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December 13, 2017

The Honorable Makan Delrahim
Assistant Attorney General, Antitrust Division
The United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Delrahim,

As you know, the Antitrust Division of the Justice Department brought an enforcement action against Comcast's acquisition of NBC Universal (NBCU) in 2011, and the conditions that govern this acquisition are set to expire in September 2018.¹ I write to you out of serious concern that, particularly in the absence of the conditions set forth in the consent decree, this acquisition poses a serious threat to fair competition.

Over the past six years, the Comcast-NBCU acquisition has been roundly criticized by experts who argue that it has caused anticompetitive harm despite the conditions that were imposed on it.² This has been evidenced in part by the numerous complaints that have been filed based on violations of these conditions.³ In light of the continued anticompetitive threat posed by this acquisition, I urge you to open an investigation into these complaints with the goal of determining whether the acquisition can be allowed to stand without the conditions that currently govern it.

Moreover, while you are in the process of conducting such an investigation, I urge you to petition the U.S. District Court for the District of Columbia to leave the original conditions on the Comcast-NBCU acquisition in place. As you know, the District Court has the power to extend or modify these conditions.⁴ Given your responsibilities as head of the Antitrust Division to enforce our nation's antitrust laws, it is incumbent on you to continue to ensure that Comcast's acquisition of NBCU does not undermine free and fair competition.

It is particularly important to preserve the anti-retaliation provisions of these conditions, which require that Comcast and NBCU "shall not discriminate against, retaliate against, or punish" certain types of competitors. The continued enforcement of these conditions is critically important while complaints are still pending against Comcast, since your office will not be able to elicit full cooperation with any investigation into the anticompetitive consequences of the acquisition unless Comcast and NBCU's competitors are assured that they will be protected from retaliation for assisting your

¹ *United States v. Comcast Corp.*, No. 1:11-CV-00106, 2011 WL 5402137, at 17 (D.D.C. Sept. 1, 2011).

² See Susan P. Crawford, *The Communications Crisis in America*, 5 HARV. L. & POL'Y REV. 245, 264 (2011); see also John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 THE ANTITRUST BULLETIN 4, 979 (2012).

³ See William Rogerson, *Vertical Mergers in the Video Programming and Distribution Industry: The Case of Comcast-NBCU*, THE CENTER FOR THE STUDY OF INDUSTRIAL ORGANIZATION AT NORTHWESTERN UNIVERSITY (Dec. 2012), <https://www.econstor.eu/bitstream/10419/92480/1/776848046.pdf>.

⁴ See *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

investigation. Additionally, you should ask the District Court to expand these conditions to cover competitors who would have been protected from retaliation under conditions overseen by the Federal Communications Commission, given that those conditions are currently scheduled to sunset on January 20, 2018.

If your investigation determines that the Comcast–NBCU acquisition will produce anticompetitive effects, even if the merger conditions are retained, you may need to consider separating Comcast and NBCU in order to fully restore competition. As a member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, I have previously raised concerns regarding whether the conditions imposed on Comcast and NBCU have achieved their intended effects of promoting competition and protecting consumers and, more broadly, whether these types of conditions can actually work.⁵ A growing body of evidence suggests that such conditions are insufficient to avoid anticompetitive effects and that structural remedies—either the dissolution of past mergers or forced divestitures of particular assets—are needed.⁶

The Justice Department’s recent decision to block the acquisition of Time Warner by AT&T suggests that the Department has come to recognize the advantage of structural remedies over behavioral remedies. In fact, the very same principles that the Department invoked to justify its suit to prevent the AT&T–Time Warner acquisition suggest that the Comcast–NBCU acquisition must be investigated further. Moreover, given that the FCC is on the brink of reversing its Open Internet Order, it is all the more imperative for the Justice Department to ensure fair competition in this space. Without rules to protect consumers and govern how internet providers treat their competitors, Comcast–NBCU will be free to discriminate against online video distributors, which is exactly what DOJ is trying to avoid and is precisely what the merger conditions are meant to address.

In summary, I call on you to open an investigation into the anticompetitive threat consumers will face if Comcast–NBCU is allowed to continue as a merged entity after its merger conditions expire and, in the meantime, to request the District Court to extend the Comcast–NBCU merger conditions to ensure that our antitrust laws are uniformly applied and the interests of American consumers are protected.

Thank you for your attention on this matter.

Sincerely,



Richard Blumenthal
United States Senator

⁵ Elizabeth Gurdus, *Sen. Blumenthal: AT&T-Time Warner merger needs 'rigorous scrutiny'*, CNBC (Oct. 27, 2016, 12:23 PM), <https://www.cnbc.com/2016/10/27/sen-blumenthal-att-time-warner-merger-needs-rigorous-scrutiny.html>.

⁶ See, e.g., Kwoka and Moss, *supra* note 2.