Computer & Communications Industry Association
Tech Advocacy Since 1972

June 9, 2014

The Honorable Al Franken
United States Senate
309 Hart Senate Office Building
Washington, D.C. 20510-2309

Dear Senator Franken:

I appreciate your invitation to comment on the proposed Comcast/Time Warner Cable merger. For over 40 years, the Computer & Communications Industry Association (CCIA) has been a vigorous advocate of competition and open markets. During that time, the organization has been involved in nearly every landmark industry antitrust case, including the government investigations of IBM, AT&T, Microsoft and Intel. Because our member companies come from varied parts of the technology industry ecosystem, we take a holistic view of the competitive effects of mergers, such as the one before us now. The views expressed in this letter reflect an aggregate of our members' feedback coupled with nearly a half-century of competition policy experience. It is often difficult for individual companies to voice their concerns in competition investigations for fear of harming current or prospective business relationships. As such, our views should not be presumed to express the position of any individual member company of CCIA.

Allowing this merger would exacerbate a number of competitive issues in a market that is already highly concentrated. Acute competitive problems already exist in the last-mile broadband access market and not only will this merger lead to even less competition, but it would make competitive entry less likely in the future.

Furthermore, the merged company would be better able to impede innovation that threatens to erode its legacy cable business model. During Comcast's last controversial merger with NBCUniversal, the Department of Justice noted that Comcast made more than twice as much revenue from its legacy cable business than it did from selling high-speed Internet access.[1] Not surprisingly, the Department of Justice also found that this gives Comcast the "incentive to encumber…the development of nascent distribution technologies and the business models that underlie them."[2] This merger would only give Comcast/Time Warner Cable even more ability to successfully harm competition and innovation in the greater Internet ecosystem. Specifically, we are concerned that the merger will

[1] Complaint, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266164.pdf, at ¶15.
[2] *Id*. at ¶54.

increase the quantity and enhance the effectiveness of the anticompetitive tools at the merged company's disposal.

First, the merger would enhance Comcast/Time Warner Cable's bottleneck market power over last-mile Internet access, thus allowing it to more easily discriminate against online competitors that require transit over the merged company's network to access Comcast/Time Warner Cable's customers. Second, adding Time Warner Cable's own significant catalogue of must-have local video content to Comcast's own catalogue of video offerings would create an even larger video portfolio — including 52% of regional sports and news networks[3] and several of the most prominent cable channels such as USA Network, Bravo and NBC Sports — would increase the incentives for Comcast/Time Warner Cable to withhold its own marquee content from competitors, including potential competitors seeking to build new fiber networks. It would also make a withholding strategy more effective. Therefore, the merged entity would have both the increased incentive and ability to:

- degrade the quality of service or raise the operating costs of over-the-top content competitors, such as Netflix and Amazon Prime, by charging inflated interconnection prices to rivals that threaten the merged entity's legacy cable revenue;

- withhold its increased catalogue of video programming from MVPD or over-the-top video rivals, thus blunting their competitive impact;

- raise entry barriers for competitive last-mile broadband network providers by denying them access to or inflating the costs for marquee video content owned by Comcast/Time Warner Cable;

- use its increased buyer power, on account of being five times larger than its nearest cable rival, to ensure that potential rivals, whether they be cable companies, satellite TV providers or over-the-top video distributors, get less favorable terms and conditions than Comcast/Time Warner Cable does, thus further harming prospects for competition in this space going forward;[4] and

- restrict competition and innovation in peripheral markets, such as the market for TV set-top boxes and other devices that connect to the network.[5]

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[3] Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable,"* Consumer Federation of America (Apr. 2014), *available at* http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf, at 8.

[4] Allen Grunes, *Prepared Statement for House Judiciary Hearing on the Proposed Merger Between Comcast and Time Warner Cable* (May 2014), *available at* http://judiciary.house.gov/_cache/files/665684a1-49d4-4aca-9bc1-79ae9ad387b9/grunes-testimony.pdf, at 2.

[5] According to Gene Kimmelman, the merger would give Comcast enormous leverage to "slow the pace and dictate the direction of equipment, device, and service innovation to lock in maximum revenue for Comcast's own infrastructure and business model." Gene Kimmelman, *Testimony before the Senate Judiciary Committee on Examining the*

As an organization that represents companies in many sectors of the Internet ecosystem, CCIA is concerned that this merger poses a significant threat to innovation and competition in many parts of the marketplace, including the layer that most users are familiar with: the websites, platforms and online services that the vast majority of Americans use everyday.

This "top layer" of the Internet is a fantastically innovative marketplace that has grown exponentially in the last 20 years. In fact, the OECD has estimated that the economic impact of the Internet will be larger than the effect of electricity, the steam engine or railroads.[6] This innovation has been fueled by the Internet's competitive dynamic, where anyone anywhere can start up a website, online platform or online service and produce something new that challenges the status quo and incumbent players.

Unfortunately, aggressive vertical integration by Internet access providers has created a poisonous dynamic, where now Internet access providers have a greater incentive to harm and distort open competition on the Internet. Comcast and Time Warner Cable are no exceptions. Not only are they providing Internet access and traditional cable service, they have grown, both through mergers and organically, to control large swaths of must-have video programming. They have also expanded into providing web-based services, such as home security and cloud gaming.[7] Because they provide transit to both their offerings (or affiliated offerings) and the products and services of others (including their competitors), they have both the incentive and ability to distort open competition on the Internet.

With limited (and in many cases no) local competition[8] and nearly 50 percent of the high-speed last-mile Internet connections in the United States,[9] a merged Comcast/Time Warner Cable would be in a better position to discriminate against online websites and services that threaten its legacy cable business, or any other markets that Comcast provides service in. Furthermore, as Netflix's CEO has pointed out, Comcast already subjects content providers to an "arbitrary tax"[10] to access Comcast's

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Comcast-Time Warner Cable Merger and the Impact on Consumers (Apr. 2014), *available at* http://www.judiciary.senate.gov/download/04-09-14-kimmelman-testimony, at 2.

[6] OECD, *Broadband and the Economy* (2007), *available at* http://www.oecd.org/internet/ieconomy/40781696.pdf, at 9.

[7] In 2012, Comcast struck a deal with Microsoft to exempt Xbox Live traffic from data caps (although that deal has since been canceled because of the ensuing controversy), and recent reports indicate that Comcast is close to signing a deal with EA to directly stream popular video games directly to Comcast's users. *See* Andrew Feinburg, *Comcast to suspend data caps after Xbox controversy*, THE HILL, May 17, 2012, *available at* http://thehill.com/policy/technology/228099-comcast-to-suspend-data-cap-after-xbox-controversy; Liana Baker & Malathi Nayak, *Exclusive – Comcast nears deal to stream EA games to TVs: sources*, REUTERS, May 2, 2014, *available at* http://www.reuters.com/article/2014/05/02/us-comcast-gaming-exclusive-idUSBREA410V920140502

[8] "More than three-quarters of households have no choice other than their local cable monopoly for high-speed, high-capacity Internet." *See Cable consolidation in America: Turn it off*, THE ECONOMIST, Mar. 15, 2014, *available at* http://www.economist.com/news/leaders/21598997-american-regulators-should-block-comcasts-proposed-deal-time-warner-cable-turn-it.

[9] *See* Grunes, *supra* note 3, at 5; Kimmelman, *supra* note 4, at 2; Cooper, *supra* note 2, at.6.

[10] Kate Tummarello, *Netflix slams Comcast deal as 'arbitrary tax'*, THE HILL, Mar. 20, 2014, *available at* http://thehill.com/policy/technology/228099-comcast-to-suspend-data-cap-after-xbox-controversy.

customers. Phrased differently, Comcast charges websites and online services extra money so Comcast's own customers can get access to the content they want. In a truly competitive market, a firm would welcome complementary services that actually *increase* demand for the underlying product, in this case broadband access.

Although Comcast has argued that the Internet access market is competitive, a cursory glance at the few markets that have experienced a true competitive challenger are telling. In the markets that Google Fiber has entered, or planned to enter, the competitive responses by incumbents have been astounding. After Google Fiber entered Kansas City, Time Warner Cable doubled its top available speed, upgraded the connection speeds of many of its current customers between 30 percent and 50 percent, and cut prices across the board.[11] Kansas also saw the largest year-over-year increase in Internet connection speeds with an 86 percent increase from the fourth quarter of 2011 to the fourth quarter of 2012.[12] In Austin, Texas, where Google announced plans to build a gigabit network, AT&T responded by announcing plans to build its own gigabit network[13] and Time Warner Cable announced that it would offer free Wifi access to its customers throughout the city.[14] And in Provo, Utah, another market that Google Fiber has recently entered, Comcast has responded by significantly increasing the speed of its residential offerings[15] while at the same time lowering prices.[16]

Although projects like Google Fiber can introduce competition to a few targeted cities, they offer little hope of providing a true nationwide competitive challenger to the incumbent cable industry any time soon. Furthermore, as noted above, a consolidated Comcast/Time Warner Cable will have an increased ability and greater incentive to raise the entry barriers to new broadband challengers, including Fiber to the Home (FTTH) providers, and enterprise/business broadband providers.

Comcast and Time Warner Cable argue that because they do not compete directly for cable subscribers, then this merger fails to raise competition concerns. However, not only is this argument lacking, it fails the common sense test. Under that logic, Comcast could acquire the dominant cable provider in every market in the United States, as cable companies rarely compete with one another. In fact, if the FCC and DOJ approve this merger and Comcast/Time Warner Cable are allowed to create a cable company five times bigger than its next cable competitor, how could the agencies effectively argue against a merger of Comcast and the next largest cable companies in the United States a few years down the road when Comcast's next biggest cable competitors would only be a

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[11] Karl Bode, *Google Fiber Gets Time Warner Cable to Compete on Price*, DSLREPORTS, Jan. 13, 2013, *available at* http://www.dslreports.com/shownews/Google-Fiber-Gets-Time-Warner-Cable-to-Compete-on-Price-122968.

[12] David Talbot, *Google Fiber's Ripple Effect*, MIT TECH. REV., Apr. 26, 2013, *available at* http://www.technologyreview.com/news/514176/google-fibers-ripple-effect/.

[13] Dan Graziano, AT&*T to follow Google Fiber, build its own 1Gbps network in Austin*, BGR, Apr. 9, 2013, *available at* http://bgr.com/2013/04/09/google-fiber-competition-att-426432/.

[14] Dara Kerr, *Google Fiber prompts Time Warner Cable to offer free Austin Wi-Fi*, CNET, Apr. 25, 2013, *available at* http://www.cnet.com/news/google-fiber-prompts-time-warner-to-offer-free-austin-wi-fi/.

[15] Jeff Baumgartner, *Comcast to Light Up 250-Meg Broadband Service in Provo*, MULTICHANNEL NEWS, Aug. 28, 2013, *available at* http://www.multichannel.com/distribution/comcast-light-250-meg-broadband-service-provo/145182.

[16] Karl Bode, *Comcast Fights Google Fiber in Provo With New Pricing*, DSLREPORTS, Aug. 15 2013, *available at* http://www.dslreports.com/shownews/Comcast-Fights-Google-Fiber-in-Provo-With-New-Pricing-125390.

fraction of the size of Comcast/Time Warner Cable? Approving this merger would be a green light to further consolidation in this space.

The final point I want to make is about the very purpose of the antitrust statutes themselves. In its wisdom, Congress enacted the Clayton Act, the law governing merger approval, in 1914, fully recognizing that predicting the future course of markets and competition was uncertain, to say the least. With this in mind, the Clayton Act prohibits mergers where "the effect of such acquisition *may be* substantially to lessen competition" [emphasis supplied]. From this language came the incipiency standard that is described in the DOJ/FTC Horizontal merger guidelines:

> *Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect 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.*[17]

Legally, the statute is clear. If regulators were to conclude that the Comcast/Time Warner Cable merger does not have a chance of substantially lessening competition, then it is hard to imagine a real world merger that would. Therefore, regulators should block this merger, not only for the good of innovation, the Internet industry, and of consumers; but also for the sanctity of antitrust law itself.

We commend your leadership in this area and urge all members of Congress who truly believe in the importance of open competitive markets and in protecting their constituents from future price gouging to join in opposing this merger.

Sincerely,

Ed Black
President & CEO
Computer & Communications Industry Association

[17] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, Aug. 19, 2010, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.