Before the
Federal Communications Commission
Washington, DC 20554

In the matter of Applications of Comcast Corp. and Time Warner Cable Inc., For Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations	MB Docket No. 14-57

REPLY TO OPPOSITION TO PETITION TO DENY

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Introduction

In its response to the many nonprofits, consumers, creators, and companies that filed in opposition to it merger,[1] Comcast largely repeats its initial arguments while casting aspersions on the motivations of those who question its proposed unprecedented accumulation of power. The Commission already has the evidence it needs to block this merger, but Public Knowledge (PK) and the Open Technology Institute (OTI) submit this filing to address a few brief points.

I. Comcast Correctly Notes That This Merger Would Exacerbate Existing Industry Issues

In its response to certain points raised by PK and OTI in their pleading, Comcast argues that because PK has raised similar issues in other proceedings, that they cannot be transaction-specific.[2] This is fallacious. The problems that Comcast's merger with Time Warner Cable would cause to the consumers and industry are unique in their degree and severity. In some cases the merger would exacerbate already-existing harms. But the fact that PK and other groups have already raised concerns with the Commission over open Internet issues or data caps does not mean that open Internet issues or data caps are irrelevant to this transaction—indeed, with data caps, a key problem is that Comcast's already-bad policies would begin harming millions of new former Time Warner Cable subscribers. Any way in which the marketplace is worse for consumers post-transaction is a transaction-specific harm.

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[1] Opposition to Petitions to Deny and Response to Comments of Comcast and Time Warner Cable, MB Docket No. 14-57 (Sep. 23, 2014) [hereafter "Comcast Reply"].
[2] Comcast Reply at 197.

Indeed, many of the problems that PK focuses on in its work relate to the excess power that some broadband providers have over the marketplace, such that their actions have a disproportionate effect on consumers. It stands to reason that a merger in which the nation's largest broadband provider proposes to become still-larger would cause further problems, particularly when there is evidence, as there is here, that Comcast's size *already* causes it to behave in ways that are contrary to the interests of its subscribers. Only the largest broadband providers, for instance, have the leverage to demand unprecedented payments from Internet content companies merely for delivering to end users the very content those end users have requested. Comcast characterizes arguments along these lines as a "generalized 'big is bad' theme",[3] and continues to maintain in the face of clear legal precedent as well as economic and common sense that only end-user facing, not distribution markets are relevant to an antitrust or public interest analysis. Of course, the arguments in its pleadings are in tension with public statements where Comcast executives admit that a reputation for poor customer service is an inevitable consequence of scale.[4] While it accuses its critics of thinking only that "big is bad," despite the critics' evidence and arguments that if it bought Time Warner Cable Comcast specifically would be both big and bad, it itself puts forward the argument that "big can never be bad," a theory that has no limiting principle and if taken at face value would permit it to purchase any broadband provider with which it has little overlap, recreating the Bell System for the 21st Century.

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[3] Comcast Reply at 13.
[4] Karl Bode, *Comcast CEO Still Pretending His Company's Horrible Satisfaction Ratings Are Just A Normal Part Of Being So Huge*, TECHDIRT (Nov. 19 2014), https://www.techdirt.com/articles/20141114/04521929135.

II. Legal Precedent Requires a Nationwide, Distribution-Oriented Market Definition

In addition to providing services to residential and business end users, Comcast acts as a distributor of cable and broadband content to those end users. Consumers (both Comcast's own broadband subscribers and subscribers nationwide) would ultimately suffer from the harms Comcast would cause in this role. If Comcast combines with Time Warner Cable, its overwhelming dominance as a distributor—the make-or-break power it would hold over many online content and service providers—provides ample antitrust grounds to block this merger. Precedent supports this.

The *AT&T-MediaOne* case is clear precedent demonstrating that broadband distribution is a relevant market for antitrust purposes.[5] Comcast chooses to mischaracterize rather than engage with this precedent, a precedent that is indeed adverse to its cause, arguing that "that case, unlike here, involved a horizontal merger of competitors in the portal market."[6] But AT&T and MediaOne were not merely portals—they were residential broadband providers in exactly the sense that Comcast and Time Warner Cable are. That they were *also* involved in the portal market (and that there were competitive concerns in that market, as well) is immaterial. When defining the market in AT&T-MediaOne, the DoJ found that portal services such as "aggregation and promotion of content" *as well as* "physical distribution of content, are valuable services to content providers that heavily

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[5] Competitive Impact Statement, filed in United States v. AT&T Corp., Civ. Act. No. 1:00CV01176 (D.D.C. filed May 25, 2000) [hereinafter "AT&T/MediaOne"].
[6] Comcast Reply at 20.

influence their success or failure in the content market."[7] It further held that "[b]y virtue of the large number of subscribers to their residential broadband services, both firms will be able to significantly assist or retard the competitive efforts of broadband content providers, by granting or withholding aggregation, promotion, and distribution services, or through the prices, terms, and conditions by which such services are provided."[8] This analysis lines up with the facts of the present case. Not only would post-transaction Comcast be able to "assist or retard" the efforts of online content providers through its control of distribution—its bottleneck control over the last mile and interconnection with the last mile—even its "promotional" efforts (for example, exempting certain services from data caps and advertising that fact) could have a similarly adverse effect. What's more, Comcast's "aggregation, promotion, and distribution" of programming in the MVPD market could have a similar effect on the cable and broadcast programming market.

Comcast's characterization of the *AT&T-MediaOne* precedent is thus counter to both its plain text and logic, and mischaracterizes the circa 2000 broadband market. It should be disregarded. But there is more recent precedent that also undermines Comcast's preferred market definition. In *Verizon v. FCC* this year, the DC Circuit adopted an analysis that compels the conclusion that competitive concerns can affect the broadband/content relationship as well as the broadband/end user relationship. It wrote,

> It is true, generally speaking, that the "customers" of broadband providers are end users. But that hardly means that broadband providers could not also be carriers with respect to edge providers….Because broadband

[7] AT&T/MediaOne.
[8] *Id.*

> providers furnish a service to edge providers, [they] undoubtedly function[] as edge providers' "carriers"....
>
> ....
>
> No one disputes that a broadband provider's transmission of edge-provider traffic to its end-user subscribers represents a valuable service: an edge provider like Amazon wants and needs a broadband provider like Comcast to permit its subscribers to use Amazon.com.[9]

Regardless of how the DC Circuit's analysis affects the FCC's other proceedings, it at least stands for the proposition that the Commission must consider the ISP/content relationship in its policy deliberations here. In this merger, this precedent along with other legal authority requires that the Commission consider how post-transaction Comcast would be able to behave anticompetitively in its relationship with online content and service providers, as well as with cable and broadcast programmers.

III. Comcast Belittles and Opposes Independent Programmers

Comcast's vociferous response to the objections of small programmers is itself evidence that this merger would harm independent viewpoints.

Many independent programmers have voiced their concerns in this proceeding that increasing Comcast's dominance as a programming distributor would limit the diversity of programming available to viewers. Comcast chooses to respond to these complaints by casting aspersions on the motivations and character of these independent programmers who have come forward, despite the risk of retaliation, to speak their minds—for example, calling RFD-TV, a network that airs programming of interest to a rural and agricultural audience "shameless and

[9] 740 F.3d 623, 653 (2014).

unprincipled."[10] Comcast even boldly points to its own past success at suppressing independent programming options as evidence that FCC action to promote diverse content (such as denying an anticompetitive mergers like this one) is not needed. For example, Comcast notes that it opposed The America Channel (TAC) in various FCC proceedings for years[11]—delaying tactics that fulfilled their ultimate goal of ensuring that TAC did not launch. The obvious conclusion is that a new programming network should not have to rely on carriage by one dominant cable distributor in order to be viable—no single bottleneck ought to have that level of make-or-break power. In the current environment, firmer action, not *no* action, is needed to ensure that viewers have access to a full range of independent programming (starting with preventing a single distributor from gaining even *more* bottleneck power).

The likely result of a Comcast/TWC merger would be that many independent voices like the ones that have filed in this proceeding, and the many that did not either due to a lack of resources or a fear of retaliation, would increasingly find it difficult to do business. The content industry, like the distribution industry, would be pressured to consolidate yet further, harming the public's access to a diversity of viewpoints in yet more ways.

IV. Recent Legislation Could Give Comcast More Power in the Set-Top Box Market

In their Petition, PK and OTI noted that Comcast's involvement with the X1 platform—a video set-top box technology—threatens to allow Comcast to use its

[10] Comcast Reply at 258.
[11] Comcast Reply at 251-52.

market power as a cable system to enter adjacent markets and to use its technology and associated licensing to further cement its dominance in various ways. Since that filing, Congress weakened components of the FCC's current standard for promoting competition in set-top boxes, CableCARD.[12] While the FCC's fundamental mandate to promote set-top box competition remains in place (and is in some ways strengthened through the Congressionally-mandated Downloadable Security Advisory Committee), until it can implement a new standard, CableCARD's weakening creates a regulatory lacuna that dominant players in the cable industry can use to further their own interests at the expense of consumers and third-party innovation. The ways that Comcast can use its market power to influence the development of video device markets go beyond its direct control over its set-top box and related technology. In their petition PK and OTI described how Comcast leverages the "authentication" process to limit the devices its subscribers can use to access the content they pay for. Just recently, Amazon launched its Fire TV device, which now supports the HBO Go app. However, Comcast customers cannot use the HBO Go app on that device, because unlike other MVPDs Comcast has again declined to authenticate its users on that app and device.[13] Comcast's pattern of obstructing its subscribers' ability to use the apps and devices of their choice should by now be clear.

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[12] STELA Reauthorization Act of 2014, Public Law No: 113-200.
[13] Mario Aguilar, *HBO Go Is Coming to Amazon Fire TV Unless You Have Comcast*, (Dec. 15, 2014), http://gizmodo.com/hbo-go-is-now-available-on-amazon-fire-tv-1671387980.

By blocking this transaction, the Commission will make it more difficult for Comcast to use its enviable position in several key markets to impose its own view of how consumer video devices and services should work on the rest of the industry.

V. Consumer Survey Data and Technical Analysis Confirm that the Broadband Market is Uncompetitive, Which Gives Extra Leverage to Gatekeepers Like Comcast

Finally, as part of this response to Comcast's opposition, petitioners include the attached reports from Dr. John B. Horrigan and CTC Technology and Engineering that shed light on the broadband marketplace for the Commission's consideration, which were previously filed in this docket but which PK includes again for convenience.

While the bulk of PK and OTI's argument against this merger is that post-transaction, Comcast would have monopsonist power as a content distributor, this market power is in turn amplified by the existing lack of competition in the last-mile market. Put simply, it is easier for a distributor to demand anticompetitive terms or impose anticompetitive conditions on content and service providers when it controls a massive, largely captive user base. Therefore, the Commission should consider the extent to which a lack of competition in the last-mile market extends and amplifies harms in the distribution market.

However, accurately assessing the state of competition in the last-mile marker can be difficult. The Commission and many others frequently measure (and attempt to measure) the state of broadband competition. While these efforts produce valuable results, exercises in broadband measurement can be difficult due to a lack of granularity (for example, data that only reveals what providers exist in a

census block, rather than on a per-household basis), or because they compare unlike services (for example, business-class broadband and residential broadband, or wired and wireless connections). Certainly, efforts to directly measure broadband availability should continue and should continue to improve, and the Commission's efforts recently (e.g., the Media Bureau submitting its market share figures into the record, and the Commission's recognition that 10 Mbps is a minimum threshold for broadband for USF purposes[14]) have been useful.

However, since the purpose of competition is to benefit consumers—and because broadband choices that are only notionally available to consumers can have little competitive effect—one way to cut through any measurement difficulties is simply to ask consumers themselves for their perspectives on broadband choice. To that end, Public Knowledge commissioned Dr. John B. Horrigan to survey consumers in this regard. One report, Consumers and choice in the Broadband and wireless markets, summarizes these findings. Among other things, the report finds:

- "In the context of limited choice for very high-speed home broadband service, just one-quarter of Americans have considered switching broadband or wireless providers."
- "Nearly half of all broadband subscribers say they would find it difficult to find comparable service in their neighborhood. However, a majority of rural and low-income broadband subscribers say it would be hard for them to find comparable service where they live."
- "For wireless service, one quarter of have considered switching carriers and most say it would be easy for them to go through the process of switching carriers."

[14] FCC Increases Rural Broadband Speeds Under Connect America Fund, Press Release (Dec. 11, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1211/DOC-330989A1.pdf.

- “Just one-third of cell phone users said it would be difficult to find comparable service in their neighborhood, a much lower rate compared to what broadband customers say when asked a similar question.”

These findings demonstrate that most home broadband consumers find competitive options lacking—in contrast to wireless consumers, where there are typically more options for providers.

However, one should not conclude from this that home broadband subscribers can simply switch to wireless service. In another report, Smartphones and Broadband, Dr. Horrigan demonstrates that wired and wireless connectivity options are not viewed by consumers as substitutes for each other.

He finds that “[v]ery few respondents said they would give up their home broadband connection in favor of their smartphone alone, and most are very intentional in making choices about what connection type to use for different applications,” and that “[m]ost smartphone users are subject to data caps and they rely on Wi-Fi – at home and in public places – to manage data caps. They also find their broadband speeds more satisfactory and in line with their expectations than what they experience on their wireless devices.” Notably, Horrigan finds that 92% of those surveyed were at least somewhat unlikely to consider switching away from home broadband and relying entirely on their smartphone.

It is important to note the extent to which users rely on Wi-Fi even on “mobile” devices, both at and out of the home. Typically, Wi-Fi connections are convenient ways to access and share a wired broadband connection—they can no more “substitute” for wired broadband than battery power can “substitute” for

mains electricity. Wi-Fi depends on wired broadband just as batteries depend on being charged. The extent to which mobile users rely on Wi-Fi thus shows that mobile broadband networks are not good substitutes for wired broadband for most users.

Mobile users' behavior is shaped in part by billing practices and pricing structures. As Horrigan finds, "among the 55% of smartphone users with a data cap, more than half – 52% – have altered their online behavior because of the cap – either by not doing some online activities out of concern for hitting the limit or by waiting until they were within Wi-Fi range." The very different pricing structure of wireless connections compared with home broadband is more evidence the products exist in complementary markets. But the technical characteristics of different broadband options play a part in consumer perception, as well, and can explain why Horrigan found that wired broadband customers tend to be more satisfied with the performance of their connections than wireless consumers.

These technical issues are explored in greater depth in The State of the Art and Evolution of Cable Television and Broadband Technology, a report prepared for Public Knowledge by CTC Technology and Energy. This report provides explanations rooted in the technical characteristics of different broadband and connectivity options. Based on this technical analysis, CTC concludes, among other things, that "[w]ireless networks offer tremendous benefits with respect to mobility and convenience, but are limited in speed and cannot provide the consistency that wireline networks provide. Wireless will therefore always serve as complements—not alternatives—to high-bandwidth wired connections like cable." CTC also

explains why cable broadband technology has become the dominant form of wired broadband access in the United States compared with other wired options, like DSL. Cable operators have leveraged the inherent technical superiority of their networks to achieve significant scale, which makes them formidable competitors. While other technologies, such as fiber-to-the-home (and, to a limited extent, fiber-to-the-node), are comparable to cable in terms of technical performance, the higher infrastructure costs associated with building out these networks limits their competitive potential.

Taken together, the Horrigan results and the CTC analysis paint a picture of a wired broadband market that is far from a picture of competitive health. These findings are relevant from an antitrust perspective, because they show how easily a broadband provider—particularly a cable provider—can impose at least a "small but significant and non-transitory increase in price" on its customers. This test is a way of determining whether a company has market power—whether it can, in effect, just "turn a knob" and increase its profits without fear of customers defecting to competing providers (or doing without service entirely) to a degree that would offset the profit-boosting effects of the price increase. Not only do companies with such market power harm consumers through high prices, they can create a "deadweight loss" where customers who would be willing to pay for service at a level that would cover the provider's costs nonetheless are not offered any affordable options. Only companies with market power, such as the nation's dominant ISPs, can increase their profits by deliberately leaving consumers behind.

This market power in the last-mile distribution network means that a large broadband ISP—such as a post-transaction Comcast—can take actions that

detriment its end user customers without them switching to other providers, which in turn gives networks such as Comcast the ability to squeeze online content and service providers and cable programmers in ways that ultimately harm users and viewers nationwide.

VI. Further Reports Confirm That The Harms That Dominant ISPs Can Cause Are Not Theoretical, and That This Merger Would Exacerbate Them

In addition to the market challenges that the two reports above reveal, it is clear that these challenges are in no way theoretical. This fall, OTI released a groundbreaking report of its own, titled "Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes." That policy brief, along with a Technical Report from the Measurement Lab (M-Lab) research consortium of which OTI is a partner, paint a dramatic picture of very real and very significant harms experienced by customers of several of the largest ISPs, including Comcast, while those ISPs were engaged in interconnection disputes with transit providers and content companies. These two documents are included in this filing.

The data collected by M-Lab—a public, open platform for Internet measurement—confirmed that millions of ISP customers were caught in the middle of these disputes in 2013 and 2014 as their service degraded without explanation. Consumers had no reliable way to know that interconnection congestion was causing the degradation. The ISPs were not required to inform anyone that prolonged disputes were happening, nor that the disputes were harming millions of Internet users. Moreover, the congestion appears to have been intentionally created to pressure a company to pay more money. Millions of people were swept up as collateral damage in a dispute to which they were bystanders; telecommuters trying

to connect to their employers, businesses trying to conference with their customers, and online video subscribers trying to access the content they paid for all experienced massive service degradation.

While the specifics of the disputes that led to these harms occurred behind closed doors, we do know that Comcast was a principal actor. For months, Comcast did nothing to either explain the situation to their customers or to take steps to address the very clear and very real capacity constraints on its network. Others in this proceeding also indicate that Comcast's role as a terminating access monopolist gave it both the incentive and power to leverage its gatekeeper status in the negotiations with edge and transit providers to dictate unreasonable demands for payment, all while allowing its customers' service to slow below the FCC's former 4 Mbps definition of broadband.

This evidence shows the harms that Comcast can cause today, as the nation's largest broadband ISP. If the FCC allows it to buy Time Warner Cable, both its ability to engage in this anti-consumer conduct, and its incentives to, would both increase. Therefore, the Commission must block the transaction.

Conclusion

For the reasons stated in PK and OTI's original petition and here, the Commission should stop this transaction.

Respectfully submitted,

/s John Bergmayer
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December 22, 2014

CERTIFICATE OF SERVICE

I, John Bergmayer, certify that today, I have caused copies of this Petition to Deny to be served on the following parties and staff via email:

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