

United States Senate

WASHINGTON, DC 20510

June 21, 2017

The Honorable Jeff Sessions
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

We are writing to urge the Department of Justice (DOJ) to closely scrutinize AT&T's proposed acquisition of Time Warner. We have strong concerns that the combined company's unmatched control of popular content and the distribution of that content will lead to higher prices, fewer choices, and poorer quality services for Americans – substantial harms that cannot be remedied with unreliable, unenforceable, and time-limited behavioral conditions. Our constituents face significant and growing costs for telecommunications services.¹ Before initiating the next big wave of media consolidation, you must consider how the \$85 billion deal will impact Americans' wallets, as well as their access to a wide-range of news and entertainment programming. Should you determine that the substantial harms to competition and consumers arising from the transaction outweigh the purported benefits, you should reject the proposed acquisition.

**I. THE PROPOSED DEAL WOULD SUBSTANTIALLY LESSEN COMPETITION,
RESULTING IN FEWER CHOICES AND HIGHER PRICES FOR CONSUMERS.**

As the largest pay-TV provider in the nation, after acquiring DIRECTV in 2015, and the second largest mobile broadband provider, AT&T is one of the nation's leading distributors of content, with 135 million wireless subscribers and 25.5 million pay-TV subscribers.² Time Warner is one of the nation's largest media companies and owns high-rated programming, including HBO, TNT, TBS, CNN, and Warner Bros. Combining these behemoths would create a mega media conglomerate with both the incentive and the ability to favor its own content over that of other entertainment companies and to restrict competing video distributors from accessing that content, harming its competitors and ultimately consumers. While the companies have suggested that the proposed deal will result in certain consumer benefits, they have thus far failed to demonstrate that these purported benefits are either merger-specific or sufficient to outweigh the substantial harms of the deal.

¹ The average American household, which has two cell phones, one landline, and a video-internet bundle, spends approximately \$2,700 per year on these services. Mark Cooper, *Overcharged and Underserved: How a Tight Oligopoly on Steroids Undermines Competition and Harms Consumers in Digital Communications Markets* (Consumer Federation of America & Public Knowledge 2016).

² AT&T, Inc., *Investor Briefing*, Q4 2016, 4, 13 (Jan. 25, 2017).

A. AT&T-Time Warner could favor its own programming and unfairly discriminate against that of other TV and entertainment companies.

A combined AT&T-Time Warner would have both the ability and the incentive to increase viewership of its newly acquired content by restricting AT&T subscribers' access to other content or otherwise prioritizing its own. From forcing its customers to buy bigger bundles of Time Warner's programming to foreclosing rival content creators' access to AT&T customers, AT&T-Time Warner could engage in a wide variety of behaviors that would harm competition in the media market.

i. *Premium Channels Market*

AT&T-Time Warner could prioritize Time Warner content, including HBO, over HBO's competitors in the premium channels market, such as Starz and Showtime. While premium channels are working to reach subscribers through over the top (OTT) services, many Americans still access premium channels by selecting them when they purchase or update their pay-TV service, such as AT&T-owned DIRECTV. Because AT&T-Time Warner would have an incentive to drive subscribers to HBO, the combined company could choose to not market, market less vigorously, or otherwise harm its premium channel competitors during the DIRECTV sign-up process, which AT&T controls. As a result, Starz and Showtime could face a significant decrease in new subscriptions from AT&T-DIRECTV subscribers, which would limit their power in the premium channels market and leave room for HBO to dominate, ultimately restricting consumers' choice. And as AT&T-Time Warner is further enriched by HBO's dominance of the premium channels market, it will have greater ability to raise HBO prices for its own AT&T-DIRECTV subscribers, as well as for competing distributors. It could also use this bargaining leverage to negotiate lower payments for inputs, such as the creative talent necessary to produce high-quality programming.

ii. *Net Neutrality*

AT&T-Time Warner could also expand its discriminatory treatment of content under its Sponsored Data zero-rating program, whereby AT&T offers its wireless customers access to certain sites or services without such data usage counting towards their monthly data cap. Zero-rating programs can be anticompetitive if providers offer special treatment of certain content without meaningfully offering the same treatment to other content creators. AT&T currently only offers its customers zero-rated treatment of its own DIRECTV OTT product, DIRECTV Now, although the company claims that participation in the program is offered at a similar rate to other interested content providers.³ However, that suggestion ignores the reality that the cost of participation has a different financial impact on AT&T-owned DIRECTV than on competing streaming services, because AT&T is merely paying itself that price and shifting the supposed costs from one subsidiary to another.⁴ If competitors to DIRECTV Now, including more

³ AT&T, Inc., White Paper on Sponsored Data 3 (Nov. 21, 2016).

⁴ In December of last year, the Federal Communications Commission (FCC) found that in order for DIRECTV Now competitors to participate in the Sponsored Data program they would have to pay AT&T a rate so high "that it would make it very difficult, if not infeasible, to offer a competitively-priced service" while AT&T would incur no such cost by zero-rating its own DIRECTV Now service. Ultimately, the FCC determined the program was anticompetitive, anti-consumer, and violated the principles of net neutrality. Letter from Jon Wilkins, Wireless

traditional streaming services like Netflix and Amazon Prime, as well as newer live TV OTT services like Sling TV and Sony VUE, choose to pay for equal treatment, they would be forced to raise their monthly user rates to make up for the cost of participation, thus forcing their users to foot the bill for the AT&T subscribers' data.

Should a combined AT&T-Time Warner expand its Sponsored Data program and zero-rate Time Warner content, these anticompetitive problems would be exacerbated. By offering popular HBO programming "free" from data charges under an arbitrarily low data cap, AT&T could capture subscribers from competing wireless providers, and DIRECTV Now could capture users from competing streaming services that can't financially justify participation in the Sponsored Data program. Ultimately, AT&T could expand its power in both the mobile broadband and OTT markets and foreclose competition from OTT startups that can't afford to compete on such discriminatory terms.

Furthermore, the combined AT&T-Time Warner would have the incentive to engage in anticompetitive behavior that would violate the principles of net neutrality in a wide variety of ways. For example, the combined company could expand its use of significantly lower data caps and additional fees on its subscribers who use competing streaming services as their primary source of television – a practice that AT&T is already known for aggressively employing.⁵ It could also create discriminatory charges to disadvantage content companies that compete with Time Warner for providing sufficient internet bandwidth to enable high-quality video distribution. These practices would leave AT&T subscribers paying extra for streaming services that compete with DIRECTV Now and may ultimately result in fewer options for OTT programming.

iii. *Free Flow of Information*

Finally, allowing one giant company like a combined AT&T-Time Warner to control the content available to Americans would threaten the basic principles of our democracy, especially given Time Warner's ownership of key information sources like CNN. With both the incentive and the ability to direct consumers to Time Warner-owned content, AT&T-Time Warner could restrict its subscribers' access to alternative viewpoints, such as those offered by competing news outlets like Fox, MSNBC, or Breitbart. As a result, the free flow of information that our democracy relies on would be stymied.

B. AT&T-Time Warner could restrict other video distributors' ability to offer Time Warner content.

A combined AT&T-Time Warner would also have both the ability and the incentive to restrict its competitors in the video distribution market, including both traditional pay-TV providers and OTT services, from offering Time Warner's highly desirable content. As AT&T-

Telecomm. Bureau Chief, Fed. Comm'n Comm'n, to Robert W. Quinn, Senior Executive Vice President, AT&T, Inc. (Dec. 1, 2016) *available* at https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7575775/Letter_to_R_Quinn_12.1.16.0.pdf.

⁵ Letter from Harold Feld, Legal Director, Public Knowledge, & Sascha Meinrath, Director, New America Foundation's Open Technology Initiative, to Sharon Gillet, Chief Wireline Competition Bureau, Fed. Comm'n Comm'n (May 6, 2011) *available* at <https://www.publicknowledge.org/documents/letter-to-fcc-on-att-data-caps>.

Time Warner restricts access to or raises the prices for its content, competition in the already highly concentrated pay-TV market will decrease even more, and consumers will face fewer options and higher prices for video services.

i. *Over the Top Market*

Any efforts by a combined AT&T-Time Warner to restrict access to its content could have a significant impact on the growing, but fragile, OTT market. With control of both the DIRECTV and Time Warner content and apps, and in order to favor DIRECTV, AT&T-Time Warner could withhold access entirely or substantially raise prices of its programming for competing distribution platforms, such as Roku and Amazon Fire, as well as OTT services like Hulu, Netflix, and Sling TV. Start-ups could be foreclosed from entering the OTT market altogether. As Americans switch to AT&T for lower-priced access to Time Warner content, the combined company would have less incentive to innovate and develop new offerings of their own, and consumers, who face increasingly high cable bills, will have fewer options if they cut the cord.

ii. *Traditional Pay-TV Providers*

With ownership of Time Warner's content, the combined company would also gain substantial bargaining leverage when negotiating content carriage with traditional pay-TV providers, including Comcast, Charter, and DISH, as well as smaller cable providers that already have limited negotiating power. AT&T-Time Warner could raise rates for Time Warner programming, which would ultimately be passed on to its competitors' subscribers. It could also more aggressively pursue anticompetitive bundling strategies, forcing competing providers, as well as their subscribers, to accept more of Time Warner's content than they may desire in order to access popular networks like HBO or CNN. AT&T-Time Warner could use such tactics to ultimately expand its power in the pay-TV market. And if competing distributors are forced to pay more for Time Warner content, they will have less buying power to support independent programmers, and consumers will have less access to a wide range of entertainment and news programming.

iii. *AT&T-Time Warner's National Footprint*

AT&T and Time Warner have repeatedly stated that the combined company would have no incentive to restrict or foreclose access to its newly acquired content,⁶ but we question the credibility of this claim. We agree that under normal circumstances, merging video distributors and content creators would maintain an incentive to maximize viewership of their jointly controlled programming. In the case of Comcast-NBCUniversal, for example, the combined company has some incentive to seek carriage of its content by rival distributors because of the

⁶ Letter from Timothy P. McKone, Exec. Vice President, AT&T, Inc., & Steve Vest, Senior Vice President, Time Warner, Inc., to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley available at <https://www Franken.senate.gov/files/documents/170217ATTimeWarnerResponse.pdf>. Letter from Timothy P.; *Examining the Competitive Impact of the AT&T-Time Warner Transaction Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm.* On the Judiciary, 114th Cong. (2016) (statement of Randall Stephenson, Chairman, CEO, & President, AT&T).

limits of Comcast's distribution footprint. But AT&T's reach is far greater: DIRECTV's nationwide satellite service coupled with AT&T's nationwide wireless footprint would ensure that Time Warner content could pass through nearly every home in America even if the combined company decided to offer it exclusively and deny it entirely to rival distributors. While restricting competitors' access to its content may reduce Time Warner viewership initially, any short term losses in viewership could be recouped in the form of higher prices for Time Warner content among its competitors and its own customers or through increased power in the pay-TV market.

C. The companies have failed to demonstrate that the efficiencies arising from the deal are merger-specific or sufficient to outweigh the substantial harms to competition and consumers caused by the deal.

AT&T and Time Warner have suggested that the proposed deal will result in a number of benefits, but they have thus far failed to demonstrate that the purported benefits either are merger-specific or would outweigh the substantial harms described above. In particular, the companies have highlighted the reduction of "bargaining friction" that they say the deal will allow.⁷ Through the elimination of certain negotiations between AT&T and Time Warner, the companies suggest that the deal will allow them to "generate additional innovative ways for consumers to experience video anywhere and anytime, with greater levels of customization and interactivity", including interactive methods of viewing live events, more relevant advertising in video services, and social media sharing opportunities.⁸ It is currently unclear, however, why the proposed transaction – as opposed to a contract between the two companies in their current capacities – is necessary to achieve such goals. As demonstrated by AT&T's current offering of free HBO as part of its Unlimited Plus wireless plan, the companies already enjoy a strong working relationship – one where contract negotiations have thus far not prevented them from collaborating in mobile video distribution.

Furthermore, while the companies assure us that the proposed innovations will result in "better value" for consumers, they are silent with respect to whether a reduction in bargaining friction will be passed on to consumers in the form of lower prices for video services. As customers of both AT&T and competing video distributors face higher prices and fewer choices for programming as a result of this deal, we believe that any proposed benefits should speak to how those harms would be counteracted by lower prices for other content or services.

II. BEHAVIORAL CONDITIONS ARE INSUFFICIENT TO ADDRESS THE SUBSTANTIAL HARMES THAT THE PROPOSED DEAL WOULD CAUSE.

In 2011, the Antitrust Division recognized that "conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers," but it also warned that "no matter what type of conduct remedy is considered, however, a remedy is not effective if it

⁷ Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.

⁸ *Id.*

cannot be enforced.”⁹ After reviewing conditions placed on the Comcast-NBCUniversal deal, we believe that the demonstrated lack of enforceability and reliability of such conditions have rendered them insufficient as remedies for deals of this nature. Furthermore, we are strongly concerned about how such conditions would be enforced given the lack of oversight of the deal by the Federal Communications Commission (FCC) and the uncertainty surrounding the future of the Open Internet Order.

While the individual facts of each proposed deal require separate analysis, analogous past deals should provide insight into whether behavioral conditions are successful in remedying competitive harms that these deals pose. Like the deal at issue today, Comcast’s 2011 acquisition of NBCUniversal raised concerns that the combined company would have strong incentives to favor its own programming over others and restrict its competitors in the pay-TV market from accessing its programming. Acknowledging these concerns, the DOJ and FCC imposed a number of behavioral conditions on that deal – conditions that Comcast-NBCUniversal has since been accused of repeatedly violating.¹⁰ Enforcement of the conditions proved to be an expensive and lengthy process, allowing Comcast’s anticompetitive behavior to persist largely unchecked.

AT&T itself has a similarly troubling track record when it comes to compliance with its past promises. Almost immediately after acquiring DIRECTV in 2015, the company hiked prices and cited rising programming costs as a factor, despite having told regulators that the merger would help it keep those programming costs in check.¹¹ There have also been accusations that AT&T has failed to meet commitments it made to meet broadband deployment goals when it combined BellSouth, Cingular Wireless, and the legacy AT&T long distance company to form the current company over a decade ago.¹² And most recently, DOJ sued DIRECTV when the pay-TV provider “orchestrated a series of information exchanges with direct competitors that ultimately made consumers less likely to be able to watch their hometown team.”¹³ AT&T’s history of going back on its public promises and engaging in anticompetitive behavior demonstrates that the company cannot be relied on to abide by any commitments made in furtherance of its proposal.

⁹ Jon Sallet, Deputy Assistant Att’y Gen., Dep’t of Justice, Remarks at the American Bar Association Fall Forum: The Interesting Case of the Vertical Merger (Nov. 17, 2016).

¹⁰ Comcast favored its own programming by keeping its newly acquired MSNBC and CNBC in a TV channel lineup “neighborhood” of news networks while relegating Bloomberg News to an undesirable location. The FCC sanctioned Comcast for failing to deliver on promises regarding affordable standalone broadband offerings. It was also accused of violating its commitments on local news, racial diversity in programming, and online video distribution. See Eriq Gardner, *FCC Orders Comcast to Put Bloomberg TV Alongside Other News Channels*, Hollywood Reporter, Sep. 27, 2013, available at <http://www.hollywoodreporter.com/thr-esq/fcc-orders-comcast-put-bloomberg-638226>; Cynthia Littleton, *Byron Allen Accuses Comcast, FCC of Violating NBCUniversal Merger Conditions*, Variety, Mar. 28, 2016, available at <http://variety.com/2016/tv/news/byron-allen-fcc-discrimination-petition-1201740110/>.

¹¹ Karl Bode, *Now Merged, AT&T and DirecTV Raise TV Rates in Perfect Unison*, DSLREPORTS, Dec. 17, 2015, available at <https://www.dslreports.com/shownews/Now-Merged-ATT-and-DirecTV-Raise-TV-Rates-in-Perfect-Unison-135907>.

¹² *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, HUFFINGTON POST, Nov. 18, 2012, available at http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html.

¹³ David Lieberman, *Justice Department Settles Suit Over DirecTV’s Effort To Keep Dodgers Games Dark – Update*, Deadline, Mar. 23, 2017, available at <http://deadline.com/2017/03/justice-department-sues-directv-conspiracy-keep-los-angeles-dodgers-games-dark-1201846950/>.

Finally, we question how the DOJ will enforce many of the potential behavioral conditions that could be placed on the deal without the assistance of the FCC. AT&T and Time Warner have suggested that one major consumer benefit of the acquisition is that it will strengthen their incentives to invest in the deployment of wireless broadband.¹⁴ It is unclear, however, how this benefit would counteract the harms to competition created by this deal, and how the DOJ would hold a communications provider accountable for such a commitment should the Department make it legally binding. Therefore, we question whether it is appropriate for the Antitrust Division to consider these stated benefits of the deal – and whether they outweigh the substantial harms – if there is no way to ensure that the combined company actually acts to achieve such benefits.

In sum, while we cannot possibly predict all the harms that could arise from this deal, we maintain that AT&T's proposed acquisition of Time Warner would result in higher prices, fewer choices, and worse service for consumers – consequences that we believe cannot be remedied by unenforceable behavioral conditions. As the DOJ finalizes its review of the transaction, we call on you to defend American competition and innovation and ensure that Americans have open and affordable access to communications services, as well as a wide range of programming. We hope you'll take a stand for U.S. consumers and businesses and closely scrutinize the transaction. Should you determine that the substantial harms arising from the transaction outweigh the purported benefits, we urge you to reject it. As always, thank you for your attention to this matter.

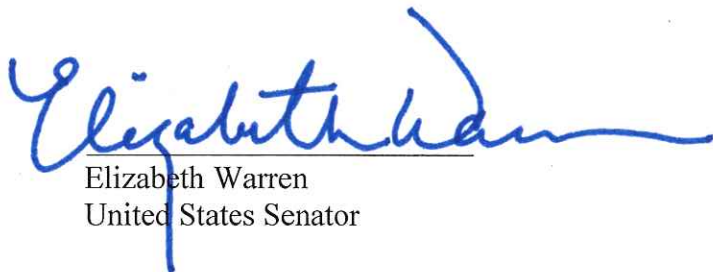
Sincerely,



Al Franken
United States Senator



Edward J. Markey
United States Senator



Elizabeth Warren
United States Senator

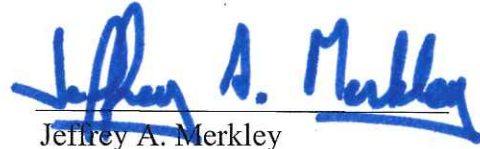


Ron Wyden
United States Senator

¹⁴ Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.



Richard Blumenthal
United States Senator



Jeffrey A. Merkley
United States Senator



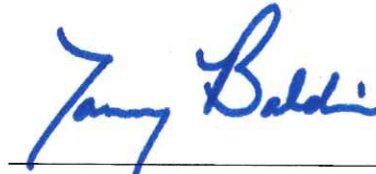
Bernard Sanders
United States Senator



Maria Cantwell
United States Senator



Sherrod Brown
United States Senator



Tammy Baldwin
United States Senator



Cory A. Booker
United States Senator