WGAW WRITERS GUILD OF AMERICA WEST

December 28, 2018

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons,

Thank you for inviting public comment on the question of whether U.S. antitrust agencies should publish new vertical merger guidelines, and how those guidelines should address competitive harms, transaction-related efficiencies, and behavioral remedies. We submit these comments on behalf of the Writers Guild of America West ("WGAW"), a labor organization representing more than 10,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Our members and the members of our affiliate, Writers Guild of America East (jointly, "WGA") create nearly all of the scripted entertainment viewed in theaters and on television today as well as most of the original scripted series now offered by online video distributors ("OVDs") such as Netflix, Hulu, Amazon, Crackle, and more.

The Non-Horizontal Merger Guidelines ("Guidelines"), originally issued in 1984,[1] are the governing document of U.S. vertical antitrust enforcement. They rely, however, upon outdated economic theories that not only fail to promote and protect competition, but, in some cases, obstruct appropriate antitrust enforcement. Large vertical mergers in key industries have caused harm to consumers and failed to deliver on their promised innovations, efficiencies, and public benefits. The current Guidelines' bias toward false negatives, or non-findings of harm, enables incumbents to consolidate market power and undermine competition.

Recent vertical mergers in the telecommunications and entertainment industries illustrate the deficiencies of the current regulatory regime and provide evidence of the need for new guidelines. The FTC and DOJ should re-write the Guidelines for vertical merger review, and should do so through a public comment process. Market power and the organization of essential industries is a matter of considerable concern to the public, not only as consumers but as employees and citizens. The public should have a seat at the table in determining how the U.S. antitrust agencies conduct vertical antitrust review.

Vertical Integration in the Entertainment Industry

WGAW has been concerned about vertical integration for decades. Following the repeal of the Federal Communication Commission's Financial Interest and Syndication rules in 1993, video

[1] US Department of Justice, Non-Horizontal Merger Guidelines (June 29, 1984), available at https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf (*"Non-Horizontal Merger Guidelines"*).

programming markets experienced significant vertical integration between content producers (studios) and distributors (networks). Viacom purchased Paramount in 1993, then merged with CBS in 1999; Disney acquired Capital Cities/ABC in 1995, Time Warner purchased Turner Broadcasting in 1996, and NBC merged with Universal in 2003. This integration caused a significant decline in independently-produced programming. In 1989, 78% of broadcast networks' primetime lineups were produced by independent companies. By 2009, that share had diminished to 16%.[2] Competition and innovation in video programming deteriorated as content creators faced a decreasing number of powerful buyers for their work, and diverse and independent voices were squeezed out of the market. The emergence of online video in the mid-2000s lowered barriers to entry for creators and stimulated new sources of competition, posing a threat to incumbent video distributors and programmers who responded with consolidation in an effort to entrench their control.

Comcast-NBCUniversal Merger

Vertical integration reached new heights with Comcast's 2009 purchase of NBCUniversal. This merger brought together powerful players in the concentrated markets for distribution and programming. NBC Universal had ownership stakes in 30 national cable channels, ten local broadcast stations and nine regional sports networks, along with a 32% stake in then-incipient streaming platform Hulu. The combination of NBC's broadcast network and the highly-rated cable channels represented 20% of all primetime viewers.[3] At the same time, Comcast was the largest multichannel video programming distributor ("MVPD") and Internet service provider ("ISP") in the country.[4] Comcast and NBCUniversal claimed that the combination of content and distribution would spur competition and innovation, "accelerating the 'new media' future of in-home and mobile entertainment."[5] However, the WGAW and others were deeply concerned that the vertical integration would incentivize the combined company to favor its affiliated programming or raise competitor MVPDs' costs for affiliated programming, harming competition in traditional programming and distribution markets.[6] The WGAW was also concerned about the effect of the merger on the developing market for online video, where Comcast, the largest MVPD, "undeniably has an interest in making sure that the online video marketplace develops in a way that complements, rather than competes with its existing services."[7] Vertical integration would give the combined company numerous tools to thwart or control this new competition, including restricting the availability of affiliated content on competing online platforms, using control of consumer internet connections to block, throttle, or extract fees from online content distributors, or manipulating user interfaces to make competing online content less accessible or attractive to Comcast customers.[8]

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[2] In this context, "independent programming" is defined as content produced by a studio or production entity that is not affiliated with a broadcast network. Comments of Writers Guild of America West in the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 10-56, at 6 (June 21, 2010) (*"WGAW Comcast-NBCU Comments"*).
[3] WGAW Comcast-NBCU Comments at 8.
[4] William P. Rogerson, An Estimate of the Consumer Harm That Will Result from the Comcast-NBCU Transaction, at 4 (Nov. 8, 2010).
[5] *Applications and Public Interest Statement,* In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 10-56, at ii (Jan. 28, 2010) (*"Comcast-NBCU Public Interest Statement"*).
[6] WGAW Comcast-NBCU Comments at 15.
[7] WGAW Comcast-NBCU Comments at 17-18.
[8] WGAW Comcast-NBCU Comments at 18-19.

As we expected, many of these anticipated harms came to pass while the promised merger-specific benefits failed to materialize. In traditional video distribution, Comcast-NBCU's programming assets increased the company's incentive and ability to discriminate against rival programmers. Examples are well-documented: the FCC found that Comcast had used channel placement to discriminate against two independently-owned networks, the Tennis Channel and Bloomberg News, which competed with Comcast-affiliated sports and news networks (the Tennis Channel decision was reversed on appeal).[9] Comcast also dropped Yankees regional sports channel YES Network during a carriage dispute with Fox, benefiting its partially-owned competing RSN, SportsNet New York, which then posted higher ratings than YES for the first time ever.[10]

In online video distribution, Comcast-NBCU's traditional MVPD assets increased the incentive to limit or obstruct consumer-friendly innovation. Although online video distribution has expanded in the years since the merger, with online offerings from television networks like HBO and CBS and Internet-delivered cable bundles ("vMVPDs") such as SlingTV, these innovations did not come from Comcast-NBCU's vertically-integrated ecosystem. Instead, Comcast-NBCU limited "innovation" to products that would not compete with its traditional MVPD business, like TV Everywhere and VOD delivered through a set-top box.

Further, Comcast-NBCU has been accused of using its Internet-connected set-top boxes and control of customers' cable and broadband subscriptions to disadvantage competing platforms and providers. Comcast-NBCU has refused to authenticate HBO Go and Showtime Anytime on some independent streaming devices,[11] and blocked the Starz streaming app on Comcast-NBCU's Xfinity user interface.[12] Roku, one of the streaming device manufacturers affected by Comcast's behavior, filed an FCC complaint and Comcast-NBCU only agreed to stop obstructing Roku devices while under scrutiny for attempting to acquire Time Warner Cable.[13] Comcast-NBCU is currently developing a new streaming device for its broadband-only customers that blocks access to unaffiliated vMVPDs such as SlingTV.[14] In addition, online video providers have struggled to gain access to Comcast-NBCU content despite program access conditions intended to mitigate that harm. For example, FubuTV, a sports-centric vMVPD, claimed to have needed the threat of legal action to bring Comcast-NBCU to the bargaining table,[15] while a start-up OVD called Project Concord went out of business while

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[9] David Lieberman, *Tennis Channel Asks FCC to Revisit Challenge Against Comcast,* Deadline (Mar. 11, 2014), https://deadline.com/2014/03/tennis-channel-asks-fcc-to-revisit-challenge-against-comcast-697336/; In the Matter of Bloomberg L.P. v. Comcast Cable Communications, L.L.C., *Memorandum Opinion and Order*, MB Docket No. 11-104 at ¶ 40 (Sept. 26, 2013).

[10] Andrew Bucholtz, *Yes-Comcast dispute helps SNY's Mets coverage outdraw YES's Yankees coverage,* Awful Announcing (Oct. 3, 2016), https://awfulannouncing.com/2016/sny-outdraws-yes-network-for-first-time-aided-by-yes-comcast-dispute.html.

[11] Roku and Playstation 3 and 4.

[12] Karl Bode, *Comcast Blocks HBO Go From Working on Playstation 4, Won't Coherently Explain Why,* TechDirt (Mar. 5, 2015), https://www.techdirt.com/articles/20150303/12433530200/comcast-blocks-hbo-go-working-playstation-4-wont-coherently-explain-why.shtml.

[13] Jon Brodkin, *Comcast to stop blocking HBO Go and Showtime on Roku streaming devices,* Ars Technica (Dec. 16, 2014), https://arstechnica.com/information-technology/2014/12/comcast-to-stop-blocking-hbo-go-and-showtime-on-roku-streaming-devices/.

[14] Alex Sherman, *Comcast is developing a video-streaming platform for broadband-only customers,* CNBC (Nov. 7, 2018), https://www.cnbc.com/2018/11/07/comcast-making-video-streaming-box-for-broadband-only-customers.html.

[15] Joel Armijo, CFO of FuboTV, "Future of the Bundle." Interview. *Re-Imagining Television* at Barclays, New York, NY, Feb. 15, 2018.

trying to obtain access to Comcast-NBCU programming.[16] Traditional MVPDs recently claimed that Comcast-NBCU, newly freed from merger condition requiring it to be a passive owner of Hulu, has withheld Hulu from their platforms.[17] Taken together, these actions demonstrate the harmful and anticompetitive effects of one of the most significant vertical mergers approved under the current merger Guidelines.

AT&T-Time Warner Merger

Less than a decade after Comcast-NBCU, AT&T announced plans to acquire Time Warner and combine the nation's largest MVPD, second-largest wireless company and third-largest wired ISP with control of five of the top 20 basic cable networks, the top premium cable network, Warner Brothers studio and a stake in Hulu. As in the case of Comcast-NBCU, the vertical integration of AT&T and Time Warner gives AT&T the incentive and ability to harm its rivals and control the competitive threat from online video. In traditional video, this could mean discriminating against unaffiliated networks with channel placement or refusal to carry, or withholding or increasing the price of affiliated content. In online video, the combined company could withhold affiliated content from competing services or use billing or pricing policies such as zero-rating to favor its own content.

In the few months since U.S. District Court Judge Richard Leon approved the merger, troubling conduct has appeared in direct contradiction to assertions made by company executives and economic experts during trial.[18] Time Warner CEO Jeff Bewkes had claimed a goal of wide programming distribution in response to theories of vertical harms, saying, "We need to get [Turner] on every distribution platform…We try everything to stay on all of our channels, Turner, HBO, everything, to keep them on there."[19] Yet in November 2018, AT&T-Time Warner pulled HBO off of Dish platforms during a carriage dispute. Dish argued that AT&T-Time Warner was raising Dish's programming costs while offering HBO to AT&T's own customers at a discount, giving the customers an incentive to purchase HBO from AT&T rather than Dish. When announcing the dispute, AT&T-Time Warner encouraged Dish's HBO viewers to find "other ways"[20] to access HBO—by implication, affiliated services DirecTV, HBO Now or DirecTV Now.

AT&T and Time Warner boasted that "merging AT&T and Time Warner will lead to new products, better services, more innovation, ever-fiercer competition, and lower consumer prices."[21] Instead, consumers have experienced increased prices and fewer choices. In August 2018, AT&T raised prices on the basic DirecTV Now package almost 15% and scaled back

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[16] Ex Parte Presentation of Stop Mega Comcast Coalition to Marlene H. Dortch, Secretary, FCC, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57 at 2-3 (Apr. 8, 2015).

[17] American Cable Association, US Department of Justice Letter to Assistant Attorney General Delrahim re Opening An Investigation in Comcast/NBCU, Nov. 6, 2018, http://www.americancable.org/u-s-department-of-justice-letter-to-assistant-attorney-general-delrahim-re-opening-an-investigation-into-comcast-nbcu/.

[18] Appeal is ongoing in DC Circuit Court; U.S. v. AT&T Inc. et al., No. 18-5214 (Filed July 13, 2018).

[19] U.S. v. AT&T, No. 1:17-cv-2511 (Hon. Richard J. Leon), at 11, https://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf.

[20] Dade Hayes, *HBO Goes Dirk on Dish Network; Dish Rips AT&T for "Stacking the Deck,"* Deadline Hollywood (Nov. 1, 2018), https://deadline.com/2018/11/hbo-dish-network-carriage-dispute-blackout-1202493744/.

[21] U.S. v. AT&T, No. 1:17-cv-2511 (Pretrial Brief of Defendants AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc.), at 10.

promotions and special offers.[22] AT&T-Time Warner recently announced the closure of popular niche services, DramaFever, which catered to fans of Korean dramas, and FilmStruck, which catered to fans of classic and arthouse cinema, as well as millennial-focused digital studio Super Deluxe. In contrast, other claimed innovations or benefits were unrelated to the merger, such as the superskinny online cable bundle, AT&T Watch, which AT&T introduced before the merger was even approved.[23]

A number of panelists at the November 1, 2018 FTC Hearings on Competition and Consumer Protection in the 21st Century called the existing Non-Horizontal Merger Guidelines "irrelevant." As the AT&T-Time Warner trial illustrates, this understates the harm; the existing Guidelines are obstructing appropriate antitrust enforcement. Judge Leon relied on the Guidelines to establish the presumption that vertical mergers are likely pro-competitive, contributing to his final finding that the merger should be approved. Judge Leon noted that "although the Guidelines are not binding on this Court, our Circuit has noted that they are 'a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers.' *Anthem, 855 F. 3d at 349."*[24] Judge Leon explicitly embraced the Guidelines' view that vertical mergers "are less likely than horizontal mergers to create competitive problems"[25] which established a narrow path to winning a vertical merger case.[26] This economic theory is perniciously outdated. As Professor Steven Salop argued at the FTC Hearing, a pro-competitive presumption for vertical mergers makes no sense in concentrated markets given the potential harms from multiple types of foreclosure and coordination and the elimination of potential competition, as well as real world evidence of *inefficient* vertical integration such as AOL-Time Warner, Pepsi-KFC/Taco Bell/Pizza Hut, Time Warner-Time Warner Cable, and more.[27]

It is also clear from the record that behavioral conditions do not adequately mitigate these harms. As the Bloomberg News and Tennis Channel cases showed, Comcast's vertical integration with NBCU created an incentive and ability to harm rival programmers and favor affiliated programmers; these independent programmers were forced to wage expensive battles for several years in multiple venues. The FuboTV and Project Concord cases illustrate that despite conditions intended to preserve access to programming, a large vertically-integrated entity can still create significant barriers to entry for new competitors. In 2015, the DOJ and FCC announced that it was investigating whether Comcast-NBCU had intervened to stop the sale of Hulu despite the merger condition requiring that Comcast be a passive owner of Hulu.[28] Comcast was also fined by the FCC for failing to promote the standalone broadband service it

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[22] Tom McKay, *AT&T Is Jacking Up the Price of Its DirecTV Now Streaming Service By $5 a Month,* Gizmodo (July 1, 2018), https://gizmodo.com/at-t-is-jacking-up-the-price-of-its-directv-now-streami-1827273526.
[23] Drew FitzGerald, *AT&T to Launch $15 Video Service,* The Wall Street Journal (Apr. 19, 2018), https://www.wsj.com/articles/at-t-to-launch-low-cost-streaming-service-1524190779.
[24] U.S. v. AT&T, No. 1:17-cv-2511 (Memorandum Opinion of Hon. Richard J. Leon), at 56, fn 18 ("*Leon Opinion"*).
[25] Non-Horizontal Merger Guidelines at 23.
[26] Leon Opinion at 59.
[27] Steven Salop. "Presentation: Vertical Mergers." FTC Hearing #5: Competition and Consumer Protection in the 21st Century, Washington, DC, Nov. 1, 2018.
[28] Emily Steel, *Comcast's Track Record in Past Deals May Be Hitch for Merger With Time Warner Cable,* The New York Times (Apr. 21, 2015), https://www.nytimes.com/2015/04/22/business/media/6-senators-urge-rejection-of-comcast-time-warner-cable-deal.html.

was required to offer in order to facilitate competition from OVDs.[29] Comcast-NBCU then violated its net neutrality commitments by zero-rating its Stream TV service, using its control of broadband to disadvantage competing video services.[30]

The cases of Comcast-NBCU and AT&T-Time Warner illustrate and portend significant harms for consumers and competition from vertical integration. That they were both approved demonstrates the inadequacy of Guidelines from 1984 that consider such mergers to be presumptively pro-competitive. Guidelines for vertical merger evaluation must be rewritten, and should begin with the presumption that vertical mergers are anti-competitive in oligopolistic markets. The new Guidelines must recognize that, as these large telecommunications and media mergers demonstrate, vertical mergers eliminate potential competition and create the incentive and ability to discriminate, foreclose, coordinate, and raise rivals' costs. Given the centrality of these large firms to consumer, citizen, and employee welfare, the revisions of the Guidelines must involve a public comment process. The Federal Communications Commission has effectively utilized public comment processes in merger review to maximize stakeholder input and encourage empirically-grounded, open, and democratic decision-making. We encourage the U.S. antitrust agencies to adopt a similar process to strengthen popular support for the merger review process.

Sincerely,

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[29] Stacy Higginbotham, *Comcast pays $800,000 to U.S. for hiding stand-alone broadband,* GigaOm (June 27, 2012), https://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/.
[30] Klint Finley, *Comcast May Have Found a Major Net Neutrality Loophole,* Wired (Nov. 20, 2015), https://www.wired.com/2015/11/comcast-may-have-found-a-major-net-neutrality-loophole/.