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December 14, 2010

Ms. Christine Varney
Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Varney:

I write to express my firm opposition to the proposed merger of Comcast Corporation ("Comcast"), the nation's largest distributor of video services, and NBC Universal ("NBCU"), one of the nation's largest producers of video content. I strongly urge you to deny approval for this transaction.

As you know, the Clayton Act provides that "[n]o person . . . shall acquire . . . another person . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] This standard prohibits mergers where the anticompetitive effects are probable, even if they are not certain.[2] As your Division has recognized, it "reflect[s] the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[3] Especially in an age of entrenched corporate power, the Clayton Act reflects the profound truth that it is easier to stop monopolistic forces before they start.

For eight years under the previous administration, this clear congressional mandate was ignored, to the detriment of consumers. As President Obama noted during his campaign, "the [Bush] Administration [had] what may be the weakest record of antitrust enforcement of any administration in the last half century,"[4] and as you have so

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[1] 15 U.S.C. § 18.

[2] *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964).

[3] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* 4 (2010).

[4] Senator Barack Obama, Remarks for the American Antitrust Institute (Sept. 26, 2007), available at http://www.antitrustinstitute.org/search/node/obama%20presidential.

admirably stated, "[t]here was a high cost to standing aside. We must change course and take a new tack."[5] I appreciate that, under your leadership, there is a new commitment to consumers and to antitrust enforcement at the Department of Justice. I hope that you will continue this demonstrated commitment, enforcing the Clayton Act to deny approval for the merger of Comcast and NBCU.

Although robust antitrust enforcement is important across the board, it is particularly crucial in the media context. In ordinary markets, monopolies harm consumers by inflating prices. In the market for media, monopolies not only harm consumers by increasing prices but also by restricting the free flow of ideas, thereby striking at the very foundation of our democratic society. As the courts have recognized, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare."[6] Robust enforcement of the Clayton Act is particularly critical here, given that the Comcast-NBCU merger occurs in the media context.

A Comcast NBCU merger would have the likely effect of substantially lessening competition in three distinct markets: (1) the market for video programming, (2) the market for traditional distribution through cable, and (3) the emerging market for online distribution.

First, the merger would lessen competition in the market for video programming by giving NBCU a leg up on the competition. Comcast currently carries content from a small number of independent programmers, in addition to NBCU. If the merger were approved, Comcast would have an incentive to favor NBCU over other the content companies in its carriage negotiations. It would be able to charge independent producers higher fees, offer them less desirable channel placement, and impose greater restraints on their ability to use innovative third-party distribution mechanisms for their content. If they were refused carriage on reasonable terms by their largest buyer, small and independent producers would find it more difficult to stay afloat, and all American citizens—whether Comcast subscribers or not—would no longer have the benefit of their programming.

Second, the merger would harm competition in the market for traditional distribution through cable, satellite, and telephone lines because Comcast would have an incentive to increase prices for, or even withhold, access to NBCU content for its competitors. This could be particularly destructive to consumers, as competing providers

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[5] Assistant Attorney General Christine Varney, Statement at the Center for American Progress (May 11, 2009).

[6] *Scripps-Howard Radio v. Fed. Commc'n Comm'n*, 189 F.2d 677, 683 (D.C. Cir. 1951) (quoting *Assoc. Press v. Untied States*, 326 U.S. 1, 20 (1945)).

would likely pass price increases on to consumers. For this reason, the Federal Communication Commission's former Chief Economist, William Rogerson, found that the anticompetitive effects in the market for traditional distribution would cause consumer rates to rise by $2.4 billion upon consummation of the merger.[7]

Third, the merger would damage the emerging market for online delivery of content. Not only is Comcast our nation's the largest cable company, but it is also our nation's largest internet delivery service. As such, it would have every incentive to direct bandwidth to NBCU online programming, especially in the absence of strong net neutrality regulations. Furthermore, because Comcast's cable division would profit financially from preventing the rise of free online video, a Comcast-NBCU conglomerate would likely be hesitant to allow consumers to access NBCU content for free online. Comcast demonstrated its intent to dominate the online market just last month, when it demanded that a Netflix subsidiary pay exorbitant fees in order to reach Comcast internet subscribers.

I understand that certain Commission regulations exist that purport to ameliorate some of these concerns, but these rules have been grossly insufficient to mitigate public harms of vertically integrated cable companies in the past. Furthermore, the proposed Comcast-NBCU merger poses substantial new risks not seen in past transactions, because of both its size and the dynamic evolution of distribution models for video content. These risks go above and beyond even the hypothetical ameliorative potential of current Commission and statutory protections. Were the merger to be approved, I have little doubt that Comcast-NBCU would retain hundreds of attorneys and lobbyists to exploit the gaps and loopholes in current regulations.

In fact, Comcast has already demonstrated that it intends to proceed down the road of insider influence, and in the last two election cycles, it has doubled its campaign contributions. This savvy appears to be paying off, as, according to recent media reports, ninety-one of the ninety-nine House members and three of the five senators who recently wrote the Commission in support of the merger received donations from Comcast in the last election cycle.[8] There is no reason to assume that, if this merger is approved, Comcast-NBC will not have even more political clout in the future.

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[7] Dr. William P. Rogerson, *An Estimate of the Consumer Harm that will Result from the Comcast-NBCU Transaction* 5 (2010).

[8] Jonathan D. Salant and Todd Shields, Comcast Campaign Giving Jumps by Half as U.S. Considers NBC Universal Deal, Bloomberg L.P., October 19, 2010, available at http://www.bloomberg.com/news/2010-10-19/comcast-campaign-giving-jumps-by-half-as-u-s-considers-nbc-universal-deal.html.

Because this merger would lessen competition in the three separate markets, and because it would put our media landscape in grave danger, I urge you to deny approval.

Sincerely,

Bernard Sanders

Senator Bernard Sanders