SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR COMCAST-TWC MERGER HEARING, APRIL 9, 2014

QUESTIONS FOR MR. KIMMELMAN

In your opinion, should Congress take additional steps to ensure access to the Internet for content, service and application providers, as well as for consumers? Or are existing laws and policies sufficient to deal with potential anti-competitive behavior?

Public Knowledge's answer:

The FCC is in the process of crafting revised Open Internet policies, which have the potential to ensure that all content creators and service providers have a chance to reach Internet users. Under Title II of the Communications Act, the FCC has the legal authority it needs to accomplish this.

We currently have a hodgepodge of regulations that regulate the communications sector. Common Carriers are regulated like a telephone company from 1982 when they had a monopoly on voice services. Today, Comcast and Time Warner Cable are both competing with telephone companies not only for broadband customers, but for voice customers as well. Do you believe that today's regulatory regime that places burdensome regulations on the telephone company but not on the cable company, gives the cable company a market advantage?

The justification for common carrier treatment of basic communications services has not changed since the days of the telegraph. The application of common carriage principles to different technologies is of course different, but the concept of common carriage is as important today as it ever was. Furthermore, common carrier status never has been, and should not be, reserved only for monopolies. Again, the application of common carrier principles in a monopoly context might be different than the application of those principles in another context but the overall framework should continue to guide policymakers.

At the moment, broadband services are not treated as common carriers, whether they are provided by telephone companies or cable companies. So this does not provide a competitive advantage to cable over telephone. By contrast, telephone services provided by cable companies have an unclear regulatory status, and the interconnection obligations of IP-based telephone services (regardless of who provides them) are also unclear. This market uncertainty harms consumers and competition. To the extent this unclear policy situation helps any part of the

industry it is to the extent that policies can be manipulated to exclude competition. The actual costs of compliance with interconnection requirements or other common carrier requirements themselves are minimal.

In your opinion, what will be the effect of the merger on regional sports programming costs, which are necessary for other video providers to offer in order to maintain a viable service?

Sports programming is one of the clearest examples of "must-have" content. A vertically-integrated, horizontally-expansive cable/broadband provider can use sports to gain an unfair advantage in the marketplace in at least two ways: (1) By controlling sports programming directly, and pricing that programming at a level that harms competing distributors, and (2) by squeezing independent sports programming providers, forcing those programmers to raise the costs they charge to competing distributors.

Some have argued that free markets and a lack of government regulation have enabled technological innovation and allowed internet services to flourish. Do you believe that imposing new regulations could stifle innovation and inhibit the growth and deployment of broadband services? In your view, should there be more or less government involvement in this industry?

Just as bad regulation can inhibit competition and technological innovation, good regulation is necessary when market forces fail to ensure those very things. The government is regulating already, so the first task is to ensure that its policies help consumers and competition instead of protecting incumbents. Whether particular interventions are necessary can only be determined in a very fact-specific way.

What are the implications of this merger for open access and peering in the broadband market? How does the proposed transaction affect competition in the market for "last mile" interconnection services?

This merger would harm competition in those markets. Comcast/TWC would control a large proportion of the country's Internet users, and the terms they set for access to their customers would have large effects throughout the industry. In many ways, the problems this merger poses to those companies who operate networks that must interconnect with Comcast's (e.g., Cogent and Netflix) parallel the challenges that independent video programmers face when they must have their programming carried by Comcast. When just one company controls access to

such a large part of the country's base of Internet users and TV viewers, actions that company can end up harming industries and users everywhere.

What effect will the merger have on competing set-top boxes like Roku and Apple TV?

Devices like the ones listed above are niche, because they only access online content, not MVPD content. While a path for third-party devices to access cable content exists—CableCARD—TiVo's challenges show that this is no easy path. This merger would make a bad situation for third-party devices even worse. In the absence of reform to CableCARD, devices that want full access to cable content without using that technology must individually negotiate with each MVPD. Having one less MVPD doesn't make this any easier, since the larger an MVPD is the less willing it is to work with third parties that want to offer customers a differentiated user experience.

Some are concerned that this merger is bad for content providers because a combined Comcast-Time Warner Cable would be too powerful of a gatekeeper. However, others view this merger as a possible signal that the industry is transitioning from a cable television system of the past to a new system. Could this merger break down some of the walls of innovation and shift from a licensing model to a more direct IP-enabled model?

No. This merger would be more likely to lock in the current distribution model. The current cable model has been very profitable for Comcast and nothing about this merger would give it an incentive to switch away from it. In fact, this merger would give it an increased ability to fend off challenges from new forms of competition, whether they come from satellite, broadband, or some other new technology or business model.

Things are changing in how we view television – every day there are more ways to watch our shows, movies and other content. Comcast and Netflix have reached a deal and it has been rumored that Apple and Comcast have had discussions about providing service for Apple TV. Both of these entities are Comcast competitors. How does this co-opetition benefit consumers? How does it affect the industry?

Consumers benefit from competition, choice, and flexibility, not sweetheart or anti-competitive deals between corporate giants. Healthy markets are characterized by open competition, not corporate cronyism.

Comcast is the country's largest cable company and largest broadband provider. Apple is the world's largest company by market capitalization. The deals companies of this sort are able to come to with each other may undercut competition from smaller companies.

While Comcast and Netflix have come to an arrangement, Netflix has been public with its position that it shouldn't have to "deal" with Comcast in this way simply to reach Comcast subscribers, many of whom have no alternative broadband provider (but could easily switch away from Netflix). This deal could portend a world where gatekeeper ISPs rake profits off of most successful online services, undercutting incentives to innovate.

Senator Klobuchar's QFRs
"Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers"

<u>Gene Kimmelman, Public Knowledge</u>
Comcast owns the NBC Universal suite of content – including must-have channels like Bravo and USA Network, and several regional sports networks. Competitive video providers in Time Warner's footprint will now have to buy NBC programming from Comcast. For competitors this cost must be passed on to its consumers. Will the merged company's larger presence throughout the country, especially in major markets like New York and Los Angeles, give it even more leverage to charge its competitors more for the Comcast-NBC suite of programming? Could the merger impact prices for consumers who are served by MVPDs outside of Comcast and Time Warner Cable's footprint?

Public Knowledge's answer:

Yes. The harms from vertical integration and horizontal expansion are interrelated. The greater the combined company's horizontal reach as a cable company—that is, the more markets it provides service in and the more subscribers it serves—the greater its incentive to use its programming assets to benefit the cable part of its business. Post-merger, if the company overcharges for NBCU content, even if that reduces demand for that programming, the company as a whole would still benefit due to the harms to competitors in the distribution space.

Questions for the Record
"Examining the Comcast-Time Warner Cable Merger and Impact on Consumers"
Senator Mike Lee
April 16, 2014

Gene Kimmelman (President and CEO, Public Knowledge)

1. *Mr. Kimmelman, in your testimony you expressed concern with regard to the potential degree of market power Comcast could have with respect to the purchasing of video content. This seems to be a question of monopsony—the power of a buyer to dictate terms to a seller.*

    a. *How could undue monopsony power harm consumers, and with respect to this transaction in particular, what makes you concerned that the company's purchasing power could harm consumers?*

    Public Knowledge's answer:

    A monopsony harms consumers by harming programmers and online service providers. By squeezing programmers (e.g., paying them less, or making them provide more generous terms), gatekeepers can impose costs on their rivals. If a programmer can't get paid enough from Comcast, it may have to charge more to other MVPDs (or reduce its investment in programming, which is also a consumer harm). Other MVPDs facing higher costs may have to raise their prices, while Comcast would face no competitive pressure to lower its bills. Similarly, if an Internet service has to pay Comcast for access to its millions of subscribers, it will have to either charge its own customers more, find a way to make smaller ISPs pay it, or reduce the quality of its offering. All of these directly harm the cost and quality of the services available to consumers.

2. With respect to the market for video programming, testimony was given during the hearing that the combined company would have less than a 30 percent share of the market. And court decisions have confirmed that a share of less than 30 percent in the video market is insufficient to raise competitive concerns.

    a. How would you respond to those that argue that based on the fact that Comcast would have less than 30 percent of the video market this transaction does not pose competition concerns?

    Public Knowledge's answer:

    First, the 30% number was a maximum. Market shares below that number were never given a safe harbor, but rather judged on their particular facts. Second, that number only applied to the MVPD market and did not account for unique circumstances where MVPDs were also vertically integrated.

Yet some of the largest harms that would arise from this merger arise in the broadband context, which calls for a new analysis. Of course, applying the 30% figure to broadband does Comcast no favors. While Comcast has fewer broadband than cable customers it is more dominant in broadband because of the lack of a broadband equivalent to DBS. Post-merger, Comcast's share of the high-speed broadband market would be about 50%, depending on the counting methodology.