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The Honorable Makan Delrahim
Assistant Attorney General, Antitrust Division
The U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Assistant Attorney General Delrahim:

The American Cable Association (ACA), which represents more than 700 smaller video and broadband providers, shares the concern of the Department of Justice (DOJ) that video and broadband distribution firms that are vertically integrated with video programmers can cause substantial competitive harm.[1] We, therefore, are heartened that you have notified Comcast-NBCUniversal (NBCU) on August 14th that the DOJ will continue monitoring its activities now that the remedial conditions in the 2011 Consent Decree[2] and the order of the Federal Communications Commissions (FCC)[3] have expired. However, the vertically integrated Comcast-NBCU poses a much greater threat to competition in markets across the country than the AT&T-Time Warner combination (AT&T-TW) that was just consummated, especially because Comcast-NBCU has a combination of cable systems, an NBCU Owned and Operated station, and a Regional Sports Network in seven markets – up from six in 2011. Further, Comcast-NBCU has shown a willingness to harm rivals, even while being subject to the 2011 DOJ and FCC conditions. In light of these concerns, which also have been expressed by members of Congress and a diverse array of stakeholders, the Antitrust Division should immediately open an investigation into the firm's behavior. ACA and its members will cooperate fully to assist in the investigation, including by providing information about Comcast-NBCU's practices.

[1] ACA and its members, including RCN and Cable ONE supported the DOJ's efforts to oppose AT&T's acquisition of Time Warner, including by testifying in the hearing and filing *amici* briefs with the U.S. District Court and the US Court of Appeals. ACA supported the DOJ, as well as the Federal Communications Commission, in opposing Comcast's acquisition of NBCUniversal in 2011.

[2] *United States v. Comcast Corp.*, No. 1:11-CV-00106, 201 WL 5402137, at 17 (D.D.C. Sept. 1, 2011).

[3] *Applications of Comcast Corporation., General Electric Company, NBC Universal, Inc,.for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum, Opinion and Order, 26 FCC Rcd 4238 (2011).

Comcast-NBCU Poses A Greater Risk of Harm Than AT&T-Time Warner

ACA agrees with the DOJ's argument before the U.S. District Court in the AT&T-TW case that when a single firm owns both video distribution and programming assets, a major competitive harm that arises is that the vertically integrated firm will have both the incentive and ability to disadvantage rival distributors by raising the prices it charges these rivals for programming.[4] This harms consumers because a share of these price increases are passed through to them. Furthermore, when its rivals are forced to raise their prices, this allows the vertically integrated distributor to raise its own prices which further harms consumers.

Unfortunately, the court did not agree with the DOJ[5] and permitted AT&T-DirecTV to acquire Time Warner's (TW's) programming assets, creating a major vertically integrated firm that poses a significant threat to competition. If there is any saving grace, at least AT&T committed after DOJ filed its complaint to abide by a binding commercial arbitration requirement to resolve program access disputes that is similar to the now-expired arbitration requirement originally imposed in the Comcast-NBCU transaction.

ACA agrees with the DOJ that the court reached the wrong decision in AT&T-TW, but nonetheless, for two primary reasons Comcast-NBCU poses a much greater threat to competition than AT&T-TW.[6] First, Comcast-NBCU's ability to raise programming prices in local markets is unmatched by any similar problem created by the AT&T-TW combination. Unlike Time Warner, Comcast-NBCU owns significant must-have local programming, including 11 NBC local television stations and seven NBC Regional Sports Networks, and unlike AT&T, Comcast is the dominant multichannel video programming distributor in many of these local markets with market shares above 60 percent.

Second, Comcast-NBCU offers bundles of video/broadband/telephone throughout its entire footprint, while AT&T-TW is only able to offer a complete bundle of services where AT&T has a wireline presence. This means that Comcast-NBCU is likely to earn significantly higher average profit margins on switching customers than AT&T will, which in turn implies that Comcast-NBCU has dramatically increased leverage over programming prices compared to that of AT&T-TW.[7]

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[4] Although not an argument that DOJ made to the courts, ACA believes Comcast also can cause harm to rival programmers.

[5] In deciding not to block the AT&T-TW merger, the court considered the fact that AT&T-TW had made a unilateral commitment to follow a binding arbitration requirement to settle program access disputes. The court, for instance, found convincing evidence offered by AT&T-TW that Comcast-NBCU had not been able to raise programming prices while the binding arbitration requirement had been in effect. Thus, the court's opinion leaves intact the proposition that an effective binding arbitration requirement is necessary to control the additional market power created when a large video distributor attempts to acquire significant programming assets.

[6] In the appendix to this document, we attach a paper that discusses the critical factors for analyzing competitive harm in a vertical combination and then analyzes the amount of competitive harm caused each by Comcast-NBCU and by AT&T's acquisition of TW's programming assets by comparing the magnitude of these three factors for the two major types of programming that MVPDs distribute to their customers: national (advertiser supported) cable networks, and the signals of local TV broadcast stations and Regional Sports Networks.

[7] In addition to these two primary reasons, unlike with regard to AT&T's acquisition of TW, Comcast-NBCU's incentives to harm rivals stemming from its vertical combination are not diminished by other factors. First, Comcast-

In sum, given DOJ's concern with the AT&T-TW combination, it has, based on these facts alone, good cause to investigate Comcast-NBCU. However, Comcast-NBCU's incentive to cause harm is not just based on economic theory – Comcast has engaged in specific behavior that has undermined competition while it's been subjected to the now-expired conditions.

Comcast-NBCU Has Demonstrated A Willingness to Harm Rivals, Even While Being Subject to DOJ and FCC Conditions

ACA expects – and there is every reason for DOJ to expect -- Comcast-NBCU to act on its natural incentives and use its capabilities to harm rivals, unless the government somehow, either through structural or behavioral remedies, deals with them. Comcast-NBCU, in fact, took many opportunities to exercise its market power even though the DOJ and FCC conditions were in effect, supposedly limiting Comcast-NBCU's behavior. For instance, Comcast-NBCU used its deep pockets to engage in delaying tactics that forestalled compliance with the condition that it carry Bloomberg TV. Comcast also refused to offer standalone broadband Internet access service as the FCC condition required. And, of course, we do not even know how many times Comcast's rivals had to threaten to utilize the arbitration or some other condition to get Comcast-NBCU to limit to some degree its natural proclivity to harm rivals.[8] At least, with conditions in place, some of these abuses could be addressed.[9]

NBCU's incentive to disadvantage rival online pay television providers, such as Sling, is not diminished because Comcast is not a leading national wireless provider, unlike AT&T, and therefore would not benefit from increased usage of these virtual distributors. Second, unlike TW, NBCU relies on a much larger stable of networks for most of its profits, and so it is would be less willing to partner with online video distributors that wish to offer "skinny bundles" than TW, which relies only on a small number of networks.

[8] While the National Cable Television Cooperative (NCTC) has perceived the risks and costs of baseball-style arbitration – with its many flaws – to outweigh any potential benefits that may result from the arbitration, the NCTC has had modest success in threatening to use the arbitration provision to get Comcast-NBCU to concede on certain terms and conditions. See *Federal Communications Commission Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, 32 FCC Rcd 6654 (2017), Comments of the American Cable Association, MB Docket No. 17-214, at 10 (Oct. 10, 2017) ("NCTC has informed ACA that in the last negotiation, Comcast-NBCU pressed very hard for inclusion of a minimum penetration requirement with no lifeline exclusion and only relented at the last minute when this became a final sticking point and NCTC, acting as a bargaining agent for its members, threatened to ask for commercial arbitration if Comcast-NBCU would not relent in its demand.").

[9] We also note that flaws in the conditions' design diminished their effectiveness. For instance, the process permitted Comcast to appeal an arbitrator's decision to the full FCC, delaying a final ruling and driving up the costs for aggrieved parties. The online video distributor Project Concord encountered this problem and had to concede defeat. Further, the process forces an aggrieved party to make a final offer without sufficient information about the market, and once the party makes a final offer, it would be locked into the process and could not exit without a final decision or Comcast's approval. In fact, because of the many flaws in the process, some aggrieved parties like Lieberman Broadcasting and beIN Sports relied on the FCC's also flawed program carriage rules, and not the FCC's conditions, to address Comcast-NBCU's behavior. Liberman Broadcasting has a long pending program access complaint before the Commission now, and beIN's carriage complaint was recently dismissed by the Commission. Additionally, aggrieved parties chose not to use any conditions or regulations to resolve a dispute with Comcast (*e.g.*, the YES Network could not resolve its dispute with Comcast-NBCU for more than a year, which ended up benefiting Comcast-NBCU's Regional Sports Network – the SNY Network).

Now, however, without any conditions, Comcast-NBCU can act with impunity, and DOJ should expect this to happen.[10] For example, Comcast-NBCU may already be wielding a new weapon against its rivals – Hulu. We have heard from ACA members that they fear that Comcast-NBCU may restrict, if it is not already restricting, their ability to access Hulu and make it available to their customers as an alternative to their cable offerings. This is especially troubling because their customers increasingly seek over-the-top options to prime offerings. As you noted in your recent Senate testimony, "Hulu could be a competitor to the cable business, and it's one that we will examine carefully to see if they might take any conduct that would harm its ability to compete within their market."

When it was subject to the 2011 conditions, Comcast-NBCU at least thought twice about engaging in anticompetitive acts. Without a leash, it can engage in a much wider range of bad behavior and, if it gets caught, merely use its deep pockets to play out the clock or, at worst, ask for forgiveness. Rivals operating in such an environment and their customers that want choice have much to fear.

Conclusion: An Investigation by the Antitrust Division is Warranted

In 2011, the DOJ and FCC recognized that the combination of programming and distribution assets within Comcast-NBCU created such serious competitive problems that the transaction could only be approved with robust remedies. Since that time, as demonstrated herein, Comcast-NBCU's dominant position in the market has not lessened, and in fact, it is even greater – and the 2011 remedies are no longer in effect. As a result, Comcast-NBCU is unleashed, and consumer and rivals are bound to suffer harm.

While monitoring by DOJ is certainly a step in the right direction, such a passive approach is unlikely to be effective against a sophisticated, giant firm like Comcast-NBCU. And, smaller rivals in particular will have great difficulty in trying to recover from any harms that Comcast-NBCU inflicts while the monitoring is in process. Moreover, mere monitoring may not provide sufficient safeguards for rivals who may have information to share with the DOJ regarding the practices of Comcast. For those reasons, more active engagement by DOJ is warranted.

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[10] For a variety of reasons, smaller MVPDs view the FCC's program access rules as ineffective, except where the act of the vertically-integrated firm is so blatant and egregious. First, for purposes of evaluating price discrimination complaints, the FCC has adopted the position that quantity discounts of any size should not be viewed as discriminatory. This means that a smaller MVPD cannot win a price discrimination complaint against a vertically integrated provider by showing that a larger MVPD has received a lower price for the same programming no matter how extreme the price difference. Instead it must show that an MVPD no larger than itself has received a lower price for the same programming. In particular, since Comcast is the second-largest MVPD in the United States, program access rules allow Comcast-NBCU to charge higher prices to almost all of its rivals than it charges to itself. Second, to the extent that the internal transfer price that a firm charges itself for programming is simply an accounting charge that can be arbitrarily set without any real consequences, Comcast-NBCU can raise prices to all rivals and still satisfy the price discrimination prohibition at no real cost to itself simply by raising its own internal transfer price. Third, the provision contains no "standstill" requirement, which would protect an MVPD from subscriber losses while the dispute is being adjudicated. Fourth, NCTC has no right to file a program access complaint on behalf of a group of its member MVPDs.

By opening a formal investigation, the DOJ will demonstrate seriousness of purpose and give it the ability to collect sufficient information to determine whether Comcast-NBC is acting anticompetitively. It also will be a sign to rivals that the DOJ is serious about hearing their experiences with Comcast-NBCU and will preserve the confidentiality of those communications. ACA urges the DOJ to take this logical next step, and we and our members are prepared to discuss this more fully with you.

Finally, ACA is not alone in raising concerns that Comcast-NBCU will harm consumer welfare and asking the DOJ to initiate an investigation. Last December, Senator Blumenthal called on you to open such an investigation and to petition the U.S. District Court to maintain the 2011 conditions.[11] Former FCC Commissioner Mignon Clyburn later joined with Sen. Richard Blumenthal of Connecticut to again express these concerns.[12] The consumer organization, Public Knowledge, also wrote you, echoing the Senator's concerns and his request for an investigation.[13] More recently, groups for other parts of the political spectrum, such as Americans for Limited Government[14] and the National Grange,[15] have publicly announced their concerns about Comcast-NBCU's anticompetitive conduct and calling for you to intervene. This wideranging concern attests to the grave harm that Comcast-NBCU can inflict on consumers and rivals and should give you additional reason to engage and investigate.

Thank you for your attention on this matter.

Sincerely,

Matthew M. Polka
President and CEO
American Cable Association

[11] Letter from The Honorable Richard Blumenthal, United States Senator, to The Honorable Makan Delrahim, Assistant Attorney General, Antitrust Division (Dec. 13, 2017) available at https://www.blumenthal.senate.gov/imo/media/doc/12.13.17%20Letter%20to%20DOJ%20Antitrust%20re%20Comcast-NBCU.pdf.

[12] "It's Too Soon to Unleash Comcast," Richard Blumenthal and Mignon Clyburn, Bloomberg (Feb. 5, 2018) available at https://www.bloomberg.com/opinion/articles/2018-02-05/it-s-too-soon-to-unleash-comcast.

[13] Letter from John Bergmayer, Senior Counsel, Public Knowledge, to The Honorable Makan Delrahim, Assistant Attorney General, Antitrust Division (Dec. 22, 2017) available at https://www.publicknowledge.org/assets/uploads/blog/PK_Letter_to_Asst_AG_Delrahim_on_Comcast-NBC_Consent_Decree_12-22.pdf.

[14] Letter from Richard M. Manning, President, Americans for Limited Government, to The Honorable Makan Delrahim, Assistant Attorney General, Antitrust Division (Aug. 30, 2018) available at https://dailytorch.com/2018/08/alg-president-rick-manning-pens-letter-to-doj-antitrust-division/.

[15] "Comcast Overlooks Rural American Again, And It's Not Without Consequences," Betsy Huber, President, The National Grange (Aug. 8, 2018) available at https://dailycaller.com/2018/08/08/comcast-overlooks-rural-america/.

APPENDIX

Competitive Harms Created by the Vertical Integration of Video Distribution and Programming:

Comcast/NBCU is Far More a Threat to Consumer Welfare than AT&T/Time Warner

June 12, 2018

By the end of today, we will know the Court's view toward the AT&T/Time Warner (AT&T/TW) combination. Regardless of the case's outcome, this memo demonstrates that the level of competitive harm from programming price increases created by Comcast/NBCU's vertical combination of distribution and programming assets is significantly greater than the competitive harm from programming price increases that would result from the AT&T/TW transaction. Thus, a decision in the AT&T/TW case that the Department of Justice (DOJ) failed to prove that the transaction causes harm cannot be relied upon to imply that Comcast/NBCU does not cause significant harm. Furthermore, to the extent that the Court finds that AT&T/TW would cause harm, the case is clear that the DOJ, the Federal Communications Commission (FCC), and state agencies need to address immediately the greater harm caused by Comcast/NBCU. This is especially important because whereas AT&T/TW unilaterally committed to abide by a binding arbitration agreement if the transaction is approved, Comcast/NBCU will soon not be subject to any binding arbitration conditions. In sum, the DOJ and the FCC should seriously evaluate measures to limit the harm caused by Comcast/NBCU's existing market power. At a minimum, the agencies should not allow Comcast/NBCU to further increase its control over programming assets through purchasing the programming assets of Fox.

1. When a single firm owns both video distribution and programming assets, a major competitive harm that arises is that the vertically integrated firm will have both the incentive and ability to disadvantage rival distributors by raising the prices it charges these rivals for programming. This harms consumers because a share of these price increases are passed through to them. Furthermore, when its rivals are forced to raise their prices, this allows the vertically integrated distributor to raise its own prices, which further harms consumers.

2. The most significant existing vertical combination of distribution and programming assets occurs within Comcast/NBCU, which is the largest cable operator and which owns many key programming assets, including regional sports networks (RSNs) and local TV owned and operated broadcast stations (O&Os). When the DOJ and FCC considered the Comcast/NBCU transaction in 2010-2011, they both recognized that the vertical integration resulting from this transaction threatened to cause significant competitive harm in the form of increased programming prices, and they both imposed binding arbitration conditions on the merged entity designed to limit this harm. However, the conditions were only put in place for an initial period of seven years and have either just expired (in the case of the FCC conditions) or are about to expire (in the case of the DOJ conditions.) This raises the important public policy question of whether or not there is a need to either ensure a commercial arbitration condition is imposed for a longer period or perhaps impose even more forceful actions, such as breaking up the firm.

3. The proposed AT&T/TW transaction, in combining the AT&T/DirecTV distribution assets with TW's programming assets, would create a second major vertically integrated firm if this transaction is approved. The DOJ has taken the position that this transaction threatens serious competitive harm that cannot be sufficiently remedied by conditions and has challenged the transaction in the court. As part of its defense against this challenge, AT&T has unilaterally committed to abide by a binding arbitration requirement if the AT&T/TW transaction is allowed that is very similar to the arbitration requirement originally imposed on the Comcast/NBCU transaction. The court will now decide whether the transaction will be allowed, and if so what conditions, if any, the merged entity will be subject to.

4. The purpose of this memo is to show that the level of competitive harm from programming price increases created by the vertical combination of distribution and programming assets in Comcast/NBCU is significantly greater than the level of competitive harm that would be created by the AT&T/TW transaction. This means that the measures taken to control the competitive harm created by Comcast/NBCU should be at least as strong as any measures taken to control the competitive harm created by the proposed AT&T/TW transaction.

5. There are two major types of programming that Multichannel Video Programming Distributors (MVPDs, which include cable and satellite providers) distribute to their customers, distinguished by whether the programming is distributed nationally or regionally.

   (i) national (advertiser supported) cable networks

   (ii) the signals of local TV broadcast stations and RSNs

6. This memo will compare the level of competitive harm caused by Comcast/NBCU and the AT&T/TW transaction to each of these major groups of programming.

7. Vertical integration allows a firm to increase programming prices to a rival MVPD because its bargaining leverage over programming increases. Its bargaining leverage increases to the extent that its own profits will rise if it withholds programming from a rival because a material number of the rival's customers will switch to the vertically integrated firm's MVPD. Three factors will increase the profitability of withholding programming and thus result in more bargaining leverage and greater competitive harm. These are:

   (i) How important the programming is to consumers or how "must have" it is, which determines the number of consumers that will leave the rival if programming is withheld.

   (ii) The market share of the vertically integrated distributor, which determines the share of departing customers that will switch to the vertically integrated distributor.

   (iii) The profit that the vertically integrated firm earns on each new customer.

8. This memo will compare the amount of competitive harm caused by different instances of vertical integration by comparing the magnitude of these three factors.

9. Analysis for National Cable Networks:

- Based on prime time ratings, the bundles of national cable networks sold by Comcast/NBCU and TW appear to be very similar in popularity.[1] In addition, the national shares of MVPD customers of Comcast/NBCU and AT&T are very similar.[2] Thus, based on factors (i) and (ii) the competitive harms created by Comcast/NBCU and the AT&T/TW transaction are likely very similar.

- However, it is very likely that the profit margin that Comcast/NBCU earns on switching customers is significantly higher than the profit margin earned by AT&T. Although the two firms likely earn relatively similar profits on MVPD service, the key difference is that any customer switching to Comcast MVPD service can also purchase broadband and telephone service from Comcast. This is not often the case for AT&T. AT&T is only capable of offering broadband and telephone service within the limited area that AT&T provides wireline U-verse service. Because many consumers prefer to purchase a bundle of MVPD/broadband/telephone service from a single provider, it is likely that many customers induced to switch to a new MVPD service will also switch and purchase the entire bundle of all three services from the new provider if the provider is capable of offering these services. The profit margin that a firm earns on a customer purchasing all three services is of course considerably larger than the profit margin a firm earns on a customer purchasing only video service. Because a much greater share of switching customers will purchase the entire bundle of all three services from Comcast/NBCU than from a merged AT&T/TW, this means that Comcast/NBCU will earn a significantly higher average profit margin on switching customers than will a merged AT&T/TW. Thus, based on factor (iii), the competitive harm created by Comcast/NBCU is significantly greater than that competitive harm created by the AT&T/TW transaction.

- Since factors (i) and (ii) are of equal magnitude for both firms and factor (iii) is much more significant for Comcast/NBCU than for the AT&T/TW transaction, this means that the overall competitive harm to national cable networks will be higher for Comcast/NBCU than for the AT&T/TW transaction. The magnitude of harm is proportional to the magnitude of the profit margin. Therefore, for example, if the average profit margin Comcast/NBCU earns on switching customers is 50% larger than the average profit margin earned by a merged AT&T/TW, this would mean that the price rises caused by Comcast/NBCU to its bundle of national cable networks would also be 50% larger than the prices rises causes by the AT&T/TW transaction to its bundle of national cable networks.

[1] Tables 1 and 2 present the prime time ratings for the most widely distributed national cable networks produced by Comcast/NBCU and TW and the sum of the ratings for the entire bundle produced by each firm. As can be seen from the tables, the sum of prime time ratings for each bundle of networks are very similar (4.6% for Comcast/NBCU vs. $4.7% for TW), which suggests that the programming is of relatively similar popularity.

[2] Table 3 presents the national shares of MVPD subscribers for the top MVPDs. The shares of Comcast/NBCU and AT&T are relatively close to one another (23.5% for Comcast/NBCU vs. 26% for AT&T).

10. Analysis for Local Broadcast TV and RSNs

- The main point for this class of programming is that Comcast/NBCU provides a significant amount of this type of programming while TW provides none. Therefore, to the extent that Comcast/NBCU has a significant incentive and ability to raise the prices of this programming, this means that Comcast/NBCU creates extra competitive harm that is not matched in any way by the AT&T/TW transaction.

- It will now be shown that the vertical integration of Comcast/NBCU distribution assets with its NBC O&O TV stations and NBC RSNs creates a significant ability for Comcast/NBCU to raise the prices of this programming.

- It is undoubtedly the case that consumers value O&O and RSN programming and that it is at least as "must have" as the bundle of national cable networks provided by either entity. Thus factor (i) is significant.

- Regarding factor (ii), the relevant market share for local programming is the local market share of the vertically integrated MVPD because the share in the local market determines the extent to which consumers that switch from a rival MVPD are likely to switch to the vertically integrated MVPD. There are eleven NBC O&Os and seven NBC RSNs.[3] Comcast/NBCU is the predominant incumbent cable operator in seven of the DMAs served by NBC O&Os. Furthermore, all seven of the NBC RSNs operate in DMAs where Comcast/NBCU is the predominant incumbent cable provider.

- Table 4 presents data on the nine DMAs where Comcast/NBCU is the predominant incumbent cable operator and an NBC O&O and/or NBC RSN serves the DMA. For each DMA it provides the national ranking of the DMA (based on total number of MVPD subscribers), the total number of MVPD subscribers, the number of MVPD subscribers served by Comcast/NBCU and calculates Comcast/NBCU's share of total MVPD subscribers. It also shows whether the DMA is served by an NBC O&O and/or an NBC RSN. There are a number of important points to note about this table.

    - All of the affected DMAs are major metropolitan areas with significant numbers of MVPD subscribers. Five of the ten largest DMAs in the country are included in this group. Thus, the number of consumers affected is significant.

    - In many of the largest DMAs, Comcast/NBC owns both an NBC O&O and an NBC RSN. In particular, this is true for all five of the DMAs listed in Table 4 that are among the top ten DMAs in the country.

[3] The DMAs served by NBC O&Os are New York, Los Angeles, Chicago, Philadelphia, Dallas Fort Worth, Bay Area, Washington DC, Boston, Miami, San Diego and Hartford. The seven NBC RSNs are NBC Sports Bay Area, NBC Sports Boston, NBC Sports California (serving the Bay Area and northern California), NBC Chicago, NBC Northwest (serving Oregon and Washington State), NBC Sports Washington DC, and NBC Sports New York.

- Comcast/NBCU's share of MVPD subscribers in these DMAs is extremely high. In seven of the nine DMAs listed in Table 4, Comcast/NBCU's share of MVPD subscribers is greater than 50%. In four of the DMAs, Comcast's share is greater than 60%.

- This last point is important because the magnitude of the price increases caused by vertical integration is proportional to the magnitude of the vertically integrated firm's market share. The market share that was relevant for calculating the magnitude of the incentive problem for the bundle of national cable networks was the national market share of the vertically integrated MVPD. Recall from Table 3 that the national market shares of Comcast/NBCU and AT&T were, respectively, 23.5% and 26%. This means that, holding all other factors equal, the price effects of vertical integration on NBC O&Os and RSNs are each likely to be more than twice as high as the price effects on the bundle of national cable networks sold either by Comcast/NBCU or the merged AT&T/TW.

- Regarding factor (iii), since Comcast/NBCU is always able to provide broadband and telephone service in addition to MVPD service, the relevant profit margin will be higher than it otherwise would be to reflect the fact that a certain fraction of customers switching their video service will also switch their broadband and telephone service, just as was the case for national programming.

11. Conclusion

This memo shows that the level of competitive harm due to programming price increases created by the vertical combination of distribution and programming assets in Comcast/NBCU is significantly greater than the level of competitive harm due to programming price increases that would be caused by the AT&T/TW transaction. This means that the measures taken to control the competitive harm created by Comcast/NBCU should be at least as strong as any measures taken to control the competitive harm created by the proposed AT&T/TW transaction. Moreover, any finding that the AT&T/TW transaction would not cause competitive harm should not be relied upon to imply that Comcast/NBCU does not cause harm. Furthermore, the AT&T/TW has unilaterally committed to abide by a binding arbitration agreement if the AT&T/TW transaction is approved. As discussed above, in the very near future a binding arbitration requirement will no longer apply to Comcast. This further increases the disparity between the harm from the AT&T/TW transaction that the court is evaluating and the harm from Comcast/NBCU. Finally, the fact that that the existing combination of programming and distribution assets within Comcast/NBCU creates such serious problems suggests that DOJ and the FCC should seriously evaluate possible measures to limit this harm. At a minimum, the agencies should not allow Comcast/NBCU to further increase its control over programming assets through purchasing the programming assets of Fox.

Table 1[4]

Prime Time Ratings for the Major Comcast/NBCU National Cable Networks

Network	Prime Time Ratings (%)
USA	1.20%
MSNBC	0.80%
Bravo	0.70%
Syfy	0.50%
E!	0.40%
CNBC	0.30%
NBCSN	0.30%
Oxygen	0.20%
Universal Kids	0.20%
Golf Channel	0.00%
Total	**4.60%**

Table 2[5]

Prime Time Ratings for the Major TW National Cable Networks

Network	Prime Time Rating (%)
TBS	1.20%
TNT	1.10%
Cartoon Network / Adult Swim	1.00%
CNN	0.80%
HLN	0.30%
TruTV	0.30%
TCM	0.00%
Total	**4.70%**

[4] Source: Kagan Prime Time Ratings are for 2016.
[5] Source: Kagan Prime Time Ratings are for 2016.

Table 3[6]

Number of Subscribers Share of Total MVPD Subscribers for the Top MVPDs

MVPD	Subscribers (millions)	Share (%)
AT&T	23.454	26.0%
DirecTV	19.822	22.0%
U-Verse	3.632	4.0%
Comcast	21.210	23.5%
Charter	16.422	18.2%
Dish	10.584	11.7%
Verizon	4.543	5.0%
Cox	3.687	4.1%
Suddenlink	1.035	1.1%
Others	9.393	10.4%
Total	**90.329**	**100.0%**

Table 4[7]

DMAs Served by an NBC O&O or RSN
Where Comcast is the Primary Incumbent Cable Provider

DMA Rank	DMA Name	Total MVPD Subs	Comcast MVPD Subs	Comcast Share (%)	NBC O&O (Y/N)	NBC RSN (Y/N)
3	Chicago	2,755,095	16,578,858	60.20%	Y	Y
4	Philadelphia	2,677,517	1,448,392	54.10%	Y	Y
6	Washington DC	2,152,142	758,006	35.20%	Y	Y
8	Bay Area	2,063,356	1,286,921	62.40%	Y	Y
10	Boston	2,336,627	1,500,501	64.20%	Y	Y
12	Seattle-Tacoma	1,582,047	983,315	62.20%	N	Y
16	Miami-Ft. Lauderdale	1,327,742	668,430	50.30%	Y	N
22	Portland	934,289	489,883	52.40%	N	Y
32	Hartford New Haven	884,936	400,642	45.30%	Y	N

6 Source: Kagan Data is for 2017.
7 Source: Kagen Data is for 2017.