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# United States Senate

WASHINGTON, DC 20510-2309

November 30, 2010

The Honorable Christine A. Varney
Assistant Attorney General for Antitrust
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Assistant Secretary Varney, Chairman Genachowski, and Commissioners:

On November 22, I wrote to ask Assistant Secretary Varney to investigate Comcast Corporation's compliance with federal antitrust laws in light of its recent announcement designating the future positions of 43 separate individuals in the management structure of NBC Universal—a company whose acquisition has yet to be approved by either the Department of Justice or the Federal Communications Commission. Yesterday, it was revealed that Comcast had imposed a new, recurring fee on Level 3 Communications, the company slated to become the primary "backbone" delivery provider for Netflix's online movie streaming. This appears to be in exchange for Comcast simply permitting Netflix and other online video services to stream to Comcast's 17 million Internet service subscribers—who have already paid for Comcast's Internet service.

Regardless of whether these fees are novel to the industry (which historically has opaque commercial arrangements), these practices are highly problematic. These fees will likely raise prices for Netflix and other online video streaming service subscribers. More critically, they threaten the existence of an open Internet and threaten one of Comcast's biggest rivals in the video delivery to the home market. Comcast's flagrant willingness to violate net neutrality and engage in apparently anticompetitive conduct—in the midst of two simultaneous federal merger inquiries, no less—trumpets the need to stop the merger of Comcast and NBC Universal, or at a bare minimum, impose stringent conditions upon it to protect net neutrality and competition in the Internet and media marketplace.

Comcast's actions are an affront to the FCC's Internet Policy principles adopted in 2005 as well as those proposed in October 2009. In 2005, under Chairman Kevin Martin, the FCC endorsed the principle that "consumers are entitled to access the lawful Internet content of their choice." Federal Communications Commission, *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 F.C.C.R. 14986, 14988 (2005). In 2009, the FCC proposed an additional, general rule that providers of broadband Internet access service "must treat lawful content, applications, and services in a nondiscriminatory manner." Federal Communications Commission, *In re Preserving the Open Internet and Broadband Industry Practices*, 24 F.C.C.R. 13064, 13104 (2009).

If Comcast can pick and choose which of its competitors can deliver competing content and services to its subscribers—and at what price— consumers will suffer and independent content will decline. Only Comcast will gain. I can think of no more compelling instance in recent memory that justifies the urgent need for the Commission to strengthen, expand, and enforce the open Internet principles it has forcefully set out to date. There is also no more compelling evidence supporting rejection of the proposed merger, or at a minimum, adoption of tough net neutrality conditions upon it.

Comcast's actions also raise serious antitrust concerns that in and of themselves merit investigation by the Department of Justice. The latest FCC survey from 2006 revealed Comcast to be the dominant company in the national market for home purchase of video programming—with nearly a quarter of all subscribers. Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 F.C.C.R. 542, 689, Table B-3 (2009). However, that position has been threatened by the 2007 launch of Netflix's video streaming service, and the proliferation of other online streaming services from Apple TV, Amazon.com, and Hulu, among others. As of 2009, Comcast's video-on-demand service had 23.6 million users who generated an estimated $1 billion in annual revenues. *See* Brian L. Roberts, Chairman & CEO of Comcast, *Letter to Comcast Shareholders* (March 16, 2010), at 4, http://www.comcast.com/2009annualreview/pdf/CMS_Letter_to_shareholders.pdf; Trefis, *Comcast's On-Demand Video Service Worth More than 30x Blockbuster*, Feb. 23, 2010, http://www.trefis.com/articles/11750/comcasts-on-demand-service-worth-more-than-30x-blockbuster/2010-02-23. That same year, Netflix reported 12.3 million users and $1.7 billion in revenue—although only a portion of this amount can be attributed to its online streaming service. Netflix, Inc., Annual Report (Form 10-K), at 26 (Feb. 19, 2010).

Comcast's interest in impairing Netflix is evident to industry observers. In a recent market comparison of Comcast's video-on-demand service to Netflix's DVD rental and online streaming service, the financial firm Trefis (dubbed the "next top stock model" by the *New York Times*) found that "Netflix's pricing is much more attractive than Comcast's," and concluded, in stark terms, that "[c]able providers like Comcast could benefit from a scenario in which Netflix is forced to raise its subscription price." *See* Trefis, *Netflix Fights Comcast for Video Rental Supremacy*, July 5, 2010, https://www.trefis.com/company?article=18269.

This is the first step in that process—and it may violate the letter and spirit of the Sherman Act's prohibition on certain exclusionary unilateral conduct. *See* 15 U.S.C. § 2. Despite its nascent competitors, Comcast may hold a monopolistic share of various regional video delivery to the home markets in its "footprint", that is, in those markets where it is the incumbent cable television provider. In these markets, Comcast may enjoy market shares for pay-TV services estimated to be as high as 70%. *See* Katy Bachman, Opposition to NBCU-Comcast Intensifies, ADWEEK, Aug. 4, 2010, http://www.adweek.com/aw/content_display/news/politics/e3i266ae09ea03f402719e20c828224882e. Given that, Comcast's new fee on Level 3 Communications may constitute willful, anticompetitive maintenance of that monopoly share in violation of the Sherman Act. *See generally Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). I urge you to investigate this conduct.

More importantly, I urge you to consider seriously blocking this merger, both to protect competition on the Internet and in the media, and to protect the public's interest in preserving a free and open Internet. If this is for some reason impossible, I urge you to impose strict conditions upon the merger to prevent further anticompetitive and Internet "closing" conduct from Comcast. I am enclosing a copy of my submission to the Commission, including the conditions I have proposed, in connection with this merger. I believe that, if necessary, these will go a long way in addressing my concerns.

Thank you for your prompt attention to this matter. I look forward to your response.

Sincerely,

Al Franken
United States Senator