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it. The record also contains NBCU e-mails and documents showing that many of the other cable companies are similarly concerned about the OVD threat and that

[5] Memorandum Opinion and Order, In re Applications of Comcast Corp., General Electric Co. *and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,* FCC MB Docket No. 10-56 (adopted Jan. 18, 2011).

EXHIBIT I-1: CONCERNS ABOUT COMCAST'S INCENTIVE AND ABILITY TO ABUSE ITS MARKET POWER AS A RESULT OF THE NBC ACQUISITION



> NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.[6]

In public Comcast executives claimed that OVDs did not pose a competitive challenge; in private they thought and acted in exactly the opposite manner. In fact, in the FCC order, which reviews the record in detail, there are almost 50 citations to proprietary documents that contradict the Company's public statements. This is approximately one-third of all the citations to proprietary documents in the body of the FCC order. In addition to the key issue of OVD competition, these citations covered other key issues, including exclusionary conduct with respect to MVPDs, online distribution of content affecting both OVDs and MVPDs and broadband Internet access service. In short, Comcast's public statements are repeatedly at odds with its private thoughts and the reality of the markets in which it sells services.[7]

Comcast could have challenged the conclusions reached by the DOJ and FCC and gone to court to prove that the agencies were wrong. It chose not to do so. As a matter of law, Comcast's original claims of no actual or potential harm were wrong.

In CFA's petition to deny the transfer of NBC licenses to Comcast,[8] we offered a detailed analytic framework and extensive empirical analysis showing that the merger posed a substantial threat to competition, consumers and the public interest. Given the DOJ consent decree and the FCC merger order, we were right and Comcast was wrong. The application of the same framework and approach to data analysis in this petition to deny shows Comcast is wrong again.

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[6] FCC Comcast-NBC Order, p.35.

[7] The lead Comcast experts did not cite the internal proprietary documents in the Comcast-NBC case, nor do they do so in the proposed merger. Instead they just regurgitate management arguments. In this case the lead experts (Rosston and Topper) cite interviews with Comcast executives as their source over 60 times.

[8] Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project, In re Applications of Comcast Corp., General Electric Co. *and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, FCC MB Docket No. 10-56, June 21, 2010.

Comcast-Time Warner

In less than four years, Comcast is back defending another merger with essentially the same failed arguments.[9] Comcast and its experts claim that because its proposed merger with Time Warner Cable is largely a geographic extension merger and all of the market segments involved are vigorously competitive, the merger poses no actual or potential threat to competition, consumers or the public interest.

Ironically, Comcast's public interest filing and attached expert testimony in the proposed Time Warner merger never mentions the DOJ consent decree. It is easy to see why. The DOJ was required to lay out the case against the NBC merger in a legal filing in Court. Needless to say, the Competitive Impact Statement and the Complaint filed by the DOJ thoroughly undercut the Comcast claims of no harm.

The failure to mention or analyze the consent decree is quite revealing. Comcast and its experts cite approximately 35 prior FCC merger orders over 180 times in their filings. At least ten of those mergers also had antitrust case filings. Comcast and its experts cite at least four of the antitrust documents, but they failed to cite or analyze the DOJ consent decree in the most relevant merger. The failure to cite the DOJ documents is an error of commission.

In contrast to ignoring the DOJ consent decree, Comcast does cite the FCC merger order, approximately 30 times. Half of those citations are to conditions that were placed on the merger to address the harms that the FCC concluded would result from the merger, harms that Comcast insisted did not exist, a claim they reiterate in this proceeding. Even though Comcast claims the

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[9] Application and Public Interest Statement, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (Application), MB Docket No.14-57, before the Federal Communications Commission (April 8, 2014),

acquisition of Time Warner poses no threat, it argues that the conditions imposed on the NBC merger are sufficient to deal with any concerns the FCC might have.

We disagree on both of the main points in Comcast's defense of the Comcast-Time Warner merger. In this Petition to deny the transfer of Time Warner cable licenses to Comcast, we not only show that Comcast's claims that there is no actual or potential harm are wrong again, but also that **this merger poses so much more of a threat that the conditions imposed on the Comcast-NBC are grossly inadequate. It is extremely difficult, if not impossible, to see how behavioral remedies can possibly discipline the abuse of market power and the resulting harms the Comcast-Time Warner merger would inflict.**

The merger extends the anticompetitive and anti-consumer incentives and market power the DOJ/FTC found Comcast possesses to a much larger geographic area and, more importantly, magnifies the ability to exercise market power (see Exhibit I-2). The incentive and ability to abuse market power is dramatically increased by the proposed merger by adding to the underlying problems that were identified in the analysis of the prior merger. In this sense, this merger is much worse than the last merger for the following reasons.

- The merger results in a 50% increase in Comcast's control over the strategic chokepoints in the supply chain that were the source of the DOJ/FCC concerns in the Comcast-NBC merger.

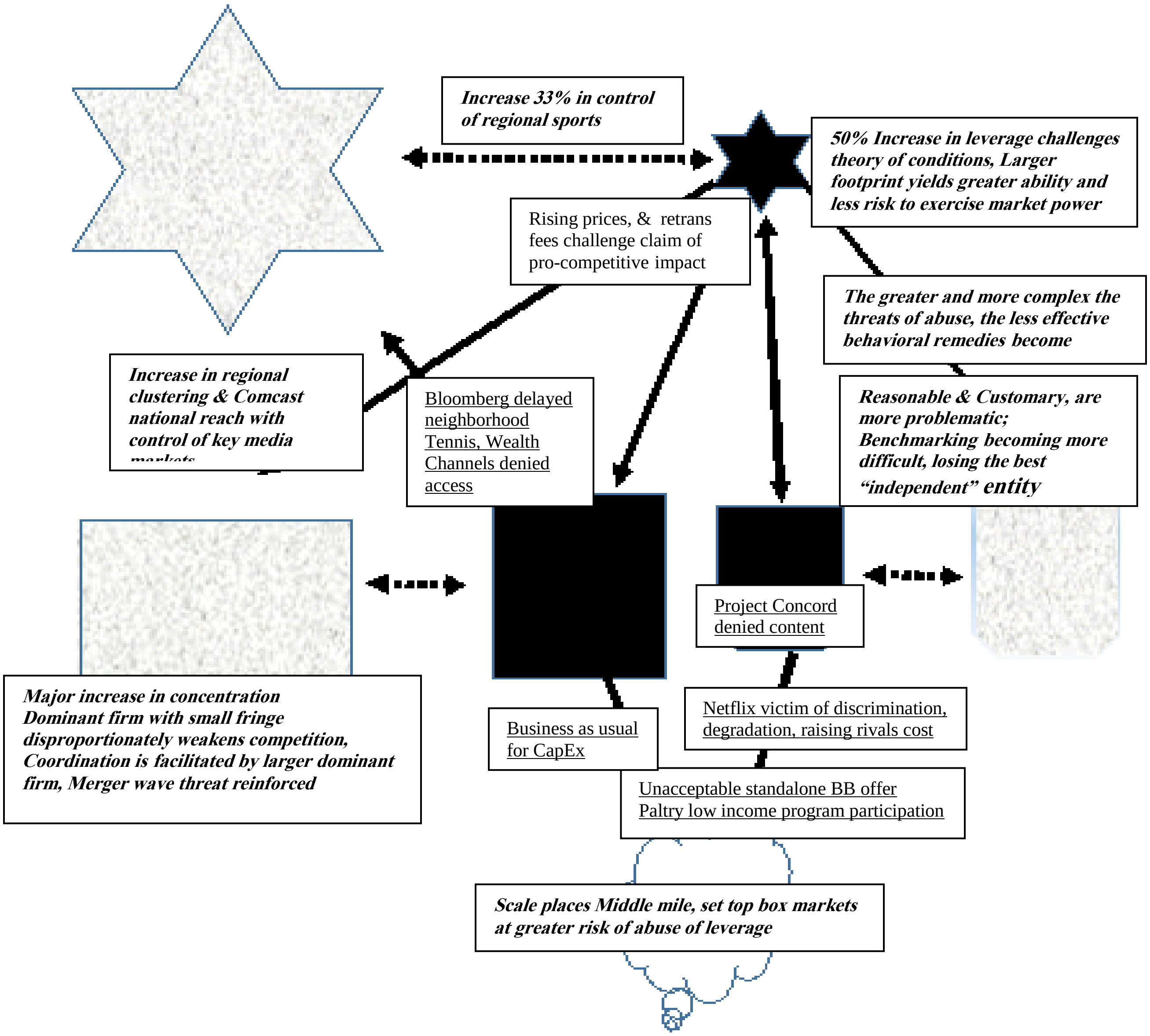
- The state of competition in the markets in which Comcast participates has not improved significantly at the key choke points.

- The merger makes Comcast the largest provider if MVPD and BIAS service by far, diminishing the possibility that they can be challenged by their relatively smaller rivals.

- The merger makes Comcast the dominant MVPD not only in the largest video markets, but also the two most important media markets in the nation.

- The merger results in a 33% increase in Comcast's control of regional sports and news, local marquee content that Comcast has repeatedly used to undermine competition.

EXHIBIT I-2: CONCERNS RAISED BY COMCAST'S PROPOSED ACQUISITION OF TIME WARNER



LEGEND

Ownership: Comcast= Other =

Products: Programming= MVPD= Broadband Access= Internet=

Merger Impacts: Vertical = link; Vertical Leverage = direction of flow of market power; Horizontal competition at risk = where monopsony power & vertical leverage are strong

<u>Disappointing performances of Comcast NBC merger & conditions</u>

New concerns raised by the Comcast-Time Warner merger

- This increase in market power is reinforce by the fact that the merger and swaps of multiple system operations with Charter create stronger regional clusters that are tantamount to a national market division scheme.

- These increases in market power are magnified by the fact that the conditions imposed on Comcast have had difficulty dealing with the market power that resulted from the previous merger, while the public interest benefits identified by Comcast have been meager, at best.

STANDARD OF REVIEW

The standard of review remains the same for this merger as for the last. Under the Communications Act, to approve the proposed transaction, the FCC must find that the proposed merger and attendant license transfers serve the public interest. Specifically, the Commission must deny the transfer of licenses if the Commission determines that the transfer is not in "public interest, convenience and necessity."[10] To make this finding, the FCC must weigh the potential public interest harms and benefits,[11] and determine that, as a threshold matter, the merger does not violate a statute or rule, or otherwise interfere with the objectives of the Communications Act.[12]

The Commission's consideration includes the merger's effect on competition, but its review is not limited by antitrust laws.[13] Indeed, the Commission's review must meet a higher standard than mere congruence with antitrust principles. The Commission has found that the public interest standard "necessarily encompasses the broad aims of the Communications Act."[14]

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10 Codified at 47 U.S.C. § 310(d).

11 *In the Matter of General Motors Corp. and Hughes Elec. Corp. and the News Corp. Ltd., for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶15 (2004) (*GM/News Corp Order*)..

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

13 *See, e.g., Applications for Consent and transfer from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3168 (1999).

14 *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.*

Thus, in addition to competition, the Commission has determined that the public interest involves other matters.[15] Moreover, the Applicants seeking Commission approval of the proposed transaction "bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest."[16] Accordingly, the Applicants bear the burden of demonstrating that the merger would enhance (rather than merely preserve) competition.[17]

The Applicants have failed to make this showing by a wide margin. The merger can only be analyzed from a clear understanding of the nature of the merger and the markets it affects, which must start with the findings of the DOJ/FCC in the Comcast-NBC merger. Viewed in this way, the DOJ and FCC must conclude that the threat to competition, consumers and the public interest is too great to allow the merger because the harm would be beyond the ability of conditions to repair. In fact, this petition shows that if Comcast had acquired Time Warner

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Inc. and its Subsidiaries to FairPoint Comm., Inc., 23 FCC Rcd 514, 520 ¶ 12 (2008); *In the Matter of AT&T and Bell South Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007) (*AT&T/Bell South Order*).

15 For example, factors considered to be in the public interest may include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest." *See* 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (*1996 Act*), 254, 332(c)(7)); *1996 Act*, Preamble. *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, 23 FCC Rcd 514, 520 ¶ 12 (2008);,*AT&T/Bell South Order*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007).

16 *In the Matter of New Corp. and the DIRECTV Group, Inc., and Liberty Media Corp., For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 22 (2008) (*NewsCorp/DIRECTV Order*).

17 *See Applications for Consent to the Transfer of Control of Licenses XMSatellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶ 32 (2008);, *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 19987, ¶ 2 (1997).

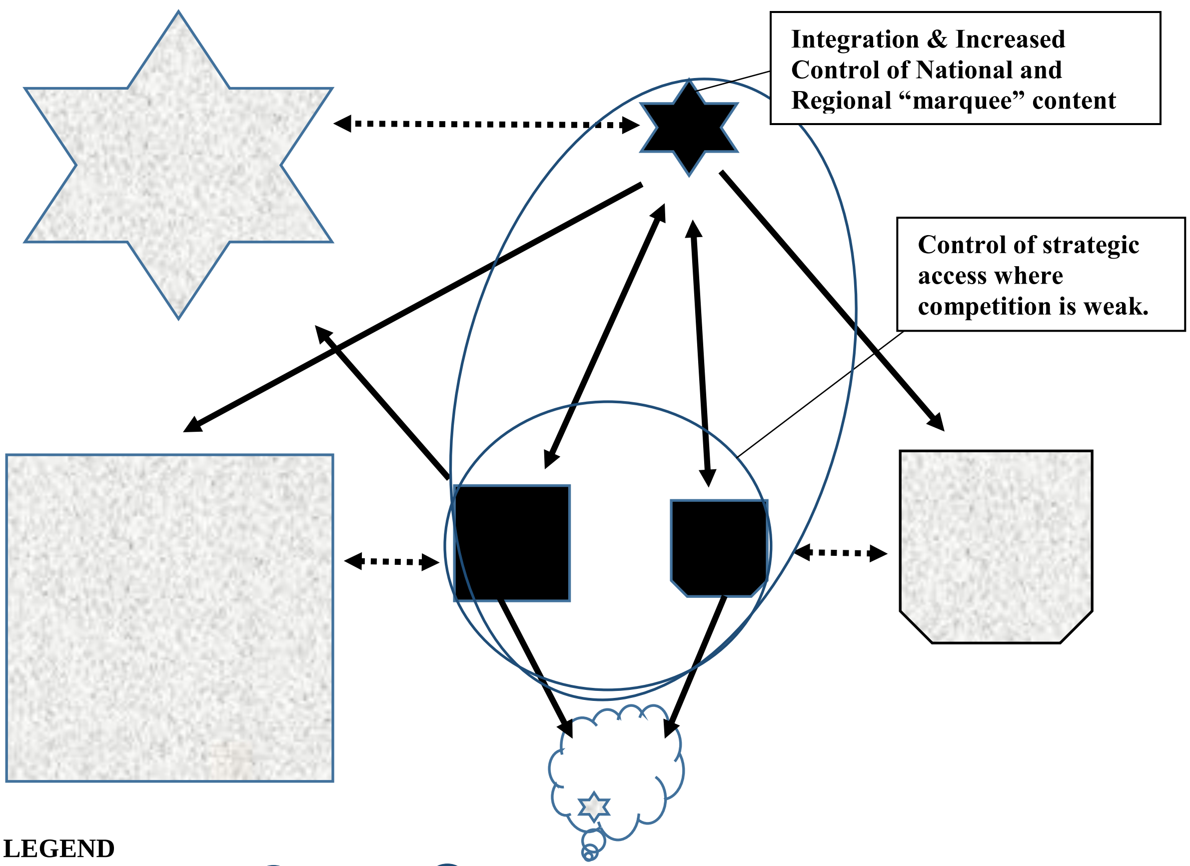
before it attempted to acquire NBC, based on law, practice and its analysis of the state of competition in the various market segments affected, the DOJ and the FCC would have been compelled to reject the acquisition of NBC by a huge cable/broadband giant.

II. COMPETITIVE, CONSUMER & PUBLIC INTEREST HARMS OF THE COMCAST-NBC MERGER

THE SOURCES OF MARKET POWER

As the largest MVPD and largest BIAS provider in the nation, Comcast occupies a key strategic location in the 21st century communications sector that is quickly becoming the heart of the digital economy (see Exhibit II-1). Access to the network is an essential, necessary component of any and all uses of the network. Comcast is the dominant provider of the dominant technology.

EXHIBIT II-1: COMCAST'S LOCATION IN THE MULTICHANNEL VIDEO PROGRAMMING AND BROADBAND INTERNET ACCESS PRODUCT SPACE WITH THE ACQUISITION OF NBC



LEGEND
Ownership: Comcast= Other =
Products: Programming= MVPD= Broadband Access= Internet=
Merger Impacts: Vertical = link; Vertical Leverage = direction of flow of market power; Horizontal competition at risk = where monopsony power & vertical leverage are strong

As depicted in Exhibit II-1, the vertical links created by the merger (bidirectional, solid arrows) give Comcast the incentive and the ability to exercise market power through vertical leverage (the unidirectional, solid arrows) that has harmful effects on horizontal competition, consumers and the public interest (the bidirectional, broken arrows).

Access facilities and markets are inherently local. The user needs a local connection to access the network. Because network access facilities tend to be capital intensive and immobile (i.e., they serve a particular place and it is difficult, costly and time consuming to move them [(if they can be moved at all]), competition tends to be weak in these markets. Network owners are likely to have market power.

Although the access market is local, when a single entity dominates many of these local markets, it has implications for the goods and services that are delivered to consumers over the local communication network. If a single entity dominates a large enough share of the local markets, it can influence the outcome of services that compete in national markets. Denying access to a large body of consumers who subscribe to a network or imposing excessive costs and conditions on gaining access to those consumers can reduce or undermine the ability of potential and actual content competitors to survive or provide effective. Similarly, withholding access to marquee content can reduce or undermine the ability of actual or potential distribution competitors to survive or provide effective competition.

CONCERNS ABOUT VERTICAL LEVERAGE AS THE ABUSE OF MARKET POWER

Buyer Market Power

An important antitrust concern arises when a firm becomes so large a buyer of goods or services that it can use its market power to dictate prices, terms and conditions that hurt the firms from which it buys those goods and services. It might do so to increase its profits, even though the quality or diversity of the products available declines. The official term for this form of market power is "monopsony" power.

> Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.[18]

If the firm with buyer market power also happens to sell similar products, as Comcast does in the video market, it would be doubly glad to weaken potential competition in the market for those product. It could increase its profits by paying less for the goods and services it buys and charge more or gain market share for its own products by using its buyer power. The weaker horizontal competition is, the more likely it is for the firm with buyer market power to benefit from its abuse.

There is no doubt about the relevance of this concern. Comcast is the nation's largest buyer of professional video content. When Comcast announced the Time Warner acquisition, it said it would divest enough cable subscribers to lower its market share to 30%. The 30% figure is the limit the Federal Communications Commission (FCC) proposed for video distribution firms based on the fear that by refusing to carry a cable network, the firm would be large enough to determine if the program will succeed or fail. Antitrust practice uses the same threshold and companies have been found guilty of violating the antitrust laws by abusing their market power with market shares at this level. Mergers have been blocked based on the existence of buyer

[18] Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, p. 2.

market power.[19] The Comcast-NBC merger was legally blocked and later approved with conditions on this basis.

> We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) <u>blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video….</u>
>
> Specifically, we find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to <u>discriminate against unaffiliated content</u> and distributors in its exercise of control over consumers' broadband connections.[20]

Bottleneck Market Power

When a firm has a large market share for an input that is necessary for other firms to compete with it, then it can use its control over that bottleneck to undermine competition in a number of ways. The official term for this form of market power is vertical leverage. Potential competitors who want to enter the market to compete with the dominant incumbents, like over-the-top video distributors, need to have access to customers. If Comcast controls access to a large enough number of customer, it can make it hard for the competitor to succeed by raising its rival's cost, degrading its quality of service, or discriminating against (even blocking) the delivery of its product. This preserves its market power in its core business of video distribution.

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[19] The area of greatest activity has been health care (e.g. Henry, S. Allen, Jr., *Consolidating Health Insurer Markets: A Challenge Facing Antitrust Enforcement*, American Medical Association.

[20] Federal Communications Commission, "Memorandum Opinion and Order," In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, January 20, 2011, p. 26, 37, emphasis added.

The importance of bottleneck power was affirmed in the Comcast-NBC merger. The Department of Justice (DOJ) made it clear that Comcast would have the incentive and the ability to undermine competition by leveraging its control over access to broadband customers. This would weaken online video distributors (OVDs). Both the DOJ and the FCC imposed conditions to prevent that abuse.

> The proposed JV would allow Comcast to limit competition from MVPD competitors and from the growing threat of OVDs. The JV would give Comcast control over NBCU content that is important to its competitors. Comcast has long recognized that by withholding certain content from competitors, it can gain additional cable subscribers and limit the growth of emerging competition. Comcast has refused to license one of its RSNs, CSN Philadelphia, to DirecTV or DISH. As a result, DirecTV's and DISH's market shares in Philadelphia are much lower than in other areas where they have access to RSN programming…
>
> 52. The impact of the JV [Joint Venture between Comcast and NBC] on emerging competition from the OVDs is extremely troubling given the nascent stage of OVDs' development and the potential of these distributors to significantly increase competition through the introduction of new and innovative features, packaging, pricing, and delivery methods…
> 54. Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. As a result, Comcast will face less competitive pressure to innovate, and the future evolution of OVDs will likely be muted.[21]
>
> Every MVPD rival that participates along with Comcast in these relevant markets purchases most if not all of Comcast-NBCU's programming, including most if not all of the programming to be contributed to Comcast-NBCU in this transaction. Comcast-NBCU has the ability to exclude all of Comcast's rivals from the JV's programming, whether by withholding the programming or raising its price, thereby harming competition in MVPD services in each of Comcast's franchise areas.[22]

Coordinated Effects

Given the failure of cable operators to compete head-to-head in physical space and their efforts to extend that non-compete model into cyberspace, the impact of the proposed merger to

[21] United States Department of Justice, et al. v. Comcast, et. Al, Complaint, 2011, pp. 19…21
[22] FCC Comcast-NBC Order, p. 20.

enhance the ability of the industry to coordinate this campaign against OVD competitors must be considered.

> A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred…
> The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct… and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.[23]

A dominant firm with a post-merger market share as large as Comcast-Time Warner would be well positioned to lead, signal and coordinate actions that would diminish competition. "Internal documents expressly acknowledge that "authentication" is Comcast's and other MVPDs' attempt to counter the perceived threat posed by OVDs."[24]

THE COMCAST-NBC MERGER

Although the Comcast-NBC merger did not increase horizontal concentration in the MVPD and BIAS markets, it raised antitrust and Communications Act concerns because Comcast already had a large share of key strategic input markets, where competition is weak.

Comcast claimed that there was absolutely no cause for concern. As noted earlier and described in Exhibits II-2 and II-3, the authorities responsible for protecting competition and protecting consumers and the public interest, disagreed. Exhibit I-2 notes their concerns. Exhibit II-3 identifies the remedies they demanded.

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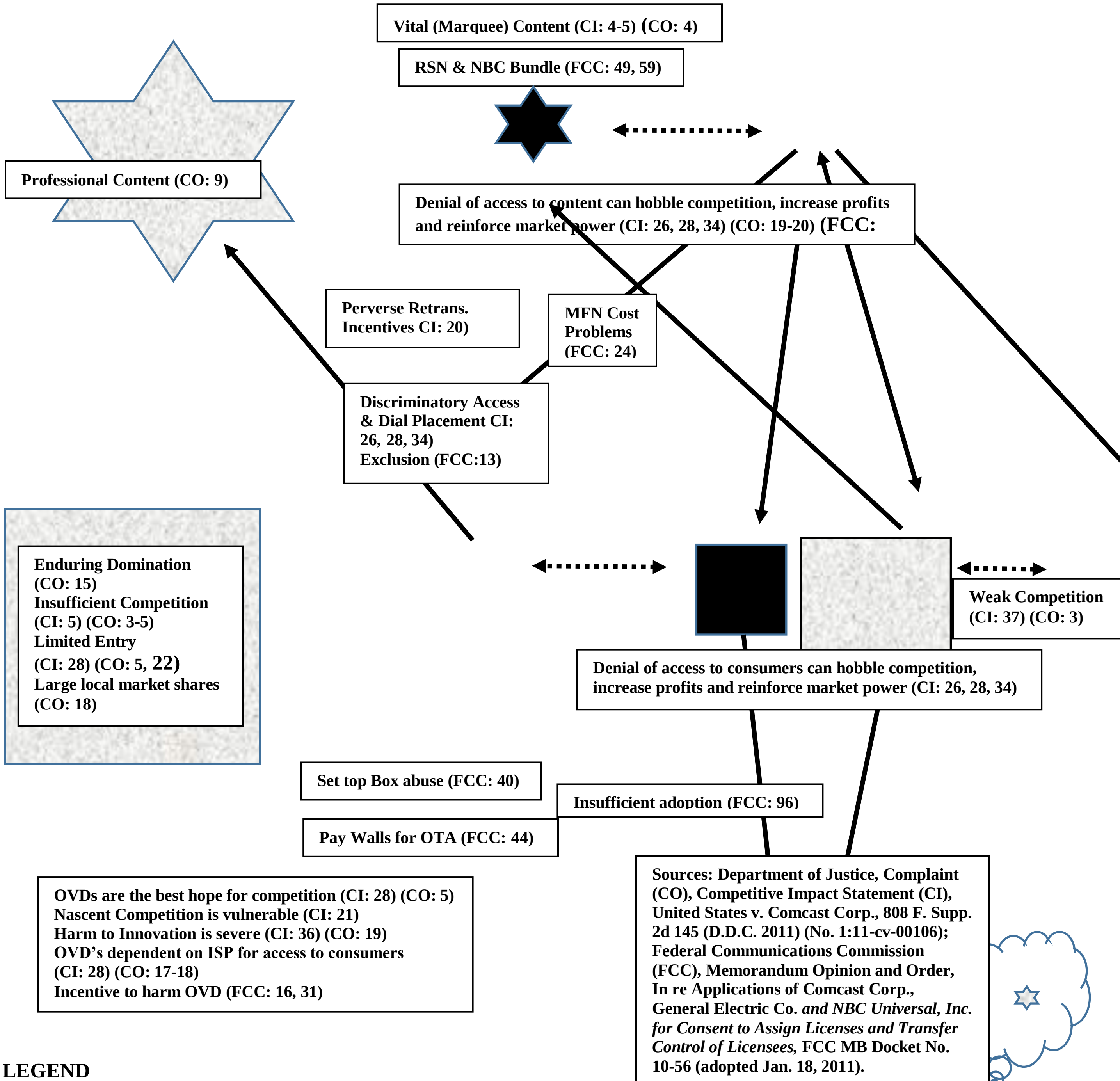
[23] DOJ/FTC, *Merger Guidelines*, 2010, pp. 2… 25.
[24] DOJ Competitive Impact Statement, p. 19.

EXHIBIT II-2: DOJ/FCC CONCERNS ABOUT COMCAST'S INCREASED INCENTIVE AND ABILITY TO HARM COMPETITION, CONSUMERS AND THE PUBLIC INTEREST RESULTING FROM THE ACQUISITION OF NBC



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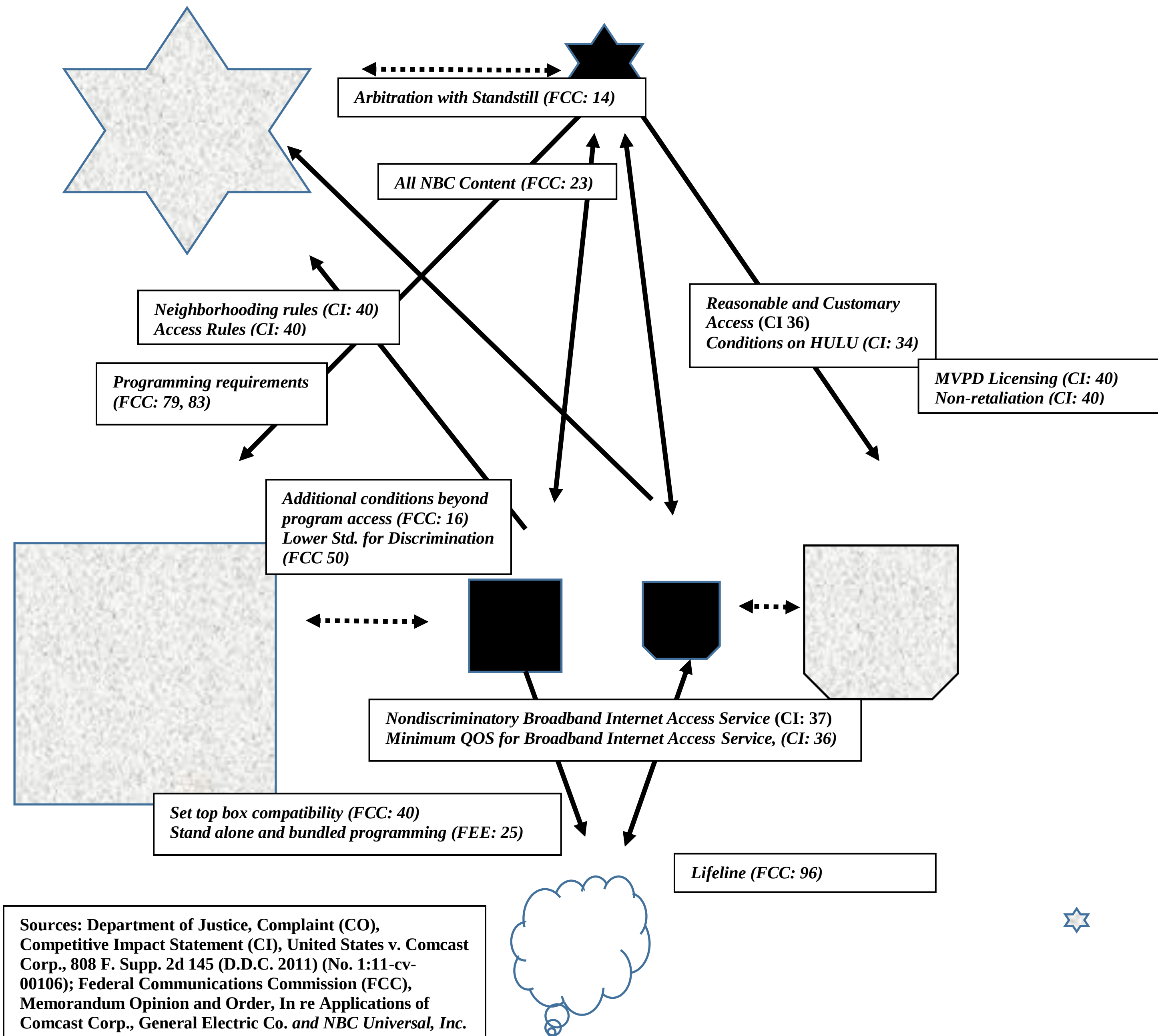
Ownership: Comcast= Other =

Products: Programming= MVPD= Broadband Access= Internet=

Merger Impacts: Vertical link = Vertical Leverage = direction of flow of market power Horizontal competition at risk = where monopsony power & vertical leverage are strong

EXHIBIT II-3: DOJ/FCC REMEDIES FOR COMCAST'S INCREASED INCENTIVE AND ABILITY TO HARM COMPETITION



Sources: Department of Justice, Complaint (CO), Competitive Impact Statement (CI), United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106); Federal Communications Commission (FCC), Memorandum Opinion and Order, In re Applications of Comcast Corp., General Electric Co. *and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, FCC MB Docket No. 10-56 (adopted Jan. 18, 2011).

LEGEND

Ownership: Comcast= Other =

Products: Programming= MVPD= Broadband Access Internet=

Merger Impacts: Vertical = link Vertical Leverage = direction of flow of market power Horizontal competition at risk = where monopsony power & vertical leverage are strong

Comcast had always recognized the importance of certain types of content to the MVPD market. It developed extensive holdings in programming of generally local interest, particularly regional sports and local news. As the above quote shows, the link between local content and local distribution was very prominent in the case of Comcast, which used its control over local sports to put potential competitors at a disadvantage. Without access to local sports programming on reasonable terms, it was hard for competitors to gain local viewers. Content that is special in this way is referred to as "marquee content."

Comcast also had ownership interests in about a dozen national channels. However, the acquisition of NBC, dramatically increased its holding of national "marquee" content and also gave it control over important local video distribution (over-the-air) and local news content production. Comcast-NBC has well over 1 billion subscribers to cable networks, in addition to millions of subscribers to broadcast and regional sports networks.

Tying NBC content to a dominant local distribution network with a large footprint raised concerns about the incentive and ability of Comcast to leverage its market power, both in local distribution and content, as well as its large footprint, to undermine competition, increases prices, and slow innovation in local and national markets. The DOJ and FCC outlined an extensive set of concerns and Comcast agreed to conditions on their behavior to address these concerns. As the next section shows, the Comcast-Time Warner merger dramatically increases the link between NBC content and strategic distribution.

III. ASSESSMENT OF THE IMPACT OF THE COMCAST-TIME WARNER MERGER ON MARKET STRUCTURE

ASSESSING THE IMPACT OF MERGERS

The cornerstone for the analysis of the impact of a merger on the market are the *Merger Guidelines.* The Department of Justice and the Federal Trade Commission (FTC) have published *Merger Guidelines* for decades that lay out the broad framework that they apply in reviewing mergers.[25] The goal is to give industry guidance on the general approach that will be taken.

At the core of those *Guidelines* is statistical analysis of the market structure. Two aspects of the market are captured. How large is the post-merger firm and how much does the merger increase the concentration in the market. The *Guidelines* were recently revised, so the standards for review are quite fresh.

As described in Table III-1, the DOJ/FTC use three categories to identify markets – Unconcentrated, Moderately Concentrated and Highly Concentrated. The categories are defined by the HHI index, which is a measure of the degree of concentration that has been used throughout the history of the *Guidelines.*

TABLE III-1: MERGER GUIDELINE THRESHOLD ANALYSIS

Post-Merger Market Type	HHI Level	HHI Change	Impact on Competition
Unconcentrated	**HHI <1500**	**NA**	
Moderately Concentrated	**1500 ≤ HHI< 2500**	**+100**	**Raise significant competitive concerns**
Highly Concentrated	**HHI ≥ 2500**	**+100-200**	**Raise significant competitive concerns**
		+≥200	**Presumed to be likely to enhance market power**

Source: Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines,* August 19, 2010

[25] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, **August 19, 2010, ("*Horizontal Merger Guidelines*")** *available at* **http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf**

A merger is assessed primarily in terms of the post-market level of concentration and the impact of the merger on the level of concentration.

- If the post-merger market is unconcentrated, it generally does not raise competitive concerns.
- If the post-merger market is either moderately concentrated or highly concentrated and the merger increases the HHI by a fairly small amount, more than 100 points, the merger "raises significant competitive concerns."
- If the post-merger market is highly concentrated and the merger raises the HHI by more than 200 points, the merger is "presumed to be likely to enhance market power."

These are only the initial screening thresholds and the results are greatly influenced by the way the geographic and products markets are defined, but this analysis sets the tone of the inquiry.

EXPANDING THE BASIS FOR ABUSE OF VERTICAL LEVERAGE

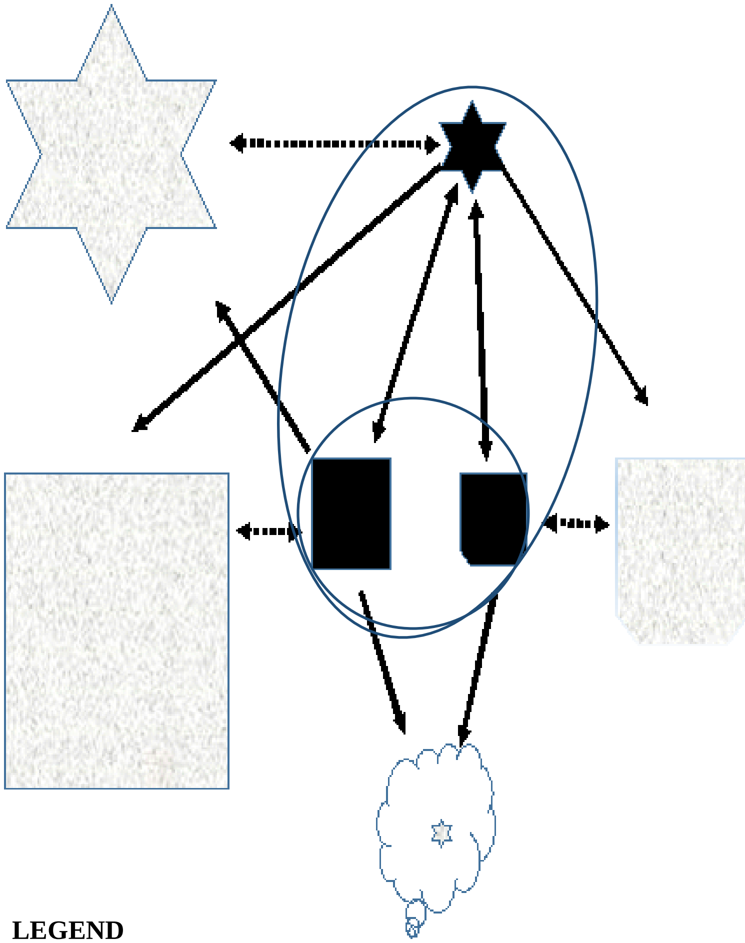
Comcast again claims that because Comcast and Time Warner do not compete head-to-head in the MVPD or BIAS markets, the merger cannot have a negative impact on competition consumers and the public interest. Once again, Comcast has ignored the problem of buyer and bottleneck market power that compelled the DOJ and FCC to take action against the threat of vertical leverage created by Comcast's acquisition of NBC.

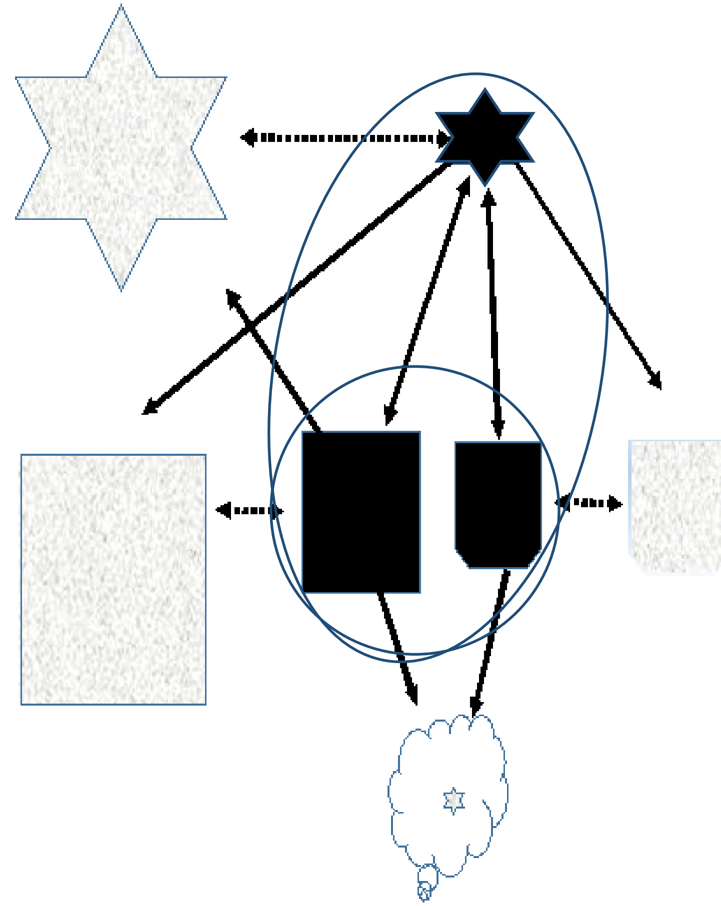
Viewed from this angle, Comcast's acquisition of Time Warner poses a very serious threat to competition, consumers and the public interest. The acquisition of Time Warner dramatically increases its control over the strategic choke point – by 50% – but Comcast again incorrectly claims that there is nothing to be concerned about.

Exhibit III-I depicts the impact of the acquisition of Time Warner graphically. The relative size of Comcast in the three markets in which it operates is depicted by the solid figures. It shows a 50% increase in the control of key distribution choke points, which is also reflected in

EXHIBIT III-1: INCREASED SIZE PROVIDES INCREASED LEVERAGE AT KEY CHOKE POINTS

PRE-TIME WARNER MERGER | **POST-TIME WARNER MERGER**





LEGEND

Ownership: Comcast= Other =

Products: Programming= MVPD= Broadband Access Internet=

Merger Impacts: Vertical = link | Vertical Leverage = direction of flow of market power | Horizontal competition at risk = where monopsony power & vertical leverage are strong the smaller size of the independent market share. This increases Comcast's leverage substantially. The ability to inflict harm on actual and potential competing content providers is at least 50% greater. This affects providers of both traditional video content and online video content. The Exhibit also depicts a substantial (33%) increase in concentration of regional marquee content.

Comcast-Time Warner Impact on Concentration

Table III-2 presents the market structure analysis of the Comcast-Time Warner merger in terms of both the dominant firm's post-merger market share analysis (30% threshold recognized by Comcast) and antitrust practice and the HHI analysis from the *Guidelines.* It assumes the market is national and presents several alternative definitions of the product market that have been discussed in the press and would be examined by the oversight agencies.

TABLE III-2: THE MERGER RAISES SEVERE CONCERNS ABOUT INCREASED MARKET POWER

	Post-Merger Market		DOJ/FTC Merger Guidelines	
	Dominant Firm Share	HHI Level	Change in HHI	Impact on Competition
DOJ/FTC Thresholds of market power concerns	30	1500-2500	100-200	
Internet Access Service				
True Broadband	**49**	**2835**	**1120**	**Likely to enhance market power**
High Speed Data	38	2045	670	Significant competitive concerns
Cable Television Service				
Wireline	**54**	**3249**	**1359**	**Likely to enhance market power**
MVPD	35	1778	552	Significant competitive concerns
Regional Marquee Content	**52**	**3188**	**1014**	**Likely to enhance market power**

Sources and Notes:

Thresholds: Dominant firm, see text, Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010

Market shares: LRG March 17, 2014, Year-End subscriber counts for Broadband and Multichannel Video.

True Broadband includes AT&T U-Verse and Verizon FIOS, but excludes AT&T and Verizon DSL subscribers and all other telephone company DSL subscribers. Wireline excludes satellite from the video count.

Regional Programming: Federal Communications Commission, *Fifteenth Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203

The key to product market definition is the ability of products to provide similar service at similar prices. "A relevant product market consists of a group of substitute products."[26] If a product does not possess reasonably similar attributes or has a much higher price tag, it is not a good substitute. We believe that the most relevant product markets are the True Broadband access market, the Wireline MVPD market and the regional programming market identified in bold in the table.

The most important product market here is the True Broadband Market. We define the True Broadband Market to include cable modem service, Verizon FIOS and ATT U-verse. We do not include telephone company DSL in the product market. True broadband is the product that can deliver large amounts of high quality video to consumers, which makes it the primary area for potential competition. Comcast's own advertising and executive statements make it clear that DSL is not a good substitute.[27]

We do not include wireless (mobile) broadband in this product definition. As deployed, it generally lacks the ability to deliver large quantities of high quality video that can compete with the MVPD product. Comparisons of speed and price make it clear that wireless broadband is not a good substitute when it comes to professional MVPD video. Compared to Verizon and AT&T, the dominant wireless broadband service providers, Comcast offers services at roughly the same fixed monthly charge but the speed is twice as fast and the cap is over 100 times higher. At the level of Comcast's cap, AT&T and Verizon wireless broadband is ten times as expensive.

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[26] Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, p. 8.

[27] Allen P. Grunes and Maurice E. Stucke, *The Beneficent Monopolist*, March 26, 2014, p. 4, cite cable industry "veteran" John Malone who states that "In broadband, other an in the FIOS area, cable's pretty much a monopoly," a sentiment expressed by Comcast CEO Brian Roberts.

Streaming of HD video, which is the direction of video service, will overwhelm wireless broadband.

For similar reasons, we believe the wireline MVPD market is the relevant video market. Satellite has never been able to discipline cable pricing power and is at a severe disadvantage vis-à-vis cable because of the emerging dominance of bundles. The bundled product is clearly the product that Comcast promotes, "According to Comcast 79 percent of its video customers at the end of 2013 subscribed to two services while 44 percent subscribed to all three.[28] Satellite cannot provide bundles.

The definition of a true broadband product market gives Comcast-Time Warner a 49% market share of a 65 million subscriber True Broadband, based on publicly available date. Free Press has estimated the market share of the post-merger Comcast at between 47% (true broadband), 49% (double play) and 55% (triple play) based on proprietary data. The somewhat dated FCC broadband statistics put the broadband market for services with speeds of greater than 10 mb at 60 million in December 2012. LRG reports an increase of 6.3 million cable and ATT/Verizon broadband subscribers. Hence, we believe our estimate of the size of the true broadband market and the Comcast-Time Warner market share is reasonable and accurate.

It is a gross understatement to say that the proposed Comcast-Time Warner raises competitive concerns. It fractures the *Guidelines* and standards of antitrust practice. The increase in concentration is five to ten times the threshold levels and, as discussed in the next section, any mitigating effect of the deal with Charter is offset by the market division effectuated by the swaps.

The market share and competitive impact that flows from the merger in the wireline MVPD market is similar to that in the True broadband product market. Even if broader market

[28] http://www.gurufocus.com/news/268374/3-reason6s-to-invest-in-comcast-for-the-long-run

definitions are used, the merger violates the guidelines and standards by a substantial margin. If the unique value of subscribers in the large markets dominated by Comcast-Time Warner are taken into account, the anticompetitive effect of the merger would be seen as even greater.

We also include an estimate of the impact of the merger on the holding of regional "marquee" (sports and news) content. While regional sports and news are local, the creation of fortress regions and the increase in concentration of marquee regional content has a significant impact on the likelihood that competitors can enter these markets. Calculating the HHI of regional programming is an indication of the increased barrier to entry.

On the basis of this analysis, we conclude that if Comcast had been the size of the firm that would be created by this merger **before** it acquired NBC, it is a very good bet that the Comcast-NBC merger would not have been approved because the anticompetitive threat of buyer and bottleneck market power would have been much more severe.

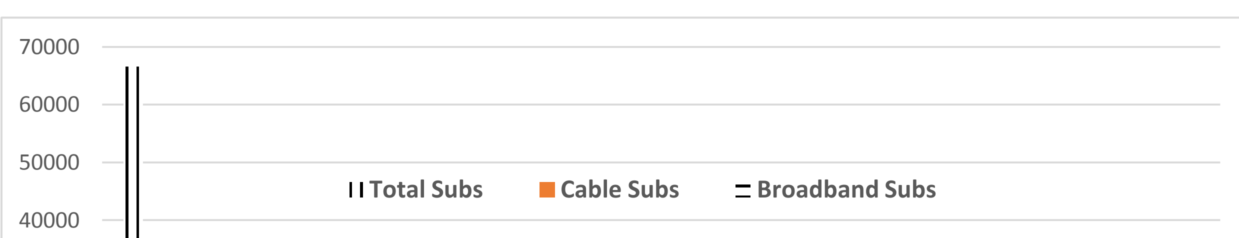
QUALITATIVE FACTORS THAT MAGNIFY THE IMPACT OF THE COMCAST-TIME WARNER MERGER ON MARKET STRUCTURE

The calculation of measures of concentration raises serious concern about the merger. However, it does not fully capture the negative impact that the merger would have on the market structure. Viewed qualitatively, the concerns are magnified.

A Dominant Firm in the Most Vital Markets

Comcast-NBC was the first merger between a cable Multiple System Operator (MSO) and a broadcast network. Comcast-Time Warner would be only the second. It increases the incentive and ability of Comcast to abuse its vertical leverage and creates a giant firm that towers over its competitors in terms of control of strategic assets in the professional video and distribution markets (see Exhibit III-2).

EXHIBIT III-2: POST-MERGER DOMINANCE OF COMCAST IN THE MVPD AND BIAS MARKETS



Source: Leichtman Research Group, Cable Subs 1Q 2014, Broadband Subs, 2Q 2014. Since the breakdown of divested subscribers between cable and broadband was not is unknown and the subs acquired by Comcast are in larger market (therefor having higher value), the sub counts are pre-Charter Swaps.

Comcast-Time Warner is the largest merger in the history of the broadband access market, a merger between the #1 and #3 firms that dramatically increases the level of concentration in the market far in excess of the threshold of concern stated in the recently revised *Merger Guidelines*. It creates an industry leader that is twice the size of the next firm.

This is one of the largest mergers between Multichannel Video Program Distributors (MVPD) in U.S. history. It is a merger between the #1 and #5 MVPDs (the #1 and #2 cable MSOs) that increases the level of concentration in the market by much more than the threshold of concern stated in the recently revised *Merger Guidelines*. It creates an industry leader that is 1.5 times the size of the next firm.

Combining the ability to deliver both MVPD and BIAS service, post-merger Comcast would be 3 times as large as the next largest service provider with the capacity to deliver an integrated bundle of video and broadband, Thus, by creating a huge firm with buyer and bottleneck market power, this merger poses a severe threat to competition, even though it is a geographic extension merger. Moreover, this is a unique geographic extension merger that magnifies the potential harm to competition.

MARKET EXTENSION

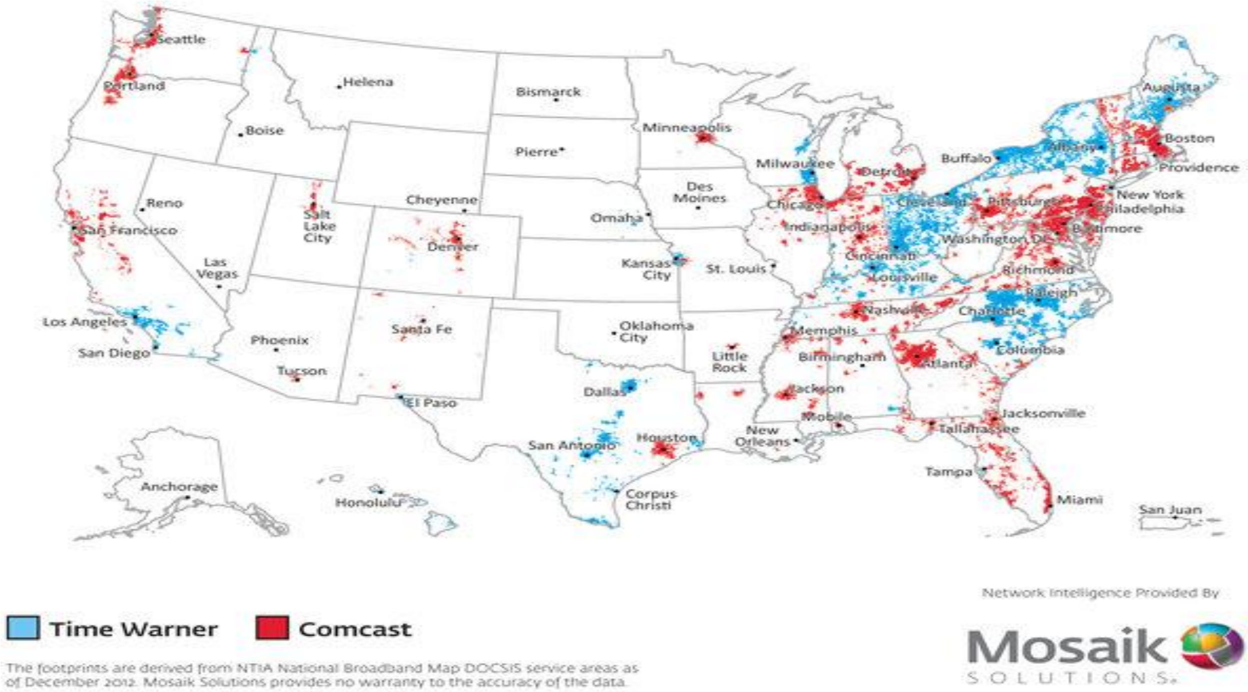
Since Comcast and Time Warner have chosen not to compete head-to-head as MVPDs and they have extended the gentlemen's agreement not to compete in physical space into cyberspace, Comcast claims that its acquisition of Time Warner is a benign geographic extension merger. Given the history of behavior in the industry, the claim must be rejected. Exhibit III-3 show a map of the designated market areas in which Comcast-Time Warner would hold a cable franchise. The designated market area (DMA) is the unit of analysis in the video sector. While it is a geographic extension merger, it is far from benign.

Since the market power concern is about the ability of the dominant firm to harm competition by using leverage as a buyer or a bottleneck, control over the most important markets compounds the problem. The market power of the combined firm is magnified by the fact that post-merger, Comcast will have a strong, even dominant position in the most important video advertising markets in the U.S. It will be the dominant MVPD in 9 of the top 10, 19 of the top 20 markets, 24 of the top 25 markets.[29] It will be present in 95% of the top 20 DMAs, 92% of the top 25 DMA, and 86% of the top 50. The merger gives it a new presence in a dozen DMAs. Being denied access or placed at a disadvantage in access to customers in the markets

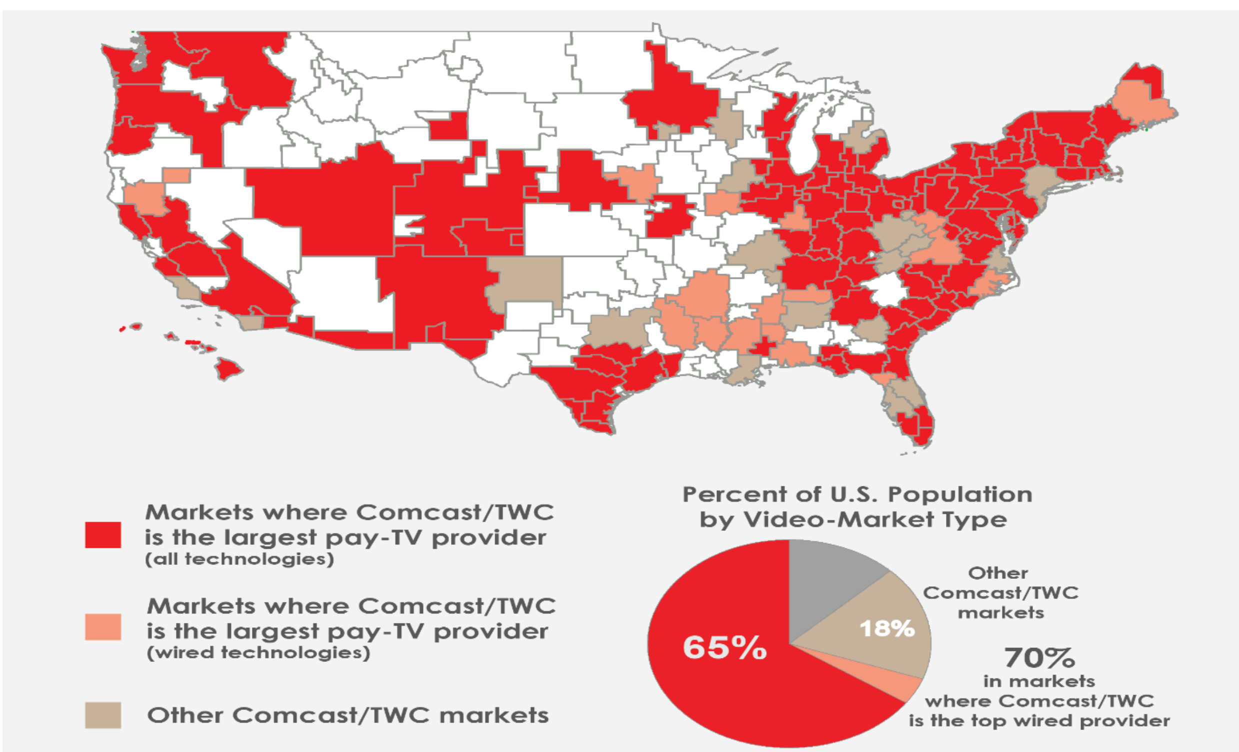
[29] MoffettNathanson, cited in Philadelphia Magazine-Online, March 17, 2014, David Carr, "The Media Equation," *New York Times*, April 7, 2014.

EXHIBIT III-3: COMCAST-TIME WARNER DOMINATE KEY VIDEO MARKETS

Premerger Cable Systems



Post-Merger Comcast Market Dominance



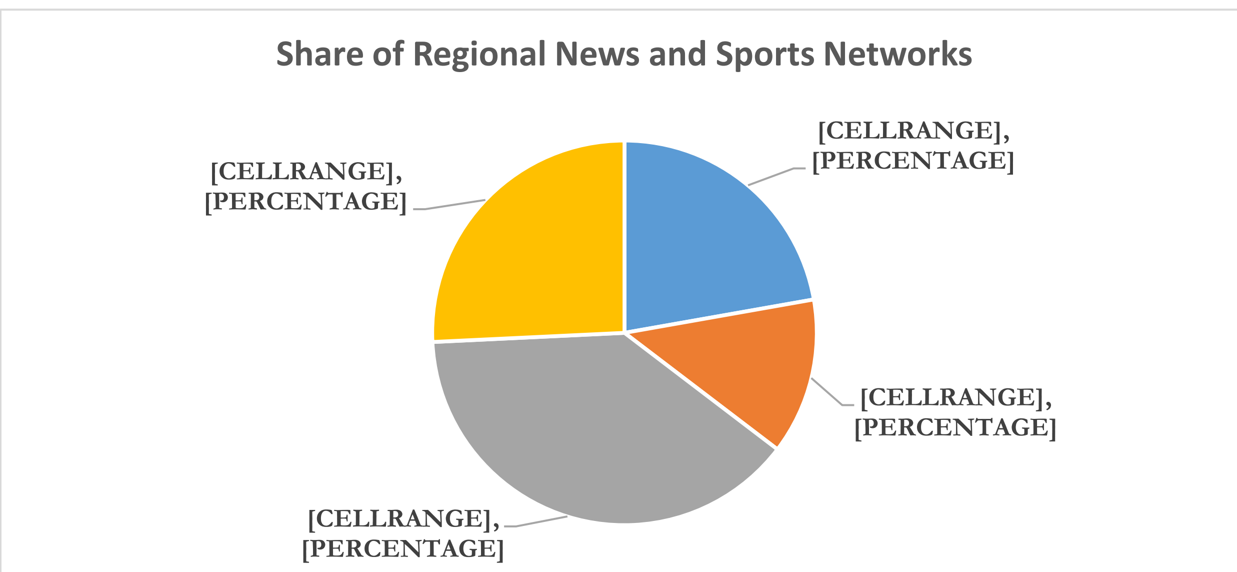
Source: Josh Stearns, "Four Infographics Reveal Why the Comcast Merger is Bad for You, Free Press, March 26, 2014.

where they are most valuable does particularly severe harm to potential content or OVD competitors. Advertisers covet access to audiences in these markets.

The regional sports and news networks that Comcast and Time Warner control would enhance the market power of the post-merger firms both as a buyer and bottleneck owner. Comcast has used access to this marquee content to weaken competition in the past. Given the markets in which Comcast-Time Warner would dominate, an analysis based on subscribers and revenues would magnify their market shares. To the extent that regional programming can be used as a tool to weaken competition in the distribution market, the post-merger regional dominance raises significant concerns.

Exhibit III-4 shows the impact of the merger in terms of regional news and sports, measured by the count of networks. Time Warner dominates regional news with two thirds of all the networks listed by the FCC. Sports is more evenly divided with both Comcast and Time Warner owning about one-fifth of the sports networks. The merger would make Comcast-Time

EXHIBIT III-4: COMCAST-TIME WARNER DOMINANCE OF MARQUEE REGIONAL CONTENT



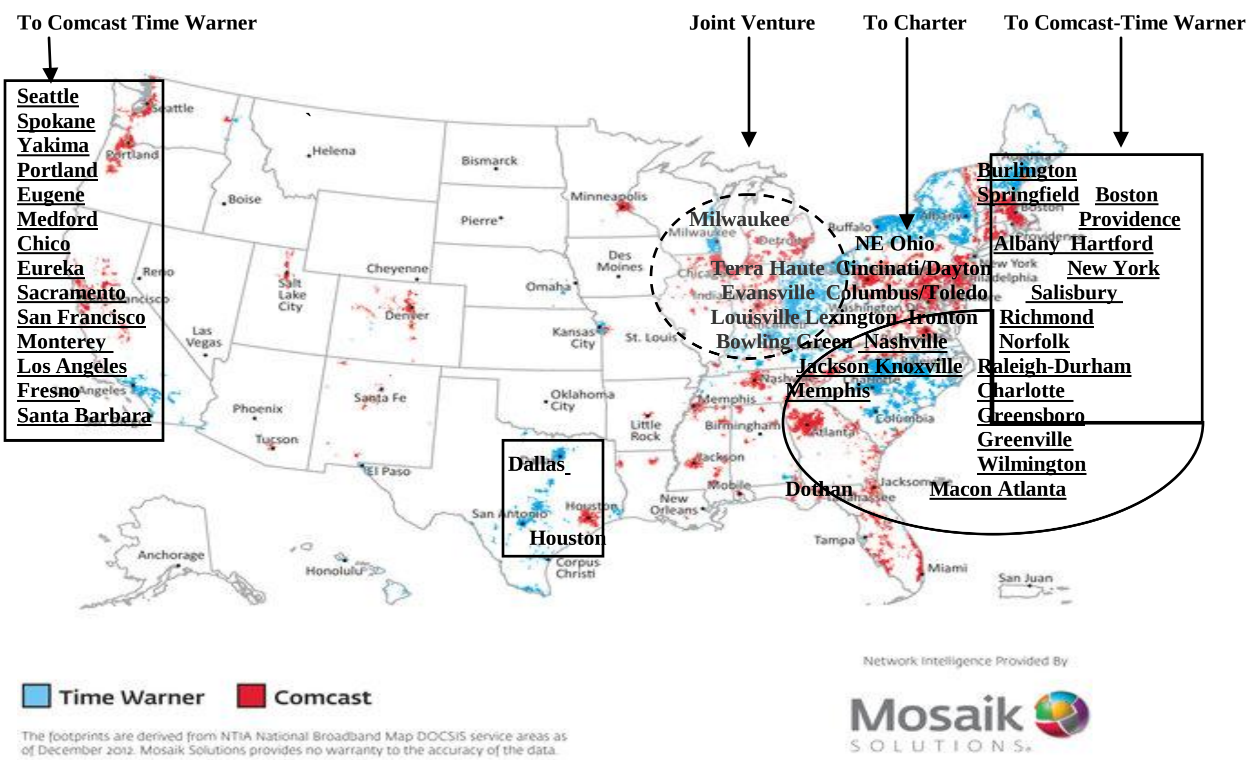
Source: Federal Communications Commission, *Fifteenth Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 12-203

Warner the dominant regional sports programmer and the dominant regional news programmer. Combining the companies and the two forms of marquee regional content, Comcast-Time Warner would have a majority of the total regional marquee networks.

THE CHARTER SWAPS

If Comcast's opening gambit to convince regulators its proposed merger with Time Warner should be approve is any indication of where the negotiations over this merger are headed, the process is going to be ugly. The swap of cable systems with Charter is a blatant geographic market division scheme in which cable operators who have long refused to compete head-to-head in local market extend that practice into regional markets. The swaps cleanse DMAs of any possible competition for regional sports and news (see Exhibit III-5).

EXHIBIT III-5: COMCAST-TIME WARNER DOMINATION OF KEY CLUSTERS IS STRENGTHENED BY THE CHARTER SWAPS



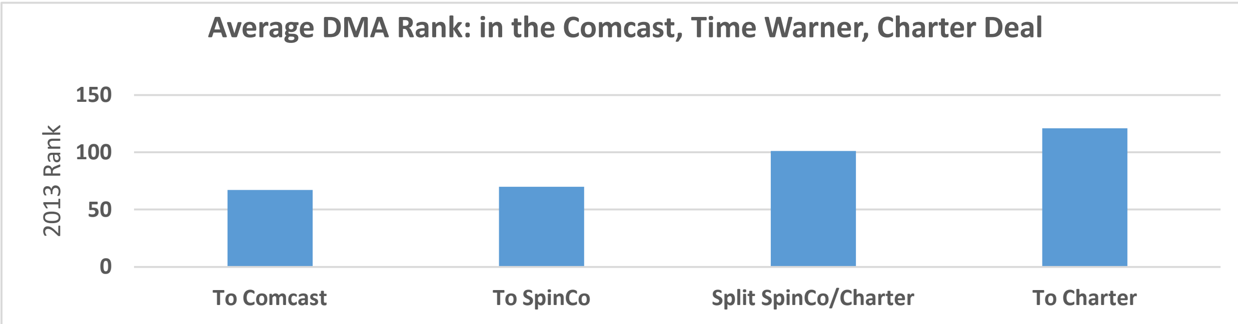
Source: Charter, *Subscriber Divestiture,* 2014.

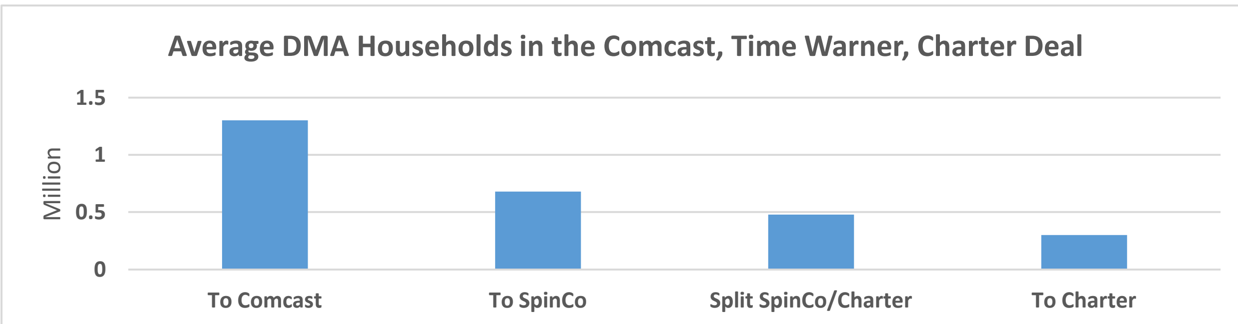
Comcast had originally said it would divest 3 million subscribers. It has now presented a deal with Charter in which it divests 1.5 million, puts 2.5 million in a joint venture, and acquires Charter subscribers in three times as many DMAs as Charter obtains subscribers (see Exhibit III-6. There is a clear pattern of regional consolidation observable in the swaps. Comcast acquires subscribers in regions where it is the dominant MVPD/broadband service provider, reinforcing its regional dominance.

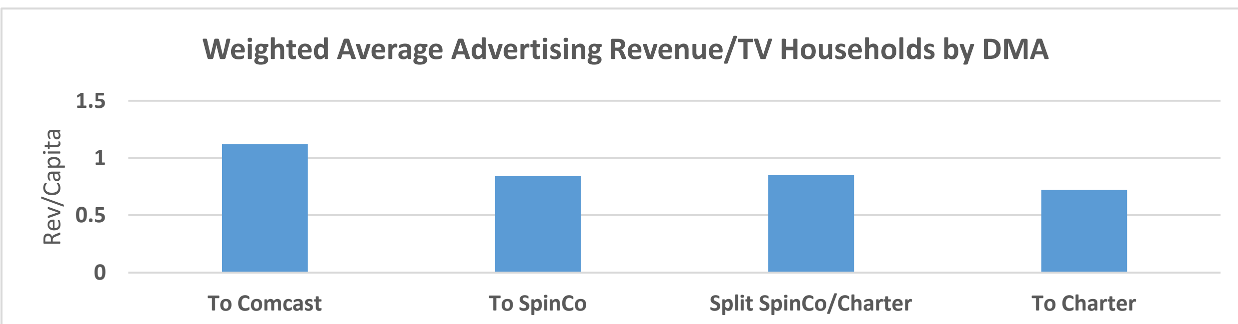
Moreover the DMAs in which Comcast acquires subscribers are much larger than the DMAs in which Charter or the joint venture are acquiring subscribers (see Exhibit III-6). Since Comcast is acquiring viewers in the larger markets, the value per viewer, measured by TV advertising dollars per capita is greater.

The bottom line is that the deal with Charter does little if anything to address the market power problem that the Comcast-Time Warner merger creates. Indeed, it can be argued that the Comcast-Time Warner-Charter merger/joint venture/system swaps makes matters worse.

EXHIBIT III-6: THE CHARTER SWAPS INCREASES COMCAST-TIME WARNER MARKET POWER IN LARGE DMAS







Source: Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable,"* April 8, 2014; Comments of Consumer Federation of America and Consumers Union in Opposition to the Transfer of Licenses Applications of Adelphia Communications Corporation, Comcast Corporation and Time Warner Cable Inc., For Authority to Assign and/or Transfer Control of Various Licenses, Federal Communications Commission, MM Docket No. 05-192, August 8, 2005, pp. 6-8… 19-20… 21…22; Charter, *Subscriber Divestiture,* Nielsen, Local Television Market Universe Estimates, 2012-2013.

IV. THE OVERARCHING CONCERNS RAISED BY THE COMCAST-TIME WARNER MERGER

A DRAMATIC INCREASE IN VERTICAL LEVERAGE

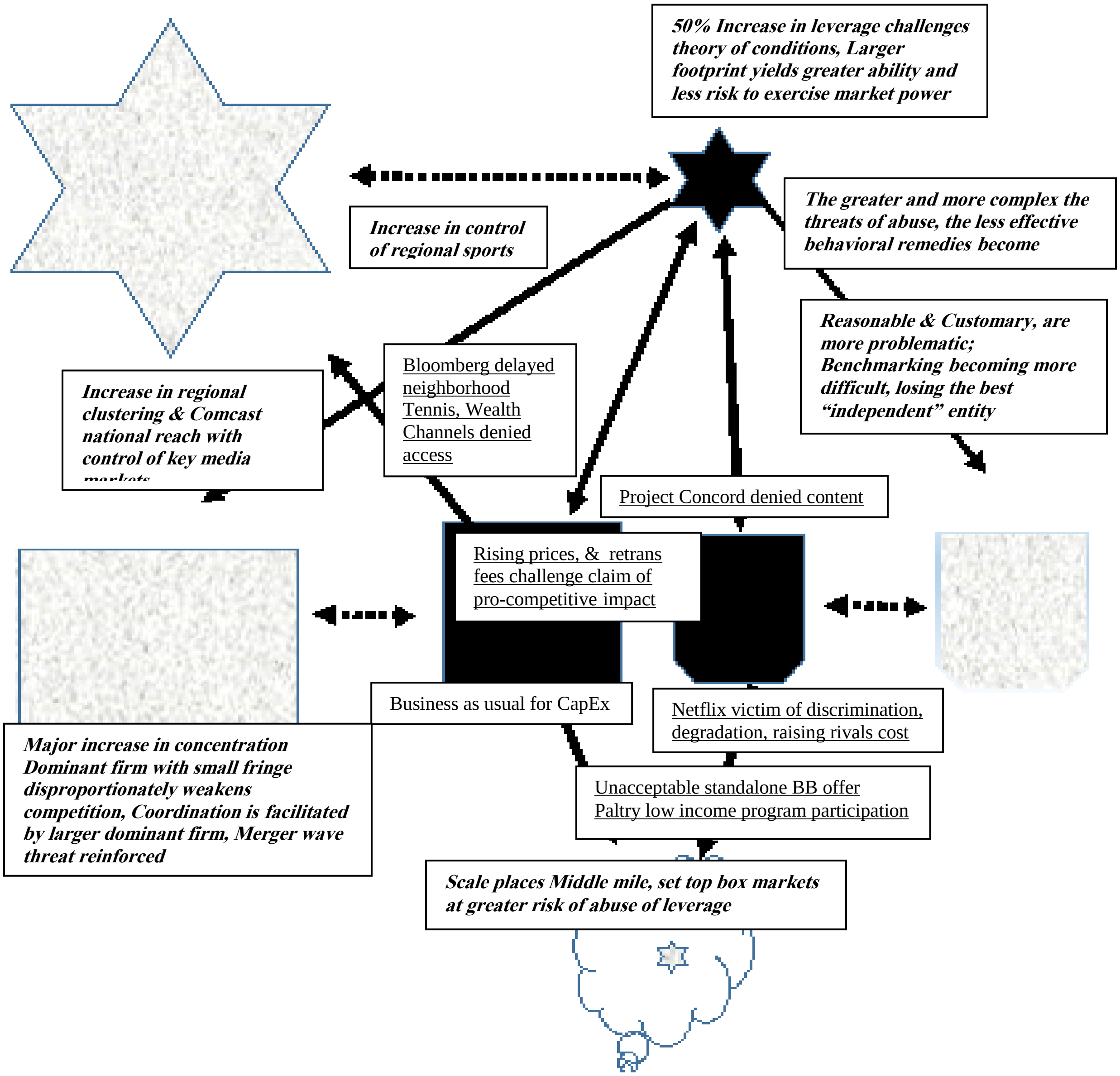
The dramatic increase in the control of strategic chokepoints in the MVPD and the BIAS markets, as well as the increase in regional market power raise significant concerns about harm to competition, consumers and the public interest. Exhibit IV-1 shows these concerns as magnifications of the problems raised by the Comcast-NBC merger. New concerns raised by the Comcast-Time Warner merger are identified in ***bold italics*** around the periphery of the market structure. At the center of the market structure the graph identifies developments in the market since the Comcast-NBC merger (plain text, underlined) that have important implications for the review of the current merger. We begin with a discussion of the latter.

DISAPPOINTING DEVELOPMENTS SINCE THE COMCAST-NBC MERGER SPECIFIC TO THE MERGER CONDITIONS

From the point of view of the review of the Comcast Time Warner merger, the most important developments since the Comcast NBC merger are the disputes that have arisen under the DOJ consent decree and the FCC order. The disputes with Netflix and Conductive in the OVD space and Bloomberg, Wealth TV and the Tennis Channel in the MVPD space make it clear that Comcast will press its advantage up to the limits of the law and beyond. It will do the most it can to promotes its interest.

Its performance with respect to public interest obligations – the offer of a low income broadband service program and the requirement that it offer a standalone broadband service – was exactly the opposite. It will do as little as it can get away to promote the public interest and

EXHIBIT IV-1: CONCERNS RAISED BY COMCAST'S PROPOSED ACQUISITION OF TIME WARNER



LEGEND
Ownership: Comcast= Other =
Products: Programming= MVPD= Broadband Access Internet=
Merger Impacts: Vertical = link Vertical Leverage = direction of flow of market power Horizontal competition at risk = where monopsony power & vertical leverage are strong
Disappointing performances of Comcast NBC merger & conditions
New concerns raised by the Comcast-Time Warner merger

is willing to get caught doing too little. Comcast's low income program came with so many conditions and restrictions that the take rate has been paltry,[30] to say the least.[31] The commitment to offer standalone broadband at a specific price required a second consent decree to enforce compliance and combat Comcast's persistent interpretation of conditions in a manner that frustrates its effectiveness.[32] The resistance to affordable standalone service underscores how strong the push for bundles is, which magnifies the technology advantage of cable's fixed line broadband technology.

Of course, one may argue that on both counts the responsible authorities should have written conditions that were clearer and more readily enforceable. Alternatively, one can conclude that the problem was so severe and difficult to police that no conditions would have succeeded. Either way, one cannot argue that the conditions were adequate, even to deal with the much smaller underlying threat to competition, consumers and the public interest posed by the Comcast-NBC merger. The much larger threat posed by the Comcast-Time Warner merger and Comcast's persistent anticompetitive and anti-consumer behavior under the existing consent decree should push the regulatory authorities toward rejection of the proposed merger.

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[30] Allan Holmes, "Comcast-Time Warner deal may hinge on anemic low-cost Internet plan, May 28, 2014.

[31] Comcast claims a 12% take rate (300,000 enrolled out of 2.6 million eligible). The government does much better with the lifeline program, achieving a take rate of over 30% nationally and the more effective states routinely achieve 50% (Florida Public Service Commission, *Link-up Lifeline Assistance*, December 2011). Moreover, given that the number of participants in the national school lunch program is over 30,000,000 (New America Foundation, *Federal School Nutrition Programs)*, the 300,000 figure for Comcast represents just 1% of the national total. Since Comcast passes 40% of U.S. households (Comcast Annual Report), the estimate of 12% participation seems low. The difference may be in counting households as opposed to individual or the Comcast calculation of participation may reflect the restrictive conditions it places on participation, which limits the benefit of the program.

32 Federal Communications Commission, In the Matter of Comcast Corporation ORDER, DA 12-953, File No.: EB-11-IH-0163, June 27, 2012.

The conditions placed on the Comcast NBC merger are grossly inadequate to deal with the likely enhancement of market power that would result from the Comcast-Time Warner merger. The leverage for the abuse of market power is dramatically increased by this merger. Every aspect of the consent decrees would have to be reviewed and we believe found inadequate to prevent the abuse of the much more virulent market power created by the proposed Comcast-Time Warner merger. For example:

First, the cornerstone of the consent decrees was a nondiscrimination obligation that relies on market benchmarks and pays deference to standard industry practices in things like most favor nation clauses or other contract provisions that reference third parties. With Comcast Time Warner representing half of the broadband access market (measured by subscribers and even more by subscriber value), there may simply be no effective market to point to. Especially when standard industry contracts refer to the rates, terms and conditions that others receive, Comcast can dictate industry wide practices that are anticompetitive and then point to them as market benchmarks. The FCC's reliance on benchmarks is also affected adversely by the combination of the number one and number two cable companies.

Second, the Netflix dispute delivers a similar message. It took Netflix years to resolve its dispute with Comcast and it quickly made it clear that it was forced to agree to undesirable terms ("arbitrary tax") because the network neutrality conditions are too weak. It declares there is a need for "strong" network neutrality conditions.[33] This was before Comcast had proposed to acquire 50% more bargaining power by merging with Time Warner.

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[33] Peter Lauria, "The regulatory war between Comcast and opponents of its Time Warner Cable Deal has officially begun," Buzzfeed, March 23, 2014, for the reference to strong network neutrality; Reuters, "Netflix CEO calls for Free Interconnection, Criticizes Comcast," March 21, 2014.

Third, in the video space, Comcast's treatment of Bloomberg is a blatant demonstration of bad faith and recalcitrance that calls into question the ability of the oversight agencies to enforce consent decree conditions.[34]

Fourth, even though the Netflix and Bloomberg disputes were or are likely to be resolved eventually, they raise a more fundamental question. These are two very large companies that could withstand years of foot dragging by Comcast. Smaller firms cannot, especially if Comcast is 50% larger. The entire approach to enforcement would have to be revamped with Comcast required to comply on an expedited basis (weeks, not months or years).

Fifth, the choke points over which Comcast would exercise bottleneck market power have also expanded beyond those considered in the consent decree. Set top box and WiFi hotspots are emerging as additional choke points where the industry is moving unilaterally or collectively to extend their agreement not to compete and their efforts to foreclose competition.[35] A review of the merger conditions would require a comprehensive review of all the choke points and would show that the Comcast-NBC consent decree is inadequate to address the multilayered vertical leverage that Comcast-Time Warner would have.

THE BROADER PUBLIC INTEREST

Prices

The general theme of the Comcast defense of the merger is that it will make it a better competitor in an already vigorously competitive market. Opponents of the merger, including the DOJ and the FCC express the concern that it would have the ability and incentive to exercise market

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[34] Grunes and Stucke, 2014, p. 9.

[35] Shalini Ramachandran, Daisuke Wakabayashi and Amol Sharma, "Apple in talks with Comcast about streaming-TV service," *Wall Street Journal,* March 23, 2014, refers to the new Comcast, cloud based set top box; Jea-Lois Gassee, "Comcast and Us," *Mondaynote.com,* February 16, 2014, notes that control of set top box preserves control over video customers; Kevin Fitchard, "Its not just cable: Comcast-time Warner would create a WiFi powerhouse," *gigaom.com.*

power and harm competition and consumers. Since Comcast is such a large part of the market, if the merger had the beneficial effects that Comcast claimed, we should be able to see it in the general industry statistics. Looking at broad trends in the industry, it is clear that the general benefits of more vigorous competition have not materialized. For example, cable price increases have actually accelerated since the merger (see Exhibit IV-2). Exhibit IV-2 contrasts the overall index for video services with the price increases for the most popular, expanded basic tier. Increases have outpaced inflation and they accelerated after the Comcast-NBC merger. There is anecdotal evidence that Comcast rate increases have
been higher than average.[36] Satellite rates which are included in the broad index have not risen as fast as cable rates.

Moreover, over the past few years, as digital service has expanded, the charges for equipment have increase more than twice as fast as the charges for video service (see Exhibit IV-3). This is part of a broad pricing strategy that has been defined as "drip pricing."[37]

Comcast claimed that it would have leverage to hold the line on retransmission rates. Opponents of the merger feared that its incentive to raise fees for its owned programming would have the opposite effect. The trend since the merger supports the latter points of view (see Exhibit IV-4).

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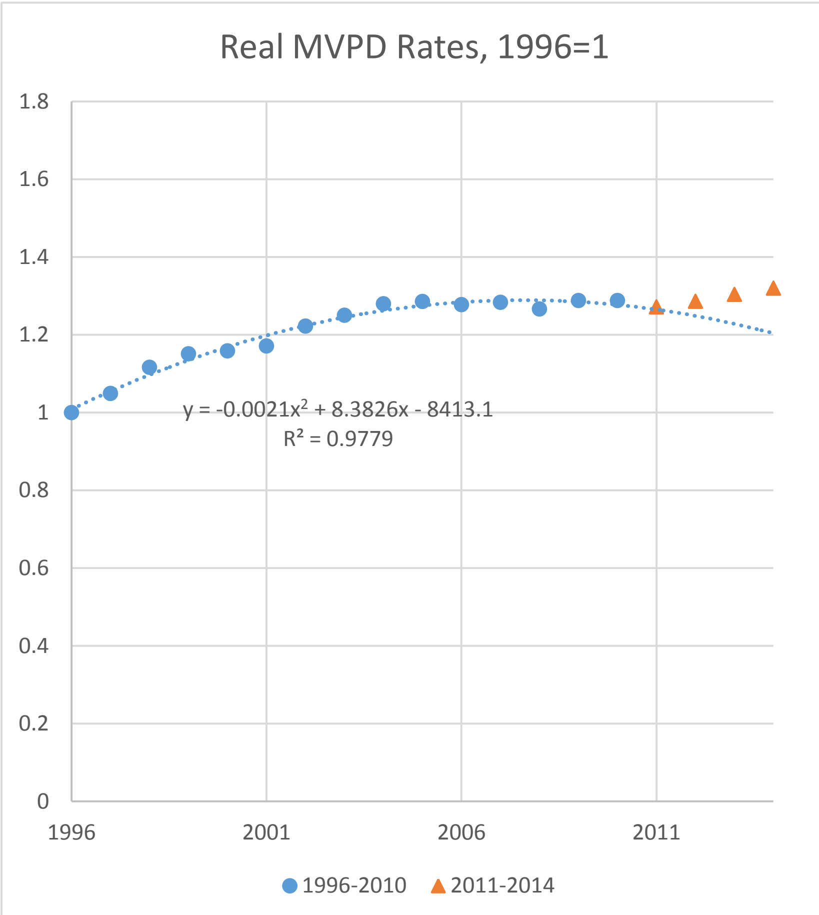
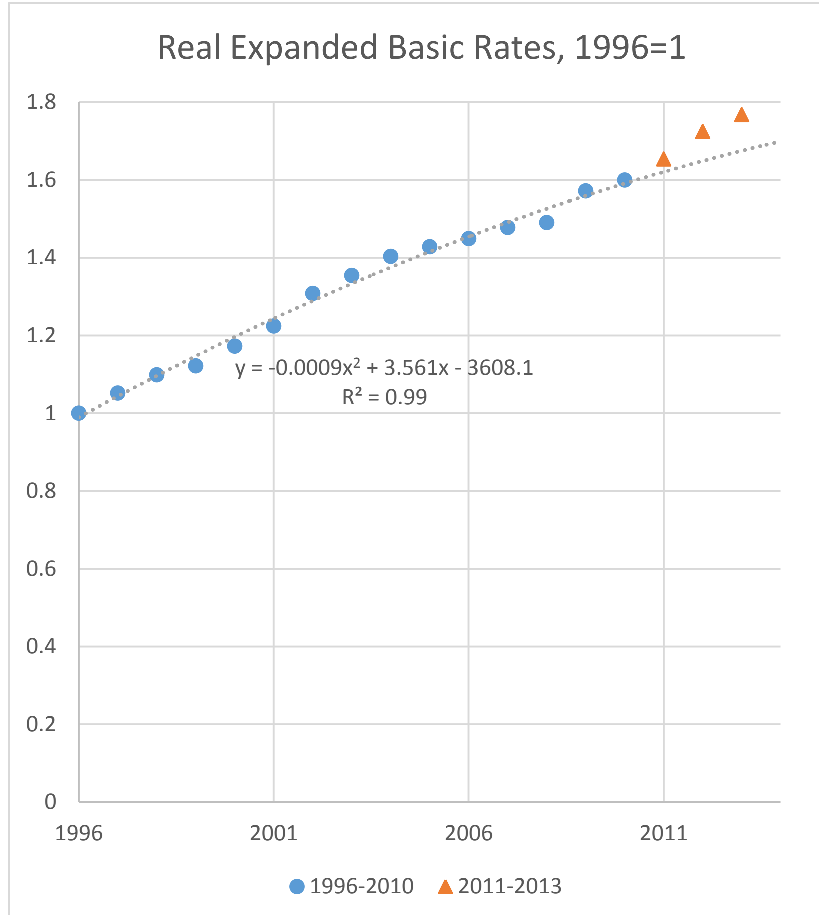
[36] Mike Rogoway, "Comcast cable TV rates going up again; 'subscriber numbers remain steady," Oregonian, August 23, 2013, shows a ten year history of rate increases well above the national average. Christopher Zara, Cable Bills Rising: Amid Comcast-TWC Merger Scrutiny, FCC Media Bureau Report Shows Pay-TV Price Hikes Outpacing Inflation, IBTimes, May 20 2014.

[37] Leslie Brooks Suzukamo, Comcast's rate increase masked by 'drip pricing,' *pioneerpress.com*, *February 17, 2013*

EXHIBIT IV-2: CABLE RATES COMPARED TO INFLATION

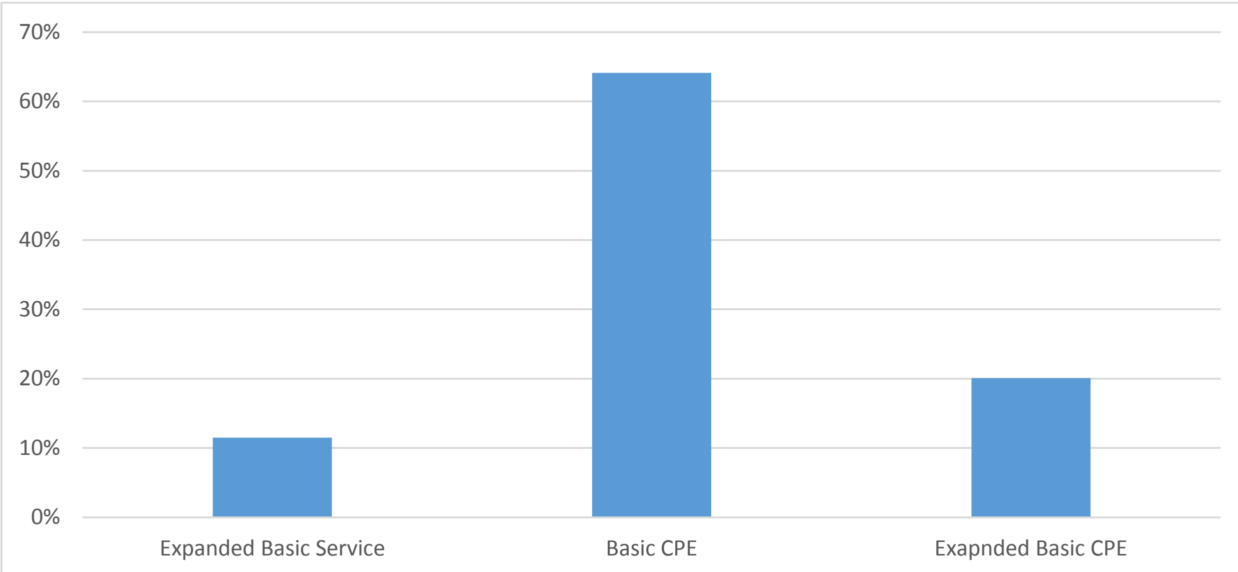


Source: Bureau of Labor Statistics, *Consumer Price Index.*



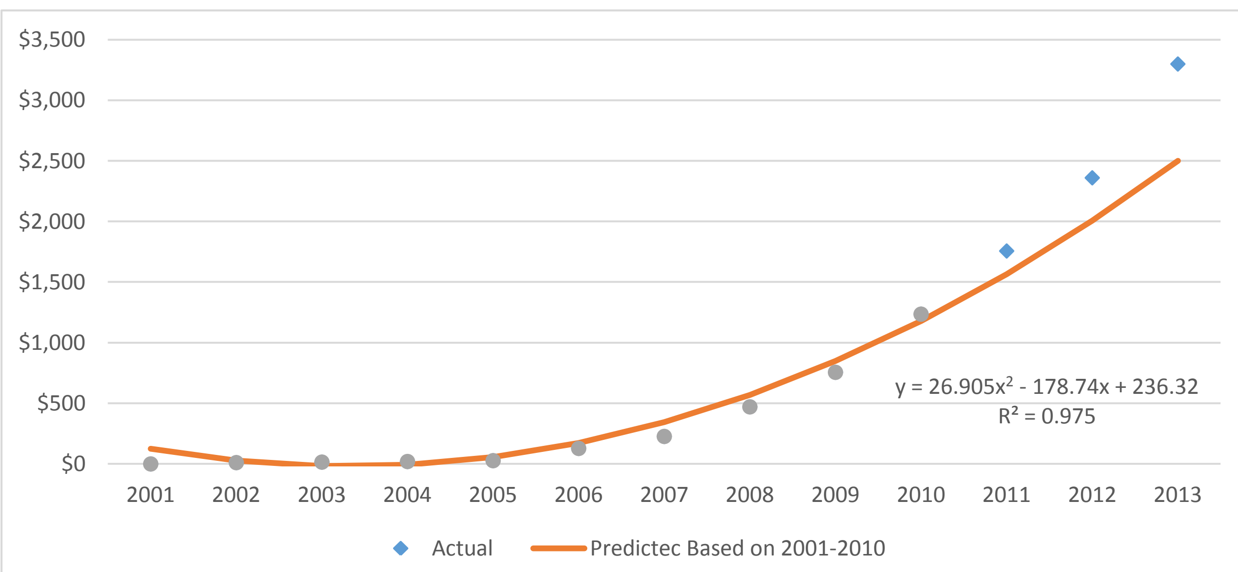
Federal Communications Commission, *Report on Cable Industry Prices,* In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, May 16, 2014

EXHIBIT IV-3: INCREASE IN EQUIPMENT RATES EXCEEDS INCREASE IN CABLE RATES: 2010-2013



Source and Notes: Since equipment prices are given as of January of each year, for expanded basic we use the average of the 1009 & 2010 for 2010 and 2012 and 2013 for 2013. Federal Communications Commission, *Report on Cable Industry Prices,* In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, Table 7, March 9, 2012, May 16, 2014.

EXHIBIT IV-4: INCREASING RETRANSMISSION FEES FOR BROADCAST TELEVISION (Annual Millions)



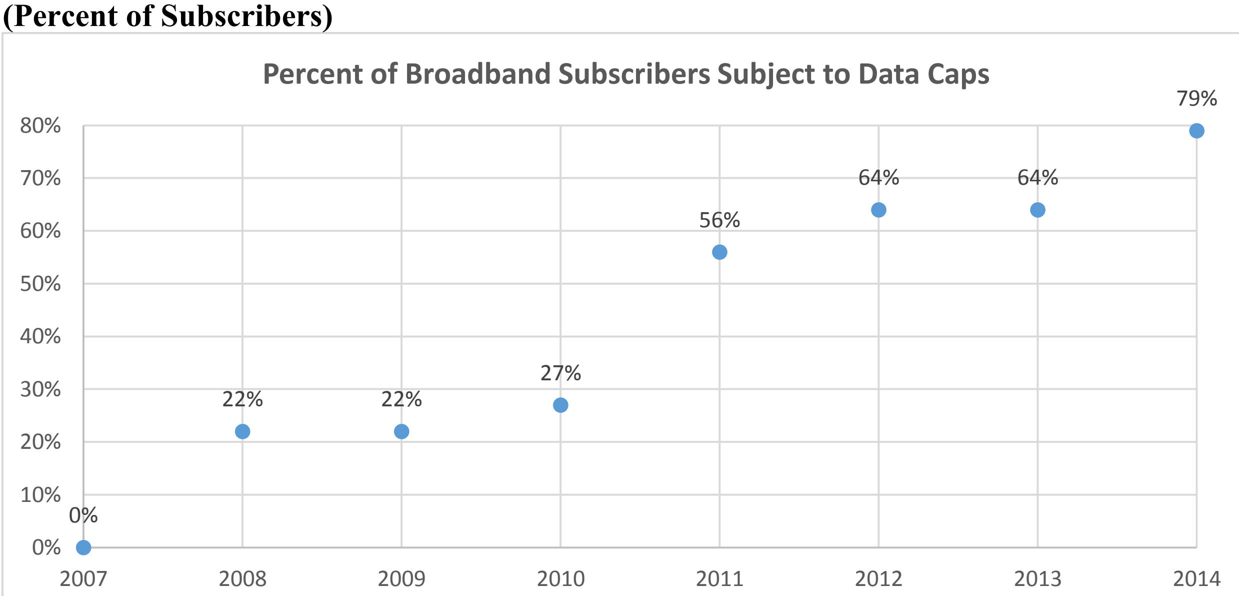
Katerina Eva Matsa, "Time Warner vs. CBS: The High Stakes of their fight over fees," *Pew Research Center,* August 21 2013; Roger Ya, "Retransmission fee race poses questions for TV viewers," *USA Today,* August 2, 2013; "SNL Kagan Releases Updated Industry Retransmission Fee Projections, November 22, 2013.

Usage Caps

In addition to the concern that Comcast would use its market power to undermine competition and raise prices, there is also a concern that the abuse of market power will harm consumers in other ways. The concern is that Comcast will impose abusive terms and conditions. As its market power and its tools to weaken the competition grow, it can impose these conditions with less concern about the loss of customers.

One particular concern among consumer advocates is that Comcast will impose limits on the use of broadband service. Service caps punish people who use their broadband to stream video. One recent analysis show that the use of these caps increased dramatically after the Comcast-NBC merger and would jump dramatically should Comcast acquire Time Warner (see Exhibit IV-5).

**EXHIBIT IV-5: BROADBAND SUBSCRIBERS SUBJECT TO DATA CAPS
(Percent of Subscribers)**



Source: Stacy Higginbotham, "Latest stats show Comcast/TWC merger will cap 79% of broadband subscribers," ***gigaom.com,*** **May 21, 2014.**

It should also be noted that these caps are not only anti-consumer, they become an important anticompetitive tool. Comcast may not count its own streams of video against the cap.[38] This is a discriminatory practice that places OVD competitors at a severe disadvantage. As viewing shifts to high definition and ultrahigh definition, consumers who use OVD to view streams will find that they have quickly exceeded the cap, as shown in Table IV-1. This makes OVDs considerably less attractive as a source of video programming.

TABLE IV-1: NORMAL TV VIEWING TIME UNTIL USE EXCEEDS THE CAP

	Assuming 5 hours per day	
	Wireline	Wireless
	Cap at 250 GB	Cap at 5 GB
SD	Never	5 Days
HD	Never	1 Day
UltraHD	6 Days	1 Hour

Source: based on http://www.cableone.net/Pages/datacalculator.html, assumes ultra HD uses 8 times as much bandwidth than HD.

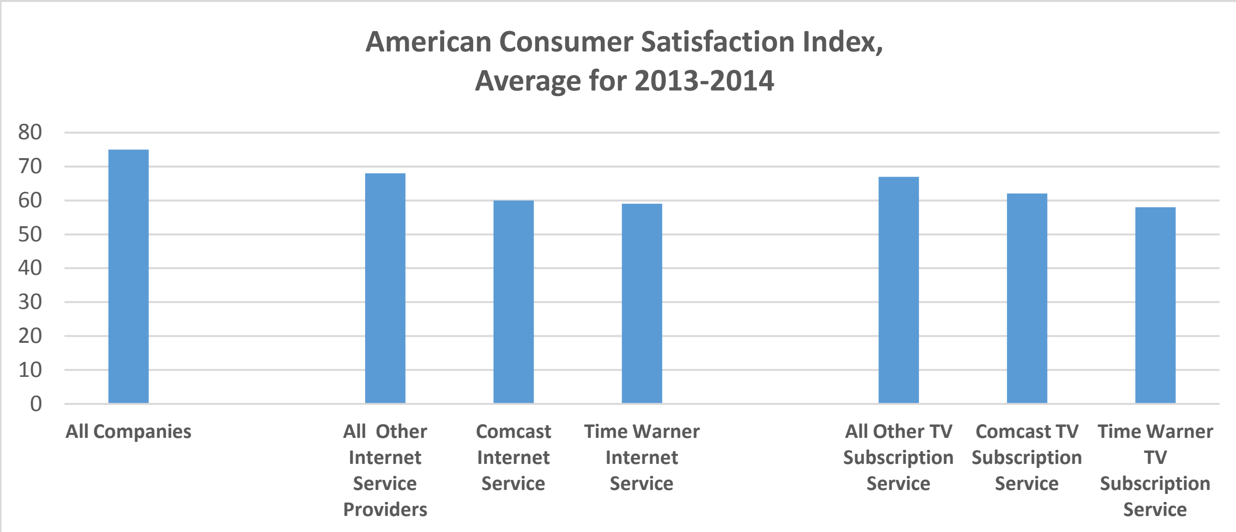
Consumer Dissatisfaction

With respect to consumer satisfaction, Comcast has long been among the worst performers in the worst performing sector in the U.S. economy. The merger with NBC did nothing to improve its performance as measured by the American Customer Satisfaction Index (ACSI).[39] The ACSI covers 48 sectors (Internet service ranks last, video subscriptions ranks next to last) and over 230 combinations of companies and industries. Comcast and Time Warner rank among the worst companies. Comcast Internet is ranked 3rd worst out of 234 and Comcast TV ranked 8ther worst. Time Warner is one notch below Comcast on each. Even within the sector, Comcast ranks at the bottom (see Exhibit IV-6).

[38] Greg Sandoval , "Netflix not buying Comcast excuse about Xfinity data," ***CNET***, April 23, 2012.

[39] Benchmarks by Industry http://www.theacsi.org/index.php?option=com_content&view=article&id=148&Itemid=213

EXHIBIT IV-6: CONTINUING CONSUMER DISSATISFACTION WITH COMCAST SERVICE



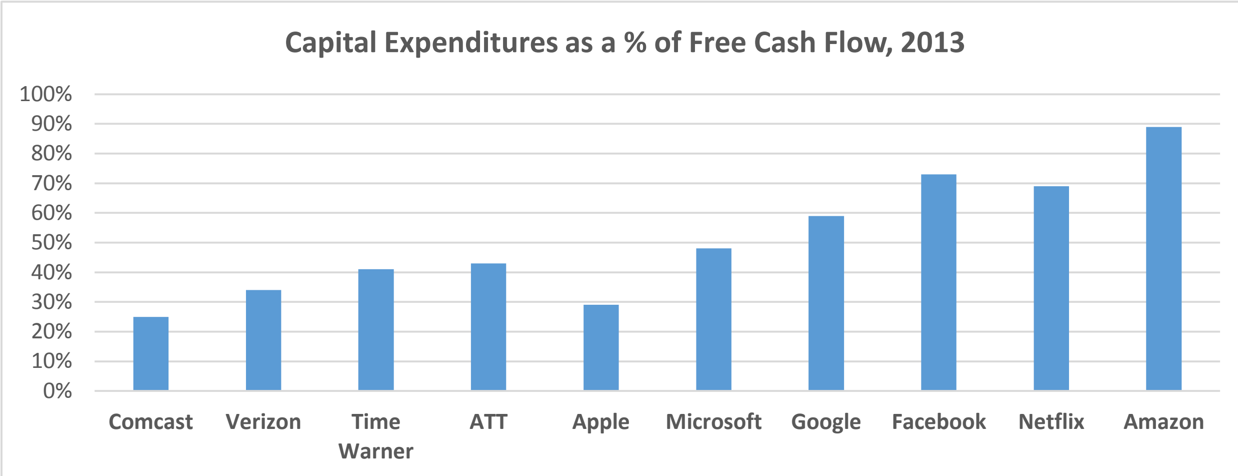
Source: American Customer Satisfaction Index.

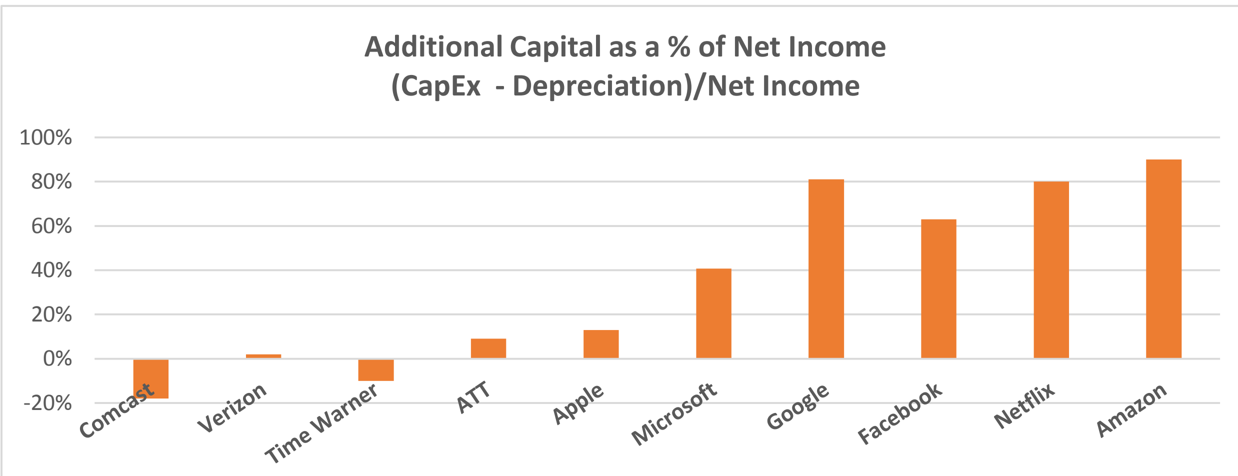
Investment

Comcast also claimed that the merger would enable it make more investment in infrastructure and innovation. As shown in Exhibit IV-7, it continues to invest very little particularly relative to the Internet companies that it uses for comparison. In the public interest statement Comcast compares itself to other distribution firms and Internet companies, but it leaves out the most important measures of performance in a capitalist economy, the use of capital. Comcast is the worst performer in terms of capital expenditure as a percent of free cash flow and in terms of taking capital out of the sector (see Exhibit IV-7). Note that although Time Warner performs much worse that the telephone companies and Internet companies, it does perform somewhat better than Comcast.

Moreover, as shown in Exhibit IV-8, Comcast takes more out of the industry in terms of depreciation and amortization than it puts into the industry in terms of capital expenditure. This has been the case for the past decade. The total capital taken out of the industry over that period is almost $15 billion.

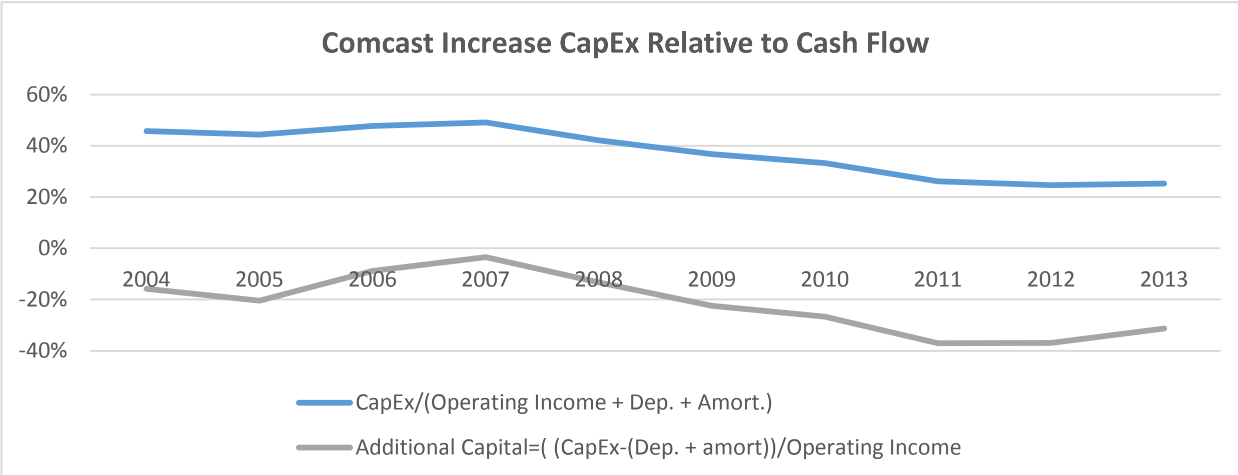
EXHIBIT IV-7: COMPARATIVE PERFORMANCE OF CAPITAL EXPENDITURES

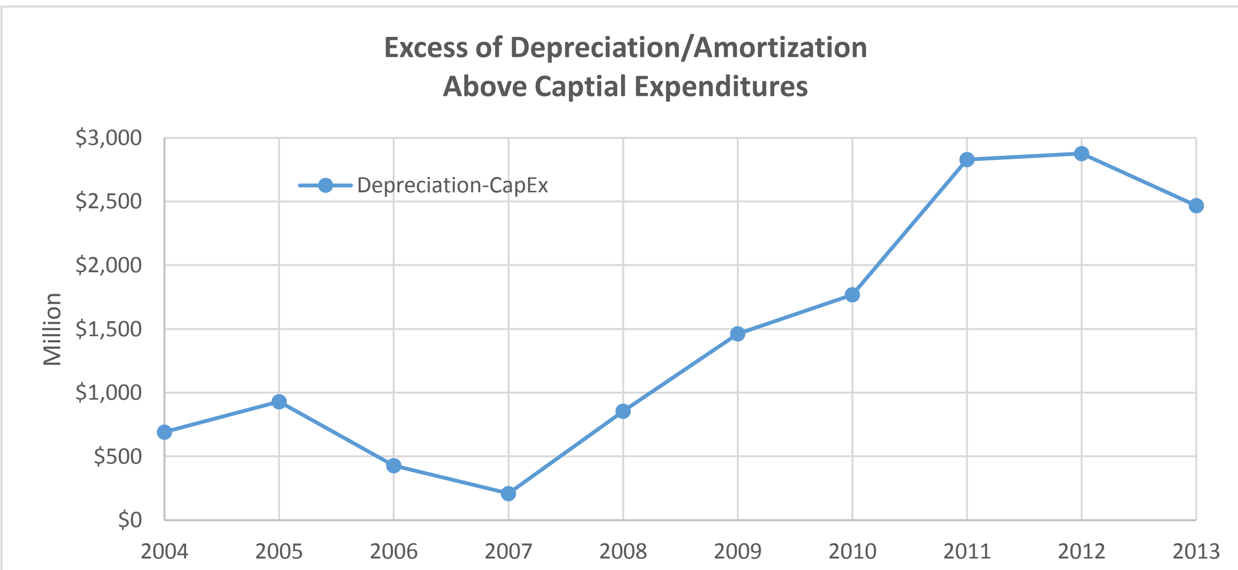




Source: Company Annual Reports, The Internet companies expense research and developments. For comparison to other companies we treat these as capital expenditures and increase cash flow by an equivalent amount.

EXHIBIT IV-8: FAILURE OF COMCAST TO INCREASE RATE OF CAPITAL EXPENDITURES





Source: Comcast Annual Reports, Operating Income includes depreciation and amortization.

V. MITIGATING FACTORS DO NOT SAVE THE MERGER

In order to overcome the severe threat to competition, consumers and the public interest posed by this merger, the parties proposing the merger would have to show either, a dramatic, near term change in the competitive state of the markets affected by the merger, which presumably would prevent the harms from coming about, or huge benefits that outweigh the harms.

At the outset we need to be clear about the standard by which these possible "offsets" to the harm are evaluated. In both cases, they must be practical and explicit.

In the case of competition, the time frame is short.[40] Speculation about some distant future in which markets will be transformed are irrelevant. The DOJ's analysis focuses on "significant, nontransitory increases in price," over the next few years.

In the case of offsetting efficiency benefits, the antitrust agencies use a high and practical standard. The efficiencies need to be cognizable and merger specific.[41] Speculation about how only the merger can improve things is insufficient, particularly where the concerns raised are as substantial as they are in case.

The public interest filing has failed to persuasively make the case on either competition or efficiency grounds by a wide margin.

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[40] Although no period is specified, the DOJ use of terms like "non-transitory" in terms of impacts and timeliness in terms of competitive response in the *Merger Guidelines* suggest relatively short periods. "Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms. (9) Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. (17) Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. (28)"

[41] DOJ/FTC, Merger Guideline, pp. 29-31.

LACK OF COMPETITION

The Persistence of Market Structure Problems

The failure of the market to improve its performance and Comcast's behavior to improve demonstrated above should come as no surprise. The market was not vigorously competitive before the Comcast –NBC merger and the merger made matters worse. There is nothing in the recent development of the affected markets or on the horizon that suggests the competitive landscape has changed or will change in a way that would reduce Comcast's market power. In a series of rulemakings, merger reviews and subsequent court cases, in 2011[42], 2012,[43] and 2013,[44] the DOJ and the FCC have reiterated their view of the sad state of competition in the MVPD and BIAS markets. These recent affirmations of the concern about the state of competition involve many of the issues that are at the center of the concern about market power in the current merger.

Indeed, one of the cases cut to the heart of Comcast's bogus claims about wireless competition. In selling off its spectrum and proposing to enter into joint marketing and technology development, the largest cable companies and one of the largest wireless operators essentially provided striking testimony to the lack of competition in this space. In a white paper entitled *The End of the End of Competition for Digital Access Service*[45] and comments filed at the FCC, CFA noted

> The proposed sale of Comcast spectrum to Verizon and the collaborative agreement between Verizon and the major cable companies mark the end of the competitive promise of the 1996 Act. The last two competitors standing, cable companies and telecommunications service providers, with any hope of building a

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[42] Cablevision Sys. Corp. V. FCC, 649, 712 (D.C. cir. 2011)
[43] U.S. v Verizon Communications Inc.., Civ. Action No. 1:12-cv-001354 (D.D.C., August 16, 2012)
[44] Time Warner Cable Inc. v FCC, 729 F.3d 137, 163 (2d Cir. 2013)
[45] Mark Cooper, *The End of the End of Competition for Digital Access Service The Verizon-Cable Spectrum Sale and Collaborative Agreements Mark the Final Failure of the 1996 Telecommunications Act to Provide Consumers with Effective Competition in Local Markets,* Consumer Federation of America, July 1012.

serious competitive challenge by offering a bundle of services anchored in a product in which it has a clear advantage, have decided to collaborate, rather than compete.[46]

While our analysis of the anticompetitive impact of the deal between focused on the collaborative joint venture between Verizon and the cable operators, it rested on an examination of the characteristics of the markets involved that are directly relevant to the Comcast-Time Warner merger. As shown in Table V-1, the key conditions that lay the foundation for our opposition to this merger were clearly in play with the Comcast-Verizon joint venture.

TABLE V-1: ANTITRUST CONCERNS ABOUT THE VERIZON-CABLE TV SPECTRUM SALE & COLLABORATIVE AGREEMENTS RELEVANT TO THE COMCAST-TIME WARNER MERGER

Market Factors	
Market Structure	**Highly concentrated (wireless)** **Very highly concentrated (Cable, Broadband)**
Market Shares	**Very large, Lack of competitors**
Entry	**Extremely difficult**
Collaborative Agreement Details	
Impact on competition	**Strengthens dominant firms**
Assets devoted to venture	**Cross marketing crown Jewels**
Control of assets	**Most Favored Nation clauses** **Exclusives, Sharing crown jewel assets**
Duration	**Very Long**
Potential Mitigating Factors	
Efficiency gains	**Anticompetitive, Doubtful** **Less harmful alternatives available**

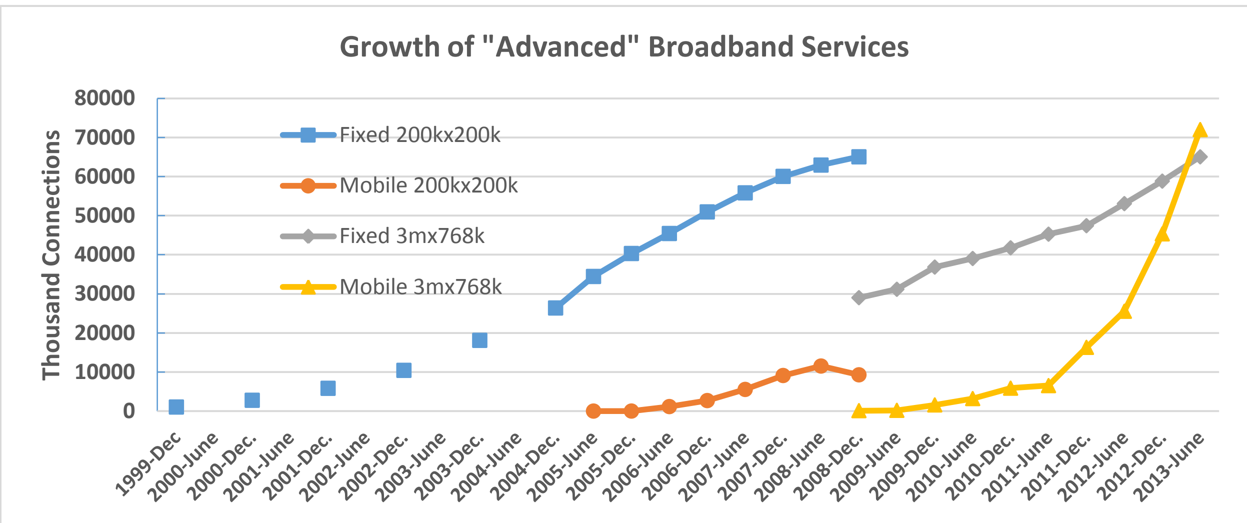
Sources: Comment of The Consumer Federation of America, In the Matter of Applications of Cellco Partnership c/b/a Verizon Wireless and SpectrumCo LLC For Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless,LLC for consent to Assign Licenses, Federal Communications Commission, WT Docket No.12-4, p. 4; Mark Cooper, *The End of the End of Competition for Digital Access Service The Verizon-Cable Spectrum Sale and Collaborative Agreements Mark the Final Failure of the 1996 Telecommunications Act to Provide Consumers with Effective Competition in Local Markets,* Consumer Federation of America, July 1012, pp. 18-19.

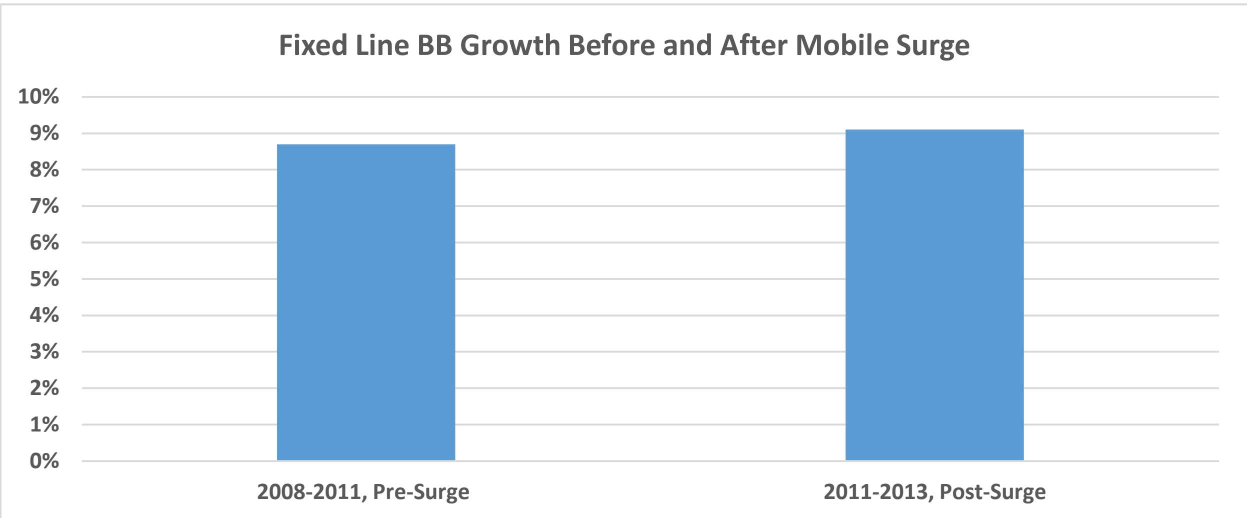
[46] Comment of The Consumer Federation of America, In the Matter of Applications of Cellco Partnership c/b/a Verizon Wireless and SpectrumCo LLC For Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for consent to Assign Licenses, Federal Communications Commission, WT Docket No.12-4, p. 8.

Mobile Broadband

Mobile and fixed line broadband are complements that serve different consumer needs, not competitors. Fixed broadband delivers high capacity. Mobile broadband delivers mobility. If mobile and fixed line broadband were competitors, we would expect to see fixed line penetration decline or cease to grow as wireless penetration grows. That is not the case, as shown in Exhibit V-1. In fact there is a highly significant correlation between wireless and wireline broadband subscriptions. The opposite of what you would expect if they were substitutes.

EXHIBIT V-1: GROWTH OF BROADBAND SERVICE FOR RESIDENTIAL CUSTOMERS





Source: Federal Communication Commission, *Internet Access Services:* various issues.

Exhibit V-1 shows the growth of the type of service the FCC has labeled as "advanced" broadband over the past decade and a half. The thresholds are much too low by today's standards, but the graphs make an important point. As the upper graph shows, fixed line and mobile have grown together. In fact, as the lower graph shows, with the faster networks now defined as basic Internet service, fixed line subscription grew faster after the surge in mobile broadband growth. Other evidence supports the conclusion that they are not substitutes.

First, in its public interest statement Comcast shows that cable high speed data service is projected to continue to expand and mobile broadband migrates from current technologies to 4G. This tells us nothing about whether the services are substitutes that compete.[47]

Data from the Pew Internet and American Life Project found that approximately five-sixths of smart phone owners also have fixed line broadband subscriptions.[48] Only 10 percent of all respondents had a smart phone and no fixed line broadband connection. These respondents were significantly more likely to be low income, a segment that fixed line broadband providers have priced out of the market with their aggressive bundling and price increases. There may be some substitution between mobile and fixed line broadband, but not much, certainly not enough to consider mobile a good substitute and therefore a serious competitor for fixed-line broadband.

Second, the reason that mobile is not a good substitute for fixed line broadband is capacity limitations and costs. As shown in the discussion of caps above, a normal level of usage of high definition video would exceed the cap on mobile broadband services in a matter of hours or days. The cost of using mobile for an average level of viewing would be exorbitant.

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[47] Interestingly, the size of the 4G market in 2014 is considerably smaller than the estimate we have used for true broadband.

48 Kathryn Zickuhr and Aaron Smith, Home Broadband 2013, August 26, 201; Lee Rainie and Aaron Smith, Tablet and E-reader Ownership, October 18, 2013

The differences in the capacity of the technologies is reflected in their current deployment, as shown in Table V-2.

TABLE V-2: MARKET SHARES OF TECHNOLOGIES DEPLOYED FOR RESIDENTIAL BROADBAND CUSTOMERS AT VARIOUS DOWNSTREAM CAPABILITIES

	Downstream Speed At Least 10 Mbps	At Least 25 Mbps
Technology		
Cable	81%	38%
DSL	27	1
Mobile	23	0
Cable as a % of all connections	50	86

Source: Federal Communication Commission, *Internet Access Services: Status as of June 30, 2013:*

Fixed-line Broadband

Table V-2 shows the weak position of DSL compared to cable at bitrates that define true broadband service. As a result, the market share of DSL technology, which was never very high, has been declining sharply, from 16% in 2008 to 10% in 2013. With plans to deploy fiber in a state of flux (Verizon virtually stopping, ATT speeding up) the prospects for fixed line competition for cable from other technologies is bleak.

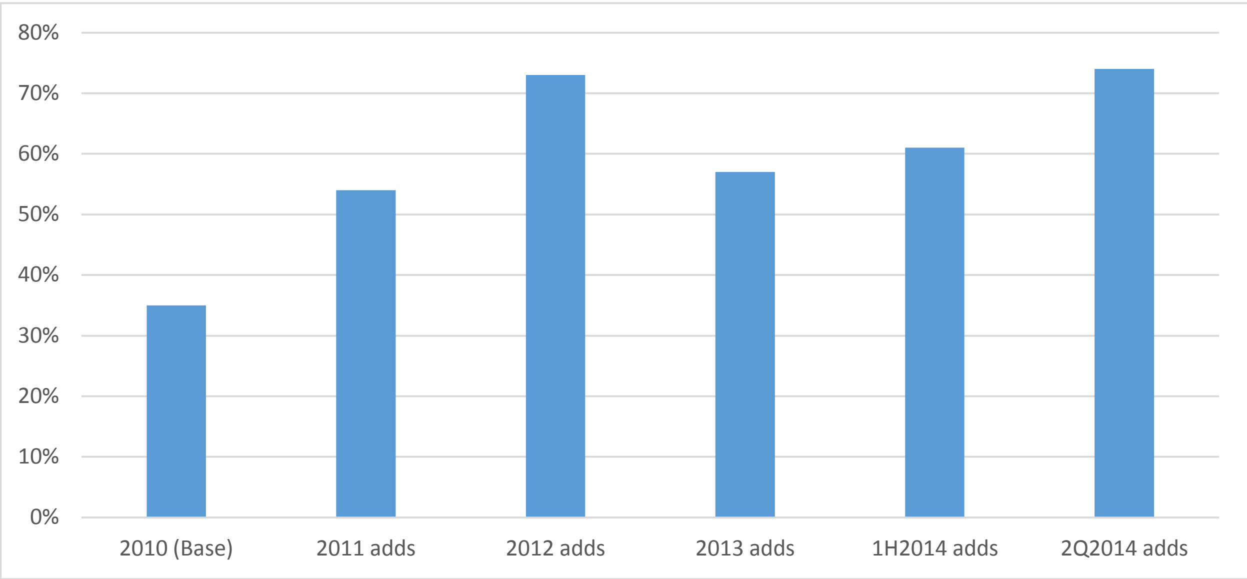
Reflecting the dominance of cable, since the Comcast-NBC merger, Comcast and Time Warner have been adding subscribers at a much faster rate than other market participants, as shown in Exhibit V-2. As Craig Moffett, one of the leading financial analysts who tracks the cable/broadband sector, "Cable infrastructure is advantaged." [49]

Hypothetical Future Competition

[49] Craig Moffett, Nick Del Deo and Cathy Yao, *U.S. Cable and U.S. Telecom: The Broadband Report,* MoffettNathanson, July 8, 2013, pp. 22).

Comcast hypothesizes the entry of new technologies and service providers that might provide competition in the future. In its public interest statement, Comcast devotes a great deal of attention to the next generation of DSL technology. .

EXHIBIT V-2: COMCAST-TIME WARNER, INCREASING DOMINANCE OF BROADBAND INTERNET ACCESS SERVICE



Leichtman Research Group, Various years.

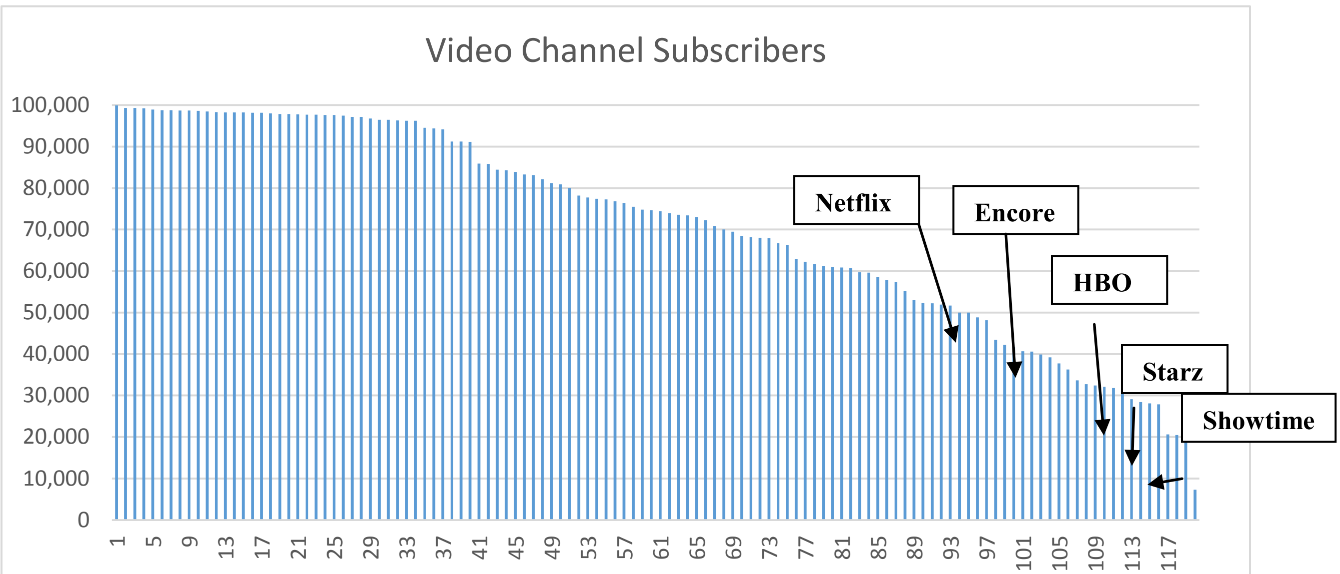
Moffett is skeptical

> With or without the redefinition of broadband, Cable has been taking share. And with the DOCCSIS 3.1, which is expected by 2016, Cable's technology advantage will take a dramatic step forward. Our forecasts project more of the same… albeit with meaningful adjustments to the pace of both market growth as we approach saturation, and share growth given changes in the competitive landscape, relative to other forecasts.
> Historically, Cable's technology advantage was the foundation of the bull case for Cable stocks. It remains so today…but that advantage is increasingly tinged with regulatory risk…
>
> [T]he last ten years were about capital markets figuring out that Cable's infrastructure is advantaged… the *next* ten years will be about Washington figuring out what to do about it.[50]

[50] Moffett, Deo and Yao, 2013, pp. 1… 22.

Comcast offers a series of additional hypothetical competitors that might diminish its market power. While it is clear that Netflix competes for attention, it is a mistake to claim that it is a Multichannel video programmer. In fact, it is a single channel provider who is dependent on broadband Internet access service providers to reach the consumers. It is a successful pay channel, but its subscribership pales in comparison to the other successful channels (see Exhibit V-3). To put this in perspective, not counting NBC broadcast network or Comcast regional

EXHIBIT V-3: NETFLIX IS A SUCCESSFUL PAY CHANNEL



Source: Robert Seidman, "List of How Many Homes Each Cable Network is In – Cable Network Coverage as of August 2013," *TV by the Numbers,* Aguste 23, 2013.

sports networks, Comcast owns 15 cable networks for which it is compensated with over 1.1 billion subscribers – over 20 times as many subscribers as Netflix.[51] To underscore the disadvantage the Netflix suffers, we should recall that Comcast pays the other channels to deliver their programming to its subscribers, but it now charges Netflix to deliver its programming to

[51] The Columbia Journalism Review, "Who Owns What?", lists 15 networks on the list compiled by Robert Seidman, "List of How Many Homes Each Cable Network is In – Cable Network Coverage as of August 2013," TV by the Numbers, Aguste 23, 2013.

subscribers. If there were competition in the video distribution market, Comcast would pay Netflix to make its content available to attract customers to is distribution network.

Google's entry into video and broadband distribution has received a lot of headlines and attention,[52] but the competitive impact of Google as an MVPD and BIAS provider is highly speculative and likely to be quite limited. Google has entered a very small number of areas on a neighborhood-neighborhood basis. Its plans to enter other areas are quite limited. Traditional overbuilders have a much larger market share and they have had no general impact on the competitive structure of the market. Where they exist, actual head-to-head competition delivers the expected benefits, but there are no spillovers to other markets. MVPDs react to Google the way they react to overbuilders, responding only in specific markets and only to entry when it is ongoing or imminent. In order to have a broad competitive impact, Google will have to dramatically expand its plans to enter many more markets on a full market basis. As Moffett put it, "Yes Google Fiber and other TelCo-led fiber-to-the-premises initiatives are growing. But only slowly and they remain very small."[53] Any such change is well beyond the limits of the time horizon that the DOJ/FCC properly consider in their merger reviews.

CLAIMS OF EFFICIENCIES ARE NOT EVEN COLORABLE, NOT TO MENTION COGNIZABLE AND MERGER SPECIFIC

Given the remarkably poor performance of Comcast in terms of price, consumer satisfaction, implementation of the competitive conditions of the DOJ consent decree and FCC conditions, and the foot dragging on the low income and standalone broadband programs, the DOJ and FCC must look very carefully at the benefits Comcast attributes to the merger with Time Warner. The merger brings together two of the worst performing companies from the point of view of price and consumer satisfaction in the U.S. economy. There is no reason to

[52] Public Interest Statement, lists Google as an overbuilder.
[53] Moffett, Deo and Yao, 2013, pp. 1.

assume that combining to bads will make a good. In fact, there are good reasons to assume the opposite.

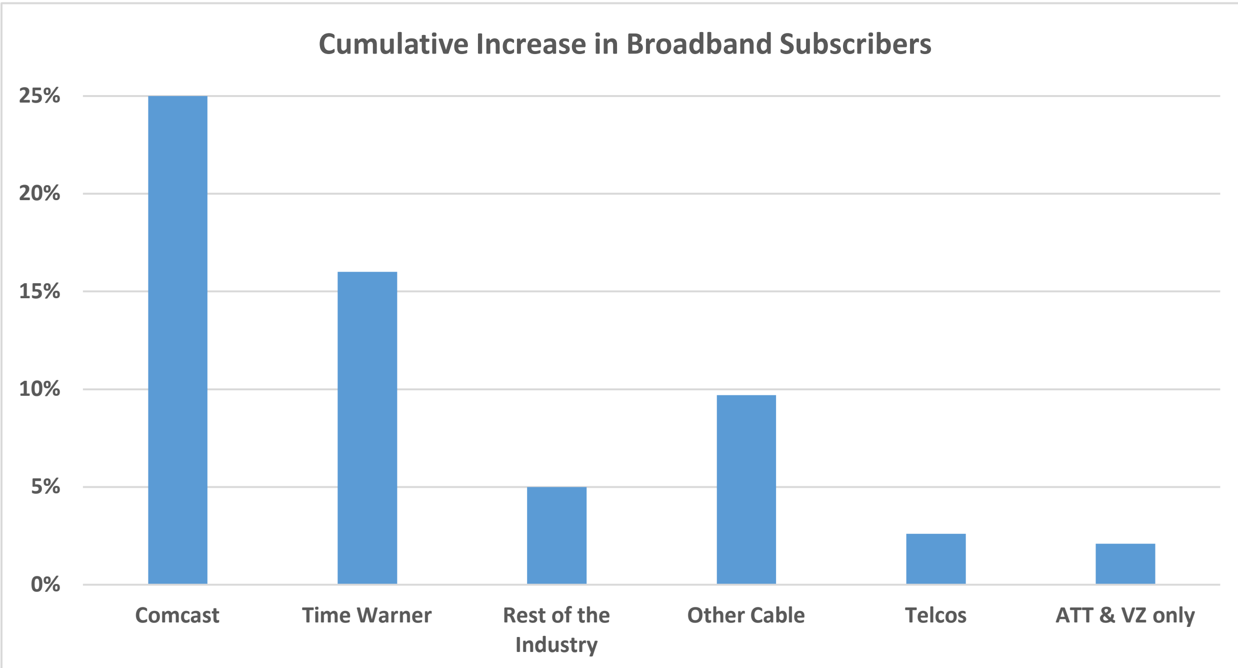
- The integration of the two firms will take time and resources, disrupting operations.
- With greater market power, there will be less pressure to perform, which will push Comcast toward choosing "worst" rather than the best, strategies that maximize returns. This is particularly true if Comcast imposes its strategy of taking capital out of the industry.
- Neither Comcast, nor Time Warner needs to merge to do the right thing with respect to offers like standalone broadband at an affordable price or a low income program.

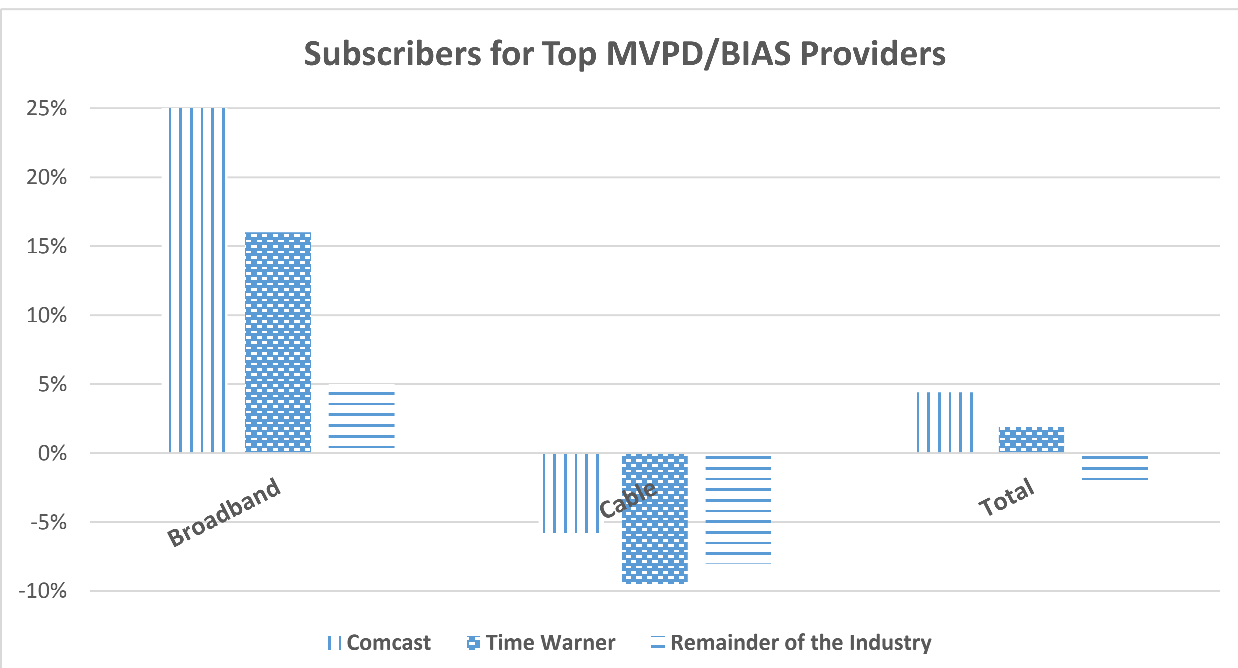
Time Warner is certainly not a failing firm in need of rescue. Since the Comcast-NBC merger, although Time Warner has not added broadband subscribes as fast as Comcast, it has added them almost twice as fast as the other cable operators and almost 8 times as fast as telephone companies (see Exhibit V-4). This merger is an example of the rich getting richer.

PROFITABILITY

Increasing subscribership by adding highly profitable broadband subscribers combined with increasing prices, while taking more capital out of the industry than is expended, makes for an extremely strong balance sheet, without the merger. In our analysis of the Comcast NBC merger we measured this profitability in terms of the cash flow per cable subscriber, compared to prices and CPI, as presented in the upper graph in Exhibit V-5). As broadband subscriptions now equal video subscriptions in number and produce much higher margins, the base of the calculation should probably change to a nonduplicated count of subscribers. For the purpose of this analysis, the important point is that the short term increase in operating income has come about with very little change in the number of subscribers. Comcast has enjoyed more than a 20% increase in cash flow with little growth of subscribers since 2009

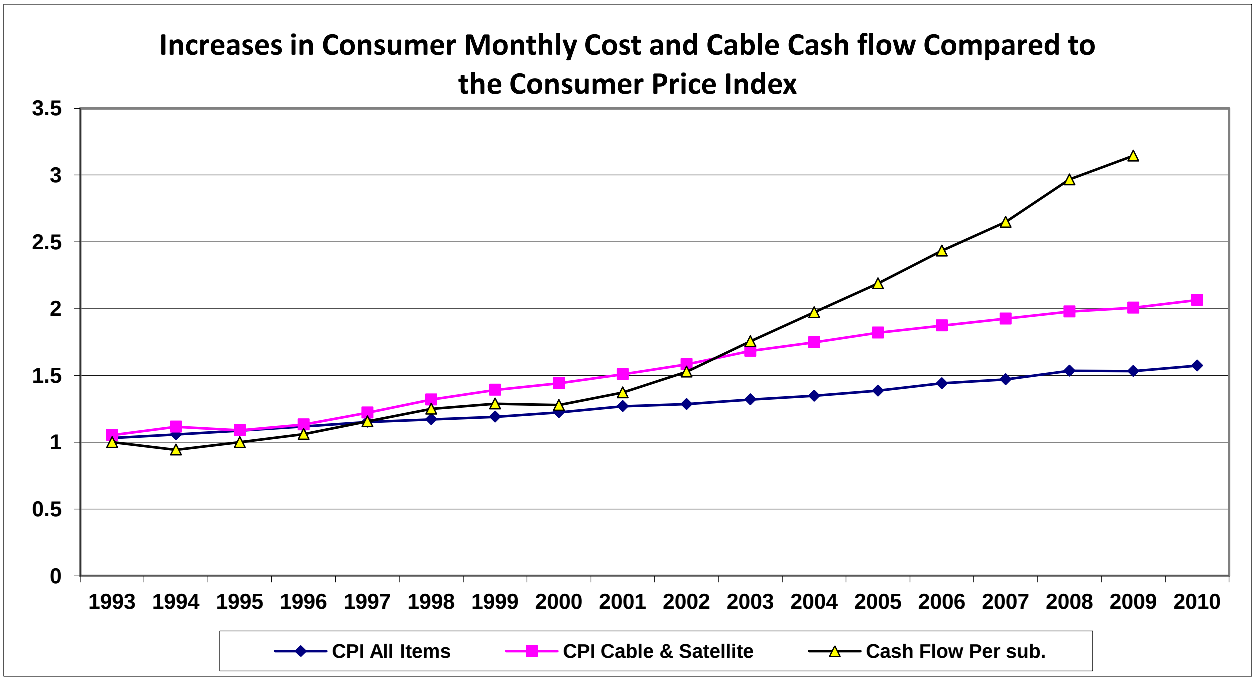
EXHIBIT V-4: CUMULATIVE INCREASE IN BROADBAND SUBSCRIBERS, DECEMBER 2010-JUNE 2014

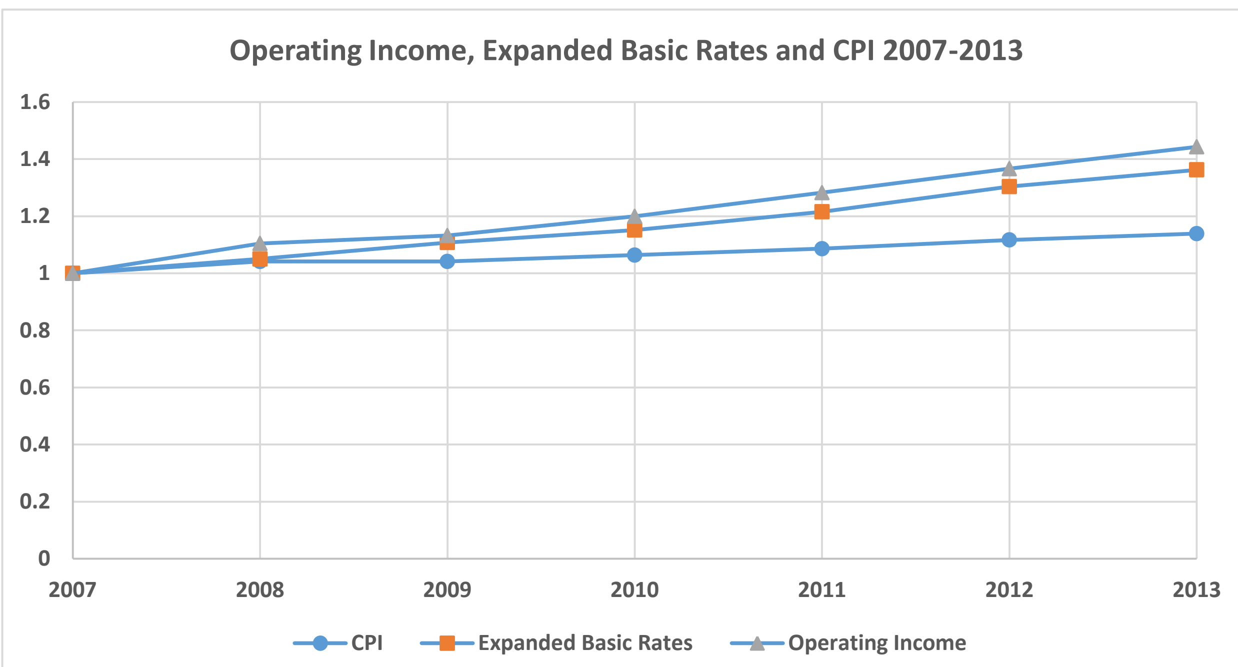




Leichtman Research Group, Various years.

EXHIBIT V-5: THE SHARP INCREASE IN COMCAST PROFITABILITY



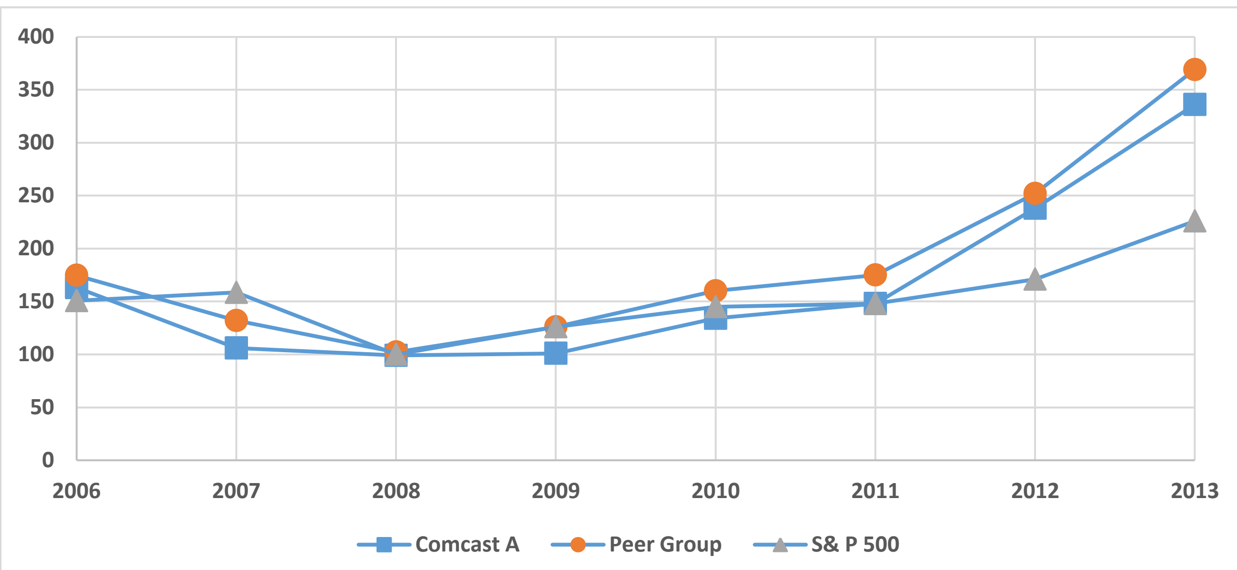


Sources: Prices: Bureau of Labor Statistics, Consumer Price Index, Cash Flow: Federal Communications Commission, Annual Video Competition Reports, Comcast Annual Report.

Comcast does not need to merge to find resources to innovate, it is already highly profitable. It could increase its scale by innovating and improving its customer service by winning customers within its service territory or competing for customers inside and outside of its territory (in cyberspace if not in physical space).

In fact, Comcast and its peer group have significantly outperformed the Standard and Poors 500 in total return in the past two years (see Exhibit V-6). Not that the peer group includes all of the major MVPD and non-telephone company BIAS service providers, as well as the video content providers who account for the overwhelming majority of professional video content. There can be no claim that the merger is necessary to improve the financial performance or cash flow of the merging parties and each could expand by growing the in region and out of region subscribership.

EXHIBIT V-6: FIVE YEAR TOTAL RETURN



Source: Comcast Annual Reports, various years. "This peer group consists of Comcast (Class A and Class A Special common stock), Cablevision Systems Corporation (Class A), DISH Network Corporation (Class A), DirecTV Inc. and Time Warner Cable Inc. (the "cable subgroup"), and Time Warner Inc., Walt Disney Company, Viacom Inc. (Class B), Twenty-First Century Fox, Inc. (formerly News Corporation) (Class A), and CBS Corporation (Class B) (the "media subgroup").

CONCLUSION

In our Tunney Act comments supporting the consent decree in the Comcast-NBC merger, we cautioned that the benefits of the conditions would be contingent on two key developments. First, we noted that "enforcement would have to be vigilant and aggressive." [54] Second, we pointed out that

> the complaint lays the basis for broader Section I or Section II action against other operators… The Department has now established the product and geographic market definitions, the structural sources of horizontal market power and vertical leverage, and the behaviors that would constitute anticompetitive conduct that seeks to defend or extent the market power of the cable/ broadband access companies. The market structure analysis indicates that it is so likely to substantially enhance market power it should not be approved.[55]

The proposed merger is a clear violation of Section 7 of the Clayton Act, as the Comcast NBC merger was. The current state of competition in the markets that are placed at risk by this merger reinforces this conclusion. We have moved from potential competition to emerging competition.[56] It is clear that Internet distribution of video content has begun to dent the anticompetitive armor that cable operators have built around their abusive business model. Unfortunately, but not unexpectedly, it is also clear that cable operators are attempting to rebuild their defenses by extending their practices to cyberspace and leveraging their control over true broadband access. And, it is clear that the Comcast-NBC consent decree is inadequate to deal with the buyer and bottleneck market power of a merged Comcast-Time Warner.

[54] Tunney Act Comments of The Consumer Federation of America And Consumers Union, United States District Court For The District Of Columbia, United States of America, et al., v. Comcast, et al., State of California, v. Comcast Corp., General Electric Co., and NBC Universal Inc., Case: 1:11-cv-00106, p. 5.
[55] Tunney Act Comments of The Consumer Federation Of America, p. 5.
[56] The *Merger Guidelines* use the term potential competition and potential entrants 17 times.

The opposition to the merger expressed by the *Economist,* hardly a "paranoid blogger,"[57] or wild-eyed populist enemy of capitalism,"[58] incorporated the market definitions and anticompetitive concerns demonstrated with basic antitrust concepts in this paper.

> The deal would create a Goliath far more fearsome than the latest ride at the Universal Studios theme park (also Comcast-owned). Comcast has said it would forfeit 3m subscribers, but even with that concession the combination of the two firms would have around 30m—more than 30% of all TV subscribers and around 33% of broadband customers. In the cable market alone (i.e., not counting suppliers of satellite services such as DirecTV), Comcast has as much as 55% of all TV and broadband subscribers.
>
> Comcast will argue that its share of customers in any individual market is not increasing. That is true only because cable companies decided years ago not to compete head-to-head, and divided the country among themselves. More than three-quarters of households have no choice other than their local cable monopoly for high-speed, high-capacity internet.
>
> If the takeover is approved, Comcast would control 20 of the top 25 cable markets, according to MoffettNathanson, a research firm. Antitrust officials will need to consider Comcast's status as a monopsony (a buyer with disproportionate power), when it comes to negotiations with programmers, whose channels it pays to carry. Comcast could refuse to carry certain channels, or use its clout to insist on even greater price discounts or to favour its own content over that of others.
>
> For consumers the deal would mean the union of two companies that are already reviled for their poor customer service and high prices. Greater size will fix neither problem…
>
> The biggest worry is Comcast's grip on the internet. Unlike Britain and France, America unwisely has no "common carriage", allowing for internet service providers to rent cable companies' pipes and compete on price and speed. Already Americans pay far more than people in other rich countries for slower internet. Comcast will have extraordinary power over what content is delivered to consumers, and at what speed.[59]

This is a critical moment in the development of potential competition. Allowing a merger that would create a broadband and MVPD giant would be a huge mistake. Allowing

[57] Doug Brake, "Ignore Paranoid Bloggers: The Comcast-Time Warner Merger Is Good for Consumers," *Forbes,* February, 27, 2014.

[58] Grabnetworks, "Comcast-TWC Merger Would Create a "Fearsome Goliath," Should be Shot Down, *IT Business Net*, March 18, 2014.

[59] Turn it off: American regulators should block Comcast's proposed deal with Time Warner Cable, *Economist,* March 15th 2014

firms that have been at the forefront of the industry-wide efforts to undermine competition to become a "fearsome Goliath" that towers over the rest of the industry would deal a severe, if not a death blow to emerging competition.   When all is said and done, the merger is too large and the leverage points too numerous to try and repair the damage to competition with conditions. Competition, consumers and the public interest can only be served if the merger is blocked.