AL FRANKEN
MINNESOTA

SUITE
SH-309
202-224-5641

United States Senate

WASHINGTON, DC 20510-2309

April 16, 2014

Reed Hastings
Chief Executive Officer
Netflix, Inc.
100 Winchester Circle
Los Gatos, CA 95032

Dear Mr. Hastings,

I am deeply concerned that Comcast's proposed acquisition of Time Warner Cable would give Comcast both the power and the incentive to act as a gatekeeper on the Internet, raising costs and limiting choices for consumers. As a popular provider of Internet content that competes directly with Comcast, Netflix is uniquely positioned to gauge the risks posed by this deal. I therefore write to invite you or your designee to share Netflix's views, particularly as they pertain to certain testimony provided by Comcast during the Senate Judiciary Committee's April 9 hearing on the proposed acquisition.

Because it acquired NBCUniversal in 2011, Comcast now holds an extensive programming portfolio that includes content produced by NBC, MSNBC, CNBC, Telemundo, USA, Bravo, and several other networks. There can be no serious doubt that Comcast has an incentive to favor its own content over unaffiliated content, like that produced and distributed by Netflix. Simply put, Comcast benefits financially when consumers watch Comcast-owned content instead of rivals' content.

Nor can there be any serious doubt that Comcast has the power necessary to act on those incentives. The corporation currently controls about a quarter of the national broadband market, and it has a significantly higher degree of control in many of the local markets in which it operates. In many areas, consumers have no viable alternative to Comcast or Time Warner Cable for their high-speed Internet service. If Comcast is permitted to acquire Time Warner Cable, its size will increase dramatically, as it will obtain a presence in 19 of the top 20 markets and will control broadband access for nearly two out of every five American households.

My concern is that Comcast will be able to use its clout in the broadband distribution market to obtain an anticompetitive advantage in the content market. Comcast can achieve this by blocking, degrading, raising costs for, or otherwise interfering with unaffiliated content that relies on Comcast's distribution network to reach consumers. I am not alone in my concerns. When Comcast acquired NBCUniversal, the FCC noted the unprecedented nature of Comcast's vertical integration and concluded that it would "increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections[.]" Those concerns certainly were appropriate when Comcast acquired NBCUniversal a few years ago; they are heightened significantly now that Comcast seeks to acquire Time Warner Cable.

Comcast's recent interconnection arrangement with Netflix seems to illustrate my point. My understanding is that Comcast's consumers and the press documented problems streaming Netflix videos over Comcast's broadband networks and that Netflix ultimately had to pay Comcast an undisclosed sum to resolve the issue. If incidents like this become the norm – as I fear is more likely if Comcast is allowed to acquire Time Warner Cable – it would have serious implications for consumers. For one thing, the increased costs not only will create a barrier to entry for new content producers, they also will be passed along to consumers. For another, if Comcast is permitted to throttle Internet traffic, it will be able to undermine consumers' viewing options, steering them from competitors' offerings to its own.

In a competitive marketplace, consumers would not tolerate this: they would switch to a competitor that offered better prices, service, or both. But Comcast and Time Warner Cable do not operate in competitive markets. Indeed, you have written that "[s]ome big ISPs are extracting a toll because they can – they effectively control access to millions of consumers and are willing to sacrifice the interests of their own customers to press Netflix and others to pay" and that "[t]he big ISPs can make these demands – driving up costs and prices for everyone else – because of their market position."

However, when asked about interconnection and open Internet issues during the Judiciary Committee's recent hearing on the Comcast-Time Warner Cable deal, Comcast suggested that we should not be concerned. With respect to the Comcast-Netflix arrangement, Comcast said that it "was Netflix's idea" and that the deal arose out of "[t]he Netflix desire to pay us directly and cut out the middleman." Comcast went on to assure the Committee that "the customers are the winners here." I am not convinced.

In light of these concerns, I respectfully request that you or your designee answer the following questions: First, will Comcast's acquisition of Time Warner Cable increase Comcast's ability to extract payments from non-affiliated entities as a condition of access to Comcast's broadband Internet consumers? If so, please explain how and why, noting also any consequences for consumers. Second, do you agree with Comcast's testimony describing interconnection arrangements generally and Comcast's new interconnection arrangement with Netflix in particular? If not, please explain. Finally, Comcast argues that it operates in a highly competitive marketplace in which consumers have ample choices for high speed Internet service and therefore will not tolerate slow streaming speeds or artificially high costs. What do you make of that argument?

I appreciate your attention to this matter. Please submit your responses to my General Counsel, Joshua Riley, at joshua_riley@judiciary-dem.senate.gov.

Sincerely,

Al Franken

Al Franken
United States Senator