Hearing on

"Examining the Comcast-
Time Warner Cable Merger
and the Impact on Consumers"

United States Senate Committee on the Judiciary

April 9, 2014

Written Statement of James Bosworth
CEO
Back9Network Inc.

Testimony of James Bosworth
CEO of Back9Network Inc.
"Examining the Comcast-Time Warner Cable Merger
and the Impact on Consumers"
April 9, 2014

Introduction and Summary

Good morning Chairman Leahy, Ranking Member Grassley, and Members of the Committee. My name is Jamie Bosworth, and I am CEO of Back9Network, a new golf and lifestyle cable network. Thank you for the opportunity to testify today on what the Comcast-Time Warner Cable deal means for independent cable networks like ours.

Based in Hartford, Connecticut, Back9Network is an independent cable network focused on golf-lifestyle programming, and on expanding the game's audience into new and diverse markets. We have built state-of-the-art facilities in Hartford, where we have created jobs and built the fastest-growing online audience in golf. We have acquired quality programming and signed up sponsors and investors. While focusing on the lifestyle and not live golf tournaments, we will compete directly with the Comcast-owned Golf Channel for audience, advertisers, and talent. I am concerned that this merger will make a bad situation near-impossible for independent programmers — particularly those that compete with channels owned by a vertically-integrated powerhouse with unparalleled control over distribution.

Every new network focuses on two things for a successful launch: (1) the ability to produce or acquire quality programming, and (2) distribution to a critical mass of subscribers. Today, the four biggest carriers — Comcast, DirecTV, DISH Network, and Time Warner Cable — dwarf every other provider in their number of video subscribers. Even if a programmer were able to successfully negotiate affiliation agreements with nearly every single other small and midsize operator (which would result in geographically disparate distribution in approximately one-third of U.S. multichannel homes), a programmer that is shut out of distribution from all four of the largest distributors will struggle to compete for enough advertising and audience to succeed. Someday we may get to the point where a Netflix or another over-the-top service changes this marketplace reality, but that is not the case today. Television advertising still dwarfs online video advertising by a factor of 20-to-1.[1]

Despite the structural challenges before this announced merger, we were well positioned to succeed and optimistic about a launch on Time Warner Cable's systems sometime this year. The merger, however, makes us concerned that this will not happen because, notwithstanding the commitments Comcast made to independent programmers to secure approval of its NBCU merger, the incentive is for the merged company not to carry us. I hope Comcast will remain true to its commitments and not discriminate based on its ownership of the Golf Channel, and I hope Comcast will judge us on the merits of our business plan. But, so far, that has not been our experience. If the structural problems in the distribution system get worse through mergers, it will not only be bad for those of us trying to launch new networks, but consumers will not have the programming choice — or diversity of viewpoints — they want.

I. Back9Network: Filling A Niche In Sports And Lifestyle Programming

The Back9Network was formed in 2010 to provide original lifestyle and entertainment programming to golf-oriented consumers and advertisers. The golf lifestyle industry is a $177 billion market that includes spending on travel, equipment, apparel, real estate, and golf courses.[2]

---

[1] *The TV Landscape*, Multichannel News, Jan. 6, 2014.

[2] Per the most recent Golf Industry Report by SRI International and Bloomberg, only 1 percent of the $177 billion golf economy is spent on golf endorsements, tournaments, and associations. Approximately 99 percent is spent on the lifestyle activities (e.g., travel, course play, fashion, equipment, etc.) on which Back9Network content will focus. Per Bloomberg, this $69 billion core golf economy tops such professional spectator sports such as baseball, basketball, football (continued…)

At approximately 26 million golfers, golf has the second-largest participant base in American sports, behind only bowling.[3] But it has only one home on cable — the Golf Channel, owned by Comcast. The Golf Channel focuses on airing live professional golf tournaments, but largely ignores the golf lifestyle market and therefore misses a large segment of the potential audience and ad revenue. Golf Channel's audience (total-day-viewership averaged 110,000 in 2013) does not even attract one-half percent (0.5%) of the approximately 26 million active golfers in the U.S.[4]

That's where the Back9Network comes in. We are a lifestyle and entertainment channel with character-driven and compelling original programming that covers all aspects of the golf world, including golf personalities, golf courses, fashion, health and wellness, and golf equipment and apparel. Our leadership team includes executives from Disney/ESPN, Callaway Golf, NBC, Time Warner/CNN, and AOL. We know the golf lifestyle, and we know television. And we know that golfers and golfer-focused advertisers are ready for a network that's about not just the professional game of golf, but about everyone who loves the sport. For more than three years now, we've been building our network to appeal to a broad base of consumers.

Independent market research has shown that our programs — such as *Ball Hogs*, *Golf Wives*, *Of Course*, and *Golf Treasures* — appeal to a young, diverse audience of frequent golfers

---

and hockey combined, according to the Census Bureau. The golf economy expands to $177 billion, when one includes the spillover effect on industries such as tourism.

[3] Sporting Goods Manufacturing Association (SGMA), 2012 Sports Participation Report.

[4] Austin Karp, *ESPN Audience In '13 Lowest Since '08; MLB Net, NFL Net See Record Viewership*, Sports Business Daily, Jan. 9, 2014, at http://www.sportsbusinessdaily.com/Daily/Issues/2014/01/09/Research-and-Ratings/cable-nets.aspx.

and other cable viewers.[5] While the Back9Network may compete with the Golf Channel for advertisers and viewers, it will also present unique golf-related programming that cannot be found anywhere else —documentaries, scripted programming, character- and story-driven reality programming, and fresh takes on pro tour coverage. Our market research has found that 38 million American adults aged 25-54 would probably or definitely watch our programming.[6]

We have negotiated and continue to negotiate several co-production agreements with some of the top Hollywood production houses, many of which have created the highest-rated shows on cable television today. We have signed up on-air talent and brand ambassadors including Padraig Harrington, Cheyenne Woods, Audrina Patridge, and Ahmad Rashad. We have created an online media site that features golf news, players profiles, information on golf travel destinations, reviews of golf courses and equipment, documentaries, videos, and clips from our original programming. And we've raised nearly $30 million from individual investors (including a loan from the State of Connecticut) who are committed to the game, to our network's mission, and to our management team.

Furthermore, our creative mix of programming dovetails with PGA of America's efforts to make the game more user-friendly and appealing to a broader audience. The PGA initiative, called Golf 2.0, aims to expand golf's audience by re-engaging those who have tried golf but left the sport and by creating new players amid youth, minorities, and women.[7] The Boston Consulting Group found that more than 90 million Americans have played golf and enjoyed the

---

[5] Commissioned online survey of 1,250 U.S. adults 25-54 by Back9Network using Frank N. Magid Associates, Inc. in April 2013. Twenty-three percent of participants were Comcast subscribers, and 13 percent were subscribers of Time Warner Cable.

[6] *Id.*

[7] *See PGA of America to drive growth with Golf 2.0*, GolfWeek (Feb. 20, 2012), at http://golfweek.com/news/2012/feb/20/pga-america-touts-golf-20-means-grow-golf/.

experience, and some 70 percent of them have an interest in playing again.[8] Approximately 26 million Americans actively golf. And another 20 million aspire to play golf. That's nearly one-half of all Americans who either play golf, have played golf before, or aspire to play the game. The Back9Nework can help the PGA expand beyond the core golf audience with our original mix of programming focusing on the casual player's experiences and stories around the game.

II. Carriage Negotiations Began Well But Sputtered After The Comcast-Time Warner Cable Merger Announcement

To attract the national advertising necessary to support a new, national cable network, the network relies on carriage in the nation's top markets. Advertisers want to see carriage in most of the top 25 markets, and the success of a network requires distribution to a critical mass of subscribers. Only four cable and satellite providers reach more than 10 million subscribers: Comcast (22 million), DirecTV (20 million); DISH Network (14 million); and Time Warner Cable (11 million).[9] No other provider comes close.

Moreover, the major satellite providers — DISH Network and DirecTV — are hesitant to launch a new, independent network because of unique bandwidth constraints related to satellite delivery. As a practical matter, the satellite providers require new programmers to demonstrate that subscribers will migrate from a rival pay TV provider to receive their new programming, in order to launch as part of the regular television lineup. That is hard to demonstrate for mature networks, much less new networks, and providers tend not to trust survey data that shows the likelihood of this effect, even if it exists. As a result, Comcast and Time Warner Cable —

---

[8] *Id.*

[9] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, MB Docket No. 12-203, at ¶ 130, Table 7 (rel. July 22, 2013).

traditional facilities-based cable systems that do not have the same bandwidth limitations — are truly the gatekeepers of new, national cable networks.

We initiated carriage negotiations with both Comcast and Time Warner Cable. Comcast turned us down when we approached Comcast in the fall of 2012. We continued to approach Comcast again last summer and fall, and again this year, but, while we were told our offer was creative, we have not had any real, productive and substantive discussions that are leading toward carriage.

So we focused our efforts on Time Warner Cable, which was not biased by incentives to favor the Golf Channel and discriminate against competing networks. We had at least five productive, high-level meetings with Time Warner Cable executives in 2013. These discussions made us believe that our programming strategy and proposal were unique and compelling. They also allowed us to evolve our proposal's terms to ensure that Time Warner Cable possessed little-to-no financial risk in launching our network.

The announcement of the Comcast-Time Warner Cable deal has and will continue to hurt our ability to get carriage with Time Warner Cable. We are concerned that we will not have an opportunity (not a right, but an opportunity) to compete for distribution in light of Comcast's financial stake in the Golf Channel.

Lastly, I cannot emphasize enough how attractive and creative our carriage proposal is for Comcast and Time Warner Cable (in the absence of incentives to favor Comcast's affiliated programming interests). I possess a 20-year track record in golf sales and marketing. But no matter what the industry, when you approach any customer, you listen to his or her issues or problems, and you go back with your team and create a solution. We have listened to our potential pay TV partners and understand that their programming costs are escalating. We have listened to their desire to have channel carriage fees tied directly to channels' audience metrics. Our proposal addresses their industry concerns; yet, neither operator has launched us. The only logical conclusion is that Comcast is discriminating against us because of its ownership of a golf-focused channel (and potentially its other lifestyle channels).

III. As A Vertically-Integrated Powerhouse, Comcast Has The Incentive And Ability To Foreclose Programming Competition

For many years, Congress and federal agencies have been concerned about the power that media distribution gatekeepers have to discriminate in favor of, or against, content developers on the basis of financial interests. In fact, a key driver of the anti-discrimination provisions that were included in the 1992 Cable Act was concern about the inherent competitive problem raised when cable and satellite operators own both cable programming networks and the distribution platforms for these channels (so-called "vertical integration").[10] The proposed merger of Comcast and Time Warner Cable magnifies these competitive problems considerably, as the combined entity will not only be a vertically integrated powerhouse with the *incentive* to discriminate against competitive programming channels, but it will have unprecedented control over the cable distribution platform and therefore the ability to profitably restrict competition. As described below, a combined Comcast/Time Warner Cable will have more than 30 million

---

[10] 1992 Cable Act § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable operators the incentive and ability to favor their affiliated programming services"); *see id*. ("For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee allege that some cable operators favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSOs and discriminating against rival programming services with regard to price, channel positioning, and promotion.").

subscribers, and it will be the dominant pay TV provider in nearly every single major television market.

A. Comcast Is A Vertically Integrated Powerhouse With A Track Record Of Favoring Affiliated Programming Channels

Today, Comcast has a financial stake in 50 different national cable networks, including such channels as Bravo, CNBC, E! Entertainment TV, Golf Channel, MLB Network, MSNBC, NBC Sports Network, NHL Network, Oxygen Network, SyFy, The Style Network (now changed to Esquire Network due to Style Network's underperformance), The Weather Channel, and USA Network, as well as numerous regional news and sports networks.[11] (During prior years, it had ownership interests in *more than 75 national networks*.[12]) These cable network holdings are in addition to its ownership interest in two national broadcast networks, NBC Television Network and Telemundo Television Network, as well as a major movie studio, Universal Pictures, and additional studio and cable production interests. Its holdings also include ten NBC owned and operated television stations and 15 Telemundo owned and operated stations.[13]

While Comcast is already a vertically integrated powerhouse, its proposed acquisition of Time Warner Cable would further expand its content portfolio. Today, Time Warner Cable has ownership interests in national cable networks such as MLS Direct Kick, NBA League Pass, NHL Center Ice, MLB Network, and Team HD, as well as numerous regional news and sports networks, including two of the top regional sports networks in Los Angeles, the second largest U.S. television advertising market and a region where Comcast's presence is currently non-existent.

[11] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, Appendix B, Table B-1 (2013).

[12] *Id.* at ¶ 39.

[13] *Id.* at ¶ 96.

These programming and content interests combine to provide Comcast and Time Warner Cable strong incentives to discriminate against unaffiliated content. As Congress anticipated in 1992, "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services."[14] By "foreclosing or disadvantaging rival programming networks," Comcast can increase audience, competitiveness for programming rights, and advertising revenues for its affiliated networks.[15] And much more recently, federal agencies have echoed this concern, finding that Comcast has an "ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[16]

Unfortunately, Comcast has a track record of doing just that. Both NFL Network and Tennis Channel have filed discrimination complaints against Comcast alleging that it discriminated against them in the terms of carriage and in favor of its affiliated networks, including NBC Sports Network and Golf Channel.[17] And Bloomberg had to file a complaint against Comcast to enforce Federal Communications Commission ("FCC")-imposed conditions intended to address Comcast's ability to discriminate against unaffiliated news channels, like Bloomberg, in favor of its affiliated news networks.[18] Indeed, Comcast's own executives have acknowledged that Comcast treats its affiliated programming "like siblings as opposed to like

---

[14] S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158.

[15] *Applications of Comcast Corp., General Electronic Co., and NBC Universal, Inc.* ¶ 119.

[16] *Applications of Comcast Corp., General Electronic Co., and NBC Universal, Inc.* ¶ 116

[17] *See In the Matter of Tennis Channel, Inc.*, MB Docket No. 10-204 (rel. July 24, 2012); Press Release, NFL, NFL Network files FCC complaint against Comcast (May 6, 2008), at http://www.nfl.com/news/story/09000d5d80830a76/article/nfl-network-files-fcc-complaint-against-comcast.

[18] *See In the Matter of Bloomberg L.P.*, MB Docket No. 11-104 (MB rel. May 2, 2012).

strangers."[19] In connection with its review of the Comcast/NBC Universal merger, the FCC's Chief Economist found evidence that Comcast discriminated in program carriage in favor of affiliated networks for anticompetitive reasons.[20]

In sum, Comcast clearly has the incentive to act in an anticompetitive manner based on its vertical integration. That incentive alone is not concerning; what is problematic is that it has — and with Time Warner Cable will certainly have — not only the incentive but the ability to profit over the long term by thwarting competition in the programming market.

B. <u>The Horizontal Integration That Would Result From A Combined Comcast/Time Warner Cable Would Foreclose Opportunities.</u>

The combination of Comcast and Time Warner Cable would consolidate under one entity more than 30 million cable subscriber homes (including homes in nearly all the major television markets). This unprecedented horizontal integration would truly provide the combined entity "make or break" power over programming channels. As described above, Comcast/Time Warner Cable has the incentive to shut out independent programmers, like the Back9Network, that compete with its affiliated networks, and this horizontal aspect of the merger would give it the ability to do so. (Ironically, the stronger and more competitive the programming and content, the stronger Comcast's incentives to foreclose such competition.)

If the merger takes place, the combined entity would be the dominant pay TV provider in all ten of the top-ten television markets, including New York and Los Angeles (which are disproportionately important to the ability of a cable network to attract advertisers and compete

---

[19] *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 9274, ¶ 4 (2012), rev. sub nom. *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013), cert. denied 134 S. Ct. 1287 (2014).

[20] *Id.* at ¶ 117 & Technical Appendix. Even when Comcast committed to launch new, independent channels, it has affiliations with the channels it did launch, as described in Appendix A.

for programming rights). Indeed, the combined company would be in 23 of the top 25 television markets and 37 of the top 40 television markets.[21] In support of the merger, Comcast has pointed to the fact that it does not today compete in the same coverage areas as Time Warner Cable. While that is true, it is also true that, today, neither entity on its own has the ability to foreclose independent programming channels from the video marketplace. Following the acquisition, the combined entity will be able to unilaterally foreclose an independent programmer from accessing *approximately half of all cable subscribers (a third of all MVPD subscribers)* and from reaching eyeballs in New York, Los Angeles and *nearly all other major television media markets*. With DirecTV and DISH's bandwidth constraints, the ability of a new independent network to launch will essentially require negotiation for carriage from a combined Comcast/Time Warner Cable.

C. Comcast/Time Warner Cable's Foreclosure of Independent Programmers Will Result In Fewer Choices For Consumers And Advertisers.

If the combined Comcast/Time Warner Cable is not prevented from exercising such a foreclosure strategy, the result would plainly harm consumers and advertisers, as well as competing content holders. When Congress considered the need for anti-discrimination provisions in adopting the 1992 Cable Act, it understood that independent cable networks add diversity and competition to the video marketplace that benefit consumers.[22] That remains true today, although innovative new voices like the Back9Network simply will not have a chance of

[21] Comcast and Time Warner Cable have a presence in 23 of the top 25 markets. That does not include Phoenix, the 12th largest DMA, where Comcast has 1,200 subscribers and Time Warner Cable has none. SNL Kagan, Comcast and TWC Combined - Top 50 DMA Analysis.

[22] *See* H.R. Rep. No. 102-628 (1992), at 41 ("The Committee received testimony that vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.").

competing with Comcast's affiliated networks if Comcast is permitted to use its control over distribution platforms to disadvantage its competitors.

No doubt, the most well-established and well-funded legacy networks will be able to continue to secure carriage on Comcast systems. (Even there, there is a question about whether Comcast will be able to exact an anti-competitive price for such carriage.) However, true independent programmers simply will not be able to survive in the absence of a chance to compete. That means that Comcast's affiliated networks will have successfully foreclosed competition for audience, programming and advertising dollars, and consumers will have fewer choices available to them.

CONCLUSION

I thank the Committee for the opportunity to add my voice today to those concerned about the prospects for anti-competitive behavior posed by the Comcast-Time Warner Cable merger. While I remain optimistic that Comcast will not discriminate against independent networks that compete with Comcast-owned networks, I am also a realist. I urge the Committee to use its oversight authority to ensure that, if the deal is approved, the Department of Justice and the FCC require effective, enforceable conditions so that new, independent networks will be given a fair hearing and a fair chance to show they are worthy of carriage based on the quality of their programming and the audience they attract. Competition should determine who succeeds -- mergers should not be allowed to lessen competition.

Appendix A

Comcast's "Independent" Networks Have an Affiliation with Comcast

Comcast pledged to add 10 new "independently-owned and -operated" networks to its systems to secure FCC approval of its merger with NBCUniversal. In 2012, Comcast announced the first four of those networks.[23] At least two of the networks, however, are affiliated with Comcast.

ASPiRE: Comcast states that it developed this channel "in partnership with" Magic Johnson to deliver "enlightening, entertaining, and positive programming to African American families."[24] Financial terms of the deal were not disclosed, but Comcast describes itself as a "partner" in the network and states that it provides "the platform" to help Johnson launch the network.[25] The network is carried by Comcast and Time Warner Cable, giving it carriage in 21 of the top 25 African-American markets and to 15 million homes.

Revolt TV: This new music network from Sean Combs was one of four that Comcast announced it would carry under its agreement with the FCC. Comcast has been described as Combs' "production partner" in the venture.[26] And while terms of the partnership have not been made public, Bloomberg Businessweek reported that Revolt TV "has backing from Comcast."[27] The music-oriented network, which features music videos, live performances, news and interviews, is carried on Comcast and Time Warner Cable systems.

---

[23] *See* Press Release, Comcast, Comcast Announces Agreements with Four New Minority-Owned Independent Networks (Feb. 21, 2012) *at* http://corporate.comcast.com/news-information/news-feed/comcast-announces-agreements-with-four-new-minority-owned-independent-networks.

[24] *See* Aspire Network Seeks to Inspire, Comcast NBCUniversal, http://corporate.comcast.com/csr2012/aspire-network-seeks-to-inspire.

[25] *Id.*

[26] Liz Elfman, *Revolt TV and Sean Combs: The Revolution Will Be Televised*, Huff. Post, Dec. 4, 2013, *at* http://www.huffingtonpost.com/fueled/revolt-tv-and-sean-combs-_b_4371800.html.

[27] Andy Fixmer & Alex Sherman, *Sean Combs Said to Bid $200 Million for Fude TV Network,* Bloomberg Businessweek, Mar. 11, 2014, at http://www.businessweek.com/news/2014-03-10/sean-combs-said-to-bid-200-million-for-fuse-tv-network.