January 4, 2010

The Honorable Jon Leibowitz
Chairman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Request for Investigation into Potential Antitrust Violations Regarding "TV Everywhere"

Dear Chairman Leibowitz:

The undersigned consumer advocacy organizations are writing to call your attention to a problematic new business practice called "TV Everywhere," a new agreement between competing incumbent video providers, or multichannel video programming distributors (MVPDs), to upset the emerging market of online video. MVPDs include traditional cable operators, satellite television operators and traditional phone companies now providing video service. Essentially, the TV Everywhere model requires consumers who wish to watch popular video content on the Internet to first subscribe to cable television—a traditional MVPD service.

Almost every incumbent MVPD has announced plans to implement the new agreement, and the largest MVPD recently launched the first TV Everywhere service. While it is advertised as having consumer benefits, recent reports suggest that TV Everywhere rests on an illegal agreement among competitors specifically designed to undermine emerging Internet-based competition and consumer choice in video programming delivery.

We ask that the agency consider initiating an immediate investigation. To support this request, we are attaching a report issued today by Free Press. That report shows that sufficient evidence exists in the public record to warrant an investigation into whether TV Everywhere is the result of illegal collusion among existing competitors in the MVPD industry or is otherwise anti-competitive in violation of the nation's antitrust laws. The report also demonstrates the harms of a TV Everywhere model to consumers, innovation and competition.

As detailed in the report, news stories in the *Wall Street Journal*, *New York Times*, and industry publications strongly suggest — and often explicitly state — that incumbent MVPD competitors created TV Everywhere with what one reporter called "a rare agreement" made through conversations carefully orchestrated by phone and in person, that could have been intended to avoid an evidentiary paper trail. Moreover, the competitive circumstances, and the statements by top MVPD executives, demonstrate that MVPDs would not introduce TV Everywhere services unless assured of an agreement with competitors.

Incumbent MVPDs have the incentive to engage in such practices because they have traditionally viewed the emergence of Internet-based video as a threat to the existing cable market structure of limited competition. This is a rational business concern for them, because tight control over competition and content has for years yielded ever-higher cable rates and profits for them. For consumers, the emergence of online video is a breakthrough moment when disruptive technologies can bring market forces to bear in their favor. Transformative moments in media markets come along rarely, and it is critically important that the market functions properly to maximize consumer benefit. The alternative is that incumbent operators in the old media will crush new media competition before it can emerge.

The principle behind TV Everywhere is to prohibit a consumer from watching television programming over an Internet-based service unless the consumer is also a subscriber to a traditional MVPD. TV Everywhere is thus designed to ensure consumers cannot cancel their MVPD subscriptions and turn to competing TV services that use the Internet, Internet-connected televisions and set-top devices, which perhaps include over-the-air digital streams. By tying online television to incumbent MVPD subscriptions, TV Everywhere is designed to undermine new forms of competition and consumer choice currently emerging over the Internet.

First, it undermines consumer choice between channel programmers and MVPDs; for example, the online service of Fox, Disney and NBC, called Hulu, could compete against Comcast. Second, consumers could have the ability to choose between several incumbent MVPDs. For example, today Comcast, Cox, and Time Warner Cable have MVPD "service areas" that tend not to overlap. Through the Internet, Comcast's online TV service would compete nationally against MVPD services offered over the Internet by Time Warner Cable or Cox, increasing competition for the benefit of consumers. Third, it undermines consumer choice between incumbent MVPDs and emerging online distributors, who use new online technologies and boxes connected to television sets to compete for the living room screen.

The birth of TV Everywhere marks a critical bellwether for the future of video competition. Will we see the traditional, limited-competition cable model dominate Internet delivery of video? Or will we see a dynamic, innovative market of competitive video distributors online?

First indications are that the cartel of the old media market is using its power to replicate itself in the new media market. According to the *New York Times*, industry executives took precautions "so as to avoid being accused of collusion"; for example, "much of the discussions have been on the telephone and in private, one-on-one chats during industry events."[1] Published reports, statements by MVPD executives, and the competitive circumstances all strongly suggest that dominant MVPD industry participants have colluded to create their TV Everywhere initiative.

Consumers rely on government agencies and committees to investigate these practices. Programming agreements implementing TV Everywhere are generally confidential, thus requiring government investigators to reveal their terms. We urge you to consider a full government investigation to determine the existence — or extent — of the collusion underlying TV Everywhere services.

The future of television is at stake, as the MVPD industry observes. Consumers deserve competing choices and competitive prices; emerging competitors deserve a fair chance to compete; and constituents deserve to know whether our video marketplace will be subject to competition or agreements among an existing club of providers. For these reasons, we urge you to review the attached report and move swiftly to investigate potentially unlawful conduct by MVPDs offering TV Everywhere services.

[1] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall Street Journal*, April 20, 2009; Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009.

We are simultaneously informing the Department of Justice, the Federal Trade Commission, the House and Senate Commerce and Judiciary Committees, and the Federal Communications Commission about our concerns with the anti-competitive and anti-consumer effects of the TV Everywhere initiative.

Respectfully submitted,

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