Consumer Federation of America

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THE COMCAST-TIME WARNER MERGER WOULD BE A DEATH BLOW TO EMERGING, ONLINE VIDEO COMPETITION

Consumer Group Study Concludes Federal and State Authorities Should Reject the Merger

Washington, D.C.— Today, the Consumer Federation of America released a report that concludes the proposed Comcast-Time Warner merger violates the antitrust laws and the Communications Act by such a wide margin that it cannot be approved. The report shows that the consent decrees that Comcast entered into with the Department of Justice and the Federal Communications Commission to obtain approval of the Comcast-NBCU transaction are totally inadequate to deal with the immense increase in market power that would result from the proposed Comcast-Time Warner merger.

"Comcast executives have claimed that the proposed merger is 'approvable' because the two firms do not compete head-to-head and Comcast agreed to conditions in its acquisition of NBC that address the concerns of federal and state authorities reviewing the merger," Mark Cooper, CFA's Director of Research and author of the report, said. "Nothing could be farther from the truth.

"This merger causes such a massive increase in two other forms of market power – buyer and bottleneck market power – that it doesn't just violate the antitrust laws and the Communications Act, it obliterates them," Cooper added. "Ironically, the weakness of head-to-head competition in the broadband and multichannel video markets that Comcast reminds us about, magnifies the concern about the other forms of market power."

"We have moved from potential competition to incipient competition in which Internet distribution of video content has begun to dent the anticompetitive armor that cable operators have built around their abusive business model," Cooper said, "but they are attempting to rebuild their defenses by extending the industry's anticompetitive practices to cyberspace and leveraging their control over broadband access."

"The overwhelmingly dominant firm that would result from this merger would be uniquely capable of coordinating those industry-wide efforts to undermine competition," Cooper added. "This merger would deal a severe, if not a death blow to emerging competition."

The report, entitled, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable,"* explains why buyer and bottleneck market power are important in this merger review:

- Comcast would be so large, as a buyer of content, that it would have the power to dictate the prices, terms and conditions, exercising what antitrust calls monopsony power. Because Comcast sells content, it would be more than glad to weaken competition in the market for those products.
- Comcast would have such a huge broadband footprint it would have the ability to undermine online video distribution by raising its rival's cost, degrading its quality of service, or blocking the delivery of its product altogether, exercising what antitrust calls vertical leverage.
- The weaker horizontal competition is, the more likely it is for the firm with buyer market power to benefit from these abuses.
- By exercising buyer and bottleneck market power Comcast can indirectly enhance its dominance in video distribution.

The report evaluates the impact of the merger with respect to the standards applied in merger review and market power abuse cases. Buyer market power is judged to be a concern where the market share of the firm is 30% or higher. Mergers are deemed to be "likely to enhance market power" when a substantial increase in market concentration results in a highly concentrated market. The Comcast-Time Warner merger exceeds these thresholds by a wide margin.

- The Comcast-Time Warner merger increases Comcast's market share by 50% at the key points of leverage in the vertical video supply chain, including not only the purchase of content and the sale of broadband access, but also set top box design and WiFi hotspot designs and deployment.
- It creates an industry leader in the broadband access market that is twice the size of the next firm, a dominant firm with a post-merger market share that is so large, it could only eliminate the competitive concern by divesting all of the Time-Warner subscribers.

While the analysis of the merger impact based on subscriber counts indicates the merger "is likely to enhance market power," the report identifies two characteristics of Comcast-Time Warner that indicate the impact is even more damaging.

- The market power of the combined firm is magnified because post-merger Comcast will have more of a dominant position in the most important video markets – 9 of the top 10 markets, 20 of the top 25 and 30 of the top 50. The analysis shows that in terms of advertising revenue, the viewer in the markets that Comcast-Time Warner would dominate have a "premium" of 20%.
- Post-merger, Comcast-Time Warner would have a majority of marquee regional content – regional sports and news networks. Comcast has used the tactic of withholding access to marquee content to weaken competition in the past.

The report concludes by identifying five reasons the Comcast-NBC consent decrees are inadequate to deal with the dramatic increase in market power caused by a Comcast-Time Warner merger.

- The cornerstone of the consent decrees was a nondiscrimination obligation that relies on market benchmarks and pays deference to standard industry practices, like most favored nation clauses. With Comcast-Time Warner representing such a large share of the market, it can drive industry practices, meaning there is no effective competitive market benchmark.
- The Netflix dispute took years to reach a conclusion that Netflix calls an "arbitrary tax" because the network neutrality conditions are too weak. This was before Comcast had proposed to acquire 50% more bargaining power by merging with Time Warner.
- Comcast's mistreatment of Bloomberg under the consent decree is a blatant demonstration of bad faith and recalcitrance that calls into question the ability of the oversight agencies to enforce consent decree conditions.
- Netflix and Bloomberg are two very large companies that could withstand years of foot dragging by Comcast. Smaller firms cannot, especially if Comcast is 50% larger. The entire approach to enforcement would have to be revamped with Comcast required to comply on an expedited basis (weeks not months or years).
- Finally, the choke points over which Comcast would exercise bottleneck market power have also expanded beyond those considered in the consent decree to include set top box and WiFi hotspots.

"When all is said and done, the merger is too large and the leverage points too numerous to try and repair the damage to competition with conditions," Cooper concluded. "Competition, consumers and the public interest will be best served if the merger is blocked."

A Copy of the study is available at:

www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf

The Consumer Federation of America is an association of more than 250 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.