

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874- C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-695-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013

(Filed April 1, 2014)

Joint Application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC (U6878C) for Expedited Approval to Transfer Certain Assets and Customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, Pursuant to Public Utilities Code Section 851.

Application 14-06-012

(Filed June 17, 2014)

REPLY BRIEF OF CALIFORNIA COMMON CAUSE

Sarah Swanbeck
Legislative Affairs
California Common Cause
1005 12th Street, Suite C
Sacramento, CA 95814
sswanbeck@commoncause.org
(510) 381-3641

December 10, 2014

SUMMARY

California Common Cause¹ is part of a nonpartisan, nationwide grassroots network of 400,000 members and supporters that has advocated open, honest, and accountable government for over 40 years. Because a vibrant informational ecosystem is critical to self-governance, California Common Cause is working to ensure public interest communications policies that connect all Americans to quality news and information. California Common Cause urges the California Public Utilities Commission (“Commission” or “CPUC”) to reject the proposed transaction between Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“TWC”) as harmful to the public interest. No set of conditions could ameliorate the harm this consolidation would do to telecommunications and multichannel video (“cable”) customers. It would further damage media localism and diversity, as well as the competitive market place for ideas, both important public interest goals.

ARGUMENT

I. THE PROPOSED MERGER WOULD HARM THE PUBLIC INTEREST

The Commission’s statutory obligation to regulate in the public interest compels it to look beyond a narrow antitrust interpretation. Indeed, the proposal presents numerous anti-trust issues in multichannel video and telecommunications markets, among others.² Even a determination by the U.S. Department of Justice, however, that the planned merger is permissible under antitrust laws, would not, and should not, be determinative of the Commission’s decision regarding the application. Instead, the Commission must evaluate the

¹ See www.commoncause.org/states/california/about

² See Diana Moss, “Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should be Blocked” at http://www.antitrustinstitute.org/sites/default/files/AAI_CC-TWC%20White%20Paper_6-11.pdf and Mark Cooper, Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger “Unapprovable,” CONSUMER FED’N OF AM., at 11 (Apr. 2014), available at <http://www.consumerfed.org/pdfs/cfa-comcast-tw-merger-analysis.pdf> (“The proposed merger is a clear violation of Sections 1 and 2 of the Sherman Act and Sections 7, 12, 15 and 16 of the Clayton Act.”)

application based on whether the outcome would be “averse to the public interest.” By conferring unacceptable levels of market and gatekeeping power on Comcast, this merger would substantially harm the public interest. Contrary to Comcast’s many public pronouncements, it is clear that the proposed transaction is without benefit to the public interest.

A. HARM TO CABLE AND TELECOMMUNICATIONS CONSUMERS

While Comcast has taken the position that approval of the transaction will result in substantial cost savings and economies of scale, the company has been careful to avoid any suggestion that customers would benefit from those cost savings, or that consumer prices would begin at last to decline. At best, Comcast spokesmen have suggested that the merger might slow cable price increases.³ While estimates indicate that the potential savings to the combined entity could total over \$1 billion annually, Comcast and TWC customers will not be sharing any cost savings with customers. Comcast is apparently counting on “revenue synergies” to accrue to its bottom line as the primary benefit of the proposed merger. The comments of Comcast Cable president, Neil Smith, speaking at the 2014 Deutsche Bank telecom and Media Conference, are illuminating:

I think the revenue synergies are greater than the cost synergies. On the revenue synergies side the first would be *the residential area where we would seek to bundle more* and that is call center training, that’s teaching people to sell another RTU on a call, on a service call, fix a billing problem, *upsell to a third product, so just bundling better.* [Emphasis added]⁴

³ See Bob Fernandez, “Before a House committee, Comcast exec fields more questions on Time Warner merger”, Philadelphia Inquirer, May 10, 2014, http://articles.philly.com/2014-05-10/business/49745413_1_comcast-time-warner-cable-comcast-corp-cable-tv-rate.

⁴ <http://www.cmcas.com/secfiling.cfm?filingID=950103-14-1756>, as discussed in Wallsten, *An Economic Analysis of the Proposed Comcast/Time Warner Cable Merger*, Technology Policy Institute, May 2014.

As an additional problem, Comcast may extend its monthly data cap to Time Warner Cable customers⁵. Data caps are consumer unfriendly. They ration scarcity and restrain innovation, in a state home to some of the most innovative startups and established American technology firms.

Finally, Comcast has maintained throughout proceedings that the proposed merger will not reduce competition because Comcast and TWC do not directly compete in any markets. But recent comments by company representatives indicate that they do not have the data to back up that claim. In a blog post by Comcast Vice President Sena Fitzmaurice, posted to the corporate website on December 3, 2014, Comcast appears to concede that there is reason to doubt whether some consumers will not lose a broadband choice following consolidation:

We are still working with a vendor to analyze the FCC spreadsheet but *in case it shows that there are any consumers in census blocks that may lose a broadband choice*, want to make sure these sentences are more nuanced. [Emphasis added]⁶

Part of the comment is an editorial about general tone, but the content is clear: While Comcast has not wavered in its public assertion that the proposed merger will not reduce competition in the broadband marketplace, behind the scenes, even Comcast's top executives question the veracity of this claim.

B. HARM TO THE MEDIA

The proposed transaction would permanently shift the balance of the nation's media ecosystem. A robust, diverse, and vibrant media is crucial to maintaining open fair and democratic discourse. The proposed merger, to the extent that it will reduce the number of

⁵ Josh Lowenson "Comcast could mandate a monthly data cap on all customers in the next five years" <http://www.theverge.com/2014/5/14/5718746/comcast-says-it-could-bring-data-caps-to-home-internet-service-for-all>

⁶ Sena Fitzmaurice, "The Clock Restarts and the Real Story on Support for the Comcast Time Warner Cable Transaction" <http://corporate.comcast.com/comcast-voices/the-clock-restarts-and-the-real-story-on-support-for-the-comcast-time-warner-cable-transaction>. Original post available at <http://consumerist.com/2014/12/03/comcast-forgets-to-delete-revealing-note-from-blog-post/>

newsrooms and affect the diversity of opinion in investigative journalism, is a threat to maintaining an open democracy.

With a consolidated Comcast-TWC, Comcast would gain tremendous scale in purchasing content, conferring near-monopsony market power to set rates for carriage. In turn, independent, diverse, and niche voices would lack sufficient resources to produce programming. Alternatively, content creators may try to make up for lost revenue by raising rates elsewhere on other multichannel video programming distributors (“MVPDs”). Finally, since Comcast owns NBCUniversal, the firm is likely to raise the prices of its programming on rival MVPDs. As Public Knowledge President Gene Kimmelman summarized in testimony at a congressional hearing:

By expanding its customer base to control almost one-third of all subscription TV households in the country and almost one-half of all the high speed broadband customers in the U.S., Comcast would position itself to dictate how much consumers must pay, determine what packages of services customers must buy, and influence what devices people can use to receive the type of video content they want. Through vertical control of NBCU's "must have programming" and its enormous customer base, a combined Comcast-Time Warner Cable could become the dominant Internet gatekeeper and choke point for innovative video services and products, inflating prices and preventing millions of consumers from receiving these services and products at competitive market prices.”⁷

II. THE PROPOSED VOLUNTARY CONCESSIONS ARE INSUFFICIENT

Applicants propose several concessions to alleviate the public interest harms that would attend this merger. These “concessions” such as divestiture in several markets and the new Greatland Connections are insufficient for a number of reasons. The divestitures create the

⁷ See testimony of Gene Kimmelman of Public Knowledge before U.S. Senate Committee on Commerce, Science, and Transportation hearing on “At a Tipping Point: Consumer Choice, Consolidation and the Future Video Marketplace” at https://www.publicknowledge.org/assets/uploads/blog/Kimmelman_Testimony_FINAL.pdf for references and context.

illusion of moderation amidst the reality of a significantly wider and deeper national foot-print. Comcast would be left with control of the largest markets in the country, including Los Angeles.

Another proposal, to expand Comcast's *Internet Essentials* program, is also problematic. The program for low-income families with school children was pivotal in securing the Federal Communication Commission's (FCC) approval of Comcast's previous acquisition of NBCUniversal. But subsequently, Comcast erected a number of barriers to participation. Thanks to restrictions on qualification, only 300,000 out of 7.2 million low income households in Comcast's service area participate in the program.⁸ Those who do manage to connect find that the service does not provide broadband. The peak broadband throughput is 3 megabits per second downstream, and 768 kilobits per second upstream⁹ – plainly insufficient for modern web applications and services.

The proposed voluntary concessions fail miserably to enhance the public interest. But even a more robust package of concessions would be inadequate to address the shortcomings of the proposed transaction. Plainly put, this transaction – like the previous Comcast-NBCU merger of just a few years ago – confers too much power on one company and further jeopardizes the competitiveness, diversity, and localism of our already-diminished media ecosystem.

Additionally, any voluntary concessions should be evaluated in light of Comcast's spotty compliance in the past. As an example, the Commission found Comcast discriminated against

⁸ See Allan Holmes, "Comcast-Time Warner deal may hinge on anemic low-cost Internet plan." *Center for Public Integrity* May 28, 2014 at <http://www.publicintegrity.org/2014/05/28/14808/comcast-time-warner-deal-may-hinge-anemic-low-cost-internet-plan>

⁹ See John Randall, "Comcast Profits from the Poor with Internet Essentials Deal." At <http://rooseveltinstitute.org/new-roosevelt/comcast-profits-poor-internet-essentials-deal>

Bloomberg programming after the ComcastNBCU merger.¹⁰ An even larger Comcast would have even greater gatekeeper power, denying viewers access to rival and needed content. Comcast's pronouncements to support non-discriminatory policies must be viewed with considerable skepticism.

III. EVALUATION OF THE PROPOSED MERGER SHOULD BE TRANSPARENT

In addition to evaluating the proposed application from a public interest standpoint, the Commission has a responsibility to California consumers, and consumers nationwide, to ensure an open and transparent process. Adequate access and time to evaluate Comcast's proposal and subsequent filings, will ensure that the public is brought into the process and the voice of everyday Californians is represented in the discourse. Recent proceedings at the CPUC, in particular the lengthy process that the City of San Bruno underwent in order to get the Commission to comply with the Public Information Act request following the PG&E pipeline explosion in San Bruno, highlight the ongoing issue of the lack of transparency at the Commission.¹¹ In case of the Comcast application, California Common Cause maintains that both the timeline for responding to the Comcast's filings, as well as the timeline that the CPUC has set for public hearings, make it extremely difficult to ensure that the proceedings are transparent to the public and that all parties have adequate time to participate.

CONCLUSION

California Common Cause believes that no package of concessions or conditions is capable of addressing the fundamental flaws in this ill-conceived mega-merger. In the last several decades, our media landscape has been transformed by rampant consolidation and

¹⁰ See John Eggerton, "FCC Upholds Bloomberg News Neighborhooding Complaint against Comcast." *Broadcasting and Cable*. September 26, 2013 at <http://www.broadcastingcable.com/news/washington/fcc-upholds-bloomberg-news-neighborhooding-complaint-against-comcast/123754>

¹¹ Jaxon Van Derbeken, "San Bruno Sues Statate for PG&E Documents." <http://www.sfgate.com/bayarea/article/San-Bruno-sues-state-for-PG-amp-E-blast-documents-5201426.php>

growing gate-keeping – a clear threat to the local and diverse media upon which our democracy depends. A vibrant informational ecosystem is foundational to self-governance. Vesting outsized gatekeeping power over what Californians may see and say – on the cable network and online – undermines the public interest specifically – and democracy broadly. California Common Cause strongly urges the Commission to reject Comcast’s proposal as harmful to the public interest.

Respectfully submitted,

_____/s/_____

Sarah Swanbeck
Legislative Affairs
California Common Cause
1005 12th Street, Suite C
Sacramento, CA 95814
(510) 381-3641