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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 14, 2014

The Honorable Eric Holder
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

1196

The Honorable Thomas Wheeler
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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Dear Attorney General Holder and Chairman Wheeler:

We write to follow up with you regarding the proposed merger of Comcast and Time Warner Cable (TWC). As we explained in our previous letter, we believe this merger presents a number of important competition and public interest concerns. We understand that the Department of Justice and the Federal Communications Commission are examining all of the issues related to this transaction, including the expansion of Comcast's programming suite and increased market share for both video distribution and broadband services. In undertaking that examination, your agencies should approve the merger only if you find that it will not substantially lessen competition and that it would serve the public interest. If you decide to approve the merger, you should consider what conditions, if any, would be necessary to abate any risk of competitive harm.

Today, however, we wish to call your attention to a specific issue implicated by the merger: its effect on the ability of independent programmers to enter and thrive in the video content market. We have heard extensively from independent programmers and from Comcast about this issue, and we urge you to examine three important questions as you review the transaction: (1) whether Comcast/TWC's combined share of nearly 30 percent of the distribution market would give Comcast the ability to restrict or block entry for independent programmers into the content market; (2) whether Comcast/TWC, with its large suite of cable and broadcast programming and wider distribution, would have the incentive and ability to withhold carriage or discriminate against non-affiliated independent programming; and (3) whether online content distribution serves as a viable alternative to video distribution, and whether Comcast/TWC would have the incentive and ability to block online video in favor of its own programming.

First, we urge you to assess the conditions necessary for an independent programmer to enter the market and reach viable scale. Comcast asserts that the merger will not enable it to restrict entry into the content market because, if it did not carry desirable independent programming, it would risk losing subscribers to competitors. Comcast also says its projected 30 percent share of the nation's video subscribers is not enough to block new entrants because the remaining 70 percent

of the market, which includes other large distributors, offers more than enough opportunities for independent programmers to gain distribution. And Comcast contends that many independent networks have been created without ever being carried on Comcast.

Some independent programmers, however, dispute Comcast's claims. They argue that Comcast/TWC would be a critical distribution partner, without which a new entrant could not attract necessary advertising and investment capital, because (i) even 30 percent of the market is sufficient to block new entry and (ii) Comcast's 30 percent critically includes 16 of the top 20 advertising markets in the country, including both New York and Los Angeles. We hope you will examine these claims and consider whether the transaction threatens to create barriers to entering the video programming market.

Second, we have heard from a number of parties concerned about whether the combined entity would be able to discriminate against independent programmers with which it competes. When it approved the Comcast/NBC Universal merger, the FCC acknowledged the competitive risks posed by a multichannel video programming distributor (MVPD) that owns significant content. Now that Comcast proposes to acquire TWC, independent programmers have been divided over whether the merger increases the potential for Comcast to withhold carriage or discriminate against non-affiliated independent programming. Comcast notes that it carries a total of 160 independent networks across all of its markets and tiers of service, and that many of them support the merger. It also observes, correctly, that carriage decisions require subjective business judgments about what subscribers want to watch, making it difficult to say that any particular carriage decision was designed to suppress competition rather than to provide Comcast's subscribers with desired content. Nevertheless, we urge you to consider whether objective factors about an independent network—such as its ratings, advertising commitments and capital, and Comcast's treatment of its own similarly situated networks—may shed light on carriage decisions. And in general, you should consider whether the merger would alter Comcast/TWC's incentive and ability to carry or block competitive programming.

We have also heard—both in the context of this merger and the pay-television industry generally—about the use of "most favored nation" clauses (MFNs) in program-carriage contracts. MFNs can serve a procompetitive function by assuring lower prices for consumers, but in some cases they may be anticompetitive and foreclose independent programmers' ability to negotiate creative or competitive contracts. We urge you to consider whether certain types of MFNs harm competition and consumers, and whether the merger would aggravate that risk.

Finally, in response to some independent programmers' concerns, Comcast claims that programmers do not need cable distribution because they can reach consumers through online video services. While it is true that MVPDs are facing increasing competition from online content, television viewing is still incredibly significant—more than 100 million television subscribers watch roughly $74 billion in television advertising every year. Many online services cannot serve as a sufficient substitute for real-time television programming, particularly in sports and news. During the Comcast/NBC Universal merger, the FCC recognized that MVPDs offering both video and broadband service have an incentive to interfere with online services competing with revenue generating pay-television. Your agencies should consider whether online video distribution for independent programmers is a viable alternative to cable

distribution. In addition, you should determine whether a combined Comcast/TWC, with an increased share of high-speed broadband subscribers (ranging from 35 percent to 55 percent of the market, by some estimates), would have the incentive and ability to block or discriminate against online video platforms in favor of its own services and content.

Although we have raised several issues related to independent programmers, we wish to emphasize that we do not believe the proposed merger should serve as an opportunity for particular entities to seek favorable carriage decisions, and we therefore take no position about whether any specific programmers should or should not be carried by Comcast/TWC. But the loss of TWC as a significant alternative source of distribution requires a fresh look at the competitive concerns raised by some independent programmers.

Thank you for your attention to these issues, and we look forward to working with you in the future.

Sincerely,

Amy Klobuchar, Chairman
Subcommittee on Antitrust,
Competition Policy and Consumer Rights

Mike Lee, Ranking Member
Subcommittee on Antitrust,
Competition Policy and Consumer Rights