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United States Senate
WASHINGTON, DC 20510-2309

May 7, 2012

Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Sharis Pozen
Acting Assistant Attorney General for Antitrust
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairman Genachowski, Commissioners, and Acting Assistant Attorney General Pozen,

On February 28, 2012, Comcast Corporation and NBCUniversal Media, LLC (hereinafter Comcast) submitted its first annual report regarding compliance with its merger order.[1] As you know, I opposed Comcast's acquisition of NBCUniversal, and last August, I sent a letter to both of your agencies urging you to proactively monitor, investigate, and enforce the conditions you adopted in the merger order. It has now been more than a year since the merger was approved, and a number of complaints regarding Comcast's compliance with the merger conditions have been filed with the Federal Communications Commission (FCC). Several of these have languished before the Commission for extended periods of time. As I wrote last August, I am concerned that if the Commission fails to address conditions disputes in a timely manner, it will only incentivize Comcast to challenge future conditions and delay resolution of disputes through a protracted complaint process. It will also dissuade other companies from seeking relief before the Commission, if they believe Comcast has violated a condition. This ultimately undermines the conditions that were imposed by your agencies to promote the public interest and to foster competition, and it raises serious questions about whether it is appropriate to rely on behavioral conditions to prevent anticompetitive conduct.

Last June, Bloomberg filed a complaint with the FCC alleging that Comcast had violated the merger order by refusing to place Bloomberg's financial news channel in the same "neighborhood" as other cable news networks.[2] I am pleased that the Commission finally acted on this complaint last week, but I remain disappointed that this dispute languished before the Commission for more than ten months. The Commission was merely being asked to interpret language that it adopted based on circumstances that remained largely unchanged since the date the merger order was approved. It should not have taken the Commission more than ten months to issue an order on this complaint. Such a delay is unacceptable if the merger conditions are to be effectively enforced. I have heard from several independent channels that they fear retaliation if they file a complaint against Comcast. The longer the Commission waits to resolve program carriage disputes like this one, as well as the pending dispute involving the Tennis Channel, the

[1] Comcast Corporation and NBCUniversal Media, LLC, *Annual Report of Compliance With Transaction and Conditions*, MB Docket 10-56 (filed February 28, 2012).
[2] Complaint of Bloomberg L.P., *In re Bloomberg L.P., Complaint v. Comcast Cable Communications, LLC, Defendant,* MB Docket No. 11-104 (filed June 13, 2011).

more it signals to independent companies that they cannot rely on the Commission to provide timely relief from discriminatory conduct. This is particularly true given that Comcast has already indicated it plans to appeal the Commission's decision. I urge the Commission to continue to monitor this issue and ensure that Comcast promptly complies with the carriage requirements laid out in the order. I hope the delay in this instance was an anomaly, and I urge the Commission to act swiftly if Comcast files an appeal to this order.

In addition to the Bloomberg dispute, it has come to my attention that at least one online video distributor (OVDs) has encountered problems negotiating programming deals with Comcast. Your agencies spent considerable time analyzing the OVD market, and you adopted conditions to protect the future development of online competition. For example, the Commission expressly found that "as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies."[3] And it went on to note that "[i]f an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming. Comcast has strong incentives not to let this occur."[4] To address these concerns, you adopted a number of conditions, including a condition that requires Comcast to make comparable programming available to an OVD at comparable terms once an OVD has entered into a distribution arrangement with one of Comcast's peers.[5] On October 10, 2011 Project Concord, Inc., an OVD, notified the FCC that it is seeking enforcement of this peer programming condition through the arbitration process that your agencies established in the merger order.[6] Comcast alleged that it needs to have a full, unredacted copy of the underlying peer agreement before it can provide its programming, and that several executive management and business persons in its company must have access to these peer agreements before it can comply with the condition.[7] It requested that the FCC clarify this particular condition.

I fear that this is yet another tactic to delay Comcast's compliance with the terms of the merger order. I urge the Commission to closely consider the serious concerns that were outlined by CBS, News Corporation, Sony Pictures, Time Warner, Viacom, and Disney in a February 27th letter to the FCC and in their more detailed filing on April 3rd. These content companies stated that Comcast's request is "overbroad and will harm competition in the evolving video

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[3] *In re Applications of Comcast Corporation, General Electric Company, and NBCUniversal, Inc., for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, 4263 (2011) [hereinafter Merger Order]; *see also* Competitive Impact Statement, *United States v. Comcast Corp.*, No. 1:11-cv-00106 at 11 (D.D.C. Jan. 18, 2011) [hereinafter Competitive Impact Statement] ("Because Comcast is the country's largest ISP, an inherent conflict exists between Comcast's provision of broadband services to its customers, who may use this service to view video programming provided by OVDs, and its desire to continue to sell them MVPD services.").

[4] Merger Order, *supra* note 4, at 4273; *see also* Competitive Impact Statement, *supra* note 4, at 11 ("Growth of OVDs also will depend, in part, on their ability to acquire programming from content producers.").

[5] Merger Order, *supra* note 4, at 4273; *see also* Final Judgment, *United States v. Comcast Corp.*, No. 1:11-cv-00106 at 11 (D.D.C. September 1, 2011) [hereinafter Final Judgment] ("At the request of any Qualified OVD, Defendants shall provide Comparable Video Programming to the Qualified OVD on terms that are Economically Equivalent to the price, terms, and conditions on which the Qualified OVD receives Video Programming from a Peer.").

[6] Letter from Monica S. Desai, Counsel for Patton Boggs LLP, to William T. Lake, Chief, Media Bureau, *FCC,* MB Docket No. 10-56 (filed Feb. 23, 2012).

[7] Letter from David Murray, Counsel for Comcast Corporation and NBCUniversal Media, Inc., to William T. Lake, Chief, Media Bureau, *FCC,* MB Docket No. 10-56 (filed Feb. 17, 2012).

marketplace generally."[8] The companies go on to explain that "[e]xpansive disclosure of the type anticipated in the Request would have a chilling effect on future online distribution deals, and skew the competitive landscape by allowing one entity to possess detailed nonpublic information about its competitors' business dealings—which would appear to be counter to relevant competition laws."[9] In my view, this dispute has far-reaching implications for the entire OVD market. If your agencies fail to act quickly to resolve this issue, it will dissuade other OVDs from seeking Comcast's programming under the terms of the order, and it will send a message to Comcast that it may set unreasonable requirements on OVDs as a condition of receiving its content.

The Media Bureau's decision to open this proceeding up for public comment, while seemingly well intentioned, may further delay resolution of this important issue and will likely impact future OVD negotiations for content. I am concerned that these sorts of delays always inure to the benefit of Comcast and give Comcast further incentive to challenge any aspect of its compliance with the merger order. These types of challenges should be resolved by the FCC as soon as possible, and if necessary, DOJ should take affirmative steps to advance the competitive objectives of the final judgment.[10] Comcast should not be permitted to relitigate every term of the merger order. This will dissuade other companies from filing complaints with the Commission, and it will incentivize Comcast to continue to delay implementation of the order in the hopes that it will be able to renegotiate better terms.

Smaller companies, independent programmers, and online distributors are generally not equipped to engage in protracted litigation with a company like Comcast, nor are they willing to risk potential retaliation if they complain to the FCC. This dynamic already tilts the odds in favor of Comcast. If you fail to take prompt decisive action on pending complaints, you send the message to other potential complainants that they cannot expect to receive help from your agencies if they encounter anticompetitive behavior from Comcast.

I am particularly concerned that the conditions that have been contested by Comcast were the conditions your agencies specifically designed to reduce Comcast's ability to leverage its market power to hinder competition. These are exactly the conditions your agencies should be the most vigilant about monitoring and enforcing, rather than the voluntary commitments made by Comcast. Your agencies both recognized that the Internet and OVDs hold the greatest promise for becoming future competitors to cable services. Over the last year and a half since you finalized the conditions of this, we have seen an exponential growth in consumers' use of laptops, tablet computers, and smart phones to watch TV and video. This is a very promising development. But OVDs can only become meaningful and effective competitors to cable companies if they are able to obtain Comcast's content in a timely manner and at reasonable and non-discriminatory rates. It is essential that you monitor Comcast's conduct with regard to this

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[8] Joint Letter from Content Providers (CBS Corp., News Corp., Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., The Walt Disney Co.) to William T. Lake, Chief, Media Bureau, MB Docket No. 10-56 (filed Feb. 27, 2012).

[9] *Id.*

[10] *See* Final Judgment, *supra* note 6, at 14-15 (The court specifically notes that the FCC's arbitration process does not prohibit the Department of Justice from seeking a court order to either compel compliance by Comcast or punish noncompliance.).

industry to verify that Comcast is not acting in an anticompetitive manner to thwart or stifle the growth of these small OVDs.

Finally, I am very concerned about Comcast's recent announcement that it will exempt its own Xfinity "on demand" service for the Xbox 360 from counting against its data cap for broadband service. Your agencies were keenly aware that Comcast would have every incentive to violate net neutrality principles by prioritizing or advantaging its cable and video on demand service to the detriment of its OVD competitors. To address this potential threat, DOJ adopted a condition that states: "If Comcast offers consumers Internet Access Service under a package that includes caps, tiers, metering, or other usage-based pricing, it shall not measure, count, or otherwise treat Defendants' affiliated network traffic differently from unaffiliated network traffic."[11] It went on to state that: "Comcast shall not prioritize Defendants' Video Programming or other content over other Persons' Video Programming or other content."[12] I recognize that Comcast contends they are not in violation of this condition because video content is being delivered over Comcast's private IP network, rather than the Internet. I am not yet prepared to say that this appears to be a technical violation of the Commission's merger order or DOJ's final judgment, but I urge both of your agencies to investigate this conduct immediately. Even if this does not amount to a technical violation, it certainly raises serious questions about how Comcast will favor its own content and services to the detriment of its competitors. Comcast's actions will almost certainly drive consumers to Comcast's Xfinity Streampix, rather other Internet video streaming services, which I fear will thwart your agencies' efforts to create an open and level playing field for current and future competitors of Comcast.

I was very dismayed to hear that Sony recently announced that it is reconsidering launching an Internet TV service because it is concerned that Comcast will impose data caps on its competitors' programming.[13] The conditions your agencies adopted were designed to foster innovation and encourage competitors like Sony to enter the online video market. If Comcast is able to impose restrictive data caps to the detriment of its competitors, I fear other companies like Sony will choose not to compete with Comcast. This development is particularly worrying given recent press reports that Hulu is considering requiring consumers to subscribe to cable or satellite service in order to watch video on its site. I was very concerned about the future of Hulu during your review of this merger, because I wanted to make sure consumers had real alternatives to cable and satellite television post the merger. These announcements by Sony and Hulu only further demonstrate the need for your agencies to carefully review how Comcast is advantaging or prioritizing its own content to the detriment of online video competitors.

As you consider these issues in the context of Comcast's compliance with the merger order, I also urge you to consider Comcast's behavior during your investigation of its spectrum deal and joint marketing agreements with Verizon. Given Comcast's questionable compliance record to date and its penchant for challenging all conditions-related complaints, I am doubtful

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[11] *Id.* at 23; *see also* Merger Order, *supra* note 4, at 4275 ("Any Comcast or Comcast-NBCU broadband Internet access service offering that involves caps, tiers, metering, or other usage-based pricing shall not treat affiliated network traffic differently from unaffiliated network traffic.").

[12] Final Judgment, *supra* note 6, at 23. *See also* Merger Order, *supra* note 4, at 4275 ("Neither Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.").

[13] *See* Andrew Wallenstein, *Sony virtual MSO play could hinge on Comcast*, VARIETY, April 30, 2012, *available at* http://www.variety.com/article/VR1118053341?refCatId=14

that behavioral conditions can be structured with sufficient precision to prevent future competitive harm. I hope your agencies will be mindful of this when assessing the potential competition implications of Verizon and Comcast's decision to form a joint venture and jointly market each others' products and services. I am particularly concerned that this type of coordination and collaboration will only further harm consumers and will throttle competition in the online video space, and I urge you to closely examine these issues in the course of your investigations.

I urge your agencies to thoroughly review these issues and act quickly and vigorously to address any violations of your respective orders. If you determine that Comcast is in violation of your orders, I recommend you seriously consider substantial fines and penalties, as well as an extension of time for the relevant condition to dissuade Comcast from engaging in this type of behavior going forward. I also urge your agencies to work together to develop a faster, more comprehensive strategy for monitoring and enforcing behavioral conditions on this and other mergers. If your agencies are going to approve large telecommunications and media mergers based in part on the conditions that are imposed on the transaction, the public needs to be assured that your agencies are carefully monitoring and reviewing these transactions to ensure corporations are complying with the obligations you imposed.

Thank you for your prompt attention to this matter, and I look forward to your response and a detailed report on how your agencies will monitor and enforce conditions for this and other mergers.

Sincerely,

Al Franken
United States Senator