AMERICAN CABLE ASSOCIATION

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The Hon. Michael Lee
Chairman
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Committee on the Judiciary
UNITED STATES SENATE
Washington, D.C. 20510

The Hon. Amy Klobuchar
Ranking Member
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Committee on the Judiciary
UNITED STATES SENATE
Washington, D.C. 20510

Re: Oversight of the Enforcement of the Antitrust Laws

Dear Chairman Lee and Ranking Member Klobuchar:

I write on behalf of the American Cable Association ("ACA") regarding your upcoming hearing on antitrust enforcement. ACA represents more than 700 of America's small- and medium-sized cable operators. Our members provide video and broadband service to some of America's smallest towns and in some of its most rural locations—locations in which connectivity is vital but that are more challenging to serve. Others provide robust competition in suburban and urban markets against some of the largest pay-TV providers. As such, we believe we can provide a unique perspective on two sets of issues facing antitrust enforcement.

- **Media Consolidation.** Cable bills have increased in recent years. These price increases largely reflect the fees cable operators themselves must pay to program suppliers—including television broadcasters, who continue to increase their "retransmission consent" fees faster than any other class of programming (double digits annually). Media consolidation—both "vertical" mergers like AT&T-Time Warner and "horizontal" ones like the proposed Sinclair-Tribune combination—is in no small part responsible for this problem. Further consolidation threatens to exacerbate the problem, leading to even higher cable bills, particularly for customers of smaller operators.

- **Broadband Service.** Smaller Internet Service Providers ("ISPs") operate in competitive markets or are otherwise constrained from unreasonably raising prices or imposing unreasonable terms and conditions on their customers. Moreover, they cannot harm other players in the Internet ecosystem, such as content, service, and edge providers. The larger platform firms and content distribution networks, by contrast, can dictate terms to smaller ISPs, just as upstream programmers do in the video market

> Already, many smaller ISPs are unable to get these firms to enter into arrangements to improve service for their customers. Should such practices continue and become even more extensive, smaller ISPs will be put at a competitive disadvantage and their customers will have reduced choice and pay higher prices for service.

Antitrust agencies have indicated they are paying greater attention to these competitive issues. We would like to ask you to encourage them to do so at this week's hearing—and to engage in meaningful oversight of their efforts.

I. Media Consolidation.

We have seen tremendous consolidation in the media sector in the last few years. From Comcast-NBCU to the more recent Disney-Fox, AT&T-Time Warner, Sinclair-Tribune, and Gray-Raycom deals, it sometimes seems like the largest players are more interested in merging with one another than in improving their products and services. We do not object to mergers *per se*, or merely for the sake of objecting. We *do* object, however, where such mergers raise our subscribers' bills or hinder our ability to offer innovative services to our customers in other ways.

A. "Vertical" Media Consolidation, including AT&T-Time Warner and Comcast-NBCU.

ACA applauds the Department of Justice for recognizing in the AT&T-Time Warner merger that so-called "vertical" integration—between a video distributor like AT&T and a program supplier like Time Warner—can lead to higher programming fees and more unreasonable terms and conditions for rival distributors.[1] DOJ recognized this common-sense proposition in opposing the AT&T-Time Warner merger. We believe the district court erred in rejecting it and expect the court of appeals to rectify this error.

We are also pleased with the attention being paid to another vertical combination—Comcast and NBC Universal. When the DOJ and the FCC approved the merger of Comcast and NBCU in 2011, they recognized that the merged firm could harm consumer welfare in numerous ways, and they imposed conditions on the merger designed to prevent such harm. We have long thought those conditions were insufficient, but they at least served to moderate the combined company's behavior. Unfortunately, these conditions have recently expired. Thus, unless

[1] ACA members buy the programming they offer their subscribers from programming suppliers such as Time Warner. When a stand-alone Time Warner negotiates with an ACA member, it has a powerful incentive to reach a deal. If it fails to do so, Time Warner loses license fees and advertising revenues and gains nothing in exchange. The merger with the distributor AT&T, however, changes Time Warner's calculus. Now, if the Time Warner part of the combined company fails to reach a deal with an ACA member, the AT&T part of that company will benefit when ACA-member subscribers who want the Time Warner programming switch providers. The combined company will thus be more willing to walk away from negotiations with the ACA member than the stand-alone Time Warner would have. This new willingness to forego a deal, in turn, translates into higher fees that Time Warner can charge to AT&T's rivals, making them less competitive. In addition, higher costs will invariably get passed along to consumers.

antitrust enforcers intervene, Comcast-NBCU will have the unfettered ability to raise the prices it charges for programming.

The danger posed by Comcast-NBCU is far greater than the danger posed by AT&T-Time Warner. No programmer—not even Time Warner—has more "must-have" programming than NBCU. NBCU owns a broadcast network, dozens of network affiliates in the largest markets, regional sports networks (such as NBC Sports Washington, which carries the Capitals and the Wizards), national sports networks (such as NBCSN), and some of the highest-rated general programming on cable television (such as USA Network). Time Warner, by contrast, does not own any broadcast television networks, local television stations or sports networks. For an ACA member, failure to acquire NBCU programming would entail losing far more subscribers than would failure to acquire Time Warner programming. This means Comcast has a greater incentive to raise their rival's rates than does AT&T.

We are thus encouraged by DOJ's recent announcement that it intends to monitor Comcast-NBCU's behavior.[2] Mere monitoring, however, will not be enough to prevent anticompetitive behavior. DOJ should go one step further and undertake an investigation of Comcast-NBCU's practices. We urge you to inquire about DOJ's intentions with respect to Comcast-NBCU at this week's hearing.

B. Horizontal Media Consolidation, Including Sinclair-Tribune, Gray-Raycom, and the National Ownership Cap.

Antitrust regulators have also expressed concern with respect to so-called "horizontal" media consolidation, especially the merger of television station owners. Such mergers tend to increase retransmission consent rates. Our members, in turn, have little choice but to pass along such increases to their subscribers.

Local Consolidation. Such concerns are perhaps at their most acute where a single party proposes to acquire multiple television stations in a single local market—especially if both such stations are affiliated with one of the "Big Four" television networks. A broadcaster that can withhold two stations in a market simultaneously can cause an ACA Member much more harm than one that can withhold only one such station at a time—meaning that it can command higher prices.[3]

We were thus encouraged to learn that (at least according to Tribune) DOJ refused to permit Sinclair from purchasing Tribune without divesting stations in each of the markets in which the combination would have created a duopoly. And we appreciated the FCC's efforts to ensure that all such divestitures involved *bona fide* transactions with independent buyers. This, in our view, remains the bare minimum that competition policy should require. Here again, questions from you at this week's hearing about local consolidation would be helpful.

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[2] David McLaughlin, "Comcast Gets Notice that NBC Antitrust Scrutiny Will Persist," Bloomberg (Aug. 28, 2018), https://www.bloomberg.com/news/articles/2018-08-29/comcast-gets-notice-that-nbc-antitrust-scrutiny-will-persist.

[3] Competitive Impact Statement at 8, United States v. Nexstar Broad. Grp. (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB), https://www.justice.gov/atr/case-document/file/910661/download.

National Consolidation. Equally concerning to ACA's members, however, is national consolidation. National consolidation can also place upward pressure on retransmission consent rates—leading to higher prices for consumers. That is because a national broadcast conglomerate that owns many broadcast stations can threaten to black out all of those stations simultaneously, giving it leverage to command higher prices than a broadcaster that serves only a single market. That common-sense conclusion is confirmed by multiple econometric analyses.[4]

We thus urge antitrust authorities to consider the potential for price increases as they consider mergers such as that in which Gray proposes to purchase Raycom. We also expect the FCC to consider these issues in connection with proposals to increase or eliminate the national ownership cap. As with other issues, we would urge you to ask questions about national consolidation at this week's hearing.

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As described above, both local and national consolidation lead to higher wholesale video prices, which in turn leads to higher *retail* prices. Consolidation also, however, has add-on effects related to broadband. When programming fee increases make video service itself unprofitable (as they have done in many cases), cable operators find themselves less able to invest in their broadband networks. For some of our members, this has led to something of a "vicious cycle": high wholesale video prices leads to lower video margins which leads to lower network investment which leads to degraded broadband service which leads to slower broadband adaption. And, of course, degraded broadband service and low adaption causes any number of downstream harms to inclusion and democracy. When media consolidation leads to higher prices, in other words, everyone suffers.

II. Broadband

A. Smaller ISPs Face Competitive Constraints

Most of ACA's members provide broadband Internet access service in smaller communities and rural areas.[5] Eighty percent of these ISPs have fewer than 5,000 subscribers, and half have fewer than 1,000. These smaller ISPs operate subject to competitive constraints, which is best indicated, as detailed below, by their substantial and continuing investments to increase the performance, quality, and reliability of their broadband networks while maintaining reasonable prices:

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[4] Petition to Dismiss or Deny of Dish Network, LLC, Ex. D, Declaration of Janusz A. Ordover at ¶ 3,MB Docket No. 17-179 (filed Aug. 7, 2017); Reply of Dish Network, LLC, Ex. C, Reply Declaration of Janusz A. Ordover at ¶ 19, MB Docket No. 17-179 (filed Aug. 29, 2017).

[5] A handful of ACA ISPs operate as the "third provider" (overbuilder) in urban areas where they face even greater competition since they compete against much larger incumbent cable operators and telephone providers to provide wireline broadband service. These overbuilders range in size, with smaller providers serving a few thousand subscribers to the largest having upwards of 1 million subscribers spread over numerous local markets. Because they are the "third" wireline provider in a business where economies of scale count, overbuilders face substantial challenges to be viable and must compete aggressively, including by not only providing services on par or better than their competitors, but with superior customer service and innovative product offerings.

Smaller ISPs are Increasing Output. Smaller ISPs have invested, and continue to invest, substantial amounts of capital to maintain and upgrade to higher performance networks, as well as, in many instances, to expand into new areas. Over the past decade, they have invested more than $10 billion, and smaller ISPs continue to invest over $1 billion annually[6] to ensure their consumers have access to robust broadband service.

Smaller ISPs are Maintaining Reasonable Prices. Even while increasing the performance of their broadband networks, smaller ISPs have maintained reasonable prices, terms and conditions for their broadband service. Smaller ISPs generally face another wireline provider and increasingly compete with fixed and mobile wireless broadband providers and, in more remote areas, even with satellite providers. In addition, smaller ISPs are based in their communities, and it simply makes good business sense to treat their "neighbors" well.[7]

Even apart from these market incentives, FCC mandates constrain the behavior of smaller ISPs in several ways depending upon the area in which they operate. In high cost areas served by larger incumbent telephone providers, smaller ISPs must offer broadband service at prices below the certain benchmarks in order to prevent the government from subsidizing its rivals.[8] In high cost areas where smaller incumbent telephone providers receive FCC support, the small ISP must compete on price with a subsidized competitor. And, even where a smaller ISP is the sole provider in an area, it most often receives FCC support, and therefore its prices are constrained and minimum performance levels set by FCC mandates.[9]

In sum, smaller ISPs operate either in competitive markets or are otherwise subject to competitive constraints and thus cannot harm consumer welfare. Policymakers thus should apply a light-touch regulatory regime to smaller ISPs to encourage their investments and provision of innovative services, especially in rural areas.

B. Smaller ISPs Cannot Leverage Upstream Edge Providers but May be Leveraged by Them.

To access Internet sites, end users connect to a local ISP, and then the ISP connects to the broader Internet by exchanging traffic with a third-party transit provider. When an ISP sends as much traffic as it receives, which happens with the largest ISPs, transit providers do not charge the ISP for its service. An ISP also can also exchange traffic directly from its own network with

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6 The amount of annual investment by smaller ISPs is derived from their public statements and from reports on public companies' financial filings.

7 Smaller ISPs that are overbuilders have even greater incentives because of heightened competition to maintain reasonable retail prices.

8 *See e.g.*, *Connect America Fund, et al*., Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 81, 86, 109 (2011), *aff'd sub nom*., *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); *Connect America Fund, et al.*, Report & Order, 29 FCC Rcd 15644, ¶¶15, 73 (2014); *Connect America Fund*, Order, DA No. 18-710, WC Docket No. 10-90, ¶ 3 (rel. Jul. 6, 2018).

9 A smaller ISP that is the sole wireline provider in an area usually competes with mobile and satellite providers. In addition, the FCC will soon provide additional support for 4G service in areas unserved by incumbent mobile providers. *See* Wireless Telecommunications Bureau, *Mobility Fund Phase II*, Federal Communications Commission, https://www.fcc.gov/mobility-fund-phase-ii-mf-ii.

a content provider (e.g. Netflix, Amazon). These content providers have an incentive to work with local ISPs so that its customers can readily access the most in-demand content, but only so long as an ISP has a large number of customers. Consequently, unlike larger ISPs, which generally have settlement-free peering arrangements with transit providers or no-cost collocation agreements with content providers, smaller ISPs almost always use a transit provider, pay to exchange traffic,[10] and do not have agreements with content providers. Smaller ISPs thus are "price takers" in negotiations with transit or content providers and cannot dictate the terms of any of these agreements. This means they cannot save transit and transport costs and are limited in giving their customers a better experience by directly accessing content.

While smaller ISPs cannot dictate terms to upstream providers, they can be leveraged by content, service, and edge providers, especially by the most popular platform providers (e.g. Facebook, Amazon, Netflix, and Google). This is not dissimilar from what occurs when smaller ISPs that offer video deal with video programming providers. Smaller ISPs do not have their own facilities to connect with the Internet, lack the "eyeballs" to attract content providers, and most certainly are unable to impose tolls on upstream providers. However, their customers consider it essential to access the most popular platform providers, giving these providers the ability to exact monopoly rents from smaller ISPs or otherwise place smaller ISPs at a competitive disadvantage. This will harm smaller ISPs' customers and their communities, an especially troubling problem in rural areas. Congress and federal agencies are now exploring the competitive consequences of the practices of these platforms, and ACA believes it should examine these practices as part of its review.

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In conclusion, ACA thanks the Judiciary Committee for overseeing the activities of the federal antitrust agencies, including to have them address the two issues we raised here. We stand ready to provide additional information and respond to any questions.

Sincerely,

Matthew M. Polka
President and CEO
American Cable Association

Cc: Members, Subcommittee on Antitrust, Competition Policy and Consumer Rights

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[10] Transit providers have a variety of restrictions before entering into settlement-free peering agreements, which smaller ISPs cannot meet.