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February 4, 2015

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

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

Dear Chairman Wheeler and Assistant Attorney General Baer:

I write in regard to the proposed merger of Comcast and Time Warner Cable (TWC). As you know, the Federal Communications Commission recently restarted the 180-day clock for review of the merger. As former Chairman of the Senate Judiciary Committee and as a current Member of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, I urge you to review the merger carefully, giving full consideration to the issues and objections identified by various parties. As matters currently stand, however, I see no reasonable basis in existing law for the merger not to be approved.

The primary objections to the merger fall into three categories. First, a post-merger Comcast would control approximately 30 percent of the national multichannel video programming distribution (MVPD) market. Second, a post-merger Comcast would control a substantial proportion of the national fixed Internet broadband market, perhaps as high as 65 percent. Third, because Comcast also owns some video programming content (as a result of its 2011 merger with NBCUniversal), a post-merger Comcast may use its increased market share to favor Comcast-affiliated content over non-Comcast-affiliated content, or to withhold Comcast-affiliated content from rival video programming distributors. Although these objections merit serious review, at this time I do not believe that any of them warrants blocking the merger.

As to the first objection, the D.C. Circuit has twice rejected Commission efforts to cap cable providers at 30 percent of the market, finding that the Commission had failed to show that allowing market shares in excess of 30 percent would threaten competition or diversity of programming. Here, Comcast's post-merger market share would be no higher than the limits the D.C. Circuit previously struck down, and essentially equal to Comcast's market share following earlier 2002 and 2006 mergers. Moreover, because Comcast and TWC operate in different geographic markets, there will be no direct competition loss from the merger. No customers will

lose the ability to choose between Comcast and TWC services, because no customers currently have the ability to choose between the two services. Antitrust laws do not provide a basis for blocking mergers that do not reduce competition.

Regarding the second objection, which concerns Comcast's post-merger Internet broadband market share, it is important to take full account of the current broadband marketplace. Current broadband offerings include traditional fixed broadband, as well as non-fixed offerings such as satellite and wireless. In claiming that Comcast will have a near–65 percent post-merger market share, merger opponents exclude these other, non-fixed offerings, and also limit the universe to services with download speeds far in excess of what than the typical customer actually uses. This narrow view of the market overlooks current market conditions and fails to account for the many options today's Internet users have for accessing broadband. In particular, the explosive growth of wireless broadband threatens to upend the entire broadband industry and render traditional fixed broadband far less important. Calculations of Comcast's post-merger Internet broadband market share that include wireless, and that account for the connection speeds most customers actually use, range from 15 to 23 percent.* These figures are not high enough to justify blocking the merger.

The third objection both attributes too much programming power to Comcast and misses important market dynamics. Through its ownership of NBCUniversal, Comcast controls approximately 12 percent of the video programming content market. The proposed merger would increase its market share by only 0.25 percent. Neither the combined post-merger share, nor the increase caused by the merger, is large enough to raise significant concerns.

The fear that Comcast may use its enhanced post-merger share of the video programming distribution market or of the Internet broadband market to favor NBCUniversal content over non-Comcast-affiliated content is also likely overstated. Degrading Internet delivery speeds for non-affiliated content would upset customers and cause many to consider switching services. In today's expanding broadband market, increasing numbers of customers have increasing numbers of options—including wireless—to meet their Internet needs. It would defy business sense for Comcast to risk losing substantial numbers of customers in order to promote its own content over other content. Dissatisfied customers can, and will, go elsewhere.

Nor is it likely that Comcast will withhold Comcast-affiliated content from competing video programming distributors. The success of NBCUniversal programming depends on having a broad viewer base. Withholding content reduces viewership and thus advertising revenue. A 12.25 percent share of the video programming content market is simply not large enough for anticompetitive behavior to pay dividends.

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* Last week, the Commission voted 3-2 to redefine "broadband" to require connection speeds of 25 Mbps, a 525 percent increase over the prior threshold of 4 Mbps. I agree with the two dissenting Commissioners that this move was both unnecessary and unwise and that the threshold the majority selected was unreasonably excessive because it far exceeds the connection speeds the typical customer needs or uses. Under the Commission's prior 4 Mbps threshold (which was in effect until last week), Comcast will have approximately 15 percent of the combined—fixed and wireless—post-merger Internet broadband market. Under a higher 10 Mbps threshold, which still exceeds typical customer needs, Comcast will have approximately 23 percent of the combined post-merger broadband market.

And even without access to Comcast's Internet broadband or video programming distribution network, content providers would have access to more than enough subscribers to succeed. Seventy percent of the MVPD market will be non-Comcast, as will 75 percent or more of the Internet broadband market. Content providers will have access to many tens of millions of non-Comcast subscribers, an exceedingly broad and diverse viewer base.

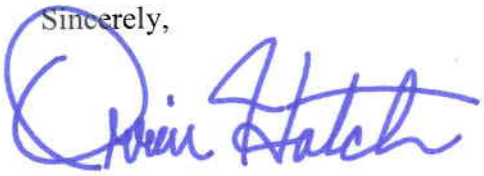
The above analysis, in my view, establishes that the proposed Comcast-TWC merger does not raise sufficient competitive concerns to warrant blocking the merger. If Comcast and TWC have any competitive overlaps, those overlaps can be resolved through divestitures and other conditions. If new facts come to light that affect the above analysis, any resulting concerns can also likely be resolved through appropriate conditions. In sum, as I evaluate the proposed merger, and the objections lodged thereto, there appears to be no reasonable basis in existing law to prevent the merger.

Before closing, I would like to raise one additional issue of concern related to the merger. President Obama recently announced his strong support for so-called net neutrality regulations. I have long opposed such regulations on the grounds that they are unnecessary and would hinder the continued growth of the Internet and the technology sector.

I am deeply concerned about the potential of the government to use the merger review process to extract unnecessary net neutrality concessions or to strong-arm companies seeking (or considering) merger review into supporting net neutrality regulations. It would, in my view, be highly inappropriate for either agency to use the threat of challenge or delay to extract concessions unrelated to actual anticompetitive effects. I urge the Commission and the Department of Justice to abide their statutory mandates and to not turn the merger review process into an opportunity to impose a controversial, unwise, and ultimately unnecessary regulatory agenda upon merging parties.

Thank you for your attention to this matter.

Sincerely,



Orrin G. Hatch
United States Senate Committee on the Judiciary
Member, Subcommittee on Antitrust,
Competition Policy and Consumer Rights