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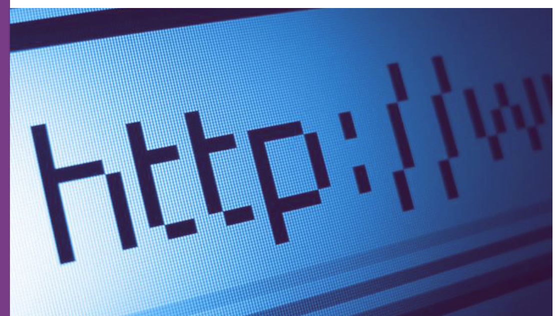
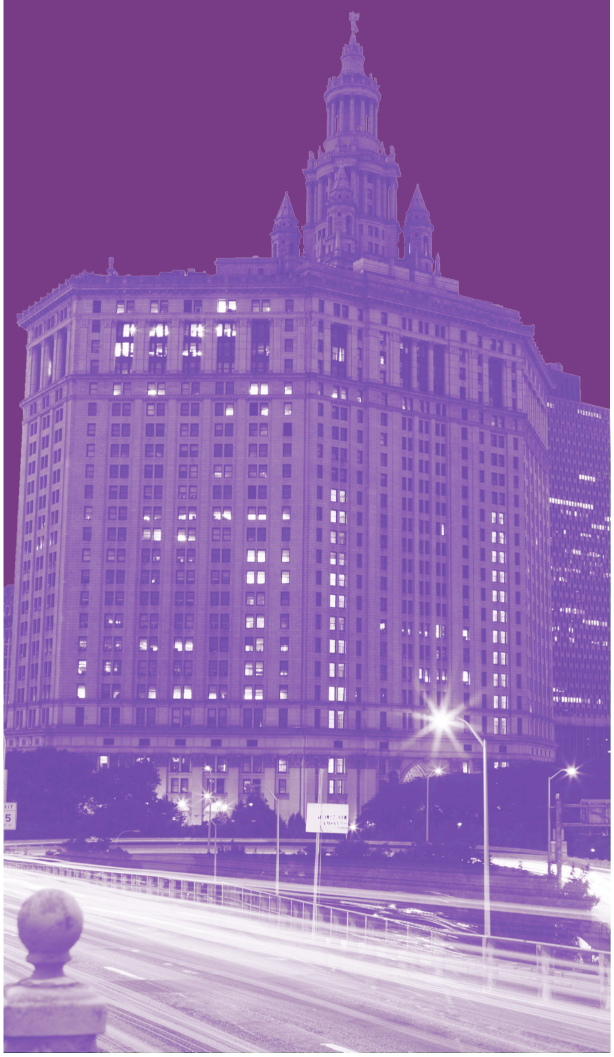


**THE PUBLIC ADVOCATE**
FOR THE CITY OF NEW YORK

**Letitia James**



# POLICY REPORT:

## Protecting Internet Service for All New Yorkers: The Comcast Time-Warner Cable Merger and The Role of New York City's Franchise Agreements

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## EXECUTIVE SUMMARY

The New York City Public Advocate is responsible for ensuring that municipal services and by extension franchise agreements are fulfilled. The proposed $45 billion Comcast-Time Warner Cable merger may have considerable implications on consumers and raises concerns about the lack of competition in our broadband and cable services. Should the merger be approved, New York City's franchise agreement with Time Warner Cable (TWC) would transfer to Comcast. With the increased consolidation in the industry and less competition, the City may be in a weaker position to negotiate future franchise agreements.

There are numerous federal and state entities with regulatory oversight over the proposed merger. In New York, the state's Public Service Commission (PSC) must thoroughly examine the effects that the proposed merger would have on our communities to ensure that the needs of our people are best served by any changes that may result. This deal would create the largest media, cable, and internet company in the world.

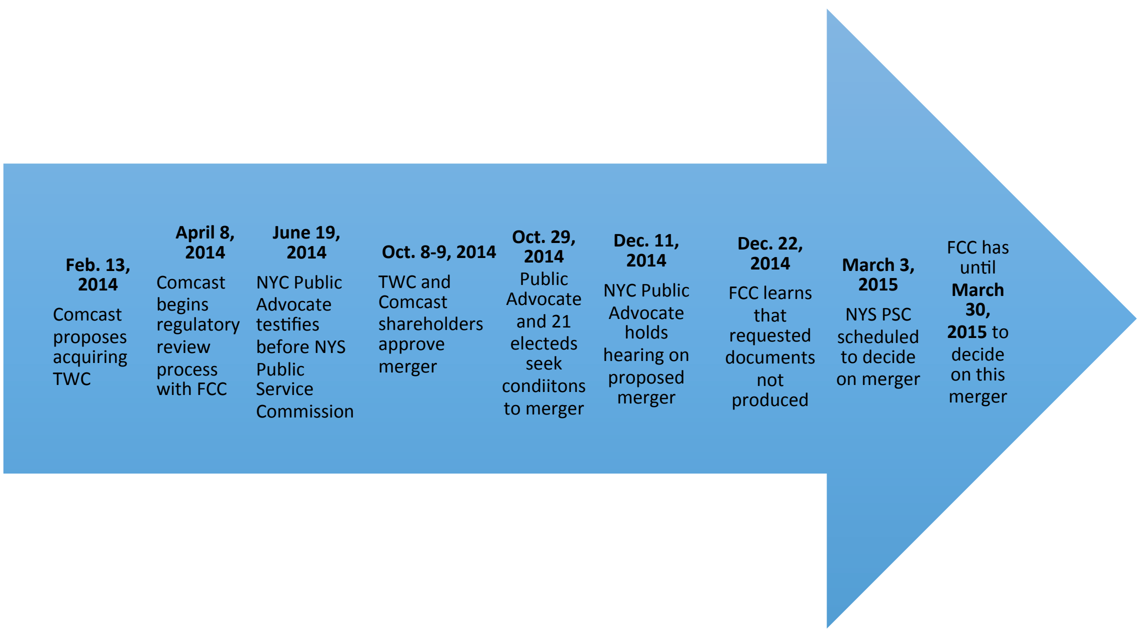
There is an urgent need for the deployment of high-speed internet in Staten Island, Brooklyn, Queens, the Bronx, and Northern Manhattan. Nearly a third of the residents of New York City do not have access to broadband. Whether it is a child who struggles to do their homework due to a slow or non-existent internet connection, or a start-up tech firm that has to wait months to get a broadband internet connection, the current system is failing us. For New York City to remain competitive in the 21st century and for our economy to diversify with more technology companies that create middle class jobs, the PSC must seek to bridge the digital divide. Prior to 2008, New York City retained greater authority when a franchisee such as TWC sought to merge with another company. Unfortunately, when New York City renewed its Cable Franchise Agreement with TWC in 2008, the Bloomberg Administration effectively relinquished all ability for the City to protect its interests and leverage the value of its extremely important and profitable franchise.

This brief analyzes the current merger that is before state regulators, and proposes measures that would greatly increase economic and educational opportunities. Additionally, the New York City Public Advocate recommends that the New York City Department of Information Technology and Telecommunications (DOITT) and the New York City Franchise Concession and Review Committee (FCRC) voluntarily adopt the 1998 Transfer of Franchise language in all prospective telecommunication franchise agreements pending appropriate reforms.

## BACKGROUND

On February 13, 2014, Comcast Corporation proposed to acquire TWC for $45.2 billion dollars as part of a deal that will give the new entity control of 40 percent of the broadband market and 30 percent of the cable market of the nation.[1] In New York State, TWC provides digital cable television, broadband internet and Voice over Internet Protocol (VoIP) telephone service to approximately 2.6 million subscribers. Comcast currently provides digital cable television, internet, and VoIP telephone service to approximately 23,000 subscribers.[2] The merger was approved by Comcast shareholders on October 8, 2014 and subsequently by TWC shareholders on October 9, 2014.

### TIMELINE OF THE PROPOSED TIME WARNER/COMCAST MERGER




On April 8, 2014, Comcast initiated the required federal regulatory review process by filing a public interest statement with the Federal Communications Commission (FCC). The FCC then commenced an informal 180-day transaction clock to review all paperwork by January 12, 2015. As part of the review, the FCC issued Requests for Information from TWC in August, 2014. Problems arose when during this review FCC staff learned that:

[1] Bartz, Diane. Comcast fight with upstart Spanish station is grist for merger foes. Reuters. 17 February 2015. 19 February 2015. www.reuters.com/article/2015/02/17/us-twc-comcast-m-a-estrella-idUSKBN0LL28T20150217.

[2] Office of the Governor of the State of New York. Governor Cuomo Announces Review of Comcast, Time Warner Merger Underway. 2014. Web. 27 January, 2015. www.governor.ny.gov/news/governor-cuomo-announces-review-comcast-time-warner-merger-underway.

> "in excess of 7,000 responsive documents had been withheld based on an inappropriate claim of attorney-client privilege. These documents were produced to the Commission on December 9 and 10, 2014, and Commission staff was advised that a complete revised privilege log would be provided in mid-January, 2015. During the week of December 15, 2014, Commission staff learned that in excess of 31,000 responsive documents had not been produced to the Commission due to vendor error, and would be produced on December 30, 2014." [3]

The FCC has until March 30, 2015 to decide if the merger serves the public interest. The Department of Justice is also in the process of reviewing whether the merger would be anti-competitive.

In addition, approvals of the merger in the states where these entities operate is also needed. In New York, the PSC is reviewing the proposed merger in accordance with state law that authorizes the PSC the power to reject cable company ownership changes, if the changes are not in the public interest. Governor Andrew Cuomo has requested the PSC review how the proposed merger will impact state policies, such as its efforts to expand broadband in under-served areas and providing better broadband access to schools.[4] Moreover, historically, New York City would have had an opportunity to review the merger pursuant to the franchise agreement with TWC. Unfortunately, this right was relinquished in 2008.

This brief outlines concerns over whether this merger will achieve the best public service possible for New Yorkers. Additionally, the New York City Public Advocate has developed a set of proposals to ensure improved service and performance for the consumer, as well as mechanisms to better protect New Yorkers in prospective franchise agreements.

## FRANCHISE AGREEMENT WITH TIME WARNER CABLE: THEN AND NOW

New York customers of a merged Comcast/TWC would account for nearly 10 percent of the company's total customer base.[5] This merger has raised many questions by consumer advocates and representatives from the burgeoning and robust technology sector.

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[3] Lake, William, Chief Media Bureau - FCC. "E: Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 14-57." Letter to Kathryn Zachem, Steven Teplitz and Catherine Bohigian:. 22 Dec. 2014. MS. N.p.

[4] Office of the Governor of the State of New York. Governor Cuomo Announces Review of Comcast, Time Warner Merger Underway. 2014. Web. 27 January, 2015. www.governor.ny.gov/news/governor-cuomo-announces-review-comcast-time-warner-merger-underway.

[5] Fung, Brian. How New York could put a stop to Comcast's merger with Time Warner Cable. Washington Post. 19 June, 2014. www.washingtonpost.com/blogs/the-switch/wp/2014/06/19/how-new-york-could-put-a-stop-to-comcasts-merger-with-time-warner-cable/.

These questions range from concerns about consumer cost increases to negative implications for broadband access, to the impact of the horizontal and vertical control the new Comcast would have. On December 11, 2014, the New York City Public Advocate convened a public hearing on this issue, and heard specifically about many of those concerns. Notwithstanding what appear to be very real and significant possible impacts for New York City, the City lacks any say in the merger, a right that – until very recently – the City had the authority to exercise.

Pursuant to Title VI of the Communications Act (47 U.S.C. §522(10)), the City is a franchising authority and is authorized to grant non-exclusive cable franchises. On September 16, 1998, the City entered into a franchising agreement with Time Warner. In Section 11 of the agreement, Restrictions Against Assignment and Other Transfers, the City included robust language to protect its interests in the case of any change in control of Time Warner. Under Section 11.2, Transfer of Control or Stock:

> "no change in Control of the Company, the System, or the franchise granted herein shall occur after the Closing, by act of the Company, by act of any Person holding Control of the Company, the System, or the franchise granted herein, by operation of law or otherwise, without the prior written consent of the City."

In this provision, the City reserved the right to accept, hear and/or grant petitions or other written requests for the Transfer of Control of the franchise from interested parties. The City's approval applied to any event that would result in a change of control, regardless of the form in which the change was effectuated (stocks, bonds, debt instruments). Section 11.4 granted the City the power to schedule public hearings on any request to transfer ownership, conduct comprehensive audits and to inquire into "all other matters the City deems relevant in evaluating the petition."

The terms of the franchise agreement expired on September 16, 2008. In Section 13 of the renewed franchise agreement, signed in 2008 (the "Renewed Franchise Agreement"), any change to the ownership or control structure of the Franchisee is subject to City approval, unless it is effectuated by the exchange of publicly traded shares. The new language stands in stark contrast to the comprehensive protections in the 1998 Franchise Agreement. Moreover, the new language removed the City's ability to protect its interest given the likelihood that any sale of TWC would entail a "stock for stock" transaction.

## NEGATIVE IMPLICATIONS OF THE RENEWED FRANCHISE AGREEMENT

### A. MONOPOLIES

The proposed exchange of publicly traded shares merger between TWC and Comcast, valued at over $45 billion, is directly impacted by the changed language in the Renewed Franchise Agreement. Due to the elimination of language requiring City approval, the City loses any power to review, leverage, and approve any change in the "Cable System assets or the Franchise." As TWC and Comcast's current services reach roughly 2,623,000 million customers in New York State alone,[6] the acquisition of TWC by Comcast would have a direct impact on consumers, particularly in low-income and marginalized communities. The proposed transaction would make Comcast the largest, cable, broadband and media content provider in New York, resulting in Comcast wielding de facto monopolistic power over access, content, and pricing, both in the cable industry and with consumers.

After the merger, Comcast will have a significant advantage over the cable networks it negotiates with to distribute their content. As a result, the competitiveness of the cable market will be reduced due to Comcast's stronghold on access to consumers. For consumers, an approved merger could effectively eradicate any affordable internet service for consumers, as Comcast's virtual monopoly would provide little incentive to lower prices. Consequently, lower and middle income families, as well as small businesses will be increasingly burdened.

### B. UNEQUAL PROVISION OF SERVICES

Internet access is not a luxury but a necessity for accessing opportunities for education, employment and communication. For example, government agencies at the local, state, and federal levels are bringing more programs and services online to enhance service and customer interaction. A Pew Research Survey from 2010 determined that 82 percent of internet users (representing 61 percent of all American adults) looked for information or completed a transaction on a government website.[7] However, nearly one-third of New York City residents do not have access to broadband internet service, due largely to a failure to invest in broadband infrastructure.

Increased costs would bar low-income individuals and families that already struggle to pay for internet service. Comcast will argue that their current program, Internet Essentials is the solution to this problem. Internet Essentials offers low-income consumers service at $9.95 a month and

[6] Office of the Governor of the State of New York. Governor Cuomo Announces Review of Comcast, Time Warner Merger Underway. 2014. Web. 27 January, 2015. www.governor.ny.gov/news/governor-cuomo-announces-review-comcast-time-warner-merger-underway.

[7] Smith, Aaron. The Internet gives citizens new paths to government services and information. Pew Research Center. 27 January, 2015. 27 April, 2010. www.pewInternet.org/2010/04/27/government-online/.

was started in 2011 as a condition of Comcast's merger with NBCUniversal. There are three problems with Internet Essentials. First, in order to enroll in Internet Essentials, the consumer cannot have subscribed to Comcast Internet Service within the last 90 days. This is a major barrier to affordable service because it forces consumers to go three months with no internet during which time they could be applying to jobs or accessing vital programs and services. The second barrier is that Internet Essentials is separate from Comcast's standard service. It uses a separate website and phone number for enrollment and information increasing the risk that consumers will not be redirected to the program's phone or website if they contact Comcast directly. Finally, the program offers 5 Mbps download speeds and 1 Mbps upload speeds, which according to Slate is only "good enough for basic browsing."[8] While New York City consumers would have access to the Internet Essentials plans, they would still be at a disadvantage with those who can afford higher speed service. Comcast has been accused of using the Internet Essentials program as a public relations tool to seal the merger, instead of providing meaningful access and affordability to City residents.

### C. POOR CUSTOMER SERVICE

The American Customer Satisfaction Index, which is put out quarterly by the University of Michigan's Ross School of Business, determined in 2014 that Comcast and TWC have the lowest customer satisfaction ratings of any internet service provider in the United States.[9] Comcast has not provided information or plans to improve the service and customer experience following the merger.

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[8] Newman, Lily Hay. Comcast's Internet Program for Low-Income Customers Is Getting a Makeover. Slate. 5 August, 2014. 27 January 2015. www.slate.com/blogs/future_tense/2014/08/05/comcast_is_expanding_its_Internet_essentials_program_for_poor_customers.html.

[9] Mosendez, Polly. Comcast and Time Warner Are the Most Hated Companies in America. The Wire. 20 May, 2014. 27 January, 2015. www.thewire.com/technology/2014/05/comcast-and-time-warner-are-the-most-hated-companies-in-america/371295/.

# RECOMMENDATIONS TO ENSURE THE NEW COMCAST SERVES ALL NEW YORKERS

The merger in its current state does not include any commitments to develop infrastructure and does not guarantee universal and affordable broadband access to all New Yorkers in their franchise territory. In order to ensure that the merger will promote the public interest, the New York City Public Advocate recommends the following requirements as fundamental to the satisfaction of any agreement, including the proposed acquisition of TWC by Comcast. It is critical to note that due to changes in the Franchise Agreement, unfortunately, New York City is unable to directly leverage these concessions and instead, must advocate through the PSC.

### A. UNIVERSAL BROADBAND

- Universal broadband for all New York City consumers;
- Free access, training and equipment for all public housing residents of the New York City Housing Authority, all senior, youth and community centers, and all domestic violence and homeless shelters; and
- Free Wi-Fi service in all New York City Parks.

### B. MAINTAIN AND EXPAND ACCESS TO QUALITY BROADBAND SERVICES

- Strengthen the Internet Essentials program to give access to more individuals and families and ensure that the quality of the service is equal in price, speed, and service received by customers purchasing TWC's "Everyday Low Price service;"
- Change the "Everyday Low Price" program to provide at least 10 Mbps download speeds and 1 Mbps upload speeds for $9.95 a month;
- Remove connection fees in communities that do not have existing cable services; and
- Provide internet service at discounted prices to small businesses, as well as investing in 10 small business incubator buildings.

### C. COMMITMENT TO INFRASTRUCTURE, JOB CREATION, INCREASED TRANSPARENCY, AND CUSTOMER SERVICE

- Upgrade New York City's Hybrid Fiber-Coax plant to provide at least gigabit network speeds, which will provide faster service for consumers;
- Establish fund to train New Yorkers for broadband, infrastructure, and technology jobs;
- Reduce the number of consumer complaints by creating at least one customer service center in each borough, along with developing a Comcast call center in New York and hiring more customer service staff in New York;

- Establish a service quality plan that would result in a penalty paid to consumers if objective criteria fail to be satisfied, similar to Verizon's Performance Improvement Plan; and
- Increased transparency in regards to price increases and service changes.

## RECOMMENDATIONS TO ENSURE NEW YORK CITY PROTECTS ITS LONG-TERM INTERESTS

In addition to the requirements to ensure the Comcast/TWC merger serves the interest of all New Yorkers, it is essential that the City regain its power to approve any change in the control in order to protect against the negative implications of the proposed merger. The following recommendations to DOITT and the FCRC would ensure that the City will be able to promote and guard the interests of New York City consumers, businesses, and communities:

### A. RESTORE NEW YORK CITY'S RIGHT TO CONTROL FRANCHISE CHANGES

- A return to the protective and expansive language in the 1998 agreement will best serve the public interest, as the City will regain its power to approve or deny changes of control of a Franchisee, hold public hearings and set conditions that must be satisfied before any merger takes place.

### B. IMMEDIATELY ADOPT 1998 TRANSFER OF FRANCHISE LANGUAGE

- Until a definitive change to the Franchising agreement can be made, we request that DOITT and the FCRC voluntarily adopt the 1998 Transfer of Franchise language in this agreement and in all agreements that will have a substantial impact on the New York City population.

### C. APPLY THE VENDOR INFORMATION EXCHANGE SYSTEMS (VENDEX) REVIEW PROCESS TO FRANCHISE TRANSFERS

- Any mergers or acquisitions must include a Vendor Information Exchange System (VENDEX) review process so that the awarding agency may inquire into the technical and financial resources of the acquiring entity and determine responsibility. The current process subverts VENDEX structure.

- New York City utilizes the VENDEX review process to ensure that a vendor is responsible and has the technical and financial capability to fully perform the requirements of the contract, before awarding any contracts.

- The current process undermines the current VENDEX structure and contravenes the intentions by the Procurement Policy Board and the New York City Charter to ensure responsible and informed decisions by New York City.

## CONCLUSION

After thorough review, the New York City Public Advocate finds that the New York State Public Service Commission, along with the Federal Communications Commission should not approve this merger unless there are commitments to develop infrastructure, guarantee universal and affordable broadband access, and improve customer service. On the local level, a return to the 1998 language mandating a City hearing and approval of prospective mergers plus utilization of the Vendor Information Exchange System process will ensure proposals serve the best interest of New York City residents. These reforms are necessary as we seek to diversify our economy and create the next generation of middle-class jobs in New York City. We must ensure that technology, and specifically internet access is accessible and affordable for all New Yorkers.

## ACKNOWLEDGEMENTS

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