United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 23, 2014

The Honorable William J. Baer
Assistant Attorney General for Antitrust
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

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

Dear Assistant Attorney General Baer and Chairman Wheeler:

As Chairman and Ranking Member of the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, we write today to highlight a few key issues raised in the course of the Committee's hearing on Comcast's proposed acquisition of Time Warner Cable ("TWC"). Since our hearing, Comcast and Charter have announced a related transaction. We will continue to examine these transactions and plan to follow up with additional comments once the FCC record is complete.

The Comcast/TWC transaction has the potential to alter the competitive landscape in markets for products that are very important to consumers. At our Committee's hearing, witnesses voiced concerns that the merger may negatively affect the development of online video distribution, give the combined entity undue market power as a buyer in the market for programming, and increase the combined entity's incentive and ability to restrict access to content by rival multichannel video programming distributors ("MVPDs").

Among the benefits that robust competition offers consumers is innovation, which leads to new products, increased choices, and additional competition. In the video market, one of the most significant new forms of innovation in recent years has been the development of online video distribution. Accordingly, any transaction that has the potential to impede that development merits attention.

The FCC previously has concluded that Comcast, as a provider of broadband and content, has "the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business."[1] Through this transaction, Comcast would increase its share of the market for internet. The new entity would have as much as 50 percent of high-speed broadband customers. In addition, it would, by some estimates, pass more than 60% of homes in America, and in much of that area it would be the only broadband provider that online video distributors have to reach their consumers and the only broadband service consumers have to access online video content. At the Committee's hearing, we heard concerns that, with additional consolidation in the market for internet, it may be more difficult for online video distributors to continue to develop and compete in the video market. For example, Public Knowledge CEO Gene Kimmelman stated: "No new service that requires high speed Internet access [could] hope to achieve the necessary critical mass for success without being able to reach the 50 percent of high speed Internet subscribers controlled by [a post-merger] Comcast." Comcast, in response, argued that it would under no circumstance have control over an online video distributor's ability to get its content on the internet. It stated that the market for interconnection to the internet is "intensively competitive" and that Comcast maintains "over 8,000 free and paid peering arrangements." A key element of any analysis of this merger will be the impact it will have on innovation in the markets for internet and video and, in particular, any impact it may have on the development of online video distribution.

Another area of focus at our hearing was the merger's potential impact on consumer's continued access to a wide array of video content, including independent programming. We heard concerns that additional consolidation among those buyers of video content that have the ability to widely distribute such content may harm the development of new video content. For example, Jamie Bosworth, the CEO of a golf lifestyle channel named Back9Network, stated that upstart networks seeking national distribution need access to millions of homes in top markets in order to create a sustainable stream of revenue from advertising. In his view, only four MVPDs—Comcast, TWC, DirecTV and Dish Network—"have the ability to reach viewers in the top markets that advertisers demand." Because this transaction would eliminate one of those options, Bosworth, as well as Univision, RFDTV, and other independent programmers who are hesitant to weigh in publicly, have expressed concern that independent programmers may have fewer opportunities to develop or thrive. The American Antitrust Institute expressed a similar concern, stating: "The size of a combined Comcast-TWC, coupled with very limited competition in video programming distribution in the U.S., means that rival video programmers could be foreclosed from access to a sizable share of the distribution market."

In response, Comcast stated that it has a strong track-record of carrying independent networks. It further emphasized that it has every incentive to carry successful programming, including that of independent networks. Because this transaction will materially increase the buying power of the largest buyer in the market for programming, it is important for your agencies to carefully assess the impact of this transaction on the ability of viable content providers of all types to obtain distribution of their content.

Finally, at the Committee's hearing, we heard concerns expressed regarding the combined entity's vertical integration and its potential ability to raise the prices it charges its MVPD rivals for "must have" content, including some of the NBC suite of programming and regional sports networks. In markets such as Los Angeles, Dallas, and San Diego, the combined entity would control NBC broadcast stations and regional sports networks previously owned by TWC. In a letter submitted to

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[1] *In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees* (2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf

the Committee, the American Cable Association and the Rural Broadband Association expressed their concern that "[t]he combination of Comcast's programming assets with TWC's regional sports networks will allow the merged entity to exercise greater bargaining power against all MVPDs that carry this programming by bundling more 'must have' programming together." Small cable competitors have stated to the Committee that they believe the combination of Comcast and Time Warner Cable content will give it the incentive and ability to raise its rivals' costs, and thus the cost to their customers. In response, Comcast argued that because its subscriber base does not overlap with that of TWC, this transaction will not change the status quo with respect to its content, including regional sports networks. It stated: "We are not going to have any more power in the L.A. market to negotiate different deals because we also own regional sports nets in Chicago, Philadelphia and the Washington area." Comcast also has pointed to current arbitration requirements with respect to the pricing of regional sports networks, which they contend mitigate any harm that may result from their ownership of that content. This issue merits careful attention and also may have application in the Comcast/Charter transaction in which Comcast will acquire Charter subscribers in existing Comcast and TWC markets.

These are among the key concerns raised at our hearing. Thank you for your attention to these matters, and we looking forward to following up with you regarding this transaction.

Sincerely,

Amy Klobuchar

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

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

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 23, 2014

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Antitrust, Competition and Consumer Rights
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairwoman Klobuchar:

Thank you for your letter regarding the proposed acquisition of Time Warner Cable by Comcast. I appreciate hearing your views and learning of the issues raised during the Subcommittee's hearing in April.

As you note, this is a pending transaction, and the Commission recently established formal comment periods with initial comments and petitions due by August 25, 2014. A copy of your letter will be made a part of the record and taken into consideration.

I assure you that the Commission will continue to conduct an open and transparent process as we review the issues presented by the proposed transaction.

Again, thank you for your views.

Sincerely,

Tom Wheeler

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