Before the

New York State Public Service Commission

In the Matter of	)	
	)	
Joint Petition of Time Warner Cable Inc.	)	
And Comcast Corporation	)	Docket No. 14-M-0183
	)	
For Approval of a Holding Company Level	)	
Transfer of Control	)	

Comments of Zephyr Teachout and Tim Wu

We write today to urge the Commission to stop the Comcast-Time Warner Cable (TWC) merger in New York.

Under New York Public Law, the Commission has a duty to block the deal if the companies fail to prove the merger is "in the public interest."[1] Comcast and TWC do not meet this burden. Both existing rate structures and the statements of Comcast's executives make clear that the merger will result in higher prices for New Yorkers, and do damage to vital New York industries. As such, the Commission has no choice under the statute but to block the merger.

First, existing pricing data shows that Comcast already charges higher prices than TWC and collects far more dollars per month per customer, year after year. By simply switching from TWC to Comcast, 2.6 million New York subscribers could together pay well over $1.5 billion per year in higher rates. On top of that, the merger would give Comcast even more muscle to use its proven methods to extract higher prices from consumers– for cable, broadband, sports, internet applications, and online video – and to quash any competitive threats that could offer lower prices. Comcast's executives, moreover, have made it clear that they will continue to raise prices. "We're certainly not promising that customer bills are going to go down or even increase less rapidly," said Comcast Executive VP David Cohen, in response to questions when Comcast announced the merger.

The certain prospect that Comcast will raise prices for New Yorkers, and the absence of any plan to lower prices, makes it clear that Comcast and Time-Warner have failed to meet their burden of establishing that the merger is in the public interest.

Second, the merger will have negative effects on important parts of the New York state economy as well. One company controlling the exclusive route to 40% of US broadband customers, plus nearly three-quarters of the cable industry,[2] will do significant damage to

[1] Public Service Law §§ 100, 222.

[2] Christie Smythe, *Time Warner Cable Shareholder Sues to Stop Comcast Deal*, Bloomberg, http://www.bloomberg.com/news/2014-02-14/time-warner-cable-shareholder-sues-to-stop-comcast-deal.html

New York's media and tech sectors. Comcast will have the leverage to demand exclusive licenses with content creators and to pay them less for their work. It will have the power and incentive to impose Internet tolls that threaten New York's tech entrepreneurs.

We strongly believe that approving the merger with conditions is not the answer. If, as we estimate, the merger will cost New Yorkers over $1 billion per year in higher rates and expensive add-ons, it is hard to imagine conditions worth that amount of money. Moreover, Comcast has a long track record of violating merger conditions. It has failed time and time again to meet its promises – even when they are legal obligations contained in a merger consent decree – and nothing suggests this time will be any different. By gaining more economic and political power, Comcast will be impervious to future competition and will have little incentive to meet its commitments to New York. The Commission should not accept another pay-off that will come at New Yorkers' expense.

I. Higher Prices are Not in the Public Interest

With its greater buying power and huge broadband market share, the merger will allow Comcast to raise prices even higher for New Yorkers. First, Comcast is simply more expensive than TWC. As Stop The Cap has detailed,[3] Comcast charges higher prices for less broadband speed than does TWC. For example, Comcast charges $69.95 a month for 25 megabits; TWC charges $12 less for twice the data. And TWC has announced it is tripling internet speeds in New York City at no extra cost.[4]

As this average monthly revenue per customer (known as "ARPU") table shows, Comcast has collected substantially more money than TWC from its customers every month for years, even as both companies have increased prices at a rate exceeding inflation:[5]

	2010	**2011**	**2012**	**2013**
Comcast	$127	$138	$149	$156
TWC	$97	$102	$104	$105

Using last year's averages, simply by transferring TWC's 2.6 million New York subscribers to Comcast, New Yorkers together would pay *$132.6 million more per month*. That works

[3] Philip Dampier, *Stop the Cap!'s Testimony Before the N.Y. Public Service Commission on Comcast-TWC Merger,* http://stopthecap.com/2014/06/17/stop-the-caps-testimony-before-the-n-y-public-service-commission-on-comcast-twc-merger/
[4] Time Warner Cable, *Time Warner Cable to Transform TV and Internet Experience in New York City*, http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2014/Time-Warner-Cable-to-Transform-TV-and-Internet-Experience-in-New-York-City-and-Los-Angeles/default.aspx
[5] Table source: Demitrios Kalogeropoulos, *3 Reasons Your Cable Bill is Rising*, The Motley Fool, http://www.fool.com/investing/general/2013/08/04/3-reasons-your-cable-bill-is-rising.aspx; company filings; Zacks Equity Research, *Earnings Beat for Time Warner Cable*, http://www.zacks.com/stock/news/105427/Earnings-Beat-for-Time-Warner-Cable

out to $1.59 billion per year.

Second, New Yorkers should expect Comcast to raise prices to recoup the $45.2 billion it is spending to buy TWC. Third, the deal will allow Comcast to use several of its proven tactics to raise prices and stifle competition:

A. Using Sports to Raise New Yorkers' Prices

The merger combines TWC's New York regional sports network with Comcast's New York NBC Broadcast stations. Post-merger, Comcast will have the power to bundle its other media properties with its must-have sports content, charging higher prices to other multichannel video programming distributors ("MVPDs").[6] New Yorkers who subscribe to other MVPDs, such as Cablevision, Verizon, DISH Network, DIRECTV and AT&T, will thus face higher prices, regardless of whether the MVPDs overlap geographically with Comcast.

Comcast has used this strategy previously, relying on local demand in Philadelphia for Phillies, Flyers, and 76ers games to depress satellite competition and maintain high prices. If Comcast gains unfettered control over TWC, it will use the Nets, Knicks, Rangers, Yankees and others as an anticompetitive force.

B. Using Data Caps to Raise Prices for New Yorkers

TWC has no data caps. Comcast, in contrast, has rolled out data caps in several states and has told investors all of its customers will get data caps within five years.[7] Although Comcast claims the caps will not affect most customers, customers that watch lower-cost cable alternatives like Netflix will often surpass the limits. As New Yorkers know all too well from their mobile phone bills, usage limit overcharges can quickly strain families' budgets.

Comcast's broadband prices and planned usage fees are not justified by Comcast's costs. Moffett Research points out that broadband costs less than $5 a month to provide. The price of bandwidth has plummeted in recent years, and about 90 percent of broadband revenue goes straight to gross profit.[8] Data caps are simply another way to force New Yorkers to

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[6] Statement of Matthew M. Polka, American Cable Association before the House Judiciary Committee, available at http://judiciary.house.gov/_cache/files/160e162e-d32e-4b86-b382-7a270d82af1e/polka-testimony.pdf "ACA members are concerned that the combination of Comcast's programming assets with TWC's RSNs will allow the merged entity to exercise greater bargaining power against all MVPDs that carry this programming, by bundling more "must have" programming. This effect will occur in the areas where TWC owns or controls RSNs, and will be most severe in the designated market areas ("DMAs") where there is both an NBCU O&O and a popular TWC RSN, such as New York and Los Angeles. All MVPDs, and therefore consumers, in these regions and markets will be affected by this harm regardless of whether they compete against Comcast or TWC. In the New York DMA, these MVPDs include Cablevision, Verizon, DIRECTV, DISH Network, AT&T, and four ACA members."

[7] Greg Kumparak, *Comcast Wants to Put Data Caps on All Customers Within 5 Years,* Tech Crunch, http://techcrunch.com/2014/05/14/comcast-wants-to-put-data-caps-on-all-customers-within-5-years/

[8] Shalini Ramachandran, *Cord-Cutting: Cable's Offer You Can't Refuse*, Wall Street Journal, http://online.wsj.com/news/articles/SB10001424127887324073504578109513660989132

pay more.

C. Making Online Alternatives to Cable More Expensive

New Yorkers seeking to escape high cable bills now have Internet TV as an option. Netflix costs $9.99 a month, compared to cable's monthly average of $86. Buying TWC gives Comcast greater ability to thwart these online threats to its cable business. First, the merger allows it to impose data caps on 40% of America's broadband users, making Internet TV more expensive to use and threatening its viability.

Second, by adding millions of broadband subscribers, Comcast will have even greater power to charge Internet TV companies tolls to travel on Comcast's broadband pipes to customers' homes. Comcast has shown it will use its broadband gatekeeper power to exact tolls on its Internet TV competitors,[9] and the FCC has said its new net neutrality regulations will not reach these kinds of tolls.[10] Internet TV companies will have little choice but to pass on the costs of Comcast's tolls to their customers, meaning higher prices for New Yorkers seeking an alternative to cable.

D. Raising Prices Through Touted Innovations

Comcast calls the TWC deal "an exciting opportunity" for its customers, promising "accelerated deployment of existing and new innovative products and services." But Comcast's innovations are simply new ways to raise New Yorkers' prices – like its X1 set top box that comes with a $99 upgrade fee.

"We're very pleased with X1," Comcast President and CEO Neil Smit has told investors, "ARPU has gone up nicely."[11] ARPU, as mentioned earlier, is the amount of money each customer pays Comcast each month. Another touted innovation is Comcast's Streampix service, a Netflix imitation that raises customers' existing Comcast bills by $4.99 per month.

Comcast also told the Commission that New Yorkers would benefit from its TV Everywhere innovation, which the Wall Street Journal notes is "aimed at insulating cable television against a rising tide of cheap online video alternatives."[12] Rather than allowing customers to pay for only the channels they want, TV Everywhere preserves the expensive cable bundle of channels – it "cable-izes" the internet. What New Yorkers need are innovations that lower prices, but Comcast's innovations instead are designed to raise them.

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[9] Netflix, *The Case Against ISP Tolls*, http://blog.netflix.com/2014/04/the-case-against-isp-tolls.html

[10] Bloomberg, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched,* http://www.bna.com/wheeler-peering-not-n17179889335/

[11] Alan Bresnick, *Comcast Seeks More X1 Magic*, Lightreading, http://www.lightreading.com/video/multi-screen-video/comcast-seeks-more-x1-magic/d/d-id/710063

[12] Sam Schechner and Shalini Ramachandran, *Plans for 'TV Everywhere' Bog Down in Tangled Pacts*, Wall Street Journal, http://online.wsj.com/news/articles/SB10001424052970203986604577253491897421420

II. The Merger Would Harm Important Sectors of New York's Economy – Including Media, Tech and Film

A. Impacting New York's Content Creators

Not only would the merger lead to higher prices for New Yorkers, but it also would weaken New York's creative industries. New York City is home to 29 multi-billion dollar media companies, accounting for nearly 10 percent of the city's private workforce and $30 billion in annual revenue.[13]

With control of the exclusive route to 40% of US broadband customers, plus nearly three-quarters of the cable industry,[14] Comcast will be able to pay New York's content creators less – and to demand exclusive rights to content. It could demand media companies not make their content available online at all. Such practices harm both the New York economy and New York consumers who could otherwise view the same content for a lower cost online.

As media content continues to migrate online, and the distinction between TV, film, and Internet content blurs, any content creator that wants to reach 40% of America will need to go through Comcast. Whether a small filmmaker or a new online magazine, New York's creative minds will be at Comcast's mercy to reach Americans.

To make matters worse, Comcast itself is a content creator competing with New York's media companies. It owns NBC and popular cable networks like USA, CNBC, MSNBC, E!, Bravo, Golf Channel, and Syfy. It is not fair to New York's media companies for their competitor to control access to a huge percentage of their potential customers across the country. Comcast has used its size and vertical integration to compete unfairly in the past, exempting its own content from its data caps (in violation of its NBC-Universal net neutrality merger conditions). [15]

B. Weakening New York's Burgeoning Tech Industry

On top of New York's content creators, the merger would put New York's tech entrepreneurs under Comcast's thumb. The Internet has thrived as a level playing field spawning innovation, and New York has developed a robust tech economy. According to a recent study, the New York City tech ecosystem includes 291,000 jobs, with 128,000 jobs not requiring a Bachelor's degree. [16] The jobs that do not require bachelor's degrees pay

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[13] New York City Economic Development Corp, *Media NYC 2020*, http://www.nycedc.com/industry/media-emerging-tech

[14] Christie Smythe, *Time Warner Cable Shareholder Sues to Stop Comcast Deal*, Bloomberg, http://www.bloomberg.com/news/2014-02-14/time-warner-cable-shareholder-sues-to-stop-comcast-deal.html

[15] *See* Netflix Annual Report, Feb. 3, 2014, available at http://ir.netflix.com/secfiling.cfm?filingID=1065280-14-6&CIK=1065280, "…many network operators have an incentive to use their network infrastructure in a manner adverse to our continued growth and success. For example, Comcast exempted certain of its own Internet video traffic (e.g., Streampix videos to the Xbox 360) from a bandwidth cap that applies to all unaffiliated Internet video traffic (e.g., Netflix videos to the Xbox 360)"

[16] Full study available at http://www.nyctecheconomy.com

45% more than jobs with the same educational requirements in other industries. The New York City tech ecosystem also generates over $5.6 billion in annual tax revenues to the City, and Albany and Buffalo are also growing tech centers. But the tech industry has expressed deep concerns about the merger, with one industry coalition arguing the merger should be blocked "for the good of innovation, the Internet industry, and of consumers…"[17]

New York's tech industry has reason to be worried about Comcast controlling 40% of broadband. Comcast's role as both a cable provider and an internet provider gives it the perverse incentive to use usage-based pricing, data caps, and paid peering agreements to make it harder to reach customers, even though bandwidth is remarkably inexpensive. These practices both weaken online competition to Comcast's cable business and increase Comcast's profits.

Comcast has charged Netflix internet tolls to access the fast lane, but New York's tech startups may never get off the ground in a world of tolls. By making it more expensive for New York tech entrepreneurs to reach broadband subscribers, Comcast would impair their ability to compete and innovate. And if a combined Comcast-TWC relegates New York's entrepreneurs to Internet slow lanes, they will not stand a chance against faster performing corporate giants that can pay up.

Although Comcast's incentives are to preserve its cable business model as TV content migrates online, its practices threaten high-bandwidth innovations that have nothing to do with TV, such as online education or telemedicine. If the next great innovation is to come from New York's Silicon Alley, then the Commission must not allow further broadband consolidation.

Post-merger, Comcast would indeed have the power to pick the winners and losers of film, TV, media, and tech. Its gatekeeper power would compromise the ability of New York content creators to get out their diverse viewpoints and of New York residents to access diverse forms of speech. This is dangerous not just to the New York economy and New York workers, but to the free flow of ideas essential to our democracy. The Commission should not allow Comcast to control important New York business sectors and what New Yorkers can watch, see, and do online.

III. Merger Conditions Are Insufficient

The Public Service Commission may be tempted to simply try to extract conditions that it hopes will make the merger serve the public interest. We believe this approach is misguided for several reasons.

First, the Commission should consider that any merger conditions must be compared to the estimated $1.5 billion per year more that Comcast will charge New Yorkers in higher rates and expensive add-ons. It is hard to imagine any conditions worth that price. That makes rejecting the merger outright the only course that will serve the public interest. Moreover,

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[17] Computer & Communications Industry Association (CCIA) letter, available at http://www.franken.senate.gov/files/letter/140609CCIAResponse.pdf

even if the Commission were to bargain for valuable merger conditions, history suggests that Comcast will not live up to its promises.

A. Comcast Has a Record of Breaking Promises to Regulators

When Comcast sought approval of its acquisition of NBC-Universal, the FCC and DOJ imposed numerous conditions to allay their concerns. Yet the agencies underestimated the challenge of holding Comcast to its obligations. As a merger condition, Comcast promised to work to close the digital divide. Yet its much-touted Internet Essentials program serves a small portion of those eligible, with red tape and an array of restrictions that reduce participation. The agencies also required Comcast to increase production of local news. Not only did Comcast reportedly fail to meet requirements, but it also counted commercials as local programming in its FCC reports.[18]

The FCC and DOJ further required Comcast to promote a stand-alone broadband product; The FCC investigated and fined Comcast for failing to do so. Comcast also skirted its net neutrality obligations, another merger condition, imposing data caps that stifle competition from online video providers, exempting its own Xfinity content from the data caps, and degrading traffic from BitTorrent. Yet another merger condition required Comcast to carry all independent news channels next to similar channels; Bloomberg TV spent a year and a half in a legal battle to force Comcast to comply, something smaller media companies would lack the resources to do.

The Commission cannot anticipate the ways in which Comcast could exploit loopholes in merger conditions and subvert their spirit. Comcast knows its business far better than could the Commission and has shown a willingness to craftily accomplish through other means the ends prohibited by merger conditions.

B. New Yorkers Lack Power to Hold TWC to its Contractual Terms, Much Less Merger Conditions

In considering merger conditions as an option, the Commission should remember New York has not even been able to enforce contract terms against ISPs. Take Verizon's failure to build out FIOS as agreed in New York City,[19] and the town of Nassau's inability to hold TWC to its contractual commitments to expand access.

As reported by The Record,[20] TWC is obligated under its Nassau contract to add service wherever 20 residencies are within a one-mile radius. The town met with TWC and pointed out all the un-served areas to try to get it to fulfill the contract terms. "This only succeeded in a couple of areas," said the town Supervisor. "This is because PSC told us we have no

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[18] Corie Wright, *No News is Bad News: An Analysis of Comcast-NBCU Compliance with FCC Localism Conditions*, Free Press, http://www.freepress.net/sites/default/files/fp-legacy/No_News_Is_Bad_News.pdf
[19] Karl Bode, *Verizon Accused of Lagging on NYC FiOS Promises*, DSL Reports, http://www.dslreports.com/shownews/Verizon-Accused-of-Lagging-on-NYC-FiOS-Promises-124089
[20] Lauren Halligan, *No Silver Bullet For Expanding Internet in Nassau*, The Record, http://www.troyrecord.com/general-news/20140512/no-silver-bullet-for-expanding-internet-in-nassau

bargaining power." If New Yorkers have no bargaining power against ISPs now, letting TWC and Comcast get bigger and amass more bargaining power is not the solution.

Comcast has shown that it would rather fail to meet its commitments than dip into its tremendous profit margins. Comcast recently posted nearly $2 billion in profits in just the first three months of 2014,[21] yet it has not sufficiently invested in Internet Essentials to meet its promises to regulators. Similarly, TWC reported a 20% increase in quarterly profits in the first quarter of 2014, with average revenue per broadband subscriber increasing by 9% in the first quarter.[22] Yet it has not met its contractual commitments to New Yorkers.

C. Post-Merger, Nothing is to Stop Comcast From Raising New Yorkers' Prices to Pay for the Pay-Off

To the extent Comcast does meet merger conditions, it can simply charge New Yorkers higher prices to pay for them. With the absence of any potential competition, and the political might to ensure new competitors or rival technologies are thwarted at their inception, there's nothing to stop Comcast from paying for any promises simply by raising bills for New Yorkers.

Conclusion

Accepting a pay-off from Comcast shortchanges New York. The Commission cannot settle for paltry concessions that Comcast can renege on or modify later. New Yorkers need real market competition. The Commission should unwind the extreme consolidation that is fleecing New Yorkers for third-rate service, and leaving us behind other regions in the US and across the world. And the Commission should ensure the cable giants can not squeeze the life and profitability out of our media and tech industries, mainstays of New York's economy and culture.

The Commission has a duty to hold Comcast and TWC to their burden under the law – the companies must prove the merger fulfills the public interest. With no plan to lower prices, and the power and tools to raise prices even further, the companies have failed to meet their burden. The law requires the Commission deny Comcast and TWC merger clearance in New York.

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[21] Cyrus Farivar, *Rolling In It: Comcast Profited $1.9 Billion In First 3 Months of 2014*, ArsTechnica, http://arstechnica.com/business/2014/04/rolling-in-it-comcast-profited-1-9-billion-in-first-3-months-of-2014/

[22] Forbes, *Time Warner Cable Earnings Jump 20% Over Broadband Growth*, http://www.forbes.com/sites/greatspeculations/2014/04/29/time-warner-cable-earnings-jump-20-over-broadband-growth/